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Right to Counsel in Criminal Law

CONSTITUTIONAL LAW

RIGHT TO COUNSEL IN CRIMINAL CASES

Plaintiff, a nineteen year old, was convicted of murder in the first degree upon a plea of guilty without the advice of counsel. The Supreme Court of Indiana held plaintiff had

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31. Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930); at 396, "Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here." Accord, Stafford v. Wallace, 258 U.S. 495 (1922); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
32. " . . . The Indiana Gross Income Tax Division does not include in the Regulations any specific rulings on taxability of receipts derived from activities in interstate commerce, because of the number and dissimilarity of situations. Therefore, each case will be considered in the light of the individual circumstances and the Division will determine whether or not immunity exists. . . . " CCH Ind. C. T. ¶ 10-574.
33. Freeman v. Hewit, 67 S. Ct. 274,278 (1946), suggesting the seller state may tax; manufacturing [American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919)], licensing local business [Cheney Bros. Co. v. Mass. 246 U.S. 147 (1918)], net income [U.S. Glue Co. v. Oak Creek, 247 U.S. 321 (1918)], property [Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1934)].
34. Inter alia; McAllister, "Court, Congress and Trade Barriers" (1940) 16 Ind. L.J. 144; Tax Institute Symposium, "Tax Barriers to Trade" (1940) p. 261; Browne, "Tax Coordination" (1945) 31 Corn. L.Q. 182; Comment, "The Commerce Clause and State Franchise Taxes Affecting Interstate Commerce" (1940) 35 Ill. L. Rev. 441.

waived his constitutional right to counsel.[1] Petition for writ of habeas corpus in federal district court was dismissed. Held: Affirmed. *Hoelscher v. Howard,* 155 F.(2d) 909 (C.C.A. 7th, 1946).

The Sixth Amendment to the United States Constitution[2] withholds from the federal courts[3] in all criminal prosecutions the power to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.[4]

The Indiana Constitution requires that "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ."[5] This provision has the same effect as does the Sixth Amendment.[6] It ensures the right to be heard by counsel of one's own choice.[7] It is within the courts' inherent power to make appointment of counsel for indigents at county expense.[8]

The due process clause of the Fourteenth Amendment also guarantees the right to counsel in state courts.[9] The due

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1. Hoelscher v. State, 223 Ind. 62, 57 N.E.(2d) 770 (1944), cert. denied 325 U.S. 854 (1945). Intelligent waiver is primarily a fact for trial court, and unless upon evidence there can be reasonable difference of opinion, the decision must stand. All that is required is that accused be advised of the nature of the charge and his right to have an attorney.
2. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."
3. The Sixth Amendment applies only to federal trials, Betts v. Brady, 316 U.S. 455,461 (1942).
4. Glasser v. U.S., 315 U.S. 60 (1941); Johnson v. Zerbst, 304 U.S. 458 (1937);Wilfong v. Johnston, 156 F.(2d) 507 (C.C.A. 9th, 1946); U.S. v. Bergamo, 154 F.(2d) 31 (C.C.A. 3rd, 1946). See Holtzoff, "The Right of Counsel Under the Sixth Amendment" (1945) 68 N.J.L. Rev. 1, 29.
5. Art. I, §13.
6. Wilson v. State, 222 Ind. 63,79, 51 N.E. (2d) 848,854 (1943), (1944) 19 Ind. L. J. 274.
7. Wilson v. State, cited supra n. 6; Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).
8. State v. Hilgemann, 218 Ind. 572, 34 N.E. (2d) 129 (1941); Knox County Council v. State, 217 Ind. 493, 29 N.E.(2d) 405 (1940), (1941) 16 Ind. L. J. 406; Webb v. Baird, 6 Ind. 13 (1854). Indiana is not in accord with the general rule that an attorney assigned by the court to defend an indigent cannot recover compensation from the public in absence of a statute. See Notes (1941) 130 A.L.R. 1439, (1943) 144 A.L.R. 847.
9. Simultaneously with the development of an expanding concept of a "fair trial" under the Fourteenth Amendment, the Supreme Court has been developing a series of procedural restrictions which on some occasions and in some states puts the rights granted beyond the practical reach of the victim. Thus, the prisoner claiming the protection of the Fourteenth Amendment must first exhaust all state remedies before applying for consideration of

process clause does not incorporate all the provisions specifically enumerated in the first eight Amendments, nor is it confined to these.[10] Rather it guarantees those immunities "that have been found to be implicit in the concept of ordered liberty."[11] The right to counsel has been found to be

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his claim in a federal court, and the impoverished and unlettered prisoner may have an impossible time finding the right remedy. In Indiana, no man can tell with assurance whether there is a state remedy or not. See Note (1947) 22 Ind. L. J. 189. Prisoner Henry Hawk after sixteen attempts is still unable to discover a state remedy because of Nebraska's mixed up system, Hawk v. Olson, 146 Neb. 875, 22 N.W.(2d) 136 (1946); Hawk v. Olson, 66 F.Supp. 195 (D. Neb. 1946).

The most recent case is DeMeerleer v. Michigan, 67 S. Ct. 596 (1947), in which petitioner, a seventeen year old, was confronted by a serious and complicated criminal charge and was hurried through unfamiliar legal proceedings without a word being said in his defense. Legal assistance never was offered or mentioned to him, and he was not apprised of the consequences of his plea of guilty. Held: He was deprived of rights essential to a fair hearing under the United States Constitution.

In these criminal cases, the Supreme Court obviously has two policies: (a) it wants to improve the administration of criminal justice, raising it to high constitutional standards; (b) it wants to give the state courts prime responsibility to improve the local processes. Both goals can be achieved, e.g. the operation of the New York procedure described in Canizio v. New York, 327 U.S. 82 (1946); but where state procedures are awkward, the Court is hard forced to salvage both objectives; and in Woods v. Neirstheimer, 328 U.S. 211 (1946), when compelled to choose, it sacrificed immediate consideration of petitioner's claim in favor of giving Illinois one more opportunity to correct its own procedures.

For Indiana, Illinois, and Nebraska, at least, one may speculate that failure to provide a state system for testing claimed constitutional rights may rapidly be followed by a decision that there is no practical state remedy, and that hereafter state prisoners may proceed directly to federal court, ignoring the state judiciary. This result is foreshadowed by the last sentence in Woods v. Neirstheimer, supra at p. 217. The 7th Circuit Court of Appeals has already begun to ignore the Indiana Courts, Potter v. Dowd, 146 F.(2d) 244 (1944), and Justice Murphy has recently clearly revolted against state hypertechnicality, Carter v. Illinois, 67 S. Ct. 216 (1946) (dissent). The dissenting opinion of Black, Dougless, and Rutledge, J.J., in the same case is a sign that their patience with ineffective state procedure is running out. Recognizing that a real procedural crisis exists, the Indiana Judicial Council has proposed a series of rules which, if adopted, will put Indiana into position to handle its criminal reviews in its own courts, 1946 Report of the Judicial Council of Indiana 19.

10. See Justice Frankfurter, concurring in Louisiana v. Resweber, 67 S. Ct. 374,378 (1947) and in Malinski v. New York 324 U.S. 401,412 (1945). Justice Black has expressed the opinion that the Bill of Rights is incorporated in the due process clause, Betts v. Brady, 316 U.S. 455,474 (1942). For criticism of the "fair trial" rule, see Green, "Liberty under the Fourteenth Amendment: 1943-1944" (1944) 43 Mich. L. Rev. 437,465.

11. Palko v. Connecticut, 302 U.S. 319,324 (1937).

of this fundamental nature.[12] According to the holding in *Betts v. Brady*,[13] counsel need not be appointed in every case; however since this holding the Supreme Court has found no other situation where counsel is not required.[14] Counsel is

12. Williams v. Kaiser, 323 U.S. 471 (1944); Powell v. Alabama, 287 U.S. 45 (1932). Note how the court carefully limited its holding in the Powell case, p. 71: "All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process. . . ."

13. 316 U.S. 455 (1942), (1943) 18 Ind. L. J. 135. Petitioner had been indicted for robbery. He was unable to employ counsel and requested that counsel be appointed for him. The trial judge refused on grounds that it was not the practice in the county to appoint counsel for indigents except in prosecution for murder or rape. The Supreme Court affirmed denial of writ of habeas corpus.
The case apparently anewsred in the negative the unanswered question in Powell v. Alabama, 287 U.S. 45 (1932), cited supra n. 12, as to whether in every case one charged with crime must be furnished counsel by the state.

14. Betts v. Brady, 316 U.S. 455 (1942) has been cited in recent Supreme Court cases prefixed by "See" or "Cf." or has been ignored completely. However, the case has been given some efficacy in the lower federal courts: Mayo v. Wade, 158 F.(2d) 614 (C.C.A. 5th, 1946); Flansburg v. Kaiser, 55 F.Supp. 959 (W.D. Mo. 1944); Ex parte Williams, 54 F.Supp. 924 (E.D. Ill. 1943); see U.S. v. Ragen, 60 F.Supp. 821 (E.D. Ill. 1945). Betts v. Brady will continue to exist in our law so long as these federal courts continue to apply it since most petitioners' rights will be determined at this level. These cases and the principal case noted herein, Hoeschler v. Howard, 155 F.(2d) 909 (C.C.A. 7th, 1946), attempt to distinguish such cases as Williams v. Kaiser, 323 U.S. 471 (1944) and Powell v. Alabama, 287 U.S. 45 (1932), on the ground that in Betts v. Brady, Maryland had no statute requiring appointment of counsel, while in the other cases the state law also was violated by the failure to appoint counsel. The majority opinion in Betts v. Brady, pp. 464,465, mentions the fact that in previous cases the state law had required appointment of counsel; however, no emphasis is given to this fact, and main emphasis for the decision lies in the difference in the manitude of the charges and that petitioner had here "obviously" committed the crime, see p. 473. It would not seem that an important federal constitutional right should be protected only when the state also recognizes the same right as a state right. It is even more important to guarantee a fair trial under the Fourteenth Amendment where state rights are not adequate. The only possible effect state substantive law should have on a federal right might be the determination by "wager of law" whether or not the particular provision is necessary to fundamental justice so as to be included in the Fourteenth Amendment. But see Appendix to Betts v. Brady, at p. 477, for the various state laws on this subject.

required for crimes less than murder.[15] Even a defendant who pleads guilty is entitled to benefit of counsel.[16] A request for counsel is not necessary.[17] Accused is entitled to a reasonable opportunity to consult with counsel of his own choice,[18] and the duty to appoint counsel is not discharged by an assignment under circumstances that preclude the giving of effective aid in the preparation and trial of the case.[19] Accused is entitled to counsel at all stages of the trial.[20]

Nevertheless, the right to counsel may be waived.[21] It is necessary, however, to determine under the circumstances of each particular case whether the accused was competent to exercise an intelligent judgment.[22] Defendant must of course be aware of his right to counsel before he can effectively waive.[23] Although not conclusive, factors which may be considered in determining waiver are: that accused is himself a lawyer,[24] has had previous experience in the courts,[25] or was advised by counsel to waive.[26] A plea of guilty or the absence of a request for counsel is not an implied waiver of

15. Burglary: Rice v. Olson, 324 U.S. 786 (1945); House v. Mayo, 324 U.S. 42 (1945). Robbery: compare Williams v. Kaiser, 323 U.S. 471 (1945), with Betts v. Brady, 316 U.S. 455 (1942). Obtaining money in a con game: White v. Ragen, 324 U.S. 760 (1945).
16. Rice v. Olson, 324 U.S. 786 (1945); Williams v. Kaiser, 323 U.S. 471 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945).
17. Rice v. Olson, 324 U.S. 786 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945).
18. House v. Mayo, 324 U.S. 42 (1945); Powell v. Alabama, 287 U.S. 45, 53 (1932).
19. White v. Ragen, 324 U.S. 760 (1945) (counsel appointed did not confer with petitioner until they came into court for trial, counsel was too busy to call witnesses); Avery v. Alabama, 308 U.S. 444 (1940) (refusal to grant continuance under the circumstances did not deny to petitioner a fair trial); Powell v. Alabama, 287 U.S. 45 (1932) (all the members of the bar had been appointed to defend and until a few minutes before trial, no specific person was charged with the responsibility).
20. Hawk v. Olsen, 326 U.S. 271 (1945) (between plea of not guilty and calling of jury); Robinson v. Johnston, 50 F.Supp. 774 (N.D. Calif. 1943) (at arraignment).
21. Adams v. U.S. ex rel. McCann, 317 U.S. 269,277 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1937). For waiver of jury trial, see Patton v. U.S., 281 U.S. 277 (1930).
22. Johnson v. Zerbst, 304 U.S. 458,464 (1937); Williams v. Huff, 142 F.(2d) 91 (App. D.C. 1944).
23. Walker v. Johnston, 312 U.S. 275 (1941).
24. Glasser v. U.S. 315 U.S. 60 (1941).
25. Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942).
26. Id. at p. 277.

the right.[27] The fact that the trial judge appointed counsel at the sentencing stage does not show that accused was not competent to waive counsel at other stages of the proceedings.[28]

On appeal, every reasonable presumption should be against waiver of such an important constitutional right.[29] If waiver is to be permitted,[30] it should at least appear affirmatively in the record that accused was informed of his right to counsel and intelligently choose to waive it.[31] This should make trial judges more conscientious in informing accused of their rights.

CONSTITUTIONAL LAW

SUPPRESSION OF COERCED CONFESSIONS

Appellants were arrested by F.B.I. agents for the illegal possession of stolen goods and confessions were obtained. Alleging the confessions to have been illegally obtained,[1] appellants, prior to indictment, petitioned the district court to suppress them and to restrain the United States Attorney from using them as evidence. The district judge, without

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27. Rice v. Olson, 324 U.S. 786 (1945). At least whatever inference can be drawn is answered by allegation of no waiver. Question of fact arises.

28. Carter v. Illinois, 67 S.Ct. 216 (1946).

29. Johnson v. Zerbst, 304 U.S. 458,468 (1937). A conflict of presumptions arises. Which should prevail, every reasonable presumption against waiver of important constitutional rights or presumption of regularity of judgment of a court when collaterally attacked by habeas corpus?

30. See Douglas, Murphy, and Black, J.J. dissenting in Adams v. U.S. ex rel. McCann, 317 U.S. 269,282 (1942). Query under this view if counsel could ever be waived at all.

31. See Justice Murphy dissenting in Carter v. Illinois, 67 S. Ct. 216, 222 (1946). Johnson v. Zerbst, 304 U.S. 458,465 (1937) (though not necessary it would be fitting and proper).
See Rules of the Indiana Supreme Court, Rule 1-11, November 6, 1946. With a plea of guilty in felony cases, the judge shall cause a record to be made of the entire proceedings in connection with arraignment and sentencing.
There is a possibility that the affirmative statement might become a mere formal matter of record.

1. Appellants alleged the confessions were obtained by threats of physical violence and other coercive measures. Appellants also contended that search of a rubber cement plant and seizure of certain documents were conducted under a warrant unlawfully issued. However, the district judge found that the search and seizure was conducted with the written consent of the appellants voluntarily given. This ruling was affirmed in the principal case.