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Constitutional Law--Due Process--Prosecution's Withholding Evidence Favorable to Defendant Held Violative

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CASE COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS—PROSECUTION'S WITHHOLDING EVIDENCE FAVORABLE TO DEFENDANT HELD VIOLATIVE.—*D* was indicted for the murder of his wife. At the trial he admitted the killing but claimed it occurred in a fit of passion when he discovered his wife kissing one *X* late at night in a parked car. *X* the only eye witness to the killing, testified that there had been no illicit relations between *D*'s wife and himself. *D* was found guilty of murder with malice and was sentenced to death, and the conviction and sentence were affirmed by the Texas Court of Criminal Appeals. 294 S.W.2d 112 (Tex. 1956).

D asked the trial court to issue a writ of habeas corpus claiming he had been denied a fair trial. At a hearing on the petition, *X* confessed giving false testimony at the trial and having had sexual intercourse with *D*'s wife on several occasions and testified he had informed the prosecutor of this before the trial. The prosecutor corroborated this statement, but the trial court refused to issue the writ; and the Texas Court of Criminal Appeals affirmed. The United States Supreme Court granted certiorari. *Held*, that *D* was not accorded due process of law, since, had *X* not testified falsely with the prosecutor's knowledge, the jury might have accepted *D*'s defense, thereby reducing his offense to murder without malice and precluding the death penalty. Reversed and remanded. *Alcorta v. Texas*, 78 Sup. Ct. 103 (1957).

It was made clear in the principal case that *D* had exhausted all of his remedies in the state courts. This is an essential allegation, for orderly procedure requires that before a United States court is asked to issue a writ of habeas corpus in the case of a person held under a state commitment, recourse should be had to all judicial remedies afforded by the state. 28 U.S.C.A. § 2254 (1948); *Ex parte Hawk*, 321 U.S. 114 (1944); *Mooney v. Holohan*, 294 U.S. 103 (1934); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3rd Cir. 1952). This principle is only a side issue so far as this comment is concerned; however, it is a very essential element in a case of this nature.

The primary problems to be considered here are the principal duty of the prosecutor when trying a case and the limitations on his actions in carrying out this duty. Undoubtedly, his first and foremost duty "is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of

establishing the innocence of the accused is highly reprehensible." American Bar Association Canons of Professional Ethics, Canon 5 (1957); see also the Code of Professional Ethics governing West Virginia attorneys. 128 W. Va. XXI (1947). In a criminal trial the prosecuting attorney occupies a quasi-judicial position. *State v. Seckman*, 124 W. Va. 740, 22 S.E.2d 374 (1942). He "may prosecute vigorously, so long as he deals fairly with the accused; but he should never become a partisan, intent only on conviction." *State v. Hively*, 103 W. Va. 237, 136 S.E. 862 (1927). Mr. Justice Sutherland, in explaining the duties and obligations of a United States attorney in *Berger v. United States*, 295 U.S. 78, 88 (1935), observed:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . . As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The question considered in the principal case, the suppression of evidence by the prosecution in criminal cases as vitiating the conviction, is one upon which there is little authority. The few cases on the subject, with apparently one exception, hold or recognize that the suppression of evidence favorable to the accused by the prosecution is a denial of due process of law, entitling the accused to release from custody. *Pyle v. Kansas*, 317 U. S. 213 (1942); *Mooney v. Holohan*, *supra*; *United States ex rel. Almeida v. Baldi*, *supra*; *Woollomes v. Heinze*, 198 F.2d 577 (9th Cir. 1952); *United States ex rel. Montgomery v. Rogen*, 86 F. Supp. 382 (N.D. Ill. 1949); *Curtis v. Rives*, 123 F.2d 936 (D.C. Cir. 1941); *Ex parte Lindley*, 29 Cal. App. 2d 709, 177 P.2d 918 (1947). But *cf. Wallace v. Foster*, 206 Ga. 561, 57 S.E.2d 920 (1950). See also, Annot., 33 A.L.R.2d 1421 (1954).

The term, due process, identifies itself with the due course of proceedings in the administration of justice, thereby protecting the defendant from partisan actions on the part of the prosecuting attorney. This protection does not extend to every partisan act, however, for, if every such act of the state's attorney were to vitiate

a conviction, the efficient administration of criminal justice would be seriously impaired. For example, there is no duty upon a prosecutor to present a question to the court which an intelligent and well represented defendant does not see fit to raise in his own behalf. *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956). The evil which the courts should and apparently do attempt to meet is not partisanship per se but deceit and dishonesty. See Comment, 62 HARV. L. REV. 1234 (1949).

There can be no doubt that suppression by the prosecutor of evidence that is favorable to the defendant is a deceitful and dishonest practice, and while the courts look upon such conduct with disfavor and while the Canons of Professional Ethics, *supra*, condemn the practice, no case is found in which a prosecuting attorney has been removed from office or otherwise disciplined on such ground. See 27 C.J.S., *District and Prosecuting Attorneys* § 7 (1941).

In West Virginia a prosecutor may be removed from office for "official misconduct, incompetence, neglect of duty, or gross immorality." W. VA. CONST. art. IV, § 6. W. VA. CODE c. 6, art. 6, § 7 (Michie 1955), provides the procedure for such removal. Although there are no cases so holding, it would seem that in West Virginia, on the basis of the decisions cited herein, if a prosecutor withheld evidence favorable to the defendant, his action would amount to a neglect of his primary duty, *e.g.*, to see that justice is done. There is a strong basis for the belief that his neglect would, in turn, be ground for removal from office.

T. E. P.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—STATE REGULATION OF MONEY ORDER AGENCIES.—The Illinois Community Currency Exchange Act, having as its purpose the protection of the public, required all firms selling or issuing money orders within the state to secure a license and to submit to specified restrictive regulations. The American Express Company, being of unquestionable solvency, was specifically exempted under the act. *P.*, a competing money order agency, contended that the exemption constituted a violation of the equal protection clause of the fourteenth amendment. *Held*, affirming the district court, that the relationship of the statutory classification to the purpose of the act was too remote, and in effect created a closed class favoring a named com-