The Right to Counsel

Within the criminal justice system in the United States today, those people accused of a crime are afforded rights, before, during and after trial. One of these rights that the accused has is the right to the assistance of qualified counsel in all phases of the criminal process. This aid may include, but not limited to, assistance during questioning while in custody, advice during an arraignment, aid in the preparation of a defense, presentation of the defense case and further appeals. This right to assistance of counsel is, today, a guaranteed right by the United States Constitution as interpreted by the United States Supreme Court through various cases.

This right to counsel was stated in the Sixth amendment to the Constitution.

> **"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and <u>to have the assistance of counsel for his defense.</u>**

At approximately the same time that the Sixth Amendment was ratified, Congress passed two provisions that either aided or confused the issue of right to counsel. The first was Section 35 of the Judiciary Act of 1789, ch. 20, I Stat. 73. This act "provided that in federal courts parties could manage and plead their own causes or by the assistance of counsel as provided by the rules of court." This act seems to indicate that the assistance of counsel is left to the discretion of either the defendant or the court in which the case resided. In the Act of April 30, 1790, ch. 9, I Stat.118, the issue is taken further.

> **"Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours".**

This act certainly made the concept of appointment of counsel clear. The act did specify that the availability of the appointed counsel was limited to capital cases. It is unclear whether or not Congress wanted this appointment of counsel to include those people charged with other felonies or misdemeanors. Given the fact that treason and other capital crimes were specifically stated in the act, it is probably a fair assumption that all other accused persons were on their own, either to find counsel or represent themselves.

There are no United States Supreme Court cases reported from 1790 to 1932 that address the right to counsel. This means that either there were no challenges to the concept of the right to counsel because accused persons felt satisfied with the system or there were no appeals by defendants that had been convicted, with or without counsel. The most probable speculation is that the Judiciary Act and subsequent acts of Congress specified the type of crime that opened the door for appointed counsel and that these crimes were on the federal level, only. If the bulk of crimes are committed at the state level, then the decision as to the right to counsel was made at the state level. Also, given the reluctance of the Supreme Court to interfere with state law, it is plausible to believe that the court was satisfied with the states assuming the responsibility of administering criminal justice.

IN 1932, for the first time, the United States Supreme Court addressed the issue of right to counsel. In Powell v Alabama, 287 U.S. 45 (1932), the United States

Supreme Court ruled that in a capital case, the accused had a right to counsel, provided certain facts existed. This is the infamous Scottsboro Boys case. In this case, 8 black men were removed from a train and charged with rape of one or two white women. Without going into the entire fact pattern, it should be noted that the defendants were held under military guard and questioned without counsel. At trial, the defendants were not appointed counsel. This failure to appoint counsel seems to disregard the Alabama State Constitution. "The Constitution of Alabama (Const. 1901, 6) provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel; and a state statute (Code 1923, 5567) requires the court in a capital case, where the defendant is unable to employ counsel, to appoint counsel for him". There was little doubt that this was a capital case in the State of Alabama. The Supreme Court reversed the convictions on two specific grounds. The first was "The right of the accused, at least in a capital case, to have aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. (287 U.S. 68). The second issue that was addressed was the duty of appointment of counsel by the court. "In a capital case, where the defendant is unable to employ counsel and is incapable his own defense adequately because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, … (287 U.S. 71).

The precepts stated in Powell seem to be reinforced in the case of Johnson v

Zerbst, 304 U.S. 458 (1938). This was not a capital case, but rather a case wherein the defendant was accused of uttering counterfeit money. In this case, the court set down two rules that expanded the concepts put forth in Powell. The first was "A person charged with a crime in federal court is entitled by the Sixth Amendment to the assistance of counsel for his defense. (304 U.S. 462). The court continued by stating" It is a duty of a federal court in the trial of a criminal case to protect the right of the accused to counsel…" (304 U.S. 465). This case made it clear that the right to counsel, in federal courts, was a right accorded to the accused and the crime did not have to be a capital crime.

It would seem that this case would have settled the issue and all persons accused of, at least capital crimes, have the right to have counsel appointed, if necessary. In 1942, it appeared that the Supreme Court reversed itself. In Betts v Brady, 316 U.S. 456 (1942), the court amended its ruling in Zerbst. Although the court ruled that the accused had a right to counsel under the Sixth Amendment, the ruling applied only to those accused under federal law. Thus, the argument of the state versus the federal rears its ugly head, again. In Betts v Brady, the court stated three reasons that Zerbst did not apply. The first reason was, "The application of the due process clause to State criminal proceedings is not governed by hard and fast rule". (316 U.S. 426). Secondly, "Decisions of this Court do not lay down a rule that, in every case, whatever the circumstances, one charged with a crime who is unable to obtain counsel must be furnished counsel by the State". (316 U.S. 462).The third ruling is the most telling.

> **"A review of state constitutional and statutory provisions on the subject in connection with the common law demonstrates that,**

> **in the great majority of the States, it has been the considered judgment of the people, their representatives, and their courts that an appointment of counsel for indigent defendants in criminal cases is not a fundamental right, essential to a fair trial, and that the matter has generally been deemed one of legislative policy. In the light of this evidence, it cannot be said that the concept of due process incorporated in the Fourteenth Amendment obliges the State, whatever may be their own views, to furnish counsel in every such case."(316 U.S. 472).**

This case represented a blow to the indigent defendant throughout the country. Although there were some states that did appoint counsel for all accused, there were others that took the Betts ruling to heart. The Betts case indicated the reluctance of the court to interfere with the internal workings of any state's criminal justice system.

In 1961, The United States Supreme Court expanded the right to counsel to include the arraignment process. In Hamilton v Alabama 368 U.S. 52 (1961), the court made a brief, but telling statement. "Absence of counsel for petitioner at the time of his arraignment violated hid rights under the Due Process Clause of the fourteenth Amendment". (368 U.S. 55).

The case that changed the rights of the accused as regards the right to counsel was Gideon v Wainwright, 372 U.S. 335 (1963). In this case there is an indigent defendant charged with breaking and entering a pool hall during the nighttime. At trial, the petitioner asked for counsel to be appointed. The request was denied because Florida law only allowed appointment of counsel for capital cases. The court overruled Betts v Brady, using a quote from Justice Sutherland form Powell v Alabama.

> **"The right to be heard would be, in many cases, of little avail if it**

> **did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (372 U.S. 345).**

The court further stated that "The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment" (372 U.S. 345).

This case was the turning point in the right to counsel for the accused. The right has been further expanded to include the right to counsel before, during and after custodial interrogation. The court put the burden on law enforcement to advise the accused of this right to counsel and the appointment thereof. Miranda v Arizona 384 U.S. 436 (1966). In light of Miranda, the court has set down guidelines that cover overheard conversations. Brewer v Williams 430 U.S. 387 (1977), and Rhode Island v Innis 446 U.S. 291 (1980). In Brewer, The defendant was reacting to a soliloquy by a police officer who was playing on a religious aspect of the defendant's life. The so-called "Christian Burial" speech was disallowed. In Innis, the confession made in the presence of two police officers was allowed as they were not directing any questioning toward Innis and he volunteered incrimination information about the location of a gun he had used in a taxi robbery. It appears that these two cases

are contradictory. They are not as the thread of right to counsel during questioning was not broken.

The court has further allowed the right to counsel to include counsel at "critical stages" of investigations. Line ups or out of court show ups are now deemed inadmissible as evidence. United States v Wade 388 U.S. 218 (1967).

In In re Gault, 387 U.S. 1 (1967), the court went further and stated that all of the rights that an adult accused may have also apply to juveniles.

In a recent case, the Supreme Court of Indiana further expanded the right to counsel. In Indiana v Edwards, 07-208 (2008), this jurisdiction decided that a defendant whose mental capacity to stand trial for a misdemeanor required the trial court to appoint counsel, even though the defendant wanted to represent himself. The court stated "The Constitution does not forbid states from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. (07-208 p. 13).

There is little question where both state and federal courts stand as regards the right to counsel. All jurisdictions seem to agree that the right to counsel at all stages of the criminal process is absolute.

Addendum

Since the writing of the main body of the paper, there have been two new cases that are relevant to the topic of right to counsel. In the case of Rothgery v Gillespie County, Texas 07-440 (2008), the United States Supreme Court made clear that the right to counsel attaches at the first adversary proceeding wherein the accused may subjected to a loss of freedom. In this case, Rothgery was brought before a magistrate judge for a Fourth Amendment probable cause hearing at which bail was set. At the hearing, Rothgery was formally apprised of the charges, and he orally and in written form requested counsel. This request was denied. After the hearing, Rothgery was incarcerated when he could not post bail. The Court stated, clearly, in its decision:

> **A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of the adversary proceeding the trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor (as distinct from a police officer) be aware of the initial proceeding or involved in its conduct. (07-440).**

In the case of United States v Morriss 08-1187 (2008), the Eighth Circuit Court of Appeals, reaffirms Rothgery but states that voluntary statements given to law enforcement after Morriss was warned that he did not have to speak at all are admissible without the attachment of counsel. This is not a restriction on Rothgery, but rather a affirmation of the principle that voluntary statements, made after appropriate warnings may be admissible against a defendant. In this case, Morriss was represented by counsel at two proceedings prior to the interview and the court stated that this prior representation did not apply to the interview at hand.

Cases and Acts Cited

1. **Constitution of the United States, Sixth Amendment.**
2. **Judiciary Act of 1789, Section 35, I Stat.73**
3. **Act of April 30, 1790, ch. 9, I Stat. 118**
4. **Powell v Alabama 287 U.S. 45 (1932)**
5. **Johnson V Zerbst 304 U.S. 458 (1938)**
6. **Betts v Brady 316 U. S. 456 (1942)**
7. **Hamilton v Alabama 368 U.S. 52 (1961)**
8. **Gideon v Wainwright 372 U.S. 335 (1963)**
9. **Miranda v Arizona 384 U.S. 436 (1966)**
10. **Brewer v Williams 436 U.S. 387 (1977)**
11. **Rhode Island v Innis 446 U.S. 291 (1980)**
12. **United States v Wade 388 U.S. 218 (1967)**
13. **In re Gault 387 U.S. 1 (1967)**
14. **Indiana v Edwards Indiana Supreme Court 07-208 (2008)**