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The Right of Counsel Today

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The Right of Counsel Today

While the right of the accused to be represented by counsel in a criminal trial was not part of the English common law,[1] the Federal Constitution and many state constitutions contain provisions for this right. These provisions have generally been construed, in the light of the English background, as merely guaranteeing the opportunity to be heard by counsel of his own choice if the accused is able to provide such counsel.[2] This construction of the constitutional provisions left unsolved the problem of how far the state and federal governments were willing to go in informing the defendant of his right to counsel and providing it if necessary.

Shortly after the adoption of the Bill of Rights, Congress, under the authority of the Sixth Amendment, enacted a statute which required the federal courts to assign counsel in capital cases.[3] Thereafter, the states —by statute, judicial decision, and constitutional provision—have provided counsel for defendants unable to obtain such services, until by 1931 the indigent and uninformed defendant was entitled to counsel in all states in capital cases and in thirty-four states when under indictment for a felony.[4] In 1932 the United States Supreme Court, in *Powell v. Alabama,*[5] held that, under certain circumstances, the denial of the right of counsel would constitute a violation of due process of law under the Fourteenth Amendment. In 1938 the first rule guaranteeing the right of counsel in *all* federal cases was laid down in *Johnson v. Zerbst;*[6] this was subsequently codified in the Federal Rules of Criminal Procedure.[7] Although establishing a definite rule for the federal courts, the Supreme Court, in dealing with the right of counsel in the state courts, preferred to adopt an approach, reviewed and summarized in *Bute v. Illinois,*[8] necessitating the decision of each case on its individual facts. By adopting such an approach, the Court has left open an area within which an

1 The right to be represented by counsel was first recognized in England in the Trials for Felonies Act (6 & 7 Will. 4, c. 114) in 1836. For a history of the common law development see Plucknett, Concise History of the Common Law, (2nd ed.) (1936) 385-386.

2 For the early American Constitutional doctrines on provisions for the right of counsel see 1 Cooley, Constitutional Limitations (8th ed., Carrington) (1927) 696-708. See also Betts v. Brady, 316 U.S. 455, 466 (1941).

3 1 Stat. 118 (1790), 18 USCA § 563 (1927).

4 Nat'l. Comm. on Law Observance and Enforcement, Report on Prosecution 4 (1931).

5 287 U.S. 46 (1932).

6 304 U.S. 458 (1938).

7 Rule 44: "Assignment of Counsel. If the defendant appears in court without a counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."—18 USCA (Supp. 1946) following § 687.

8 333 U.S. 640 (1948).

indigent defendant, uninformed of his rights to counsel, is not deprived of his federal constitutional rights when convicted and sentenced in a state court without the presence of counsel; within that area the question of further protection is left to the states. In an attempt to provide protection within that area, the Illinois Supreme Court, in the June term of 1948, adopted Rule of Practice and Procedure 27A[9] in order to give greater effectiveness to the statutory provision of counsel which has existed in that state since 1871.[10]

From these historical facts it is apparent that the question of whether or not a court is under a duty to inform a defendant of his right to counsel and supply one where necessary is one which has only recently arisen in the courts. Its importance, in terms of providing protection on an essentially equal basis to all citizens regardless of economic status or educational level, is obvious. From the variety of answers presented, the inference is clear that there is no predominating consensus of opinion as to the most desirable solution.

Federal Court Procedure

The divergence in the federal constitutional rules applicable to the federal and state courts has its origin in the fact that the federal courts are governed by the Sixth Amendment, which specifically provides for the right of counsel, while the state courts are governed only by the due process clause of the Fourteenth Amendment. The right of indigent defendants who are charged with felonies to be informed that they would be assigned counsel upon request was first recognized as existing in the federal courts in 1938 in *Johnson v. Zerbst.*[11] In that case the Court held that under the provisions of the Sixth Amendment, either the presence of counsel or an intelligent waiver thereof was required in the federal courts, and the presiding judge was under the duty of informing all felony defendants of this right. What constituted an intelligent waiver was to be determined in the light of the facts in each case, and the presumption against the waiver of a constitutional right was to be employed in the absence of an affirmative showing of a valid waiver. Federal Rule of Criminal Procedure Number 44, adopted in 1946, consolidated the holding of this case and the previous statutes into a general rule applicable in the federal district courts.[12]

Constitutional Protection in State Courts

The protection of the uninformed and indigent defendants' right to counsel in state courts under the due process clause of the Fourteenth

9 Illinois Supreme Court. Rules of Practice and Procedure, Rule 27A, 400 Ill.—— (1948). See note 46, *infra,* for text.

10 Ill. Rev. Stats. (1947) c. 38, § 730. See 42, *infra,* for text.

11 304 U.S. 458 (1938). See Holtzoff, Right of Counsel Under the Sixth Amendment (1944) 20 N.Y.L.Q. Rev. 1, for a general discussion of the history and effect of the rule. Walker v. Johnson, 312 U.S. 275 (1941) impliedly held that a plea of guilty should not be deemed a waiver of counsel, and Evans v. Rice, 126 F. (2d) 633, 637 (App. D.C. 1942) held that *Johnson v. Zerbst* applied to convictions upon a plea of guilty. Von Molke v. Giles, 332 U.S. 708 (1948) (German spy acting without the advice or knowing waiver of counsel pleaded guilty in a prosecution under the Espionage Act at the suggestion of an agent of the Federal Bureau of Investigation) applies this rule to an intelligent defendant, financially capable of providing counsel, but merely ignorant of her rights.

12 See note 7, *supra,* for text.

Amendment[13] was recently reviewed by the Court in *Bute v. Illinois*,[14] in which the defendant was prosecuted for the crime of indecent liberties. The petitioner contended that the Illinois trial court was under an affirmative duty to inquire into his desire for the services of counsel and his ability to procure them, and that the lack of a showing of such inquiry on the common law record created a presumption of a violation of due process. The Court held that the lack of such an entry did not create such a presumption, but decided the case on the grounds that, assuming the truth of his allegation that the Court had not informed him of his right to counsel, the petitioner was not entitled to counsel as a matter of constitutional right in the absence of aggravating circumstances.

In arriving at this conclusion, the Court rejected the view, expressed by Mr. Justice Black in his dissents in *Adamson v. California*[15] and *Foster v. Illinois*[16] that the enactment of the Fourteenth Amendment made the provisions of the first eight amendments applicable to the state governments as well as to the Federal Government. In this manner the Court avoided the application of the rigid requirements of *Johnson v. Zerbst*[17] to the state courts, and adopted a broad test of a violation of due process laid down in *Hebert v. Louisiana*[18] and developed in *Palko v. Connecticut*.[19] The *Hebert* and *Palko* cases established the principle that in matters of criminal procedure in state courts the Fourteenth Amendment protects the defendant against the abuses that "conflict with the fundamental principles of liberty and justice which lie at the basis of our civil and political institutions."[20] This test has enabled the Court to

13 The applicable portion of the Fourteenth Amendment is the due process clause rather than the privileges and immunities clause. See Adamson v. California, 332 U.S. 46, 51 (1947) for an extended discussion of the scope of this clause. It applies only to the privileges and immunities stemming from United States, as opposed to state, citizenship. Neither is the provision of counsel a problem of equal protection despite the economic overtones. See Carr v. Lanagan, 50 F. Supp. 41 (D.C. Mass. 1943) (Statutory imposition of three dollar filing fee for petition for writ of error with no provision for proceedings forma pauperis held not violative of the equal protection clause). In this case the court rejects the argument of economic discrimination, and holds that the classification is reasonable. Traditionally the equal protection clause in criminal procedure has largely been limited to problems of discrimination and classification. For examples of this use see: Strauder v. West Virginia, 100 U.S. 303 (1880) (trial of a negro where the state statute governing jury eligibility excluded negroes). Hill v. Texas, 316 U.S. 400 (1942) (exclusion of negroes from grand juries).

14 333 U.S. 640 (1948), affirming, People v. Bute, 396 Ill. 588, 72 N.E. (2d) 813 (1947) (petitioner convicted of taking indecent liberties with a child).

15 332 U.S. 46, 68-123 (1947), in which Mr. Justice Black, dissenting, made an extended historical argument to sustain the position that the Fourteenth Amendment made the provisions of the first eight Amendments applicable to the states.

16 332 U.S. 134 (1947), in which Mr. Justice Black, dissenting, took the position that his dissent in the *Adamson* case, *ibid*, was applicable to a deprivation of the right of counsel. This position would impose the mandatory Federal Rule, which has its origin in the Sixth Amendment, upon the state courts.

17 304 U.S. 458 (1938).

18 272 U.S. 312 (1926).

19 302 U.S. 312 (1937).

20 Hebert v. Louisiana, 272 U.S. 312, 316 (1926). In Palko v. Connecticut, 302 U.S. 312, 325-328 (1937) Mr. Justice Cardozo adopted this test as a peg on which to hang his analysis of what does and does not constitute a violation of due process under the Fourteenth Amendment. The subsequent Court decisions have followed Mr. Justice Cardozo's technique in dealing with the right of counsel, and usually begin by citing these two cases as containing the controlling principles. It is interesting to notice, however, that in developing the test, the Justice laid down certain rights which the states could not abridge, and among them was the right of counsel.

approach the facts of each case independently, deciding it in terms of whether or not the demands of common fairness were defeated by the lack of counsel.[21] With this test the lack of counsel alone has not constituted a deprivation of due process under the Fourteenth Amendment. A finding of a violation of the requirements of due process has depended on the presence of additional factors. Since the decision of *Powell v. Alabama*[22] in 1932, there are two groups of cases, all decided by a divided court, in which the result has depended on whether or not the deprivation of counsel was accompanied by other factors.

In *Powell v. Alabama*, nine young, illiterate, non-resident negroes were arraigned, tried and sentenced to death in one day without the benefit of counsel. The Court held that because of the fact that time was not allowed to procure counsel and the petitioners were incapable of defending themselves, the failure of the trial court to assign counsel constituted a violation of the Fourteenth Amendment. The Court has subsequently held that the following factors, coupled with the failure of a trial court to assign counsel, constitute denial of due process: trickery by state officials, lack of education,[23] youth and inexperience,[24] technical difficulties of possible defenses,[25] precipitancy in the proceedings while holding the defendant incommunicado,[26] and carelessness and misinformation on the part of the trial judge.[27]

See Bute v. People of Illinois, 333 U.S. 640, 656 (1948). For discussions of the *Palko* case see Note (1938) 28 J. Crim. L. & Criminology 919; Note (1938) 51 Harv. L. Rev. 739; Note (1938) 27 Ill. B. J. 102; Note (1938) 22 Minn. L. Rev. 550; Note (1938) 15 N.Y.L.Q. Rev. 442; Note (1938) Yale L. J. 489.

21 The test of ultimate decency is explicitly advanced by Mr. Justice Frankfurter, concurring, in Adamson v. California, 332 U.S. 46, 59, 61 (1947). For general discussions of the *Adamson* case see Note (1947) J. Crim. L. & Criminology 379; Note (1948) A.B.A.J. 19; Note (1948) 46 Mich. L. Rev. 372; Note (1947) 21 So. Calif. L. Rev. 47; Note (1947) 33 W. Va. L. Rev. 642.

22 287 U.S. 45 (1932). The trial court actually made a farce of the duty to provide counsel by refusing to appoint specific counsel, and designating all the members of the county bar, at large, to act as counsel for the defendants until competent counsel should appear. See Note (1933) 23 J. Crim. L. & Criminology 841; Note (1932) 31 Mich. L. Rev. 245; Note (1933) 8 Notre Dame Law 260; Note (1933) 17 Mich. L. Rev. 415; Note (1933) 10 N.Y.L.Q. Rev. 389.

23 Smith v. O'Grady, 312 U.S. 329 (1941) (defendant arrested for burglary and pleaded guilty under the assurance of a light sentence and received twenty years; he had no knowledge of legal procedure, no previous knowledge of the charges, and was refused permission to withdraw his plea and obtain counsel). See Note (1941) 20 Neb. L. Rev. 173.

24 Wade v. Mayo, 334 U.S. 672 (1948) (sixteen year old boy held incapable of defending himself on charge of breaking and entering because of youth). DeMeerleer v. Michigan, 329 U.S. 663 (1947) (seventeen year old boy arraigned, convicted and sentenced for first degree murder without assistance of counsel).

25 Williams v. Kaiser, 323 U.S. 471 (1945) (refusal of counsel on a charge of armed robbery with a deadly weapon). The court held that even if the petitioner had committed the offense, determination of the degree, of which several were provided by the statute, required the services of trained counsel. Tompkins v. Missouri, 323 U.S. 485 (1945) (companion case to Williams v. Kaiser involving a charge of first degree murder). Rice v. Olson, 324 U.S. 787 (1945) (conviction of an uneducated Indian in the state courts without the advice of counsel reversed on the grounds that a possible defense of Federal jurisdiction existed to the charge since the burglary was committed on an Indian Reservation). For discussion of the *Tompkins* and *Williams* cases see: Note (1945) 33 Geo. L.J. 495; Note (1945) 44 Mich. L. Rev. 489.

26 Hawk v. Olson, 326 U.S. 271 (1945) (petitioner held incommunicado until arraignment and refused a continuance to consult counsel).

27 Townsend v. Burke, 334 U.S. 736 (1948) (transcript of the trial court's questioning of the defendant showed that the court was misinformed as to the defend-

In *Betts v. Brady*,[28] the Court, while stating that the denial of counsel by state courts in a capital case was unconstitutional, held that the denial of counsel to a defendant who had requested that counsel be assigned to defend him on a robbery charge, where the trial was before the court without a jury, and the only issue was the veracity of the witnesses, did not constitute a contravention of the requirements of the Fourteenth Amendment. More recently the Court has made it clear that severity of sentence alone, in a non-capital case, does not constitute a sufficient additional circumstance to amount to a denial of due process.[29]

In view of these decisions, the Court in the *Bute* case pointed out that while in a capital case a denial of counsel was a contravention of due process, in a non-capital case the deprivation of counsel as a violation of due process depended on the fact situation of the particular case.[30] In support of its opinion, Mr. Justice Burton, speaking for the Court, argued that while any decision made under the Fourteenth Amendment would govern despite the presence of less stringent requirements in the state constitutions, it did not feel justified in imposing an inflexible rule arbitrarily upon the states when it had only recently recognized such a requirement in the federal courts. The Court also pointed to the fact that the right to be provided with counsel in federal courts stemmed from the Sixth Amendment rather than the due process clause of the Fifth Amendment so that the Court did not even have a verbal similarity on which to rest a requirement of the same standard for state procedure in the due process clause of the Fourteenth Amendment.[31] To do so, claimed the Court, would be to disregard the area of state autonomy, and to "introduce extraordinary confusion and uncertainty into state criminal procedure where clarity and certainty are essential."[32] Underlying this reasoning is probably a fear that a retroactive decision on Constitutional grounds would result in a mass exodus of hardened criminals who could not be retried because of a lack of evidence as well as an apprehension as to the strain which such retrials would place on the capacity of the state judicial systems.[33]

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ant's previous record and conducted its examination in a facetious manner). *But cf.* Gryger v. Burke, 334 U.S. 728 (1948), distinguishable from Townsend v. Burke in that the only allegation was the severity of a sentence under the habitual criminal act was unconstitutional because the court had acted under the misapprehension that the sentence was mandatory. The Court stated that, in the absence of other considerations, the severity of the sentence imposed was not grounds for the allegation of a violation of due process. But see Mr. Justice Rutledge's dissent in this case for a criticism of the distinction between the two cases.

28 316 U.S. 455 (1941). For a discussion of the case see: Note (1943) A.B.A.J. 61; Note (1942) 21 Chi-Kent L. Rev. 107; Note (1942) 42 Col. L. Rev. 1205; Note (1942) 17 Tul. L. Rev. 306; Note (1942) 91 U. Pa. L. Rev. 78.

29 Gryger v. Burke, cited *supra* note 27.

30 See Carter v. Illinois, 329 U. S. 173, 179 (1946). Mr. Justice Frankfurter, in dicta, points out that the court requires additional circumstances combined with the lack of counsel to constitute a violation of due process such as "racial handicap of the defendant, his mental incapacity, his inability to make an intelligent choice, and a precipitancy in the acceptance of a plea of guilty."

31 U.S. Const., Amendment VI, provides: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

32 Bute v. Illinois, 333 U.S. 640, 668 (1948).

33 This point is explicitly made by Mr. Justice Frankfurter, *see* Foster v. U.S., 332 U.S. 134, 139 (1947). *But see* the position taken by Mr. Justice Black (dissenting) in the same case at 140 where he states that this consideration is irrelevant in determining whether or not to apply the Bill of Rights.

The dissent in *Bute v. Illinois*[34] is typical of the position which four of the Justices of the present Court have taken in the right of counsel cases. In addition to the broad grounds of Mr. Justice Black's position in *Adamson v. California*,[35] Mr. Justice Douglas rested his dissent on the position that irrespective of the fact that the Sixth Amendment is not applied to the states by force of the Fourteenth Amendment, the right of counsel is one of the fundamental and basic rights which is guaranteed by the due process clause of the Fourteenth Amendment and cannot be abridged. But, as a third objection to the majority opinion, the dissent contends that, even if the need for counsel is the proper test, that need should be measured by the nature of the charge and the ability of the average man to defend himself against it without the aid of an expert in the law rather than by the complexities of the particular case and the lack of ability of the particular defendant, which is the criterion set up by the majority. In short, the dissent would measure the need for counsel in terms of the need of a "reasonable man," as opposed to the need of the actual defendant in each case. This would of course enable a court to rule on specific offenses and defenses rather than adhering strictly to an evaluation of the net impression created by all the factors in each case.

If it is admitted that it is difficult to support the distinction between capital and non-capital cases on rational grounds, the question then becomes whether the present view on capital cases should be extended to cover all cases which carry a penalty of imprisonment in the penitentiary, or whether the present rule is sufficiently protective in that the right of counsel under the Fourteenth Amendment should exist only where the defendant is placed at a disadvantage because of his particular situation, which could have been corrected by the presence of counsel. The best argument in favor of the present position is that it offers the decided advantage of preventing the exodus of criminals which would follow a decision recognizing the right in all felony cases while permitting the court to correct the more flagrant abuses. Under the rule of the *Bute* case it will be possible for the Court to narrow gradually the area in which the denial of the right of counsel is not a violation of due process through an accumulation of decisions recognizing additional factors which, coupled with the lack of counsel, constitute a denial of due process.

Provision of Counsel by the States

The Court's refusal to proclaim an absolute constitutional right has left to the states the initiative in supplying additional protection to the uninformed and indigent defendant. For the most part the states have recognized that additional protection is needed to give the indigent and uninformed defendant an equal opportunity before the criminal bench, and have provided for the assignment of counsel in varying situations by statute, constitutional provision, or judicial decision.[36] In construing

34 333 U.S. 640, 677 (1948) (Douglas, J., dissenting).

35 332 U.S. 46 (1947), cited *supra*, note 14.

36 The provision of counsel to defendants on request in non-capital cases is required by statute in Arkansas, California, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Washington, and Wyoming. It is required by judicial decision in Connecticut, Florida, Indiana,

these provisions the state courts have adopted a wide variety of techniques. Some states have held that there is an affirmative duty on the trial court to inform the defendant that he has a right to counsel and that counsel will be furnished if he so desires. A failure to appoint counsel, unless waived, constitutes a loss of jurisdiction by the court in some of these decisions.[37] Other states limit the duty to furnish counsel to capital cases only.[38]

Many of the states place no affirmative duty on the court to inform the defendant in a non-capital case, but provide counsel when it is requested by the defendant.[39] Assignment of counsel has also been held to rest within the trial court's discretion.[40] Where the right has been guaranteed by legislative or constitutional provision, some courts have tended to employ procedural devices and judicial interpretation to limit its effectiveness.[41] From this brief survey it can be deduced that the right of the indigent and uninformed defendant to be assigned counsel has not been uniformly recognized by the states, and that where it has been recognized, the courts have in some instances tended to limit its efficacy.

Provision of Counsel in Illinois

The history of the right of counsel in Illinois presents an instance in which all of the techniques noted above have been used in limiting the right. Recently, however, Illinois has recognized that this right was one which in all fairness required more adequate protection; and despite the holding in *Bute v. Illinois* that its procedure intrinsically satisfied the minimum requirements of the Fourteenth Amendment, the Illinois

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Michigan, Pennsylvania, Virginia, West Virginia, and Wisconsin. It is guaranteed by constitutional provisions in Georgia and Kentucky, but has been affirmatively rejected by courts in Maryland and Texas, and by dicta in Alabama and Mississippi. See Betts v. Brady, 316 U.S. 455, 470 (1941).

37 Wiley v. Hudspeth, 162 Kan. 516, 178 P. (2d) 246 (1947) (seventeen year old boy sentenced on plea of guilty to the charge of burglary with no journal entry as to the presence of counsel); *In re* Connor, 15 Cal. (2d) 161, 99 P. (2d) 804 (1940); People v. Miller, 123 Cal. App. 499, 11 P. (2d) 994 (1932); Note (1942) 15 So. Cal. L. Rev. 242; Richardson v. State, 61 Okla. Cr. 278, 67 P. (2d) 804 (1937) (defendant pleaded guilty to a charge of robbery); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E. (2d) 405 (1940) (in a suit by an attorney to collect a fee for defending a pauper the Indiana Court, in passing on the power to appoint counsel, held that the Indiana Constitution imposes a duty on the court to appoint counsel and that failure to do so constitutes a loss of jurisdiction).

38 Johnson v. Mayo, 158 Fla. 264, 28 So. (2d) 585 (1947) (defendant requested counsel on a charge of larceny and was informed that the court was without power to grant it); Thomas v. State, 132 Tex. Crim. 549, 106 S.W. (2d) 289 (1937) (assault to rob); Gilchrist v. State, 27 Ala. App. 401, 173 So. 649 (1937) (second degree burglary) (in this case the court held that the right existed only in a capital case where the inability to provide counsel was made known to the trial court, but suggested that the court had discretionary power to appoint counsel which should be exercised in felony cases).

39 Mackey v. Kaiser, ___Mo.___, 187 S.W. (2d) 198 (1945) (defendant waived counsel and pleaded guilty; court indicated, however, that there is a requirement of full knowledge of the consequences of a waiver by plea of guilty as a result of Williams v. Kaiser, 326 U.S. 471 (1945)); Commonwealth *ex rel* Stengel v. Burke, 158 Pa. Super. 87, 42 A. (2d) 921 (1945); People v. Fries, 294 Mich. 382, 293 N.W. 689 (1940); State v. Blakenship, 186 La. 238, 172 So. 4 (1937).

40 Williams v. State, 143 Fla. 826, 197 So. 562 (1940).

41 See Moore v. Commonwealth, 298 Ky. 14, 181 S.W. (2d) 413 (1944); Hamlin v. Commonwealth, 287 Ky. 22, 152 S.W. (2d) 297 (1941); Holton v. State, 143 Tex. Cr. 415, 158 S.W. (2d) 772 (1942) for examples of this type of limitation.

Supreme Court created a rule of court providing additional safeguards for the indigent and uninformed defendant.

The original Illinois position regarding the right to counsel was incorporated in a statute enacted March 27, 1874 which provided that every person charged with a felony shall be allowed counsel if he states on oath that he is unable to procure counsel.[42] In its review of denial of rights under this statute, the Illinois Supreme Court limited the right to counsel by various interpretations and presumptions which were recently approved in the *Bute* case.[43] The Illinois Court had consistently taken the position that the right to counsel under this statute does not arise until the defendant, of his own initiative, requests counsel of the court and files an affidavit stating that because of indigency or other reasons he is unable to procure counsel. Under this construction, in order to constitute an error on the part of the court, it must appear on the record that the defendant took these affirmative steps to procure counsel and, except where other circumstances are present which constitute a violation of the Fourteenth Amendment, no duty arises on the part of the court to provide counsel or to inform the defendant of his right to counsel until such action is initiated by the defendant.[44] Expressing its rationale of the rule, the court in *People v. Wilson*[45] explained that the difference between the Illinois and federal rules is that the latter starts from the assumption that the defendant does not know of his rights while the Illinois court begins with the well grounded legal maxim that everyone is presumed to know the law. The advisability of this maxim in such a fundamental situation, particularly where knowledge of the right to counsel, if present, would not add to the knowledge of prohibited behavior under criminal law, is decidedly questionable. It is unrealistic to assume that anyone without considerable experience in criminal procedure would be able to determine the steps necessary to comply with the statute and invoke the right which it provides.

The recently announced Illinois Supreme Court rule provides that in the absence of counsel the trial court shall advise the defendant of his right to be defended by counsel before any plea to the indictment can be entered, allowed, or changed.[46] The rule further makes it mandatory

42 Ill. Rev. Stats. (1947) c. 38, §730: "Every person charged with a crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel."

43 Bute v. Illinois, 333 U.S. 640, 672 (1948).

44 People v. Wilson, 399 Ill. 437, 78 N.E. (2d) 512 (1948); People v. Bute, 396 Ill. 588, 72 N.E. (2d) 813 (1947); People v. Davis, 396 Ill. 432, 72 N.E. (2d) 193 (1947); People v. Creviston, 396 Ill. 78, 71 N.E. (2d) 205 (1947); People v. Corrie, 387 Ill. 587, 56 N.E. (2d) 767 (1944); People v. Corbett, 387 Ill. 41, 55 N.E. (2d) 74 (1944). But under a similar requirement, the Louisiana Court in State v. Blankenship, 186 La. 238, 172 So. 4 (1937), held that while the defendant must request counsel, once he has done so it becomes the duty of the trial court to assist him in preparing the necessary proof of indigency.

45 399 Ill. 437, 78 N.E. (2d) 512 (1948).

46 Illinois Supreme Court Rules of Practice and Procedure, Rule 27A. 400 Ill.—(1948): "In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall, before receiving, entering, or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel. If he desires counsel and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. The court shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction, the punishment shall be imprisonment

to appoint counsel where the defendant is under eighteen years of age, or where the defendant is, in the opinion of the court, incapable of understanding the nature of the charges, his right to counsel, and the consequences of his being found guilty. The only issue left open for judicial determination under the rule is the standard of understanding necessary to constitute a valid waiver of counsel. It can be said, therefore, that the effect of the new rule will be to abrogate most of the case law interpreting the right of counsel under this statute, and to cause the trial courts to provide counsel for every defendant charged with a felony (i. e., a penitentiary offense), without the initiation of any action on the part of the defendant himself.

The final test of the effectiveness of the guarantee of the right of counsel lies in the availability of judicial review of its denial; by requiring the inclusion of the questioning of the defendant in the common law record, Rule 27A will apparently settle the problem of the proper remedy for review of denial of the right of counsel in Illinois courts. The problem was recently highlighted by a concurring opinion of Mr. Justice Rutledge in *Marino v. Ragen*,[47] in which he expressed doubt whether any remedy whatsoever existed to raise the issue in Illinois.

Recent surveys of the work of the Illinois Supreme Court have pointed out the fact that the existence of three remedies for error in criminal cases—*habeas corpus*, motion in the nature of a *writ of error coram nobis*, and *writ of error*—caused an endless procession of appeals in which most were dismissed on procedural grounds without going to the merits of the case. Such dismissal had the general result of blocking relief in federal courts because of the exhaustion of remedies rule,[48] and of preventing

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in the penitentiary, unless the court finds from proceedings had in open court that the accused understands the nature of the charges against him, and the consequences thereof if found guilty, and understands that he has a right to counsel and understandingly waives such right. The inquiries of the court and the answers of the defendant to determine whether the accused understands his rights to be represented by counsel, and comprehends the nature of the crime with which he is charged, and the punishment thereof fixed by law, shall be recited in, and become a part of the common law record in the case; provided in no case shall a plea of guilty be received or accepted from a minor under the age of eighteen years unless represented by counsel."

47 332 U.S. 561, 564 (1947) (an Italian who had been in the country two years and who allegedly could not understand the English language pleaded guilty to murder; the arresting officer acted as interpreter). While this case was dismissed on a confession of error by the Attorney General of Illinois, Mr. Justice Rutledge, in a concurring opinion, strongly castigated the Illinois procedure, saying, at footnote 9, "It is questionable whether Illinois offers a remedy for a man deprived of his right to counsel . . . The trial judge would surely know that he had refused to appoint counsel, and would be presumed to be familiar with the record . . . hence coram nobis would not lie. Assuming that the clerk makes the routine entry to the effect that the defendant was apprised of his rights which he promptly waived . . . writ of error would afford inadequate review. Only if the Attorney General's view of habeas corpus would extend to such a case would there be a remedy available."

48 Before the Federal Courts can entertain a petition for habeas corpus to obtain relief from a conviction in a state court where a question of Federal right is involved, the petitioner must exhaust his state remedies, including all appeals to the state supreme court and appeals and writs of certiorari to the United States Supreme Court. The federal court will only hear a petition where the same issues were previously presented in the state system and no substantial relief existed for the violation of a Federal right in the state courts. *Ex parte* Hawk, 321 U.S. 114 (1943). But during the last term the Court, in Wade v. Mayo, 334 U.S. 672 (1948), held that it was not necessary for petitions for certiorari or appeals to be filed in the United States Supreme Court from the decisions of the state courts to satisfy the rule. It also held that, where more than one remedy had been established by decision

review by the United States Supreme Court on *certiorari* in many cases because the denial of relief was on the non-federal grounds of a procedural deficiency.[49] The procedural problem then becomes one of determining the defects in these three remedies, and then determining whether or not Rule 27A cures those defects.

It has previously been held that *habeas corpus* will not lie for a denial of the right of the accused to be assigned counsel under Illinois procedure.[50] However, in *Marino v. Ragen*[51] and *Loftus v. Illinois*[52] the Attorney General of Illinois has argued otherwise, and a second opinion in the latter case supports this contention. The fact that the trial judge would be presumed to know whether or not the prisoner asserted his right of counsel or waived it precludes the use of the motion in the nature of *writ of error coram nobis* which lies for error of fact, not law.[53]

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of the state courts for the deprivation alleged, exhaustion of one remedy was all that was necessary to satisfy the rule. But the new Judicial Code, Pub. L. No. 773, 80th Cong., 2d. Sess. (June 25, 1948) §2254, enacts the law as stated in *Ex parte* Hawk without the subsequent modifications of *Wade v. Mayo*. See Note (1948) 61 Harv. L. Rev. 657, 664 for discussion of habeas corpus in the federal courts; note (1948) 39 J. Crim. L. & Criminology 357.

49 For a general discussion of the problem of collateral relief in Illinois see: Comment (1947) 38 J. Crim. L. & Criminology 139; reprinted as Comment (1947) 42 Ill. L. Rev. 329; Comment (1947) 15 U. of Chi. L. Rev. 107, 119-123.

50 People *ex rel.* Thompson v. Neirstheimer, 395 Ill. 572, 71 N.E. (2d) 343 (1947). In the face of allegations of facts which if proved might have amounted to a violation of due process, the court held that habeas corpus can not take the place of writ of error and is only proper for questioning the jurisdiction of the court. This position was taken as against the argument that failure to assign counsel constituted a loss of jurisdiction. People *ex rel.* Swolley v. Ragen, 390 Ill. 106, 61 N.E. (2d) 248 (1944); People *ex rel.* Barrett v. Bradley, 291 Ill. 169, 62 N.E. (2d) 788 (1945).

51 332 U.S. 561 (1947).

52 334 U.S. 804 (1948). This case was held in abeyance pending clarification of Illinois procedure. The Attorney General of Illinois argued on the basis of dicta in People v. Shoffner, 400 Ill. 337, 79 N.E. (2d) 200 (1948) and People v. Wilson, 399 Ill. 437, 78 N.E. (2d) 512 (1948) that habeas corpus was the proper remedy. In People v. Shoffner, the court said by way of dicta, "Reference should be made to the plaintiff in error's affidavit for it furnishes an opportunity to again emphasize the distinction plainly drawn between the questions reviewable on a writ of error and the questions of fact that may be tried on a petition for habeas corpus where it is claimed that due process has been denied . . . (the opinion cites facts analogous to Powell v. Alabama) . . . The Supreme Court of the United States held that such averments, if proved, were within the doctrine of Powell v. Alabama and, being such, required an answer . . . " The Attorney General also argued that habeas corpus was the proper remedy in Marino v. Ragen, 332 U.S. 561 (1947). But in White v. Ragen, 324 U.S. 760 (1945) he argued that the Illinois Supreme Court will not review issues of fact on an original application for a writ of habeas corpus. In a subsequent opinion in the same case, People v. Loftus, 400 Ill. 432, 81 N.E. (2d) —(1948), the Illinois Supreme Court took the position that habeas corpus would lie for review of void convictions. Further in the per curiam opinion the court stated that the United States Supreme Court had held that under certain circumstances a denial of counsel voided the conviction on due process grounds. It required, however, that the original petition must allege facts which bring the case within the doctrine of Powell v. Alabama. The dicta in the Shoffner case is rather tenuous, and, despite the strong inference that habeas corpus would lie for failure to provide counsel, it seems that a direct ruling on the problem would be necessary to overcome the force of the previous holdings, cited *supra*, note 50. See "Open Letter to the Attorney General of Illinois" by Dean Wilbur G. Katz in 15 U. of Chi. L. Rev. 251 (1948) for an account of the vacillations of that official on this point.

53 The motion in the nature of writ of error coram nobis is the Illinois statutory substitute for the common law writ and bears a five year limitation. Ill Rev. Stats. (1947) c. 110, §196. This motion only brings before the court facts, not of record and unknown to the court at the time of trial which would have barred the conviction, provided that the defendant has not been negligent in not informing the court

Elimination of these remedies leaves only the *writ of error* which lies for review of the trial court record and would appear to be the proper remedy. While it has a twenty year statutory limitation, this writ is hedged about with certain procedural difficulties: the defendant is only entitled to the common law record of his trial and conviction on appeal[54] and in the absence of a bill of exceptions, prepared at the defendant's own expense[55] and certified by the trial judge within fifty days after conviction,[56] the Illinois Supreme Court has consistently held that it is limited to matters contained in the common law record.[57] Most cases therefore come up for review on the common law record only.[58]

Moreover, in determining the due process issue on appeal from a decision rendered on such a record, the United States Supreme Court has held that it was bound by the common law record which was before the state court, and that it is not necessary that an affirmative recital of an explanation of the right of counsel by the trial court be recited in the record.[59] The common law record imports verity and, in the absence of any proof to the contrary by another matter of record, it is presumed that the court fully discharged all of its duties toward the defendant.[60] That record ordinarily contains no facts whatsoever concerning the deprivation of the right to counsel, and, in the absence of such facts, the presumption of verity makes the appeal a mere formality.[61]

Rule 27A, however, is designed to supply an effective remedy by incorporating a transcript of the court's questioning of the defendant in a felony prosecution on his desire for counsel into the common law record. With that information available, review on *writ of error* would go to the merits of the claim of deprivation rather than being a purely formal proceeding, necessary only to exhaust the state remedies and go into the Federal courts. It will also incorporate into the common law record sufficient information to make the process of review by the United States Supreme Court on due process grounds easier.

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of these facts at the time of the trial. Sims v. People, 399 Ill. 159, 77 N.E. (2d) 173 (1948); People v. Rave, 392 Ill. 435, 65 N. E. (2d) 23 (1946); People *ex rel.* Courtney v. Green, 355 Ill. 468, 189 N.E. 500 (1934); People v. Dysch, 311 Ill. 342, 143 N.E. 100 (1924). For discussions concerning this motion see Comment (1937) 31 Ill. L. Rev. 646; Comment (1947) 38 J. Crim. L. & Criminology 139, 140-143; also printed (1947) 42 Ill. L. Rev. 329, 330-334.

54 Illinois Supreme Court Rules of Practice and Procedure, Rule 36, Ill. Rev. Stats. (1947) c. 110 §259.36.

55 Ill. Rev. Stats. (1947) c. 53, §81.

56 Illinois Supreme Court Rules of Practice and Procedure, Rule 70A, Ill. Rev. Stats. (1947) c. 110, §259.70A.

57 People v. Shoffner, 400 Ill. 337, 79 N.E. (2d) 200 (1948); People v. Berry, 399 Ill. 17, 76 N.E. (2d) 433 (1947); People v. Bolds, 398 Ill. 626, 76 N.E. (2d) 456 (1947); People v. Nelson, 398 Ill. 623, 76 N.E. (2d) 441 (1947).

58 Comment (1947) 15 U. of Chi. L. Rev. 107, 125.

59 Foster v. People of Illinois, 332 U.S. 134 (1947); Carter v. Illinois, 329 U.S. 173 (1946).

60 People v. Shoffner, 400 Ill. 337, 79 N.E. (2d) 200 (1948); People v. Owens, 397 Ill. 166, 73 N.E. (2d) 274 (1947); People v. Fuhs, 390 Ill. 67, 60 N.E. (2d) 205 (1946); People v. Pacora, 358 Ill. 448, 193 N.E. 477 (1935).

61 The evils of this situation are apparent from a consideration of Carter v. Illinois, 329 U.S. 173 (1946), in which a majority of the Court held that since they were limited to the common law record, they were confronted with no factors which, in addition to the denial of the right of counsel, constituted a violation of due process. Actually, as Mr. Justice Murphy pointed out in his dissent, the facts of that case closely paralleled those of Powell v. Alabama, 287 U.S. 46 (1932) discussed *supra.*

The effect of this rule has been substantially to incorporate the Federal rule, as expressed in *Johnson v. Zerbst*, into the Illinois Rules of Practice and Procedure. A possible mechanical improvement might be to provide for the assignment of counsel at the preliminary hearing as is the English practice.[62] This has the advantage of having counsel on the case during the pre-trial period and avoiding the delay caused by a continuance when counsel is appointed on arraignment.

The remaining problem is the construction which the Illinois Supreme Court will place on the requirement of the rule that the waiver of counsel shall be valid only if the accused understands the nature of the right to counsel, the nature of the crime with which he is charged, and the consequences of conviction. Because of the great similarity between the Illinois and Federal rules, it seems probable that the court will be guided by *Johnson v. Zerbst*. The minimum to be expected is a series of decisions conforming to the requirements of the Fourteenth Amendment. This follows from the fact that incorporation of the examination of the defendant into the common law record will make the facts available to the United States Supreme Court so that it can determine the issue on its merits.

Conclusion

Bute v. Illinois indicates that, within the foreseeable future, the United States Supreme Court does not intend to interpret the Constitution as imposing a mandatory requirement of counsel in all felony cases in the state courts. A survey of the state provisions for the protection of the indigent defendants who are uninformed as regards the right to counsel shows that even where the right is recognized, the tendency of the courts has been to limit its effectiveness by various devices.

Illinois Rule 27A represents one attempt to deal with the problem created by these limitations. Its advantages are twofold: (1) its status as a rule of court makes easier the process of amendment to correct defects which may subsequently appear in its operation; (2) its prospective operation avoids the problem of retroactivity previously discussed which would be created by invoking such a rule as a constitutional right.

Mechanically, therefore, the new Illinois rule represents an excellent solution to the problem of the protection of the indigent and uninformed defendant's right of counsel. The only problem remaining to be solved is the construction of the standards of trial court procedure which will satisfy the requirements for an intelligent waiver of the right of counsel. In the construction of these standards lies the answer to the extent of the protection of the right of the indigent and uninformed defendant to counsel.[63]

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62 Under the Poor Prisoners Defense Act, 1930 (20 & 21 Geo. 5, c. 32) the right to counsel is absolute in cases of murder and placed at the discretion of the committing magistrate or the trial court in all other cases. It further provides that the justice may satisfy himself by ordinary means as to the accused's ability to pay for counsel in the litigation then pending. This feature of gauging the ability to pay by the costs of defending the particular action also differs from the usual American practice.

63 A collateral problem, far beyond the scope of the present discussion, is the quality of the counsel provided for the indigent defendants and the compensation of such counsel. See the Report of the Nat'l. Comm. on Law Observance and Enforcement, Report on Prosecution, 27-84 (1941) for a general survey of this situation.