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## Constitutional Law - Right to Effective Assistance of Counsel in Federal Courts and Waiver Thereof

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CONSTITUTIONAL LAW—RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN FEDERAL COURTS AND WAIVER THEREOF—Indicted for illegal traffic in narcotics, petitioner and his trial counsel allegedly attempted to fabricate an alibi on the false testimony of petitioner's girl friend. The evidence indicated that on several occasions before trial, the girl was invited to the office of petitioner's attorney, given narcotics, and told to memorize certain false testimony to be used in petitioner's defense. Later the girl had a change of mind and agreed to testify for the government. Despite the strenuous objections of defendant's counsel, a description of this alleged fraud on the court was given in the prosecution's opening statement, and the witness was permitted to testify. The defense attorney refused the court's offer of additional counsel and proceeded to conduct the defense alone. Petitioner was convicted as charged in the indictment, whereupon, with the aid of new counsel appointed by the court, he filed a motion to vacate judgment. There was no question on the admissibility of testimony showing the attempted fabrication of evidence. Yet the petitioner contended that this evidence so discredited his attorney in the eyes of the jury that he did not have the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments; therefore the court should have either advised him of his constitutional rights or, acting *sua sponte*, appointed other counsel in his behalf. The lower court rejected this line of argument. On appeal, *held*, affirmed with one judge dissenting. The majority found that even if petitioner was prejudiced, he was in no position to say that the court should have rescued him from his own wrongdoing. *Harvey v. United States*, (D.C. Cir. 1954) 215 F. (2d) 330.

The right to the assistance of counsel guaranteed in the federal courts by the express provision of the Sixth Amendment and the due process clause of the Fifth Amendment extends far beyond the simple appointment of an attorney for the accused.<sup>1</sup> This is an absolute substantive right, which, when vio-

<sup>1</sup> For a discussion of the subject in general, see Fellman, "The Constitutional Right to Counsel in Federal Courts," 30 *NEB. L. REV.* 559 (1951); Holtzoff, "The Right of Counsel Under the Sixth Amendment," 20 *N.Y. UNIV. L.Q. REV.* 1 (1944).

lated, goes to the jurisdiction of the court.<sup>2</sup> To protect defendant's right, therefore, the assistance of counsel must be "effective,"<sup>3</sup> which implies that counsel should be competent.<sup>4</sup> Though the courts are reluctant to recognize a denial of any constitutional right when the counsel has simply made a mistake at trial<sup>5</sup> or misadvised his client,<sup>6</sup> the incompetence involved in the principal case presents a more serious problem. Clearly the jury would be prejudiced against petitioner's counsel by the evidence that he participated in an attempted fraud upon the court. This could not but reflect on the counsel's veracity and such prejudice could hardly be wiped from the minds of the jury by instructions from the court. Though counsel may have been competent in every other respect, one doubts whether his representation was effective in presenting petitioner's defense before an impartial jury. Even the majority opinion does not categorically deny this lack of effectiveness, but rests instead on a principle of waiver or estoppel. The court's theory was that petitioner could not ask the court to protect his right to effective counsel because he had chosen his own counsel, had continued with him throughout the trial without objection, and had himself participated in the attempted fraud on the court. But does the fact that petitioner selected counsel for himself necessarily amount to a waiver? In *Diggs v. Welch*<sup>7</sup> it was held that once defendant had secured competent counsel, in that case by appointment of the court, his rights under the Sixth Amendment were satisfied. The opinion went on to say, however, that in an extreme case of incompetency defendant could still rely on his right to a fair trial under the due process clause of the Fifth Amendment. The same principle might properly apply when counsel is selected by the defendant. Nor is it clear that petitioner effectively waived his rights by raising no objection during the trial. A proper waiver must be intelligently and competently made,<sup>8</sup> which means that the petitioner must at least understand what his rights are.<sup>9</sup> Admittedly,

<sup>2</sup> *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938). This case, the leading one in the field, held that it is the duty of the trial court to protect and advise the accused of his right to counsel; that if the accused is unable to secure counsel for financial or other reasons, the court must appoint counsel for him; and that, absent an intelligent and competent waiver, a violation of this right will sustain a release of the convicted party by writ of habeas corpus.

<sup>3</sup> *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457 (1942) (effective assistance of counsel was found lacking when one attorney was appointed for two defendants with conflicting interests); *United States v. Bergamo*, (3d Cir. 1946) 154 F. (2d) 31 (counsel was denied sufficient time to prepare for trial); and *United States v. Venuto*, (3d Cir. 1950) 182 F. (2d) 519 (defendant was prohibited from consulting in privacy with his counsel during an 18-hour court recess).

<sup>4</sup> *Achtien v. Dowd*, (7th Cir. 1941) 117 F. (2d) 989.

<sup>5</sup> *Diggs v. Welch*, (D.C. Cir. 1945) 148 F. (2d) 667, cert. den. 325 U.S. 889, 65 S.Ct. 1576 (1945).

<sup>6</sup> *Helms v. Humphrey*, (D.C. Minn. 1945) 63 F. Supp. 4.

<sup>7</sup> Note 5 supra.

<sup>8</sup> *Johnson v. Zerbst*, note 2 supra.

<sup>9</sup> Knowledge is a material element of waiver, and therefore without being informed of his right, defendant could not be deemed to have waived it. *Wood v. United States*, (D.C. Cir. 1942) 128 F. (2d) 265.

where the accused has competent counsel, he may be deemed to have been advised of his rights and a failure to object would serve as a waiver. However, it is hardly fair to assume that the accused in the principal case was advised of the invasion of his rights when that invasion is counsel's own incompetence. Finally, can petitioner be estopped from asking the assistance of the court in appointing new counsel because he participated in the fraudulent scheme? There is no indication in the opinion that the alleged fraud was established by the jury in a special verdict or admitted by petitioner.<sup>10</sup> If the fraud was not proved, it is inconceivable that petitioner should be precluded from asserting a constitutional right by the mere allegation and evidence of the prosecution. But even if this question had been decided against the petitioner or admitted, it would only constitute a separate crime of subornation of perjury and should not preclude petitioner's right to a fair and impartial trial on the indictment at hand.<sup>11</sup> The strength of the majority position therefore is by no means as self evident as the brevity of the opinion would suggest. As the principles of waiver which the court has so conveniently assumed are examined more thoroughly, there is considerable question whether petitioner has received the full protection of the court to which he is entitled under the Constitution.

*Richard M. Adams, S.Ed.*

<sup>10</sup> The alleged fraud was not an issue in the trial, but was only offered as evidence of petitioner's guilt on the indictment of illegal traffic in narcotics. Absent a special verdict, a finding of guilty on the indictment would not prove that petitioner was also guilty of the fraud charge. Nor had petitioner admitted the fact, for, according to the opinion, he denied practically everything that the witness said. Principal case at 331, note 2.

<sup>11</sup> *Braswell v. United States*, (5th Cir. 1952) 200 F. (2d) 597. Where defendant had assaulted the prosecuting attorney during trial and was charged with contempt, the court found that defendant should not be denied his right to request a new trial because of prejudice resulting from this assault and other acts of misconduct by codefendants.