Golden Gate University Law Review

Volume 2 | Issue 1 Article 16

January 1972

High School Legal Curricula: The Sixth Amendment

THE SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted 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.

The Sixth Amendment guarantees certain rights to the criminally accused. They are:

1. the right to a lawyer;
2. the right to a jury trial;
3. the right to an impartial jury;
4. the right to a speedy trial;
5. the right to confront and cross-examine witnesses;
6. the right to have witnesses subpoened; and
7. the right to be informed of the nature and cause of the accusation.

The purpose of the amendment is to secure for the accused a speedy and fair trial and to provide the defendant with the best possible chance to defend himself through effective counsel.

While the rights listed above seem clear, it should be remembered that they are merely words and are subject to interpretation by the courts. As a result, the rights are not blanketly applied to all stages and types of criminal prosecutions. In some criminal proceedings, one or more of the rights may be denied to the accused.

RIGHT TO COUNSEL

The most litigated of all Sixth Amendment rights is the right to counsel. Even though the right has been expanded, it has not yet fully developed. For example, there is still no guaranteed right to counsel at parole revocation hearings or at secondary appeals.[1]

The basic law in the right to counsel area is derived from two cases decided in the Supreme Court on the same day. In the *Gideon* case,[2] the Supreme Court held that, in all criminal prosecutions, the accused shall enjoy the right to assistance of counsel. The Court held this right to be *fundamental* to a fair trial. The states are obligated under the Sixth Amendment as applied to them through the Fourteenth Amendment to provide indigents with counsel unless the accused *competently and intelligently waives* the right.

The *Douglas*[3] case established that the right to counsel extends to an initial appeal when an appeal is granted as a matter of right under a particular state's law. Without guaranteeing the right to counsel in those situations, indigents, who could not afford counsel for an appeal, would be denied *equal protection of the laws*.

In effect, the Court said that a lawyer is a necessity and not a

1. A secondary appeal, which follows the defendant's first appeal, appeals the decision of the first appellate court. Usually in a state proceeding, it is to the state supreme court, and in a federal proceeding, to the U.S. Supreme Court.

2. Gideon v. Wainwright, 372 U.S. 335 (1963).

3. Douglas v. California, 372 U.S. 353 (1963).

luxury, due to the complex maze of legal proceedings. Its decision obligated the states to provide the accused with counsel through the accused's first appeal. States are not required to provide counsel beyond the first appeal or for collateral criminal proceedings, i.e., a federal *habeas corpus* proceeding after an action has been initiated in a state court.[4]

WHEN DOES THE RIGHT TO COUNSEL BECOME EFFECTIVE?

At what precise moment is the accused entitled to counsel? It is here that the Fourth, Fifth and Sixth Amendments overlap because the right to counsel is closely related to coerced confessions and exclusionary rules.

The right to counsel becomes effective whenever a *critical state in the proceeding* is reached. Therefore, the point when the right to counsel begins to operate will vary with each case. It may operate when the accused is stopped on the street by the police, if the police's actions are *accusatory* rather than *investigatory* in nature.[5] The accused has a right to counsel when there would be *substantial prejudice* without counsel. There are a number of preliminary stages to the actual trial where the accused's rights can be affected. The three major ones are the *initial appearance*, the *preliminary hearing*, and the *pretrial arraignment*.[6] While many states do appoint counsel

4. *Habeas Corpus* is the process by which a criminal defendant convicted of a crime in a state court may appeal to a federal court on the ground that his constitutional rights have been violated.

5. Powell v. Alabama, 278 U.S. 45 (1932).

6. See Court Systems Unit for a discussion of the criminal process at p. 160.

at the *initial appearance*, most do not. At the *initial appearance*, bail is set and the accused is formally told all of his rights. At this stage nothing occurs that might *substantially prejudice* the accused's case.

The *preliminary hearing*, on the other hand, is designed to protect against unwarranted prosecutions. There the prosecution presents its evidence and the defendant can cross-examine and present evidence in his own behalf.[7] At this stage, the accused's case may be *substantially prejudiced*. The United States Supreme Court has held that "the guiding hand of counsel at the *preliminary hearing* is essential to protect the indigent accused against an onerous or improper prosecution."[8] Counsel is needed to cross-examine witnesses, impeach witnesses' credibility, discover the nature of the state's case, set up defenses, argue any disputes regarding bail, and argue for psychiatric treatment.

The Supreme Court has held that the *pretrial arraignment* is also a *critical stage* in the criminal proceeding because certain rights may be sacrificed or lost.[9] There the charges are read to the accused and he enters his plea of guilty or not guilty. At that point, counsel will be appointed if it has not already been done. Police line-ups are another example of possible *critical stages* in the criminal process. Lawyers are

7. There are few cases concerning the right to counsel at the preliminary hearing because the hearing is waived by most criminal defendants.

8. Hamilton v. Alabama, 386 U.S. 52 (1961).

9. Coleman v. Alabama, 399 U.S. 1 (1970).

sometimes necessary to prevent unfair line-up procedures.[10] In one such situation, the offender is identified as tall and fat. The accused, who is also tall and fat, is placed in a line-up with four others who are short and thin. The identifying party may erroneously identify the accused simply because he is the only tall and fat person in the line-up. If that occurs, the accused's case is *substantially prejudiced.* But even if the accused's rights are violated in a line-up, the error may still be *harmless* and the evidence will not be excluded at trial if an *independent identification* of the accused is made by a witness at the trial.[11] An *independent identification* is one based on something other than the pretrial police line-up.

The right to counsel is almost nonexistent in post-conviction proceedings. For example, there is no right to counsel at parole revocation hearings. A recent Iowa case[12] denied the right to counsel at parole revocation hearings reasoning that parole is a *privilege* granted by the state and not a *right.* The Iowa court also said that parole is merely an *extension of custody;* the prisoner is still in the care of the prison warden and counsel is not required. The *Morrisey* case is on appeal to the United States Supreme Court.

10. United States v. Wade, 388 U.S. 218 (1967).

11. People v. Edmonds, 32 Mich.App. 172, 188 N.W.2d 205 (1971).

12. Morrisey v. Brewer, 443 F.2d 942 (1971).

WAIVER OF RIGHT TO COUNSEL

At the stage where the right to counsel is guaranteed, states must furnish counsel if the defendant is *indigent* and cannot afford his own counsel. However, the defendant may make a *knowing* and *intelligent waiver* of his right. For a waiver to be *knowing* and *intelligent*, the accused must be aware of what he is doing and his choice must be made with "open eyes."[13] Thus, the accused must understand the nature of all the charges against him, the potential punishment, possible defenses, and all other facts essential to making a *knowing* and *intelligent waiver*.[14] The trial judge usually examines the accused regarding his knowledge of those facts before allowing the waiver. It is questionable whether an accused can ever make an intelligent waiver of counsel without having an attorney present at the time because of the complexity of the criminal process.

QUALITY OF APPOINTED COUNSEL

The accused must be provided *effective assistance of counsel* in order to satisfy his Sixth Amendment right. Courts are reluctant to find that appointed counsel has been ineffective since such a finding is tantamount to calling the appointed counsel incompetent. Judges are also lawyers and are reluctant to make judgments about other members of their profession. In addition, even though appointed counsel may be ineffective, the accused has the burden of proving that ineffective counsel prejudiced his case.

13. Adams v. United States ex rel. McCann, 317 U.S. 269 (1942).

14. Von Moltke v. Gillies, 332 U.S. 708 (1948).

Most state-appointed attorneys are public defenders. Because they have such large case loads, frequently, they meet the defendants shortly before entering the courtroom. These attorneys may know little or nothing about the accused. In *Chambers*,[15] the defendant met his legal aid attorney only minutes before his second trial. The appointed legal aid attorney did not represent him at his first trial. Neither had conferred with him between trials. Although most attorneys spend much time analyzing and preparing a client's case, the Supreme Court held this belated attorney appearance to be *effective assistance of counsel* and nonprejudicial to the defendant's case.

OFFENSES THAT WARRANT COURT-APPOINTED COUNSEL

In another decision decided in the same year as *Gideon*, a defendant, convicted of two misdemeanors with a maximum penalty of two years in jail or a $1000 fine, was denied counsel. The Supreme Court remanded the case to the lower court "for further consideration in the list of *Gideon*."[16] This holding was later interpreted to mean that the guaranty of counsel extends only to *felonies* and *serious offenses*.[17] It does not extend to *petty offenses*.

15. Chambers v. Maroney, 399 U.S. 42 (1970).

16. Patterson v. Warden, 372 U.S. 776 (1963).

17. Wall v. Purdy, 321 F.Supp. 367 (1971).

The dividing line between *petty* and *serious offenses* is vague. The vagueness in the standards results from the United States Supreme Court's attempt to balance the individual's need for legal assistance against the society's ability to pay for the assistance. A *petty offense* has been defined under federal law as any misdemeanor that does not carry a penalty greater than six months in jail, a $500 fine, or both.[18] A recent case[19] in this area held that the balance can best be achieved by distinguishing between *petty* and *serious misdemeanors* using the *United States Magistrates Rules* as guidelines.[20] Under those rules, magistrates are to inform indigent defendants charged with *minor offenses* other than *petty offenses* of their right to court-appointed counsel. If the offense is a *petty offense*, the defendant is currently to be informed only of his right to retain his own counsel. The Supreme Court will be setting more definitive guidelines in a case to be decided in the near future.[21]

INMATES AS LAWYERS

Many inmates file their own *habeas corpus* petitions and secondary appeals with the aid of "jailhouse lawyers," inmates with practical experience

18. 18 U.S.C. §1(3).

19. Newell v. State, 277 A.2d 731 (Maine Sup.Ct. 1971).

20. Rules of Procedure for the Trial of Minor Offenses Before U.S. Magistrates, 401 U.S. 1037-42 (1971).

21. State v. Hamlin, 336 So.2d 442 (Fla. Sup.Ct. 1970), cert. granted 401 U.S. 908 (1971).

in the law who help other inmates with legal work. The Supreme Court has upheld the right of inmates to provide this service until the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief.[22]

JUVENILE RIGHTS UNDER THE SIXTH AMENDMENT

Prior to 1967, there was a wide gap between the rights of adults and the rights of juveniles. The law considered juvenile incarceration as something other than criminal punishment. In 1967, the Supreme Court gave juveniles substantially (but not fully) the same rights as adults.[23] In proceedings that result in committing juveniles to a state institution, the requirements of *due process* must be satisfied, including (1) written notice of the charges and factual allegations in advance of the hearing to the minor and his parents or guardian; (2) notification to the minor and his parents or guardian of his right to counsel and (3) his right to have a state-appointed attorney if he cannot afford his own; and (4) warning to the minor of his privilege against self-incrimination. In the absence of a sworn confession, the accused may be found delinquent and committed to the state institution only on sworn testimony that has been subject to cross-examination.

A distinction still exists between adult rights and the rights of

22. Johnson v. Avery, 393 U.S. 483 (1969).

23. In re Gault, 387 U.S. 1 (1967).

minors. Juvenile rights to counsel apply only to the actual proceedings; adult rights to counsel operate prior to the criminal trial. Similarly, in 1971, the Supreme Court held that offenders charged in juvenile court with what would be a crime if they were adults are not entitled, as a matter of right, to a trial by jury.[24] The Court reasoned that juvenile court proceedings are not "criminal prosecutions" within the meaning of the Sixth Amendment. To require a jury trial would "remake the juvenile proceedings into a fully adversary process" and "...put an effective end" to the informal nature of juvenile court processes.

RIGHT TO A JURY TRIAL

The Sixth Amendment guarantees the right to trial by a jury in *serious* criminal cases because the right is *fundamental* to the American scheme of justice. The Sixth Amendment right to trial by jury applies to the states through the Fourteenth Amendment Due Process and Equal Protection Clauses.[25]

The determination of whether a crime is *serious* or *petty* is based on the maximum penalty prescribed by law for that particular crime. Does the right to trial by jury mean a twelve-man jury or less? The Supreme Court has ruled that juries in state courts can have less than twelve jurors.[26]

24. McKeiver v. Pennsylvania, 91 S.Ct. 1976 (1971).

25. Duncan v. Louisiana, 391 U.S. 145 (1968).

26. Williams v. Florida, 399 U.S. 78 (1970).

To convict an accused in a criminal proceeding, the state must convince all jurors of the accused's guilt *beyond a reasonable doubt*. *Reasonable doubt* exists when an average juror cannot say with certainty that the defendant is guilty.[27] "Absolute moral certainty" is not required because such proof is rarely possible.[28] The California Penal Code defines *beyond a reasonable doubt* as that "state of the case, which, after the entire comparison and consideration of all evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge."[29]

RIGHT TO AN IMPARTIAL JURY

Prior to 1968, the Supreme Court held that persons may not be systematically excluded from juries because of race,[30] that states may not fix different qualifications for jurors for special types of criminal cases,[31] and that states may exempt women from jury duty.[32] In 1968, the Court decided *Witherspoon v. Illinois*[33] in which the defendant, a convicted

27. In civil proceedings, the burden of proof is less than in criminal proceedings. In order for the plaintiff to be successful, the preponderance of the evidence must favor his position.

28. People v. Arnold, 199 Cal. 471 (1926).

29. California Penal Code §1096 (Deering 1971).

30. Norris v. Alabama, 294 U.S. 587 (1935).

31. Fay v. New York, 332 U.S. 261 (1947).

32. Hoyt v. Florida, 368 U.S. 57 (1961).

33. 391 U.S. 510 (1968).

murderer, challenged the long-established practice of excusing all prospective jurors who indicated that they had conscientious scruples against capital punishment. The Supreme Court reversed the conviction, remanded it to the lower court for retrial with a proper jury, and held that such a practice results in a prosecution-prone jury--one more willing to convict and sentence to death. In the majority opinion, Mr. Justice Potter Stewart wrote: "...[A] state may not entrust the decision of whether or not a man should live or die to a tribunal organized to return a verdict of death."

RIGHT TO A SPEEDY TRIAL

The Supreme Court has held that the Sixth Amendment right to a speedy trial applies to the states through the Fourteenth Amendment.[34] When the right is denied, the accused may suffer public scorn and deprivation of employment, and his freedoms of speech and association may be jeopardized by the constant threat of prosecution.

Many states have statutes requiring that the criminal defendant be brought to trial within a certain specified period of time or the charges against him must be dropped. This time will vary depending on whether the defendant is in jail or is out on bail.

However, the accused can *waive time* in which case the time requirements no longer exist. But if the accused does waive time, his trial may

34. Klopfer v. North Carolina, 386 U.S. 213 (1967).

not occur for a year or more since many criminal courts have heavy backlogs of cases. One has a right to bail and may be able to qualify for release on his *own recognizance (O.R.)*, i.e., without bail. The judge will condition the *O.R.* or low bail, if one qualifies, on a *waiver of time*.

Waiving time may sometimes be to the accused's advantage. Memories may fade with the passage of time making it hard for the police to remember exactly what took place. It may also give the accused's lawyer more time to prepare his defense or to bargain with the district attorney. On the other hand, waiving time means that the accused must bear the frustrations of a pending trial.

RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES

The Sixth Amendment says in part, "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The Fourteenth Amendment guarantees the right in state courts.[35] In addition, the right may be applied to administrative hearings depending upon the nature of the hearing or upon the nature of the individual's rights at stake.

In a disbarment proceeding against an attorney, the Supreme Court held that the right of cross-examination was guaranteed to the attorney because the hearing was an "adversary proceeding of a quasi-criminal

35. Pointer v. Texas, 380 U.S. 400 (1965).

nature."[36] Thus, in administrative proceedings where there are accusations of misconduct directed at a party that will result in levying a penalty, he will have the right to confront and cross-examine his accusers. In another case involving a welfare hearing to determine whether a welfare recipient would be able to continue to receive benefits that provided him the necessities of life, the Supreme Court held that the recipient had the right of confrontation and cross-examination in light of the serious rights involved.[37]

The confrontation clause also guarantees the accused the right to be present in the courtroom during every stage of the trial. However, a disruptive defendant may lose this right. Thus, if a defendant continues to disrupt court proceedings after being warned by the judge, he may be removed from the courtroom without his constitutional rights being violated. The right may be reclaimed as soon as the defendant can compose himself.[38]

RIGHT TO COMPULSORY PROCESS

The Sixth Amendment says in part: "In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor...." The right of the accused to have compulsory

36. In re Ruffalo, 390 U.S. 544 (1968).

37. Goldberg v. Kelly, 397 U.S. 254 (1970).

38. Illinois v. Allen, 397 U.S. 337 (1970).

process for obtaining witnesses in his favor is binding on the states through the Fourteenth Amendment.[39] This right means that a criminal defendant may compel witnesses to appear on his behalf in addition to cross-examining prosecution witnesses. To compel witnesses to appear, the accused *subpoenas* the witnesses. The *subpoena* is a court order to appear. Witnesses' failure to appear results in contempt of court and possibly a jail sentence.

RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION

The Sixth Amendment guarantees the accused's right "...to be informed of the nature and cause of the accusation...." The United States Supreme Court has ruled that the accused's right to know the charges against him is "the first and most universally recognized requirement of due process."[40] It is necessary to clearly and accurately apprise the accused of the crimes charged and the alleged manner of their commission so that the accused may thoroughly prepare his defense.

A conviction for an offense with which a defendant has not been formally charged violates due process and must be reversed.[41] The formal charge, which satisfies this Sixth Amendment right of the accused, can be either an *indictment*, brought by a grand jury after considering evidence

39. Washington v. Texas, 388 U.S. 14 (1967).

40. Smith v. O'Grady, 312 U.S. 329, (1941).

41. Cole v. Arkansas, 333 U.S. 196 (1948).

presented to it, or an *information*, issued by the district attorney after a preliminary determination by a judge that there is sufficient evidence against the accused to justify a trial.[42]

> A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence.[43]

FAIR TRIAL AND THE PRESS

In order for the accused to have a fair trial, the selection of an unbiased jury is necessary. Inflamed public opinion is not conducive to the selection of an unbiased jury. A series of Supreme Court cases establish guidelines in this area. In the 1961 case of *Irwin v. Dowd*,[44] the Supreme Court reversed the lower court conviction solely on the grounds of prejudicial pretrial publicity. Most of the jurors selected reflected a deep and bitter prejudice. In 1966, the Court reversed a conviction because of undue publicity and failure to take proper action to insulate the jury.[45]

Special emphasis has been given to the role of television in prejudicing the jury and destroying the chance of a fair trial. In 1963, the Supreme Court reversed a murder conviction because the defendant's confession

42. See Court Systems Unit, p. 161

43. In re Oliver, 333 U.S. 257 (1948).

44. 366 U.S. 717 (1961).

45. Sheppard v. Maxwell, 384 U.S. 333 (1966).

was presented on live television and rerun on video tape on two other occasions.[46] The television broadcast occurred in the locality where jurors resided. The Court said that in order to ensure a fair trial, the proceedings would have to be moved to an area unaffected by the adverse publicity. Two years later, in the famous case of *Estes v. Texas*,[47] the Court was faced with a situation where television cameras were in the courtroom during the trial. They reversed the conviction with directions that it be retried in the proper manner, emphasizing the right of the accused to have his day in court free from abstractions inherent in telecasting.

CONCLUSION

The interpretations of the rights of the criminally accused under the Sixth Amendment are multifaceted and constantly changing. However, there does remain one constant throughout--the standard of fairness. It is this fundamental fairness guaranteed by the United States Constitution that dictates that a criminal defendant, whether rich or poor, has a right to the aid of one knowledgeable in the law, that such a person cannot be left in jail for long periods of time before his trial, and that when the accused goes to trial, he has the right to be tried by a jury of his peers.

The Constitution is a living document. The preceding discussion illustrates how the only restraints on Sixth Amendment rights are the contemporary standards of fair play that continually develop with the passage of time.

46. Rideau v. Louisiana, 373 U.S. 723 (1963).

47. 381 U.S. 532 (1965).