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Joel Denton

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Constitutional Law—Right to Waive Jury in Federal Court without Advice of Counsel

The Circuit Court of Appeals, Second Circuit, recently held, one judge dissenting, that a federal district court had no jurisdiction to try a defendant charged with a felony where it appeared that the defendant had been tried by the court without a jury after having requested, without the advice and consent of an attorney, that he be allowed to waive his constitutional right¹ to a jury trial. A writ of habeas corpus was issued directing the release of the defendant who had been convicted and sentenced to imprisonment after a trial by the court.²

The decision was made to turn on the fact that the defendant had not been assisted by counsel in making his decision to waive jury trial. A reading of the opinion reveals, however, that the court had grave doubts as to the constitutionality of any waiver of jury trial, either with or without the assistance of counsel.

The history of the right to waive jury trial in the federal courts may be briefly traced as follows: The constitutional provision for the trial of all crimes by a jury was first interpreted as being mandatory, and courts were held to have no jurisdiction to try, without a jury, defendants accused of crime.³ Exceptions were that a jury could be waived by a plea of guilty⁴ or by a failure to plead further after a demurrer to the indictment had been overruled.⁵ Later, the rule was relaxed to permit waiver of jury trial in prosecutions for "petty offenses," which were said not to be "crimes" within the meaning of the constitutional provision.^{6*} The Supreme Court of the United States

¹ U. S. CONST. Art. III, §2; U. S. CONST. AMEND. VI.

² United States *ex rel.* McCann v. Adams *et al.*, 126 F. (2d) 774 (C. C. A. 2d, 1942).

³ United States v. Taylor, 11 F. 470 (C. C. Kan. 1882).

⁴ West v. Gammon *et al.*, 98 F. 426 (C. C. A. 6th, 1899).

⁵ Summers v. United States, 204 F. 976 (C. C. A. 9th, 1913).

^{6*} Schick v. United States, 195 U. S. 65, 24 S. Ct. 826, 49 L. ed. 99 (1904); Frank *et al.* v. United States, 192 F. 864 (C. C. A. 6th, 1911); Low *et al.* v. United States, 169 F. 86 (C. C. A. 6th, 1909); United States v. Praeger, 149 F. 474 (W. D. Tex. 1907); *accord*, Coates v. United States, 290 F. 134 (C. C. A. 4th, 1923). The argument made by the courts in these cases was that the word "crimes," as used in the Constitution, referred only to criminal offenses of a somewhat serious nature. They maintained that not all acts contrary to law were triable by a jury at common law, and said that the makers of the Constitution, in the course of debate, had changed the wording from "criminal offenses" to "crimes" so as to exclude these petty offenses which required no jury at common law. The courts indicated that they would look to the nature of the punishment provided in order to determine whether the offense was sufficiently serious to require a jury trial. They stated specifically that it would not necessarily depend on whether or not the offense was a felony or a misdemeanor. Mr. Justice Harlan, dissenting in Schick v. United States, *supra*, said that neither the Constitution nor the Congress had set up a criterion for deciding whether or not a jury was required for a particular offense, and that the court had no authority to draw the line for itself.

then rendered a decision in *Patton et al. v. United States*⁷ which has long been interpreted by courts⁸ and legal periodicals⁹ as standing for the proposition that an accused on trial in a federal court for any crime may waive his right to a jury trial if he does so intelligently, and if the prosecution consents to such waiver.¹⁰ This case held that a defendant on trial for a felony could consent to be tried by eleven jurors, where it appeared that the twelfth juror had fallen ill after the beginning of the trial, and was unable to serve further. The court added, by way of dictum, that a decision that the presence of one juror could constitutionally be waived logically required the conclusion that the whole jury could be waived, since a constitutional jury was a common-law jury of twelve, and no less.¹¹

The court in the principal case is obviously of the opinion that this conclusion does not follow. It evidently believes that the Supreme Court today would refuse to permit the total waiver of a jury. It casts discredit on the dictum of *Patton et al. v. United States* in the following language: "Since [the *Patton* case] the surrender of that right [the right to jury trial] has not been before the Supreme Court, but we are to assume that that decision is still law, at least as to the point actually decided, which was that the accused might lawfully consent to a jury of less than twelve—eleven as it chanced. . . . Hughes, C. J., took no part in the decision, and Holmes, Brandeis and Stone, JJ., concurred only in the result; perhaps because they did not think that consenting to go on before a jury of eleven, after one had fallen ill, involved the same constitutional question as consenting to a trial 'by the court without a jury.' Whether or not it does, practically there is much difference between being tried by a jury of eleven, or six, or for that matter even of three, and being tried by the judge."¹² The court then argues that a trial by even a very small jury preserves the fundamental characteristics which have endeared the jury to the American judicial system, whereas a trial by a judge does not.

It is submitted that the court, believing that the judge would have no jurisdiction to try the defendant without a jury under any conditions, seized upon the fact that the accused did not have the advice and consent of counsel in regard to the waiver, in order to release him without

⁷ 281 U. S. 276, 50 S. Ct. 253, 74 L. ed. 854, 70 A. L. R. 263, 279 (1930).

⁸ *Simons et al. v. United States*, 119 F. (2d) 539 (C. C. A. 9th, 1941); *Brown v. Zerbst*, 99 F. (2d) 745 (C. C. A. 5th, 1938); *Spann v. Zerbst*, 99 F. (2d) 336 (C. C. A. 5th, 1938); *Irvin v. Zerbst*, 97 F. (2d) 257 (C. C. A. 5th, 1938).

⁹ Naff, *Jury Trial, Waiver Thereof, and the Alternate Juror* (1933) 22 Ky. L. J. 125; Notes (1930) 16 A. B. A. J. 372; (1932) 27 ILL. L. REV. 447.

¹⁰ *Rees et al. v. United States*, 95 F. (2d) 784 (C. C. A. 4th, 1938).

¹¹ *Patton et al. v. United States*, 281 U. S. 276, 290, 50 S. Ct. 253, 255, 74 L. ed. 854, 859, 70 A. L. R. 263, 267 (1930), cited *supra* note 7.

¹² *United States ex rel. McCann v. Adams et al.*, 126 F. (2d) 774, 775 (C. C. A. 2d, 1942), cited *supra* note 2.

directly disaffirming the popular interpretation of the doctrine of *Patton et al. v. United States*. The court admits that the defendant had waived the jury with a full understanding of his constitutional rights, and that he was probably capable of appraising his chances as between judge and jury. The defendant, while not a member of any bar, had studied law, and, after having been advised to retain a lawyer, stated that he wished to act as his own counsel. He had been convicted before by a jury in a trial involving transactions similar to those for which he was being prosecuted, and concluded that he would have a better chance in a trial before a judge. The present court argued that trial by jury is such a fundamental right that the power to waive it without the assistance of counsel should not depend upon the outcome of a preliminary inquiry as to the competency of the particular accused. Rather, concludes the court, he must be presumed to be incompetent to waive his right to a jury trial, and must retain an attorney to advise him on such waiver, even though the advice of the attorney extends to no more than that particular choice.

There are both practical and legalistic objections to this conclusion. As a practical matter, many persons, not lawyers, would be capable of making a well-advised and intelligent choice between judge and jury. The ability to make such a decision does not necessarily depend upon whether or not one is an attorney. To force one who wishes to be tried by a judge and to conduct his own defense to call in a lawyer for the sole purpose of waiving a jury would be to put the defendant to unnecessary expense. If he is capable of defending himself, he is capable of waiving jury trial, and there would be no logic in forcing him to pay for a service which would be more form than substance.

The court has placed a limitation upon the right of an accused to act as his own attorney. The reason advanced is that the right to jury trial is a fundamental one which should be zealously protected by the courts. The court, however, overlooks the fact that other fundamental rights may be waived without the advice of an attorney. The right to counsel has itself been held to be a fundamental right.¹³ This right may be waived.¹⁴ It would, of course, be absurd to hold that the right to counsel can be waived only upon the advice of counsel. Yet the reasoning of the court would lead to this result.

A California court, dealing with the problem before the court in the principal case, reached a different result.¹⁵ It reasoned that the right to waive counsel carried with it the implication that the defendant

¹³ *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158, 84 A. L. R. 527, 544 (1932).

¹⁴ *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed 1461 (1938).

¹⁵ *People v. Thompson*, 41 Cal. App. 965, 108 P. (2d) 105 (1940).

might do for himself that which he and his counsel together might do. This, in the opinion of the writer, is a better line of reasoning than that pursued in the principal case. When a defendant without counsel comes before the court asking that he be tried without a jury, the court should decide whether the defendant understands the full nature and consequences of his request. If the court believes him competent to make such waiver, then he should be allowed to do so. A preliminary inquiry of this nature would not be unduly burdensome on the court.

These weaknesses in the court's argument as to the necessity of having advice of counsel concerning the waiver of jury trial strengthen the belief of the writer that the defendant's lack of counsel was not the real reason for the decision. The determining factor seems to have been the court's belief that the constitutional provision for the trial of all crimes by a jury is mandatory, and that no federal judge has jurisdiction to try, without a jury, a defendant accused of felony.

Certiorari has been granted,¹⁶ and the principal case will soon come before the Supreme Court for final determination. It is to be hoped that the court will take this opportunity to clarify, once and for all, the status of the right of an accused to completely waive trial by jury. It is highly unlikely that the Supreme Court will subscribe to the denial of the Circuit Court of Appeals that the case of *Patton et al. v. United States* stands for the proposition that a jury trial may be waived. The term "jury" as used in the constitutional provision means a common-law jury of twelve.¹⁷ If, as the *Patton* case undoubtedly held, the presence of one juror may be waived, it follows that the provision is not mandatory, since the nature of the Constitution is such that it will not allow even a partial waiver of any of its mandatory provisions.

The problem of the principal case would not arise in the North Carolina courts. The State Constitution decrees that the trial of all crimes, except petty misdemeanors, must be by a jury.¹⁸ This provision has been held to be mandatory, and does not merely guarantee a right which may be waived.¹⁹ It has been held that this jury must consist of twelve persons.²⁰ However, an act²¹ providing that the court

¹⁶ *Adams v. United States ex rel. McCann*, 62 S. Ct. 1048, 86 L. ed. 937 (1942).

¹⁷ *Patton et al. v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. ed. 854, 70 A. L. R. 263, 279 (1930), cited *supra* notes 7 and 11.

¹⁸ N. C. CONST. ART. I, §13.

¹⁹ *State v. Muse*, 219 N. C. 226, 13 S. E. (2d) 219 (1941); *State v. Hill*, 209 N. C. 53, 182 S. E. 716 (1935); *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394 (1922); *State v. Camby*, 209 N. C. 50, 182 S. E. 715 (1935) (holding unconstitutional c. 23, N. C. PUBLIC LAWS 1933, as amended by c. 469, N. C. CODE ANN. (Michie, 1939) §4636(a), providing for trial by the court as upon a plea of "Not Guilty," when a defendant enters a "conditional plea" under the act).

²⁰ *State v. Rogers*, 162 N. C. 656, 78 S. E. 293 (1913); *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720 (1894).

²¹ N. C. PUBLIC LAWS 1931, c. 103, N. C. CODE ANN. (Michie, 1939) §233(a).

may order the selection of an alternate juror to sit with the other twelve and serve as a juror in case one of the original twelve should die or be discharged has been held not to infringe upon the constitutional provisions.²²

JOEL DENTON.

Federal Crimes—Interpretation of Statute for Protection of National Banks—Incorporation of State Definition of Felony into Federal Criminal Statute

Petitioner was indicted and convicted under the National Banking Law for entering a national bank in Nebraska with the intent to cash a no fund check for \$42.50, which he in fact succeeded in cashing. The statute under which the indictment was drawn reads:

“. . . or whosoever shall enter or attempt to enter any bank, or building used in whole or in part as a bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny, shall be . . . [fined or imprisoned].”¹

The cashing of a bad check is not of itself an offense against the United States, but it is a felony under the laws of Nebraska.² Petitioner brought habeas corpus proceedings against the warden of the Federal Penitentiary at Leavenworth, Kansas, on the ground that he had committed no offense against the United States. The United States District Court of Kansas granted habeas corpus. The Circuit Court of Appeals, however, reversed the decision, holding that by using the words “any felony” Congress indicated an intent to include in the statute all felonies, under either federal or state law, having relation to the preservation of the efficiency of a national bank.³

The general rule is that penal statutes are to be construed strictly, but this rule is relaxed to the extent that they are not to be construed so strictly as to defeat the obvious intent of the legislature.⁴ Congress had the power to adopt state felonies by this statute if it wished to do so,⁵ but there seems to be no precedent for such adoption by the court under the guise of interpreting Congressional intent.

²² *State v. Dalton*, 206 N. C. 507, 174 S. E. 422 (1934).

¹ 50 STAT. 749 (1937), 12 U. S. C. A. §588b(a) (Supp. 1942). This statute was passed in 1937 to amend the bank robbery statute so as to include burglary and larceny, or entry with intent to commit any felony or larceny.

² COMP. STAT. NEBR. (1929) Ch. 28, §1212; Ch. 29, §102.

³ *Hudspeth v. Melville*, 127 F. (2d) 373 (C. C. A. 10th, 1941) (one judge dissenting). Same holding on the basis of this case in *Hudspeth v. Tornello*, 128 F. (2d) 173 (C. C. A. 10th, 1942) (same judge dissenting); *United States v. Jerome*, 130 F. (2d) 514 (C. C. A. 2nd, 1942) (one judge dissenting), cert. granted, *Jerome v. United States*, 11 U. S. L. WEEK 3106 (U. S. 1942).

⁴ *United States v. Wiltberger*, 5 Wheat. (U. S.) 76, 5 L. ed. 37 (1820); MAXWELL, INTERPRETATION OF STATUTES (6th ed. 1920) 484.

⁵ *Westfall v. United States*, 274 U. S. 256, 47 S. Ct. 629, 71 L. ed. 1036 (1927)