MR. JUSTICE CLARK, concurring in the result.

In *Bute v. Illinois,* 333 U. S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel, but stated that, "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps."

Id. at 339 U. S. 674. Prior to that case, I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment. [Footnote 3/1] At the next Term of the Court, Mr. Justice Reed revealed that the Court was divided as to noncapital cases, but that "the due process clause . . . requires counsel for all persons charged with serious crimes. . . ." *Uveges v. Pennsylvania,* 335 U. S. 437, 335 U. S. 441 (1948). Finally, in *Hamilton v. Alabama,* 368 U. S. 52 (1961), we said that, "[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* at 368 U. S. 55. Page 372 U. S. 348

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. *See Johnson v. Zerbst,* 304 U. S. 458 (1938). It is equally clear from the above cases, all decided after *Betts v. Brady,* 316 U. S. 455 (1942), that the Fourteenth 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. In *Kinsella v. United States ex rel. Singleton,* 361 U. S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, *Reid v. Covert,* 354 U. S. 1 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, [Footnote 3/2] as we noted that:

"Obviously Fourteenth Amendment cases dealing with state action have no application here, but if Page 372 U. S. 349 they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . . would be as invalid under those cases as it would be in cases of a capital nature." 361 U.S. at 361 U. S. 246-247.

I must conclude here, as in *Kinsella, supra,* that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty," just as for deprival 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 Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life -- a value judgment not universally accepted [Footnote 3/3] -- or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

[Footnote 3/1]

It might, however, be said that there is such an implication in *Avery v. Alabama*, 308 U. S. 444 (1940), a capital case in which counsel had been appointed, but in which the petitioner claimed a denial of "effective" assistance. The Court, in affirming, noted that,

"[h]ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction."

Id. at 308 U. S. 445. No "special circumstances" were recited by the Court, but, in citing *Powell v. Alabama*, 287 U. S. 45(1932), as authority for its dictum, it appears that the Court did not rely solely on the capital nature of the offense.

[Footnote 3/2]

Portents of today's decision may be found as well in *Griffin v. Illinois*, 351 U. S. 12 (1956), and *Ferguson v. Georgia*, 365 U. S. 570 (1961). In *Griffin*, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In *Ferguson*, we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that "[o]ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel." 365 U.S. at 365 U. S. 596.

[Footnote 3/3]

See, e.g., Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188-189 (1962).