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Right to Assistance of Counsel During Police Interrogation

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be necessary and in closing remarked: "We believe that a person has no right to expect the law to allow him to place responsibility for his reckless and wanton actions on someone else."

The soundness of the decision in the instant case was enhanced by the analysis of Judge Shannon, who perceptively distinguished those decisions in which insurance companies have been held liable for punitive damages. He stated:

In these cases, the courts have construed the contracts against the drafting party and found the wording broad enough to encompass punitive damages. We base our decision on public policy, and therefore the question of interpretation is not reached.

It is submitted that Judge Shannon's approach to the problem settles the question. His reconciliation of Lazenby upon contract grounds removes Lazenby from a position in direct opposition to the majority. Such a result clearly comports with both the public policy surrounding punitive damages and the possibilities of indemnification for those damages.

BARRY KUTUN

RIGHT TO ASSISTANCE OF COUNSEL DURING POLICE INTERROGATION

The defendant was arrested in connection with the murder of a store-keeper. After police investigators interrogated him for several hours at a police station, he admitted complicity in the murder. He made no request for the assistance of counsel at any time during police questioning. The trial court allowed the incriminating statements to be introduced into evidence over the defendant's objection that such introduction would result in a denial of due process of law because he was interrogated without benefit of the advice of counsel. On direct appeal to the Supreme Court of Florida, held, affirmed: the sixth amendment to the federal constitution, as made obligatory upon the states by the fourteenth amend-

35. Ibid.
36. Ibid.

1. The defendant raised the issue of the fifth amendment right against self-incrimination. However, this note will be confined to the sixth amendment right-to-counsel clause as it applies to the states through the fourteenth amendment because the Supreme Court of the United States has recently based its holdings in confession cases on that clause rather than upon consideration of whether a confession can be voluntarily made when a suspect is not advised of his right to remain silent.

For a cogent argument that the fifth amendment is the only appropriate clause to be applied to confessions, see Elsen & Enker, Counsel for the Suspect: Massiah v. United States & Escobedo v. Illinois, 49 MINN. L. REV. 47, 57-58 (1965).
ment, guarantees an accused person the right to legal counsel in all criminal prosecutions; however, before a suspect has been formally charged with a crime—while the investigative processes are still going on—there is no "criminal prosecution" to which this guarantee can attach. *Montgomery v. State*, 176 So.2d 331 (Fla. 1965).

Most authorities have concluded that "the English common law was not particularly solicitous of the rights of a criminal defendant . . . ." In 1695, those accused of treason were granted a statutory right to appointed counsel, and in 1836, those accused of a felony were granted the right to have retained counsel represent them fully at trial. The English "Judges Rules" of 1912 require an arresting officer to advise a suspect that he has a right not to answer the officer's charge and that any statement he makes may be used against him. A statement taken contrary to the Judges Rules may be admitted into evidence by the trial judge at his discretion, provided it is voluntarily made.

The sixth amendment to the United States Constitution provides for the assistance of counsel in criminal proceedings. However, the Supreme Court heard practically no cases arising in the state courts involving the right to counsel, until 1932.

In that year the Court concluded in *Powell v. Alabama* that the sixth amendment extends to state criminal proceedings through the due process clause of the fourteenth amendment and that defendants on trial for a capital crime who are "unable to employ counsel, and incapable adequately of making [their] own defense because of ignorance, feeble-

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But see Comment, 73 YALE L.J. 1001, 1015-17, 1028-33 (1964). "One thing can be said with certainty: the right to counsel was . . . one of the basic and continuing procedural rights of criminal defendants in the common law. Not until the sixteenth century . . . was the right to counsel kept from expanding." Id. at 1032.

3. The Treason Act, 1695, 7 & 8 Will. 3, c. 3, § 1.

4. Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114, § 1.


7. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."


10. Id. at 67. The Court rejected the reasoning found in Hurtado v. California, 110 U.S. 516 (1884) to the effect that where an absolute right as against the federal government is explicitly stated in the Bill of Rights and not re-expressed in the fourteenth amendment due process clause, then it must have been the intent of the framers of the Constitution not to perpetuate such an absolute right against the states. The rule laid down in Hurtado must yield if the right involved is of such a character that it cannot be denied without violating "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . . A consideration of the right [to counsel] makes it clear that the right is of this fundamental character."
CASES NOTED

mindedness, illiteracy, or the like [must have counsel at trial] whether requested or not, . . . as a necessary requisite of due process of law.\footnote{111} Subsequently, the appointment of counsel was held to be mandatory in all state capital cases regardless of accompanying circumstances.\footnote{12}

In \textit{Betts v. Brady},\footnote{13} the Supreme Court distinguished \textit{Powell} and held that the appointment of counsel at \textit{state trials for non-capital crimes} was necessary under the due process clause only if the failure to appoint counsel "tested by an appraisal of the totality of the facts in a given case [results in a trial which lacks] fundamental fairness, shocking to the universal sense of justice . . . ."\footnote{14} In constructing this test the Court reasoned that the right to counsel is not absolute in state non-capital proceedings because the sixth amendment is not incorporated into the due process clause of the fourteenth.\footnote{15} This case by case approach is justified because due process standing alone is a "concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."\footnote{16}

The Supreme Court, in \textit{Gideon v. Wainwright},\footnote{17} overruled \textit{Betts} and held that an absolute right to the assistance of counsel exists at state trials for non-capital crimes because that right is one of "those guarantees of the Bill of Rights which are fundamental safeguards of liberty . . . protected against state invasion by the Due Process Clause of the Fourteenth Amendment."\footnote{18} While the Court in \textit{Powell} limited its holding to the particular facts and circumstances of that case, "its conclusions about the fundamental nature of the right to counsel are unmistakable."\footnote{19}

An absolute right to appointed counsel exists on direct review of state criminal convictions.\footnote{20} An accused's constitutional right to counsel in-

\begin{itemize}
  \item \footnotetext[11] {287 U.S. at 67.}
  \item The right to retain counsel at all state criminal trials has been held to be absolute. Cash v. Culver, 358 U.S. 633 (1959); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Avery v. Alabama, 308 U.S. 444 (1940).}
  \item \footnotetext[13] {316 U.S. 455 (1942).}
  \item \footnotetext[14] {Id. at 462.}
  \item \footnotetext[15] {The Court dismissed the precedents provided in Powell v. Alabama by stating: "Expressions in the opinions of this court lend color to the argument [that the right to counsel at state criminal trials is absolute] but . . . none of our decisions squarely adjudicates the question now presented." Id. at 462-63.}
  \item \footnotetext[16] {See Palko v. Connecticut, 302 U.S. 319, 327 (1937) where the Court stated that the decision in Powell "did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. [It turned upon the fact that in] the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."}
  \item \footnotetext[17] {Betts v. Brady, 316 U.S. 455, 462 (1942).}
  \item \footnotetext[18] {372 U.S. 335 (1963).}
  \item \footnotetext[19] {Id. at 341.}
  \item \footnotetext[20] {Id. at 343.}
\end{itemize}
cludes the right to assistance at state pre-trial criminal proceedings, such as arraignment and preliminary hearing, but only when that stage is "critical." The right is based upon the sixth amendment and therefore is absolute and not dependent upon the particular circumstances of each case.\(^2\)

*Lisenba v. California\(^2\) was the first Supreme Court case in which the absence of counsel during police interrogation played a prominent role. The Court treated the denial of counsel at that stage as only a factor to be considered in determining if a confession is made voluntarily.\(^2\)

The problems inherent in determining the constitutionality of denial of counsel by police were presented sharply in the case of *Crooker v. California.*\(^2\) The defendant, a thirty-one year old college graduate with one year of law school training, was arrested on suspicion of murder. He confessed to the crime after being interrogated three separate times which totaled three hours. At the outset of the interrogation he twice requested to call an attorney but was informed that he could do so only at the end of the interrogation. The Supreme Court, speaking through Justice Clark, first concluded that denial of counsel does not render a confession involuntary *per se.*\(^2\) The Court then rejected the reasoning of *Powell v. Alabama,*\(^2\) and adopted the approach of *Betts v. Brady,*\(^2\) by holding that because the sixth amendment is not incorporated into the fourteenth amendment and because due process is a concept "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,"\(^2\) the right to counsel at police interrogation is not absolute. Due process alone does not protect an accused from a deprival of counsel unless "he is so prejudiced thereby as to infect his subsequent..."

\(^2\) In both *Hamilton* and *White* the stage was deemed critical because under the state procedure involved *pleas could be made to the charge.* Pointer v. Texas, 380 U.S. 400 (1965) (dictum). If the stage is critical, any conviction will be held void without the necessity of the accused showing by particular circumstances that he was prejudiced in any way by the absence of counsel. Hamilton v. Alabama, supra note 21, at 54; White v. Maryland, supra note 22, at 66. Contra, Rash v. State, 162 So.2d 311 (Fla. 3d Dist. 1964) which was decided before the dictum in Pointer v. State clarified *Hamilton* and *White.*
\(^2\) 314 U.S. 219 (1941).
\(^2\) 357 U.S. 433 (1958).
\(^2\) Id. at 438.
\(^2\) 304 U.S. 458 (1938). See note 10 supra and accompanying text.
\(^2\) 316 U.S. 455 (1942).
\(^2\) Crooker v. California, 357 U.S. 433, 441 (1958).
trials with an absence of that fundamental fairness essential to the very concept of justice. The Court stated that whether a denial of a request for counsel will cause a fundamentally unfair result depends on the sum total of facts and circumstances of each individual case and concluded that the circumstances presented did not in fact result in such fundamental unfairness.

The United States Supreme Court cases subsequent to *Crooker* that have used its test, have not gone so far as to assert that a confession made to police without the advice of counsel results in fundamental unfairness in the absence of the more traditional factors which have rendered a confession inadmissible because it was given involuntarily.

In *Massiah v. United States*, an indicted defendant who had retained counsel made incriminating statements to a confederate who had agreed to cooperate with the government. The statements were overheard by a government agent through a hidden radio and used at trial. The Supreme Court held that the defendant was denied the protection of the Sixth Amendment but emphasized that it was dealing with a federal rather than a state case and limited its holding to the particular circumstances involved. However, the Court has recently indicated its willingness to extend the holding in *Massiah* to cases originating in state courts when a suspect confesses after indictment.

In *Escobedo v. Illinois*, the Supreme Court reversed a state murder conviction where the trial court had admitted into evidence the defendant’s incriminating statements made during pre-indictment interrogation.

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31. *Id.* at 439.
32. *Id.* at 440.

34. 377 U.S. 201 (1964).
35. The Court has remanded such a case to the Ohio courts "for consideration in light of *Massiah v. United States.*" McLeod v. Ohio, 378 U.S. 582 (1964).

On remand, the Ohio Supreme Court, in State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), has distinguished *Massiah* on the ground that in *McLeod* the defendant’s statements were made willingly in the known presence of public officers before he had obtained counsel.

The police had not advised the defendant of his constitutional right to remain silent and had denied his repeated requests for an opportunity to consult with his attorney. The court held that the sixth amendment did apply to the case and announced a new test for determining when the right to assistance of counsel has been violated:

When the [interrogation process] shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate . . . and the accused must be permitted to consult with his lawyer.87

However, the court then limited its holding to the facts presented and distinguished Crooker v. California, on the grounds that the defendant in Crooker was advised of his right to remain silent and was a well educated man.88

In the present case, the court distinguished Escobedo on the ground that the instant defendant did not request to consult with counsel before confessing. It reasoned that since the Court in Escobedo limited its holding to the particular facts of that case, the sixth amendment does not apply until all the circumstances found in Escobedo are present. It then applied the Crooker test and concluded that the due process clause standing alone was satisfied because the circumstances showed no lack of fundamental fairness.

A majority of other courts which have been faced recently with facts essentially the same as those presented in Montgomery, have used the same approach as the Florida Supreme Court to limit the impact of Escobedo.89

The California Supreme Court, in People v. Dorado,40 has determined that a demand for an attorney is relevant in determining whether the sixth amendment applies only to the extent that it is evidence that an interrogation has become accusatory. It found "no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protec-

37. Id. at 492.
38. Id. at 490-92.
tion of guidance of counsel has been reached." A minority of courts have followed Dorado. 42

By limiting its holding in Escobedo, the United States Supreme Court has approached the question of right to counsel with the characteristic caution it often displays in areas where serious moral and pragmatic reasons exist both for and against extending relief to aggrieved parties. 43 However, because the Court has expressly refuted its limiting of Powell v. Alabama, 44 and impliedly refuted its limiting of Massiah v. United States, 45 it is reasonable to assume that it may also refute its limiting of the Escobedo test in the near future. 46 The author submits that if this occurs, the key circumstances in determining whether the police have "focused" on the accused in an individual case will be the weight of the evidence available to the police at any given time 47 and the severity of the methods used by interrogating officers. 48 Since the arrest of a defendant is a strong indication that the police have "focused" upon him, such arrest combined with a single question by an officer may be deemed sufficient for the sixth amendment to attach. 49

The focus test is necessarily hazy as are all tests of fact which

41. Id. at 268, 394 P.2d at 956.
44. If assignment of counsel is required, the cost may be prohibitive. Elsen & Enker, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47, 78 (1965).
45. Presence of counsel is necessary because of the critical nature of interrogation. "Any lawyer who has ever been called into a case after his client has 'told all' ... knows how helpless he is to protect his client against the facts ... disclosed." Watts v. Indiana, 338 U.S. 49, 59 (1949) (concurring opinion of Jackson, J.).
47. Police interrogation undercuts the accusatorial nature of our system of justice. American justice is based upon the premise that society should prove guilt from evidence independently secured through skillful investigation. Frankfurter, J. in Watts v. Indiana, 338 U.S. 49, 54 (1949).
depend upon consideration of many circumstances for their determination. Until a pattern of circumstances sufficient to constitute "accusation" emerges from future United States Supreme Court decisions, it will be difficult to predict with any certainty when investigation has shaded into accusation in any particular case.

MICHAEL J. CAPPUCIO

WHITHER NONSUIT?

The plaintiff moved for nonsuit immediately after the jury had been impaneled and sworn. The defendant then moved for a judgment with prejudice against the plaintiff on the ground that the Florida Rules of Civil Procedure provide only for voluntary dismissal of actions, with no provision for nonsuits. The trial court denied the defendant's motion and allowed the plaintiff to take a nonsuit, assessing costs against the plaintiff. The First District Court of Appeal reversed, holding that Florida Rule 1.35(a), as revised in 1962, supersedes Florida's nonsuit statute, insofar as the statute permits the taking of a voluntary nonsuit in any manner inconsistent with the Rule. The Supreme Court granted certiorari and affirmed the decision of the District Court of Appeal. Crews v. Dobson, 177 So.2d 202 (Fla. 1965).

In the instant case the Florida Supreme Court attempted to deal the death blow to the common law concept of nonsuit in this state. This was done on the federal level in 1938, with the promulgation of the Federal Rules of Civil Procedure. In Florida, however, despite the similarity of Florida Rule 1.35 to Federal Rule 41, the right of the plaintiff to take a nonsuit until "the Jury retire from the bar," has been zealously protected. The decision of the supreme court to treat with finality the long-standing problem of "Florida's unique dismissal" calls for a review of the history and significance of the problem.

Under the common law, as modified by the statute of 2 Hen. IV. c. 7, a plaintiff had an absolute right to terminate his litigation at any stage of the proceedings before the verdict was read. In 1913, the United States

1. FLA. STAT. § 54.09 (1963): "No plaintiff shall take a non-suit on trial unless he do so before the Jury retire from the bar."
2. FED. R. CIV. P. 41 provides for the voluntary dismissal of actions under specified circumstances and conditions. On the federal level there is no absolute right of dismissal after service by an adverse party of an answer or of a motion for summary judgment.