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# Criminal Procedure--Right to Counsel Prior to Trial

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## CRIMINAL PROCEDURE—RIGHT TO COUNSEL PRIOR TO TRIAL

“The administration of the criminal law is a disgrace to our civilization.” To no part of criminal proceedings is this oft-quoted statement of William Howard Taft more applicable than to pre-trial proceedings. One eminent federal judge, in speaking quite strongly of the evils of criminal pre-trial procedure said:

Those who think of the accused as one at an unfair disadvantage with all the powers of the state arrayed against him . . . if they think intelligently and not merely as emotional romanticists . . . think of that half concealed, unsupervised procedure which precedes the appearance of the accused in the court of record. Here it is that we find the third degree, the bail bond broker, the school pigeon, the crooked interpreter, the shyster lawyer, the lame duck magistrate, and all the rest of the motley of underworld characters and methods. The poor man . . . often is the victim of a grotesque burlesque on the administration of justice.<sup>1</sup>

If at any time, from the time of his arrest to final determination of his guilt or innocence, an accused really needs the help of an attorney, it is in the pre-trial period. This is the time for the preparation of his defense, the foundation must be laid and the framework constructed. The testimony of witnesses against him must be examined and evaluated, his own witnesses examined and their value to his cause ascertained. The technical skill of a lawyer is needed to examine the indictment or information. Even if the defendant has committed some crime, he may not be guilty of the crime with which he has been charged, and in ignorance of the law he may, on arraignment, even plead guilty to a more serious offense than he has actually committed.<sup>2</sup> Often it may be unwise to disclose his defense at the preliminary examination, and even the most educated layman cannot intelligently make such strategic legal decisions without the advice of an attorney. Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and

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<sup>1</sup> Miller, J., as quoted in ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, footnote at 43, 44 (1947)

<sup>2</sup> For a shocking example of this, see *Palmer v. Ashe*, 342 U.S. 134 (1951).

put on trial. It is with this right to counsel, either retained or assigned, from the time of the arrest of the accused until he is arraigned before the trial court that this discussion will be concerned.

### *Right to Assistance of Retained Counsel*

The right of an accused in a criminal prosecution to any assistance of counsel in making his defense is of comparatively recent origin and has no basis in the English common law.<sup>3</sup> Until modified by statute in 1836, a person accused of a felony in England was denied all aid of counsel except in respect of questions of law which the accused himself might suggest.<sup>4</sup> As early as 1712, this harsh English rule was rejected in the American Colonies, and by the time of the adoption of the Federal Constitution, twelve of the thirteen colonies recognized substantially the right of the accused to assistance of retained counsel.<sup>5</sup> The Sixth Amendment to the Constitution of the United States, proposed by the first Congress in 1789 and adopted finally in 1791, provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence."<sup>6</sup> This is the source of the right in all federal prosecutions. Since the adoption of this Amendment, it has never been doubted that the accused has an absolute right to representation by *retained* counsel in each and every federal criminal prosecution.

The provisions of the Sixth Amendment are not binding upon the state courts, however,<sup>7</sup> and a defendant in a state prosecution must look to the state constitutional and statutory provisions or to the due process clause of the Fourteenth Amendment in the Federal Constitution for any guarantee of a right to counsel. Forty-seven states have constitutional provisions similar to the Sixth Amendment.<sup>8</sup> The other, Virginia, effectively provides a similar right to assistance of retained counsel through statute and

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<sup>3</sup> *Betts v. Brady*, 316 U.S. 455 (1942); *Powell v. Alabama*, 287 U.S. 45, 60 (1932); Note, 20 NEW YORK UNIV. L.Q. REV. 1 (1944); Note, 28 NOTRE DAME LAWYER, 351 (1952).

<sup>4</sup> *Supra* note 3.

<sup>5</sup> *Powell v. Alabama*, *supra* note 3, at 61-66 (1932); see also KONVITZ, BILL OF RIGHTS READER 491 (1954).

<sup>6</sup> U.S. CONST. AMENDMENT VI.

<sup>7</sup> *Foster v. Illinois*, 332 U.S. 134 (1947); *Gaines v. Washington*, 277 U.S. 81 (1928); *Cf.*, dissent in *Foster v. Illinois*, *supra* at 139.

<sup>8</sup> A.L.I. CODE OF CRIMINAL PROCEDURE, commentaries 273-275 (1930).

judicial decision.<sup>9</sup> In addition to the guarantee of the particular state, the defendant in a state prosecution is also protected by the provision of the Fourteenth Amendment that "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."<sup>10</sup> The Supreme Court has construed this clause as follows:

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the Constitutional sense. . . . The decisions all point to that conclusion.<sup>11</sup>

Thus it is clear that in any criminal prosecution in the United States today, state as well as federal, the accused has an absolute right to representation by counsel of his own choice, employed by him and appearing for him at his trial.

Prior to 1848,<sup>12</sup> the defendant in an English criminal prosecution was not entitled to counsel at the preliminary hearing.<sup>13</sup> The same rule persisted in our federal courts<sup>14</sup> until it was renounced by judicial decision in 1858.<sup>15</sup> Rule 5(b) of the Federal Rules of Criminal Procedure implements the current federal practice in this connection by providing that at the preliminary hearing:

The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. . . . The commissioner shall allow the defendant reasonable time and opportunity to consult counsel. . . .<sup>16</sup>

Nearly all states which have decided the question have held that the accused is entitled to representation which he himself furnishes at the preliminary hearing under the guarantee of the

<sup>9</sup> *Enoch v. Commonwealth*, 141 Va. 411, 126 S.E. 222 (1925).

<sup>10</sup> U.S. CONST. AMENDMENT XIV.

<sup>11</sup> *Powell v. Alabama*, *supra* note 3, at 69.

<sup>12</sup> *Cox v. Coleridge*, 1 Barn. & C. 37, 107 Eng. Reprint 15 (1822).

<sup>13</sup> 11 & 12 Vict. ch. 42, sec. 18; A.L.I. CODE OF CRIMINAL PROCEDURE, commentaries 266-268 (1930).

<sup>14</sup> *In re Bates*, 2 Fed. Cas. No. 1099a (1858).

<sup>15</sup> *U.S. v. Bollman*, 1 Cranch CC 373, Fed. Cas. No. 14, 622 (1858); *see also* *Anderson v. Treat*, 172 U.S. 24 (1898).

<sup>16</sup> FEDERAL RULES OF CRIMINAL PROCEDURE 5(b).

state constitution or statutes.<sup>17</sup> The question also arises as to the effect of the due process clause of the Fourteenth Amendment in respect to right to assistance of retained counsel at the preliminary hearing. Although no case in point has been found, it would seem that denial of a right to representation of retained counsel at the preliminary hearing is not a denial of due process of law if, in fact, the accused is allowed counsel employed by him at the trial of the case.

Prior to the appearance of the defendant before the committing officer, no effective right to advice of counsel exists in either federal or state courts.<sup>18</sup> The ineffectiveness of such right at this stage of the proceedings is closely related to the ineffectiveness of our prohibition of the third degree prior to the preliminary hearing. While enunciating an abstract rule that the defendant is entitled to assistance of counsel at every stage of the proceeding, courts uniformly hold that mere refusal to allow the defendant opportunity to retain and consult with counsel will not invalidate a confession obtained after such refusal has been made.<sup>19</sup> One state, California, has attempted to solve the problem by making it a misdemeanor to refuse to allow an attorney to visit the prisoner at the request of the prisoner or a relative.<sup>20</sup> Just as making it a crime to use third degree methods on an accused has failed to solve that problem, California's approach has failed to adequately guarantee the defendant a right to retain counsel from the time of his arrest to the preliminary hearing. Some courts have intimated that refusal by officers having custody of the defendant of an opportunity to retain and consult with counsel at this stage of the proceeding is a factor which may be considered in determining whether or not a subsequent confession was voluntary.<sup>21</sup> In no case, however, has this failure to allow counsel

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<sup>17</sup> *Martin v. Edmondson*, 176 Kan. 374, 270 P. 2d 791 (1954); *State v. Schabert*, 218 Minn. 1, 15 N.W. 2d 585 (1944); *Lambert v. Kaiser*, 352 Mo. 122, 176 S.W. 2d 494 (1943); *In re Both*, 200 App. Div. 423, 192 N.Y.S. 822 (1922). See also note, 84 L. Ed. 383, 390 (1939). New Jersey alone appears to have a rule contra. See *State v. Murphy*, 87 N.J.L. 515, 94 Atl. 640 (1915).

<sup>18</sup> The "committing officer" is one who must on probable evidence commit the accused for trial or require bail. In the Federal judicial system, the United States Commissioner is the committing officer, while in most states the magistrate is the committing officer.

<sup>19</sup> Note, 23 A.L.R. 1382, 1387 (1923).

<sup>20</sup> *Lisenba v. California*, 314 U.S. 219 (1941).

<sup>21</sup> *McNabb v. U.S.*, 318 U.S. 332 (1942), *rehearing denied* 319 U.S. 784 (1943); *Gros v. United States*, 136 F. 2d 878 (9th Cir. 1943).

been a decisive factor in holding a confession inadmissible as being involuntary. It is submitted that from arrest to preliminary hearing, the right of the defendant to obtain legal advice is almost wholly controlled by the discretion of the officers who have him in custody, and that an abuse by them of the right will bring no more than a judicial reprimand in form of a declaration that the officers have been over-zealous in the performance of their duties.<sup>22</sup>

### *Right to Assigned Counsel*

The Sixth Amendment to the Federal Constitution entitles the defendant in every criminal prosecution to assistance of *retained* counsel. Prior to 1938, it was not understood to guarantee any right to *assigned* counsel.<sup>23</sup> This construction of the Amendment was supported by the "plain meaning" of its language, and by the fact that in 1790, after proposing the first ten Amendments, Congress enacted a statute requiring Federal courts to assign counsel in all capital cases.<sup>24</sup> In deciding *Johnson v. Zerbst*,<sup>25</sup> the Supreme Court rejected prior narrow interpretations of the right to counsel embodied in the Sixth Amendment and held that, in every case, the court must assign counsel unless the defendant intelligently and competently waives the right, or is able to retain counsel himself.

The Federal right to *assigned* counsel clearly does not exist before the accused is arraigned before the trial court.<sup>26</sup> Rule 5(b) of the Federal Rules of Criminal Procedure requires only that the commissioner on preliminary examination inform the accused of his right to *retain* counsel and allow him reasonable time and opportunity to consult with counsel.<sup>27</sup> It does not require him to assign counsel at this stage of the proceeding. Rule 44 provides for the assignment of counsel in federal prosecutions in the following language:

<sup>22</sup> See *McCleary v. State*, 122 Md. 394, 89 Atl. 1100 (1914).

<sup>23</sup> Note, 20 NEW YORK UNIV. L.Q. REV. 1, 7 (1944); Note, 38 Kx. L.J. 317, 318 (1949-50).

<sup>24</sup> 1 STAT. 118 (1790); 18 U.S.C.A. sec. 563 (1927).

<sup>25</sup> 304 U.S. 458 (1938).

<sup>26</sup> *Council v. Clemmer*, 177 F. 2d 22, 23 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 880 (1949); *Setzer v. Welch*, 159 F. 2d 703 (4th Cir. 1947), *cert. denied*, 337 U.S. 840 (1947); *Burall v. Johnston*, 144 F.2d 260 (9th Cir. 1944); *Gilmore v. U.S.*, 129 F. 2d 199 (10th Cir.), *cert. denied*, 317 U.S. 631 (1942).

<sup>27</sup> *Ibid.*

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and *assign counsel* to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.<sup>28</sup> (Emphasis supplied by writer.)

The Advisory Committee that drafted the Federal Rules of Criminal Procedure, after considering the desirability of requiring the assignment of counsel at the preliminary examination, rejected it with the following comment:

The rule is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in the court and, therefore, does not include the preliminary proceedings. . . .<sup>29</sup>

If the accused has no right to assigned counsel under the Sixth Amendment at his preliminary examination, then *a fortiori* he has no right to assistance of assigned counsel from the time of his arrest until he is brought before the committing officer under this Amendment.

The Fourteenth Amendment gives to the defendant in some state prosecutions a guarantee of a right to assigned counsel similar to the guarantee of the Sixth Amendment in federal prosecutions. Thus in all capital cases in which the defendant is unable to retain counsel, the state trial court must provide him with legal assistance unless he competently and intelligently waives the right.<sup>30</sup> In non-capital cases, the mere refusal of a state court to appoint counsel for an indigent defendant is not denial of due process under the Fourteenth Amendment.<sup>31</sup> The Supreme Court has described the guarantee of the due process clause in non-capital cases as follows:

. . . [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no

<sup>28</sup> FEDERAL RULES OF CRIMINAL PROCEDURE 44.

<sup>29</sup> Notes of Advisory Committee on Rules, 18 U.S.C.A. (FEDERAL RULES OF CRIMINAL PROCEDURE), Rule 44, p. 501 (1951).

<sup>30</sup> *Bute v. Illinois*, 333 U.S. 640 (1948); *Powell v. Alabama*, *supra* note 3, at 71.

<sup>31</sup> *Foster v. Illinois*, *supra* note 7, at 137; *Betts v. Brady*, *supra* note 3.

trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.<sup>32</sup>

Each case is therefore made to depend on the totality of its circumstances, and an indigent person convicted in a state court of a non-capital offense without benefit of counsel will not be heard to complain unless he can affirmatively show that his trial was "offensive to the common and fundamental ideas of fairness and right". The inherent weakness of such a test, applied at the appellate level and based on little other than the record of the trial court, was pointed up in the dissenting opinion of Mr. Justice Black in the case of *Betts v. Brady* in the following language:

Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. . . .<sup>33</sup>

The Fourteenth Amendment has not in any case been construed to guarantee to an accused a right to assignment of counsel at the preliminary hearing or at any other stage of the proceedings prior to the arraignment of the defendant before the trial court.

Despite the fact that the constitutions of forty-seven states contain provisions guaranteeing a right to counsel in language similar to that of the Sixth Amendment to the Federal Constitution, only three states have interpreted these provisions to entitle an indigent accused to assigned counsel as a matter of constitutional right.<sup>34</sup> However, all states have some statutory guarantee of a right to assigned counsel.<sup>35</sup> An analysis of these statutes reveals that thirty-one states purport to guarantee the right in all cases, seven in all felony cases, and six in all capital cases, the remainder particularly describing certain cases in which counsel must be assigned.<sup>36</sup> California alone guarantees the indigent defendant assistance of assigned counsel at some stage of the proceedings prior to arraignment.<sup>37</sup> That state, by amendment to its

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<sup>32</sup> *Betts v. Brady*, *supra* note 3, at 473.

<sup>33</sup> *Id.*, dissent at 476.

<sup>34</sup> *Betts v. Brady*, *supra* note 3, at 468-471.

<sup>35</sup> See BROWNELL, *LEGAL AID IN THE UNITED STATES*, appendix C, 300 (1951).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Martin v. Edmondson*, *supra* note 17; *Blanks v. State*, 30 Ala. App. 519, 8 So. 2d 450 (1942); *Phillips v. State*, 162 Ark. 541, 258 S.W. 403 (1924); *McCall*



Penal Code in 1951, requires that the indigent defendant be assigned counsel at his preliminary hearing if he so desires legal assistance.<sup>38</sup> No state provides assigned counsel prior to the preliminary hearing stage of the proceedings.

### *Summary and Conclusions*

The basic American concepts of right to counsel are rooted in principles of fairness and justice. Our courts have long recognized that there is little fairness or justice in a criminal trial, conducted on the one side by a battery of experienced and skilled lawyers for the prosecution and on the other by an inexperienced, unskilled, often ignorant and uneducated layman defendant. In the *Johnson* case, the Supreme Court quoted with approval the following statement from the earlier decision in *Powell v. Alabama*:<sup>39</sup>

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 a 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 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."<sup>40</sup>

The proceedings against the defendant in fact start with his arrest. From that time on he is subjected to intense interrogation by police officers for the sole purpose of obtaining from him a confession or evidence upon which to convict him. The methods used in interrogation vary with the circumstances and it is of

v. State, 136 Fla. 343, 186 So. 667 (1939); State v. Calkins, 63 Idaho 314, 120 P. 2d 253 (1941); State v. Graves, 352 Mo. 1102, 182 S.W. 2d 46 (1944); Roberts v. State, 145 Neb. 658, 17 N.W. 2d 666 (1945); Lyons v. State, 77 Okl. Cr. 197, 138 P. 2d 142 (1943), affirmed 322 U.S. 596 (1944). Cf. People v. Williams, 268 P. 2d 156 (Cal. 1954).

<sup>38</sup> People v. Williams, *supra* note 37.

<sup>39</sup> *Supra* note 3.

<sup>40</sup> *Supra* note 25, at 463.

little use here to discuss in detail the evils of third degree methods.<sup>41</sup> The prosecution may spend months in preparing its case against the defendant, perhaps with several qualified attorneys supervising the procedure, aided by modern scientific police methods and experienced police officers. Yet in nearly every jurisdiction we provide the indigent defendant with no legal assistance until he is arraigned before the trial court. And then we allow the assigned counsel only a few days in which to prepare the defense. By that time so many consequential steps may well have taken that the counsel assigned can do little for the accused. Even if the accused can hire an attorney, police officers taking him into custody can deny him an opportunity to retain counsel without running serious risk that a confession they exact from him will be invalidated. The stark truth of the matter is that a guarantee of counsel only at the trial stage is in many cases a mere shell, affording the defendant little or no real benefit and not at all satisfying the basic requirements of fairness and justice.

The ideal time at which an accused should be allowed to retain counsel or have counsel assigned is immediately after his arrest. Where he can retain counsel of his own choice, there should be no great difficulty in allowing him opportunity to consult with counsel at this time. The inconvenience to police officers, if any, would be negligible and the advantage to the defendant great. It is submitted that the only way to accomplish this result is to strictly enforce the right, which he has already in theory, by rendering inadmissible evidence obtained from the defendant after he has been refused opportunity to obtain and consult with counsel.

A much more difficult problem is presented in regard to *assignment of counsel* at an early stage in the proceedings. Already our attorneys are burdened in some areas by assignments in criminal cases. Public defender systems have worked well where needed, however, and growth of these systems will alleviate the burden on the individual attorney.<sup>42</sup> The difficulty of administration of appointment of counsel at or shortly following the arrest of the accused probably precludes this measure without widespread adoption of the public defender system. A much improved

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<sup>41</sup> See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 61 (1947).

<sup>42</sup> BROWNELL, *op. cit. supra* note 36, at 125.

system of justice could be developed without serious administrative difficulties by requiring the committing officer at the preliminary hearing to inform the defendant of his right to counsel and to appoint counsel on the same basis that the trial judge now does in the federal courts. To supplement this appointment at the preliminary hearing, it would be necessary to strictly enforce the present requirement that an arrested person be brought before the committing officer without unreasonable delay. These two provisions, presentment before a committing officer without unreasonable delay and appointment of counsel at the preliminary hearing, would virtually abolish the injustices of pre-trial procedure to the indigent defendant. A persistence in following our current practice of handling the right to counsel in the pre-trial period can only lead to further disrepute of our criminal law administration.

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#### MISREPRESENTATION—BASIS OF LIABILITY—DAMAGES AT LAW AND EQUITABLE RESCISSION IN KENTUCKY

From a historical point of view, the law in regard to misrepresentation has shown a gradual but unmistakable trend toward granting relief more readily to those whose interests have been prejudiced because of the breach of a confidence justly reposed. At common law, the remedy for misrepresentation, or fraud, as it has been usually called, was an action on the case for deceit.<sup>1</sup> To secure relief in this action, the plaintiff had to prove either that the defendant knew his representation to be false, or that he made the statement recklessly, without caring whether it was true or false.<sup>2</sup> However, equity courts were not bound by the common law definitions of fraud in granting relief. For instance, where there was an innocent misrepresentation by a vendor, the vendee was allowed to return his purchase, rescind the transaction, and recover his consideration without proving the element of intent which was required in actions at law.<sup>3</sup> Courts

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<sup>1</sup> 23 AM. JUR. 771 (1939).

<sup>2</sup> *Id.* at 773. In Kentucky, see *Smith v. Barton*, 266 S.W. 2d 317 (Ky. 1954); *Southern Express Co. v. Fox & Logan*, 131 Ky. 257, 115 S.W. 184 (1909).

<sup>3</sup> PROSSER, TORTS, 703 (1941). See also for equitable estoppel, equitable defenses, etc., *Id.* at 712-718.