

## **Gideon v. Wainwright / Excerpts from the Concurring Opinions—Answer Key**

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### **The following are excerpts from Justice Clark’s concurring opinion:**

That the Sixth Amendment requires appointment of counsel in “all criminal prosecutions” is clear, both from the language of the Amendment and from this Court’s interpretation. . . . It is equally clear from the above cases, all decided after *Betts v. Brady*, . . . (1942), that the 14th Amendment requires such appointment in all prosecutions for capital crimes. The Court’s decision today, then, does no more than erase a distinction, which has no basis in logic and an increasingly eroded basis in authority.

I must conclude here . . . that the Constitution makes no distinction between capital and noncapital cases. The 14<sup>th</sup> Amendment requires due process of law for the deprivation of “liberty” just as for deprivation of “life,” and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the 14<sup>th</sup> Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life—a value judgment not universally accepted or that only the latter deprivation is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

### **Questions to Consider**

1. Justice Clark agrees with the other justices that *Betts v. Brady* should be overturned. However, he cites a different reason. What reason does he give?  
Justice Clark says that the Constitution "makes no distinction between capital and non-capital cases." He argues that due process rights should be the same for everyone and should not differ due to the type of crime one is accused of committing.
2. Do you agree or disagree with Justice Clark’s reasoning? Explain.  
Student answers will vary. Those who agree with Justice Clark might cite the specific wording in the Constitution, which says, "in all criminal cases." Those who disagree might argue that if the states provided all accused persons with an attorney, it would be too costly. The stakes are higher in capital cases, so if a state has to choose how to allocate money, it should go to those individuals who have been accused of capital crimes.

### **The following are excerpts from Justice Harlan’s concurring opinion:**

In 1932, in *Powell v. Alabama*, . . . a capital case, this Court declared that under the particular facts there presented—“the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and above all that they stood in deadly peril of their lives”—the state court had a duty to assign counsel for the trial as a necessary requisite of due process of law.

Thus when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process.

The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses, which, as the one involved here, carry the possibility of a substantial prison sentence.

In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the 14<sup>th</sup> Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be “implicit in the concept of ordered liberty” and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions.

On these premises I join in the judgment of the Court.

## Questions to Consider

1. What are Justice Harlan’s beliefs regarding “special circumstances?”  
Justice Harlan believes that the "special circumstances" rule should be abolished because being accused of a crime is a special circumstance in and of itself.
2. Some people believe that the passage of the 14<sup>th</sup> Amendment meant that all of the rights in the Bill of Rights applied to the states, and not just the federal government. Why is Justice Harlan hesitant to make this generalization?  
Justice Harlan is reluctant to jump to the conclusion that because certain federal constitutional rights have been held to apply to the state government, then all aspects or applications of those federal rights must apply to the states. He believes that the federal government and the states have different interests and face different problems and so may need to apply certain rights differently.