Denver Law Review

Volume 33 | Issue 1 Article 9

May 2021

The Right to Representation by Counsel under the Fourteenth Amendment

Harold E. Hurst

THE RIGHT TO REPRESENTATION BY COUNSEL UNDER THE FOURTEENTH AMENDMENT

HAROLD E. HURST
Professor, Univ. of Denver College of Law

The right of an accused in state criminal proceedings to be represented by counsel has frequently been claimed as a necessary element of the fair hearing inherent in due process of law required of the states by the Fourteenth Amendment.

The right to be represented by counsel in federal criminal proceedings is guaranteed by the Sixth Amendment but no specific mention of the right to counsel in state proceedings is to be found in the Constitution. The Court has consistently refused to rule that the procedural protections of the Bill of Rights are a catalogue of rights protected by the Fourteenth Amendment against state encroachment.[1] And so, as might be expected, the Court has adamantly refused to hold that representation by counsel in criminal proceedings is a fixed and specific requirement of due process. Rather, due process or the lack of it depends upon whether in the judgment of the Court the proceeding is characterized by fairness —or the lack of it. The principle has found expression in the following language:

> The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[2]

And to bolster its judgment in the matter, the Court has tabulated provisions of state constitutions and statutes, concluding that a majority of the states appeared not to consider representation by counsel fundamental to a fair trial in all situations.

What, then, is a fair trial in which the defendant is not represented by counsel? The following sections indicate the conditions and circumstances which may run so contrary to the Court's collective sense of fair play as to result in violation of the Fourteenth Amendment.

Illiteracy, Youth, Ignorance, Intelligence of the Defendendant

There is a clear relationship in the Court's mind between a defendant's capacity to prepare and present a defense and the fairness of a criminal proceeding against the defendant without coun-

[1] Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908); Adamson v. California, 332 U.S. 46 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); Wolf v. Colorado 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949); Irvine v. California, 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 324 (1954).
[2] Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942).

sel. The Court has frequently drawn the inference[3] that defendants who were young, ignorant, illiterate and inexperienced were not capable of making a defense, and has declared that to put such individuals on trial without counsel is fundamentally unfair and consequently is not due process.

Paradoxical though it be, the burden of establishing the incapacity or inability of a defendant to obtain a fair hearing without counsel falls upon the defendant himself. Obviously, cases involving the question usually come into a lawyer's hands only after trial and conviction of the defendant. The lawyer's decision whether to raise the issue of unfairness because of lack of counsel requires a careful study of the pretrial and trial proceedings and an investigation of the personal characteristics of the defendant, because the factors which indicate lack of capacity to defend—youth, illiteracy, inexperience, mental deficiency—are matters of degree and exist in different combinations.

Trial of one incapable of defending himself adequately without counsel may not be considered "offensive to the common and fundamental ideas of fairness and right" if counsel is provided in time to raise the question of the fairness of the proceeding, or if the court adequately safeguards the defendant from prejudicial error.[4]

[3] In the following cases convictions have ben reversed or remanded to determine the truth of the allegations of persons seeking release on the grounds that trial without counsel was unfair: Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932); House v. Mayo, 324 U.S. 42, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); Wad v. Mayo, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948); DeMeerleer v. Michigan, 329 U.S. 633, 67 S. Ct. 596, 91 L. Ed. 584 (1947); Uveges v. Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948); Palmer v. Ashe, 342 U.S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951); Reece v. Georgia, — U.S. —, 76 S. Ct. 167, — L. Ed. (1955); Massey v. Moore 348 U.S. 105 75 S. Ct. 145, 99 L. Ed. 134 (1954); Chandler v. Fretag, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954).

The Court has refused to reverse convictions in: Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) Gayes v. New York, 332 U.S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962 (1947); Bute v. Illinois, 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Gryger v. Burke, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948); Quicksall v. Michigan 339 U.S. 660, 70 S. Ct. 910, 94 L. Ed. 1188 (1950); Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86 (1951).

[4] Counsel appointed in time to object to prejudicial errors: Canizio v. New York, 327 U.S. 82, 66 S. Ct. 452, 90 L. Ed. 545 (1946); Gallegos v. Nebraska, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 99 (1951); Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940). Cf. Reese v. Georgia, U.S. —, 76 S. Ct. 167, L. Ed. (1955).

Rights of the defendant adequately protected by the trial judge: Carter v. Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed 172 (1946); Foster v. Illinois, 332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 (1947); Quicksall v. Michigan, 339 U.S. 660, 70 S. Ct. 910, 94 L. Ed. 1188 (1950).

COMPLEXITIES OF CHARGE—TECHNICALITIES OF DEFENSE

Although an accused appears in all respects to be of normal intelligence and experience, conviction without the assistance of counsel (unless intelligently waived) may be a deprivation of liberty without due process of law where close technical distinctions between the degrees of crime and available defenses present complex problems in the presentation of evidence and instructions to the jury. The Supreme Court has reversed convictions where the offense charge was distinguishable from other lesser crimes only by technical differences in the evidence required to convict, different instructions to the jury, and availability of different defenses, the Court saying that such complexities "are a closed book to the average layman."[5] The Court considers such trials unfair.[6]

Although no such cases have come before the Supreme Court, it is reasonable to expect that the Court would hold representation by counsel to be necessary to a fair hearing before an administrative tribunal or a court in a civil matter where the issues are complex and the proof difficult. For instance, matters such as the public convenience and necessity or the compensability of an industrial injury and the extent of the disability are a "closed book to the average layman." The applicant for a truck licensing permit or the injured workman seeking workman's compensation, appearing without a lawyer or other expert representative because he is unaware of the pitfalls ahead, would seem to be placing his rights in danger unfairly unless the tribunal concerned itself affirmatively in the protection of such rights in the absence of counsel.

OPPORTUNITY OF COUNSEL TO PREPARE—EFFECTIVE COUNSEL

The fair hearing required by due process of law includes an opportunity to prepare and present such defenses as may be available. It would seem to follow that appointment of counsel at such a time as to make it impossible for him to prepare for trial likewise deprives those defendants of liberty without due process who need counsel because of incapacity. This view of requirement of due process seems to have been applied by the Court in the few cases presenting the issue.[7]

It would seem also, although there are no state cases reversing convictions on that ground, that trial of a defendant who needs counsel but who is represented by counsel so obviously negligent or incompetent as to be of no assistance is inconsistent with the constitutional guarantee of a fair trial. If appointment of counsel at such *time* as to render his assistance valueless does not satisfy

[5] Williams v. Kaiser, 323 U.S. 471, 65 S. Ct 363, 89 L. Ed. 398 (1945).

[6] Tomkins v. Missouri, 323 U.S. 485, 65 S. Ct. 370, 89 L. Ed. 407 (1945); Rice v. Olson 324 U.S. 786, 65 S. Ct 989, 89 L. Ed. 1367 (1945); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 (1945); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). Cf. Betts v. Brady, 316 U S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942); Gryger v. Burke ,334 U.S. 728,, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948).

[7] Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.l R. 527 (1932); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed 61 (1945); White v. Ragen, 324 U.S. 760, 65 S. St. 978, 89 L. Ed. 1348 (1945); Reece v. Georgia, .. U.S. ...., 76 S. Ct. 167, ... L. Ed .... (1955). Cf. Avery v. Alabama, 308 U.S. 444, 60 S. Ct 321, 84 L. Ed. 377 (1940); Canizio v. New York, 327 U.S. 82, 66 S. Ct. 452, 90 L. Ed. 545 (1946); Strable v. California, 343 U.S 181, 72 S. Ct. 599, 96 L. Ed. 872 (1952); Michel v. Louisiana, ... U.S. ...., 76 S Ct. 167, ... L. Ed. .... (1955).

due process, then neither does the appointment of counsel of such *kind* as to render his assistance valueless.[8]

CONDUCT OF THE POLICE OR PROSECUTOR

Aside from coercing confessions from defendants, police or prosecutors frequently obtain convictions or pleas of guilty by deception practiced upon a defendant who is without counsel. Some trials are unfair because a defendant who needs counsel is not provided with counsel.[9] It goes without saying that such a trial is even more repugnant to the requirements of due process if the defendant is also the victim of deception or misrepresentation. Such is clearly the view of the Supreme Court.[10] Similarly, although the degree of unfairness is lesser, it appears to be a violation of the Fourteenth Amendment for the police or prosecutor to practice deception and misrepresentation on a defendant who might otherwise have been considered capable of presenting his defense without counsel.[11]

The logic of due process, which is the rule of fairness when procedure is being considered, also appears in those cases which the Court has refused to reverse. There would seem to be no particular unfairness in a conviction resulting from a proceeding in which deception, misrepresentation or "deals," promising the dropping of other charges or a lighter sentence in return for a plea of guilty, are perpetrated upon a defendant without counsel, if the defendant is afforded counsel in time to raise objections to the procedure and otherwise to protect the defendant's rights.[12]

[8] This issue might well have been raised in Powell v. Alabama, Hawk v. Olson, and White v. Ragen (see note 7 above), in which the Court declared a failure of a fair trial where defendants were denied "effective aid and assistance" of counsel. From the circumstances as reported, however, it appears that the Court may have been indulgent toward counsel since the lack of effective aid and assistance" seemed at least in part the result of inefficient or inattentive counsel, rather than of lack of time to prepare. The issue was specifically raised and decided against the defendant in Poret et al. v. Louisiana, ... U.S ...., 76 S. Ct. 158, ... L. Ed. .... (1955).

[9] Supra.

[10] Uveges v. Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948); Palmer v. Ashe, 342 U S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951).

[11] Smith v. O'Grady, 312 U.S. 329, 61 S. Ct. 572, 85 L. Ed. 859 (1941), wherein the defendant, told he was charged with burglary but prevented from seeing the indictments, and told he would receive a sentence of not over three years if he would plead guilty, found later that he would plead guilty, found later that he had actually pleaded guilty to a more serious charge with a mandatory minimum sentence of 20 years.

[12] Canizio v. New York, 327 U.S. 82, 66 S. Ct 452, 90 L. Ed. 545 (1946); Gallegos v. Nebraska, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951); Stroble v. California, 343 U.S. 181, 72 S. Ct 599, 96 L. Ed. 872 (1952).

CONDUCT OF TRIAL

The trial judge is the key figure in any proceeding wherein a person's life, liberty or property is affected. The fairness of the proceeding is primarily the responsibility of the judge. Even when trial of a defendant without counsel would not necessarily be a violation of the constitutional right to due process, the deportment of the trial judge or the manner of conducting the trial may nevertheless be so prejudicial as to render the trial unfair. Substantial prejudice may arise in many ways—the admission of incompetent or prejudicial evidence, exclusion of material evidence favorable to the defendant, improper remarks by the judge or prosecutor in the presence of the jury, intimidation of the defendant to plead guilty, misrepresentation in explaining the charge to the defendant. The bounds of ordinary decency would seem to have been exceeded in any trial without counsel in which such practices were permitted, and so seems the Court to look upon the matter.[13]

Where a defendant is not incapable of providing an adequate defense and the trial court properly advises the defendant, failure to offer appointed counsel is not a denial of the right to a fair trial. Three cases are noted[14] in which the trial judge explained to the defendants the consequences of a plea of guilty, the right to counsel, the right to a jury trial and the degree of proof which would be required to convict, but in which the defendants nevertheless elected to plead guilty. All three cases were affirmed when the defendants sought release on the ground of lack of counsel and denial of a fair hearing. Here, it would seem, the judge has done all that counsel could do to safeguard the rights of the defendant, and the defendant, having been made aware of his rights and the difficulties ahead, has intelligently waived his right to counsel. It is clear that a defendant who is capable of understanding the nature and significance of the proceeding can waive his right to be represented by counsel.[15]

SERIOUSNESS OF THE OFFENSE

The seriousness of the offense with which the defendant is charged—whether the penalty be capital punishment or imprisonment—is of little consequence in determining if counsel must be appointed. Although there appear in the cases statements that indicate a disposition on the part of the Court to require the appointment of counsel in capital cases, the actual reason for the decisions appears to be the requirement that in any case—capital or otherwise—the proceeding be fair in the sense that a defendant who is without counsel be intelligent and experienced enough to defend himself adequately or to waive counsel intelligently, taking into

[13] House v. Mayo, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739 (1945); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed 1690 (1948); Gibbs v. Burke, 337 U.S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686 (1949); In re Oliver, 333 U.S. U.S. 257, 68 S. Ct. 499, 92 L. Ed 682 (1948).

[14] Carter v. Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L Ed. 172 1946); Foster v. Illinois, 332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 (1947); Quicksall v. Michigan, 339 U.S. 660, 70 S Ct. 910, 94 L. Ed. 1188 (1950).

[15] Gryger v. Burke, 334 U.S 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948) and cases cited in footnote 14 above. See also Poret et al. v. Louisiana ,... U.S. ...., 76 S. Ct. 158, ... L. Ed. ...., (1955), in which the defendant, in his flight to avoid apprehension, was deemed to have waived his right to counsel for the purpose of attacking the validity of the indictment, time for which attack expired while defendant was a fugitive in another state.

consideration the complexity of the issues and the conduct of the investigation and trial. In *Powell v. Alabama,*[16] a capital case, the Court said, "All that it 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, feeble mindedness, illiteracy, 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 of law . . ." Four other cases have reached the Supreme Court in which defendants were on trial for capital offenses and did not have counsel. In three of them[17] the Court reversed state court dismissals of petitions for habeas corpus on the authority of *Powell v. Alabama,* interpreting the Alabama case to mean that "at least in capital offenses" where the defendant is incapable of making an adequate defense there must be representation by counsel. The emphasis in each case is upon the incapacity of the defendant rather than upon the seriousness of the offense. In the fourth case,[18] the rights of the defendant to have a lawyer, the degree of proof necessary to convict, the right to trial by jury, and the consequences of a plea of guilty were explained by the trial judge to the defendant who nevertheless elected to plead guilt. In this capital case, where the trial judge took great pains, short of actual appointment of counsel, to avoid any unfairness or prejudice, the conviction was affirmed.

No case has as yet reached the Court on the right to counsel issue wherein a defendant, on trial for a capital offense, and not shown to be incapable of representing himself, elected to stand trial without the aid of counsel and was convicted. Since the basic consideration in right to counsel cases is the fairness of the proceeding, taking into account all the circumstances, it seems unlikely that the Supreme Court would require the appointment of counsel in such a case solely because the offense charged threatened capital punishment. The Court has refused to reverse con-

[16] 287 U.S. 45, 53 S Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932).

[17] Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398 (1945); Tomkins v. Missouri, 323 U.S. 485, 65 S. Ct. 370, 89 L Ed. 407 (1945); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 (1945).

[18] Carter v. Illinois, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946)

victions in noncapital cases wherein the defendant intelligently elected to stand trial and make his own defense.

Furthermore, the consideration of fairness of the proceeding runs through noncapital state felony cases as the basis for decision, rather than the seriousness of the offense. Typical lauguage appears in *Palmer v. Ashe.*[19] "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and fair defense."

Convictions without counsel have been reversed or remanded wherein the charge was burglary,[20] robbery,[21] larceny,[22] and confidence game.[23] In no case has the Court placed its refusal to consider a proceeding violative of the Fourteenth Amendment on the ground that the offense charged was not serious or that such offense was a misdemeanor as distinguished from a felony. It could with reasonable safety be ventured that any conviction, regardless of the nature of the charge or the seriousness of the punishment, will be reversed where it can be shown "that without a lawyer a defendant could not have an adequate and fair defense."[24]—*H. H.*

[19] 342 U.S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951); see also Bute v. Illinois, 333 U S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Gallegos v. Nebraska, 342 U.S. 55, 72 S Ct. 141, 96 L. Ed. 99 (1951); Massey v. Moore, 348 U.S. 105, 75 S. Ct. 145, 99 L. Ed. 135 (1954)

[20] Smith v. O'Grady, 312 U.S. 329, 61 S. Ct. 572, 85 L. Ed. 859 (1941); House v Mayo, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739 (1945); Rive v. Olson, 324 U S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); Wade v. Mayo, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948); Uveges v Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948).

[21] Townsend v Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); Palmer v. Ashe, 342 6.S. 142, 72 S. Ct. 191, 96 L. Ed. 154 (1951); Massey v. Moore, 348 U.S. 105, 75 S. Ct. 145, 99 L. Ed. 135 (1954).

[22] Gibbs v Burke, 337 U.S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686.

[23] White v. Ragen, 324 U.S. 760, 65 S. Ct. 978, 89 L. Ed. 1348.

[24] Palmer v. Ashe, 342 U.S. 142, 72 S. Ct. 191, 96 L. Ed 154 (1951).

The University of Denver College of Law has in its excellent Law Library a centralized group of Law Reviews representing all sections of the United States. The use of this centralized collection is available at all times to all members of the Bar and the College of Law has cordially extended an invitation to the profession to use the facilities of the Law Library with respect to the collection of Law Reviews and all other reference materials available.

ARNOLD M. CHUTKOW, Editor