

cannot be raised on habeas corpus;' and said: 'No final judgment upon the indictment herein has yet been reached, and therefore the district court has never yet been dispossessed of its jurisdiction over it, nor of the person of the accused. In the lawful exercise of this jurisdiction, it has the undoubted authority, under certain circumstances and for certain specified causes (Gen. Stats., c. 116, secs. 16, 17), to discharge the jury prior to a verdict, and to cause a retrial of the indictment before another jury. It necessarily had the right of determining upon the existence of these circumstances and causes, and whether it erred or not, its decision thereon was lawful and valid, until reversed on error. This conclusion is fully supported by the case of Wright vs. The State, 5 Ind. 290, which is directly in point on the question under consideration, and we are confident no authority can be found in any way countenancing a contrary doctrine. In that case the jury having failed to agree upon a verdict prior to the time designated for closing the term, was brought into court and discharged, against the defendant's objection. This was held an improper discharge of the jury, and that, under the laws of that state, it precluded a retrial of the indictment before another jury, yet the court refused to discharge the prisoner on habeas corpus, saying that he must apply for relief to the trial court wherein the indictment was pending.

“ ‘Fully agreeing with the doctrine of that case upon this point, it follows that no inquiry can be had in this proceeding whether the relator was in fact present or absent when the jury was discharged from the further consideration of the indictment, nor whether the decision of the trial court in discharging them was correct or incorrect, and the prisoner must be remanded.’ ”

In view of the foregoing authorities we respectfully submit that the Supreme Court of the United States should in this case determine that on a trial for murder in a state court the due process of law clause of the Fourteenth Amendment does not guarantee the right to be present, to the defendant, when the verdict was returned;

And that this court ought to decide that he cannot in any event now be discharged in view of the final judgment refusing a new trial in the case where the defendant did not make the fact of his absence, when the verdict was returned, a ground of the motion nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal constitution.

The above ought to follow more readily, especially since this court has already refused to grant a writ of error in a case where the alleged jurisdictional question was presented in a motion filed at a time not authorized by the practice of the state where the trial took place.

And certainly habeas corpus is not an available remedy under the facts disclosed.

All of which is respectfully submitted.

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