Michigan Law Review

Volume 39 | Issue 2

1940

CONSTITUTIONAL LAW - DUE PROCESS - USE OF INVOLUNTARY CONFESSIONS IN CRIMINAL CASES

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COMMENTS

CONSTITUTIONAL LAW — DUE PROCESS — USE OF INVOLUNTARY CONFESSIONS IN CRIMINAL CASES — The practice of wringing confessions from the lips of persons accused of crime forms a substantial blot on the history of the medieval administration of criminal law. Never legalized in England, the practice early earned the condemnation of writers and criticism of courts. From a recognition of human rights and a perception of the unreliability of statements extorted by violence, evolved the general rule, now long recognized in England and the

United States, that the accused's involuntary confession is inadmissible in evidence against him.[1] Recently this rule of evidence has been implemented by the recognition of the United States Supreme Court that in the light of the requirement of due process of law embodied in the Fourteenth Amendment, a conviction based solely on use in evidence of the accused's involuntary confession is void. This recognition of the application of the due process clause to involuntary confessions first appeared in *Brown v. Mississippi*,[2] and was recently followed in *Chambers v. Florida*.[3] The basis of these holdings seems to be that since an involuntary confession is unreliable evidence, a conviction resting solely on its use in a state criminal trial deprives an accused of life or liberty without the hearing guaranteed to him by the due process clause of the Fourteenth Amendment.

Chambers v. Florida came before the United States Supreme Court on certiorari to the Florida Supreme Court, to review that court's affirmance of convictions of the petitioners for murder. Within twenty-four hours after the commission of the murder, from twenty-five to forty negroes, including the four petitioners, were arrested without warrants, confined, questioned, and cross-questioned from Sunday, May 14th to Saturday, May 20th. The prisoners were confronted individually in a fourth-floor room by groups of officers containing from four to ten members, including a convict guard who was at all times present. Neither counsel nor friends saw the prisoners in that period. The interrogation was concluded by an all-night vigil from the afternoon of Saturday, May 20th until the following morning, with a concentration of effort on a small number of prisoners including petitioners. A confession was finally obtained, but it was unsatisfactory to the state's attorney. After its rejection, questioning for several more hours elicited the confessions used to convict petitioners. They were arraigned, and three pleaded guilty. From the arrest until the sentencing, "petitioners were never . . . wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions."[4]

[1] 3 WIGMORE, EVIDENCE, 3d ed., § 815 (1940); annotation, 18 L. R. A. (N. S.) 768 at 769 (1909); 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 591 (1935).

[2] 297 U. S. 278, 56 S. Ct. 461 (1936).

[3] 309 U. S. 227, 60 S. Ct. 472 (1940).

[4] 309 U. S. at 235. This statement of the circumstances of the prolonged interrogation of petitioners raises the question of the voluntariness of the confessions elicited. By the general rule, the court must determine the voluntariness of the confession, and therefore its admissibility, on the basis of its probable truth by examining the surrounding circumstances. People v. Fox, 319 Ill. 606, 150 N. E. 347 (1925). It is not decisive that the prisoner was kept in unlawful custody [Balbo v. People, 80 N. Y. 484 (1880) (unlawful arrest); People v. Alex, 265 N. Y. 192, 192 N. E. 289 (1934)

The Florida Supreme Court was cautious in dealing with the confessions. In successive appeals, it directed that the petitioners have a jury trial of the issue of voluntariness of the confessions. On the fourth appeal, which was from a jury's finding that the confessions were voluntary, the state supreme court reversed on deficiency in the instructions to the jury and reviewed the law of exclusion of involuntary confessions, saying that the evidence of the sheriff and other state's witnesses alone tended to show that the petitioners' confessions were not freely and voluntarily made.[5] Again the jury found the confessions voluntary, and, on the fifth appeal, the state supreme court affirmed, holding that "All night vigils in proceedings of this kind are not approved but are not *ipso facto* illegal."[6]

On certiorari, the United States Supreme Court found that the confessions were involuntary, pointing out the terror and misgivings of petitioners in their surroundings, the unpitying questioning, and saying, "From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance .... relentless tenacity ... 'broke' petitioners' will and rendered them helpless to resist their accusers further."[7] On the authority of *Brown v. Mississippi*, the Court

(unlawful delay in arraignment)] or that his relatives and friends [State v. Murphy, 87 N. J. L. 515, 94 A. 640 (1915)] or counsel [McCleary v. State, 122 Md. 394, 89 A. 1100 (1914)] were denied admission to the jail until after the confession was made. Vigorous and persistent questioning is not per se unduly coercive. People v. Nelson, 320 Ill. 273, 150 N. E. 686 (1926); People v. Rogers, 192 N. Y. 331, 85 N. E. 135 (1908); Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113 (1905). Such questioning, if kept within proper bounds, is not morally reprehensible, and, in fact, is necessary for efficient, intelligent enforcement of law. WIGMORE, PRINCIPLES OF JUDICIAL PROOF, 2d ed., § 226 (1931). Cursing and other verbal abuse [Buschy v. People, 73 Colo. 472, 216 P. 519 (1923)] and the fact that the form of the questions assumes the guilt of the accused [Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (1923] are not necessarily grounds for exclusion. All of these devices form part of the surrounding circumstances and are considered in the individual case to throw some light on the probable truth of the confession. Sparf v. United States, 156 U. S. 51, 15 S. Ct. 273 (1895); People v. Quan Gim Gow, 23 Cal. App. 507, 138 P. 918 (1914); annotation, 69 L. Ed. 131 (1926). As the duration and vigor of the questioning increase, the amount of coercion increases until it becomes undue; the difference between that questioning which is legitimate and that which is improper is one of degree. 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 612 (1935). In the multitude of cases involving confessions elicited by prolonged questioning, the duration of the questioning and the other surrounding circumstances vary materially, and the results of the cases with them. See annotation, 69 L. Ed. 131 (1926).

[5] Chambers v. State, 123 Fla. 734, 167 So. 697 (1936).

[6] Chambers v. State, 136 Fla. 568 at 572, 187 So. 156 (1939).

[7] Chambers v. Florida, 309 U. S. 227 at 240, 60 S. Ct. 472 (1940). The United

held that "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol." [8] In *Brown v. Mississippi*, where the Court held that accused was deprived of due process of law by a conviction resting solely on his involuntary confession, Chief Justice Hughes stated at the outset that the notion of due process included certain fundamental standards of procedure, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." [9] To omit any of the fundamental requirements makes the trial a mask, and renders the conviction and sentence wholly void.[10] While mere error in admission of evidence is no fundamental wrong, the trial loses its reality as a determination of justice when the conviction is, for example, based solely on perjured testimony.[11] "And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." [12] Both *Brown v. Mississippi* and *Chambers v. Florida* speak strongly in terms which condemn inquisitorial methods and assert the illegality of a conviction based on use in evidence of testimony obtained thereby.

Primarily, that which due process of law requires in a criminal trial is a fair and impartial hearing.[13] Violent and barbarous treatment before trial is certainly highly censorable and may in itself be an independent denial of due process of law from which the accused can obtain relief.[14]

States Supreme Court had the authority to determine, independently of the Florida Supreme Court's inferences from the facts, whether petitioners' confessions were voluntary. "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." Norris v. Alabama, 294 U. S. 587 at 590, 55 S. Ct. 579 (1935). For a further discussion, see 38 MICH. L. REV. 858 (1940).

[8] Id., 309 U. S. at 240.

[9] Brown v. Mississippi, 297 U. S. 278 at 286, 56 S. Ct. 461 (1936), quoting from Hebert v. Louisiana, 272 U. S. 312 at 316, 47 S. Ct. 103 (1926).

[10] In other cases as well it has been said that a judgment rendered against accused without due process of law is void. Ex parte Hollins, 54 Okla. Cr. 70, 14 P. (2d) 243 (1932); Ward v. Hunter Machine Co., 263 Mich. 445, 248 N. W. 864 (1933).

[11] The court cited Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935).

[12] 297 U. S. 278 at 286 (1936).

[13] 16 C. J. S. "Constitutional Law," § 591 (1939).

[14] Cf. Howard v. State, 28 Ariz. 433, 237 P. 203 (1925), involving unreasonable treatment after conviction.

However, such treatment is immaterial when considering whether or not due process requires that evidence obtained thereby be inadmissible, unless the treatment contributed to a denial of a hearing at the trial from which the questioned conviction came. It is a general rule that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."[15] That this general rule applies in the field of involuntary confessions is shown by the holdings of all courts that where information contained in an inadmissible confession results in the discovery of inculpatory facts, evidence of such facts is admissible.[16] Another application of this general rule involves evidence obtained by an illegal search and seizure of accused or his premises. A majority of states admit evidence so obtained against the accused.[17] The federal courts and a minority of state courts refuse admission, holding that to admit such evidence would violate the constitutional rights to be free from unreasonable search and seizure and from being compelled to accuse oneself.[18] However it is not a denial of due process of law as guaranteed by the Fourteenth Amendment for state courts to admit evidence obtained by unlawful searches and seizures.[19] In view of the above general rule, therefore, it follows that in *Brown v. Mississippi* and *Chambers v. Florida*, the United States Supreme Court was examining the adequacy of the hearing given at the trial from which the convictions came, and looking at the illegal methods of obtaining the evidence only as affecting the hearing.

How, then, does use of accused's involuntary confession in evidence against him affect the fair hearing without which he cannot validly be deprived of life or liberty? The evil of an involuntary confession, from the evidentiary standpoint, lies in its unreliability. It is common knowledge among law-enforcement officials, judges, and other trained and practical psychologists that as all forms of persuasion (e.g., force, threat of force, and promise of benefit) and the results thereof (e.g., physical fatigue and emotional disturbance) increase, the probability that the accused will tell the truth decreases. Faced with the devices of overpersuasion, a person responds to the natural impulses of immediate escape from an intolerable or difficult situation with optimism, heed-

[15] 8 WIGMORE, EVIDENCE, 3d ed., § 2183 at p. 5 (1940).

[16] State v. Douglass, 20 W. Va. 770 (1882); annotation 53 L. R. A. 402 (1901); 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., §§ 599, 600 (1935), and cases therein cited.

[17] Annotation 88 A. L. R. 348 (1934) and previous annotations cited therein.

[18] Id.

[19] Commonwealth v. Donnelly, 246 Mass. 507, 141 N. E. 500 (1923); People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926); Johnson v. State, 152 Ga. 271, 109 S. E. 662 (1921).

lessness, or ignorance as to the future effects of his damaging statements.[20] Pain and fatigue contribute to a heightened degree of suggestibility through which at times the accused may himself believe, at least temporarily, the false accusations of his tormentors.[21] Consideration of these natural reactions forms the basis for doubting the credibility of an involuntary confession.

Courts define an involuntary confession as one forced or extorted in any manner by promises, threats, or other means of overpersuasion.[22] In application, the broad definition is limited: that confession is involuntary which is elicited by promises, threats, or other means of overpersuasion which, under the surrounding circumstances, create, in any considerable degree, a risk that the confession is false.[23] The large majority of courts base common-law exclusion of an involuntary confession on its testimonial untrustworthiness.[24] Other reasons that have been followed by a small minority of courts in excluding an involuntary confession have been criticized. Moreover, even under these other reasons, in effect only untrustworthy confessions are excluded.[25]

[20] 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 603 (1935).

[21] BURTT, LEGAL PSYCHOLOGY 171-172 (1931).

[22] 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 592 (1935).

[23] "The test of exclusion thus would be: Human nature being what it is, *were the prospects attending confession* (involving the equalization or averaging of the benefit of realizing the promise or the benefit of escaping the threat, against the drawbacks moral and legal of furnishing damaging evidence) *as weighed at the time against the prospects attending non-confession* (involving a similar averaging), *such as to have created, in any considerable degree, a risk that a false confession would be made?* Putting it more briefly and roughly, Was the inducement such that there was any fair risk of a false confession?" 3 WIGMORE, EVIDENCE, 3d ed., § 824 at p. 252 (1940).

[24] 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 602 (1935).

[25] A small minority of courts have said that the inadmissibility of accused's involuntary confession in evidence against him is at least partly based on the privilege against self-incrimination, guaranteed in federal trials by the Fifth Amendment of the federal Constitution and in state trials by practically all state constitutions. Bram v. United States, 168 U. S. 532, 18 S. Ct. 183 (1897); Elmore v. State, 223 Ala. 490, 137 So. 185 (1931); Whip v. State, 143 Miss. 757, 109 So. 697 (1926); Hoobler v. State, 114 Tex. Cr. 94, 24 S. W. (2d) 413 (1930); State v. Thomas, 250 Mo. 189, 157 S. W. 330 (1913). The guarantee, that no man shall be compelled to accuse himself in a criminal case, is a codification of the maxim, "nemo tenetur seipsum accusare" (no one is bound to accuse himself). It has been strongly argued that, like the maxim, the constitutional privilege extends only to a judicial examination and not to extra-judicial proceedings. 3 WIGMORE, EVIDENCE, 3d ed., § 823 (1940) and cases cited therein; 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 603 at p. 1008 (1935); annotation, 18 L. R. A. (N. S.) 772 (1909), 50 id., 1077 (1914). The maxim was a humanitarian rule, a manifestation of the spirit of fairness to the accused. Some courts now, in excluding involuntary confessions, talk of unfairness and inhumanity. Pearrow v. State, 146 Ark. 201, 225 S. W. 308 (1920). The epithet "fox hunter's reason" has been applied when such considerations are made the basis of an exclusion, and the

To base a conviction solely on unreliable evidence seems clearly to deprive an accused of a fair hearing. There is a difference of degree only between a conviction resting solely on testimony which common experience has proven to be unreliable, and a summary conviction with no trial at all. Of the fact that use of accused's involuntary confession as the sole evidence against him denies him a fair hearing, there should be no doubt, in view of the language of the United States Supreme Court previously quoted.[26] That language, it will be recalled, was in terms of torture and other inquisitorial methods. It has been shown that the United States Supreme Court was not considering the torture itself, but rather its effect on the adequacy of the trial as a fair hearing.

requirement that criminal investigation be conducted according to the rules of the fox hunt has been criticized. People v. Fox, 319 Ill. 606, 150 N. E. 347 (1925); annotation, 18 L. R. A. (N. S.) 772 (1909). Another outgrowth of the spirit of fairness and humanity is shown by the desire expressed by some courts to remove the incentive for inhuman treatment of accused persons. If the exclusion of an involuntary confession is put on such a basis, then the propriety of such exclusion of evidence for the purpose of controlling the conduct of police officers may be challenged. People v. Fox, supra. Courts following the foregoing reasons in excluding involuntary confessions seem to recognize a right in the accused to be free from use in evidence against him of his statements obtained through compulsion, regardless of the usefulness or credibility of the testimony. Jordan v. State, 32 Miss. 382 (1856). The scope of this right, however, is not as great as the language used in describing it might indicate. Only when the confessions have been obtained with what the courts call "undue" persuasion has the accused been compelled to accuse himself or been treated unfairly. "Whether a witness who makes a confession can be said to be a witness against himself turns upon the proposition as to whether or not the confession is voluntary." State v. Gee Jon, 46 Nev. 418 at 428, 211 P. 676, 217 P. 587 (1923). See also State v. Thomas, 250 Mo. 189, 157 S. W. 330 (1913). Confessions need not be completely free and spontaneous to be admissible, but may be drawn out by questions. Bram v. United States, 168 U. S. 532, 18 S. Ct. 183 (1897); Shaw v. United States, (C. C. A. 6th, 1910) 180 F. 348; State v. Thomas, 250 Mo. 189, 157 S. W. 330 (1913). When the rule of admissibility is not limited to completely free and spontaneous confessions, the only other practicable line of exclusion must be drawn where the degree of persuasion is sufficient to jeopardize credibility. This seems to be borne out by the results of the cases. "Involuntary confessions are rejected by all courts—by some on the ground that a confession so obtained is unreliable; and by some on the grounds of humanitarian principles which abhor all forms of torture or unfairness toward the accused in criminal proceedings. But either theory arrives at the same goal." United States v. De Los Santos, 24 Phil. 329 at 359 (1913). The confessions which are ruled inadmissible by courts applying the privilege against self-incrimination or the fox-hunter's reason, or even by those expressing a desire to remove the incentive for inhuman treatment of prisoners by officers, are nearly always those given under circumstances conducive to unreliability—when all courts (including courts following the above reasons) agree that the confessions should be excluded. 50 L. R. A. (N. S.) 1077 (1914). Many courts in excluding involuntary confessions name one or more of the above reasons together with testimonial untrustworthiness. Berry v. State, 4 Okla. Cr. 202, 111 P. 676 (1910); Elmore v. State, 223 Ala. 490, 137 So. 185 (1931).

[26] Supra, note 8.

It has also been shown that, from the evidentiary standpoint, the evil of an involuntary confession lies in its unreliability. It follows, then, that a hearing is not denied merely because the confession is elicited by torture and other inquisitorial methods. To say the contrary implies that the accused has a right to be free from the use of inquisitorial methods to compel him to accuse himself, and the United States Supreme Court has unequivocally held that the due process clause of the Fourteenth Amendment does not include the privilege against self-incrimination.[27] Without saying more, the court would probably not overrule that authority. Furthermore, if a hearing is denied merely because of the inquisitorial methods used in eliciting the confession, it is difficult to see why a hearing is denied by the use in evidence of a confession induced solely by promise of benefit. All definitions of an involuntary confession include that elicited by promise of benefit;[28] it seems very unlikely that the court intended to limit the definition of involuntary confession as viewed by the Fourteenth Amendment to that elicited by mental or physical torture. If, when a conviction rests solely on the use in evidence against the accused of his involuntary confession, the basis for holding that a fair hearing has been denied is not the torture or other inquisitorial methods used, then the basis must be the unreliability of the testimony. To repeat, then, the proper interpretation of *Brown v. Mississippi* and *Chambers v. Florida* seems to be that when a conviction in a state criminal trial rests solely on unreliable testimony, the accused has been denied a fair hearing as guaranteed to him by the due process clause of the Fourteenth Amendment. Such a principle seems to fit into the general picture of the fundamental procedural standards as framed by the holdings and language of the cases.[29]

[27] Twining v. New Jersey, 211 U. S. 678, 29 S. Ct. 14 (1908).

[28] 2 WHARTON, CRIMINAL EVIDENCE, 11th ed., § 592 (1935) and cases therein cited.

[29] The importance of Chambers v. Florida is attested by two cases decided shortly thereafter. Canty v. Alabama, 309 U. S. 629, 60 S. Ct. 612, a memorandum opinion rendered March 11, 1940, and, more recently, White v. Texas, (U. S. 1940) 60 S. Ct. 1032, decided May 27, 1940. In the latter case, accused was arrested and jailed, no charges were filed against him, he had no lawyer, and was out of touch with relatives and friends. For several successive nights after his arrest, he was taken by Texas Rangers into a certain woods. Accused claimed that there he was whipped, questioned, and warned to say nothing of his treatment. The officers denied this but admitted the nightly excursions for questioning, saying that the jail was too crowded. The exact number of excursions was not determined, it being said by an officer that they were too numerous to recall. The accused was finally taken to a town where the county attorney was to be. The Rangers, hearing of this, also went there and from 11 P.M. until 3 or 3:30 A.M., accused was repeatedly questioned. This questioning took place on the eighth floor of the jail, with the elevator locked. During the questioning, accused began to cry. From this session a written confession resulted. The state jury found that the confession was voluntary and found accused guilty. The United States

There are state court decisions holding that a trial court's prejudicial refusal to permit the introduction of evidence[30] and its material admission of unreliable evidence[31] result in denial of due process of law to the accused. Whatever the strength of such holdings, in view of the fact that in both cases reversible error as determined by ordinary rules of evidence was clearly present, still it seems equally true that the material error made the accused's trial an incomplete hearing. Likewise, it has been held a deprival of due process of law in a federal trial where the accused was convicted solely on the basis of the incontestable written testimony taken in a police investigation.[32] When a conviction in a state trial is based solely on testimony afterwards discovered to have been perjured, it has been held by the United States Supreme Court that the trial was not a fair hearing.[33] Even though the exclusion of evidence in the trial is proper and there is no admission of improper evidence, if there is a statute which, in operation, results in a conviction where there is insufficient evidence to connect accused with the commission of the crime charged, the trial court has failed to give a full hearing.[34] A statute is unconstitutional which declares proof of one fact to be presumptive evidence of another fact, when there is no natural and rational evidentiary connection between the two facts;[35] and a statute otherwise arbitrarily shifting the burden of proof is unconstitutional.[36]

The scope of the state court's discretion consistent with the evidentiary requirements of the Fourteenth Amendment, as indicated by the cases, should be noted. The United States Supreme Court is reluctant to interfere with a state conviction, and refuses completely when available state remedies have not been exhausted.[37] ". . . the Fourteenth Amendment does not limit the power of the States to try

Supreme Court reversed, quoting the following from Chambers v. Florida, 309 U. S. 227 at 241, 60 S. Ct. 472 (1940): "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." 60 S. Ct. at 1034.

[30] Warren v. State, 174 Miss. 63, 164 So. 234 (1935).

[31] McRae v. State, 8 Okla. Cr. 483, 129 P. 71 (1913); Smith v. State, 59 Okla. Cr. 312, 58 P. (2d) 347 (1936) (hearsay evidence); People v. Cavanaugh, 246 Mich. 680, 225 N. W. 501 (1929) (involuntary confession).

[32] Soto v. United States, (C. C. A. 3d, 1921) 273 F. 628.

[33] Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935), perjured testimony introduced by prosecuting attorney who knew of its falsity; also, Jones v. Kentucky, (C. C. A. 6th, 1938) 97 F. (2d) 335, falsity of perjured testimony shown by evidence discovered after the trial.

[34] State v. Grimmett, 33 Idaho 203, 193 P. 380 (1920); People v. Licavoli, 264 Mich. 643, 250 N. W. 520 (1933).

[35] Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215 (1929).

[36] Morrison v. California, 291 U. S. 82, 54 S. Ct. 281 (1934).

[37] Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935).

and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial. Consistently with the preservation of constitutional balance beween state and federal sovereignty, this Court must respect and is reluctant to interfere with the state's determination of local social policy."[38] If established rules of evidence have been followed, and the trial court in its discretion has refused to set aside a conviction which, it is charged, is not established by the evidence, the accused nevertheless has had a full hearing[39] (assuming that other fundamental procedural standards have also been observed[40]). From this, it seems to follow that, although improper testimony has been admitted against the accused, there is no denial of the hearing required by the Fourteenth Amendment, if there is also heard at the trial other evidence on which the trial court could base a conviction,[41] and if the state provides appropriate remedies for the correction of the errors.[42]

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[38] Avery v. Alabama, 308 U. S. 444 at 446-447, 60 S. Ct. 321 (1940).

[39] There have been a few statements, but not holdings, apparently implying that the fundamental procedural requirements of the Fourteenth Amendment include a correct exercise of the trial and appellate courts' discretion in weighing the evidence. In State v. Ferguson, 226 Iowa 361 at 372, 283 N. W. 917 (1939), dictum defines due process as requiring, among other things, "that the state introduce such competent evidence which, if believed, would be sufficient to establish a defendant's guilt. . . ." Possibly this was referring to arbitrary statutory changes in the rules of evidence, supra, notes 34, 35, 36. Especially in view of the reluctance expressed by the United States Supreme Court, supra, note 38, it seems very unlikely that the Fourteenth Amendment is violated by a conviction which another court might hold is not established by the evidence beyond a reasonable doubt, or is against the clear weight of evidence. In re Converse, 137 U. S. 624, 11 S. Ct. 191 (1891); Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 37 S. Ct. 492 (1917); Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521 (1926). Of course, if a state conviction against the weight of evidence operates to deprive accused of a substantive right guaranteed by the Fourteenth Amendment, e.g., freedom of speech and the press, then due process has been denied. Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 665 (1927).

[40] These standards include a fair and impartial tribunal, free from mob domination, and the right to assistance of counsel. See ROTTSCHAEFER, CONSTITUTIONAL LAW 806-812 (1939), and cases therein cited.

[41] In Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936), and Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472 (1940), the finding of a deprivation of due process is limited to convictions resting *solely* on the improper evidence. Also see Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935).

[42] Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935); State ex rel. Kunkel v. Circuit Court of La Porte County, 209 Ind. 682, 200 N. E. 614 (1936). Should the state reviewing court incorrectly find that there has been no improper admission of evidence against the accused, the conviction is invalid for want of due process only if the state reviewing court affirmed the conviction solely on the weight of the improper evidence.