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Criminal Law - Effective Assitance of Counsel - Burden of Proof - Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967)

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limits of the circumstances before the court in determining a claim peculiar to admiralty.[25] It is a subject of conjecture, as to the ultimate effect of the decision upon the field of maritime torts, where previously contribution has been granted only in collision cases. Perhaps a reconsideration has begun within the law of admiralty due to the inequities resultant in a failure to share in the payment of joint tort liability where each is as unintentionally responsible as the other. Such a development would indeed be in line with the well-accepted theory of apportionment of damages in cases of comparative negligence. It would appear that, rather than wait upon congressional action, the courts have begun to remedy the injustices reached by a broad application of the rule in *Halcyon.* At the very least, the court has filled a gap, heretofore untouched in the ancient remedy of cure and maintenance to injured seamen.

Thomas D. Horne

Criminal Law—Effective Assistance of Counsel—Burden of Proof. While serving a sentence in a State Convict Road Force Camp in Bedford County, Virginia, James Fields escaped from custody. He was recaptured within an hour and placed in the county jail, where he was held for twelve days. During this period an indictment was returned against him for escape and statutory burglary,[1] but no one discussed the charges with him prior to the date of his trial. When he was brought into the courtroom to be tried, the presiding judge appointed an attorney to defend him. After a brief consultation with this attorney in the rear of the courtroom, Fields pleaded guilty and received sentences totaling six years.[2]

Fields subsequently petitioned the circuit court for a writ of habeas corpus, contending that he had been denied the effective assistance of counsel by virtue of the last-minute appointment. The circuit court granted the writ but was reversed by the Virginia Supreme Court of

25. *Id.*, at 582.

1. During his hour of freedom, Fields entered a building described in the record only as "a cabin," apparently to hide from his pursuers. The paucity of information regarding this charge was later made the subject of comment by the federal court. Fields v. Peyton, 375 F.2d 624, 629 (4th Cir. 1967).

2. The total elapsed time between appointment of counsel and sentencing by the court was estimated at fifteen to thirty minutes. The petitioner testified that the appointed attorney did not question him as to the facts of the case, and did not ask if he was guilty, prior to recommending a guilty plea. Fields v. Peyton, 375 F.2d 624, 625-6 (4th Cir. 1967).

Appeals.[3] The prisoner then petitioned the United States District Court for a federal writ of habeas corpus, which was denied. The Fourth Circuit Court of Appeals reversed the District Court, holding that an implication of denial of effective assistance of counsel and due process was inherent in the circumstances of the case, and that the failure of the prosecution to introduce evidence to refute this implication required that the sentence be invalidated and habeas corpus granted.[4]

The case highlights a conflict between state and federal law in the Fourth Circuit. The basic proposition, that the right to counsel means the right to *effective* counsel, is not disputed.[5] It has been specifically recognized in both the federal courts[6] and in Virginia.[7] In addition, both the Virginia Supreme Court of Appeals and the Fourth Circuit Court of Appeals have held that the appointment of counsel too soon before trial may constitute denial of effective counsel.[8]

The conflict arises, however, in the assignment of the burden of proof. Under the Virginia rule, as applied by the Virginia Supreme Court of Appeals in *Peyton v. Fields*, the petitioner seeking release on grounds of ineffective assistance of counsel has the burden of proving his contention that his case was thus prejudiced,[9] and this proof must be by a preponderance of the evidence.[10] This position is in accordance

3. Peyton v. Fields, 207 Va. 40, 147 S.E.2d 762 (1966). *Noted in* 8 WM. & MARY L. REV. 308 (1966).

4. Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967).

5. The concept of effective assistance of counsel was first articulated in Powell v. Alabama, 287 U.S. 45 (1932), and has since been developed and clarified in numerous cases, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

6. *See, e.g.*, Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

7. *See, e.g.*, Morris v. Smyth, 202 Va. 832, 120 S.E.2d 465 (1961), *cert. denied*, 371 U.S. 849 (1962).

8. See Whitley v. Cunningham, 205 Va. 251, 135 S.E.2d 823 (1964), holding that where counsel was appointed on the morning of the trial and spent an hour or less in preparing defendant's case, defendant was denied effective assistance of counsel, and Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963), wherein it was said that, when the initial conference between defendant and his court-appointed attorney is held only a short time before trial, ". . . we should be obliged to treat the lawyer's representation as inadequate and the trial as falling short of the standards of due process guaranteed by the Fourteenth Amendment." *Id.* at 854, quoted with approval in Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966).

9. "It is also well settled that one serving a sentence in the penitentiary who seeks his release by *habeas corpus* on the ground of ineffective assistance of counsel has the burden of proving the charge made." Peyton v. Fields, 207 Va. 40, 44; 147 S.E.2d 762 (1966).

10. *Id.* "The denial of petitioner's constitutional rights must be proved by a preponderance of the evidence."

with the overwhelming weight of case law in both state and federal jurisdictions.[11]

Under the rule applied by the Fourth Circuit Court of Appeals, however, a "mere showing" of the late time of appointment of counsel shifts the burden of proof to the state.[12] The Court takes the position that there is a "presumption of harm" which arises from the bare fact of the late appointment of counsel.[13] It appears that, unless this "presumption of harm" is refuted by affirmative evidence appearing in the record itself, the prosecution must carry the burden of proving that the defendant's claim of prejudice is unjustified.[14] This view appears to have only limited support in federal case law.[15]

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11. In support of the Virginia rule, see Hawk v. Olson, 326 U.S. 271, 279 (1945); Johnson v. Zerbst, 304 U.S. 458, 468-9 (1938); Bostic v. Rives, 107 F.2d 649 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 664 (1940); United States *ex rel.* Jefferson v. Fay, 364 F.2d 15 (1st Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404 (2nd Cir. 1964); Palumbo v. State or New Jersey, 334 F.2d 524 (3d Cir. 1964); Williams v. Babineaux, 357 F.2d 481 (5th Cir. 1966); Von Moltke v. Gillies, 161 F.2d 113 (6th Cir. 1947), *rev'd on other grounds*, 332 U.S. 708 (1948); Piner v. United States, 222 F.2d 199 (7th Cir. 1955); Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947); Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966); Roscoe v. Hunter, 144 F.2d 91 (10th Cir. 1942); Johnson v. Crouse, 191 Kan. 694, 383 P.2d 978 (1963); Goodlet v. Goodman, 34 N.J. 358, 169 A.2d 140, *cert. denied*, 368 U.S. 855 (1961); Clark v. Page, 384 P.2d 405 (Okla. Crim. 1963); Commonwealth *ex rel.* Dion v. Tees, 180 Pa. Super. 82, 118 A.2d 756, *cert. denied*, 351 U.S. 914 (1956); State *ex rel.* Burns v. Erickson, 80 S.D. 639, 129 N.W.2d 712 (1964); State *ex rel.* Clark v. Adams, 144 W. Va. 771, 111 S.E.2d 336 (1959), *cert. denied*, 363 U.S. 807 (1960). *See also* 21 AM. JUR. 2d *Criminal Law* §§ 319, 321 (1965); 25 AM. JUR. *Habeas Corpus* § 150 (1940); 9 M. J. *Habeas Corpus* § 8 (1950); Annot., 74 A.L.R.2d 1390 (1960). In addition, the Virginia Supreme Court of Appeals, in denying Fields' petition, relied in part upon past decisions of the 4th Circuit Court of Appeals, to wit: Horne v. Peyton, 356 F.2d 631 (4th Cir. 1966); Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965) Goodson v. Peyton, 351 F.2d 905 (4th Cir. 1965); Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959).

12. ". . . A mere showing . . . of the late time of appointment constitutes a *prima facie* case of denial of effective assistance of counsel, *so that the burden of proving lack of prejudice is shifted to the state.*" 375 F.2d at 628, quoting with approval Twiford v. Peyton 372 F.2d 670 (4th Cir. 1967). (Emphasis supplied by the Court.) The Court did not flatly state whether this was a total rejection of the Virginia rule, or merely a modification or extension of it.

13. 375 F.2d at 628.

14. *Id.* In his opinion, Judge Sobeloff distinguished the Court's previous decision in Dawson v. Peyton, 359 F.2d 149 (4th Cir. 1966) (which was relied upon by the District court in its approval of the decision of the Virginia Supreme Court of Appeals) by pointing out that in the Dawson case the record contained "adequate affirmative evidence to overcome the presumption of harm" from the late appointment of counsel. 375 F.2d at 628. Judge Sobeloff declared that the Dawson case did *not* place the burden of proof on the defendant. *Id.* at 626.

15. The federal Court of Appeals cited no authority for its position except its own

Furthermore, as pointed out by the Federal Court of Appeals in the instant case, the Supreme Court of the United States has declared that while a federal District Court may accept the state court's findings of fact in a habeas corpus proceeding, federal law must be applied when the petition is heard in the federal court.[16]

The decision in *Fields v. Peyton* would therefore require that the federal District Court hereafter apply the Fourth Circuit rule (shifting the burden of proof to the prosecution) in hearings on habeas corpus petitions directed to the federal courts after dismissal in the Virginia courts. Since the federal courts have demonstrated an increasing readiness to review habeas corpus petitions by state prisoners,[17] the *Fields* decision has placed the Virginia courts in the position of having either to alter their current rule as to burden of proof, or face frequent reversal.

If the Virginia Supreme Court of Appeals maintains its present position without modification, and no clarification or reconciliation of the apparent conflict is forthcoming from the federal courts, repetitions of the result in *Fields* may be expected.

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Constitutional Law-Criminal Law—RIGHT OF AN ACCUSED TO THE PRESENCE OF COUNSEL AT A POST-INDICTMENT LINE-UP. In *United States v. Wade*,[1] defendant was indicted for the robbery of a federally insured bank in Eustace, Texas. After indictment, and without notice to Wade's court appointed attorney, defendant was exhibited in a police line-up before two bank employees who had witnessed the holdup. The line-up took place six months after the robbery, and defendant was placed in a position whereby he could be seen alone by the witnesses before the line-up began. In *Gilbert v. California*,[2] a companion case,

previous decisions. See, however, Mosley v. Dutton, 367 F.2d 913 (5th Cir. 1966), wherein it was said that, upon showing that the petitioner was jailed without preliminary hearing, held incommunicado for four months, appointed counsel three days before trial, and convicted of murder and sentenced to life imprisonment without a single witness being offered in his defense, and later requested appeal but no appeal was prosecuted, the burden of proof was shifted to the prosecution to show that his cause was not thereby prejudiced.

16. Townsend v. Sain, 372 U.S. 293 (1963), *cited in* Fields v. Peyton, 375 F.2d 624, 626 (4th Cir. 1967).

17. For a discussion of this trend, see Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967).

1. 87 S.Ct. 1926 (1967).

2. 87 S.Ct. 1951 (1967).