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the action could be set at an earlier date. Such a rule would automatically cut off the practice of disqualification because of adverse rulings during discovery or pre-trial procedures. If the right to disqualify a judge by affidavit were limited to the recommended period, the objections based on alleged control of discretion and possible vesting of appellate powers in a district judge would no longer have any validity.

Montana's disqualification statute is, on balance, preferable to the more restricted methods of recusation. Statutes requiring proof of actual bias and prejudice are undesirable for several reasons: a litigant may be put to a great deal of expense gathering evidence to prove bias and prejudice; the hearing on the question of actual bias and prejudice is time consuming; and, if the question of prejudice is decided adversely to the litigant, he is required to have his cause heard by a judge whom he believes to be prejudiced against him. Even in those states following the federal rule, which allows the judge to consider only the legal sufficiency of the affidavit, a litigant is put to additional expense and effort. Temperamental prejudice to the class of litigation involved may not, by itself, sustain a charge of actual bias and prejudice against a judge; nor would a personality conflict, or animosity on the part of the judge toward the attorney or client.³⁹ Yet, a judge may be unconsciously influenced by any or all of these factors. Proof of actual bias and prejudice of a judge is extremely difficult.⁴⁰ Our advocacy system of practice demands that an attorney be allowed to disqualify a judge if he feels that his client will not have a fair trial. Therefore, any of the above reasons should be sufficient. Abuse of the disqualification statute exists in Montana, and presumably in other states with similar statutes. In view of the difficulty of proving actual bias and prejudice, it is submitted that Montana's statute, with provisions to restrict the present abuses, both provides the necessary protection to the litigant, and keeps the courts free from even the appearance of bias and prejudice.

DOUGLAS D. DASINGER

RIGHT TO COUNSEL DURING POLICE INTERROGATION: AN INTRINSIC RIGHT?—Dennis White, 16 years of age, was taken to the county attorney's office for questioning in connection with a murder. A confession was elicited after a three hour interrogation. White alleged that he was not given the benefit of his constitutional right to counsel. On appeal to the Supreme Court of Montana, *held*, since defendant was advised of his right to counsel and his right to remain silent shortly after interrogation began, and since he did not request such assistance, the failure

³⁹*Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539 (1894).

to furnish him with counsel was not improper. *State v. White*, 22 St. Rptr. 803, 405 P.2d 761 (1965).

The concept of a right to counsel has demonstrated a fluctuating existence in the history of the law, but it has been, at least in some form, one of the basic procedural rights of criminal defendants. Under early English common law a right to be represented by counsel arose only when the defendant was accused of a minor offense, and even then, counsel could plead only formal points of law. By the time the United States Constitution was adopted, however, the right to counsel was firmly established as necessary for fair trial.¹

The Sixth Amendment of the Constitution of the United States provides that, "In all criminal prosecutions the accused shall enjoy the right. . .to have the assistance of counsel for his defense."² This amendment has been the criterion for a right to counsel in federal courts. Before the Sixth Amendment became obligatory on the states, right to counsel in state courts was determined by the Due Process Clause of the Fourteenth Amendment and the state constitutions.³

In 1958 the Supreme Court first treated the question of right to counsel during police interrogation. The cases of *Crooker v. California*,⁴ and *Cicenia v. LaGay*⁵ held that the Fourteenth Amendment does not require the appointment of counsel in every capital or noncapital felony case. These cases relied on a rationale promulgated earlier in *Betts v. Brady*.⁶

¹For an extended analysis of the history of right to counsel, see Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L. J. 1000 (1964).

²U.S. CONST. amend. VI.

³"[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. The right to counsel is guaranteed by the constitution of every state except Virginia. See Feldman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281. In Virginia the right to counsel is part of the "law of the land." See *Cottrell v. Commonwealth*, 187 Va. 351, 46 S.E.2d 413 (1948). MONT. CONST. art. III, § 16, provides that, "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. . . ." Identical language appears in the REVISED CODES OF MONTANA, 1947, § 94-4806.

Proposed Code §§ 95-901, 95-902, drafted by the Montana Criminal Law Commission, provides that any person making an arrest under a warrant shall take the arrested person without unnecessary delay before the judge who shall inform him of the charge against him, of his right to counsel, and of his right to have counsel assigned. The intent of these provisions is that the defendant be brought before the judge prior to the beginning of police interrogation. If this is not done, evidence obtained therein will be excluded. Proposed Code § 95-1001 provides:

Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel. The defendant, if charged with a felony, must be advised that counsel will be furnished at state expense if he is unable to employ counsel. If the offense charged is a felony and if the defendant desires counsel and is unable to employ counsel a court of record must assign counsel to defend him. If the offense charged is a misdemeanor. . . a court of record, in the interest of justice, may assign counsel to defend him.

⁴357 U.S. 433 (1958).

⁵357 U.S. 504 (1958).

⁶316 U.S. 455, 462 (1942). In *Betts*, the Court held that due process

formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

The *Crooker* majority believed that the absence of counsel would render a conviction reversible only when it resulted in a denial of "that fundamental fairness essential to the very concept of justice."⁷ The Court seemed hesitant to restrict state criminal law enforcement: "[T]he doctrine. . . [of an unqualified right to counsel] would have a . . . devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney."⁸

However, the dissents in *Crooker* and *Cicenia* are especially significant because they reveal the present reasoning of the Supreme Court as expressed in *Escobedo v. Illinois*.⁹ Justice Douglas, writing for Justices Warren, Black, and Brennan, found that the "right to counsel extends to pretrial proceedings as well as to the trial itself." Counsel, in this view, performs a twofold function of informing the defendant of his rights and preventing encroachment on these rights by coercive police practices.¹⁰ Douglas further noted that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."¹¹ Thus the minority rejected the "fundamental fairness" test¹² of *Betts v. Brady*, and the concept of right to counsel as merely one element in the determination of whether a confession was voluntary or involuntary.¹³ The net result of this reasoning is that counsel has an intrinsic and unqualified function in preserving the balance of power in the adversary system, and his exclusion, unless waived, is automatically prejudicial.

Betts applied a "totality of circumstances" rule which, in essence, held that where the defendant under the particular circumstances, has been denied "fundamental fairness," he has been denied due process. Two facets of this rule should be noted: (1) the Court was applying the Due Process Clause of the Fourteenth Amendment—there had not as yet been any application of an unqualified right to counsel to state proceedings by virtue of the Sixth Amendment; and (2) the rule depends on a retrospective analysis of the prejudice, if any, suffered by the defendant in his particular case.

⁷*Supra* note 4, at 439.

⁸*Id.* at 441. In *Cicenia*, *supra* note 5, at 510, the Court held it to be of the "essence of our federalism that the State would have the widest latitude in the administration of their own systems of criminal justice."

⁹378 U.S. 478 (1964).

¹⁰ The right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself. It may also be necessary as a restraint on the coercive power of the police. The pattern of the third degree runs through our cases: a lone suspect unrepresented by counsel against whom the full coercive force of a secret inquisition is brought to bear. . . . The trial of the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. . . . The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this most critical period of his ordeal.

Crooker v. California, *supra* note 4, at 443-44 (Douglas, J., dissenting). Such reasoning would seem to indicate that a request for counsel would be immaterial.

¹¹*Id.* at 442.

¹²The "fundamental fairness" test has never been used in federal cases where the Sixth Amendment was applicable. It applied to state non-capital (*Betts*) and capital (*Crooker*) cases to determine a violation of the Fourteenth Amendment.

¹³*Haynes v. Washington*, 373 U.S. 503 (1963), has made the voluntary-involuntary test rather meaningless on facts similar to those of the later *Escobedo* decision by holding that the defendant's confession was involuntary. Justice Goldberg, who wrote the opinion, felt that the absence of counsel was more important than merely one factor in the determination of the involuntariness of a confession.

The landmark case of *Gideon v. Wainwright*,¹⁴ written by the minority turned majority,¹⁵ effectively made this rationale the law of the land.¹⁶ *Gideon* implicitly asserted that the standard of fundamental fairness within the totality of circumstances is no longer consonant with the requirements of a fair proceeding, and that an absolute standard is to take its place. Thus, only a defendant who explicitly and intelligently waives counsel will now appear at trial or arraignment¹⁷ unaided.¹⁸ The *Gideon* Court went on to expressly overrule the rationale of *Betts*, regarding it as an anomaly in the field of right to counsel.

Escobedo v. Illinois heralds the application of this unqualified right to counsel to police interrogations. The Court said, "when the 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, under the circumstances here, the accused must be permitted to consult with his lawyer."¹⁹ In this statement of the rule Justice Goldberg limited its effect to the particular circumstances.²⁰ However, in spite of this language, the foregoing discussion has shown that the intention of the Court was clear: during police interrogation the suspect has an unqualified right to counsel which does not depend on a request for counsel nor a retrospective analysis of how much prejudice ensued from its denial, unless this right has been intelligently and explicitly waived.

The State of Illinois argued in *Escobedo* that if the right to counsel is afforded prior to indictment, the number of confessions obtained will

¹⁴372 U.S. 335 (1963).

¹⁵By the addition of Justice Goldberg.

¹⁶*Supra* note 14, at 342. "[A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. . . . [T]he Court in *Betts* was wrong. . . in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."

¹⁷The FED. R. CRIM. P. 44 requires that "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." This rule attaches at the arraignment. In the state courts, until *Gideon*, the right to appointed counsel at arraignment was governed by the *Betts* criterion of fundamental fairness, but in *Hamilton v. Alabama*, 368 U.S. 52 (1961), the Supreme Court made it automatically prejudicial to make a man plead in a capital case without counsel. As to a right to appointed counsel at preliminary hearing, *White v. Maryland*, 373 U.S. 59 (1963), held that the plea of a man in a capital case without guidance of counsel could not be used at his trial. Other decisions seem to hold that there arises a right to appointed counsel at preliminary hearing only if something "critical" takes place. See *State v. Richardson*, 194 Kan. 471, 399 P.2d 799 (1965).

¹⁸*Massiah v. United States*, 377 U.S. 201 (1964), also decided subsequent to *Crooker* and *Cicenia*, held that the defendant was denied his absolute right to counsel between indictment and trial when government agents secretly elicited incriminating statements from him. The Court held that the statements were not admissible at his trial. *Massiah*, unlike *Gideon* and *Escobedo*, was a federal case and its rule is not binding on the state courts.

¹⁹*Supra* note 9, at 492.

²⁰The Court, *id.* at 490-91, enumerated these circumstances in its holding:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the Assistance of Counsel to which he is entitled under the Sixth Amendment to the Constitu-

diminish significantly. Such an argument was implicit in the majority holding of *Crooker*, but the Court held that:²¹

The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that state to the accused in his need for legal advice. . . . We have learned the lesson. . . . that a system of criminal law enforcement. . . will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

The Court thus emphasized that confessions are inherently unreliable, but more significantly, it noted that the stage wherein confessions are elicited is a critical stage in the proceedings, and counsel, unless waived, must be present to help preserve an effective adversary system. In other words, at this point the "adversary" system begins to function, and the antagonists must be evenly matched.²² No longer did the Court feel that giving the accused this right would unduly restrict law enforcement.

Since *Escobedo* was decided, courts in more than half of the states have faced similar problems. The majority of these do not adhere to the rule and rationale of the *Escobedo* Court as analyzed above, but instead either continue to follow *Crooker v. California*²³ or distinguish *Escobedo* on its particular facts.²⁴

In *State v. White* the Montana Supreme Court similarly distinguished *Escobedo* and found no violation of the defendant's Sixth Amendment guaranties.²⁵

In *Escobedo* the defendant was not effectively advised of his right to counsel and his right to remain silent, and further, his request to consult a lawyer was denied. In the case now before us, the defendant was advised of his rights and then voluntarily confessed. At no time during the interrogation did he request the assistance of counsel, even though asked.

tion as 'made obligatory upon the States by the Fourteenth Amendment'. . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

²¹Supra note 9 at 488.

²²See BARTH, THE PRICE OF LIBERTY, 148-72 (1961).

²³The following cases seem to adhere to the totality of circumstances rationale of *Crooker*: *State v. Richardson*, 194 Kan. 471, 399 P.2d 799 (1965); *Carson v. Commonwealth*, 382 S.W.2d 85 (Ken., 1964); *Pece v. Cox*, 74 N.M. 591, 396 P.2d 422 (1964); *State v. Elam*, 263 N.C. 273, 139 S.E.2d 601 (1965).

²⁴The following cases limit the holding of *Escobedo* to its particular facts and most of these distinguish their cases on the basis that no request for counsel was made and denied: *Woodard v. State*, 171 So.2d 462 (Ala., 1965); *State v. Miranda*, 98 Ariz. 18, 401 P.2d 716 (1965); *Turvey v. Florida*, 174 So.2d 609 (Fla., 1965); *People v. Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33 (1964); *Hayden v. State*, 201 N.E.2d 329 (Ind., 1964); *State v. Fox*, 131 N.W.2d 684 (Iowa, 1964); *Swartz v. State*, 237 Md. 263, 205 A.2d 803 (1965); *Commonwealth v. Ladetto*, 207 N.E.2d 536 (Mass. 1965); *State v. Turnbough*, 388 S.W.2d 781 (Mo., 1965); *Bean v. State*, 398 P.2d 251 (Nev., 1965); *State v. Scanlon*, 84 N.J. Super 427, 202 A.2d 448 (1964); *People v. Agar*, 44 Misc.2d 396, 253 N.Y.S.2d 761 (1964); *State v. McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964); *Davis v. State*, 388 S.W.2d 940 (Tex. Crim., 1965); *Ward v. Commonwealth*, 205 Va. 564, 138 S.E.2d 293 (1964); *State v. Boles*, 140 S.E.2d 798 (W. Va., 1965); *Browne v. State*, 24 Wis.2d 491, 131 N.W.2d 169 (1964); *State v. Darst*, 399 P.2d 618 (Wash., 1965).

The court here seems to hold that the lack of a request for counsel is an important factor in determining whether there has been a violation of the right to counsel. However, the above analysis indicates that the defendant during police interrogation has an unqualified right to the assistance of counsel, unless intelligently and explicitly waived. This right does *not* depend on any circumstances such as the defendant requesting counsel, or his particular financial status.²⁶

In regard to a request for counsel the recent California decision of *People v. Dorado* clearly makes the more preferable analysis: "The right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it. The accused's request for counsel indicates no more than that he, himself, . . . perceived the need of legal assistance."²⁷ In *State v. Neely* the Supreme Court of Oregon properly extended the rule by holding that before the defendant could be interrogated, he had to be effectively informed of both his right to the assistance of counsel and his right to remain silent. "In the absence of such knowledge an accused can in no way be deemed to have intelligently waived his constitutional rights. . . ."²⁸

The absence of a request for counsel has been shown to have been used as a basis for distinguishing the rule of *Escobedo*. This poses an additional question, however, of whether the absence of a request for counsel is a "waiver" of the right. In cases where the defendant is informed of his right to counsel, a waiver analysis might well be an alternative basis for the court's decision. The difficult question of what constitutes an effective waiver, however, cannot be treated here.²⁹

The Montana Court seems in error on a related issue. It noted, "This Court [has] stated that the fact the confession was procured in the absence of counsel does not affect its admissibility provided it was otherwise voluntarily given."³⁰ As has been shown, the Supreme Court of the United States holds that the right to counsel is "fundamental and absolute." It is not merely one of the possibly prejudicial circumstances; counsel's absence is automatically prejudicial.³¹ The test of voluntariness must still be used in regard to questions of coercion

²⁶Justice Black asserted in *Gideon v. Wainwright*, *supra* note 14, at 344, that "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural . . . safeguards designed to assure . . . [that] every defendant stands equal before the law. This ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." There is no distinction in logic nor should there be in practice between retained and appointed counsel. See also Elison, *Assigned Counsel in Montana: The Law and the Practice*, 26 MONT. L. REV. 1 (1964).

²⁷42 Cal. Rptr. 169, 398 P.2d 361, 368 (1965). The California Court also pointed out that "to require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it."

²⁸398 P.2d 482, 487 (Or. 1965).

²⁹A related question is whether the waiver standards in federal courts will apply to the states by virtue of the decision in *Gideon v. Wainwright*. In this regard see Note, 31 U. CHI. L. REV. 591 (1964). *Carnley v. Cochran*, 369 U.S. 506 (1962), has held applicable to state proceedings the federal court's rule that the absence of a request is not a waiver of the right to counsel.

³⁰*Supra* note 25, at 765.

³¹See note 13 *supra*.

and promises of immunity, but it is not to be confused as the test for determining whether the accused has been denied his Sixth Amendment right to counsel.

Law enforcement agencies have been vocal in deprecating the recent decisions of the Supreme Court. They claim that an expansion of the right to counsel is directly contrary to the interests of the state. It would make investigation and control of crime more difficult and be nearly prohibitive in cost. Further, it would be contrary to our system of federalism by not permitting the state to administer its own system of criminal justice. It is then argued that, although the criminal defendant does have Constitutional rights, they must be balanced by the right of society to regulate itself. The authors of the Constitution did not so conceive of a "balance of rights." A right was thought to be a restraint upon governmental power, and the Bill of Rights, a set of proscriptions forbidding incursion by the government into the activities of free citizens. Thus, it is clearly anomalous to argue that the "interests" of society vest a "right" in society. What in fact exists is a balance of power: a balance in which the might and expertise of the state are placed vis-a-vis the defendant. If there is to be a balance, an effectively exercised "adversary system," then the defendant must have aid in the form of counsel.

The Constitution was not made the supreme law of the land so that it might guarantee justice. This is not because justice is unattainable, but because it is unascertainable. The Constitution guarantees only that the result, whatever it may be, has been reached in a fair way. The quintessence of this guarantee is that the possibilities of ascertaining the truth have been exhausted to the utmost, and this result depends on the adversary system. This process cannot demand absolute equality in the skill of counsel for the contending parties but it must demand equality in the right to counsel itself.

It is submitted that the right to counsel is unqualified during interrogation, and that the indigent defendant must be appointed counsel, absent a waiver, or his confession will be inadmissible. It is naive to say that this requirement will not significantly alter police interrogation, both in terms of its character and cost. The presence of counsel will mean no more, however, than that the defendant is both informed of his Constitutional guaranties and given a means by which they will be enforced. It is difficult to logically deny the importance of this intrinsic function. Moreover, can a system of criminal law enforcement be worth preserving if it depends on a fear that if the defendant is informed of his Constitutional guaranties, he may exercise them?

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