

Alabama Rules of Criminal Procedure

Rule 6. Right to counsel: appointment of counsel.

Rule 6.1. Right to counsel; waiver of right to counsel.

(a) **RIGHT TO COUNSEL.** A defendant shall be entitled to be represented by counsel in any criminal proceedings held pursuant to these rules and, if indigent, shall be entitled to have an attorney appointed to represent the defendant in all criminal proceedings in which representation by counsel is constitutionally required. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

(b) **WAIVER OF RIGHT TO COUNSEL.** A defendant may waive his or her right to counsel in writing or on the record, after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forgo that right. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. When a defendant waives the right to counsel, the court may appoint an attorney to advise the defendant during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

If a non-indigent defendant appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the cause shall proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives his right under this rule. If the indigent defendant continues to refuse appointed counsel, the cause shall proceed.

(c) **WITHDRAWAL OF WAIVER.** A defendant may withdraw a waiver of the right to counsel at any time but will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel.

Committee Comments

See Ala.Code 1975, §§ 15-12-1 through 15-12-5.

Rule 6 establishes guidelines for the representation of both indigent and nonindigent criminal defendants.

The basis of Rule 6.1 is the right of a criminal defendant under Art. I, § 6, Alabama Constitution of 1901, and the Sixth Amendment to the United States Constitution to be represented by counsel in all criminal prosecutions.

The first sentence of this section restates the requirement of Art. I, § 6, Alabama Constitution of 1901, “[t]hat in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either....”

For the purpose of Rule 6, the term “criminal proceeding” includes any stage of the criminal process, from accusation through appeal, and in collateral proceedings arising from the initiation of a criminal action against the defendant, such as post-conviction proceedings and appeals therefrom, extradition proceedings, and other like proceedings which are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal and without regard to whether a “criminal proceeding” has or has not been commenced under Rule 2.1.

The provision that a defendant may consult with the attorney’s agent is added for the convenience of the attorney.

There are two facets to the question of when counsel is to be appointed to represent indigent defendants. The first is whether the right to appointed counsel arises at all. Under *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), the right to counsel in misdemeanor cases is limited to cases in which the defendant is actually sentenced to jail. Of necessity, this will require that the judge determine before trial that, regardless of the evidence presented, the maximum punishment will not include incarceration. This already occurs in traffic cases where the judge knows in advance that upon conviction of the offense charged the punishment will not be imprisonment and that the custom and practice is to fine, even when imprisonment is a legal alternative.

The second is that if the defendant is entitled to appointed counsel, at what point in the process is counsel to be appointed. The law in this area has developed on a case-by-case basis, with state law following decisions of the United States Supreme Court. There is clearly a right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Prior to trial the right exists at arraignment, *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), and at a preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). Following the “critical stage” test, the United States Supreme Court has also held that an indigent is entitled to appointed counsel at a pre-trial, post-indictment lineup. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), but not at a pre-indictment lineup. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Using a different test, namely whether the proceeding is a “trial-like adversary confrontation” between the defendant and government, the Court has held there is no right to have appointed counsel present at a photographic display. *United*

States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), presence of counsel is required, if requested, during pre-indictment questioning if information so obtained is to be admitted as evidence at trial.

At the other end of the criminal prosecution, an indigent has a right to appointed counsel at sentencing, *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), and in a first appeal granted as a matter of right from a criminal conviction, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Rule 32.7(c) provides for appointment of counsel at post-conviction level when the court determines “that counsel is necessary to assert or protect the rights of the petitioner.”

The Alabama Supreme Court held in *Strickland v. State*, 280 Ala. 31, 189 So.2d 771 (1965), that an accused has a right to counsel beginning with arraignment and at every stage of the proceeding, including the guilty plea, unless a competent, intelligent, and voluntary waiver is made. *Sanders v. State*, 42 Ala.App. 419, 167 So.2d 174 (1964), states that the state may not prosecute an accused unless that person is attended by counsel at all critical stages. *McIntyre v. State*, 48 Ala.App. 626, 266 So.2d 837 (1972), held that due process requires representation by counsel at sentencing. Later cases have held that there is no right to counsel at a pre-indictment lineup, see, e.g., *Smith v. State*, 55 Ala.App. 26, 312 So.2d 598 (1975); *Jackson v. State*, 56 Ala.App. 276, 321 So.2d 243 (1975), or at a photographic display, *Terry v. State*, 50 Ala.App. 299, 278 So.2d 748 (1973); *McGhee v. State*, 48 Ala.App. 330, 264 So.2d 560 (1972).

With regard to post-conviction and collateral actions, under Ala.Code 1975, § 15-12-23, an indigent defendant may have counsel appointed in post-conviction proceedings and in appeals and applications for leave to review in such proceedings (see Rule 24(b), A.R.App.P., “Leave to Proceed on Appeal in Forma Pauperis in Criminal Cases”), at the discretion of the Court. Also see Rule 32.7(c).

The second sentence in Rule 6.1(a) does not alter substantive law or expand or diminish the established right of an indigent defendant to appointed counsel. Under the cases discussed above there is a constitutional mandate that counsel be provided at most stages of the criminal prosecution. As this has in the past been a constantly changing area of law, there is little reason now for a court not to extend the right to counsel to all proceedings in the criminal prosecution, once prosecution has been initiated. The most significant change would be in the area of pre-indictment lineups and photographic displays. There are practical difficulties in requiring counsel to be present, since often a defendant will not have a lawyer at this point. But counsel could be appointed shortly after arrest and a record of such appointment made; in which case there would be no difficulty in giving counsel notice of any lineup or photographic display and an

opportunity to be present. With regard to lineups, the existence or non-existence of an indictment would make no difference in the mechanics of setting up a lineup, so there is no reason counsel could not be provided prior to indictment. The remedy for failure to have counsel present where constitutionally mandated when there has been no waiver would not be reversal but rather exclusion of the evidence obtained. See *United States v. Wade*, supra. While these rules are not intended to enlarge the substantive right to counsel as enunciated by the courts, there is a serious and open equal protection problem underlying denial of appointed counsel to an indigent defendant at any stage where a defendant of means would find the presence of retained counsel a significant benefit.

Section (b) allows any defendant to waive the right to be represented by counsel. The first sentence adopts the constitutional standard set down in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948); and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and required by *Elrod v. State*, 281 Ala. 331, 202 So.2d 539 (1967).

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), established that, once the right to counsel has been invoked, a waiver (no matter how voluntary) can never be valid if made in response to further police questioning, to that extent overruling *Johnson v. Zerbst*. This is in accord with *State v. O'Guinn*, 462 So.2d 1052 (Ala.Crim.App.1985) (if the defendant requests an attorney, he or she is entitled to receive the attorney's services before being questioned).

Section (b) permits the court to appoint advisory or standby counsel. Although a criminal defendant has an absolute right to defend pro se under Art. I, § 6, Alabama Constitution of 1901, *Luckie v. State*, 55 Ala.App. 642, 318 So.2d 337 (1975), cert. denied, 294 Ala. 764, 318 So.2d 341 (1979), and the Sixth Amendment to the United States Constitution, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), it is anticipated that there may be instances where a court will deem the appointment of standby counsel advisable and in the defendant's best interest. See *Faretta*, supra; *McKaskle v. Wiggins*, 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] (1984) (reasonable actions by standby counsel did not violate Sixth Amendment rights even though the defendant objected to the appointment of standby counsel); *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); *United States v. Theriault*, 474 F.2d 359 (5th Cir.) cert. denied, 411 U.S. 984, 93 S.Ct. 2278, 36 L.Ed.2d 960 (1973); ABA, Standards for Criminal Justice, *Special Functions of the Trial Judge* 6-3.7 (2d ed. 1986).

The court is required to inform the defendant that the waiver may be withdrawn since under section (c) the defendant has the burden of requesting counsel if he later decides to withdraw the waiver.

Section (b) protects the court against dilatory tactics of the defendant in retaining counsel while at the same time preserving the defendant's right to counsel. It allows an indigent defendant the opportunity to make a good faith, though unsuccessful, effort to obtain counsel, even though as a result the proceeding will be delayed. See *Cleveland v. United States*, 322 F.2d 401 (D.C.Cir.), cert. denied, 375 U.S. 884, 84 S.Ct. 157, 11 L.Ed.2d 114 (1963); *McConnell v. United States*, 375 F.2d 905 (5th Cir.1967). The procedure may have the salutary effect of allowing an otherwise indigent defendant an opportunity to raise funds through friends or relatives to employ counsel of his choosing and thus minimize the burden on the appointed counsel system.

Section (b) anticipates primarily two situations, namely (1) where the defendant is being recalcitrant, or (2) where a non-indigent defendant has tried but been unable to obtain private counsel.

Section (c) allows a defendant to withdraw waiver of counsel at any time. The right to withdraw the waiver is unlimited, but the burden is upon the defendant to request counsel at a later proceeding after waiver has been made. *Strickland v. State*, 280 Ala. 31, 189 So.2d 771 (1965).