

**Case Studies on the Sixth Amendment:
The Right to Counsel
by Rich Barbeau**

Students will:

1. Trace the historical background of the right to counsel under the 6th Amendment to the U.S. Constitution,
2. Through the analysis of court cases, identify and discuss specific circumstances when a defendant has a constitutional right to the assistance of counsel and when a defendant does not have a constitutional right to be represented by counsel,
3. Identify the legal issues and legal arguments in the cases studied and evaluate the court's decisions.

Materials needed:

Copies of: **SIXTH AMENDMENT** (See Appended Materials)
BACKGROUND READING: Right to Counsel
Student Handout: YOU HAVE A CONSTITUTIONAL RIGHT TO COUNSEL WHEN...
Student Handout: COURT DECISIONS: YOU HAVE A CONSTITUTIONAL RIGHT TO COUNSEL WHEN...

Time needed: 4 class periods

Grade level: 9th - 12th grades

Procedure:

1. Begin the lesson by explaining to students that they will be examining court cases that involve a citizen's constitutional right to counsel.
2. Provide students with **SIXTH AMENDMENT** (could use overhead transparency).
3. Handout out copies of **BACKGROUND READING: Right to Counsel** and have students read material **OR** provide students with the information contained in the reading. Reading could be assigned prior to class meeting.

RIGHTS OF THE ACCUSED

CASE STUDIES ON THE SIXTH AMENDMENT: THE RIGHT TO COUNSEL

Procedure cont.

4. Conduct a class discussion on the historical background of the right to counsel and how the U.S. Supreme Court has expanded the protection. Explain how the court has used the 14th Amendment due process clause to apply the 6th Amendment right to counsel to the states. It may be necessary to explain the appeals process in the U.S. Federal-State court system prior to the discussion.

5. Provide each student with **Student Handout: YOU HAVE A CONSTITUTIONAL RIGHT TO COUNSEL WHEN...** Explain to the class that the handout contains examples of real cases appealed to the U.S. Supreme Court. In some cases, the court ruled that a right to counsel must be observed, and in other cases the right was denied. Working in small groups, the students should read and discuss the facts in each case and make their own decision -- should the defendant have a constitutional right to counsel or not? Each small group should contain an odd number of students so that they can operate as a mini-appeals court and reach a majority opinion. In making their decision, the students should consider the following factors:
 - A. The actual wording of the 6th Amendment to the U.S. Constitution.
 - B. Whether a denial of the right to counsel would deprive the defendant of due process of law?
 - C. Is the defendant's life\or liberty at stake?
 - D. Whether the situation is, in their opinion, a "*critical stage*" of the criminal proceedings?
 - E. Is the defendant faced with a legal problem that he\she could not understand?
 - F. Is the situation an adversarial one?

6. Discuss the decisions made by the students and their reasoning. Provide the class with the actual decisions (**Student Handout: COURT DECISIONS: YOU HAVE A RIGHT TO COUNSEL WHEN...**) made by the U.S. Supreme Court and the legal reasoning. Have students identify the specific circumstances when a constitutional right to counsel exists and when it does not exist, according to the U.S. Supreme Court. Discuss the factors the court considers in its decision-making regarding this issue. How have these factors been used by the court to balance the individual rights to the accused and the safety of the general public? As the membership of the U.S. Supreme Court changed during the 1970's and 1980's did their interpretation of the right to counsel change as well? How?

BACKGROUND READING: The Right to Counsel

The United States Bill of Rights was designed primarily to provide for democratic freedom and protect individual rights from governmental abuse. Four of the ten amendments that make up the Bill of Rights guarantee specific rights that limit the use of governmental power in dealing with persons accused of crimes. The fourth, fifth, sixth and eighth amendments protect the rights of the accused. The Fifth Amendment, in particular, provides in part, that "*No person shall be...deprived of life, liberty or property without due process of law...*" The concept of **due process of law** is an important principle of American justice and basically provides that in criminal cases a fundamentally fair system of rules and procedures must be followed to protect the accused. Historically, one of the most important rights involved in guaranteeing due process is the 6th Amendment right to counsel.

In the American criminal justice system, there are two sides-the government is represented by the prosecution and the accused is represented by the defense. This system is called the **adversary system**. It is assumed that if both sides have an equally fair chance to present their case the truth will emerge and justice will be served. Yet, what if the government is represented by a prosecutor and the defendant does not have counsel? Would this be fair? Would the accused be denied due process of law?

Today, in our legal system, the defendant has a right to be represented by counsel or to have counsel appointed by the court if she/he is indigent (lacking financial resources.) But, this constitutional protection has not always been provided to all defendants. The right to counsel has gradually developed on a case by case basis through the decision-making process of the U.S. Supreme Court.

Under common law in England, defendants accused of serious crimes were not provided with a right to counsel, and this situation did not change until 1836. Although in general we gained much from English common law, in regard to the right to counsel, we deviated from English tradition. In colonial America 12 of the 13 colonies had provisions for some right to counsel. Before the Bill of Rights were ratified, several states included in their constitutions a right to counsel in criminal proceedings. When the right to counsel in criminal prosecutions was proposed as a constitutional amendment in 1789, there was virtually no debate.

Throughout the 19th century, many states adopted similar statutory or constitutional provisions. For example, Minnesota's constitution was adopted in 1857 and included the right to counsel. Yet, the enforcement of the provision varied from state to state and in federal court as well. The U.S. Supreme Court did not begin an in-depth interpretation of the right to counsel until 1930's.

Then in *Johnson v. Zerbst*, 304 U.S. 458 (1938), the U.S. Supreme Court ruled that, based on the 6th Amendment, counsel must be supplied to a defendant in all **federal** felony criminal cases. But, did this decision apply to state criminal cases? Although the Supreme Court had ruled in *Barron v. Baltimore* 32 U.S. 243 (1833), that the U.S. Bill of Rights did not apply to state governments, the 14th Amendment, adopted in 1868, did prevent a state

BACKGROUND READING: The Right to Counsel cont.

from violating a citizen's due process of law. Did this mean a state must provide counsel to all defendants? Not yet!

In *Powell v. Alabama* 287 U.S. 45 (1932), the Supreme Court applied the due process clause of the 14th Amendment to states and ruled that in cases in which the penalty is death, counsel must be provided to a defendant if the defendant cannot afford counsel at their own expense.

Ten years later, in *Betts v. Brady*, 316 U.S. 455 (1942), the Supreme Court ruled that the right to have counsel provided also exists in special circumstances (illiteracy, competency, etc.). Yet, no state is obligated to appoint counsel in every criminal case. Although the court had been using the due process clause of the 14th Amendment to apply some of the Bill of Rights to the states, the 6th Amendment right to counsel remained limited.

Finally, in *Gideon v. Wainwright* 372 U.S. 335 (1963), the court used the due process clause of the 14th Amendment to rule that the right to counsel applied to all serious state criminal trials, and indigent defendants in criminal proceedings in state courts have a right to have counsel appointed. In addition, in *Argersinger v. Hamlin* 407 U.S. 25 (1972), the court extended defendants rights by requiring trial judges to offer poor persons a lawyer in any case in which imprisonment was possible. Furthermore, in *In Re Gault* 387 U.S. 1 (1967), it was required that a child have a right to be represented by counsel in juvenile court proceedings which may result in the juvenile's commitment to an institution.

In summary, after almost forty years of decision-making, a citizen's right to be represented by counsel at the trial state of criminal proceedings was clearly defined. But what about other steps in the process? Do you have a right to be represented by counsel:

1. at a preliminary hearing?
2. at arraignment?
3. for an appeal?
4. at a lineup?
5. before giving a blood sample or a handwriting sample?
6. during interrogation by police?
7. at a sentencing hearing?
8. at parole and/or probation revocation hearings?

We will now look at these issues.

RIGHTS OF THE ACCUSED

CASE STUDIES ON THE SIXTH AMENDMENT: THE RIGHT TO COUNSEL _____

Student Handout: YOU HAVE A RIGHT TO COUNSEL WHEN...

CASE 1: The accused was arrested by the police and taken into custody. He was interrogated at the police station regarding a murder. He was told that he had been named as the killer by an eyewitness. He asked to have advice from his lawyer. His lawyer arrived at the police station but was twice denied entry to the interrogation. The accused repeatedly asked to speak to his lawyer. **How would you rule?**

Should you have a right to counsel during police interrogation while in custody?

GROUP DECISION _____

COURT DECISION _____

CASE 2: In investigating certain robberies in which a robber used a handwritten note demanding that money be handed over to him. The police took a handwriting sample from the accused without the advice of counsel. **How would you rule?**

Should you have a right to counsel when police are taking a handwriting sample?

GROUP DECISION _____

COURT DECISION _____

CASE 3: In investigating a robbery, the police stopped and questioned two men. Both men produced I.D. that belonged to the victim of a robbery. The victim was brought in to identify the possible robber. The two suspects were not given counsel and police allowed the victim to try to identify the alleged robbers. **How would you rule?**

Should you have a right to counsel during an investigative lineup?

GROUP DECISION _____

COURT DECISION _____

CASE 4: The accused was arrested and formally charged with murder. At the arraignment (defendant makes a response to the charge), without the advice of counsel the defendant pled not guilty. **How would you rule?**

Should you have a right to counsel at arraignment?

GROUP DECISION _____

COURT DECISION _____

RIGHTS OF THE ACCUSED

CASE STUDIES ON THE SIXTH AMENDMENT: THE RIGHT TO COUNSEL

Student Handout: YOU HAVE A RIGHT TO COUNSEL WHEN... cont.

CASE 5: The defendant was indicted for violating a Federal Narcotics law. He retained a lawyer, pled not guilty, and was released on bail. While out on bail and in absence of counsel, he held a conversation with a co-defendant in an automobile. The co-defendant had allowed a government agent to place a microphone in the car. Upon questioning by the co-defendant, the defendant made incriminating statements. **How would you rule?**

Should you have a right to counsel in an interrogation while not in police custody after you have been formally indicted?

GROUP DECISION _____

COURT DECISION _____

CASE 6: The accused was indicted for bank robbery and shortly before his trial an F.B.I. agent and the prosecutor showed five color mug shots, including one of the accused, to government witnesses, in the absence of the accused's counsel. **How would you rule?**

Should you have a right to counsel at a photographic display conducted by the government to allow a witness to identify the suspect?

GROUP DECISION _____

COURT DECISION _____

CASE 7: The defendant was arrested and charged with rape. At the preliminary hearing, he was identified by the complainant even though the defendant did not have counsel and was not offered counsel. The victim made the identification after being told that she was going to view a suspect, was given his name and heard the evidence against him. **How would you rule?**

Should you have a right to counsel at a lineup after being formally charged?

GROUP DECISION _____

COURT DECISION _____

CASE 8: The accused was convicted of the offense of "joyriding" He pled guilty and was given two years probation. Four months later, he was involved in a burglary. A court hearing was held to revoke his probation, he was not provided with counsel. He admitted the burglary and was sentenced to ten years in a jail (must serve one year). **How would you rule?**

Should you have a right to counsel when pleading guilty and being sentenced?

GROUP DECISION _____

COURT DECISION _____

RIGHTS OF THE ACCUSED

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Student Handout: YOU HAVE A RIGHT TO COUNSEL WHEN... cont.

CASE 9: The accused pled guilty to armed robbery. He was sentenced to 15 years in prison, the sentence was suspended and he was given seven years probation. Less than one month later, he was arrested for burglary and he admitted the crime. Without an attorney present, his probation was revoked and he began serving his 15 year sentence. **How would you rule?**

Should you have a right to counsel at a probation revocation proceeding?

GROUP DECISION _____

COURT DECISION _____

CASE 10: Two defendants were tried and convicted in a California court for several felonies. Although every defendant in a felony case in California is entitled to a first appeal, the defendants were denied appointed counsel for an appeal (they were indigent). **How would you rule?**

Should you have a right to counsel when you have a right to an appeal?

GROUP DECISION _____

COURT DECISION _____

CASE 11: The defendant was convicted of murder and sentenced to death. He had several appeals and lost them all. He was denied the appointment of counsel on another "*discretionary appeal*". **How would you rule?**

Should you have a right to counsel in discretionary appeals?

GROUP DECISION _____

COURT DECISION _____

CASE 12: An indigent defendant was convicted of shoplifting (less than \$150.00), and no counsel was provided. Although the penalty could have been as much as a \$500 dollar fine and 1 year in jail, he was fined \$50.00. **How would you rule?**

Should you have a right to counsel if you are charged with a minor offense and imprisonment is not imposed?

GROUP DECISION _____

COURT DECISION _____

RIGHTS OF THE ACCUSED

CASE STUDIES ON THE SIXTH AMENDMENT: THE RIGHT TO COUNSEL

Student Handout: YOU HAVE A RIGHT TO COUNSEL WHEN... cont.

CASE 13: The accused was in a car accident. Because the police suspected the involvement of alcohol, a blood sample was taken at the hospital by a physician despite the defendant's refusal to consent to the test. **How would you rule?**

Should you have a right to counsel before the police can take a blood sample from you as part of a precharge criminal investigation?

GROUP DECISION

COURT DECISION

Student Handout: COURT DECISIONS: YOU HAVE A RIGHT TO COUNSEL WHEN...

CASE 1: *Escobedo v. Illinois*, 378 U.S. 478 (1964). The court ruled that when an investigation has narrowed to a particular suspect, and that suspect is in custody, he has a right to counsel before interrogation. Custodial interrogations are a critical stage of the criminal process.

CASE 2: *Gilbert v. California*, 388 U.S. 263 (1967). The court ruled that you do not have a right to counsel when police are taking a handwriting sample. Police are simply investigating the crime, and it is not considered a critical stage of the proceedings. You can still have a fair trial and challenge the evidence at the trial. Defendant had not been indicted at the time of the taking of the sample.

CASE 3: *Kirby v. Illinois*, 406 U.S. 682 (1972). The court ruled that you do not have a right to counsel at an investigative lineup prior to indictment. The investigation was not part of the criminal prosecution, it was simply a matter of gathering evidence.

CASE 4: *Hamilton v. Alabama*, 368 U.S. 52 (1961). The court ruled that the defendant has a right to counsel at arraignment. This was determined to be a critical state of the criminal proceedings because the defendant may need legal advice regarding the plea and the defenses available.

CASE 5: *Massiah v. U.S.*, 377 U.S. 201 (1964). The court ruled that the defendant has a right to counsel during interrogation, after indictment, even if he or she is not in police custody. Court argued that the "surreptitious" interrogation by a government agent was clearly during a critical stage of the criminal prosecution.

CASE 6: *United States v. Ash*, 413 U.S. 300 (1973). The court ruled that no Sixth Amendment right to counsel existed at a photographic display conducted by the government to identify a suspect. This was not considered a critical stage of the criminal prosecution. Also, the defendant was not being confronted with a legal problem, and it was not part of the adversarial process.

CASE 7: *Moore v. Illinois*, 434 U.S. 220 (1977). The court ruled that a defendant has a right to counsel during a lineup after being formally charged. Court believed that the identification at the preliminary hearing was suggestive and that it took place during a critical stage of the criminal proceedings.

RIGHTS OF THE ACCUSED

CASE STUDIES ON THE SIXTH AMENDMENT: THE RIGHT TO COUNSEL

Student Handout: COURT DECISIONS: YOU HAVE A RIGHT TO COUNSEL WHEN... cont.

CASE 8: *Mempa v. Rhay*, 389 U.S. 128 (1967). The court ruled that you have a right to counsel at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected, such as sentencing.

CASE 9: *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The court ruled that defendants do not have a right to counsel at a parole or probation revocation proceeding. Counsel could be provided at the state's discretion.

CASE 10: *Douglas v. California*, 372 U.S. 353 (1963). The court ruled that defendants do have a right to counsel at the first appeal when the appeal is a matter of legal right.

CASE 11: *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The court ruled that defendants do not have a right to counsel at post-conviction proceedings when the appeal is discretionary.

CASE 12: *Scott v. Illinois*, 440 U.S. 367 (1979). The court ruled that defendants do not have a right to counsel in misdemeanor cases if imprisonment is not imposed because the right to liberty is not being denied.

CASE 13: *Schmerber v. California*, 384 U.S. 757 (1966). The court ruled that defendants do not have a right to counsel before the police take a blood sample as part of a precharge criminal investigation. Investigation by the police is not a critical stage of the criminal proceedings.