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FEDERAL HABEAS CORPUS AND INCOMPETENCE OF COUNSEL IN STATE PROSECUTIONS

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The purpose of this comment is to examine and analyze a group of recent decisions wherein persons convicted by state courts have sought writs of habeas corpus in federal district courts on the ground that the incompetence of counsel representing them at trial worked a deprivation of rights secured by the United States Constitution.

The federal reporters contain scores of cases in which persons convicted by federal courts have sought writs of habeas corpus, new trials and reversals on allegations of incompetence of defense counsel. The regional reporters are replete with decisions by state courts in cases where convicts have sought direct and collateral relief on similar allegations of incompetence. A complete analysis of incompetence cases would of course involve examination of these two last mentioned bodies of cases. However, a separate analysis of cases involving attempts by state prisoners to obtain release by the federal district courts is warranted in view of the delicate federal-state relationships brought into play when the state prisoner utilizes the federal forum to launch a collateral attack on his conviction.

The occasion for this comment is the recent decision of *Lunce v. Overlade*[1] in which a state prisoner met with at least temporary success in a federal collateral attack on the competence of his defense counsel. Charles Lunce and John Reynolds, together with one Thompson, were charged with the crime of assault and battery with intent to commit robbery. The Indiana trial court appointed counsel to represent Lunce and Reynolds. An Ohio attorney who had not been admitted to Indiana practice was retained by Thompson's family to conduct his defense. The pre-trial efforts of the appointed attorney consisted of informing Lunce and Reynolds of the code provisions under which they were charged, informing them that a conviction could result in a life sentence and advising them to plead guilty. The appointed counsel was not present in court for the trial. The Ohio attorney succeeded in getting a dismissal of the charges against Thompson and then volunteered to represent Lunce and Reynolds and proceeded to conduct their defense. The trial resulted in a conviction and sentence of ten to twenty-five years. The Ohio attorney's attempt to perfect an appeal failed because he was not versed in Indiana appellate procedure. The Indiana supreme

[1] 244 F.2d 108 (7th Cir. 1957).

court then directed the public defender to perfect the appeal. On argument before the Indiana supreme court the only issue was whether due process of law had been denied to Lunce and Reynolds because the Ohio attorney was incompetent. The Indiana supreme court gave full consideration to the incompetence question and affirmed the conviction. The United States Supreme Court denied certiorari.[2]

Lunce and Reynolds then petitioned the United States District Court for the Northern District of Indiana for writs of habeas corpus. The petitioners alleged they had been denied due process of law in that they were represented at trial by an attorney who was wholly unversed in Indiana law and was without preparation for the trial. The petitioners' specific allegations were that the Ohio attorney failed to challenge the sufficiency of the affidavit,[3] permitted incompetent and damaging hearsay testimony to come in against them, failed to request intoxication instructions, failed to object to instructions given to the jury and failed to save exceptions.

The federal district court dismissed the petition without a hearing and without requiring the warden to answer. Petitioners then appealed the dismissal to the United States Court of Appeals for the Seventh Circuit. The circuit court held that the incompetence of counsel alleged by the petitioners resulted in a prima facie violation of constitutional rights and remanded the case to the district court for a factual determination.[4] As of this writing the district court has not rendered an opinion.

RIGHT TO COUNSEL

A federal attack on competence of counsel in a state criminal prosecution must find its basis in the fourteenth amendment. It is now settled law that the sixth amendment guarantee of representation by counsel runs only to those who are defendants in a federal prosecution. It is beyond the limited scope of this comment to examine completely the nature and scope of the constitutional right to counsel in a state trial.[5] The present rule, as announced by the Supreme Court in the case of

[2] Lunce v. State, 233 Ind. 685, 122 N.E.2d 5 (1954), *cert. denied* 349 U.S. 960 (1955).

[3] Indiana criminal procedure permits prosecution by affidavit. Burns' Ind. Stat. Ann. § 9-1104 requires that the affidavit contain the title of the action and a statement of facts constituting the offense charged.

[4] 244 F.2d 108 (7th Cir. 1957). The federal district court heard evidence in this cause on December 23, 1957.

[5] For a complete discussion of the constitutional right to counsel, see BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

Betts v. Brady,[6] is that there is no absolute federally guaranteed right to counsel in a state trial, the existence of the right being dependent upon the special circumstances of the particular case and found in the requirement of the fourteenth amendment concepts of fundamental fairness implicit in due process.

If the circumstances of the particular case are such that a denial of any representation by counsel would be a denial of due process under the fourteenth amendment it would seem to follow that denial of effective representation by counsel would also be a violation of the fourteenth amendment. The right to counsel is substantial and is not satisfied by a formal appointment.[7] But if the circumstances of the case are such that there is no constitutional right to representation by counsel it is difficult to see how the court can entertain the argument that ineffective representation by counsel works a denial of due process. Opinions in some of the *Lunce* type cases do not discuss whether the circumstances are such that the fourteenth amendment requires representation by counsel. Those opinions which do treat of the problem dispose of it in one of three different ways: (1) by disavowing concern with whether the petitioner was constitutionally entitled to counsel,[8] (2) by pointing to the presence of a state right to counsel,[9] and (3) by recognizing that the existence of a constitutional right to counsel is not absolute and depends on circumstances of the particular case.[10] The opinions which refer to a state requirement that an accused by represented by counsel do not discuss the relevance of the state-created right. Denial of a state right to counsel could not be found to raise a federal question unless the court were to entertain the admittedly tenuous argument that a denial of a state guarantee to counsel resulted in a denial of equal protection of the laws.

It is submitted that an essential initial determination in a habeas

[6] 316 U.S. 455 (1942).

[7] Powell v. Alabama, 287 U.S. 45 (1932).

[8] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957), court not concerned with whether state had to appoint counsel, concern is whether state deprived petitioner of fundamental fairness; U.S. ex rel Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948), court puts aside question of whether petitioner was entitled to counsel since he had one of his own choice, and assumes a federal right to counsel which right is satisfied when the court makes an appointment or accepts appearance of counsel.

[9] Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied* 324 U.S. 869 (1945); U.S. *ex rel.* Skinner v. Robinson, 105 F. Supp. 153 (E.D.Ill. 1952); Soulia v. O'Brien, 94 F. Supp. 764 (D.Mass. 1950); *aff'd* 188 F.2d 233 (1st Cir. 1951), *cert. denied* 341 U.S. 928 (1951); U.S. *ex rel.* Hall v. Ragen, 60 F.Supp. 820 (N.D.Ill. 1945); Coates v. Lawrence, 46 F.Supp. 414 (S.D.Ga. 1942), *aff'd* 131 F.2d 110 (5th Cir. 1942), *cert. denied* 318 U.S. 759 (1943).

[10] Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied* 324 U.S. 874 (1945).

corpus proceeding of the *Lunce* variety should be whether the fourteenth amendment guaranteed the particular petitioner effective representation by counsel, and only if it is found that the circumstances required such representation should the court undertake an examination into competence of counsel.

THE PROCEDURAL DEVICE OF HABEAS CORPUS

The prisoner who seeks to overturn his conviction by attacking the competence of his counsel will find the writ of habeas corpus to be an appropriate weapon. In the case where the attorney who represented the defendant at trial is the same attorney who took his appeal, the issue of incompetence hardly will have been raised on appeal. The acts or omissions which are alleged to constitute the incompetence may not appear on the record. In a habeas corpus proceeding the court is not limited to a review of the record. The defendant will probably not become aware of the fact that he may attack his conviction by showing incompetence of counsel until after he has been imprisoned pursuant to a final judgment.

The availability of habeas corpus as a procedural device for raising the issue of competence of counsel now appears to be established. Traditionally the writ was available to the prisoner when the trial court lacked jurisdiction over the person or the offense. In *Frank v. Mangrum*[11] the Supreme Court observed that the writ will lie where the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the trial court, either because such jurisdiction was absent at the beginning of the trial or because it was lost during the course of the proceedings. In the later decision of *Johnson v. Zerbst*[12] the Supreme Court applied the loss of jurisdiction reasoning advanced in the *Mangrum* case and held that the right to counsel is jurisdictional and that when an accused not represented by counsel has not intelligently waived that right, the trial court loses jurisdiction to proceed and its judgment is void. The *Johnson* case arose in the federal system and provides authority for the proposition that lack of representation by counsel in a federal trial is jurisdictional and may properly be raised by petition for habeas corpus.

In 1867 the Congress provided that federal justices and judges should have power to grant writs of habeas corpus in all cases where any person may be restrained of his liberty in violation of the Constitution,

[11] 237 U.S. 309 (1915).
[12] 304 U.S. 458 (1938).

or of any treaty or law of the United States.[13] This provision has remained without important change and is now found in 28 U.S.C. § 2241 (c) (3), which extends the writ to persons in custody in violation of the Constitution or laws or treaties of the United States. Most of the *Lunce* type cases which discuss availability of the writ for raising incompetence of counsel conclude that the writ lies where the petitioner has been imprisoned in violation of a constitutional right and do not employ the loss of jurisdiction theory advanced in the *Johnson* case.[14]

Before a state prisoner may seek his release in federal district court he must satisfy the statutory requirement of exhaustion of state remedies.[15] Judicial interpretation of the statutory requisite of exhaustion of state remedies has resulted in a confused body of case law, and the statutory provision has thus failed to achieve its purpose.[16] Certiorari to the Supreme Court has been held to be a necessary step in exhaustion of state remedies.[17] If the state provides more than one type of post-conviction relief, resort to only one of those has been held to satisfy the exhaustion requirement.[18]

ALLEGATIONS OF INCOMPETENCE

In seeking federal writs of habeas corpus the spectrum of incompetence allegations ranges from general incompetence[19] through specific allegations of misfeasance or non-feasance in the particular trial, to allegations of inaptitude to practice law.[20] Specific allegations of incompetence have included illiteracy,[21] failure to move for change of

[13] 14 STAT. 385.

[14] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); U.S. *ex rel.* Hall v. Ragen, 60 F.Supp. 820 (N.D.Ill. 1945); U.S. *ex rel.* Foley v. Ragen, 52 F.Supp. 265 (N.D.Ill. 1943); Coates v. Lawrence, 46 F.Supp. 414 (S.D. Ga. 1942), *aff'd* 131 F.2d 119 (5th Cir. 1942), *cert. denied* 318 U.S. 759 (1943). *But see* Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied* 324 U.S. 874 (1945).

[15] 28 U.S.C. 2254. "State custody; remedies in State courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[16] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess. on H.R.5649 (1955).

[17] Darr v. Burford, 339 U.S. 217 (1949).

[18] Brown v. Allen, 344 U.S. 443 (1952).

[19] Soulia v. O'Brien, 94 F.Supp. 764 (D.Mass. 1950), *aff'd* 188 F.2d 233 (1st Cir. 1951), *cert. denied* 341 U.S. 928 (1951).

[20] U.S. *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948).

[21] Sweet v. Howard, 155 F.2d 715 (7th Cir. 1946), *cert. denied* 336 U.S. 950 (1949).

venue or for continuance,[22] inexperience,[23] failure to introduce certain evidence or to object to admission of state's evidence,[24] failure to subpoena or call certain defense witnesses,[25] failure to cross-examine certain state's witnesses,[26] failure to move for separation of witnesses,[27] failure to file timely appeal,[28] failure to object to jury instructions,[29] failure to request certain favorable instructions,[30] failure to save exceptions,[31] failure to challenge sufficiency of affidavit,[32] inducing defendant to plead guilty,[33] recommending that defendant not take the stand,[34] insufficient preparation for trial,[35] being a member of the Negro race[36] and nervousness at trial followed the next day by an insanity commitment.[37] The allegations of incompetence made by state prisoners are similar to those advanced by federal prisoners although the ingenuity of the state prisoner has not been found to measure up to that of one federal prisoner who alleged counsel was preoccupied owing to recent notice of induction under the Selective Service Act and so was unable effectively to try the case.[38]

The contention that counsel was incompetent has been effective to secure release in only one case other than the *Lunce* case. In *U. S. ex rel Hall v. Ragen*[39] the district court discharged from state confinement a prisoner who was represented at trial by a doctor licensed to practice

[22] U.S. *ex rel.* Darcy v. Handy, 203 F.2d 407 (3rd Cir. 1952); Sweet v. Howard, *supra* note 21; Coates v. Lawrence, 46 F.Supp. 414 (S.D.Ga. 1942), *aff'd* 131 F.2d 110 (5th Cir. 1942), *cert. denied* 318 U.S. 759 (1943).

[23] Farrell v. Lanagen, 166 F.2d 845 (1st Cir. 1948), *cert. denied* 334 U.S. 853 (1948); Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied* 324 U.S. 874 (1945); Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941).

[24] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); U.S. *ex rel.* Hamby v. Ragen, 178 F.2d 379 (7th Cir. 1949), *cert. denied* 339 U.S. 905 (1950); U.S. *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), *cert. denied* 338 U.S. 809 (1949).

[25] U.S. *ex rel.* Darcy v. Handy, 203 F.2d 407 (3rd Cir. 1952); Burkett v. Mayo, 173 F.2d 574 (5th Cir. 1949); Sweet v. Howard, 155 F.2d 715 (7th Cir. 1946), *cert. denied* 336 U.S. U.S. 950 (1949); Casey v. Overlade, 129 F.Supp. 433 (N.D.Ind. 1955); U.S. *ex rel.* Foley v. Ragen, 52 F.Supp. 265 (N.D.Ill. 1943), *rev'd* 143 F.2d 774 (7th Cir. 1944).

[26] Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied* 324 U.S. 869 (1945).

[27] *Ibid.*

[28] *Ibid.*

[29] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); U.S. *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), *cert. denied* 338 U.S. 809 (1949).

[30] Lunce v. Overlade, *supra* note 29.

[31] *Ibid.*

[32] *Ibid.*

[33] U.S. *ex rel.* Foley v. Ragen, 52 F.Supp. 265 (N.D.Ill. 1943), *rev'd* 143 F.2d 774 (7th Cir. 1944).

[34] Casey v. Overlade, 129 F.Supp. 433 (N.D.Ind. 1955).

[35] U.S. *ex rel.* Thompson v. Dye, 103 F.Supp. 776 (W.D.Pa. 1952), *aff'd* 203 F.2d 429 (3rd Cir. 1953).

[36] Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941).

[37] U.S. *ex rel.* Skinner v. Robinson, 105 F.Supp. 153 (E.D.Ill. 1952).

[38] Morton v. Welch, 162 F.2d 840 (4th Cir. 1947).

[39] 60 F.Supp. 820 (N.D.Ill. 1945).

law. During the Hall trial the doctor-attorney repeatedly asked incompetent questions to which the trial judge repeatedly sustained objections. The trial degenerated into a tri-party argument among the attorney, the state's attorney and the trial judge. The attorney-doctor left the case at the time the jury retired and petitioner was without counsel at verdict and sentencing. In releasing the petitioner the district court held he had been denied due process by the ignorance of his attorney and by the fact that the trial was permitted to proceed to verdict and judgment without counsel representing defendant.

The district and circuit court opinions which have met and disposed of incompetence contentions certainly cannot be said to present a uniform approach to the problem. Because attempts to secure writs of habeas corpus on the ground that counsel was incompetent have for the most part been unsuccessful, an analysis of the opinions, of necessity, assumes a negative tenor. However, from the cases as a whole several significant propositions emerge. Bar membership in good standing is prima facie evidence of competence, and one seeking to establish incompetence must allege incompetence and prove his allegations with probative evidence. Youth and lack of experience do not constitute incompetence. Measures which appear in retrospect to have been errors in judgment or trial strategy do not constitute incompetence. Lack of skill and even negligence do not constitute incompetence. If any affirmative principle arises from these cases it would seem to be that an accused tried by a state court is denied due process of law only when his counsel was so incompetent that in reality there was no representation at all. Unless and until more decisions come down in which courts hold incompetence has been established, it will not be possible to be definitive concerning the degree of incompetence which is tantamount to no representation at all.

Selected and Appointed Counsel

Language in some opinions implies that there is a constitutional distinction between representation by court-appointed counsel and representation by counsel of defendant's own choice as to the question of denial of due process.[40] Some courts have met the issue squarely and have resolved it by holding that the acts of defendant's chosen counsel are imputed to the defendant with the result that the defendant cannot acquiesce in the conduct of his defense and then later successfully

[40] Farrell v. Lanagan, 166 F.2d 845 (1st Cir. 1948), *cert. denied* 334 U.S. 853 (1948); Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied* 324 U.S. 874 (1945); Casey v. Overlade, 129 F.Supp. 433 (N.D.Ind. 1955).

contend that incompetence of counsel resulted in a denial of due process.[41] Prior to the *Lunce* case, the courts adopting the imputation theory would except from the operation of that theory a case where chosen counsel was so incompetent that there was in effect no representation at all.

A holding that the degree of incompetence necessary to work a denial of due process is greater in the case where the counsel was employed by or for the defendant than in the case where the counsel was appointed by the court is of course a conclusion. A probable theory for this conclusion is that in controlling to this extent the conduct of his defense the defendant has waived his constitutional guarantee of effective representation by counsel and therefore there has been no state denial of due process.

In the *Lunce* case the court accepted the proposition advanced in previous cases, that generally an accused cannot proceed to trial with counsel of his own choice and then later claim a denial of due process chargeable to the state. The theory of the *Lunce* case is not new; the case differed from previous ones only in that the circuit court viewed the alleged incompetence as being sufficient to bring the case within the limited area in which due process operates when a defendant is represented by counsel of his own choice.

CONCLUSIONS

Even the most liberal student of constitutional law must concede that a concept so elastic and nebulous as that of procedural due process admits of finality at some stage. When an accused has raised the issue of incompetence on appeal and/or in an attempt to seek relief by a state post-conviction process it may well be argued that he has been accorded his due. When the question of incompetence has been determined on the merits by a state court, it would seem even clearer that the defendant has been accorded ample opportunity to litigate this issue. Our whole system of superimposed federal jurisdiction contemplates that the state judge will heed the command of article VI of the Constitution and recognize that the Constitution and laws of the United States are the supreme law of the land and that he will be bound thereby.

In theory the writ of habeas corpus is not available to review the

[41] U.S. *ex rel.* Darcy v. Handy, 203 F.2d 407 (3rd Cir. 1952), two judges refused to give significance to the distinction; Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied* 324 U.S. 869 (1945); Hendrickson v. Overlade, 131 F.Supp. 561 (N.D.Ind. 1955).

judgment of a state court, but when the federal court adjudicates a question already determined on the merits by a state court the realities of the situation are not in accord with the theory. Any legislative curtailment of federal review of state convictions must of course issue from the Congress, and to date such attempted curtailment has met with failure.[42]

It is noted that many defendants have sought writs of certiorari to obtain Supreme Court review of a state's rejection of incompetence contentions. In view of the certiorari policy of the United States Supreme Court[43] it is difficult to conclude from a denial of certiorari any more than that it has been denied. Certainly a denial of certiorari does not amount to an approval of the disposition made by the state court. However, it would seem reasonable to conclude that the denial in state incompetence cases does reflect a disposition on the part of the Supreme Court to refuse to try the defense counsel. If this is an accurate appraisal of the policy of the Supreme Court it would seem clear that the federal district courts should expedite this policy by refusing to examine into the competence of counsel except perhaps in very extreme cases where the state court has not disposed of the issue on the merits.

Under the reasoning of the *Lunce* opinion, the state trial court is put in a difficult, if not impossible, position. If the representation is found by a federal court in a habeas corpus proceeding to have been of such low caliber as to have called for state intervention, then the failure to have intervened amounts to a denial of due process. But if the trial court does intervene between an accused and his counsel it is entirely possible that a federal court might later find that the intervention itself was a denial of due process.

The trial judge and the prosecuting attorney are present at the time of the events constituting the alleged incompetence. It would therefore seem that failure to intervene should be viewed as a finding that counsel was competent, a finding to be given much weight, or even to be viewed as conclusive in the later federal habeas corpus proceeding.

[42] H.R. 5649, 84th Cong., 1st Sess. (1955).
[43] United States Supreme Court Rules, Rule 19.