Washington Law Review

Volume 36
Issue 2 *Washington Case Law—1960*

7-1-1961

Constitutional Law

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without ever designating it a duty to perform military service or to bear arms.

The court based its holding on the applicant's moral duty to share in the preservation of his heritage of liberty, rather than upon his potential constitutional duty to perform military service. By doing so it appears to have postponed to another day the question of the admissibility of conscientious objectors willing to do civilian work of national importance or to perform noncombatant military service.

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CONSTITUTIONAL LAW

Constitutional Right to Counsel. The opinions of the United States Supreme Court[1] have shown basic differences among the members of the Court as to the duty of a court to provide counsel for an accused to meet the constitutional requirements of the sixth[2] or fourteenth[3] amendments. Recent cases decided by the Washington Supreme Court under the state constitution and statutes indicate the same split of philosophy as to the degree of protection necessary. It appears that the Washington court has now adopted a more liberal position which will demand greater care by trial courts in protecting the rights of indigent prisoners. While the position of the United States Supreme Court will be briefly considered,[4] the purpose of this note is to bring

[1] Contrast the opinions of Mr. Justice Black in *In re* Groban, 352 U.S. 330, 344 (1957) (dissent) and Mr. Justice Douglas in Crooker v. California, 357 U.S. 433, 448 (1958) (dissent) with those of Mr. Justice Jackson in Watts v. Indiana, 338 U.S. 49, 58 (1949) (concurring), Harris v. South Carolina, 338 U.S. 68 (1949) (dissent), and Turner v. Pennsylvania, 338 U.S. 62 (1949) (dissent).

[2] "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." This applies only to trials in federal courts. Betts v. Brady, 316 U.S. 455 (1942).

[3] "Nor shall any State deprive any person of life, liberty or property without due process of law." This amendment does not incorporate, as such, the specific guarantee of the sixth amendment. Betts v. Brady, *supra* note 2; *In re* Gensburg v. Smith, 35 Wn.2d 849, 215 P.2d 880 (1950).

[4] The standards in determining whether failure of the state court to provide counsel to a defendant at trial and for a reasonable time prior to trial violates due process under the fourteenth amendment, vary in capital and non-capital cases. In capital cases, Powell v. Alabama, 287 U.S. 45 (1932) established the rule that the trial court has an affirmative responsibility to provide counsel to an accused person who does not have one, unless he intelligently waives his legal right to such assistance. See also Bute v. Illinois, 333 U.S. 640 (1948). In non-capital cases, however, the refusal of a state court to appoint counsel for an indigent defendant is not necessarily a denial of due process. Under the fourteenth amendment, states are only required to afford assistance of counsel when there are special circumstances, such as extreme youth, ignorance, or an offense of a particularly complicated nature. MORELAND, MODERN CRIMINAL PROCEDURE, Ch. 12 (1959); Note, 38 KY. L.J. 317, 320 (1950). "In the great majority of the states, it has been the considered judgment of the... courts that appointment of counsel is not a fundamental right, essential to a fair trial." Betts v. Brade, 316 U.S. 455, 471 (1942). In Bute v. Illinois, 333 U.S. 640 (1948) a 57 year old

to the attention of the Washington practitioner the present position of the state supreme court as adopted in two, five-to-four decisions[5] during the last term and to discuss a recent decision[6] by the Court of Appeals for the Ninth Circuit arising out of Washington.

In re Wakefield v. Rhay[7] was a petition for habeas corpus by a prisoner at the state penitentiary who had been convicted of grand larceny on a guilty plea. At the arraignment, the defendant was informed of his right to counsel as follows:

> Q. Do you understand the nature of the charge? A. I do now.... Q. Have you talked to an attorney? A. No, sir. Q. It is your privilege before entering a plea to have an attorney. A. I don't think so. Q. You don't want an attorney. A. No, sir. Q. Are you ready now to enter your plea? A. Yes, sir.[8]

The defendant entered a plea of guilty and judgment was ordered. The writ for habeas corpus alleged that the defendant was not properly advised of his right to counsel, so that he could competently and intelligently waive the right. *In re Aichele v. Rhay*[9] was almost identical on its facts, except that the defendant was a minor,[10] and the offense was second-degree burglary. As the court took no notice of these differences, the cases may be considered together. The majority of the court agreed with each petitioner's contention, granted the writ,

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man was charged with an indecent liberties offense and received a sentence of one to 21 years. The Supreme Court held that in the absence of a showing of aggravating circumstances, the Illinois court was under no duty to inform the accused of the right to counsel, to inquire as to his desire for counsel, or to assign counsel in the absence of some request. The test appears to be one of "facts and circumstances" with due process being violated only when the lack of counsel is "offensive to the common fundamental idea of fairness and right." Betts v. Brady, *supra*. The current result of this rule is a trend toward relaxation of the aggravating circumstances constituting a trial offensive to common ideas of fairness and right. Gibbs v. Burke, 337 U.S. 773 (1949). The interested reader will find a general attempt by the Supreme Court to explain its views as to the right to counsel in state courts in capital and non-capital cases in Uveges v. Pennsylvania, 335 U.S. 437 (1948). See also, Note, 40 NEB. L. REV. 161 (1960), which contends that failure adequately to inform the defendant of his right to counsel at state expense in a robbery case, violated the due process clause of the fourteenth amendment. It is submitted that this position has not yet been adopted by the Supreme Court.

[5] *In re* Wakefield v. Rhay, 157 Wash. Dec. 61, 356 P.2d 596 (1960), and *In re* Aichele v. Rhay, 157 Wash. Dec. 70, 356 P.2d 326 (1960). The effect of these cases is indicated by *In re* Wigham v. Rhay, 157 Wash. Dec. 433, 357 P.2d 316 (1961), a per curiam decision two months later, citing only the *Wakefield* and *Aichele* opinions.

[6] Griffith v. Rhay, 282 F.2d 711 (9th Cir. 1960). *Contra*, Johnson v. State, 169 Neb. 783, 100 N.W.2d 844 (1960), noted, 40 NEB. L. REV. 161 (1960).

[7] 157 Wash. Dec. 61, 356 P.2d 596 (1960).

[8] *In re* Wakefield v. Rhay, *supra* note 7, at 62, 356 P.2d at 596.

[9] 157 Wash. Dec. 70, 356 P.2d 326 (1960).

[10] For information on the special problem of the right of minors to counsel, and waiver thereof, see Annot., 71 A.L.R.2d 1160 (1960). This problem is beyond the scope of this note.

and ordered that each prisoner be remanded to the sheriff of the county in which he had been tried originally.

Each petitioner had a right to counsel under the Washington Constitution.[11] RCW 10.01.110[12] and RCW 10.40.030[13] implement the constitutional right, and, in accordance with *In re Wilken v. Squier*,[14] the trial court has the duty (1) to inform the defendant that it is his right to have counsel before being arraigned; (2) to ascertain whether, because of the defendant's poverty, he is unable to employ counsel, in which event the court must inform the defendant that it will appoint counsel for the defendant at public expense if he so desires; and (3) to ask whether the defendant desires the aid of counsel. The defendant may, of course, waive the right to counsel, but the waiver must be made intelligently—that is, the accused must be in possession of the facts relating to his right. The *Wilken* case adopted for Washington the rule established for the federal courts by the case of *Johnson v. Zerbst*,[15] that:

> Merely asking the defendant whether he wants a lawyer does not convey the information that he is entitled to a lawyer at public expense if he is an indigent person, nor does it impress upon him the importance of having legal representation if his rights are to be fully protected. Thus, an indigent defendant's waiver may be made under the mistaken impression that, since he cannot afford to pay a lawyer, he cannot have legal representation.[16]

Thus, the court must do more than inform the defendant that he has a right to counsel. Having determined that he is indigent, the court must specifically inform him that the court will appoint counsel to defend him, with no cost to the defendant. Without this being clearly impressed upon the accused, he will not be found to have waived his right intelligently, and a subsequent conviction may be challenged.

The dissent takes issue with the reasoning of the majority opinion on several points. However, the basic difference of opinion seems to be encompassed in the statement of the writer of the dissenting opin-

[11] Art. I, § 22 (amendment 10) (1922): "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel."

[12] "Whenever a defendant shall be arraigned upon the charge that he has committed any felony, and shall request the court to appoint counsel and shall... satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel."

[13] "If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel by reason of poverty, counsel shall be assigned to him by the court."

[14] 50 Wn.2d 58, 309 P.2d 746 (1957).

[15] 304 U.S. 458 (1938).

[16] *In re* Wakefield v. Rhay, 157 Wash. Dec. 61-63, 356 P.2d 596, 597 (1960).

ion that "the right conferred upon a defendant by the statute *is to have counsel* if he desires one, not to have a discourse upon the subject by the court when he has voluntarily and intelligently waived his right."[17] Thus, the dissenting judges would have the court ask only if the defendant wants counsel. If he answers "no," there would be no further inquiry, nor further need to state his right to counsel without cost to him. As the dissent points out, the court has read into RCW 10.40.030 the words "the court must inform the defendant that the court shall appoint counsel for the defendant at public expense if he so desires." But, as the concurring opinion answers, the right of the defendant is guaranteed by the state constitution, and the interpretation of the statute by the majority is in accordance with the spirit of the statute in implementing the constitutional requirement. Thus, the majority felt that a defendant cannot intelligently waive his right without knowing that the court would appoint counsel without expense to him; the minority felt that he need not be given this information to waive his right intelligently.

The dissent also points out that the burden should be on the petitioner to prove that he did not waive his right to counsel. The concurring opinion indicates that the majority has not shifted the burden from the petitioner but has simply allowed the petitioner to carry his burden of showing his ignorance by showing that he was not advised of his rights. The state must meet this proof by showing that he had actual knowledge. The dissent also indicates correctly that the attack through habeas corpus is made upon the basis that by the failure adequately to advise the defendant of his rights, the jurisdiction of the court does not attach, and the judgment is void. The reason for this discussion is not clear. If, as the concurring opinion interpreted it, the minority felt that the prisoner must now be unalterably released, the reasoning would appear to be without substance.[18]

The importance of the *Wakegeld* and *Aichele* cases is that they have removed the possibility of varied and indefinite practices of trial courts in protecting the constitutional right of an accused to counsel, present under former holdings. Without citing the case, the present decision would appear to leave little life in *State v. Cowan*,[19] in which the court

[19] 25 Wn.2d 341, 170 P.2d 653 (1946), noted, 22 WASH. L. REV. 63 (1947).

[17] *Id.* at 67, 356 P.2d at 599.

[18] To grant the writ of habeas corpus does not mean that the prisoner may escape further punishment. The court, in directing the release of the petitioner from the penitentiary, properly directed that he be delivered to the officers of the county to answer the charge contained in the indictment. 25 Am. Jur., Habeas Corpus, § 153, 154 (1940); In re Bonner, 151 U.S. 242 (1894); Mitchell v. Youell, 130 F.2d 880 (4th Cir. 1942); Bryant v. United States, 214 Fed. 51 (8th Cir. 1914).

held that the following statements by the trial court complied with the constitutional and statutory requirements. The judge asked a young sailor charged with robbery if he wished the court to appoint an attorney, to which the defendant replied, "... I guess it wouldn't hurt to have one." The next question brought out the fact that he had no funds to pay an attorney, and upon being asked if he wished to delay pleading "until an attorney had been appointed," he said, "No, I'll plead guilty."

The *Wilken* case laid down the basic rule applied in the instant cases, but the language of the trial court which was found to be inadequate apparently was so inexplicit[20] that trial court judges had not sufficiently changed their procedures to meet the requirements of the supreme court. In *Klapproth v. Squier*[21] the trial court made no specific statement that it would appoint counsel for the defendant without expense to him. Only two judges in dissent[22] felt that the charge did not specifically inform the defendant of his right to counsel under *Wilken*. The majority distinguished the *Klapproth* case from *Wilken* by stating: "[The *Wilken*] case was decided upon the basis that the defendant was 'under the mistaken impression that since he cannot afford to pay a lawyer, he cannot have legal representation.' In the instant case, the *appointment* of counsel was declined."[23] It appears that the same question of declination made intelligently is inherent in each case. In any event, it would appear that trial court judges would be well advised that the *Wakefield* and *Aichele* cases have changed the requirements in their courts.

The collateral problem of at what point in a criminal proceeding an accused has the right to counsel was considered in *Griffith v. Rhay*,[24] a recent decision by the Ninth Circuit Court of Appeals from a case originally tried in Washington. The defendant, nineteen years old, a previous offender and emotionally unstable, was indicted for murder in Spokane County. He was recovering in the hospital from four seri-

[20] The defendant was charged with robbery. At arraignment the following questioning took place: "The Court: Mr. Wilken, have you a lawyer? Mr. Wilken: No, sir. The Court: Do you want a lawyer? Mr. Wilken: No. The Court: You sure you don't want one? Mr. Wilken: No—don't want one." *Accord,* Friedbauer v. State, 51 Wn.2d 92, 316 P.2d 117 (1957).

[21] 50 Wn.2d 675, 314 P.2d 430 (1957).

[22] Both dissenters voted with the majority in the *Wakefield* and *Aichele* cases.

[23] The majority opinion was written by Judge Mallery, who was the author of the dissent in *Wakefield* and *Aichele*. It is apparent that he is expressing the same general reasoning in both opinions. One can only speculate that the judges who joined Judge Mallery in the *Klapproth* case, but not in the later cases, felt that the defendant in *Klapproth* was not indigent.

[24] 282 F.2d 711 (9th Cir. 1960).

ous operations as a result of a bullet wound at the time. A confession was obtained by the prosecuting attorney following a period of questioning during which he was neither asked if he had an attorney, nor advised that one would be provided without expense to him if he desired. During the questioning, he was under the effects of a narcotic and analgesic drug known as demerol. Medical testimony indicated that the drug would not affect the reliability of the confession, but testimony indicated the possibility that the defendant might be less able to exercise his free will in deciding to give or refrain from giving any statement. The defendant was convicted and after exhausting his state remedies,[25] petitioned the court of appeals for release on a writ of habeas corpus, contending that lack of counsel during the interrogation prior to arraignment was violation of due process under the fourteenth amendment.[26] Judge Hamley, formerly of the Washington Supreme Court, agreed. Under the case of *Powell v. Alabama*[27] the fourteenth amendment gives an accused the right to counsel in a capital case. Judge Hamley indicated that the precise question presented in *Griffith* was whether the defendant had this right to counsel during interrogation prior to arraignment.

Looking at the facts and circumstances of the case—the youth and background of the defendant, his physical condition, and the possible effects of drugs—the failure to advise him of a right to counsel violated "that fundamental fairness essential to the very concept of justice."[28] The case explicitly recognizes the distinction between the situation here and that in *Crooker v. California*[29] where the defendant was a college graduate who had attended one year of law school. Yet, the court appears to conclude that if the defendant lacks the knowledge of his right to counsel and to remain silent, failure of the investigative officials clearly to indicate his right to counsel at the expense of the state at interrogation prior to arraignment may alone violate due process. There is no discussion in the case of delay prior to arraignment. As this was not a determinative factor, it must be inferred that had the same circumstances taken place before arraignment was pos-

[25] Appeal, judgment affirmed, Griffith v. State, 52 Wn.2d 721, 328 P.2d 897 (1958). Petition for review denied, unreported. Petition for habeas corpus denied May 25, 1959, unreported. Certiorary denied, 359 U.S. 1015 (1959). Petition for habeas corpus denied, 177 F. Supp. 386 (E.D. Wash. 1959).

[26] Petition for habeas corpus to a federal court must be based on violation of a federal right, not of a state statute or constitution.

[27] 287 U.S. 45 (1932).

[28] Betts v. Brady, 316 U.S. 455 (1942); Lisenba v. California, 314 U.S. 219, 236 (1941).

[29] 357 U.S. 433 (1958).

sible, the failure to provide counsel would still have violated due process. To reach this result, the court has shown a willingness to accede to the proposition that criminal proceedings begin at the time of arrest, rather than at the time of arraignment.

This problem has often divided the United States Supreme Court since the "landmark"[30] case of *Powell v. Alabama.*[31] The Court there stated that

> During perhaps the most critical period of the proceeding against these defendants, that is to say, *from the time of their arraignment until the beginning of their trial,* when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[32] (Emphasis added.)

While it is not within the scope of this note to discuss the subsequent history of the Supreme Court position,[33] it is apparent that the dissenting opinions of Mr. Justice Black[34] and Mr. Justice Douglas[35] have recently become more strenuous in contending that a prisoner has a right to counsel prior to arraignment.[36] In the most recent Supreme Court decision on the point,[37] their contentions attained the stature of concurring opinions in which a total of four Justices agreed that the denial of counsel to one who has been indicted, during the

[30] Mr. Justice Black in dissent in *In re* Groban, 352 U.S. 330, 338 (1957).

[31] 287 U.S. 45 (1932).

[32] *Id.* at 57.

[33] For the interested reader, a brief but excellent discussion may be found in Comment, 9 DEPAUL L. REV. 65 (1959).

[34] "I... firmly believe that the due process clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense." *In re* Groban, 352 U.S. 330, 344 (1957) (dissent).

[35] "The demands of our civilization expressed in the due process clause require that the accused who wants a counsel should have one at any time after the moment of arrest." Crooker v. California, 357 U.S. 433, 448 (1958) (dissent).

[36] The philosophy of the judges presently in the majority and with which investigative officials would undoubtedly agree is presented by Mr. Justice Jackson concurring in the result in Watts v. Indiana, 338 U.S. 49, 57 (1949) and dissenting in Harris v. South Carolina, 338 U.S. 68 (1949) and Turner v. Pennsylvania, 338 U.S. 62 (1949). "To subject one without counsel to questioning which may and is intended to convict him is a real peril to individual freedom. To bring in a lawyer means a real peril to the solution of crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem." His conclusion is that "if the ultimate question in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?... I doubt very much if [the Constitution and Bill of Rights]... require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly, while those suspected of murder prowl about unmolested."

[37] Spano v. People, 360 U.S. 315 (1959).

period of police interrogation, is sufficient to make a confession inadmissible under the fourteenth amendment.

While the *Griffith* case had its own peculiar facts, Judge Hamley's opinion appears to adopt the position advocated by the minority of the United States Supreme Court. It is thus interesting to speculate why the Supreme Court has refused to review the case.[38] The effect of the decision on procedure in Washington is also speculative. The decision of the court of appeals does not have the direct effect which a United States Supreme Court, or Washington Supreme Court decision would have. Nevertheless, the holding presents a valuable avenue of appeal from decisions in Washington. With the increased threat of reversal on a writ of habeas corpus, it may be expected that the more knowledgeable superior court judges will impose somewhat stricter requirements on investigative officials in acceptance of confessions obtained from a prisoner who was without counsel.[39]

From the foregoing material, the writer advances two conclusions:

(1) If the record does not show that the court fully advised the defendant of his right to counsel and does not show that the defendant had prior knowledge of the nature and extent of his right, it will be conclusively presumed that he did not competently and intelligently waive that right. To have sufficiently advised the defendant of his rights, there is an affirmative duty not only to have informed him of his rights, but also to insure that he understands that the court will appoint an attorney without cost to him, if he cannot afford one. This duty is present whether or not the defendant may have indicated that he does not desire counsel.[40]

(2) The indication is that the United States Supreme Court and the lower federal courts are advancing toward majority holdings that will require counsel at each and every step in a state criminal proceeding.[41] It is probable that state courts will be slowly forced to adopt the position that criminal proceedings begin at the time of arrest, at least with respect to the right to counsel.

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[38] United States Supreme Court Daily Journal, Jan. 16, 1961, p. 156, No. 560. The most logical explanation would appear to be that the particular facts of the cases were rather compelling, and that the majority did not desire to have the question presented in this form.

[39] It would also be expected that investigative officials would continue to resist the implication of the case for the reasons indicated in n. 36 *supra*. The result may be an increase in the number of cases raising the issue.

[40] Judge Rosellini concurring in *In re* Wakefield v. Rhay, 157 Wash. Dec. 61, 63, 356 P.2d 596, 597 (1960).

[41] Comment, 9 DEPAUL L. REV. 65, 73 (1959).