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Court-Appointed Counsel--Right to Compensation

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been enacted for the protection of those the legislature has determined are incapable of granting legal consent to particular acts involving their person.²⁹

Even though one may not necessarily agree with the court in the present case, it must be acknowledged that the court is handicapped in its effort to bring about just results by an archaic, and in many instances poorly drafted, Penal Code.³⁰ Particularly in need of revision is the section dealing with rape. As is apparent from the particular facts of the principal case,³¹ the interpretation of the pertinent code sections formerly accepted by the court can easily bring about unsatisfactory results.³² This situation is disturbing, not only because of the heavy penal consequence,³³ but also because of the embarrassment and loss of reputation which necessarily results from a conviction of statutory rape. However, the fact that the law in this area is in urgent need of change does not necessitate the abandonment of the sound rule in regard to mistake as to the female's age or other incapacity to give legal consent.³⁴

It should now be even more clear to the legislature that the statutes concerning rape must be revised and clarified, but until this is accomplished it is hoped that the court will not be induced to bring about such changes by further judicial legislation.

Donald F. Powell*

in the State Prison not exceeding five years, and a fine not exceeding one thousand dollars." CAL. PEN. CODE § 267. In *People v. Dolan*, 96 Cal. 315, 31 Pac. 107 (1892), the court rejected the defense that the defendant had a reasonable belief that the female involved was over eighteen years of age.

²⁹ Another example of such a statute is CAL. PEN. CODE § 288, which makes it a felony for one to commit any lewd or lascivious act on or with the body of a child under the age of fourteen years.

³⁰ See Packer, *The Case for Revision of the Penal Code*, 13 STAN. L. REV. 252 (1961).

³¹ See note 10 *supra*.

³² "Under the statute the girl may be the older and more aggressive of the two, and the real seducer. . . . She may be a common prostitute and seduce a boy of fifteen, and yet in such case the boy is guilty of a felony, while to her the law awards no punishment." *People v. Derbert*, 138 Cal. 467, 469, 71 Pac. 564 (1903).

³³ Statutory rape carries a possible maximum of fifty years. CAL. PEN. CODE § 264.

³⁴ See Perkins, *Alignment of Sanction with Culpable Conduct*, 49 IOWA L. REV. 325, 381 (1964).

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COURT-APPOINTED COUNSEL—RIGHT TO COMPENSATION

Court-appointed counsel representing indigent defendants in criminal proceedings have been held not entitled to compensation for their efforts or expenses¹

¹ *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943); *Annot.*, 144 A.L.R. 839 (1943); COOLEY, *CONSTITUTIONAL LIMITATIONS* 477 (7th ed. 1903). *Contra*, *Knox County Council v. State*, 217 Ind. 493, 29 N.E.2d 405 (1940).

in the absence of statute.² In a departure from precedent, *Dillon v. United States*³ awarded compensation to an attorney for representing an indigent criminal defendant. Final outcome of the case is still in doubt pending an appeal,⁴ but the lower court's decision is noteworthy for the strong argument it makes against the usual position taken by the courts in this type of case.

Dillon held that when a United States court appoints counsel to represent an indigent in federal criminal proceedings,⁵ where right to counsel is mandatory, the United States is liable to the attorney for the reasonable value of his services and his expenses. The foundation of the decision is the fifth amendment proscription against taking private property for public use without just compensation. The court had to decide three main issues in reaching its decision: (1) whether it had authority to order the United States to pay just compensation for the taking of private property in the absence of channels provided by Congress; (2) whether an attorney's license, time, expertise, physical resources, and expenses constitute property within the meaning of the fifth amendment; (3) whether the order appointing an attorney to represent an indigent in criminal proceedings is a compensable appropriation of private property for public use.

The court ruled that it was authorized, without specific legislation by Congress, to order the United States to make payment for property appropriated by an officer of the United States. Federal district courts are vested by statute with jurisdiction to adjudicate claims against the United States founded upon the Constitution or upon an express or implied contract with the United States.⁶ In addition to citing the statute, the court relied on case authority which had awarded compensation on the basis of "an implied contract, or the black-and-white premise of a judicial implementation of the self-executing exigencies of the fifth amendment. . . ."⁷ Under the implied contract reasoning it is held that when an officer of the United States, acting with authority, appropriates property for the public use, the court will imply a promise on behalf of the government to pay for the property.⁸ On the other hand, using the self-executing provisions of the fifth amendment, the court does not rely on fictions. It declares a violation of the fifth

² *Nabb v. United States*, 1 Ct. Cl. 173 (1864); *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943); *Pardee v. Salt Lake County*, 39 Utah 482, 118 Pac. 182 (1911).

³ 230 F. Supp. 487 (D. Ore. 1964).

⁴ *Appeal docketed*, No. 19629, 9th Cir., Oct. 19, 1964.

⁵ Counsel in *Dillon* was appointed to represent defendant in 28 U.S.C. § 2255 (1958) proceedings. These proceedings are designed by Congress to streamline the method of seeking relief on constitutional grounds from judgment and sentence. The proceedings are classified as civil in nature, *Martin v. United States*, 273 F.2d 775 (10th Cir. 1960), but "realistically, a proceeding which may result in vacating a criminal proceeding is, at least, not purely civil." *Dillon v. United States*, 307 F.2d 445, 447 n.3 (9th Cir. 1962).

⁶ 28 U.S.C. § 1346 (1958).

⁷ *Dillon v. United States*, 230 F. Supp. 487, 492 (D. Ore. 1964).

⁸ *Campbell v. United States*, 266 U.S. 368 (1924) (taking of land gave rise to implied promise to pay); *United States v. Lynah*, 188 U.S. 445 (1903) (submerging land by dam gave rise to implied promise to pay); *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U.S. 552 (1894) (consensual use of patented fire-arm device resulted in implied contract); *United States v. Palmer*, 128 U.S. 262 (1888) (consensual use of inventor's infantry equipment gave rise to implied contract).

amendment and orders compensation.⁹ Both methods of reasoning arrive at the same result, and the court in *Dillon* found it unnecessary to decide between the two. It used both as authority for its decision.

The court experienced little difficulty in finding that the work-product of an attorney was property within the meaning of the fifth amendment. An analogy was drawn to the work-product of an inventor. When an inventor invests his time, expertise, and mental and physical resources in creating an idea which is patentable, he is held to have a property right. That property right may not be appropriated by the government without compensation.¹⁰ The *Dillon* case found no distinction between this and the work-product of an attorney and held that "if the work-product of an inventor . . . be compensable property, so is the work-product of a lawyer, and his office expenses and out-of-pocket money are such, per se."¹¹

Finally, the court determined that ordering an attorney to defend an indigent in criminal proceedings is a "taking" of property for public use within the meaning of the fifth amendment. It reasoned that if the appropriation of an inventor's work-product is an appropriation of compensable property, the ordering of an attorney "to give of his services under his license and of his office facilities and money" must also be an appropriation of compensable property.¹² Further, it is a taking for the public use. Under the doctrine enunciated in *Douglas v. California*¹³ an indigent is entitled to counsel on appeal, as well as in the lower court, and the *Dillon* court said that "no longer should the 'some people' in the legal profession bear . . . the cost and expense of the . . . organic obligation of the sovereign"¹⁴ to furnish counsel. Since *Dillon* was an appointment of counsel to fulfill the organic obligation of the United States, the appointment was necessarily for the public use.

One major obstacle the court had to overcome in reaching its decision was a factor which many courts in the past had used as a basis for denying compensation to court-appointed counsel.¹⁵ Earlier courts had said that the practice of law was a privilege, exercisable at the discretion of the court.¹⁶ In accepting the privilege an attorney became an officer of the court, but he took his office *cum onere*. One of the duties was an obligation to assist the court in administering

⁹ *Armstrong v. United States*, 364 U.S. 40 (1960) (taking of boats on which workman had liens violated fifth amendment).

¹⁰ *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U.S. 552 (1894); *United States v. Palmer*, 128 U.S. 262 (1888).

¹¹ 230 F. Supp. at 492.

¹² *Id.* at 493.

¹³ 372 U.S. 353 (1963).

¹⁴ 230 F. Supp. at 493.

¹⁵ *Nabb v. United States*, 1 Ct. Cl. 173 (1864); *Rowe v. Yuba County*, 17 Cal. 61 (1862); *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943).

¹⁶ *Ex parte Lockwood*, 154 U.S. 116 (1893), held that the right to practice law was purely in the discretion of the court before whom the lawyer would practice and that since the right to practice was not a privilege or immunity of citizens of the United States, the Supreme Court could not inquire into the exercise of that discretion. *But cf. Konigsberg v. State Bar*, 353 U.S. 252 (1957), holding that the right to practice law cannot be withheld without due process, by implication overruling the result in *Lockwood*.

justice.¹⁷ In fulfilling this obligation the attorney was required to represent indigents in criminal cases when appointed, and he could neither reject his appointment without cause nor demand compensation.¹⁸ This theory was held to nullify any claim of deprivation of property as well as any implied contract claim.¹⁹ *Ruckebrod v. Mullins*,²⁰ a leading case stating this theory, said that if an attorney had a right to practice, and not merely a privilege, then the attorney would be able to claim a deprivation of a property right without compensation. *Dillon* seized this point²¹ and cited two Supreme Court cases holding that admission to the bar could not be denied without due process of law.²² The practice of law, *Dillon* held, was no longer a mere privilege.

The importance of *Dillon* has been diminished with respect to federal cases by the enactment of the Criminal Justice Act of 1964.²³ This act provides for the compensation of counsel representing indigents, as well as for the representation of indigents in federal criminal cases.²⁴ Thus, whatever the ultimate disposition of *Dillon*, counsel will henceforth receive compensation on the basis of statute.²⁵

However, there is still a substantial area of indigent defense work being performed by uncompensated counsel in state criminal proceedings.²⁶ If the reasoning in *Dillon* can be extended to cover such representation, the case could take on another significance.

¹⁷ COOLEY, CONSTITUTIONAL LIMITATIONS 477 (7th ed. 1903).

¹⁸ *Rowe v. Yuba County*, 17 Cal. 61 (1862); 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 491 (3d ed. 1923). Cf., "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf." ABA, CANONS OF PROFESSIONAL ETHICS Canon 4 (1908).

¹⁹ *Nabb v. United States*, 1 Ct. Cl. 173 (1864); *Ruckebrod v. Mullins*, 102 Utah 548, 233 P.2d 325 (1943).

²⁰ 102 Utah 548, 233 P.2d 325 (1943).

²¹ Although *Dillon* does not cite *Ruckebrod*.

²² *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

²³ Pub. L. No. 455, 88th Cong., 2d Sess. (Aug. 20, 1964).

²⁴ The statute requires that each district court shall, with the approval of the judicial conference for that circuit, place in operation one of the following three plans: (1) representation by private attorneys; (2) representation by attorneys furnished by the bar association or other agency; (3) representation by a plan combining all or parts of the two above.

Compensation is to be rendered at the rate of fifteen dollars per hour for in-court work, and ten dollars for out-of-court work, with a maximum of five hundred dollars for felonies and three hundred dollars for misdemeanors. Compensation will also be rendered for reasonable expenses incurred, and additional money will be available for experts and investigational services. Payment in excess of the maximum is authorized under extraordinary circumstances. *Ibid*.

²⁵ *Dillon* expresses the opinion that the Criminal Justice Act of 1964 would not cover 28 U.S.C. § 2255 (1958) proceedings. But the language of the act, construed broadly, would seem to cover such a situation. "[A]t any stage of the proceedings, including an appeal, the court having jurisdiction . . . may appoint counsel . . . and authorize payment. . . ." *Ibid*.

²⁶ Fifteen states make no provision for compensation of court-appointed counsel, even in major felony cases, and eight of these states do not provide compensation in capital cases. SPECIAL COMMITTEE OF THE NEW YORK CITY BAR ASS'N and the NATIONAL LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED Appendix (1959).

The fourteenth amendment prohibition against taking property without due process is said to include the fifth amendment prohibition against taking property without just compensation.²⁷ If *Dillon* is correct in finding that the work-product of an attorney is property within the meaning of the fifth amendment and that the ordering of an attorney to defend an indigent is an appropriation of that property, it would seem that the reasoning of the case would apply equally to state court proceedings.

If states are required to follow *Dillon* there will be two desirable results. The first is that the quality of representation of the indigent will be improved. Unpaid counsel often provides a poor defense when contrasted with the defense compensated counsel can provide for his client.²⁸ This occurs for a number of reasons, and often in spite of the best intentions of counsel. Unpaid counsel must seek his compensation elsewhere. Consequently the indigent's case will suffer while counsel endeavors to fulfill his obligations to paying clients. He may also attempt to dispose of his indigent client's case as rapidly as possible so he can devote his efforts to earning his livelihood.²⁹ He cannot afford to expend his own personnel funds for investigation in depth, searching out and rounding up facts and witnesses.³⁰ One commentator summed up the problem: "[T]o phrase it from the indigent defendant's point of view, you don't get much for nothing."³¹ Certainly compensated counsel will be able to prepare a more adequate defense and contribute to more equal justice for indigent defendants.³²

The second desirable result of applying *Dillon* to state proceedings would be the correction of the hardships worked on the legal profession by the requirement of service without remuneration. Frequently the attorney appointed by the court to represent an indigent is relatively new to the practice of law.³³ To require him to practice without compensation is often to endanger his career. Examples of this usually follow the pattern of indebtedness,³⁴ direct out-of-pocket loss, closed

²⁷ *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

²⁸ Hannah, *Equal Protection-Fact or Fiction*, 21 LEGAL AID BRIEF CASE 56 (1962); Kadish & Kimball, *Legal Representation of the Indigent in Criminal Cases in Utah*, 4 UTAH L. REV. 198, 230 (1954).

²⁹ SPECIAL COMMITTEE OF THE NEW YORK CITY BAR ASS'N AND THE NATIONAL LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 67 (1959).

³⁰ Mazon, *The Right To Be Provided Counsel: Variations on a Familiar Theme*, 9 UTAH L. REV. 50, 82 (1964).

³¹ Bennett, *A Prison Director's Views on the Public Defender*, 21 LEGAL AID BRIEF CASE 44, 46 (1962).

³² If defendant with paid counsel is receiving better representation than the defendant with uncompensated counsel, it would seem that the statement in *Douglas v. California*, 372 U.S. 353, 357 (1963), that "there can be no equal justice where the kind of appeal a man enjoys 'depends on the kind of money he has' . . ." might be aptly applied. The Supreme Court has never ruled on whether representation by uncompensated counsel is a denial of equal protection.

³³ Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435, 436 (1963); REPORT OF SPECIAL COMMITTEE ON DEFENSE OF INDIGENT PERSONS ACCUSED OF CRIME JOINTLY WITH THE STANDING COMMITTEE ON LEGAL AID WORK, 88 A.B.A. REP. 255 (1963).

³⁴ *Dillon v. United States*, 230 F. Supp. at 495 cites personal knowledge of two young court-appointed attorneys who had to borrow money to maintain themselves during a lengthy trial.

offices,³⁵ and even impairment of professional reputation caused by not being able to adequately investigate the client's case and consequently appearing to have handled it badly.³⁶

The logic of the holding, the better representation of indigent defendants, and the relief of hardships to the legal profession all seem to require an affirmation of *Dillon* and an extension of the rule of the case to state criminal proceedings.

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³⁵ *Defects in Assigned Counsel System*, 21 LEGAL AID BRIEF CASE 78, 80-81 (1962); Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435, 436 (1963).

³⁶ *Defects in Assigned Counsel System*, 21 LEGAL AID BRIEF CASE 78, 79 (1962).

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