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THE TRIAL OF PETTY OFFENSES BY FEDERAL MAGISTRATES: COLLISION WITH AMENDMENT VI

The author discusses the trial of petty offenses by federal magistrates under the newly promulgated Rules of Procedure for the Trial of Minor Offenses in light of the sixth amendment guarantees of trial by jury and right to counsel.

I. THE ASSISTANCE OF COUNSEL

Our Federal Constitution, by the sixth amendment, provides for trial by jury and the right to counsel for an accused in a criminal proceeding. It states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense. U.S. Const. amend. VI (footnote omitted).

However, the newly promulgated Rules of Procedure for the Trial of Minor Offenses before United States Magistrates seem to make two significant exceptions to the much revered Amendment.[1] Specifically, Rules 2 and 3 appear to safeguard the rights of trial by jury and assignment of counsel for "minor offenses," but not for "petty offenses." The statutory definition of a "petty offense" is deceivingly simple. It reads:

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.[2]

Notwithstanding the seeming statutory precision of the "petty offense" definition, the courts do not appear to have provided any clear guidelines. They have technically separated "petty offenses" from that category by looking at the seriousness of the offense (or the obvious depravity test),[3] on other occasions to the length of the maximum possible sentence;[4] yet at other times a majority of the courts have ignored the maximum possible sentence and adopted the sentence actually imposed as its guideline.[5]

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[1] 18 U.S.C. §3402 (1971), *amending* 18 U.S.C. §3402 (1968). *See also* 18 U.S.C. §3006A(b) (1964).

[2] 18 U.S.C. §1 (3) (1964).

[3] District of Columbia v. Colts, 282 U.S. 63 (1930).

[4] Baldwin v. New York, 399 U.S. 66 (1970).

[5] Cheff v. Schnackenberg, 384 U.S. 373 (1966).

In *District of Columbia v. Colts,*[6] the court concluded that the defendant was entitled to all constitutional safeguards notwithstanding the fact that the relevant statute provided for punishment for "driving recklessly" by not more than a $100 fine or 30 days imprisonment. There they concluded that the offense was malum in se and one of "obvious depravity."[7]

In *Powell v. Alabama,*[8] Justice Sutherland spoke for the Supreme Court of Alabama in illustrating the importance of the assistance of counsel:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[9]

Once again in *Johnson v. Zerbst,*[10] the Court stated the reasoning for the accused's right to counsel:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . .[11]

Although both of the preceding cases involved the commission of "serious" crimes, the Court's pronouncements are not limiting, but rather inclusive and absolute. But it was not until *Evans v. Rives*[12] that a Federal Court stepped beyond the comfortable boundaries of the merits of a case and faced the problem of a defendant's rights in a "non-serious" misdemeanor case. The District Attorney suggested that the constitutional guaranty of the right to the assistance of counsel in criminal prosecutions applied only in "serious offenses." The court replied:

> No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence of a year in jail for any other crime, however serious. And so far as the

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[6] 282 U.S. 63 (1930).
[7] *Id.* at 73.
[8] 287 U.S. 45 (1932).
[9] *Id.* at 69.
[10] 304 U.S. 458 (1938).
[11] *Id.* at 465.
[12] 126 F.2d 633 (D.C. Cir. 1942).

> right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[13]

The *Evans* case has been severely critized because of the possibility that it "could create substantial practical problems, e.g., . . . 'the burden placed on members of the bar who are not paid for their services and the additional time spent in jail by defendants awaiting trial."[14] These criticisms seem somewhat lame and baseless in view of recently formed Public Defenders Systems and Bail Reform Acts, especially in light of "petty offenses."

Controversy over the *Evans* decision seemed all but moot until the Fifth Circuit Court decided *Harvey v. State of Mississippi.*[15] In *Harvey*, the court struck down a guilty plea to possession of whiskey, which was a misdemeanor punishable by a maximum of 90 days imprisonment, because the defendant had not been advised of his right to counsel. The court, however, held that a defendant's right to counsel extended to "petty" or "summary" offenses as well as those considered serious. Not only did *Harvey* go beyond *Evans*, but beyond the Criminal Justice Act of 1964[16] as well.

Following closely on the heels of *Harvey* came *McDonald v. Moore,*[17] which reaffirmed its predecessor on very similar facts.[18] It seemed as if the courts would extend the somewhat liberalized doctrine of counsel first formed in *Evans* until the decision in *Brinson v. Florida*[19] was rendered by the U. S. District Court. In *Brinson*, the court attempted to retreat from deciding the "petty offense" right to counsel question by distinguishing *Harvey* and *McDonald* on the basis of the "flagrant circumstances"[20] involved in those cases. The court also strove to nullify the impact of *Evans* by cutting away at its authority in strictly state matters. But the major reason for the court's hesitancy seems to have been the fear that an extension of *Gideon v. Wainwright*[21] would crumble the already shaky archaic administrative foundations.

> If *Gideon* is extended to all misdemeanors, its effect would be profound and create a tremendous economic and administrative burden . . . The demands upon the bench and bar would be staggering and well-nigh impossible. Such a construction could

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[13] *Id.* at 638.

[14] Rahl, *The Right to Counsel in Misdemeanor Cases*, 48 CAL. L. REV. 501, 505 (1960).

[15] 340 F. 2d 263 (5th Cir. 1965).

[16] 18 U.S.C. §3006A (1964).

[17] 353 F. 2d 106 (5th Cir. 1965).

[18] In *McDonald*, defendant was sentenced to six months and $350 on a misdemeanor charge, *i.e.*, illegal sale and possession of whiskey.

[19] 273 F. Supp. 840 (S.D. Fla. 1967).

[20] *Id.* at 845.

[21] 372 U.S. 335 (1963).

> lead to the appointment of counsel for misdemeanors not normally considered criminal, such as overparking and other petty traffic offenses, jaywalking, dropping trash upon the sidewalk, and like offenses. Further, to hold that the right to court-appointed counsel exists in all misdemeanor cases would in effect also be to hold that the portion of the Criminal Justice Act relating to petty offenses is unconstitutional, since surely the federal courts must be held to the same standards they impose upon the state courts under the Sixth and Fourteenth Amendments.[22]

Nevertheless, the court decided that where misdemeanor charges involved a "serious penalty," that an accused was entitled to the assistance of counsel.

The question now becomes settled. How far do you go in assuring an accused of the right of counsel? By the period of incarceration, by the amount of the fine involved, how far is too far? In other words, where do you draw the line?

Notwithstanding the increased attacks on the doctrine of "serious consequences" entitling a criminal defendant to counsel involving charges that could be characterized in the "petty" category, the Fifth Circuit assured the viability of *Harvey* in deciding *James v. Headley.*[23] In citing *Harvey*, the court states:

> One accused of crime has the right to the assistance of counsel before entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the *serious consequences* which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon.[24]

The right to counsel surely cannot be treated as some type of abstract theorem. Does the mere fact that a defendant faces a possible jail sentence of two, three, or four months make this any less a hardship if he stands to sacrifice income, employment, and reputation in the community than if he were facing a possible sentence of two, three, or four years?

What then is the purpose of this revered right to the assistance of counsel? It is "a means for achieving the most perfect justice possible in a given situation. The essence of the right is to protect those charged with crimes from wrongful conviction."[25]

Can it be true that a layman, untrained in any aspect of substantative or procedural law, is as capable of defending himself as would be

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[22] 273 F. Supp. 840, 845; *cf.* Bohr v. Purdy 412 F. 2d 321 (5th Cir. 1969), Wooley v. Jacksonville 433 F. 2d 980 (5th Cir. 1970).

[23] 410 F. 2d 325 (5th Cir. 1969).

[24] *Id.* at 327 (emphasis added).

[25] 273 F. Supp. 840, 845.

learned counsel—as long as the possible sentence would be "not more than six months incarceration or $500 or both."?[26]

If a line need be drawn, then it must fall at the possibility of the deprivation of a defendant's liberty. In this modern and complex society, depriving a man of one month's freedom can be as devastating as one year. It seems clear that the primary standard should be that imprisonment, for however short a period, ought never to be available as a punitive sanction unless the defendant has the "guiding hand of counsel."[27]

The deprivation of a man's liberty without the assistance of counsel was and is a paramount ideal of the Constitution.[28] And it makes little difference, especially to one incarcerated, whether the internment is for a short, intermediate or longer term, for the deprivation of one's liberty is just that:

> It would be a gross perversion of solid constitutional doctrine to find a rational distinction between one year in jail (a misdemeanor) and one year and a day in prison (a felony). *Evans v. Rives* . . . The Fifth Circuit has unhesitatingly refused to draw the line even at prosecutions resulting in six months and ninety day internments.[29]

It should logically follow that a differentiation between six months (petty offense)[30] and six months and a day (minor offense)[31] would indeed result in a "gross perversion of solid constitutional doctrine" if this means that the mere matter of days in a sentence deprives a criminal defendant of the right to counsel.

As this right was explained in *Glasser v. United States*,[32] the Court spoke of the primary importance of the sixth amendment:

> [T]he right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the assistance of counsel for his defense' . . . "is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty," and a federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel.[33]

The Supreme Court has never clearly delineated in which misdemeanors counsel is constitutionally required.[34] The Rules Governing

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[26] 18 U.S.C. §1(3) (1964).

[27] Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel & Due Process Values*, 61 U. MICH. L. REV. 219, 271 (1962).

[28] *See* 287 U.S. 45.

[29] Arbo v. Hegstrom, 261 F. Supp. 397, 401 (D. Conn. 1966).

[30] *See* 18 U.S.C. §3401 *et. seq.*

[31] *Id.*

[32] 315 U.S. 60 (1942).

[33] *Id.* at 69-70.

[34] Bennet v. Hurley, 315 F. Supp. 1131 (E.D. N.C. 1970).

The Trial Of Minor Offenses Before United States Magistrates—more specifically the rules which prescribe that the guarantee of counsel need not be enforced for "petty offenses"[35]—stand in direct contradiction to the paramount sixth amendment guarantees. The "petty offense" standard, on its face, impairs the sixth amendment rights and should, therefore, be found unconstitutional, and no pleas of "public convenience" or "administrative burden" should be entertained. The Constitution and its amendments are the "Supreme Law of the Land"[36] and no attempt to unconstitutionally dilute sixth amendment guarantees should be tolerated.

II. TRIAL BY JURY

Article III §2 of the Constitution provides that the trial of all crimes shall be by jury,[37] and the sixth amendment provides for a jury trial in all criminal prosecutions. The Courts' interpretation of these two safeguards, however, goes far beyond the seemingly plain meaning of the words themselves.

The Supreme Court first came to grips with the "problem" of jury trial in petty criminal cases in *Callan v. Wilson*.[38] The defendant was tried and convicted, before a magistrate without a jury, for "conspiracy" and was sentenced to pay a fine of $25 or to be imprisoned for thirty days. The Court found this procedure unconstitutional in that "conspiracy" was not within the petty offense category,[39] therefore, the defendant was entitled to trial by jury. Furthermore, the Court stated that a trial for "conspiracy" was therefore within article III and the sixth amendment of the Constitution and that the protections provided by these clauses were violated by a procedure which denied a defendant a jury trial until appeal after conviction:

> Without further reference to the authorities, and conceding, that there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury . . . We are of opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his codefendants is by no means a petty or trivial offense.
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> . . . It is an offense of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it in this District is not entitled to a jury, when put upon trial.[40]

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[35] *See* 18 U.S.C. §3006A (1964).
[36] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[37] U.S. CONST. art. III §2.
[38] 127 U.S. 540 (1888).
[39] Relying on common law practice prior to the Constitution.
[40] 127 U.S. at 555-556.

"An offense of grave character" seems to be formulated as the first of many varied tests by which petty offenses are distinguished from those of a more serious nature. It seems clear from *Callan* that one cannot "assume that the punishment will bear proper relation to the seriousness of the offense."[41]

The next opportunity the Court had to consider the jury requirements in petty offenses was in *Schick v. United States*.[42] *Schick* dealt with a violation of a provision of the Oleomargarine Act which subjected the defendant to a fine of $50 for each offense. The Court proceeded to "deal summarily" with the question of summary proceedings and petty offenses. They held that the specific offense[43] was a petty offense on its face, that petty offenses were not "crimes" within article III, and that the defendant's rights under the sixth amendment could be waived as to petty offenses. One might wonder about the Court's decision had the defendant been charged with "conspiracy" to sell unmarked oleomargarine and not with the act itself. The Court did indicate, however, that "the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors."[44] The question still remains. Which takes precedence—the "nature of the offense" or the "punishment prescribed"?

A third distinction in the petty offense-jury trial question arose in *Katz v. Eldredge*[45] where Mr. Justice White, speaking for the majority, in a case involving the constitutionality of state petty offense exceptions to jury trial, stated that:

> . . . I think the real underlying historically established test depends upon the character of the offense involved rather than upon the penalty imposed . . . . assuming that the punishment will bear proper relation to the seriousness of the offense, the theory, as I understand it, which gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of petty and trivial police power regulations are more important than the comparatively small prejudice to the individual resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer. This, of course, is the converse of the rule with regard to serious offenses, crimes, and misdemeanors, where, for the preservation of the liberties of the people, the security afforded the

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41 127 U.S. at 556.
42 195 U.S. 65 (1904).
43 Receiving for sale oleomargarine which had not been branded or stamped.
44 195 U.S. at 68.
45 97 N.J.L. 123, 117 A. 841 (1922).

> individual by his right to trial by jury is more important than the mere convenience of the public arising from a speeding and inexpensive summary trial.[46]

This pronouncement was considered by one of the most respected legal scholars as a "principle of persisting vitality."[47] It seems blatantly demonic, especially in light of the reasoning behind our constitutional safeguards, that convenience to the public could ever be used to justify the "comparatively small prejudice to the individual resulting from his being deprived of the safeguard of . . . a jury when held to answer" to criminal charges. To what degree must a criminal defendant be "prejudiced" before he is entitled to a jury trial?

In *District of Columbia v. Colts,*[48] the Court once again turned to a dual, historical treatment-moral quality test similar to that used in *Callan,*[49] finding that the defendant was entitled to a jury trial, notwithstanding a maximum penalty of thirty days or $100. The Court reasoned that the offense committed, reckless driving, was one "of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."[50]

Therefore, it might be said that an "obvious depravity" valued at thirty days or $100[51] may be equated with a "grave offense" valued at thirty days or $25,[52] so far as being taken out of the realm of "petty" offenses is concerned. But, how then would an "offense" valued at ninety days or $30 be classified? This became the next problem for the Court in its clarification of the spectrum of petty offenses.

In *District of Columbia v. Clawans,*[53] the Court had before it a defendant who was tried, without a jury, for the offense of selling second-hand property without a license. He received a sentence of sixty days from a possible maximum sentence of ninety days or $300 fine.

The Court understandably found itself in a rather tenuous position when it held that the penalty authorized for certain crimes was of major relevance in determining whether it was a "serious" or "petty" offense, and could be by itself serious enough to require trial by jury. The penalty authorized in the specific locality was utilized "as a gauge of its social and ethical judgement."[54] Therefore, the maximum penalty authorized, ninety days or $300, was held to be exempted from the class for which the Constitution assured trial by jury.

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[46] 97 N.J.L. at 151, 117 A. at 852.

[47] Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917 (1926).

[48] 282 U.S. 63.

[49] 127 U.S. 540.

[50] 282 U.S. at 73.

[51] 282 U.S. 63.

[52] 127 U.S. 540.

[53] 300 U.S. 617 (1937).

[54] *Id.* at 628.

It should be remembered that these three previously mentioned decisions and their reasoning form the basis of today's "petty offense" exceptions to sixth amendment rights, and at best, they seem to be totally contradictory.

In *Cheff v. Schnackenberg,*[55] the Court, interpreting a criminal contempt statute[56] under which the defendant was tried, held that "crimes" carrying possible penalties up to six months did not require a jury trial if they otherwise qualified as petty offenses. But the contempt statute treated the extent of punishment as a matter to be determined by the Court. In other words, there was more than a strong possibility that the "maximum penalty authorized" would far exceed the most liberal interpretations of the petty offense exceptions. Without overruling prior decisions in this area and in the face of a need for a concrete pronouncement to clarify the existing ambiguity involved, the Court adroitly sidestepped both issues and decided that the penalty "actually imposed" was the best evidence of the seriousness of the offense.[57]

The Court readily admitted in *Duncan v. Louisiana,*[58] that the "boundaries of the petty offense category have always been ill-defined, if not ambulatory."[59] But this factor did not deter them from deciding the question using a much criticized mechanical approach:[60]

> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine.[61]

But to refer to "existing laws and practices in the Nation" when those laws are admitted to be "ill-defined"[62] is to engage in a circular argument with predictable consequences.

However, in the recent case of *Baldwin v. New York,*[63] the Court appears to have come closer to the dreaded task of "drawing the line."

> In this case we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of "petty."[64]

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[55] 384 U.S. 373.

[56] 18 U.S.C. §401 (1964).

[57] *Cf.* Callan v. Wilson, 127 U.S. 540 (1888); District of Columbia v. Colts, 282 U.S. 63 (1930); District of Columbia v. Clawans, 300 U.S. 617 (1937).

[58] 391 U.S. 145 (1968).

[59] *Id.* at 160.

[60] *See* note 35 *supra.*

[61] 391 U.S. at 161.

[62] *Id.* at 160.

[63] 399 U.S. 66.

[64] 282 U.S. 69. In *Baldwin,* the defendant was sentenced to one year in jail, without trial by jury.

It seems that if other factors would be included in the Court's formula, offenses punishable by a maximum of six months may also be taken out of the petty category. The problem of classification was discussed openly and frankly in the light of contemporary standards and not on a pure historical basis:

> One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequence that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation.[65]

The question must again be put forward. Were article III and the sixth amendment created to enhance and expand the historical standard of public convenience or were they the written desires of those who saw the importance of safeguarding man's most expensive and valuable possession—liberty?

Mr. Justice Black, with whom Mr. Justice Douglas joined concurring in the judgment in *Baldwin,* stated that, "The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between 'petty' offenses and 'serious' offenses . . . . Thus the Constitution itself guarantees a jury trial '[i]n all criminal prosecutions' and 'in all crimes.' "[66]

The sole conclusion is that the Constitution requires jury trial of all crimes, including petty offenses. "That is what the drafters said, and what they said we are bound to heed; whether or not they actually realized and intended all the implications is immaterial."[67]

III. OPINION

This author has no desire to bring the present troubled administration of criminal justice to a grinding halt. If all criminal defendants were guilty of the crime charged with, summary procedure would not only be desired but well accepted. However, a line must be drawn, and its demarcation must be figured with more than mere "public convenience" in mind.

The justification of present summary trial practices based on historical precedent should be closely scrutinized. The "petty" criminal defendant of today stands in a far more precarious position, socially and economically, than did his "historical" counterpart. The complexities and swift events of today's world do not stand stationary while one serves a prison sentence.

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[65] *Id.* at 73.
[66] *Id.* at 74-75.
[67] Kaye, *Petty Offenders Have No Peers!* 26 U. CHI. L. REV. 245 (1959).

Thus, if the possibility exists that a "petty" criminal defendant will be incarcerated for any period of time whatsoever, he should be allowed his inherent right to be tried by a jury of his peers and to have the assistance of counsel.

After a thorough search of the Constitution, this author has been unable to find the slightest inclusion, in either article III or the sixth amendment, of the phrase—"except in petty offenses." Therefore, even if the meaning of the words "petty offense" could be discerned from prior decisions of the Court, it should never be suggested that the procedural rules and regulations affecting the trial of petty offenses[68] could ever be consistent with the plain meaning of the sixth amendment.

D.H.

[68] Crimes and Criminal Procedure, 18 U.S.C. §3401 (1971).