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or social or economic status⁴⁶ a member of the excluded class may cogently attack his conviction by such a jury on the grounds that he was denied equal protection of the laws as guaranteed by the Fourteenth Amendment.⁴⁷ Furthermore, when the administration of any jury selection procedure has resulted in the exclusion of such a class for similar reasons it is open to attack as violative of the due process clause. Finally, where the state prescribes a dual jury system, clear and convincing evidence showing a greatly disparate ratio of conviction by the special as compared with the general jury for a substantial length of time prior to trial may be used to prove the procedure violative of the equal protection clause and unconstitutional.

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Limitations on an Accused's Right to Counsel

In the recent case of *Foster v. Illinois*,¹ the United States Supreme Court held that it is not a violation of due process to permit an accused in a state criminal action to plead guilty without previously being advised by counsel.² The defendants had been indicted and arraigned on charges of burglary and larceny,³ and were not advised of their right to counsel, though the court cautioned them of the consequences of a plea of guilty and informed them of their right to a trial.⁴ Inasmuch as it is now generally the law in the United States, both in federal and state criminal proceedings, that an accused is entitled to the assistance of counsel,⁵ the case presents three interesting problems *viz.*: (a) must the defendant in a federal criminal action have the advice of counsel before entering a plea of guilty; (b) when will a plea of guilty without the assistance of counsel in a criminal action in a state court be considered as in violation of due process; (c) assuming that the defendant in a criminal case has the right to advice of counsel when entering a plea of guilty, under what circumstances is he deemed to have waived such right?

⁴⁶ Note (1947) 60 Harv. L. R. 613.

⁴⁷ In the *Fay* case the convictions were affirmed primarily because petitioners failed to convince the majority by clear and convincing proofs that the county clerk systematically and deliberately excluded the laboring class from the special jury panel.

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1 ... U. S. ..., 67 S. Ct. 1716 (1947).

2 Const. of the U. S. (1787) Am. Art. XIV, § 1.

3 Ill. Rev. Stat. 1933, c. 38, §§ 65, 796; Ill. Rev. Stat. 1933, c. 38, §§ 84, 802.

4 394 Ill. 194, 68 N. E. (2d) 252 (1947).

5 *Powell v. Alabama*, 287 U. S. 45 (1932); *People v. Cooper*, 366 Ill. 113, 7 N. E. (2d) 882 (1937). See Comment (1942) 33 J. Crim. L. & Criminology 49 (Right to counsel generally).

The Sixth Amendment to the Federal Constitution guarantees that an accused shall have the assistance of counsel "for his defense,"⁶ but the Sixth Amendment has application only to criminal prosecutions in the federal courts, and not to state criminal actions.⁷ In *Johnson v. Zerbst*⁸ the safeguards offered an accused in a federal criminal case were firmly established, and the doctrine formulated therein has been incorporated in the Federal Rules of Criminal Procedure.⁹ In that case the petitioners were indicted and convicted in a United States District Court for uttering and passing counterfeit money. They neither had knowledge of, nor were they advised of their right to counsel. On writ of habeas corpus the United States Supreme Court held that in a federal criminal proceeding the right to counsel is "fundamental," and imposes a duty on a federal judge to advise an uninformed defendant of his constitutional right. Failure of a federal court to provide counsel for an indigent, illiterate, or mentally incompetent defendant was held to be grounds for reversal of a conviction.

In a federal case the right of an accused to assistance of counsel applies in both capital and non-capital cases.¹⁰ Counsel must be provided at the preliminary hearing, on arraignment, or at whatever stage of the proceedings where a plea is effected.¹¹ When an accused enters a plea without counsel, and he has not voluntarily waived his right to counsel, then such a plea is void.¹² The nature of the plea, whether it be guilty,¹³ or not guilty,¹⁴ is of no significance.

The Fourteenth Amendment contains no express provision regarding the right to counsel, and though the guarantees offered an accused in a state criminal action are not so comprehensive as those embodied in the Sixth Amendment,¹⁵ it has been interpreted to mean that a defendant

⁶ Const. of the U. S. (1787) Am. Art. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

⁷ *Gaines v. Washington*, 277 U. S. 81 (1928); *Fay v. New York*, ... U. S. ..., 67 S. Ct. 1613 (1947).

⁸ 304 U. S. 458 (1938).

⁹ Fed. Rules of Crim. Proc., Rule 44, following 18 U. S. C. A. 687, 54 Stat. 688 (1940).

¹⁰ Const. of the U. S. (1787) Am. Art. VI. Cited note 6 *supra*.

¹¹ *Wood v. United States* (App. D. C. 1942) 128 F. (2d) 265. (Defendants were charged with robbery. At the preliminary hearing they were without counsel, and entered pleas of guilty. Eleven days later, upon arraignment, they pleaded not guilty. Court held that the constitutional right to counsel embraced the right to have counsel at the preliminary hearing.) *Evans v. Rives* (App. D. C. 1942) 126 F. (2d) 633 (1942). (Accused charged with crime of non-support of a minor. Appeared in Juvenile Court without counsel, pleaded guilty, and was sentenced. Had a fourth-grade education, and no knowledge of right to counsel. Held on appeal that "the constitutional guarantee of right to counsel makes no distinction between the arraignment and other stages of criminal proceedings.)

¹² *Bayless v. Johnston*, Warden, 127 F. (2d) 531 (C. C. A. 9th, 1942). (If the requirement to assistance of counsel is not complied with, a plea of guilty is invalid, because the court no longer has jurisdiction to proceed. "The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.")

¹³ *Walker v. Johnston*, Warden, 312 U. S. 275 (1941).

¹⁴ *Johnson v. Zerbst*, 304 U. S. 458 (1938).

¹⁵ *Palko v. Connecticut*, 302 U. S. 319 (1937).

in a state case shall be provided rights essential to a fair hearing.¹⁶ The great majority of states by statute, constitutional provision, or judicial decision insure defendants in capital and non-capital cases the right to counsel. A few states have adopted the textual provisions of the Sixth Amendment, but most states provide for counsel in non-capital cases only on request.¹⁷ In two states, however, the requirement of counsel in non-capital cases has been affirmatively rejected.¹⁸

It is well-established that in capital cases it is the duty of the court, irrespective of request, to assign counsel for an indigent defendant,¹⁹ and to advise an uninformed defendant of his right to counsel.²⁰ But in *Betts v. Brady*,²¹ it was conclusively decided that there is no fundamental right to counsel in every criminal case in a state court. The petitioner was indicted for robbery, and his request was denied on grounds that Maryland law only requires assistance of counsel in a capital case. Though he had little education, he was permitted to conduct his own defense. The United States Supreme Court affirmed the conviction, holding that in non-capital cases where the accused is of ordinary intelligence, due process does not require the assistance of counsel as a fundamental right unless it is expressly conferred by state statute or constitutional provision. In the few states, however, where an accused is not entitled to counsel in non-capital cases, if it is evident under all of the circumstances that an indigent defendant is handicapped by a lack of legal assistance, a judgment of conviction will be reversed.²²

The primary reason for the distinction between capital and non-capital cases finds its foundation in the common law and the policy of the thirteen original states with respect to the right to counsel. Under the common law the assistance of counsel was expressly denied an accused. When the thirteen states adopted their respective Constitutions, they provided that counsel was not to be denied a defendant, but did not declare that the State had an affirmative duty to provide counsel when the defendant was unable to procure one.²³ The United States Supreme Court, out of deference to this state policy and yet with an awareness of the severity of a judgment of conviction in many criminal cases, decided that it would be advisable to take the position that only where death is the penalty should the accused be provided counsel.²⁴

Where assistance of counsel in non-capital cases is provided for by statute or constitutional provision, a denial of such right after an accused has requested counsel, would be regarded as a denial of due process.²⁵ Failure to inform a defendant of his right to counsel before he enters a plea in a non-capital case is a violation of due process in those states which have adopted guarantees textually identical with those embodied

¹⁶ *Snyder v. Massachusetts*, 291 U. S. 97 (1934).

¹⁷ See *Betts v. Brady*, 316 U. S. 455, 477 (1941) for a comprehensive index of statutes on this subject.

¹⁸ *Gilley v. State*, 114 Tex. Crim. Rep. 548, 26 S. W. (2d) 1070 (1930); *Coates v. State*, 180 Md. 502, 25 A. (2d) 676 (1942).

¹⁹ *Powell v. Alabama*, 287 U. S. 45 (1932); *Avery v. Alabama*, 308 U. S. 444 (1940); *People v. Kurant*, 331 Ill. 470, 163 N. E. 411 (1928).

²⁰ *Polk v. State*, 26 Okla. Crim. Rep. 283, 224 P. 194 (1924).

²¹ 316 U. S. 455 (1941). Accord: *Gall v. Brady*, 39 F. Supp. 504, (D. Md. 1941).

²² *Coates v. State*, 180 Md. 502, 25 A. (2d) 676 (1942).

²³ *Chitty, Criminal Law* (5th Am. Ed.) Vol. I, pg. 406.

²⁴ *Betts v. Brady*, 316 U. S. 455 (1941).

²⁵ *House v. Mayo*, 324 U. S. 42 (1944).

in the Sixth Amendment.²⁶ However, there is no affirmative duty in the majority of states to advise of, or provide counsel in non-capital cases because, as it has been noted, it is only when the defendant requests counsel that he is entitled to it in non-capital cases.²⁷ Nevertheless, in some states it has been established by statute and decision that it is the duty of the court, in all cases when defendant is without counsel, to admonish him of the consequences of his plea before accepting it.²⁸

It is a fundamental rule of law that the constitutional right of an accused to assistance of counsel may be waived.²⁹ A waiver is an intentional relinquishment or abandonment of a known right or privilege. The broad formula used in the federal cases to determine whether a valid waiver has been effected is simply that it must be knowingly and intelligently made, and this is determined only by weighing the particular facts and circumstances of each case, including the background, experience and conduct of the accused.³⁰ A waiver will not be implied from the fact that the accused pleads guilty,³¹ unless he has knowledge of his right to counsel and indicates that he does not desire counsel.³² If a defendant is coerced or deceived by the court or prosecutor into waiving his constitutional right to counsel, a plea of guilty will be set aside.³³

In the state cases, an expressed waiver by the defendant of his right to counsel is not sufficient unless it appears conclusively that it was intelligently made, and with an awareness of the consequences.³⁴ A few states will not imply a waiver of counsel from a plea of guilty but require by statute that the accused sign a written statement relinquishing his right.³⁵ In a capital case, because it is the duty of a state court to inform the accused of his legal rights, a waiver will not be implied from the fact that the accused failed to request counsel, but in non-capital cases in the states which provide counsel only on request, the silence of the accused in not requesting counsel is regarded as a waiver.³⁶ When an accused lacks age or intelligence and is incapable of making an ade-

²⁶ *State v. Jameson*, ... S. D. ..., 22 N. W. (2d) 731 (1946); *State v. Murphy*, 248 Wis. 433 (1945).

²⁷ *Rowland v. State*, 35 S. E. (2d) 372, 72 Ga. App. 793 (1945).

²⁸ *People v. Cooper*, 366 Ill. 113, 7 N. E. (2d) 882 (1937). (The accused was arrested for disorderly conduct at a primary election, pleaded guilty without the offer or advice of counsel, and without the court explaining the consequences of his plea to him in accordance with statute, and sentenced to one year imprisonment. The Ill. Supreme Court reversed the judgment of conviction. Yet, in a review of the case under consideration, the same court affirmed a like conviction. The only distinction that can be determined from the records of the two cases is that in the principal case the lower court complied with its affirmative duty of informing the accused of the consequences of their pleas of guilty. In neither case were instructions given regarding the assistance of counsel.)

²⁹ *Walker v. Johnston*, 312 U. S. 275 (1941); *State v. Garcia*, 47 N. M. 319, 142 P. (2d) 552 (1943).

³⁰ *Williams v. Huff*, (App. D. C. 1944) 142 F. (2d) 91.

³¹ *Robinson v. Johnston*, (App. D. C. 1943) 50 F. Supp. 774; *Parker v. Johnston*, (App. D. C. 1939) 29 F. Supp. 829 (1939); *Williams v. Kaiser*, 323 U. S. 471 (1945).

³² *Erwin v. Sanford*, (App. D. C. 1939) 27 F. Supp. 892.

³³ *Mooney v. Holohan*, 294 U. S. 103 (1934).

³⁴ *People v. Foster*, 59 N. Y. S. (2d) 477 (1945).

³⁵ *Davis v. Hudspeth*, 161 Kan. 354, 167 P. (2d) 293 (1946).

³⁶ *People v. McEchaney*, 394 Ill. 380, 68 N. E. (2d) 715 (1946).