CONSTITUTIONALITY OF GEORGIA PRACTICE FORBIDDING QUESTIONING OF ACCUSED DEFENDANT BY HIS OWN ATTORNEY DURING UNSWORN STATEMENT

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As a result of the United States Supreme Court's decision in *Ferguson v. State of Georgia*[1] criminal practice in Georgia is now in a state of uncertainty and confusion. The trial judges are having to proceed with the criminal cases and the attorneys are having to prepare their cases without any concrete statutes or rules of law on which to rely. At the time of this writing, there has not been a case in the appellate courts concerning this problem.

Georgia has the unique distinction of being the only state in the United States which has retained the old common law rule that the accused in a criminal proceeding is incompetent to testify under oath in his own behalf.[2] By statute,[3] Georgia allowed the defendant to make an unsworn statement to the court and jury but his counsel was not allowed to question the defendant while he was making this statement. It is upon this background that *Ferguson v. State of Georgia* arose. During the trial of this murder case, while the defendant was making an unsworn statement his counsel attempted to question him. The state objected to the attempt by defendant's counsel to question him and the objection was sustained. The case was appealed to the Georgia Supreme Court where the conviction was affirmed. The United States Supreme Court granted certiorari.[4] The only question brought before the court by the defendant was whether the application by the Georgia courts of GA. CODE ANN. §38-415 (1954 Rev.)

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1. 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961).
2. GA. CODE ANN. §38-416 (1954 Rev.): (1037 P.C.) Person not competent or compellable to testify for or against self. No person, who shall be charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction, shall be competent or compellable to give evidence for or against himself. (Act 1866, pp. 138, 139).
3. GA. CODE ANN. §38-415 (1954 Rev.): (1036 P.C.) Prisoner's statement; oath; cross-examination. In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer. (Acts 1868, p. 24; 1874, pp. 22, 23; 1878-9, p. 53).
4. Ferguson v. State of Georgia, 362 U.S. 901, 80 S.Ct. 616, 4 L.Ed.2d 553 (1959).

denied defendant the right to counsel at every step in the proceedings against him within the requirements of due process in that regard as imposed upon the states by the 14th amendment. The defendant raised no question as to the constitutional validity of GA. CODE ANN. §38-416 (1954 Rev.), the incompetency statute. The Supreme Court reversed the decision, holding that Georgia courts in applying section 38-415 in connection with section 38-416 could not deny defendant the right to have his counsel question him during his unsworn statement, as such action would be in violation of the due process clause of the 14th amendment. The court relied on *Powell v. Alabama*[5] and *Chandler v. Fretag*[6] to substantiate this ruling.

That a party was unqualified to testify as a witness was firmly established in common law by the sixteenth century. "The old common law shuddered at the idea of any person testifying who had the least interest."[7] "It is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury every occasion."[8] It is obvious that the principle rationale of the rule was based on the untrustworthiness of the party's testimony. Disqualification for interest was thus extensive in the common law when this nation was formed.[9] In this country as in England, criminal defendants were at this time deemed incompetent as witnesses. Georgia by statute adopted the common law of England in 1784. Georgia therefore followed the incompetency rule for criminal defendants long before it was given statutory form by the Act of 1866.[10] The qualification of criminal defendants to give sworn evidence was first granted in Maine in 1859. After this enactment the sister states followed and before the end of the century every state except Georgia had abolished the disqualification. Georgia, in an attempt to ameliorate the harshness of the disqualification statute,[11] enacted in 1868,[12] a statute which provided that in felony cases the defendant should have the right to make an unsworn statement. In 1874[13] the right was extended to all criminal defendants. Georgia by this legislation asknowledges the disadvantage for the defendant of the incompetency

5. 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).
6. 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 3 (1954).
7. State v. Barrows, 76 Me. 401, 409 (1884). See Benson v. United States, 146 U.S. 325, 336-337, 13 S.Ct. 60, 63-64, 36 L.Ed. 991 (1892).
8. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 202.
9. 3 BI. COMM. 369.
10. See Jones v. State, 1 Ga. 610 (1846); Roberts v. State, 189 Ga. 36, 40-41, 5 S.E.2d 340 (1939).
11. PRINCES DIGEST (1837), p. 570; [NOW GA. CODE ANN. §38-416 (1954 Rev.)].
12. GA. LAWS 1868, p. 24; [NOW GA. CODE ANN. §38-415 (1954 Rev.)].
13. GA. LAWS 1874, pp. 22-23.

rule. The courts of Georgia have shown little respect for the usefulness of the unsworn statement.[14] Thus the status of the law in Georgia before the decision of the United States Supreme Court in *Ferguson v. State of Georgia* was that the defendant in criminal cases was incompetent as a witness but that the defendant could make to the court and jury such statement as he deemed proper.

For a better understanding of the right to counsel doctrine it is necessary to consider whether the Bill of Rights has been incorporated into the 14th amendment. This problem has caused much concern and confusion in the field of constitutional law. In attempting to understand this problem reference must be made to *Barron v. City of Baltimore*.[15] Marshall, a federalist and devoted to the proposition of a strong centralized federal government, stated in this case,

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the individual states. Each state established a constitution for itself, and in that constitution, provided such limitation on the powers of its particular government, as its judgment dictated.[16]

Speaking specifically of the Bill of Rights Marshall stated, "These amendments contain no expression indicating an intention to apply them to the state government."[17] This case lays down the basic principle that the Bill of Rights was intended to apply only to the federal government. If this principle had been followed as a strict rule of law, there would be no question as to whether the Bill of Rights has been incorporated into the 14th amendment, but the fact remains that it has not. From the courts' continuous use of the amendments constituting the Bill of Rights in attempting to define due process under the 14th amendment there has arisen a notion that the Bill of Rights has been incorporated into the 14th amendment. This was the problem involved in *Palko v. Connecticut*.[18] This case holds that the 14th amendment does not guarantee against state action all that would be a violation of the Bill of Rights if done by the federal government. This holding does not deny that by the process of absorption some of the rights guaranteed by the federal Bill of Rights have been brought within the 14th amendment. This process of absorption had its source in the belief that neither liberty nor justice would exist if the court allowed these rights to be sacrificed by the

14. Bird v. State, 50 Ga. 585, 589 (1874); Underwood v. State, 88 Ga. 47, 51, 13 S.E. 856, 858 (1891).
15. 7 Peters 242, 8 L.Ed. 672 (1833).
16. *Id.* at 246, 247, 8 L.Ed. at 674.
17. *Id.* at 250, 8 L.Ed. at 675.
18. 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

state courts. This change from the absolute stand taken by Marshall in the *Barron* case probably can be traced to the social and economic changes in our society in the 104 years since the Court's decision in that case. After the *Palko* case it would seem correct to say that where liberty and justice demands it, due process as provided by the 14th amendment will incorporate the protection guaranteed by the Bill of Rights. This does not mean that the Bill of Rights has been incorporated in toto into the 14th amendment. An attempt here will be made to show some of the instances where the due process clause of the 14th amendment may make it unlawful for a state to abridge rights granted by the Bill of Rights: freedom of speech,[19] freedom of the press,[20] free exercise of religion,[21] the right of one accused of a crime to the benefit of counsel.[22] In these and other situations rights that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of order and liberty and thus through the 14th amendment become limitations as against the states. The 14th amendment does not state anywhere that the accused in a state action has a right to counsel, but the 6th amendment does guarantee that the accused shall enjoy the right to have the assistance of counsel for his defense. The 6th amendment only applies to federal courts but it is possible by the reasoning given above to place this right guaranteed by the 6th amendment under the due process clause of the 14th amendment. In determining whether the protection guaranteed by the Bill of Rights will be protected under the 14th amendment the following question must be answered in the affirmative. "Does it violate those fundamental principles of liberty and justice which lie at the base of our civil and political institutions?"[23]

By a series of decisions beginning in 1932 with *Powell v. Alabama* the United States Supreme Court has defined the right to counsel which the due process clause of the 14th amendment guarantees to persons accused of criminal offenses in state court proceedings. After this case there can be no doubt that an accused, in capital cases is

19. De Jonge v. Orgen, 299 U.S. 353, 364, 57 S.Ct. 225, 260, 81 L.Ed. 278, 283, (1937); Herndon v. Lowry, 301 U.S. 242, 259, 57 S.Ct. 732, 740, 81 L.Ed. 1066, 1075 (1957).
20. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); Near v. Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 628, 75 L.Ed. 1357, 1363 (1931).
21. Hamilton v. Regents, 293 U.S. 245, 262, 55 S.Ct. 197, 204, 79 L.Ed. 343, 352 (1934); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).
22. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 3 (1954).
23. Palko v. Connecticut, 302 U.S. 319, 328, 58 S.Ct. 149, 153, 82 L.Ed. 288, 293 (1937).

entitled to hire counsel and to a reasonable opportunity to employ and consult with him.[24] Likewise in capital cases where the accused is unable to employ counsel of his own, he has an unqualified right to court-appointed counsel and this right is not satisfied unless counsel is given adequate time to prepare for the trial of the case.[25] In attempting to define "right to counsel" it is necessary to consider *Betts v. Beady*[26] which was decided in 1942, ten years after the *Powell* case. The court in the *Betts* case is swayed by a consideration of the right to counsel statutes of a majority of the states which, to the court, demonstrated that it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. The matter has generally been deemed one of legislative policy. "In the light of this evidence we are unable to say that the concept of due process incorporated in the 14th amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."[27] It is interesting to see how the court distinguished the *Powell* case. Alabama in its constitution[28] provides for an unqualified right to counsel in criminal cases. The court in the *Betts* case takes notice of this and distinguishes the *Powell* case because in Maryland right to counsel is provided,[29] but its statute is not unqualified as in Alabama. The Maryland courts have held that failure or refusal to appoint counsel is not a violation of this statute. The *Betts* case indicates that there is no express formula for determining the requisite of procedural due process. The trial must be fair, but fairness may be satisfied in some cases when accused is not represented by counsel.[30] In *Chandler v. Fretag* the United States Supreme Court carried this right to counsel a step further by holding that due process requires that the accused be represented by counsel in a non-capital case. The court states that the doctrine of the *Betts* case has no application because the petitioner did not ask the trial judge to furnish him counsel, rather he asked for a continuance so that he could obtain his own. This is a weak attempt to distinguish the two cases and Tennessee's right to counsel statute[31] must be the real explanation for the

24. Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932).
25. *Id.* at 71, 53 S.Ct. at 65, 77 L.Ed. at 172.
26. 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).
27. *Id.* at 471, 62 S. Ct. at 1261, 86 L.Ed. at 1606.
28. ALA. CODE §5567 (1932), [NOW ALA. CODE ANN. §15-218 (1958 Rev.)].
29. MD. CODE ANN. (Fleck, 1939); Art. 26, Par. 7, p. 660. See Coats v. Maryland, 180 Md. 502, 25 A.2d 676 (1942), [NOW MD. CONST., DECLARATION OF RIGHTS, Art. 21 (1957)]. See Raymond v. State, 192 Md. 602, 65 A.2d. 285 (1949).
30. Betts v. Beady, 316 U.S. 455, 473, 62 S.Ct. 1252, 1262, 86 L.Ed. 1595, 1607 (1942).
31. TENN. CODE, §11733 (1932), [NOW TENN. CODE ANN. §40-2002 (1956 Rev.)].

court's failure to follow the *Betts* case. The Tennessee statute gives the accused an unqualified right to counsel whether the crime is a felony or misdemeanor. We see that both the *Powell* and *Chandler* cases are similar in that both states have statutes requiring an unqualified right to counsel. This undoubtedly is the basic reason why the court ruled on these two cases in the same way. The doctrine of the *Powell* case has thus been extended by the *Chandler* case. This extension applies to the types of cases involved so now the rule set out in the *Powell* case will apply to all criminal cases rather than applying only to capital cases. This appears to be the law at the time the *Ferguson* case was reviewed by the United States Supreme Court. The court decides the *Ferguson* case as a right to counsel case and the decision is based entirely on the *Powell* and *Chandler* cases.

Justice Frankfurter in a concurring opinion states that it was not a right to counsel case. This would appear to be the correct approach to the case because it is readily distinguishable from the two cases on which the decision is based. In the *Ferguson* case the defendant had benefit of counsel in all stages of the proceedings except during his unsworn statement. This was not true in the *Powell* or *Chandler* cases, because in these two cases counsel was denied before the trial and the accused was prosecuted without the benefit of counsel. Here, it should be stated that the accused in the *Powell* case did have counsel but the Supreme Court decided that under the circumstances the defendants were not accorded the right of counsel in any substantial sense. In the *Ferguson* case the court has carried the doctrine of the *Powell* case a step farther, thus now the accused has a right to the guiding hand of counsel at every step in the procedure of the case. The court in the *Ferguson* case in attempting to insure due process of law for the defendant, it would seem, failed to take into consideration the complete doctrine of due process of law. "Due process is met if the trial in a criminal case is had according to the settled course of judicial proceeding of the involved and the law operates on all persons alike and does not subject the individual to arbitrary exercise of the power of the government."[32] The Georgia Supreme Court takes this same view, stating: "The constitutional provisions confer only the right to have counsel perform those duties and take such actions as are permitted by the law, and to require counsel to conform to the rules of practice and procedure is not a denial of the benefit of counsel."[33]

In *Hurtado v. California*[34] the Court states that due process

32. People v. Wilkins, 403 Ill. 421, 86 N.E.2d 355 (1949).
33. Ferguson v. State of Georgia, 215 Ga. 117, 119, 109 S.E.2d 44, 46 (1959).
34. 110 U.S. 516, 535 (1884).

of law in the 14th amendment refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and the greatest security of which resides in the right of the people to make their own laws and alter them at their pleasure. There appears to be a conflict between the *Ferguson* case and the doctrine that due process is met if the law operates on all persons alike. The authority relied on in the *Ferguson* case can be reconciled because in both cases there was a statute demanding an unqualified right to counsel which the courts ignored and therefore denied the defendants in both cases due process of law. This is not applicable to the *Ferguson* case because the law operated upon the defendant as it had in the past upon all defendants in criminal cases. The *Ferguson* case can be explained as one of those situations in which liberty and justice required the incorporation of a right guaranteed under the 6th amendment (the right to counsel at every step of the proceedings) into the due process clause of the 14th amendment. This case seems to be explainable if the following question, as applied to the facts of this case, can be answered in the affirmative. "Does [the denying of the defendant the right to have his counsel question him on his unsworn statement] violate those fundamental principles of liberty and justice which lie at the base of our civil and political institutions?"[35] It will be interesting to see how far the courts will carry this right to counsel doctrine in the future.

The court's decision raises a query as to its value to defendants in Georgia criminal cases. In the *Ferguson* case Justice Clarke in his concurring opinion states,

> The resulting advantage of the courts present holding to the criminal defendant in Georgia is obvious . . . as matters now stand the defendant may make an unsworn statement as articulate and convincing as the aid of counsel can invoke but the prosecution may not cross-examine.[36]

An examination of section 38-415[37] will show that it expressly states that the prisoner shall not be compelled to answer any questions on cross-examination should he think proper to decline to answer. In view of the cited code section Justice Clarke appears to be correct. This is only an opinion of the law as it now exists in Georgia and in actuality the present status of the Georgia law would be best defined

35. Palko v. Connecticut, 302 U.S. 319, 328, 58 S.Ct. 149, 153, 82 L.Ed. 288, 293 (1937).
36. Ferguson v. State of Georgia, 365 U.S. 570, ___, 81 S.Ct. 756, 773, 5 L.Ed.2d 783, 801 (1961).
37. GA. CODE ANN. §38-415 (1954 Rev.).

by the term "confusion." It is doubtful that the courts will follow Justice Clarke's opinion as a practical matter because it would be unreasonable to allow defendant's counsel to question him and then force cross-examination to depend on defendant's consent. It is impossible to determine how the courts will handle the situation. It will require legislative action to determine the course of procedure to be followed by the courts. Whatever the procedure in the future, the advantage the defendant might have acquired by the *Ferguson* case will be restricted by the fact that it is the prerogative of the jury to accept the defendant's statement as a whole or to reject it as a whole, to believe it in part or disbelieve it in part and in exercise of this discretion they are unlimited.[38] Georgia still remains unique as to its incompetency statute but the Court left no doubt that when this code section is questioned concerning constitutionality under the due process clause of the 14th amendment it will be struck down.

38. GA. CODE ANN. §38-415 (1954 Rev.); see Annotation on this section.