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Right to an Attorney

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majorities with vigorous dissents. Considering the recent upswing of school violence and changes to the composition of the Court, it is unclear whether future Supreme Court decisions will strengthen or further erode the constitutional rights of students.

SEE ALSO *Colleges and Universities; Education and the Constitution; First Amendment; Fourteenth Amendment; Goss v. Lopez, 419 U.S. 565 (1975); Morse v. Frederick, 551 U.S. ____ (2007); Parental Rights; Speech in Public Schools; Tinker v. Des Moines School District, 393 U.S. 503 (1969)*

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Candidus K. Dougherty

RIGHT TO AN ATTORNEY

The Supreme Court has identified two distinct rights to an attorney that stem from the U.S. Constitution. One is rooted in the Fifth Amendment. The other is rooted in the Sixth and Fourteenth Amendments. The Fifth Amendment right to an attorney is the right that all arrestees have to counsel during a custodial interrogation. That right relates to the Fifth Amendment right against compelled self-incrimination. Counsel may help advise the arrestee regarding the implications of making statements during the interrogation. Nonetheless, the arrestee may waive the right to counsel. However, in the absence of an intelligent and knowing waiver of the right to an attorney, statements gleaned from the arrestee in contravention of the right to counsel are not admissible against the arrestee if the arrestee is later prosecuted.

The Sixth Amendment right to counsel is the right to the assistance of counsel whenever a defendant in federal court faces criminal charges that may lead to incarceration. As written, the amendment appears merely to allow a defendant to retain counsel when facing

federal criminal charges. However, the right has been interpreted to include a guarantee that an indigent defendant will be provided appointed counsel whenever requested, at no cost. The right to counsel in state criminal cases is very similar to the Sixth Amendment right, but flows directly from the Fourteenth Amendment's due process clause. That clause prohibits states from depriving persons of life, liberty, or property without due process of law. The denial of the right to the assistance of counsel is a due process violation. Consequently, whenever a state wishes to incarcerate a defendant, it must allow the defendant to retain counsel or must provide appointed counsel at no cost. The Sixth and Fourteenth Amendment rights to the assistance of counsel arise as soon as the government begins adversary judicial proceedings against a defendant.

Defendants may waive the right to the assistance of counsel and assert their right to self-representation, though such action is discouraged. The violation of the Sixth or Fourteenth Amendment right to counsel usually yields a new trial in which the right to counsel is properly observed. However, in some situations, a violation will merely yield the exclusion of evidence gathered in contravention of the right or a determination that the violation was harmless error. For the remainder of this entry, reference to the Sixth Amendment right to counsel will refer to both the Sixth and Fourteenth Amendment rights to counsel unless a contrary intent is clearly indicated.

HISTORICAL ANTECEDENTS OF THE SIXTH AMENDMENT RIGHT TO AN ATTORNEY

The Sixth Amendment of the Constitution of the United States states, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." The amendment affirmatively disavowed the English common law practice that limited the right to counsel in criminal trials. Under English common law, civil litigants and criminal defendants charged with misdemeanors were allowed to retain counsel to represent them at trial. However, defendants charged with felonies or treason were not permitted to have counsel represent them at trial. Rather, they were allowed to engage counsel to ask them about specific points of law that might be relevant to the case. Though England retained vestiges of this practice until 1836, nearly all of the American colonies had affirmatively rejected the English common law rule and guaranteed the right to retain counsel, at least for the most serious crimes, in their state or colonial constitutions before the U.S. Constitution was ratified. However, in the early years of the United States, the right to counsel was in substance a guarantee that a defendant could retain counsel if the defendant could pay for counsel, not the right to have counsel appointed free of charge.

RIGHT TO AN ATTORNEY IN FEDERAL CRIMINAL CASES

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Supreme Court determined that indigent defendants in federal courts have the right to have counsel appointed for them free of charge. In that case, the defendant—a U.S. Marine on leave—was charged with passing counterfeit twenty-dollar bills. The defendant had counsel during his preliminary hearing, but could not secure counsel for trial. The defendant, acting as his own counsel, was convicted and sentenced to four and one-half years in prison. The Court indicated that the average layperson was ill equipped to defend himself or herself in court, even in a seemingly simple case. Consequently, it determined that “the Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.” With that statement, the Supreme Court recognized the right to appointed counsel. In the absence of counsel, and an intelligent and competent waiver of the right to counsel, a federal court has no jurisdiction to proceed with a criminal case. In noting that the defendant’s lack of counsel affects the federal court’s jurisdiction, the Supreme Court suggested that the need for counsel is as much about the circumstances under which the federal government may exercise its judicial power as it is about providing help to defendants to protect their freedom. Given that the prevalence of federal crime has expanded significantly in the decades since *Johnson* was decided, the right to counsel in federal court arises much more frequently now than it did then.

RIGHT TO AN ATTORNEY IN STATE CRIMINAL CASES

The right to appointed counsel in state court is grounded directly in the due process protections of the Fourteenth Amendment. The seeds of the right to appointed counsel in state court criminal trials were planted before the right to appointed counsel in federal court criminal trials was confirmed in *Johnson*. However, the right to appointed counsel in state court criminal proceedings took a more circuitous route to be recognized than the right to appointed counsel in federal criminal proceedings. The right had to be recognized as part of Fourteenth Amendment due process, rather than through the Sixth Amendment because the Sixth Amendment is not directly applicable to the states.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty or property, without due process of law.” Due process rights are those that are sufficiently fundamental that they are “implicit in the concept of ordered liberty,” in the words of the Court in *Palko v. Connecticut*, 302 U.S. 319 (1937). Until the

right to counsel was established as fundamental, whether a defendant’s due process rights had been violated depended on the circumstances in the subject case underlying the denial of appointed counsel. A number of years elapsed before the Supreme Court migrated from the position that the refusal to appoint counsel in a state criminal trial violates the due process clause of the Fourteenth Amendment under some circumstances, to the position that the Fourteenth Amendment generally guarantees the right to appointed counsel whenever the state seeks to incarcerate a defendant.

Powell v. Alabama, 287 U.S. 45 (1932), arguably was the beginning of the process that eventually yielded the general right to appointed counsel in state criminal trials. *Powell* involved the Scottsboro Boys, a group of young African-American men and boys who were accused of raping two white women on a train in Alabama in 1931. Though they had access to unofficial counsel prior to trial, counsel was not officially appointed for the defendants until the morning of their one-day trials, a mere two weeks after the alleged assault occurred. The Supreme Court concluded that Ozie Powell and the other Scottsboro Boys had not been afforded the right to counsel because they had not been afforded the ability to secure counsel on their own. More importantly, the Court concluded that had the defendants been unable to secure counsel, the failure to appoint counsel for them would have been a denial of due process under the Fourteenth Amendment, given their circumstances. Before directly addressing the right to counsel, the Court discussed the situation surrounding the trial, indicating that the heinous nature of the crime, the hostility of the public, the need to use the military to protect the defendants, and the age of the defendants were all relevant factors in the due process analysis. Only after this explanation did the Court note that “in a capital case where the defendant is unable to employ counsel” and where the defendant cannot adequately defend himself or herself “because of ignorance, feeble-mindedness, illiteracy, or the like,” the court must appoint counsel in a manner and at a time that allows the counsel to provide “effective aid in the preparation and trial of the case.” Consequently, the Court’s decision left open the possibility that counsel did not have to be appointed for a poor defendant in many circumstances.

In *Betts v. Brady*, 316 U.S. 455 (1942), the Court made clear that in the general run of state criminal cases, the Constitution did not require that counsel be appointed for indigent defendants. In *Betts*, the defendant was charged with robbery. His request for appointed counsel was refused, as the practice in Carroll County, Maryland, was to appoint counsel only for rape or murder defendants. The defendant, acting as his own counsel, was convicted and sentenced to eight years in prison. Citing

Powell, the *Betts* Court noted that whether the denial of appointed counsel violated due process was a case-by-case determination. In this case, the Court found the defendant capable of taking care of his case on his own. Not only did the Court find no general right to appointed counsel in state criminal cases, it suggested that the multitude of ways in which the states then decided when and whether to appoint counsel suggested that the right to appointed counsel was not a fundamental right that triggered a due process violation when denied. Nonetheless, the Court made clear in *Chandler v. Fretag*, 348 U.S. 3 (1954), that state court defendants undoubtedly had the right to retain counsel at their own cost.

The debate regarding appointed counsel was altered forever in *Gideon v. Wainwright*, 372 U.S. 335 (1963), a case in which the Court asked the litigants bluntly whether the Court should overrule *Betts*. In *Gideon*, the defendant was charged with a felony, burglary with the intent to commit a misdemeanor. The state claimed Gideon had broken into a pool hall and stolen alcohol and spare change from a jukebox. Gideon requested that counsel be appointed for him because he was unable to afford counsel. However, he was told that Florida provided counsel only to those who were charged with a capital offense. Gideon represented himself and was convicted. He was sentenced to five years in prison—the maximum penalty for his crime.

The *Gideon* Court overruled *Betts*. The Court forcefully rejected the notion that a layperson can adequately serve as counsel in his or her own case noting, “reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” Noting that “lawyers in criminal courts are necessities, not luxuries,” the Court raised the specter of the innocent layperson being convicted merely because of a lack of familiarity with a judicial system that an attorney has been trained to navigate with ease. With that, the Court found a general right to appointed counsel for indigent defendants. Nevertheless, defendants rich and poor retain the right to waive counsel and represent themselves.

With the issue of the scope of the right to appointed counsel settled, the Court has, since *Gideon*, continued to determine the types of cases in which a defendant must have or need not have the option of an attorney. The Court has focused on whether the defendant’s liberty is in jeopardy. In *In re Gault*, 387 U.S. 1 (1967), the Court extended the right to appointed counsel to juveniles when the juvenile may be committed to an institution and have his or her freedom limited as a result. The Court does not focus on the type of charge involved. Consequently, in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended the right to appointed counsel to those cases

where any prison term is imposed, whether the crime is considered a petty offense or otherwise. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court limited the right to counsel, ruling that the right to counsel had not been violated in a case where the defendant was not provided counsel, but also was not sentenced to incarceration. Recently, the Court resolving a lingering issue regarding the scope of the right to counsel in *Alabama v. Shelton*, 535 U.S. 654 (2002). In that case the defendant had been convicted of assault and sentenced to thirty days in jail. However, the trial court suspended the sentence and placed the defendant on two years probation. The Supreme Court ruled that the defendant should have been offered the assistance of counsel, noting that counsel should have been available in any case in which a suspended sentence could lead to “the actual deprivation of a person’s liberty.”

Even before the recognition of a general right to appointed counsel, federal and state governments realized that poor defendants needed appointed counsel in some situations. However, in the wake of *Gideon* and its progeny, the need for appointed counsel increased significantly. The need helped create the opportunity for the structured governmental provision of appointed counsel through government public defenders charged with providing appointed counsel for indigent defendants. Though some public defender’s offices predate *Gideon*, many state and federal public defender programs are the result of *Gideon*’s focus on the right to counsel. The public defendant structure of appointed counsel ensures that indigent defendants are appointed counsel who are reasonably experienced and able to well represent the defendants. Though public defenders are available in many places and circumstances, courts continue to appoint Legal Aid Society attorneys and other private counsel to serve as appointed counsel when public defenders are not available to serve.

WHEN THE RIGHT TO AN ATTORNEY ATTACHES

The Fifth Amendment right to an attorney attaches when a suspect is placed in custody. On arrest, the suspect is informed of rights, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), including the right to the presence of an attorney. The suspect may waive that right. Additionally, the suspect may invoke the right to any attorney at any time during the custodial interrogation or any subsequent custodial interrogations.

Though the Sixth Amendment right to counsel is most important during trial, it attaches well before trial. As the Court noted in *Powell*, “the duty [to assign counsel] is not discharged by an assignment as such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” The

right to counsel attaches when the suspect becomes a defendant as a prosecution begins and continues throughout the duration of the prosecution. However, the Court reiterated most recently in *Texas v. Cobb*, 532 U.S. 162 (2001), that the right to counsel is specific to whatever offense is charged and does not apply to offenses that have not been charged.

In *Cobb*, the right to counsel attached to the burglary with which the defendant was charged, but not to the murder of two occupants of the house the defendant burglarized. How the Sixth Amendment right to counsel attaches can lead to an interesting overlapping of the Fifth and Sixth Amendment-based rights to counsel. A defendant who has been charged with one crime (Crime A) has a Sixth Amendment right to counsel with respect to Crime A during the duration of the prosecution of Crime A. However, if the defendant is being investigated with respect to a different crime (Crime B), the defendant has no Sixth Amendment right to counsel with respect to Crime B until the government begins a prosecution of Crime B. Consequently, the defendant can be interrogated with respect to Crime B subject to the Fifth Amendment right to the presence of counsel during a custodial interrogation at the same time the defendant cannot be questioned with respect to Crime A without counsel.

Though the defendant retains the Sixth Amendment right to counsel throughout the prosecution, the presence of counsel is only necessary during critical pretrial stages of the prosecution and the trial itself. The Court has suggested that whether a stage is critical depends on whether the defendant faces a skilled adversary and needs counsel to help protect his or her interests. Many of those stages will be formal court hearings. However, as pretrial processes have become more prevalent in criminal cases, the import of the right to counsel has also grown. For example, the need to have counsel has expanded to some informal critical stages, such as evidence gathering involving the defendant that may not have been completed in the somewhat distant past. In focusing on the adversarial nature of a stage in determining whether it is critical or not, the Court has rejected the notion arguably implicit in *Powell* that counsel should be present at any stage of the prosecution where counsel's presence would help aid the defendant at trial.

The right to counsel must have been provided or waived if the government intends to prosecute a suspect or defendant. However, it is somewhat unclear what obligation the government has to allow a defendant to retain counsel or to appoint counsel if the government does not intend to prosecute the defendant in any conventional sense. This issue is of particular import with respect to suspected terrorists. Though the Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), indicated that people held

by the United States must be provided the opportunity to contest their detention before a neutral decision maker and must be provided counsel in the process, it is unclear what form the opportunity to contest will take or how the right to counsel will be shaped to allow it to comply with the exigencies of the situation the federal government claims exists.

INEFFECTIVE ASSISTANCE OF AND VIOLATIONS OF THE RIGHT TO AN ATTORNEY

In *McMann v. Richardson*, 397 U.S. 759 (1970), the Court decided that the right to counsel subsumes the right to the effective assistance of counsel. Ineffectiveness may stem either from the government's interference with the right to counsel or from the incompetence of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court provided the standards for the ineffective assistance of counsel. If counsel's representation is shown to have been deficient and the deficient representation deprived the defendant of a fair trial, the defendant is treated as if he or she was essentially without counsel. A violation of the Fifth Amendment right to counsel—questioning without counsel and without waiver—leads to the exclusion of the uncounseled statements. What occurs in the wake of a violation of the Sixth Amendment right to counsel depends on the nature of the violation. For example, the denial of the right to choose the counsel of one's choice will lead to the reversal of a conviction. In contrast, the denial of the right to counsel in the context of gathering evidence may merely yield the exclusion of the evidence. Yet other violations may be subject to harmless error analysis, which considers whether a violation may have affected the outcome of the trial. No possible effect on the trial's outcome yields no penalty for the violation of the right. Harmless error analysis should be distinguished from the requirement that a defendant show prejudice in the ineffective assistance of counsel area. Ineffective assistance of counsel stems from the defendant's right to a fair trial. Consequently, prejudice is necessary to prove that the right to a fair trial has been violated before any discussion of the penalty for the violation occurs.

THE RIGHT TO AN ATTORNEY AND APPEALS

The constitutional right to counsel extends to a defendant's first appeal of right, but does not generally extend to discretionary appeals. (See *Halbert v. Michigan*, 545 U.S. 605 [2005]; *Pennsylvania v. Finley*, 481 U.S. 551 [1987].) Not surprisingly, the right to counsel does not extend to state or federal habeas cases, including death penalty cases. (See *Murray v. Giarratano*, 492 U.S. 1 [1989]; *Finley*; *Ross v. Moffitt*, 417 U.S. 600 [1974].) Of course, many jurisdictions provide counsel to such defendants by statute. This entire area

is subject to continued debate, particularly given the number of death row inmates who have been exonerated in recent years. However, the Supreme Court has not changed its decisions regarding the scope of the right to counsel.

IMPACT OF THE RIGHT TO AN ATTORNEY

The impact of the recognition of Fifth and Sixth Amendment rights to counsel cannot be overstated. Of course, it is the need to inform the suspect or defendant of the right to counsel that really created value for the Fifth Amendment right to counsel. The need to tell a suspect that he or she may enjoy the advice of counsel before speaking to police officers and investigators helps convince the Court that confessions are voluntary and fair, rather than coerced or involuntary. Interestingly, informing suspects of their rights, and requiring a knowing and intelligent waiver, has not stopped suspects from confessing to crimes. The Sixth Amendment right to counsel helps guarantee that when an indigent defendant is convicted, it will not be because the defendant had no one to help him or her navigate the system. Similarly, it helps ensure that innocent poor defendants are not being convicted merely because they are poor and unable to afford counsel. In that way, the right to counsel is as much about protecting the integrity of the criminal justice system as it is about protecting the indigent defendant from harm.

However, one curiosity remains with respect to the waiver of the Sixth Amendment right to counsel. The evolution of the right to counsel indicates a change in the conception of trials and the legal process in general. A trial is not simply an occasion on which the defendant is supposed to tell his or her side of the story and be protected from legal jeopardy by counsel if wealthy enough to afford counsel. Rather, the trial is viewed as the process through which a government seeks to impose the power of the criminal justice system on one of its citizens or subjects. Consequently, fairness dictates that the government guarantee that defendants can adequately defend themselves, when necessary with the assistance of appointed counsel, before the government can exact punishment for a crime. The need for the government to make sure that defendants are protected exists uneasily alongside allowing defendants to represent themselves, given the Court's admonition that laypeople have no business representing themselves even in fairly simple criminal matters.

SEE ALSO *Dickerson v. United States*, 530 U.S. 428 (2000); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *In re Gault*, 387 U.S. 1 (1967); Lewis, Anthony; *Miranda Warnings; Sixth Amendment*

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RIGHT TO BEAR ARMS

The Second Amendment to the U.S. Constitution reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." Derived in part from a provision in the 1689 English Bill of Rights, which guaranteed the rights of Protestants to possess arms, an explicit protection was suggested by a number of states following the ratification of the U.S. Constitution, and was included in the twelve amendments submitted by James Madison (1751–1836) to the First Congress and to the states for ratification.

Debates over the meaning of the Second Amendment began in earnest in the 1930s when the first federal gun-control laws were passed; those debates intensified in the late 1960s, continuing into the mid-1990s as federal gun-control laws expanded. At the same time, what had been the prevailing consensus—that gun-control laws raised no serious constitutional questions—fragmented, with many respected constitutional law experts conceding, sometimes reluctantly, that the Second Amendment did offer some protection for private gun ownership.

Contemporaneously, cracks appeared in the judicial consensus, formerly dismissive of the notion that the Second Amendment protected any individual right. In 2007 a petition for certiorari was filed asking the U.S. Supreme Court to rule on the constitutionality of the District of Columbia's total ban on handgun possession, which was struck down by the D.C. Court of Appeals. The Supreme Court agreed, in November of 2007, to