

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	NO. 94418-1
Respondent,)	COA NO. 74333-3-I
)	
vs.)	
)	
OSCAR R. LOPEZ,)	
)	
Petitioner.)	

APPEAL FROM COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PETITIONER'S SUPPLEMENTAL BRIEF TO
THE WASHINGTON STATE SUPREME COURT

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A. IDENTITY OF THE PETITIONER:

The Petitioner, Oscar Raul Lopez, through his attorney, George Paul Trejo, Jr. of The Trejo Law Firm hereby timely files his Supplemental brief in support of his Petition for Review.

B. ARGUMENT

I. A trial court's order that defense counsel's mental illness affects the fairness of a trial is entitled to greater deference than a abuse of discretion standard used by the lower Court of Appeal

Although the Washington Criminal Defense Lawyers Association (WACDL) has submitted a brief as Amicus Curiae regarding this very issue, its importance cannot be overstated. There is one case in our State that discusses the policy reasons behind our courts' giving stronger deference than an abuse of discretion to set aside an order granting a new trial than one denying a motion for a new trial. See, State v. Hawkins, 181 Wn.2d 170, 332 P.3d 408 (2014)

In State v. Hawkins, 181 Wn.2d 170, 332 P.3d 408 (2014), the trial court granted a new trial after Mr. Hawkins produced new evidence that supported his defense theory that he was framed for possessing stolen firearm equipment. Hawkins at 408. The State appealed, and the Court of Appeals reversed holding that a new trial was not warranted because it believed that Hawkins could have discovered the evidence before trial with due diligence. Hawkins at 412. Upon review, this Court stated that a trial court's wide discretion in deciding whether or not to grant a new trial stems from "the oft repeated observation that the trial

judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed record.” Hawkins at 412. (Citing State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

This Court further stated, “we have given even greater discretion to decisions to grant a new trial. Hawkins at 412. (Citing State v. Brent, 30 Wn.2d. 286, 290, 191 P.2d 682 (1948) “[A] much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial.”)

Finally, the Supreme court stated, “[t]his policy makes sense, as trial courts have a strong interest in preserving the finality of their judgments as well as preventing their dockets from becoming overcrowded with meritless retrials.” Hawkins at 412.

In the case at bar, the trial court ordered a new trial based upon its determination that defense counsel was ineffective at the time of trial, in part, because defense counsel was suffering from a mental illness that affected his performance before and during trial. The trial court observed defense counsel every day for the entire trial. Defense counsel was late to court because he couldn’t get out of bed and would arrive at trial unprepared. Based on many observations including the declaration of defense counsel’s investigator and defense counsel’s own admissions, the trial court concluded that Mr. Lopez “has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice.”

This Court should find that the issue of whether defense counsel's mental illness materially affected the trial is a matter best suited for determination by the trial court and entitled to a "much stronger showing" of deference on appeal. In short, the Court of Appeals erred by substituting its judgment for that of the judge who sat through the entire trial.

As the Ninth Circuit observed in Smith v. Ylsg, 826 F.2d 872 (9th Cir. 1987), the performance of a mentally ill attorney might require reversal when there is a question about a defense attorney's mental competence. Further, a hearing is required when there is substantial evidence that an attorney is not competent to conduct an effective defense. Smith at 877.

Mr. Lopez would point out that there is an important distinction between the Smith and his case. In Smith, supra, the Ninth Circuit upheld the trial court's determination that the evidence before it did not raise a genuine doubt about the attorney's competence. Smith at 877. However, in Mr. Lopez's case, the trial court reasonably found that the evidence raises a genuine doubt about the attorney's competence and granted a motion for a new trial.

II. Even if the Sixth Amendment does not protect a criminal defendant's right to be represented by an attorney who is not suffering from mental illness, the history of the Fourteenth Amendment's due process clause establishes that it does provide such protection

The Constitution states only one command twice:

The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law."

The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states.

These words have as their central promise an assurance that all levels of American government, including trials, must operate within the law and provide fair procedures.

The Right to Counsel Clause was a reaction against the English practice of denying assistance of an attorney in serious criminal cases and requiring defendants to appear before the court and defend themselves in their own words.

The 1586 trial of Mary Stuart Queen of Scots illustrates the harshness of denying the assistance of counsel in a criminal case. Queen Mary was charged with Treason for allegedly conspiring to assassinate Queen Elizabeth I. Mary asked for the assistance of counsel. She plead that “the laws and statutes of England are to me most unknown; I am destitute of counselors. . . and no man dareth step forth to be my advocate.” (Winick 1989, 787). Her request was denied, and Mary was summarily convicted and executed by decapitation.

For 150 years, the Right to Counsel Clause was construed as simply granting to a defendant the right to retain a private attorney. This did not mean that an impoverished criminal defendant had the right to a court-appointed attorney without cost. In 1932, the U.S. Supreme Court began to reverse this interpretation in Powell v. Alabama, 287 U.S. 45 (1932).

In Powell, nine black youths were accused of raping a white girl in a train going through Alabama on March 25, 1931. A sheriff's posse rounded up the youths and held them in custody. The youths were not from Alabama, and there were not given the opportunity to contact their family. The youths were indicted on March 31. On April 6, they were tried with the assistance of unprepared counsel and convicted, and subsequently sentenced to death. The youths thereafter received the assistance of counsel for their appeals.

The Supreme Court of Alabama affirmed the convictions. The U. S. Supreme Court reversed the convictions and returned the case to the Alabama State Court. According to the Court, the trial Court's appointment of an unprepared attorney in a capital case is a violation of the defendant's due process rights. The Powell decision did not mandate the appointment of an attorney for all impoverished defendants. The in Powell merely held that due process requires the appointment of prepared counsel to indigent defendants in a case that involves the death penalty. Powell did, however, provide the basis for requirement of free counsel for defendants faced with serious federal charges. In fact, *Powell*, supra, relied upon the 5th, 6th and 14th Amendments in finding that the defendants due process rights had been violated. Pp 287 U.S. 68-71.

In Johnson v. Zerbst, 304 U.S. 458 (1938), the U.S. Supreme Court held that an indigent federal criminal defendant who faces a serious criminal charge, such as a felony, is entitled to an attorney at the expense of the government. According to the Court, the right to counsel is "one of the safeguards . . .deemed

necessary to insure fundamental **Human Rights of Life and Liberty.**” In making this decision, the Court noted “the obvious truth that the average defendant does not have the professional legal skill to protect himself.”

Significantly, the Johnson opinion did not force states to provide the right to counsel for all indigent criminal defendants in State Court; this right to counsel applied only to indigent defendants facing serious charges in Federal Court. In State Court, by virtue of the Powell opinion, only indigent defendants accused of capital crimes had the right to a court-appointed attorney. Many states did provide for the right to an attorney for accused felons through statutes; other states did not. In 1963, the U.S. Supreme Court corrected these inequalities in Gideon v. Wainwright, 372 U.S. 335.

In Gideon, defendant Clarence Gideon was charged in a Florida State Court with breaking and entering a poolroom with the intent to commit a misdemeanor. Under Florida law, this was a felony. Gideon valiantly represented himself, but he was found guilty and sentenced to five years in prison. On appeal to the U.S. Supreme Court, Abe Fortas, who had been appointed by the Court, represented Gideon. Through Mr. Fortas, Gideon argued that the right to counsel was a fundamental right and essential to a fair trial.

The Court agreed in deciding this case of first impression, stating that the “noble ideal” of a fair trial cannot be achieved “if the poor man charged with a crime has to face his accuser without a lawyer to assist him.” The Court reversed

Gideon's conviction, holding that all states must provide counsel to indigent defendants who face serious criminal charges. The legal basis for the decision was the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. On retrial, represented by appointed counsel, Gideon was acquitted.

Substantive due process has been interpreted to include things such as the right to work in an ordinary kind of job, marry, and to raise one's children as a parent. In Lochner v. New York (1905), the Supreme Court found unconstitutional a New York law regulating the working hours of bakers, ruling that the public benefit of the law was not enough to justify the substantive due process right of the bakers to work under their own terms. Substantive due process is still invoked in cases today, but not without criticism. See, Stanford Law Review, Essay – "Substantive Due Process as a Two Way Street," Rienzi, May 2015.

The due process clause also promises that before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting. Action denying the process that is "due" would be unconstitutional. Suppose, for example, state law gives students a right to a public education, but doesn't say anything about

discipline. Before the state could take that right away from a student, by expelling her for misbehavior, it would have to provide fair procedures, i.e. "due process." A fair trial, represented by an attorney free of mental illness should be a minimal standard when it comes to a trial for one's freedom.

While there is no definitive list of the "required procedures" that due process requires, the late Honorable Judge Henry Friendly, generated a list that remains highly influential, as to both content and relative priority:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken. (Arguably through a competent attorney who is not suffering from extreme depression).
4. The right to present evidence, including the right to call witnesses. (Once again, arguably through a competent attorney who is not suffering from extreme depression).
5. The right to know opposing evidence. (Again, arguably through a competent attorney who is not suffering from extreme depression).
6. The right to cross-examine adverse witnesses. (Again, arguably through a competent attorney who is not suffering from extreme depression).

7. A decision based exclusively on the evidence presented. (Again, arguably through a competent attorney who is not suffering from extreme depression).
8. Opportunity to be represented by counsel. (Again, arguably through a competent attorney who is not suffering from extreme depression).
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

This is not a list of procedures that are required to prove due process, but rather a list of the kinds of procedures that might be claimed in a "due process" argument, roughly in order of their perceived importance. See, *University of Pennsylvania Law Review*, Vol. 123:1267 (1975), *Some Kind of Hearing*, Henry J. Friendly, Judge United States Court of Appeals for the Second Circuit.

III. The Fourteenth Amendment's due process clause protects criminal defendants with a right to be represented by an attorney free of mental illness.

Simply because no modern court has grounded the right to effective assistance of counsel in the due process clause of the Fourteenth Amendment doesn't automatically mean that the Fourteenth Amendment's due process clause doesn't provide criminal defendants with a right to be represented by an attorney free from mental illness.

The court of appeals acknowledges as much in recognizing that Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932) found a denial of due process where the state trial court effectively failed to appoint counsel until the date of trial in a capital case. Powell, 287 U.S. at 56.

The court of appeals notes that Powell predated Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9L.Ed. 2d 799 (1963), in which the Supreme Court held that the Sixth Amendment right to counsel requires that the states appoint counsel for indigent defendants in criminal cases and that since Gideon, no subsequent decision has grounded the right to effective assistance of counsel in the due process clause.

Once again, the mere fact that no other decision has grounded the right to effective assistance of counsel in the context of the due process clause does not by itself mean that the Due Process Clause of the 14th Amendment does not apply to the issue of whether or not the Fourteenth Amendment provides Mr. Lopez with a right to be represented by an attorney free of mental illness separate and apart from a Strickland analysis under the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Certainly, Powell is still good law and no modern decision has ruled that the Due Process Clause of the Fourteenth Amendment has no applicability to issues involving a defendant's right to counsel free from mental illness especially of the type presented to the trial court in Mr. Lopez's case.

In Powell, the court relied on Ex parte Riggins, 134 Fed. 404, 418, a case involving the due process clause of the Fourteenth Amendment which held, by way of illustration, that if the state should deprive a person of the benefit of counsel, it would not be a due process of law. The court further stated that Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the development of the English law upon that subject, says: "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." 1 Cooley's Const. Lim., 8th ed., 700.

The court further states that the same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, advice and assistance of counsel is necessarily included in the due process of law. 2 Story on the Constitution, 4th ed., § 1949, p. 668.

For these reasons, the appeals court erred in ruling that there is no basis in law for the trial court's ruling that the Fourteenth Amendment's due process clause provides criminal defendants with a right to be represented by an attorney free of mental illness.

C. CONCLUSION

Criminal defendants have the right to be represented by a competent attorney who is not suffering from extreme depression such as that which Mr. Lopez's trial counsel was experiencing through the protections of the Sixth

Amendment, or alternatively, through the Fourteenth Amendment's due process clause.

The holding of the Court of Appeals should be reversed and the order of the trial court granting a new trial reinstated.

Respectfully submitted this 5th day of October 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of this document to the following:

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DATED this 5th day of October 2017.

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