NOTES

RIGHT TO COUNSEL IN INDIANA

Without attempting to evaluate the various constitutional rights innuring to the individual accused of crime, the right to counsel seems clearly the most significant. Often it is only through the efforts of an attorney representing the accused that violations of other rights,[1] such as self incrimination or unreasonable search and seizure, are brought to light. Indeed it was the obvious inability of accused persons to protect their own interests which prompted Mr. Justice Sutherland, speaking for the United States Supreme Court in *Powell v. Alabama,* to state that it is a vital necessity that every criminal defendant have "the guiding hand of counsel at each step in the proceedings against him."[2]

The Bill of Rights of the Indiana Constitution provides that "in all criminal prosecutions, the accused shall have . . . a right . . . to be heard by himself and counsel. . . ."[3] Through the Indiana Supreme Court's interpretation of this provision has emerged the defendant's basic right to legal representation. As yet, no attempt has been made to evaluate the resulting protection. This can best be done by examining (1) the scope of the right, and (2) the manner in which it has been administered.

Scope of the Indiana Right to Counsel

The overall coverage of the Indiana right to counsel is commendable.[4] The right is no respecter of persons: it protects the pauper and the person of wealth,[5] the guilty and the innocent[6] to the same extent. Every defendant

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1. See Twomley, *Indiana Bill of Rights,* 20 Ind. L.J. 213 (1945).
2. 287 U.S. 45, 68 (1932).
3. Ind. Const. Art. I, § 13.
4. See Mendelker, *Right of Accused to Counsel in State Cases,* [1948] Wis. L. Rev. 235.
5. When asked to declare that the Indiana right to counsel does not benefit indigent defendants, Stuart, J., in Webb, Auditor v. Baird, 6 Ind. 13, 18 (1854), stated: It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. . . . [T]he only question is, who shall pay? . . . It seems eminently proper and just that the treasury of the county should be chargeable with his defense." See also State *ex rel.* Brown v. Thompson, 226 Ind. 392, 81 N.E.2d 533 (1948); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, N.E.2d (1940); Note, U. Pa. L. Rev. 855 (1949).

But the accused is not entitled to be furnished counsel of his choice at the county's expense, although the trial judge may, in his discretion, make such an appointment. Lloyd v. State, 206 Ind. 359, 189 N.E. 406 (1933); Burton v. State, 75 Ind. 478 (1881). Also, the *number* of attorneys required to secure a pauper defendant a fair and impartial trial is a matter to be determined by the trial court. Keyes v. State, 122 Ind. 527, 23 N.E. 1097 (1889).

6. See dissenting opinion of Emmert, C.J., in Schmittler v. State, 93 N.E.2d 184, 192 (Ind. 1950), and cases cited therein. *But cf.* n. 51 *infra.*

must be given an opportunity to confer with an attorney before entering a plea to the charge,[7] to be represented during trial,[8] and to have legal assistance in appealing from a conviction.[9] And there is no distinction between the right available in a capital and that in a non-capital case.[10]

In view of the above development, there ean be but one substantial quarrel with the scope of the Indiana right to counsel—perhaps it does not attach soon enough.[11] If accused persons can be denied counsel for any

7. Abraham v. State, 91 N.E.2d 358 (Ind. 1950); Beard v. State, 227 Ind. 717, 88 N.E.2d 769 (1949); Kettring v. State, 209 Ind. 618, 200 N.E. 212 (1935); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1926); Beilich v. State, 189 Ind. 127, 126 N.E. 220 (1919); Parker v. State, 189 Ind. 85, 125 N.E. 772 (1919); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1919).

8. Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949); Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943); Rice v. State, 220 Ind. 523, 44 N.E.2d 829 (1942); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947); Petro v. State, 204 Ind. 401, 184 N.E. 710 (1932); Sanchez v. State, 199 Ind. 234, 157 N.E. 1 (1927).

9. The Indiana right to counsel on appeal was not established until 1940. In *Ex parte* Morgan, 122 Ind. 428, 23 N.E.2d 863 (1889), the Indiana Supreme Court denied counsel to a pauper defendant who wished to appeal from a conviction with the statement that "when all means have been provided for the preservation of the parties' rights, and a fair trial had, the state has discharged its obligation to such person and he cannot of right demand more." Thus, for over one-half century only those able to hire their own attorney had legal assistance in preparing and filing appeal papers. However, in State *ex rel.* White v. Hilgeman, 218 Ind. 572, 34 N.E.2d 129 (1940), an attempt to compel a trial judge to appoint counsel to prosecute an appeal was successful. In overruling *Ex parte* Morgan, the court stated that the same right exists at *every* stage of the proceedings.

But the court refused to extend the right to counsel to include extraordinary proceedings, such as coram nobis and habeas corpus. State *ex rel.* Rankin v. Warden, 219 Ind. 698, 40 N.E.2d 970 (1942); State *ex rel.* Sawa v. Criminal Court of Lake County, 220 Ind. 14, 40 N.E.2d 203 (1942); State *ex rel.* Jones v. Smith, 220 Ind. 645, 45 N.E.2d 203 (1942). It is not now necessary to question the propriety of this ruling. In 1945 the Indiana General Assembly created the office of the Public Defender, whose duty is to "represent any person in any penal institution of this state who is without sufficient funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, *after his time for appeal shall have expired.*" (emphasis added) IND. ANN. STAT. § 13-1401-1406 (Burns Supp. 1949). The Act was defective as passed because it failed to provide for assistants to the public defender. One man was unable to represent adequately all indigent incarcerated persons in the state. This defect was remedied at the 1951 session of the General Assembly. The defender is now provided with both legal and clerical assistants.

10. See Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947) (robbery); Petro v. State, 204 Ind. 401, 184 N.E. 710 (1932) (rape); Meyers v. State, 115 Ind. 554 (1888) (grand larceny). To date there has been no ruling by the Indiana Supreme Court concerning the state right to counsel in misdemeanor cases. See n. 19 *infra*.

The United States Supreme Court, on the other hand, has found that the Fourteenth Amendment requirement of counsel differs according to whether or not the accused is facing the death penalty. In a capital case, the requirement is absolute; in a non-capital case, legal assistance for the accused is necessary only if the proceeding would be "fundamentally unfair" without it. *Compare* Hayes v. Ohio, 332 U.S. 596 (1947); Marino v. Ragen, 332 U.S. 561 (1947); Williams v. Kaiser, 323 U.S. 471 (1944); Tompkins v. Missouri, 323 U.S. 329 (1944); Powell v. Alabama, 287 U.S. 45 (1932); *with* Quicksall v. Michigan, 70 S. Ct. 910 (U.S. 1950); Bute v. Illinois, 333 U.S. 640 (1948); Gryger v. Burke, 334 U.S. 728 (1947); Foster v. Illinois, 332 U.S. 134 (1946); Betts v. Brady, 316 U.S. 455 (1942). See Notes, 9 OHIO ST. L.J. 529 (1948); 19 IND. L.J. 274 (1944).

11. See Snively, *Right of Accused to Assistance of Counsel*, 32 J. AM. JUD. SOC. 111 (1948).

appreciable length of time between arrest and arraignment, the harm which may be inflicted in the interim will often be beyond repair. Coercion by police and prosecuting officials can result in the extraction of information from the accused which either establishes guilt or leads directly to other evidence which does so. Ignorance of the accused concerning constitutional rights can produce the same result. And evidence can escape which would be vital to a proper defense. These possibilities, not of rare occurrence under the present system of administering the criminal law, lead to the conclusion that an accused should have access to an attorney as soon as possible after he is taken into custody.[12] Legal consultation before the judicial process has become too far advanced would replace ignorance with knowledge and understanding. And the mere presence of an attorney representing the accused would be instrumental in abolishing the use of coercive methods to obtain information; such infractions are not so likely to occur when they can be brought to light immediately and acted against officially.[13]

In *Suter v. State*,[14] decided in 1949, the Indiana Supreme Court purported to extend the right to counsel to "time of arrest."[15] The holding is praise-

12. See, *e.g.*, Schmittler v. State, 83 N.E.2d 184 (Ind. 1950) (involuntary confession); Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949) (illegal search and seizure, involuntary confession); Marshall v. State, 227 Ind. 1, 83 N.E.2d 763 (1948) (in process of questioning defendant admitted his guilt). In 1931 the Wickersham Committee reported that "in considerably over half of the states, instances of the third degree practice have occurred in the last ten years. Prolonged illegal detention is a common practice. Although the law requires prompt production of a prisoner before a magistrate . . . the rule is constantly violated. Through illegal detention, time is obtained for police investigation. Various devices are employed to extend this time, such as taking the prisoner to an outlying station, sometimes to another city, sometimes even to another state, misleading friends as to the place of detention, and, in the meantime, shifting the prisoner to another place. Police and prosecutors feel strongly that they ought to be able to interrogate suspected and accused persons, and extra legal examinations by officials . . . go on continually whenever the persons examined are ignorant or inadvised as to their rights, or insignificant, or without means of employing counsel and making effective protest." UNITED STATES NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, Rep. No. 4, p. 25 (1931).

13. "The liklihood of abuse is less when the prisoner is in contact with an attorney." *Id.* at 27.

14. 227 Ind. 648, 88 N.E.2d 386 (1949): the charge was burglary; the accused repeatedly requested that he be allowed to summon counsel from Saturday evening, when he was arrested, until Monday morning. All requests were denied. The accused finally "confessed" the commission of the crime on Monday.

15. ". . . appellant had a right to have counsel when he was arrested, particularly when he immediately requested it, and specified the counsel he desired and apparently was prepared to pay for the services which he requested." *Id.* at 658, 88 N.E.2d at 390. Accord: Dearing v. State, 95 N.E.2d 832 (1951). *But cf.* Marshall v. State, 227 Ind. 1, 83 N.E.2d 763 (1948), where the charge was kidnapping and the accused contended on appeal that a confession procured could not be used because he had not been advised of his right to counsel before he confessed. The court held that the right to counsel did not extend back so as to prevent police officers from questioning an arrested person without providing a lawyer or advising him of his constitutional rights. The *Suter* opinion made no reference to the *Marshall* decision.

worthy, but of doubtful utility. Practical questions were either answered improperly or left unanswered. "Time of arrest," for example, was not given meaning other than "appellant had a right to have counsel when he was arrested."[16] If this means at the precise moment the person is taken into custody, the police will be faced with an unsurmountable administrative problem.[17] Nor was it made clear whether the extension of the right is to cover all arrested persons, including those apprehended for misdemeanors and other petty offenses. If so, the cost of providing indigent counseling will probably be extreme, since the great majority of such offenders are without means to employ counsel. Finally, the duty of providing immediate access to counsel was placed upon the police; but in the *Suter* case the state did not deny that the police had refused to provide counsel. Subsequent cases will undoubtedly contain such a denial, with a claim by the state that the accused waived the right, leaving the court a question of fact with nothing in the record upon which to base a finding.[18]

It should be possible to construct a right to counsel at "time of arrest" which would be both practical and susceptible of enforcement. Undoubtedly, the courts, attorneys, and the police, as well as the county treasury, would be burdened if the right were extended to all arrests, for whatever offense. One suggested point of cleavage is between misdemeanors and felonies. Although this distinction calls for a delicate weighing of values and possibly a sacrifice of principles, it probably is an appropriate one to make under the prevailing circumstances.[19] Also, it should not be required that counsel be present con-

16. Suter v. State, 227 Ind. 648, 658, 88 N.E.2d 386, 390 (1949).

17. But see IND. ANN. STAT. § 9-1004 (Burns Repl. 1942): "Arrest is the taking of a person into custody, that he may be held to answer for a public offense"; IND. ANN. STAT. § 9-1005 (Burns Repl. 1942): "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."

18. See Schmittler v. State, 93 N.E.2d 184 (Ind. 1950), where the appellant, convicted of burglary, alleged, by affidavit, that "said officers did not at any time fully inform appellant of the nature of the accusation against him nor advise him of his rights, including his right to counsel. . . ." *Id.* at 185. Affidavits of three of the arresting officers contained statements to the effect "that at that time appellant was advised of his constitutional rights. . . ." *Id.* at 188, 189. However, the court, in affirming the conviction on other grounds, did not consider the allegations. See discussion of the case *infra*.

19. In note 10 *supra* it was observed that the accused's right to counsel in misdemeanor cases has not yet been considered by the Indiana Supreme Court. It is believed that the Indiana right to counsel provision contemplates protection in misdemeanor as well as in felony prosecutions. Thus, the question presented is whether it is essential that the safeguards be identical in both instances. It seems apparent that the need for legal assistance immediately upon arrest is not the same where a misdemeanor rather than a felony is involved. The pressure on the prosecuting officials is not nearly so great, a conviction not nearly so important; thus the likelihood of abuse is lessened. But to say that the accused who is arrested for the commission of a misdemeanor should not be accorded *immediate* assistance of counsel is not to say that he should be denied counsel at *subsequent* stages of the criminal process. The need for counsel before entering a plea, during trial, and on appeal, as discussed in the cases cited in note 8, 9, and 10 *supra*, would seem to be as vital

tinuously in all dealings between the police and the accused. Sufficient protection would be afforded by frequent, but intermittent consultation in private between the defendant and his attorney.[20]

An objection of no merit is that since constitutional rights cannot be conditioned upon the person's ability to pay, extension of the right to counsel to the earliest stage of the criminal process, even if limited to felonies, would substantially increase pauper attorney fees. For besides the fact that necessary protections cannot be measured in monetary terms, it is by no means certain that the present expense involved in reversals and new trials, due to constitutional violations before the accused is granted counsel, does not exceed the probable cost of providing counsel to indigent defendants at an earlier moment.[21]

As for enforcement, it will not suffice to say merely that "the police have a duty to provide counsel for the defendant when he is arrested."[22] The police can effectively deny the right by asserting subsequently that the accused waived counsel.[23] An alternative place to impose the responsibility is presented by the Indiana preliminary hearing statute which provides that "when an officer arrests an accused . . . he shall take [him] . . . before . . . the nearest magistrate. . . ."[24] If this act were to be interpreted to mean an "immediate taking"[25] and were obeyed, the duty of appointing or procurring counsel could be effectively placed upon the magistrate. The police could be forced to comply with the statute by making inadmissible at trial any evidence procurred through questioning between the actual arrest and the preliminary hearing.[26] The magistrate could be required to show in his records whether there was an actual waiver of counsel by the accused.[27]

Though defective, the *Suter* decision is a step in the right direction. It is to be hoped that the Indiana Supreme Court will properly utilize "right to

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to the accused facing a misdemeanor charge as to the one facing prosecution for the commission of a felony. Certainly the right cannot be denied on the ground that the penalties involved are different.

20. See Snively, *Right of Accused to Assistance of Counsel*, 32 J. AM. JUD. Soc. 111 (1948).

21. A most notorious case is Watts v. Indiana, 338 U.S. 49 (1949), where a confession in violation of constitutional rights resulted in an otherwise unnecessary re-prosecution. See Watts v. State, 95 N.E.2d 570 (Ind. 1950).

22. Suter v. State, 227 Ind. 648, 658, 88 N.E.2d 386, 390 (1949).

23. It would then become the word of the accused against the word of the police, with the accused always outnumbered. See n. 18 *supra*.

24. IND. ANN. STAT. § 9-704 (Burns 1933).

25. See Suter v. State, 227 Ind. 648, 659, 88 N.E.2d 386, 390 (1949): "[An] officer cannot legally hold the person arrested in custody for a longer period of time than is reasonably necessary under all the circumstances of the case, to obtain a proper warrant or order for his further detention."

26. This is the federal rule. See McNabb v. United States, 318 U.S. 332 (1942).

27. For the procedure the magistrate should follow in determining waiver, see discussion of waiver *infra* p. 239 *et seq.*

counsel on arrest" as a means of checking deviations from constitutional standards by police and prosecuting officials.

ADMINISTRATION OF THE INDIANA RIGHT TO COUNSEL

Responsibility for safeguarding constitutional rights rests ultimately with the Indiana Supreme Court. However, practical considerations necessitate delegation of immediate enforcement to the trial courts. Thus, the effectiveness of the right to counsel depends largely upon proper administration—definite standards of conduct must be imposed upon trial judges and the reviewing court must insist upon strict compliance. Indiana right to counsel precedents reveal faulty administration in three areas: (1) waiver of the right, (2) incompetency of defense attorneys, and (3) amount of time required to prepare a defense. While in principle the courts have adhered to the constitutional guarantee of legal assistance for "every" person accused of crime, in practice the treatment accorded these underlying questions threatens to undermine the intended scope.

Waiver

Waiver is defined as "the voluntary relinquishment of a known right."[28] In *Batchelor v. State,* [29] decided in 1919, the Indiana Supreme Court said that knowledge of the right to counsel is not just to know that one is entitled to the services of an attorney. It is also to know and understand the following: the nature of the charge, the punishment involved, and the available defenses; that an accused need not plead guilty although convinced of his own guilt; that the state must prove guilt beyond a reasonable doubt, to an impartial jury; that an appellate tribunal has the duty to reverse in case of insufficient evidence or prejudicial error at the trial; that an accused does not have to testify against himself; that evidence illegally procurred cannot be used by the state; and that only lawyers are qualified to advise accused persons concerning complicated trial procedure.[30]

In the *Batchelor* case the trial judge told the defendant "that he had a right to counsel," but nothing more. In reversing the conviction, the court held that an accused's failure to request counsel, after such an instruction,[31] cannot be considered a waiver in the absence of a showing that he rejected legal

28. Beard v. State, 227 Ind. 717, 720, 88 N.E.2d 769, 770 (1949).

29. 189 Ind. 69, 125 N.E. 773 (1919).

30. *Id.* at 77, 125 N.E. at 776.

31. *Cf.* Von Moltke v. Gillies, 332 U.S. 708, 723 (1947): "The fact that the accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility."

aid with full knowledge of the consequences.[32] The trial judge is under a duty to convey the necessary information; and unless the record affirmatively reveals that this has been done, the reviewing court has no recourse but to reverse on the ground that the accused was denied the right to counsel.[33]

The merit of the Batchelor interpretation of waiver is apparent. An accused may honestly believe that he is guilty of a crime, especially where he has committed the act in question, when in the eyes of the law criminal guilt does not attach.[34] Of no less importance is the fact that the inexperienced layman is easy prey for the overzealous prosecutor who would coerce or trick an accused, with threats or misrepresentations, into entering a plea of guilty.[35] Circumstances of this nature might never be revealed unless the accused is represented by counsel or the trial court itself assumes the responsibility; for if the defendant learns after conviction that he was mislead into pleading guilty, he has absolutely no record to present to the reviewing court upon which to base a reversal.[36]

Although the *Batchelor* rule of waiver purported to epitomize the constitutional rule,[37] numerous instances subsequently arose in which trial judges either failed or refused to abide by the standard imposed. For example, in *Quinn v. State*[38] the trial judge asked the accused if he wanted counsel, but did not explain to him the consequences of his refusal. And in *Loucks v.*

32. *Cf.* Lobaugh v. State, 226 Ind. 548, 82 N.E.2d 247 (1948) (defendant refused assistance to counsel while under the influence of benzedrene—conviction reversed); Vonderschmidt v. State, 226 Ind. 439, 81 N.E.2d 782 (1948) (defendant refused counsel while intoxicated—conviction reversed).

33. Cases subsequent to *Batchelor* and in accord are: Parker v. State, 189 Ind. 127, 125 N.E. 772 (1919); Beilich v. State, 189 Ind. 127, 126 N.E. 220 (1919); Rhodes v. State, 199 Ind. 235, 157 N.E. 1 (1927); Dearing v. State v. State, 95 N.E.2d 832 (1951).

34. See, for example, Beilich v. State, 189 Ind. 127, 126 N.E. 220 (1919) (the accused, a foreigner, alleged that he thought he was charged with driving one Batchelor to Chicago and pleaded guilty to such charge, when in fact he was charged with driving a murderer to Chicago, but he did not at the time know of the killing); Kettring v. State, 209 Ind. 618, 200 N.E. 212 (1935) (the defendant alleged that he thought he was pleading guilty to involuntary manslaughter when actually it was voluntary manslaughter).

35. See Ledbetter v. State, 213 Ind. 152, 12 N.E.2d 120 (1937); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1926); Schoemaker v. State, 189 Ind. 426, 127 N.E. 801 (1920).

36. See Hansbrough v. State, 94 N.E.2d 534, 537 (Ind. 1950): "If such facts exist appellant had a right to have them placed in the record fully at the trial as an additional reason for his objection. . . . Counsel on appeal has attempted to bring them into this case by his mere statement without record support. This cannot be done. This court can only review the record made by the trial court to ascertain, under well known rules, whether or not it committed error. The record purports verity. We cannot hear additional evidence and certainly we cannot consider mere statements of counsel dehors the record."

37. Batchelor v. State, 189 Ind. 69, 77, 125 N.E. 773, 776 (1919).

38. 209 Ind. 316, 198 N.E. 70 (1935).

State[39] and *Hoelscher v. State*[40] the accused was not even told of his right to counsel. The Indiana Supreme Court affirmed the convictions in these cases, stressing the fact that *these* defendants knew or should have known of their rights and the consequences of their action.[41] Thus, without expressly repudiating the *Batchelor* approach to waiver, or even admitting that a deviation had occurred,[42] the court nevertheless sanctioned a serious departure from it. Waiver was tied to the knowledge, experience, education and intelligence of the individual accused; the affirmative requirement that the defendant be informed of his rights was circumvented.[43]

The subjective approach to waiver of the *Quinn* line of cases is objectionable in two respects. First, the Fourteenth Amendment to the United States Constitution imposes an absolute requirement on the states to provide counsel for defendants facing capital punishment, unless there is a waiver thereof.[44] To determine waiver in a capital case the Supreme Court has interposed a due process test in accord with the *Batchelor* rule.[45] Thus, the conviction of a defendant without counsel will be condemned by the Fourteenth Amendment unless the record *affirmatively reveals* that the accused was fully informed of his rights and with such knowledge voluntarily chose to proceed without legal assistance.[46]

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39. 213 Ind. 108, 11 N.E.2d 694 (1937).

40. 223 Ind. 62, 57 N.E.2d 770 (1944). In this case the accused, nineteen years of age and faced with a murder charge, was asked if he had an attorney (answer "no"), if he understood his constitutional rights (answer "yes"), and if he intended to waive those rights (answer "yes"). After this "interrogatory" his plea of guilty was accepted.

41. In the *Loucks* case the court stated that the "appellant was at the time of the trial thirty-six years of age and had been in court before. Unless his sense of hearing was so defective that it was impossible for him to hear what was being said . . . it would be incredible that he did not freely and understandingly enter a plea of guilty." 213 Ind. at 108, 116 N.E.2d at 698.

In Quinn v. State, Tremain, J., pointed out that "the appellant was at the time of his trial a fairly well educated and intelligent young man, and had spent most of his life in the city of Indianapolis. He was able to and did understand to the fullest extent the nature of the crime, the charge against him, and the punishment prescribed by the statute. . . ." 209 Ind. at 321, 198 N.E. at 72.

42. But see Hoelscher v. State, discussed in n. 40 *supra*, where the court stated: "We find nothing in Batchelor v. State . . . inconsistent with the views here expressed." 223 Ind. at 70, 57 N.E.2d at 773.

43. See also Chandler v. State, 226 Ind. 648, 83 N.E.2d 189 (1948); Todd v. State, 226 Ind. 496, 82 N.E.2d 407 (1948); Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946); Irvin v. State, 220 Ind. 228, 41 N.E.2d 809 (1942); Fuller v. State, 213 Ind. 144, 16 N.E.2d 594 (1937).

44. See cases cited n. 10 *supra*.

45. See Marino v. Ragen, 332 U.S. 561 (1947).

46. Carter v. Illinois, 329 U.S. 173 (1946), is the only Fourteenth Amendment capital case in which the United States Supreme Court has found a waiver of the right to counsel. The decision was based on the fact that ". . . the trial judge fully explained what the plea of guilty involved." *Id.* at 177.

Second, although in non-capital cases due process requires counsel only when a proceeding without it would be "fundamentally unfair,"[47] and although the approach of the United States Supreme Court in this area is substantially the same as that of the *Quinn* case,[48] it seems apparent that the Indiana right to counsel provision cannot be measured entirely by due process of law concepts.[49] Rather the Indiana Constitution imposes an absolute duty on the Indiana Supreme Court to see that no person is convicted of crime unless he was represented by an attorney or waived such assistance. An appellate tribunal cannot possibly determine alone whether the accused in a given case actually waived his rights. Only the trial judge before whom the defendant appears is in a position to determine the question adequately. Thus, the Indiana Supreme Court would seem also to be bound to utilize, if at all possible, the trial judge's unique position. This, of course, can only be done through the adoption of a procedure which will lead to the determination of an intelligent and voluntary waiver, and by imposing that procedure upon the trial judge.[50]

By attempting to "discover" waiver through a subjective examination of the surrounding circumstances in the trial court without controlling the course of the proceeding, the Indiana Supreme Court has interjected pure chance where at least a degree of certainty is a necessity.[51] The court in the

47. See cases cited n. 10 *supra*. The rule is aptly stated by Reed, J., in Uvegas v. Pennsylvania, 335 U.S. 437, 441 (1948): ". . . each case depends on its own facts. Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the accused must have legal assistance under the Fourteenth Amendment. . . ."

48. See, for example, Bute v. Illinois, 333 U.S. 640 (1948) (the Court felt that a fifty-seven year old defendant could not help but understand what was involved in the charge of taking indecent liberties with children, although the record failed to show that the accused was counseled by the trial judge); Gryger v. Burke, 334 U.S. 728 (1947) ("in view of eight previous convictions with representation by counsel in two of the prosecutions, the person charged as a habitual criminal must have appreciated his precarious position").

49. Note that in the Fourteenth Amendment non-capital cases the question is never whether the accused *waived* the right to counsel. The "fair trial" approach forecloses the question. Unless the absence of an attorney for the accused rendered the proceedings unfair, no right capable of being waived arose. See cases cited n. 10 *supra*. If the denial of counsel *did* render the proceedings unfair, a right to counsel supposedly arose which theoretically could have been waived. However, in such a case the "right to counsel" becomes the equivalent of a "fair trial." It would be difficult for the United States Supreme Court to say that an accused could waive the right to a fair and just hearing. See Uvegas v. Pennsylvania, 335 U.S. 437 (1948). On the other hand, under the Indiana Constitution the right is absolute for all crimes. The question cannot be whether the accused "needed" counsel; he either must have legal assistance or waive it. See Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947).

50. See Parker v. State, 189 Ind. 85, 125 N.E. 772 (1919).

51. Often this approach is tempered by an endeavor to determine the actual guilt or innocence of the accused. See, *e.g.*, Schmittler v. State, 93 N.E.2d 184, 190 (Ind. 1950): "As to whether the record reveals that the appellant was not adequately represented, it

Batchelor case recognized this need and concerned itself exclusively with the question of a standard and whether it was met by the trial court. An inflexible enforcement of the *Batchelor* rule would not overburden trial procedure,[52] but would afford defendants the protection to which they are rightfully entitled.

Incompetency

The determination and legal effect of incompetency on the part of defense attorneys has also been considered in such a manner as to threaten the security of the right to counsel in Indiana. Four decisions on the point serve to illustrate this conclusion: In *Dundovich v. State*,[53] decided in 1921, the court ruled that incompetency of a pauper attorney could not be grounds for reversal unless it was shown that the trial court rendered an incorrect decision on the merits.[54] Four years later, in *Castro v. State*,[55] it was held that although the Indiana right to counsel contemplates competent counsel, the court would not consider the matter since trial judges were better able to determine the question.[56] Then in *Sanchez v. State*,[57] decided in 1927, the court reversed a conviction on the ground that the defense attorney, in this instance hired by the accused, was incompetent. Departure from the *Castro* approach of leaving the matter to the trial court's discretion was justified on the ground that the state had not denied the defendant's allegation which, therefore, had to be taken as true.[58] And recently, in *Schmittler v. State*,[59] an

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would appear to us that the appellant was guilty as charged." And in Rhodes v. State, 199 Ind. 183, 186, 156 N.E. 389, 391 (1926), the court stated: "No attempt was made to show that, if he had been permitted to withdraw the plea of guilty, he was in possession of any facts tending to establish his innocence."

52. Neither would a return to the *Batchelor* rule necessitate reversal of a conviction. The Indiana Supreme Court now possesses power to promulgate rules of criminal procedure. See, *e.g.*, Rule 1-11, Rules of the Supreme Court of Indiana (Adopted November 4, 1946, Effective December 1, 1946): "Whenever, upon arraignment a plea of guilty to an indictment or affidavit charging a felony is accepted from any defendant . . . the judge shall cause the court reporter to record the entire proceedings in connection with such arraignment. . . ."

53. 190 Ind. 600, 131 N.E. 377 (1921).

54. "Incompetency or even gross neglect of counsel in the performance of a duty to his client . . . would not alone justify this court in disturbing a presumed correct final decision of the trial court." *Id.* at 607, 131 N.E. at 380.

55. 196 Ind. 385, 147 N.E.2d 321 (1925).

56. ". . . the court before which the trial was conducted was better able to judge of the ability, energy, and diligence of a member of the local bar in the conduct of a matter before it than this court, sitting in a distant city, and having no basis for concluding that such an attorney was incompetent. . . ." *Id.* at 391, 147 N.E. at 323.

57. 199 Ind. 235, 157 N.E. 1 (1927).

58. *Id.* at 244, 157 N.E. at 4.

59. 93 N.E.2d 184 (Ind. 1950).

accused hiring his own attorney was held to have *waived* the right to object to the latter's incompetency.[60]

It is impossible to extract from the above cases a rationale which would account for the Indiana Supreme Court's varied treatment of the competency question. The decisions must, therefore, be considered separately. Nor is it necessary to quarrel with the results reached by the court[61] in order to object to the approach of each case in regard to its possible effect upon future administration of the right. Incompetency of counsel or mere perfunctory representation is, more often than not, the equivalent of *no* counsel.[62] And it can be assumed, in light of the *Sanchez* case, that the competency requirement is a vital part of the Indiana right to counsel.[63]

The defects of the *Schmittler* holding are twofold. A waiver of the right to object to the incompetency of one's attorney would seem to be no different, in substance, than a waiver of the right to counsel itself; and a waiver in the latter instance, to be valid, requires knowledge and understanding of the right waived by the accused.[64] Secondly, an accused has no way of knowing or discovering the ability, energy, and diligence of an individual attorney.[65] But even if defendants were possessed of such proclivities, there should be at least a finding of negligence in the selection upon which to base the waiver.

The rule of the *Dundovich* case—that there must be evidence of an incorrect decision by the trial court before there can be a reversal for incompetency—is not to be distinguished from a holding that only the innocent

60. ". . . appellant was represented by counsel of his own choice throughout the proceedings and made his plea voluntarily, and by making such plea waived any question of deprivation of rights." *Id.* at 191.

61. Objection can be made, however: in Dundovich v. State, 190 Ind. 600, 131 N.E. 377 (1921), the accused alleged that the attorney appointed by the court did not investigate facts which would have shown defendant was drunk on the night of the murder. The attorney admitted lack of investigation.

In Schmittler v. State, 93 N.E.2d 184 (Ind. 1950), the record plainly revealed that the attorney, hired by the accused fifteen minutes before he entered his plea of guilty, made no investigation whatsoever, and failed to move for a continuance. See dissenting opinion of Emmert, C.J., in which it was contended that "appellant was at least entitled to the legal services that could be afforded by any second year law school student qualified to prepare a moot court case. He did not even have that." *Id.* at 195.

62. Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943). See Note, 22 IND. L.J. 83 (1947).

63. "Mere perfunctory action by an attorney assuming to represent one accused of crime which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent or the imposition of a penalty more severe than is deserved, should not be tolerated." Sanchez v. State, 199 Ind. 235, 245, 157 N.E. 1, 6 (1942).

64. Even the subjective approach to waiver, criticized *supra,* is based on this premise.

65. See dissenting opinion of Gilkinson, J., in Schmittler v. State, 93 N.E.2d 184 (Ind. 1950).

have a right to counsel. Surely this is not the case.[66] Nor can it be said, consistent with the constitutional provision here involved, that the Indiana Supreme Court's function is to withhold legal consultation by conjecturing that the accused is guilty anyway, or at least has failed to prove his innocence.[67] Perhaps the accused needs the aid of a competent attorney in order to accomplish the latter.

Finally, the *Castro-Sanchez* approach of leaving the matter to the unfettered discretion of the trial court, except where the incompetency is not denied by the state, equates the right to the personal inclination of the trial judge. Certainly there is no reason to suppose that the state will fail to deny such allegations in the future; nor is there any compelling reason for trial judges to be alert against perfunctory representation when reversal on appeal is unlikely.

Admittedly, the competency question is one primarily for the trial court's consideration. The trial judge is better able to determine whether a reasonably prudent lawyer would have proceeded as did the accused's attorney. But this is not to say that the Indiana Supreme Court is thereby relieved of all responsibility in the matter—that trial judges are to be given a free reign. At the outset, one is faced with the fact that where the Fourteenth Amendment requires that an accused be represented by an attorney, it is clear that the attorney must be competent.[68] Due process of law cannot sanction a conclusive presumption arising from inaction on the part of the trial judge, or by camouflaging this fact through waiver or a futile search for some indication of the defendant's innocence. The United States Supreme Court has felt itself bound to examine the record in search of inadequate representation—a fortiori, the Indiana Supreme Court should not hesitate to do so.[69]

Aside from due process considerations, the right to counsel provision of the Indiana Constitution would seem to require that the state supreme court declare and adhere to a policy of searching the record for inadequate representation.[70] Allegations of incompetency should be met by the reviewing

66. See Beard v. State, 227 Ind. 717, 88 N.E.2d 769 (1949); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1919).

67. "The fact that appellant may have been guilty . . . did not deprive him of his constitutional rights, and when such an issue is raised the guilt of an accused is of no consideration in disposing of the constitutional issue." Emmert, J., dissenting in Johns v. State, 227 Ind. 737, 744, 89 N.E.2d 281, 285 (1949).

68. White v. Ragen, 324 U.S. 760 (1944); Powell v. Alabama, 287 U.S. 45 (1932).

69. "The Indiana courts ought to wash their own judicial linen. It is the duty of this court to see that this is done. We should not leave . . . wrongs which will have to be corrected in the federal courts. . . . It is our sworn duty to enforce 'due process' under the Fourteenth Amendment." Emmert, J., dissenting in Johns v. State, 227 Ind. 737, 739, 89 N.E.2d 281, 282 (1949).

70. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1941).

court, not with an obtuse allusion to waiver or a presumption, but with a specific finding that the type of representation guaranteed to all defendants has been granted or denied. It should be made clear to trial judges that incompetency revealed by the record will be grounds for reversal. Failure in this respect encourages trial judges to approach the problem in a similar disinterested manner, at the expense of the right to counsel in general.

Time to Prepare

It is not uncommon for an accused to be "forced to trial with such expedition as to deprive him of the effective assistance of his counsel."[71] In *Rice v. State*,[72] decided in 1942, the Indiana Supreme Court held it reversible error for the trial court to deny a continuance and rush the accused to trial for rape when his counsel would have only one-half day to prepare for trial. Likewise, five years later in *Hoy v. State*,[73] where the accused was sent to trial for robbery on the same day counsel was appointed, it was held that adequate time for preparation was "as essential as *appointment* of counsel."[74] And in *Bradley v. State*,[75] a 1949 case, the same principle was declared when the attorney was given but sixty-five and one-half hours to prepare a defense to a charge of burglary.

The test in the above cases seemed to be objective in that the convictions were reversed on the ground that the time allowed for preparation was not equal to that which professional experience has dictated to be the absolute minimum for a given situation.[76] In none of the cases was it shown that the defendant had been particularly harmed by lack of time to prepare.[77] Yet, the court indicated that even the normal amount of time necessary could be extended under special circumstances.[78]

In *Schmittler v. State*, [79] decided in 1950, the accused's parents hired an attorney fifteen minutes before he pleaded guilty to a charge of burglary. No request for a delay was made. The conviction was affirmed, a majority of the Indiana Supreme Court indulging in a presumption that the trial court proceedings were prima facia correct and could be overturned only by a

71. White v. Ragen, 324 U.S. 760, 764 (1944). See Bradley v. State, 227 Ind. 131, 136, 84 N.E.2d 580, 582 (1949): "The fundamental right of a defendant in a criminal case to have competent counsel assist him in his defense carries with it, as a necessary corollary, the right that such counsel have adequate time to prepare the defense."

72. 220 Ind. 523, 44 N.E.2d 829 (1944).

73. 225 Ind. 428, 75 N.E.2d 915 (1947).

74. *Id.* at 440, 75 N.E.2d at 920.

75. 227 Ind. 131, 84 N.E.2d 580 (1949).

76. "This time was wholly insufficient for the attorneys to prepare adequately for the defense in the case and a denial of the motion amounted in substance to a denial of the right to counsel. . . ." *Id.* at 136, 84 N.E.2d at 582.

77. *Cf.* Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).

78. Bradley v. State, 227 Ind. 131, 137, 84 N.E.2d 580, 582 (1949).

79. 93 N.E.2d 184 (Ind. 1950).

showing that a different result would probably have been reached if the attorney had had more time.[80]

In the *Schmittler* opinion much was made of the factual differences between that case and the precedents. It was pointed out that in the *Rice, Hoy,* and *Bradley* cases, there had been a *pauper* defendant forced to trial *after a request for a continuance had been made* and denied by the trial judge. The court then attempted to show a waiver of the inadequate time defect from the fact that counsel was of the accused's own choice and the attorney had not asked for a continuance.[81] Yet both of these elements had been discussed and considered to be of no importance in the *Bradley* case where it was emphasized that the right to adequate time for preparation is the same whether counsel is employed by the county or by the accused himself;[82] and that even "if no motion for continuance had been filed . . . this court would judicially know from the record that the time allowed by the trial court for defendants to prepare . . . was wholly inadequate."[83]

"If adequate time for consultation and preparation is essential before trial, it necessarily follows that adequate time must be afforded and used. . . ."[84] No doubt the defense attorney is under a duty to seek a continuance whenever he feels that more time is needed in order to properly advise or defend.[85] But the duty would seem to be the same whether the attorney was hired or appointed.[86] In either event the trial judge is still responsible for the character of the proceedings before him; and if the record indicates that he has done nothing in regard to protecting the rights of the defendant, there should not be a presumption that it was proper for him to do nothing.

No reason is given in the *Schmittler* case justifying the court's reluctance to correct the obvious.[87] Members of the Indiana Supreme Court are usually lawyers with practical experience in trial work and will know or be able to determine the approximate time necessary to prepare a given case.[88] This is

80. *Id.* at 190.
81. *Ibid.*
82. See also Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927).
83. Bradley v. State, 227 Ind. 131, 137, 84 N.E.2d 580, 582 (1949).
84. *Ibid.*
85. See Emmert, C.J., dissenting in Schmittler v. State, 93 N.E.2d 184, 192, 195 (Ind. 1950).
86. CANON OF LEGAL ETHICS, No. 15.
87. The United States Supreme Court has also made it clear that where due process of law demands legal assistance in a state criminal proceeding, adequate time to prepare is a necessary corollary. See Avery v. Alabama, 208 U.S. 444 (1940). And the Court will search the record to determine whether a reasonably capable attorney could have prepared the defense in the period granted the accused's attorney. White v. Ragen, 324 U.S. 760 (1944).
88. "But we know from the many laborious hours that were spent by prior members of this court in writing the many cases . . . that such problems could not be adequately

not to say that all discretion should be removed from the trial court in granting or denying continuances;[89] but certainly where it is clear from the record that an attorney could not possibly had performed properly in the amount of time allowed, there is no justification of indulging in presumptions which serve no fuction other than to effectively deny an important constitutional right.[90]

The character and extent of the administrative defects just discussed indicate a serious lack of perspective on the part of the Indiana Supreme Court in regard to its duty to safeguard constitutional rights. If the Indiana right to counsel is to maintain its deserved status, it is essential that the court adopt measures of enforcement which will substantially guarantee the necessary protection.

FEDERAL HABEAS CORPUS AND THE EQUAL PROTECTION CLAUSE

Lawrence Cook was convicted of murder on July 23, 1931, sentenced to life imprisonment, and removed to the Indiana State Prison on the following day. Under existing law he had six months to perfect an appeal to the Indiana Supreme Court. Within this period Cook, with the aid of other prisoners, prepared the necessary appeal papers and attempted to send them to the circuit court in which he was convicted. His efforts were thwarted by prison authorities in pursuance of a prison regulation against sending out legal papers.

On March 11, 1949, having run the perplexing gamut of state remedies and after more than seventeen and one-half years of incarceration, Cook was discharged from custody. The Federal District Court for the Northern District of Indiana granted his petition for a writ of habeas corpus and ordered his unconditional release on the ground that the suppression of his appeal documents had denied him the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. This decision was affrimed by the Court of Appeals for the Seventh Circuit.[1]

Justice Black, speaking for a unanimous Supreme Court, vacated the judgments of the two lower courts. While accepting Cook's contention that he had been denied equal protection of the laws, the Court thought that an actual appellate determination of the merits of his conviction would cure this

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considered by any lawyer in fifteen minutes." Emmert, C.J., dissenting in Schmittler v. State, 93 N.E.2d 184, 192, 195 (Ind. 1950).

89. Delays because of newly discovered evidence or other emergency should be discretionary with the trial judge and reviewed only for abuse of discretion.

90. See 26 NOTRE DAME LAW. 118 (1950).

1. United States *ex rel.* Cook v. Dowd, Warden, 180 F.2d 212 (7th Cir. 1950).