

## 7.10: Courtroom Workgroup- Defense Attorneys

The Sixth Amendment to the U.S. Constitution provides, “The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” Most state constitutions have similar provisions. Historically, the right to counsel meant that the defendant, if he or she could afford to hire an attorney, could have an attorney’s assistance during his or her criminal trial. This right has developed over time and now includes the right to have an attorney’s assistance at all **critical stages** in the process, or at all criminal proceedings that may substantially affect the right of the accused. Importantly, the right to assistance of a defense counsel has been held to require that the state pay the costs of the defense counsel when a person is **indigent** or has insufficient financial resources to pay.

### Privately Retained Defense Attorneys

Individuals accused of any infraction or crime, no matter how minor, have the right to hire counsel and have them appear with them at trial. The attorney must be recognized as qualified to practice law within the state or jurisdiction, and generally, criminal defendants do well to hire an attorney who specializes in criminal defense work. However, because many criminal defendants don’t have enough money to hire an attorney to represent them, the court will need to appoint an attorney to represent them in criminal cases.

### Appointed Counsel

Federal and state constitutions do not mention what to do when the defendant wants, but cannot afford an attorney’s representation. Initially, the Court interpreted the Sixth Amendment as permitting defendants to hire an attorney who would assist them during the trial. Later, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendment includes the right to a fair trial, and a fair trial includes the right to the assistance of counsel. In *Powell v. Alabama*, 287 U.S. 45, at 58 (1932), the Court concluded that the focus on trial was too narrow. It stated, “[T]he most critical period of the proceeding[s] against the defendants might be that period from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation are vitally important. Defendants are as much entitled to . . . [counsel’s] aid during that period as at the trial itself.” <sup>[1]</sup>

*Powell* also dealt with the need for states to provide representation to defendants who could not afford to hire counsel in those cases where fundamental fairness required it. In a statement that led to the dramatic extensions to the right to counsel, the Court continued,

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has a small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” <sup>[2]</sup>

*Powell* was decided in 1932, and because of television and the multitude of crime drama programs, people probably know more about the criminal justice process than ever imagined by the *Powell* court. Nevertheless, the Court’s admonitions still ring true. Not too many non-lawyers know how to conduct themselves at trial, challenge the state’s evidence, make evidentiary objections, or file proper pretrial motions with the rudimentary knowledge gained from watching television. One could consult with the many great Internet sources that are easily accessible, however, many individuals charged with crimes have limited education and lack the sophistication to distinguish between those sources that are applicable to their case and which are not.

Between *Powell* (1932) and the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court decided when the appointment of counsel was necessary for a fair trial in state prosecutions on a case-by-case basis. In *Gideon*, however, the Court held that this case-by case-approach was inappropriate. It held that the state had to provide poor defendants access to counsel in every state felony prosecution. Lawyers in serious criminal cases, it said, were “necessities, not luxuries”. Since *Gideon*, the Court has extended the obligation to provide counsel to state misdemeanors prosecutions that result in the defendant receiving a jail term. The Court found that the legal problems presented in a misdemeanor case often are just as complex as those in felonies.

<sup>[3]</sup> In two cases, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979), the Court tied the right to

counsel in misdemeanor cases to the defendant's actual incarceration. Because it is difficult to predict when a judge will want to incarcerate a person convicted of a misdemeanor, this approach is difficult to implement. <sup>[4]</sup> <sup>[5]</sup> Many states instead appoint counsel to an indigent defendant charged with a crime where a possible term of incarceration could be imposed.

The Court left it for the lower courts to decide when a person is indigent. Lower courts have generally held that the financial resources of a family member cannot be considered. Also, courts cannot merely conclude that because a college student is capable of financing his or her education that he or she is capable of hiring an attorney. A person does not have to become destitute in order to be classified as indigent. An indigent defendant may have to pay back the court-appointed attorney's fees if they are convicted or enter a plea. In practice, most courts collect appointed attorneys' fees at a standard rate and much reduced from the actual costs of representation as part of the fines that a convicted defendant must pay. When acquitted, defendants are not required to pay the state back for the attorney fees.

### Public Defenders, Assigned Attorneys, and Defense Attorney Associations

Most states now have public defenders' offices. Because public defenders and assistant public defenders handle only criminal cases, they become the specialists and have considerable expertise in representing criminal defendants. Public defender offices frequently have investigators on staff to help the attorneys represent their clients. In some states, courts appoint or assign attorneys from the private bar (not from the public defender's office) to represent indigent defendants. The mixed system uses both assigned counsel, or associations of private attorneys who contract to do indigent criminal defense, and public defenders. For example, the public defender's office may contract with the state to provide 80% of all indigent representations in a particular county. The remaining 20% of cases would be assigned to the association of individual attorneys who do criminal defense work- some retained clients, some indigent clients-or private attorneys willing to take indigent defense cases.

In practice, there is no purely public defender system because of "conflict cases." Conflicts exist when one law firm tries to represent more than one party in a case. Assume, for example, that Defendant A conspired with Defendant B to rob a bank. One law firm could not represent both Defendant A and Defendant B. Public defender offices are generally considered one law firm, so attorneys from that office could not represent both A and B, and the court will have to assign a "conflict" attorney to one of the defendants.

**Controversial Issue:** Link to the 2017 report from the Oregon Public Defense Services about indigent representation in Oregon

<https://www.oregon.gov/opds/commission/reports/EDAnnualReport2017.pdf>

Link to the National Legal Aid and Defenders Association

<http://www.nlada.org/>

Link to the Oregon Criminal Defense Lawyers Association

<https://www.ocdla.org/>

### The Right to Counsel in Federal Trials

The Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), held that in all federal felony, trials counsel must represent a defendant unless the defendant waives that right. The Court further held that the lack of counsel is a jurisdictional error which would render, or make, the defendant's conviction void. A court that allows a defendant to be convicted without an attorney's representation has no power or authority to deprive an accused of life or liberty. <sup>[6]</sup>

*Zerbst* also established rules for a proper waiver of the Sixth Amendment right to counsel. The court said that it is presumed that the defendant has not waived her right to counsel. For a waiver to be constitutional, the court must find that the defendant knew he or she had a right to counsel and voluntarily gave up that right, knowing that he or she had the right to claim it. Therefore, if the defendant silently goes along with the court process without complaining about the lack of counsel, his or her silence does not amount to a waiver. The Court defined waiver as an "intelligent relinquishment or abandonment of a known right or privilege".

In 1945 Congress passed the Federal Rules of Criminal Procedure (FRCP). Rule 44 of the FRCP requires defendants to have counsel, or affirmatively waive counsel, either retained or appointed, at every stage of the proceedings from the initial appearance through appeal. This rule was difficult to implement because there was no recognized federal defense bar, or

federal defense attorneys, available or willing to take on appointed cases. So, in 1964, Congress passed the Criminal Justice Act of 1964 that established a national system for providing counsel to indigent defendants in federal courts.

### When Does a Defendant Have the Right to Assistance of an Attorney?

#### Critical Stages of the Criminal Justice Process

In *White v. Maryland*, 373 U.S. 59 (1963), the Court found that defendants are entitled to the right to counsel at any critical stage of the proceeding, defined as a stage in which he or she is compelled to make a decision which may later formally be used against him or her. The Court has found the following court procedures to be critical stages:

- The initial appearance in which the defendant enters a non-binding plea—*White v. Maryland*, 373 U.S. 59 (1963).
- A preliminary hearing—*Coleman v. Alabama*, 399 U.S. 1 (1970).
- A lineup that includes a previously indicted defendant—*Wade v. United States*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).

#### During Other Proceedings

The Court has extended the right to counsel to psychiatric examinations, juvenile delinquency proceedings <sup>[7]</sup>, civil commitments proceedings <sup>[8]</sup> and probation and parole hearings (see, below). Further, the court in *Estelle v. Smith*, 451 U.S. 454 (1981), held that a defendant charged with a capital crime and ordered by the court to be examined by a psychiatrist, to evaluate possible future dangerousness, was entitled to consult with counsel. Similarly, in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court found prejudicial error occurs when defense counsel was not appointed to represent a defendant subjected to a psychiatric evaluation. The Court further held that counsel must be made aware of the projected psychiatric evaluation before it occurs.

#### During Probation and Parole Revocation Hearings

In *Mempa v. Rhay*, 389 U.S. 128 (1967), 17-year-old Mempa was placed on probation for two years after he pleads guilty to “joyriding”. About four months later, the prosecutor moved to have petitioner’s probation revoked alleging that Mempa had committed a burglary while on probation. Mempa, who was not represented by counsel at the probation revocation hearing, admitted being involved in the burglary. The court revoked his probation based on his admission to the burglary. The U.S. Supreme Court held that Mempa should have had counsel to assist him in his hearing.

Five years later, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the state sought to revoke defendant’s probation. Originally, Gagnon was sentenced to fifteen years of imprisonment for armed robbery, but the judge had suspended the imposition of sentence and placed him instead on seven years of probation. The Court found that the probation revocation hearing did not meet the standards of due process. Because a probation revocation involves a loss of liberty, the probationer was entitled to due process. The Court did not adopt a *per se* rule that all probationers must have the assistance of counsel in every revocation hearings, but rather stated:

“We find no justification for a new, inflexible constitutional rule with respect to the requirement of counsel. We think rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim. . . . In passing on a request for the appointment of counsel, the responsible agency should also consider, especially in doubtful cases, whether probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal shall be stated succinctly in the record.” <sup>[9]</sup>

#### At Some Post-Trial Proceedings

The Sixth Amendment’s right to the assistance of counsel does not stop when the jury finds the defendant guilty. When an out-of-custody defendant is found guilty at the end of a trial, the judge may remand the defendant to custody- has the bailiff take the defendant into custody and transport them to the jail- and revokes conditions of bail if there had been any. Counsel must assist the defendant through the end of the sentencing hearing, and the defendant’s attorney has the legal obligation to make post-trial motions to preserve the defendant’s rights.

The Court has distinguished between the defendant’s right to the assistance of counsel on mandatory appeals and discretionary appeals. In *Douglas v. California*, 372 U.S. 353 (1963), the Court found that indigent counsel should be provided to individuals

when an appellate court must review their appeal or **an appeal of right**. Once the first appeal has been dismissed or resolved, however, *Ross v. Moffitt*, 417 U.S. 600 (1974), holds that indigent defendants do not have a right to appointed counsel for discretionary review in either the state supreme court or with the U.S. Supreme Court. The *Ross* majority reasoned that the defendant did not need an attorney to have “meaningful access” to the higher appellate courts because all the legal issues would have already been fully briefed in the intermediate appellate court. Additionally, the Court noted that the concept of equal protection does not require absolute equality. The majority opinion states,

“We do not believe that the Due Process Clause requires North Carolina to provide the respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant’s guilt. Under these circumstances “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him” (Citations omitted).

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State’s prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being “haled into court” by the State and stripped of his presumption of innocence, but rather as a word to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant’s consent, it is clear that the State need not provide any appeal at all. The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . (Citations omitted.)

The facts show that respondent ... received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had “once been presented by a lawyer and passed upon by an appellate court.” We do not believe that it can be said, therefore, that a defendant in respondent’s circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage, he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials . . . would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review” (Citations omitted).

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. (Emphasis added). The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process. We think the respondent was given that opportunity under the existing North Carolina system.” <sup>[10]</sup>

Similarly, prisoners have a limited right to legal assistance for the purpose of filing writs of habeas corpus. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law”. Prisons can meet this obligation by training prisoners to be paralegal assistants to work under a lawyer’s supervision or by using law students, paralegals, and volunteer lawyers. Again, it may seem inconsistent that the court requires more for habeas corpus relief than it does for discretionary review on appeals. The

difference lies in the nature of habeas corpus as a collateral attack, or side attack, where the claim is often being advanced for the first time and therefore the need for legal assistance may be greater.

### Functions of Defense Attorneys

Defense lawyers investigate the circumstances of the case, keep clients informed of any developments in the case, and take action to preserve the legal rights of the accused. Some decisions, such as which witnesses to call, when to object to evidence, and what questions to ask on cross-examination, are considered to be strategic ones and may be decided by the attorney. Other decisions must be made by the defendant, most notably, after getting advice from the attorney about the options and their likely consequences. Defendants' decisions include whether to plead guilty and forego a trial, whether to waive a jury trial, and whether to testify in their own behalf.

The ABA Standards relating to the Defense Function established basic guidelines for defense counsel in fulfilling obligations to the client. The primary duty is to zealously represent the defendant within the bounds of the law. Defense counsel is to avoid unnecessary delay, to refrain from misrepresentations of law and fact, and to avoid personal publicity connected with the case. Fees are set on the basis of the time and effort required by counsel, the responsibility assumed, the novelty and difficulty of the question involved, the gravity of the charge, and the experience, reputation, and ability of the lawyer.

#### ABA Standard 4- 1.2, The Function of Defense Counsel, states:

- (a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.
- (b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.
- (c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.
- (d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.
- (e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with the law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.
- (f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.
- (g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
- (h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in legal aid or defender program. <sup>[11]</sup>

### Tricky Issues in Representation

Defendants sometimes want to have a friend or family member speak up for them, but, the Court will not permit that. The right to counsel means the right to be represented by an attorney, someone legally trained and recognized as a member of the bar association. Similarly, defendants may not necessarily get the attorney of their choice. For example, in *Wheat v. United States*, 486 U.S. 153 (1988), one defendant who wanted to be represented by the same attorney who was representing his accomplice/co-conspirator in a complex drug distribution conspiracy was not allowed to have that attorney. The Court disallowed his application for the appointment of counsel noting that irreconcilable and unwaivable conflicts of interest would be created since there was the likelihood that the petitioning defendant would be called to testify at a subsequent trial of his co-defendant and that his co-defendant would be testifying in petitioner's trial. On the other hand, in *United States v. Gonzalez-Lopez*, 553 U.S. 285 (2008), the



Court reversed the defendant's conviction because the trial court erroneously deprived the defendant of his choice of counsel. The defendant, Gonzales-Lopez, had hired counsel from a different state, and during pretrial proceedings, the judge and the counsel had some disagreements. The judge then prohibited the attorney from taking part in the defendant's trial. The Court found that a trial judge violated the defendant's Sixth Amendment rights.

Defendants cannot repeatedly "fire" their appointed counsel as a stall tactic, and, at some point, the court will not allow the defendant to substitute attorneys and will require the defendant work with whatever attorney is currently assigned. A defendant may not force an unwilling attorney to represent him or her, but a court does have the discretion to deny an attorney's motion to withdraw from representation after inquiring about counsel's reasons for wishing to withdraw. This may present an ethical dilemma for the attorney because professional rules of responsibility require that even when an attorney withdraws from a case, he or she must still maintain attorney-client confidences. If, for example, the attorney knows that the defendant insists on taking the stand and presenting perjured testimony, the attorney must withdraw. But, at the same time, the attorney cannot discuss with the court why he or she needs to withdraw. At some point in the inquiry, after the judge has asked and the attorney has talked around the subject, the judge hopefully catches on, and the judges will allow the attorney to withdraw.

### Effective Assistance of Counsel

Defendant's attorneys must provide competent assistance and should not harm the defendant's case by their legal representation. According to *McMann v. Richardson*, 397 U.S. 759 (1970), the right to counsel means the right to effective assistance of counsel. The constitutional standard for evaluating effective assistance was determined in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* decision looked at two aspects of the representation to determine whether counsel was ineffective. First, the defense attorney's actions were not those of a reasonably competent attorney exercising reasonable professional judgment; and second, the defense attorney's actions caused the defendant prejudice, meaning that they adversely affected the outcome of the case (i.e., they likely caused the jury to find the defendant guilty).

Courts may be more inclined to find ineffective assistance of counsel in a death penalty case than other run-of-the-mill cases. For example, the Court found the defense attorneys provided ineffective assistance in the sentencing portion of defendant's death penalty trial for the murder of a 77-year-old woman because they had failed to conduct an adequate "social history" investigation of the defendant's life and had not presented information to the jury they did have which showed that defendant had been subject to regular sexual abuse as a child. *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court stated,

"In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that reasonable professional judgments support the limitations on investigation. . . . A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to defense counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*."

### Waiving Counsel

Sometimes, a defendant wishes to waive counsel and appear **pro se**, or represent him or herself at trial. The Court, in *Faretta v. California*, 422 U.S. 806 (1975), held that the Sixth Amendment includes the defendant's right to represent himself or herself. The *Faretta* Court found that, where a defendant is adamantly opposed to representation, there is little value in forcing him or her to have a lawyer. The Court stressed that it was important for the trial court to make certain and establish a record that the defendant knowingly and intelligently gave up his or her rights.

“Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish he knows what he is doing and his choice is made with eyes open.” <sup>[12]</sup>

In *McKaskle v. Wiggins*, 465 U.S. 168, at 174 (1984), the Court held that a “defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.” The constitutional right to self-representation does not mean that the defendant is free to obstruct the trial, and a judge may terminate self-representation by a defendant who is obstructing the process. Frequently, judges will assign a **standby counsel** to assist defendants. Stand-by counsel is an attorney who can be available to answer questions of a pro se defendant, and if necessary, standby counsel can step in if the defendant is engaging in misconduct.

## Conclusion

Court jurisdiction determines where a case will be filed and which courthouse has the legal authority to hear a case. Jurisdiction can be based on geography, subject matter, or seriousness of the offense. Jurisdiction is also divided between trial courts (original jurisdiction) and appellate courts (appellate jurisdiction).

More than 51 court systems operate in the United States. We have a dual court system comprised of federal trial and appellate courts and state trial and appellate courts. Federal and state courts have similar hierarchical structures with cases flowing from lower trial courts through intermediate courts of appeals and up to the supreme courts.

Defendants who wish to appeal their convictions are entitled to have their cases reviewed at least once, a mandatory appeal of right in the intermediate courts of appeal. After that, the review is discretionary and rare. Appellate courts generally affirm the decision of the trial courts, but may also reverse and remand the case back to the trial court if they determine that prejudicial error occurred. At the intermediate appellate court level, judges most frequently affirm the trial court’s decision without writing an opinion, but sometimes the judges will write opinions informing the parties of their decision and the reasons for holding as they did. Judges don’t always agree, and at times, judges will write dissenting opinions or concurring opinions. Appellate court opinions become precedent that must be followed in the trial courts.

Judges, prosecutors, defense attorneys work together along with court clerks, bailiffs, and other court staff to process tens of thousands of cases daily in trial courts across the nation. Judges, prosecutors, and defense attorneys play an important role in the criminal justice process. Although few cases actually go to trial, and the vast majority of criminal cases are resolved in the trial courts at the pre-trial stage, the defendants must be represented by an attorney at critical stages in the process, and at the government’s expense if they cannot afford to hire an attorney, unless they have voluntarily waived the right and wish to represent themselves.

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1. *Powell v. Alabama*, 287 U.S. 45, at 58 (1932) [↵](#)
2. *Powell v. Alabama*, 287 U.S. 45, at 68-69 (1932) [↵](#)
3. *Gideon v. Wainwright*, 372 U.S. 335 (1963) [↵](#)
4. *Argersinger v. Hamlin*, 407 U.S. 25 (1972) [↵](#)
5. *Scott v. Illinois*, 440 U.S. 367 (1979) [↵](#)
6. *Johnson v. Zerbst*, 304 U.S. 458 (1938) [↵](#)
7. *In re Gault*, 387 U.S. 1 (1967) [↵](#)
8. Stefan, S. (1985). Right to Counsel in Civil Commitment Proceedings. *Mental & Physical Disability L. Rep.*, 9, 230. [↵](#)
9. *Gagnon v. Scarpelli*, 411 U.S. 788, 790 (1973). [↵](#)
10. *Ross v. Moffitt*, 417 U.S. 600, 610-611, 614, 616 (1974). [↵](#)
11. ABA Standard 4- 1.2 The Function of Defense Counsel (2015). *Criminal Justice: Prosecution and Defense Function*. American Bar Association. [↵](#)
12. *Faretta v. California*, 422 U.S. 806, 835 (1975). [↵](#)

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