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Criminal Procedure--Right to Counsel--Necessity that Defendant Have Aid of an Accountant in a Complex Tax Prosecution

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be presumed. It remains to be seen whether the "presumed acceptance" in this case will be reaffirmed and applied to any donee beneficiary.

Leslie W. Morris II

Criminal Procedure—Right to Counsel—Necessity That Defendant Have Aid of an Accountant in a Complex Tax Prosecution—Defendant, a notorious gambler, was indicted for filing false and fraudulent income tax returns. Defendant had no assets at the time of indictment or at the time of trial, since all his property was subject to jeopardy assessments and tax liens in favor of the Treasury Department. It was undisputed that the services of a skilled accountant were necessary in order to prepare an effective defense. The trial court, therefore, ordered the government to release some of defendant's funds to enable him to hire an accountant. The government having refused to do so, the trial court dismissed the indictment. United States v. Brodson, 136 F. Supp. 158 (E.D. Wisc. 1955).

The trial court's opinion contains an excellent summary of the law which has been developed on the Constitutional right of a defendant to have counsel for his defense. Viewing the instant case in the light of the recent enlargements of the constitutional right to counsel, the Court felt justified in extending protection to the defendant. In reaching this result, the Court was forced to distinguish the case of O'Connor v. United States, a case reaching a contrary result. The Court did this on the grounds that in the O'Connor case the defendant's funds, though attached at the time of the trial, had been unencumbered for some twenty-two months after the indictment, and that the defendant had therefore had adequate time to hire accounting help before his funds were, in effect, attached.

The Court's primary reason for its position was the apparent un-

1 INT. REV. CODE of 1939, sec. 3670-3672. (Now INT. REV. CODE of 1954, sec. 6321-6323, 6331.)
2 Most of the Court's discussion, however, centered around the "lack of due process" inherent in the government's action here. In other words the Court views the case primarily as a Fifth Amendment case, rather than as a Sixth Amendment case, although the Constitutional right to counsel, in the Federal courts, is granted by the latter Amendment. It is believed this was caused by the fact that most of the cases discussed were state cases, brought under the Fourteenth Amendment, which like the Fifth, contains a "due process" clause.
3 In the opinion of the writer, it is of considerable significance that the trend in the law has been to broaden the scope of this particular constitutional right. In conjunction with both this footnote and footnote 2, see Note, 44 Ky. L.J. 103 (1955) and note, 38 Ky. L.J. 317 (1950).
4 203 F. 2d 301 (4th Cir. 1953).
fairness of the government's action. The Court excoriated the government for prosecuting the defendant with one arm, the Justice Department, while simultaneously permitting another arm, the Treasury Department, to deprive the defendant of an effective defense by impounding his funds. In the language of the Court, this constituted "holding and hitting." One need not be the Marquis of Queensbury to perceive that by the use of this boxing term, the Court was accusing the government of "unsportsmanlike conduct," or to revert to legal parlance, of "denying the defendant due process of law."

The Court affirmed the decision and refused to procure an accountant for the defendant under the court's power to appoint, and pay, witnesses. The Court pointed out that expert witnesses are required by law to appraise both sides of any findings made, a procedure which the Court felt would amount to the use of discovery process against a criminal defendant, and a possible violation of the self-incrimination clause of the Fifth Amendment.7

It is believed that the Court in the instant case reached the proper result. The appointment of counsel must be more than a mere formal appointment of counsel. Effective counsel is required.8 Counsel, no matter how competent, could not adequately prepare a defense without the assistance of an accountant. It seem eminently just that no trial should be held unless the defendant can procure the assistance his counsel might require in preparing his defense. Unfortunately, this broad generalization is, of course, not the law.

While justice would require that the indigent defendant be given the material for preparing his defense, abstract justice has, as so often happens, yielded to practicality and to a certain penuriousness in the body politic. The problem of who would pay for such assistance is inevitably raised, and the answer is difficult, though it might not be entirely frivolous to reply that a government which can spend billions and billions of dollars for the benefit of foreign nations, farmers, and many other groups (and no disparagement of any of these expenditures is intended) might well spend an infinitesimally smaller sum for adequately protecting the civil liberties of its own impecunious citizens.

7 U.S. v. Brodson, supra note 5, at 166. The Court was unmoved by the government's offer to waive its right to any information obtained. The Court felt that since the language of the statute was mandatory, and required the expert witness to give his findings to both sides, he would be unauthorized to collect his expenses for such unilateral action. Ibid.
It will be observed that the holding of the instant case avoids this problem. In this type of case, the defendant pays for his own defense. In requiring the government to release some of the defendant’s money from its custody, the court is not requiring the government to actually hire the accountant. The government would merely released some of the security it was holding to guarantee that the defendant’s taxes would be paid. At the worst, the government will be in exactly the same position it was in before it attached the defendant’s property. Assuming that the defendant must “owe” either the government or an accountant, it seems preferable, in this case, that he owe the government since the opposite answer will virtually mean that the defendant won’t be able to get the accounting assistance he requires to prepare his defense.10

It is therefore the writer’s belief that in spite of the over-all tone of the opinion, the instant case should not be taken as a radical extension of the right to counsel as the concept has developed in this country. The writer, being in favor of the broadest possible extension of the right to counsel apparently guaranteed by the Sixth Amendment, is naturally in accord with the result reached in this case. Whenever at all feasible, the courts should see that the rights of a defendant are not unduly prejudiced because of his poverty. “Equal justice for rich and poor” is more than a Fourth of July platitude; it is one of the cornerstones of any democratic society.

TOM SOYARS

Estate Taxation—Constitutionality of the Premium Payment Test Applied to Life Insurance Policies When Gift Tax Has Been Paid on Inter Vivos Transfer—In 1921, the insured procured insurance policies upon his life and paid the annual premiums accruing thereon until 1941. Then he assigned all his rights in the policies to his three children, retaining to himself no title, interest, or possible right of reversion. He filed a gift tax return for that year, reported the transfer of the insurance policies, and paid the gift tax due thereon. All premiums on the policies accruing subsequent to the transfer were paid by the children. At the time of the insured’s death, the Commissioner of Internal Revenue included in his gross taxable estate that portion of the value of the policies represented by the proportion that the premiums paid by the insured bore to the total amount of all the premiums. The children paid the tax on this amount, and then

10 It must also be remembered that, because of the nature of a tax claim, the government is in an infinitely better position than the accountant, a mere creditor, to actually realize on its claim.