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Right of Indigent Prisoner to Counsel

CONSTITUTIONAL LAW

RIGHT OF INDIGENT PRISONER TO COUNSEL

Petitioner, indigent and of meager education, was indicted for robbery and requested that counsel be appointed for him. His request was denied on the ground that it was contrary to local practice except

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15. Handly's Lessee v. Anthony, 5 Wheat. 374 (U.S. 1820); Indiana v. Kentucky, 136 U.S. 479 (1890); Carlisle et al. v. State, 32 Ind. 55 (1869); Sherlock et al. v. Alling Adm., 44 Ind. 184 (1873) aff'd 93 U.S. 99 (1876); McFall v. Commonwealth, 59 Ky. 394 (1859); Perks et al. v. McCracken, 169 Ky. 590, 184 S.W. 891 (1916); Nicoulin v. O'Brien, 172 Ky. 473, 189 S.W. 724 (1916). But see Watts v. Evansville, Mtc. and N. Ry. Co. et al. 191 Ind. 27, 129 N.E. 315 (1919).
16. Virginia Revised Code (1819) 59. By this act Virginia ceded her land which became the state of Kentucky and said that the jurisdiction on "The river [Ohio] shall be concurrent . . . with the states which may possess the opposite shores of the said river." Accord: Ind. Const. Art. 14, § 2, "Indiana shall have . . . concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio River. . . . "
17. Wedding v. Meyler, 192 U.S. 573 (1904); also, Sherlock et al. v. Alling Adm., 93 U.S. 99 (1876).
18. Nicoulin v. O'Brien, 172 Ky. 473, 189 S.W. 724 (1916); McFall v. Commonwealth, 59 Ky. 394 (1859); Church et al. v. Chambers, 33 Ky. 274 (1835).
19. Arnold and Parrish v. Shields et al., 35 Ky. 18, 22 (1837).
20. Carlisle et al. v. State, 32 Ind. 55 (1869) (conviction of murder committed upon the Ohio River); Welsh v. State, 126 Ind. 71, 25 N.E. 883 (1890) (conviction for violation of Indiana liquor laws upon the river); Dugan v. State, 125 Ind. 130, 25 N.E. 171 (1890) (conviction for violation of Sunday laws on the Ohio River); Memphis and Cincinnati Packet Co. v. Pikey Adm., 142 Ind. 304, 40 N.E. 527 (1895) (prosecution of a tort committed upon the river).

21 Sherlock et al. v. Alling Adm., 44 Ind. 184 (1873), aff'd, 93 U.S. 99 (1876).

in cases of rape and murder. Without waiving his asserted right to counsel he pleaded not guilty, elected to be tried without a jury, and conducted his own defense. Following conviction, his petition to a state judge for writ of habeas corpus was rejected, and he applied for certiorari to the United States Supreme Court. *Held*, affirmed. Where the issue is simple, the accused of ordinary intelligence, the crime less than a capital offense, and the appointment of counsel not required by state law, the guaranty of the Sixth Amendment of counsel in criminal cases is not included in the due process clause of the Fourteenth Amendment.[1]

The right to counsel in all criminal prosecutions was fully recognized in the original thirteen colonies, and the rule of the English common law[2] was definitely rejected.[3] It is reasonable, therefore, to assume that the Sixth Amendment[4] to the Federal Constitution was adopted primarily to reject the English rule which denied the right to full defense to a person charged with a serious crime.[5] Consistently with this view, the right has not only been extended to defendants in federal criminal cases, but it has been held that the federal courts owe a duty[6] to appoint counsel for indigent defendants, and are only discharged from this duty when there is a competent and intelligent waiver.[7] While it is universally agreed that the first eight amendments are limitations only on the powers of the Federal Government, it has been held that the right to counsel is guarded against invasion by state action through the due process clause of the Fourteenth Amendment.[8] The rationale of this view is that any rights enumerated in the first

1. Betts v. Brady, 316 U.S. 455 (1942) Justices Black, Murphy, and Douglas dissenting.
2. It was only after the revolution of 1688 that a full defense was allowed in England on trials for treason; and it was not until 1836 that the right to counsel was extended to felonies other than treason. 5 Holdsworth, History of English Law (1924) 192; Cooley, Constitutional Limitations (8th ed. 1927) 696-701. See also Powell v. Alabama, 287 U.S. 45, 64 (1932); Gall v. Brady, 39 F. Supp. 504, 509 (D. Md. 1941).
3. See Powell v. Alabama, 287 U.S. 45, 64 (1932); Holden v. Hardy, 169 U.S. 366, 386 (1898).
4. U.S. Const. Amend. VI, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."
5. Comment (1942) 42 Col. L. Rev. 271. See Powell v. Alabama, 287 U.S. 45, 60 (1932); Dane v. Smith, 13 Wis. 585, 656 (1860).
6. Johnson v. Zerbst, 304 U.S. 458 (1938). See Glasser v. U.S., 315 U.S. 60, 71 (1941); Webb v. Baird, 6 Ind. 13, 18 (1854); 14 Am. Jur., Crim. Law 174.
7. Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938); Shores v. United States, 297 U.S. 705 (1936).
8. Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45 (1932); Boyd v. O'Grady, 121 F. (2d) 146 (1941); Downer v. Dunaway, 53 F. (2d) 586, 1 F. Supp. 1001 (1932). U.S. Const. Amend. XIV, § 1 provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

eight amendments that are in the nature of "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" are essential requisites to due process of law.[9] It has been further held that the right to the assistance of counsel is not satisfied by a formal appointment of counsel to defend an indigent prisoner,[10] but that the right includes an opportunity for consultation,[11] reasonable time for preparation of the defense,[12] and the appointment of competent counsel.[13]

Due process of law within the meaning of the Federal Constitution does not import one thing with reference to the powers of the states, and another with reference to the powers of the general Government.[14] The much cited case of *Hurtado v. California*[15] stands opposed to this proposition, but the decision rests on technical construction,[16] and other compelling considerations, when present, indicate that it not be followed.[17] Furthermore, upon the state courts, equally with the federal courts, rests the duty to guard and enforce every right secured by the national Constitution.[18] It is worthy of notice

9. Powell v. Alabama, 287 U.S. 45 (1932); Hebert v. Louisiana, 272 U.S. 312, 316 (1926). In Glasser v. United States, 315 U.S. 60, 75, (1941) the court said, "The right of the accused to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations concerning the amount of prejudice arising from its denial."
See also Willis, Constitutional Law (1936) 562; 1 Cooley, Constitutional Limitations (8th ed.) 700; 2 Story on the Constitution, (4th ed.) 668; 11 Am. Jur., Const. Law 310-311.

10. Avery v. Alabama, 308 U.S. 444 (1940); Glasser v. United States, 315 U.S. 60, 76 (1941).

11. Avery v. Alabama, 308 U.S. 444 (1940); State v. Davis, 9 Okla. Crim. Rep. 94, 130 Pac. 962 (1913).

12. Powell v. Alabama, 287 U.S. 45, 68, 71 (1932); Downer v. Dunaway, 53 F. (2d) 586, 1 F. Supp. 1001 (1932); Commonwealth v. O'Keefe, 298 Pa. 169, 173, 148 Atl. 73 (1929).

13. People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911); State v. Hilgemann, ——Ind.——, 34 N.E. (2d) 129 (1941). In People v. Blevins, supra it was held that where private counsel had been employed to assist the prosecution, it would be oppressive to the indigent defendant if the court allowed more attorneys to prosecute than he appointed to defend.

14. See Mooney v. Holohan, 294 U.S. 103, 113 (1935); Rogers v. Alabama, 192 U.S. 226, 231 (1904). Hurtado v. California, 110 U.S. 516, 541 (1884) (dissenting opinion).

15. 110 U.S. 516 (1884).

16. Hurtado v. California, 110 U.S. 516, 534 (1884). In holding that the due process clause of the Fourteenth Amendment did not necessarily require an indictment by grand jury in a state prosecution for murder, the court said that inasmuch as the requirement was specifically stated in the Fifth Amendment it was not included in the due process clause since it cannot be presumed that any part of the Constitution is superfluous.

17. Powell v. Alabama, 287 U.S. 45, 67 (1932); Glasser v. United States, 315 U.S. 60, 67 (1941).

18. See Glasser v. United States, 315 U.S. 60, 69 (1941); Mooney v. Holohan, 294 U.S. 103, 113 (1935); Robb v. Connolly, 111 U.S. 624, 637 (1884).

that the courts, in determining that due process has been accorded, stress the fact that the defendant had the assistance of counsel.[19]

Most of the states have regarded the right to counsel to one charged with serious crime as essential to justice, and have indicated their position by constitutional provision, statute, or established practice judicially approved.[20]

EVIDENCE

ADMISSIBILITY OF EVIDENCE INDUCED BY MEANS OF INTERCEPTED TELEPHONE COMMUNICATIONS

Upon trial under federal indictments for mail fraud and conspiracy, petitioners were convicted largely by the testimony of two witnesses who had been induced to turn state's evidence by being confronted with phonographic recordings of telephone messages intercepted by federal investigators, to which messages the petitioners had not been parties. Petitioners made objection to the testimony of the witnesses where such testimony was induced or refreshed by the use of such intercepted messages on grounds that such messages were illegally obtained in violation of the Federal Communication Act. 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1941). *Held*, testimony induced by illegally intercepted telephone communications admissible against one not a party to the communication. *Goldstein v. United States*, 316 U.S. 114 (1942).

The common law rule, that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence, prevailed in the federal courts until repudiated on the grounds that the illegal seizure, being a violation of the rights secured by the Fourth Amendment was inadmissible in evidence. *Boyd v. United States*, 116 U.S. 616, 634 (1885). This prohibition against admissibility was in effect removed later. *Cf. Adams v. New York*, 192 U.S. 585, 586 (1904). Whatever question this latter decision may have left concerning the admissibility of illegally obtained evidence, it was later held that documents obtained through search made by a federal officer without warrant were inadmissible as evidence if prior to trial a motion was made for the return of such documents. *Weeks v. United States*, 232 U.S. 383, 396, 398 (1914). The tendency of the federal courts to

19. See Kelley v. Oregon, 273 U.S. 589, 591 (1927); Frank v. Mangum, 237 U.S. 309, 344 (1915); Felts v. Murphy, 201 U.S. 123, 129 (1906).

20. See inst. case (appendix to dissenting opinion, p. 477). In only two states has the requirement of counsel for indigent defendants in non-capital cases been affirmatively rejected (Maryland and Texas). But see Coates v. State, ——Md.——; 25 A. (2d) 676 (1942) where the Court of Appeals granted an appeal on an informal letter from the defendant, delivered after the expiration of the period during which appeals must be filed, and reversed the judgment. A colored boy of nineteen had been convicted without the aid of counsel on nine charges including robbery, assault, and burglary. In reversing the judgment the court held that counsel should have been appointed as an essential of due-process of law.

restrict the operation of the rule that evidence illegally obtained is inadmissible, is apparent. Evidence secured through illegal search and seizure has been held admissible where no application for return was made prior to trial. *Youngblood v. United States*, 266 Fed. 795, 797 (C.C.A. 8th, 1920), *McMann v. Engel*, 16 F. Supp. 446, 448 (S.D.N.Y. 1936), 87 F. (2d) 377 (C.C.A. 2d, 1937), *cert. denied*, 301 U.S. 684 (1937); where the search and seizure is made by a third party not acting in collusion with federal officers, *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921); where illegal search and seizure is made by a state officer, *United States v. Falloco*, 277 Fed. 75, 81 (W.D.Mo. 1922); where illegal search and seizure was made on premises not owned or occupied by defendant, *MacDaniel v. United States*, 294 Fed. 769, 771 (C.C.A. 6th, 1924). Search and seizure with consent of party-defendant is not within the rule, *Dillon v. United States*, 279 Fed. 639 (C.C.A. 2d, 1921); where defendant is not the party against whom the illegal search and seizure was made, *Connolly v. Medalie*, 28 F. (2d) 629, 630 (C.C.A. 2d, 1932).

Evidence obtained by the modern method of wire tapping was first held to be admissible as not being a search and seizure in violation of the FOURTH AMENDMENT. *Olmstead v. United States*, 277 U.S. 438, 464, (1928). The act of wire tapping was made illegal by 48 STAT. 1103 (1934) 47 U.S.C. § 605 (1941), and evidence thus obtained was declared to be inadmissible. *Nardone v. United States*, 302 U.S. 379, 381 (1937). Any evidence derived from or made accessible by the act of wire tapping was held to be inadmissible. *Nardone v. United States*, 308 U.S. 338, 341 (1939). Evidence from wire tapping was held inadmissible although consent to the interception was given by one party to the communication, United States v. Polakoff, 112 F. (2d) 888 (C.C.A. 2d, 1940) *cert. denied*, 311 U.S. 653 (1940), Note (1941) *16 Ind. L.J.* 412.

In the instant case, there are indications that the courts are to construe illegal wire tapping just as any other illegal search and seizure in violation of a party's constitutional rights, subject to all the exceptions and limitations which have attached to the law as set forth in *Weeks v. United States, supra*, until such time as it is recognized that public policy is not served by permitting the fact of an illegal search and seizure to prevent the introduction at the trial of indispensable evidence in the state's case. The path of effective law enforcement is one to be facilitated rather than obstructed.

LEGISLATION

SPECIAL MUNICIPAL ELECTION LAWS

The legislature enacted a statute which postponed elections of officials for all cities and school cities in the state except those of the first class. The statute was attacked as a violation of constitutional provisions forbidding special legislation. *Held*, the act was special in violation of the constitution. *Ettinger et al. v. Studevent, Hole et al. v. Dice*, —Ind.—, 38 N.E. (2d) 1000 (1942).

The Indiana Legislature is forbidden to enact special laws on 17 enumerated subjects, and special legislation cannot be enacted in