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Edward T. Haggins

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## Right to Counsel in Criminal Cases

Edward T. Haggins\*

*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. . . He requires the guiding hand of counsel at every step of the proceedings against him.<sup>1</sup>*

**T**HESE WORDS, written in 1932 by Mr. Justice Sutherland for the majority in the famous case of *Powell v. Alabama*<sup>2</sup> underline the fundamental right of a defendant in American criminal proceeding to have the assistance of counsel.

The right to counsel in the federal system is predicated on the Sixth Amendment to the United States Constitution, which provides:<sup>3</sup>

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

In a comment interpreting this Sixth Amendment right, Edwin S. Corwin, the great constitutional law writer, noted that the assistance of counsel includes such assistance while preparing a defense, as well as during the trial.<sup>4</sup>

The right to counsel was noted as early as 1769 by Blackstone in his First Edition, where he stated:

Upon what fact of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass.

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\* B.S. in Business Administration, West Virginia State College; Internal Revenue Officer, Internal Revenue Service; Fourth-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

<sup>1</sup> *Powell v. Alabama*, 287 U. S. 45 (1932).

<sup>2</sup> *Id.* at 69.

<sup>3</sup> Const. U. S., Amend. VI.

<sup>4</sup> Corwin, *The Constitution and What It Means Today*, 177 (University Press, Princeton, N. J., 1947).

England originally denied the aid of counsel to one charged with a felony, and it was not until 1836 that Parliament granted the right to counsel in felony cases.

In 1701 Pennsylvania declared that all criminals shall have the same privileges of witnesses and counsel as their prosecutors. Maryland, before the adoption of the Federal Constitution, declared that in all criminal prosecutions, every man . . . "hath a right to be allowed counsel." In twelve of the original thirteen colonies, some provision was made for the right to counsel.<sup>5</sup>

### The Supreme Court Recognizes the Right to Counsel

In *Powell v. Alabama*, the accused were tried in three groups, and all three trials were completed in one day. Each defendant was found guilty and sentenced to the death penalty. The defendants were young, ignorant, and illiterate, and were residents of states other than Alabama. Although the crime charged carried the death penalty, no lawyer had been appointed to represent the defendants until the morning of the trial. The Supreme Court, in reversing the convictions, stated that in a capital case where the defendant is unable to employ counsel, and is incapable of preparing his own defense, it is the duty of the court to assign counsel.<sup>6</sup>

The *Powell* case sets out that the right to counsel is a fundamental one which cannot be denied an accused in a capital case. Such counsel must be provided at a sufficiently early stage in the proceedings to permit adequate preparation. The case stopped short of holding, however, that the Sixth Amendment was necessarily incorporated into the Fourteenth Amendment, and therefore binding as such on the states.<sup>7</sup>

Ten years later another landmark case on the right to counsel appeared in *Betts v. Brady*.<sup>8</sup> The accused, Betts, was indicted for robbery. Due to lack of funds, he was unable to secure counsel. He requested that the court appoint counsel, but the judge advised him that Carroll County, Maryland, had no provisions for appointing counsel, except to represent indigent defendants charged with murder and rape. He then proceeded to represent himself at the trial, but was found guilty, and sen-

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<sup>5</sup> *Powell v. Alabama*, *supra* n. 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> 316 U. S. 455 (1942).

tenced to eight years in prison.<sup>9</sup> Mr. Justice Roberts, in delivering the majority opinion of the Supreme Court, stated:

The Sixth Amendment of the national Constitution applies only to trials in federal courts.<sup>10</sup> The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment,<sup>11</sup> although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operated in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.<sup>12</sup>

The *Betts* case provided the background for the historic case of *Gideon v. Wainwright*.<sup>13</sup>

### Right to Counsel Held Mandatory in All Felony Cases

The *Gideon* case was reviewed by the Supreme Court under unique circumstances. Earl Gideon was arrested and charged with breaking and entering a Florida pool room with the intent to commit a misdemeanor. Under Florida law, this offense is classified as a felony. Since Gideon was without funds to employ counsel, he asked the court to appoint one on his behalf. His request was denied by the court on the grounds that under Florida law, counsel could only be appointed in capital cases.<sup>14</sup>

Like *Betts*, Gideon conducted his own defense, but was found guilty and sentenced to serve five years in prison. While in prison, Gideon filed a writ of habeas corpus with the Florida Supreme Court. He alleged that since he was refused counsel, his rights under the United States Constitution had been denied. However the Florida court denied his petition without an opin-

<sup>9</sup> *Ibid.*

<sup>10</sup> The court cites the following cases as authority: *Spies v. Illinois*, 123 U. S. 131 (1887); *In re Sawyer*, 124 U. S. 200 (1888); *Brooks v. Missouri*, 124 U. S. 394 (1888); *Eilenbecker v. District Court*, 134 U. S. 31 (1890); *West v. Louisiana*, 194 U. S. 258 (1904); *Howard v. Kentucky*, 200 U. S. 164 (1906).

<sup>11</sup> The court cites the following cases as authority: *Hurtado v. California*, 110 U. S. 516 (1884); *Maxwell v. Dow*, 176 U. S. 581 (1900); *West v. Louisiana*, 194 U. S. 258 (1904); *Twining v. New Jersey*, 211 U. S. 78 (1908); *Frank v. Mangum*, 237 U. S. 309 (1915); *Snyder v. Massachusetts*, 291 U. S. 97 (1934); *Palko v. Connecticut*, 302 U. S. 319 (1937).

<sup>12</sup> The court cites the following cases as authority: *Twining v. New Jersey*, 211 U. S. 78 (1908); *Powell v. Alabama*, 287 U. S. 45 (1932); *Palko v. Connecticut*, 302 U. S. 319 (1937).

<sup>13</sup> 372 U. S. 335 (1963).

<sup>14</sup> *Ibid.*

ion. Gideon then sent a handwritten petition asking for certiorari, and a motion to proceed in "forma pauperis" to the United States Supreme Court.

On June 4, 1962, the Supreme Court granted certiorari, and appointed Abe Fortas to represent Gideon. In granting the petition for certiorari, the court took an unusual step; it requested that counsel for both sides discuss in their briefs and oral arguments this question: "Should this court's holding in *Betts v. Brady*, 316 U. S. 455, be reconsidered?"<sup>15</sup>

In the majority opinion Mr. Justice Black stated that the right to counsel is deemed fundamental to a fair trial in our country. Our laws from the very beginning have placed great emphasis on procedural and substantive safeguards, which were designed to guarantee fair trials, where all defendants stand equal in the eyes of the law.<sup>16</sup>

Two vital issues were laid to rest in *Gideon*. One was that the Sixth Amendment's right to counsel was incorporated into the Fourteenth Amendment's Due Process Clause, and became binding on the States. This view was expressed by Mr. Justice Douglas' concurring opinion. The second issue decided in this case, and discussed by Mr. Justice Clark in his concurring opinion, is that in capital and non-capital felony offenses alike, the right to counsel exists.

It is interesting to note that while twenty-two states filed *amici curiae* briefs in *Gideon* asking that *Betts v. Brady* be overruled, only two filed such briefs urging affirmance.<sup>17</sup>

### At What Stage of the Proceedings Does the Right to Counsel Occur?

Thus far the right to counsel as interpreted by the U. S. Supreme Court has been traced from *Powell* (1932)<sup>18</sup> to *Gideon* (1963).<sup>19</sup> This brief history serves as an introduction to *Escobedo v. Illinois*,<sup>20</sup> another landmark case on the right to counsel.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.* at 344.

<sup>17</sup> *Id.* at 335, 336; Krash, *The Right to a Lawyer: The Implications of Gideon v. Wainwright*, 39 *Notre Dame Lawyer* 150 (1964). This is an excellent article, written by Abe Krash who, as a colleague of Abe Fortas, assisted in preparing the brief in *Gideon*.

<sup>18</sup> *Powell v. Alabama*, *supra* n. 1.

<sup>19</sup> *Gideon v. Wainwright*, *supra* n. 13.

<sup>20</sup> 378 U. S. 478 (1964). See Milledge, *Escobedo—Toward Eliminating Coerced Confessions*, 19 *U. Miami L. R.* 415 (1965).

The facts in *Escobedo* were these: The accused, a youth of Mexican extraction, and his sister were arrested. They were taken to police headquarters in Chicago to be questioned in connection with the fatal shooting of Escobedo's brother-in-law. While detained at the police station, the accused made several requests for counsel, which were denied. Counsel, who had been retained by the family of the accused, was refused permission to see his client by the police who advised him that they were questioning Escobedo. Although the attorney spotted Escobedo through an open door, and made every possible effort to consult with him, he was denied this right. In the interim, police continued to question Escobedo about the murder, using various ruses to persuade him to confess. Eventually, he made a damaging statement to an Assistant State's Attorney, which was later admitted at the trial. Although he made a timely motion to suppress the statement, it was admitted into evidence.<sup>21</sup>

Before discussing the opinion of the court in *Escobedo*, the right to counsel should be examined in terms of time. When does this right arise in the accused? The Sixth Amendment is silent with reference to this question.

It is abundantly clear from a line of cases climaxed by *Gideon*, that an accused is entitled to counsel in all felony cases, capital, and non-capital.<sup>22</sup> At what point between arrest and trial the accused may exercise the constitutional right to counsel must now be determined.

The "denial of counsel" question usually arises when the accused has made a confession prior to consulting with counsel, and this confession is subsequently used at the trial as evidence.<sup>23</sup> If the confession was obtained from the accused by physical or mental coercion, there is no doubt that the accused's constitutional rights under the Fourteenth Amendment have been violated.<sup>24</sup>

Unfortunately there is no dividing line to determine whether a confession is coerced, or is made voluntarily.<sup>25</sup> By the same

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Gideon v. Wainwright*, *supra* n. 13.

<sup>23</sup> *Wicker*, *Some Developments in the Law Concerning Confessions*, 5 *Vand. L. Rev.* 507 (1952); *McNabb v. U. S.*, 318 U. S. 332, 63 S. Ct. 608 (1943).

<sup>24</sup> *Brown v. Mississippi*, 297 U. S. 278 (1936); *Ward v. Texas*, 316 U. S. 547 (1942); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944).

<sup>25</sup> *Haley v. Ohio*, 332 U. S. 596 (1948). A 15-year old boy was questioned by relays of police from midnight until 5:00 A. M. without benefit of coun-

(Continued on next page)

token there is no neat line to determine when counsel should be appointed or should be granted permission to see the accused after his arrest.

Timing is of crucial importance in the appointment of counsel. It is often stated that the failure to appoint counsel in time presents one of the gravest problems in the right to counsel cases.<sup>26</sup> In *Ex parte Sullivan*,<sup>27</sup> two boys, with no prior criminal records, repeatedly asked for counsel after their arrest, but were told by the police if they had no money to procure counsel, none would be provided. The police then tricked the boys into making a written confession and counsel was not appointed for the accused until after they had been arraigned and had pleaded guilty. The court, in holding that the boys had been denied due process, stated:

One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."

It has been held that absence of counsel at a preliminary hearing, where the accused pleads guilty without the advice of counsel violates Due Process.<sup>28</sup> In so holding, the court cited *Hamilton v. Alabama* as a basis for its decision.<sup>29</sup> In that case the accused was arraigned without counsel for a capital offense committed in the State of Alabama. In Alabama, arraignment is an extremely critical time in the proceeding, for only then may certain defenses and pleas be raised. The accused was found guilty and sentenced to death. The court held that the absence of counsel for the accused at his arraignment violated his constitutional rights, and reversed the sentence. The "critical" stage of the prosecution was cited by the court in making its

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(Continued from preceding page)

sel or friend to advise him. The Supreme Court ruled that his confession was obtained in such a manner as to violate Due Process under the Fourteenth Amendment.

<sup>26</sup> Krash, *op. cit. supra* n. 17; the author of this article states:

I believe that the right to an attorney should attach at the time of arrest. That is the moment when the State assumes an adversary role. It is also the time when an accused may be most in need of legal assistance.

<sup>27</sup> 107 F. Supp. 514 (D. C. Utah 1952).

<sup>28</sup> *White v. Maryland*, 373 U. S. 59 (1963).

<sup>29</sup> 368 U. S. 52 (1961).

determination that the accused should have been represented by counsel.<sup>30</sup>

In *Crooker v. California*,<sup>31</sup> the court held that the accused had not been denied Due Process by being refused counsel. The defendant, a college graduate who had attended law school, was refused counsel several times between his arrest and his confession. Although he was denied counsel, he was advised of his right to remain silent. It is apparent that the court felt that in these circumstances the accused was fully aware of his right to stand mute and therefore considered the confession voluntary.

In *Cicenia v. Lagay*<sup>32</sup> the petitioner argued that although he had engaged counsel before his arrest, he was repeatedly denied the right to confer with his retained counsel until he confessed. The court held that the refusal to permit the accused to consult with counsel while being examined by the police did not violate his constitutional rights.

In *Stroble v. California*<sup>33</sup> the contention of the accused was that he had been deprived of Due Process in that he was denied the aid of counsel when he waived trial by jury on the issue of insanity. The court decided that in view of the fact that the Public Defender himself had advised the accused to waive trial by jury on the insanity issue, there was no violation of Due Process.

In 1961 in *Culombe v. Connecticut*,<sup>34</sup> the Supreme Court decided that Arthur Culombe, a 33-year old mental defective of the moron class had been deprived of Due Process in violation of the Fourteenth Amendment. This decision was based on the fact that the accused was taken into custody and held without benefit of counsel although he requested such constantly. He was questioned for five days without arraignment and benefit of counsel and ultimately confessed to participating in a hold up in which two men were murdered.

The accused in *Spano v. New York*,<sup>35</sup> a foreign-born young man with a limited education and with no previous criminal record, after being indicted for first-degree murder, surrendered

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<sup>30</sup> Id. at 52.

<sup>31</sup> 357 U. S. 433 (1958).

<sup>32</sup> 357 U. S. 504 (1958).

<sup>33</sup> 343 U. S. 181 (1952); also see: *Ashdown v. Utah*, 357 U. S. 426 (1958).

<sup>34</sup> 367 U. S. 568 (1960); also see: *Fikes v. Alabama*, 352 U. S. 191 (1957).

<sup>35</sup> 360 U. S. 315 (1959).



to police. Eight or more hours of questioning led to his confession. During the questioning he continuously requested and was denied counsel. The Supreme Court held that his confession admitted into evidence violated the Due Process Clause of the Fourteenth Amendment.<sup>36</sup>

Approximately one month before *Escobedo*, in *Massiah v. United States*,<sup>37</sup> the Supreme Court decided that incriminating statements obtained by federal agents from an accused, in the absence of his attorney, deprived the accused of his right to counsel under the Sixth Amendment. In this case, federal agents had installed a radio transmitter in the automobile of an alleged confederate, and thereby overheard damaging statements by the accused.

The most recent decision in the right to counsel cases, *Escobedo v. Illinois*,<sup>38</sup> should be examined in the light of the foregoing evolution.

### Arrest to Arraignment: the Critical Stage

The majority opinion of the court in the *Escobedo* case was written by Mr. Justice Goldberg. In it he stated that the many arguments against the right to counsel before indictment are made, because "any lawyer worth his salt" will tell his client emphatically not to make any statement to the police. This will cause confessions to decrease considerably.<sup>39</sup> And justice will thereby be restricted, or so goes the argument.

This argument, of course, is double edged. The fact that many confessions are obtained during this period, points up its critical nature as a "stage when legal aid and advice" is clearly needed.<sup>40</sup> The opinion contained a pronouncement that should have a far reaching effect on future criminal cases. It stated that when the investigation has started to focus on a particular suspect, and is no longer a general inquiry as to an unsolved crime, and the police have not warned the suspect of his constitutional right to remain silent, or his corresponding right to

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

<sup>37</sup> 377 U. S. 201 (1964).

<sup>38</sup> *Escobedo v. Illinois*, *supra* n. 20.

<sup>39</sup> *Id.* at 488; the court also cites: *Watts v. Indiana*, 338 U. S. 49 (1949).

<sup>40</sup> *Ibid.*; also see; *Commonwealth ex rel. Maisenhelder J. Rundle*, 198 A. 2d 565 (Pa. 1964); *State v. Kirkland*, 197 A. 2d 876 (N. J. Super., 1964); *State v. Guay*, 196 A. 2d 599 (Conn. Super. 1963).

counsel, any statement of confession obtained during such interrogation, may not later be used at the trial against the accused.<sup>41</sup>

As a result of the holding in *Escobedo*, the accused must now be allowed to consult with counsel when the interrogation reaches the accusatory stage. However several questions remain unanswered by this case, such as: Does this decision require the police to warn the accused of his right to counsel, or his right to remain silent if he has no counsel? May the accused waive his right to counsel? And finally, will the court require that counsel be appointed in all criminal cases; misdemeanors as well as felonies? We can only guess as to the answers, as only one of these questions has been answered by a previous case. In *Crooker* the accused, a former law student, was advised of his right to remain silent and the court held that he was not deprived of Due Process.<sup>42</sup> It is felt that in future cases the Supreme Court will find a violation of Due Process based on the denial of counsel, unless the accused is timely warned of his constitutional rights and every step is taken to see that these rights are not abridged.<sup>43</sup>

### Conclusion

Although the cry rings through the country that the Supreme Court is coddling criminals by its recent decisions, such a charge is unconvincing. In our system of justice, a man is presumed innocent until proved guilty. Until he is actually found guilty by a jury of his peers, every effort must be made to safeguard his rights.

Dean Erwin Griswold of Harvard Law School recently commented, in remarks made to the Cleveland Bar Association:<sup>44</sup>

the court has simply decided that the time has come to enforce the high standards that we have long professed. To be sure this makes life harder for law enforcement agencies.

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<sup>41</sup> *Escobedo v. Illinois*, *supra* n. 20; also see: note, Right to Counsel During Police Interrogation, 16 Rutgers L. R. 16 (1962); and Justice Tom C. Clark, The Sixth Amendment and the Law of the Land, 8 St. Louis U. L. J. 1 (1963); also, Simlone and Richardson, The Indigent and His Right to Legal Assistance in Criminal Cases, 8 St. Louis U. L. J. 15 (1963). These discuss "critical stage."

<sup>42</sup> *Crooker v. California*, *supra* n. 31.

<sup>43</sup> See: Note, Police Power to Stop, Frisk and Question Suspicious Persons, 65 Columbia L. R. 848 (1965); also see: Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S. 21, 39 (1961).

<sup>44</sup> "The Supreme Court," Time Mag. (May 21, 1965) p. 63.

But we must do more to help and upgrade the police. They should have more instruction on their duties than is now available to them.

Only when the States fully meet their responsibilities in insuring criminal justice to all citizens through the right to counsel, as guaranteed by the Sixth Amendment and embodied in the Due Process clause of the Fourteenth Amendment, will we approach realization of the great potential of our system of criminal law.<sup>45</sup>

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<sup>45</sup> Ibid.