

Michigan Law Review

Volume 42 | Issue 6

1944

CONSTITUTIONAL LAW-RIGHT TO COUNSEL

Robert M. Barton

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Robert M. Barton, *CONSTITUTIONAL LAW-RIGHT TO COUNSEL*, 42 MICH. L. REV. 1125 (1944).

Available at: <https://repository.law.umich.edu/mlr/vol42/iss6/13>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—The appellant, a person with a long criminal record, was convicted of receiving and concealing stolen goods. At the trial the attorney appointed by the court to represent him presumably had enough time to prepare a defense but conducted it in a slipshod

manner. He failed to object to the admission of important evidence not legally admissible; he failed to see that a witness whom the accused described as important was subpoenaed into court; he objected to none of the prejudicial statements of the trial judge which in effect attacked the credibility of the accused, and he criticized his own client before the jury. *Held*, a fair trial consistent with due process of law requires that the accused have more than the perfunctory representation by counsel shown by this case. *Wilson v. State*, (Ind. 1943) 51 N. E. (2d) 848.

At early English common law a person accused of a felony was denied the right to counsel.¹ Only the judge could aid him at the trial.² In the United States Constitution the Sixth Amendment gives the criminally accused the right "to have assistance of Counsel for his defense," but this only applies to federal prosecutions.³ The right to counsel in state criminal actions is recognized in the leading case of *Powell v. Alabama*⁴ as being necessary for due process of law as required by the Fourteenth Amendment, and state constitutions often specifically provide for it.⁵ Armed with this right, how may the accused best exercise it? Usually he hires his own attorney to represent him, but sometimes for financial or other reasons he is not in a position to do so. In such case the state either by statute or custom provides him with one.⁶ Of course the defendant may in some manner waive counsel, e.g., by refusing the public defender's services,⁷ or by pleading guilty,⁸ but when he relies on the court's choice of counsel a problem arises as to how effective such aid must be. Where counsel appointed by the court is intimidated by fear of mob violence,⁹ or where, as in the *Powell* case, the appointed counsel has not had time to prepare a defense, it is fairly clear that the defendant has not really been "assisted" pursuant to this right.¹⁰ There are abundant dicta to the effect that right to counsel embraces a right

¹ I COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., c. 10, p. 698 (1927).

² Annotation on incompetency of counsel in 24 A.L.R. 1025 at 1036 (1923).

³ *Eilenbecker v. District Ct. of Plymouth County*, 134 U.S. 31, 10 S. Ct. 424 (1890); *Gaines v. State of Washington*, 277 U.S. 81, 48 S. Ct. 468 (1928).

⁴ *Powell v. State of Alabama*, 287 U.S. 45, 53 S. Ct. 55 (1932), where counsel appointed by the court had insufficient time to prepare a defense.

⁵ Ind. Const., art. 1, § 13, "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . ."

⁶ *Castro v. State*, 196 Ind. 385, 147 N.E. 321 at 323 (1925); *People v. Blevins*, 251 Ill. 381 at 388, 96 N.E. 214 (1911); *House v. State*, 130 Fla. 400, 177 So. 705 (1937); *Garrison v. Amrine*, 155 Kan. 509, 126 P. (2d) 228 (1942); *Downer v. Dunaway*, (C.C.A. 5th, 1931) 53 F. (2d) 586.

⁷ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S. Ct. 236 (1942), setting aside (C.C.A. 2d, 1942) 126 F. (2d) 774, certiorari granted, 316 U.S. 655, 62 S. Ct. 1048 (1942); *People v. Cortze*, 108 Cal. App. 111, 290 P. 1083 (1930).

⁸ *People v. Harris*, 266 Mich. 317, 253 N.W. 312 (1934).

⁹ *Moore v. Dempsey*, 261 U.S. 86, 43 S. Ct. 265 (1923). See also 37 HARV. L. REV. 247, 265 (1923).

¹⁰ As to the competency of the attorney himself, in civil cases the rule is practically without exception that the incompetency of an attorney will not constitute grounds for a new trial, *State v. Bengé*, 61 Iowa 658, 17 N.W. 100 (1883).

to a good, more than perfunctory, representation by the attorney,¹¹ but this places the courts in a rather embarrassing position when they have appointed counsel. Not only are members of the bar considered officers of the court and presumed to be competent,¹² but the court has added its own recommendation by selecting the attorney. In the instant case errors conceded to be prejudicial¹³ were not objected to on account of the alleged incompetence or negligence of the defense counsel, and therefore could not be reviewed.¹⁴ This seems to have been considered sufficient in the principal case to establish inadequate representation by counsel. In such cases the same result might be reached by recourse to the rule that an appellate court has power to consider errors not properly preserved where a miscarriage of justice would otherwise occur.¹⁵

Robert M. Barton

¹¹ "The conduct of the defense must be zealous and active, not merely pro forma." *Ex parte Kramer*, 61 Nev. 174 at 208, 122 P. (2d) 862 (1942); *Castro v. State*, 196 Ind. 385 (1925); *People v. Butterfield*, 37 Cal. App. (2d) 140, 99 P. (2d) 310 (1940); *Sanchez v. State*, 199 Ind. 235, 157 N.E. 1 (1927).

¹² *Fambles v. State*, 97 Ga. 625, 25 S.E. 365 (1892).

¹³ "When the judge indicated that appellant was perjuring or about to perjure himself appellant was so discredited before the jury that an adverse verdict was a foregone conclusion. This one remark was error sufficient, if properly presented, to reverse the judgment." Principal case at p. 854.

¹⁴ *Ellwanger v. State*, 203 Ind. 307, 180 N.E. 287 (1932); see also *Peterson v. State*, 227 Ala. 361, 150 So. 156 (1933).

¹⁵ ". . . in criminal cases, involving the life or liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of just enforcement of the law, serious errors in the trial of their cases, fatal to the defendant's rights, although these errors were not challenged or reserved by objections, exceptions, or assignments of error." *Lamento v. United States*, (C.C.A. 8th, 1925) 4 F. (2d) 901. See also *Skuy v. United States*, (C.C.A. 8th, 1919) 261 F. 316; *Davis v. United States*, (C.C.A. 8th, 1925) 9 F. (2d) 826; *Danaher v. United States*, (C.C.A. 8th, 1930) 30 F. (2d) 325. Cf. 12 WASH. L. REV. 305-307 (1937); *State v. Jukich*, 49 Nev. 217, 242 P. 590 (1926).