SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JANUARY 27, 1971

ORDERED that the following Rules, to be known as the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, be and they are prescribed pursuant to § 302 (b) of the Federal Magistrates Act, which amends § 3402 of Title 18, United States Code. These Rules shall take effect as of the date of this order and supersede the rules heretofore promulgated by this Court on May 19, 1969.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I dissent from the Court's adoption of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates. Almost all these Rules, except those which I think infringe constitutional rights to jury trial and assignment of counsel, are covered either by the Constitution, statutes, the existing Federal Rules of Criminal Procedure or the common, everyday practice of courts all over the country. It seems to me to be an utter waste of time to require Justices to consider "new" and unnecessary rules at a period when we have the heaviest caseload in our history. I believe the magistrates could perform their functions far more satisfactorily if they were not encumbered with so-called "rules" like these. Moreover, as I read the Rules, their main result is to cast doubt on the constitutional guarantees of jury trial and assignment of counsel for indigents. These two subjects merit discussion in some detail.

Under these Rules, the constitutional rights of trial by jury and appointment of counsel for indigents appear to depend upon whether a defendant is charged with a "minor offense" or a "petty offense." Yet the Rules do not even purport to define these vague terms "minor

offense" and "petty offense" that determine whether a defendant will be accorded these basic constitutional protections. In my view, the Court's action impairs the constitutional rights to jury trial and counsel and hence it is both unwise and unconstitutional.

Rule 2 provides that the magistrate shall inform a defendant charged with a minor offense *other than a petty offense* "of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel." And that Rule requires that such defendants must waive "trial before a judge of the district court and a jury" before the magistrate can conduct the trial. The provisions for trial of "petty offenses" are strikingly different. Rule 3 provides that a defendant charged with a petty offense shall be informed simply of his "right to counsel." And it requires waiver only of trial before "a judge of the district court." Thus these Rules appear to safeguard the rights of trial by jury and assignment of counsel for "minor offenses," but not for "petty offenses." By strong negative pregnant they suggest there exists no right to jury trial or assigned counsel for "petty offenses." This is especially disturbing since the Rules nowhere define the term "petty offense."

Even though the Rules themselves do not suggest it, we may be expected to look to the United States Code to ferret out what the authors mean by a "petty offense." Title 18 U. S. C. § 1 (3) provides:

> "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."

If this definition is taken as a guide, the Rules present serious constitutional problems under the previous decisions of this Court. Title 18 defines "petty offense" solely in terms of the maximum punishment. But this Court has held that even when a statute provides only light sanctions a defendant is entitled to a jury trial when the offense is regarded as serious by the community.

In *District of Columbia* v. *Colts,* 282 U. S. 63 (1930), a defendant was convicted of driving recklessly "so as to endanger property and individuals." The relevant statute provided for punishment by not more than a $100 fine or 30 days' imprisonment. Despite this light penalty, the Court concluded that a jury trial was required because the offense was *malum in se* and one of "obvious depravity." *Id.,* at 73. It is true that the Court held last year in *Baldwin* v. *New York,* 399 U. S. 66 (1970), that offenses punishable by more than six months' imprisonment required jury trials irrespective of other criteria of seriousness. But *Baldwin* did not overrule *Colts.* The plurality opinion there noted:

> "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.' " 399 U. S., at 69 n. 6. (Emphasis added.)

Nor do our previous decisions justify restricting an indigent's right to assignment of counsel to the class of misdemeanors defined as "petty" in 18 U. S. C. § 1 (3). We held in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), that the Sixth Amendment right to the assistance of counsel in criminal prosecutions was binding on the States. Gideon had been convicted of a felony, but no subsequent decision of this Court has held that the right to court-appointed counsel is not applicable to certain misdemeanors.

Of course some of these constitutional problems might be avoided if we look to previous decisions of this Court rather than the United States Code to define "petty offense." Unfortunately, even our decisions provide no clear guidelines. The Court has sometimes looked to the seriousness of an offense to determine whether a jury trial is required. See *District of Columbia* v. *Colts, supra.* On other occasions it has looked principally to the length of the maximum possible sentence. See *Baldwin* v. *New York, supra.* Other times a majority of the Court has

ignored the maximum possible sentence and adopted the sentence actually imposed as its guideline. See *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966). Taken together, these cases do not provide a clear, definite meaning of "petty offense." Furthermore, the cases cited above all concerned the right to jury trial, not the issue of when an indigent defendant accused of a misdemeanor is entitled to assignment of counsel. On this issue, previous opinions provide almost no guidance. See *Winters* v. *Beck,* 385 U. S. 907 (1966) (STEWART, J., dissenting from denial of certiorari).

Even if the meaning of "petty offense" is to be taken from previous decisions, I could never suggest or imply, even by silence, that these Rules are consistent with the Sixth Amendment. It provides:

> "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 defence."

By its own terms, the Amendment makes no exception for so-called "petty offenses." Despite previous decisions engrafting a petty-offense exception onto the Amendment, I cannot see where this Court derives the power to so alter the Constitution. *Baldwin* v. *New York, supra,* at 74–75 (BLACK, J., concurring in judgment). Cf. *Dyke* v. *Taylor Implement Co.,* 391 U. S. 216, 223 (1968) (BLACK, J., dissenting); *Frank* v. *United States,* 395 U. S. 147, 159 (1969) (BLACK, J., dissenting). Today's action diluting the straightforward and fundamental Sixth Amendment guarantee of trial by jury is ironic and puzzling indeed when only several days ago a majority used that Amendment to create a new constitutional right to a change of venue. That was done in a "minor" misdemeanor case where the defendant was only fined and placed on probation. *Groppi* v. *Wisconsin, ante,* p. 505.

Wholly aside from the dilution of specific Sixth Amendment guarantees, I doubt the Court has the power to

prescribe the kind of rules it does today, as I have made clear on previous occasions when the Court approved amendments to the Federal Rules of Civil and Criminal Procedure. See 383 U. S. 1032 (1966); 374 U. S. 865 (1963); 368 U. S. 1012 (1961). Whatever one thinks of the Sixth Amendment problems, these Rules unquestionably determine substantial rights when they prescribe that the guarantees of jury trial and assigned counsel need not be enforced for "petty offenses," whatever those may be. This kind of judicial lawmaking is wholly at odds with the philosophy of separation of powers contained in our Constitution. Art. I, § 1, provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Congress, not this Court, should exercise its constitutional power to define the offenses for which federal defendants are to receive jury trials. In doing so, any legislation impairing Sixth Amendment rights would of course be unconstitutional.

Assuming that the judiciary will continue to enact "procedural" rules under congressional delegations of power, it is essential that these rules be truly procedural and not affect the substantial rights of defendants. The Court's promulgation of the Magistrates Rules today inevitably has the appearance of an advisory opinion. A very plausible reading of today's action is that we have prescribed that defendants in the federal system have no right to jury trial or assigned counsel where the maximum possible penalty does not exceed six months. But both of these issues have occasioned lively controversy in previous cases. See, *e. g., Baldwin* v. *New York, supra; Cheff* v. *Schnackenberg, supra; Frank* v. *United States, supra; Dyke* v. *Taylor Implement Co., supra; Winters* v. *Beck, supra; DeJoseph* v. *Connecticut,* 385 U. S. 982 (1966). I consider it entirely inappropriate for the Court to indirectly suggest answers to these

serious constitutional issues when it is acting in a "rule making" capacity and has no case or controversy before it. Such action is likely to lead to embarrassment and confusion when the same issues are presented to us in an adversary context and we must pass directly upon the validity of these Rules.

Finally, I regret that the Court today once again chooses to indulge in what I can only consider a fiction by "prescribing" these Rules as though we had written them. The Rules were written by a committee, not by this Court. With our heavy caseload and the most crowded docket in history there is no use pretending that such rules can or do receive the careful, thoughtful attention of this Court. It seems to me an empty, formal gesture for us to "prescribe" them. In my view, Congress, not the Court, should adopt legislation altering substantial rights. But if the present kind of judicial rulemaking is to continue despite my views, I adhere to the previous position that MR. JUSTICE DOUGLAS and I set forth on another occasion when the Court adopted rules to govern district courts:

> "If the rule-making . . . is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." 374 U. S., at 870.

I dissent from the promulgation of these Rules.