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Constitutional Law - Compulsory Line Up by Police Violates Equal Protection Clause of Fourteenth Amendment

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RECENT DEVELOPMENTS

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CONSTITUTIONAL LAW — COMPULSORY LINE UP BY POLICE VIOLATES EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT.

Butler v. Crumlish (E.D. Pa. 1964)

Petitioners, held in custody for want of bail, sought to enjoin the district attorney and police chief from ordering them to appear in a "line up" for possible identification by victims of similar crimes. In granting the injunction, the district court *held* that the compulsory "line up" deprived plaintiffs of the equal protection of the laws guaranteed them by the fourteenth amendment. The court asserted that the constitutional authority allowing the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself. An accused prisoner cannot be made an active participant in police investigations and subjected to indignities to which his wealthier counterparts are not susceptible. *Butler v. Crumlish,* 229 F. Supp. 565 (E.D. Pa. 1964).

Recent demonstrations, decisions, and legislation in the field of Negroes' civil rights have completely captured the public's interest and attention to such an extent that an equally important revolution is about to pass unnoticed. The idea of equality before the law for rich and poor alike is one of the oldest and most fundamental aims of our legal system.[1] Yet, until forty years ago, the disparity between the rich and the poor charged with a criminal offense seemed insurmountable. The wealthy accused, upon first threat of imprisonment, summoned an array of erudite counsel. Release on bail was immediate; money was made available for the intensive investigation necessary for adequate defense. If the defendant were unsuccessful at the trial level, ultimate appeal to the Supreme Court was always a possibility. The indigent accused, however, found himself in an unhappy predicament.[2] Unable to afford bail, the indigent, although presumed innocent in the eyes of the law, was thrust into jail and often subjected to worse treatment than a convicted felon.[3] Inadequate counsel,

1. Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472 (1940); SMITH, JUSTICE AND THE POOR 3 (1919); THOMPSON, MAGNA CARTA 365, 380 (1948).

2. Attorney James Donovan, in a lecture at Villanova University School of Law (Fall, 1962), discussed the difficulty that these classes have in obtaining a fair trial and adequate defense counsel.

3. Foote, *Comment on the New York Bail Study,* 106 U. PA. L. REV. 685, 688 (1958); Note, *A Study of the Administration of Bail in New York City,* 106 U. PA. L. REV. 693, 723 and 724 (1958). The detention centers are maximum security penal

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if supplied at all, was the rule; furthermore, they were usually not appointed until trial was imminent.[4] Coercion had occurred and the defendant's case lost before the trial had begun. Counsel were inadequately paid, if at all, and no money was made available for expert witnesses and necessary investigation. Having a family to support, even the conscientious lawyer had little time to devote to "charity cases." Statutorily imposed costs, insignificant to the wealthy, seriously burdened the poor. Finally, cries of injustice found receptive ears in the Supreme Court and lower federal courts.

Scarcely thirty years have past since the Supreme Court, through the fourteenth amendment,[5] began to limit the authority of the states in the area of criminal law. Two landmark cases,[6] both involving poor ignorant Negroes who had been brutally beaten,[7] quickly brought to trial,[8] and given little semblance of counsel, led to the holdings that coerced confessions are not admissible into evidence,[9] and that the right to appointed counsel must include an opportunity to prepare an adequate defense.[10] The indigent's right to counsel in state proceedings[11] was not finally declared to be a fundamental right,[12] however, until the *Gideon* decision of the past year.[13] During the interim, the Supreme Court has declared that the indigent defendant is entitled to a trial record free of charge when necessary for appeal.[14] Lower federal courts have held that federal habeas corpus may be available where the petitioner is barred from appealing his conviction by his inability to pay state imposed costs.[15] Some courts have stated that the right to counsel must be made available at the commencement of

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institutions. Prisoners are often locked in their cells or in small quadrants for 18 hours out of the day. Restrictions caused by overcrowding and insufficient financing handicap imprisoned accused far beyond the limits of what would be required solely to achieve adequate security.

4. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932) (Counsel was not appointed until the day of trial).

5. Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934). The Commonwealth ". . . is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

6. Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932).

7. The *Brown* opinion stated that the Negroes were brought to the scene of the crime, surrounded by white men, accused, hanged twice and let down, and then beaten until they confessed that they had committed the crimes. Brown v. Mississippi, 297 U.S. 278, 281, 56 S.Ct. 461, 463 (1936).

8. In the *Brown* case, the time from arraignment to conviction was only two days. *Id.* at 284, 56 S.Ct. at 464.

9. Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936).

10. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932).

11. This right is explicitly guaranteed by the sixth amendment in federal proceedings. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938).

12. Betts v. Brady, 316 U.S. 455, 473, 62 S.Ct. 1252, 1262 (1942). The test used was whether the trial was offensive to the common and fundamental ideas of fairness and right.

13. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

14. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956).

15. United States *ex rel.* Embree v. Cummings, 233 F.2d 188 (2d Cir. 1956); Robbins v. Green, 218 F.2d 192 (1st Cir. 1954); Dolan v. Alvis, 186 F.2d 586 (6th Cir. 1951), *cert. denied*, 342 U.S. 906, 72 S.Ct. 298 (1952).

the proceedings[16] and through appeal if meritorious.[17] Finally, the present decision, following this same trend, holds that indigent defendants who cannot afford bail cannot constitutionally be subjected to the humiliating ordeal of the "line up."

Although proponents of states' rights in the field of criminal law and advocates of stronger and more extensive police investigative power will look upon this decision with disdain, it must be considered as a necessary and logical step in the ideological progression of modern federal court holdings. Compulsory "line ups," like coerced confessions,[18] unreasonable searches and seizures,[19] denials of right to counsel,[20] wiretapping,[21] and so on, do produce more convictions; one cannot deny that fact. Whether these convictions denote apprehension of the guilty, or possible denial of justice and freedom to the poor, ignorant and unpopular; whether stronger police protection will strengthen our democratic way of life or eliminate entirely all that is personal and private; whether the rich are to continue to be favored by the law or the poor man will get long awaited relief — these are questions which have challenged the loftiest judicial minds of the past generation. Their decisions have favored human freedom to the possible judicial escape of a few guilty. They have come to the conclusion that . . . "the law is no respecter of persons. It cannot look to the color of a man's face, the size of his pocketbook, or the number of his friends."[22] All people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American Court."[23]

To proceed from general historical facts to the case at bar, it is undisputed that this decision will somewhat hamper present methods of police investigation. The hindrance will be mild since the accused can still be observed either in his cell or walking around the prison grounds. This will approximate the view of a bailed defendant as he enters or leaves his home or place of employment. Of course, the imprisoned indigent will no longer be forced to submit to identification for every similar crime committed. He need no longer appear before glaring lights, speak and walk about upon a raised platform, and undergo similar degrading treatment. The constant dread of mistaken identification through sheer number of callings will become a thing of the past.

Logically, this decision appears to be a good one since ". . . equal protection of the law means that equal protection . . . shall be given to every person under like circumstances . . . and in the exemption from any greater

16. Fed. R. Crim. P. 44. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

17. Holmes v. United States, 126 F.2d 431 (8th Cir. 1942); see also United States v. Johnson, 238 F.2d 565 (2d Cir. 1956), *rev'd*, 352 U.S. 565 (1957).

18. Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957).

19. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

20. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

21. Fed. Comm. Act of 1934, § 605, 48 Stat. § 1103, 47 U.S.C. § 605 (1958).

22. Jeffries v. State, 9 Okla. Crim. 573, 574, 132 Pac. 823, 824 (1913).

23. Chambers v. Florida, 309 U.S. 227, 241, 60 S.Ct. 472, 479 (1940).

Villanova Law Review, Vol. 9, Iss. 4 [1964], Art. 6

burdens and charges than are equally imposed upon all others under like circumstances."[24] Requiring an indigent defendant to submit to the degradation, self incrimination, and possible mistaken identity aspects of the "line up," while excepting the similarly situated bailed accused, is an invidious State discrimination against the poor. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."[25] Simply because an indigent must submit to prison routine and follow administrative orders does not mean that he forgoes all of his constitutional rights. His right to liberty must necessarily be restrained but his other rights remain. He is the prison officials' ward but not an active participant in police investigations. "By the terms of the commitment, he is to remain in the county prison to answer the charge of murder, not to answer the call of any and every person, official or other, who may wish to meet him or speak to him. . . ."[26]

The *Butler* decision, noteworthy for its strict holding alone, attains greater importance when coupled with recent federal judicial history. Its greatest merit, however, will come from its influence upon future decisions. The court's opinion indicates the trend that these cases will take. Because the system of bail is weighted heavily against the poor,[27] because the accused's release prior to the day of the trial is essential for adequate preparation,[28] because our system of law is founded upon the idea that no one should be punished prior to a trial and verdict by one's peers, and because reasonable alternatives are often available,[29] possibly the next step will be to hold that the prescription of any amount is excessive and violative of the Constitution if the accused can not afford to pay it. The present weight of authority is to the contrary,[30] but two recent Supreme Court decisions[31] seem to indicate that these authorities will soon be overturned.[32]

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24. *Ex parte* Knapp, 73 Idaho 505, 508, 254 P.2d 411, 413 (1953).

25. Griffin v. Illinois, 351 U.S. 12, 17, 76 S.Ct. 585, 590 (1956).

26. Commonwealth v. Brines, 29 Pa. Dist. 1091 (1920).

27. Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964).

28. Foote, *Comment on the New York Bail Study*, 106 U. PA. L. REV. 685, 691 (1958). The accused, because of the restrictions on his freedom, cannot use self help to obtain evidence. He cannot maintain his job to help pay for the cost of investigation. Because of inadequate visiting rights, even the lawyer himself is restricted in obtaining all necessary information.

29. Bandy v. United States, — U.S. —, 81 S.Ct. 197 (1960) (long residence in a locality, ties of friends and family, efficiency of the modern police, attempted escape a crime in itself).

30. State v. Chivers, 198 La. 1098, 5 So.2d 363 (1941); State v. Alvarez, 182 La. 50, 161 So. 17 (1935); Heard v. Clark, 156 Miss. 355, 126 So. 43 (1930).

31. Bandy v. United States, — U.S. —, 81 S.Ct. 197 (1960); Leigh v. United States, — U.S. —, 82 S.Ct. 994 (1962).

32. In Bandy v. United States, — U.S. —, 81 S.Ct. 197, 198 (1960), the Court stated that the theory of bail is based on the assumption that the defendant has property. It then proceeded to attack the very root of this theory in light of equal protection:

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

Two years later in Leigh v. United States, — U.S. —, 82 S.Ct. 994 (1962), the Supreme Court went on to say that if it were affirmatively shown that upon release appellant would be likely either to (a) harm the community or (b) fail to appear as

In 1951, *Christoffel v. United States*,[33] listed ability of the accused to give bail as a major factor in the setting of bail. Federal Rule 46 also provides that in proper cases the requirement of security may be dispensed with. Yet, many state court justices are setting bail arbitrarily and in accordance with fixed schedules which give little effect to the financial means of the defendant.[34] This is an injustice that appears destined to be eliminated in future federal court litigation.

Although not explicitly mentioned in the instant case, three other major features of financial life prohibit the meting of equal justice by our courts. Attempts have been made to alleviate these problems, and with increased efforts they may be eliminated. They are discussed in the dissenting opinion in *United States v. Johnson*.[35] The first is the imposition of state costs which prevent the indigent from pursuing full legal redress.

> Although the right of counsel may be clearly expressed in law, the exercise of the right to counsel may be impaired substantially by the imposition of costs and fees. In some jurisdictions, a defendant, without resources to provide for his own defense, may have a completely adequate defense, from preliminary hearing to final appeal, entirely free from costs or fees. In others, court costs, the costs of transcripts, . . . and the like may operate to deprive him of the opportunity which the law purports to give him.[36]

The federal court decisions that have held that habeas corpus may be available where the petitioner is barred from appealing his conviction by inability to pay costs required by state laws, are steps in the proper direction.

The second hindrance is that in most state courts, no provision is made whereby a poor man can get funds to pay for a pre-trial search for evidence which may be vital to his defense and without which he may be deprived of a fair trial. Perhaps it might be argued that the government's defraying of such expenses in regard to the indigent defendant is essential to that assistance by counsel which the sixth amendment guarantees.[37] Chicago, Illinois and Memphis, Tennessee as well as three California counties, provide that a public defender may employ investigators who, free of charge, assist indigent defendants charged with crime to obtain evidence in preparing their defenses.[38]

Finally, the allocation of more funds for payment of appointed counsel or the universal creation of a salaried public defender office equal to that of the prosecution might be required by the sixth amendment. The indigent defendant, with his recently graduated attorney or unwilling appointed

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required, he would be ineligible for bail. Without such showing, however, he would be eligible and indeed must be permitted to secure his release upon meeting reasonable conditions. To impose a financial requirement beyond his means would be unreasonable.

33. 196 F.2d 560 (D.C. Cir. 1951).

34. HALL, CRIMINAL LAW & ENFORCEMENT 640 (1951); SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 230-31 (1934); Comment, 106 U. PA. L. REV. 693, 706 (1958).

35. 238 F.2d 565 (2d Cir. 1956).

36. Am. Bar Foundation, *The Administration of Criminal Justice in the United States* 164 (1955).

37. United States v. Johnson, 238 F.2d 565 (2d Cir. 1956).

38. BLISS, DEFENSE DETECTIVE, 47 J. Crim. L., C.&P.S. 264 (1956).