

## Memorandum of Law

### Denial of Right to Effective Assistance *OF COUNSEL*

Article the sixth of the National Constitution reads:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

Furthermore,

“The right to assistance of counsel, Justice Black wrote for the Court, "is necessary to insure fundamental human rights of life and liberty." Without stopping to distinguish between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Justice quoted Justice Sutherland's invocation of the necessity of legal counsel for even the intelligent and educated layman and said: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." HYPERLINK "<http://www.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=304&invol=458>" 304 U.S. 458, 462, 463 (1938).

“Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from a silent record, and must be determined by the trial court before proceeding in the absence of counsel.” Ibid., 464, 465.

It is undisputed that,

“Over the last century all of the protections guaranteed by the Sixth Amendment have been made applicable to the state governments through the doctrine of selective incorporation. Under this doctrine, the Due Process and Equal Protection Clauses of the HYPERLINK "</topic/fourteenth-amendment-to-the-united-states-constitution>" Fourteenth Amendment require each state to recognize certain fundamental liberties that are enumerated in the HYPERLINK "</topic/bill-of-rights>" Bill of Rights because such liberties are deemed essential to the concepts of freedom and equality. Together with the HYPERLINK "</topic/supremacy-clause>" Supremacy Clause of Article VI, the Fourteenth Amendment prohibits any state from providing less protection for a right conferred by the Sixth Amendment than is provided under the federal Constitution.”

The effective assistance of counsel requires a “counsellor,” not just in name only, but in specific ways:

“Counsellors who are associated with those regularly retained in a cause, either for the purpose of advising as to the points of law involved, or preparing the case on its legal side, or arguing questions of law to the court, or preparing or conducting the case on its appearance before an appellate tribunal, are said to be ‘of counsel’.”

A single "ATTORNEY" [OR PUBLIC DEFENDER, or BAR ASSOCIATION MONOPOLY MEMBER], ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] is the one PERSON who has been "regularly retained" in my cause. Any and all advising on the "points of law involved" or "preparing the case on its legal side," or "arguing questions of law to the court," must be done by counsellors who are ASSOCIATED with him, NOT by he himself. By definition, ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] is NOT a counsellor, he is not a counsellor in my case. The manner and the substance of his representation, as "the principal attorney of record for the case," is NOT consistent with the meaning of the term "of counsel:"

The phrase "of counsel" is a term defined as

"A phrase commonly applied in practice to the counsel employed by a party in a cause, and particularly to one employed to assist in the preparation or management of a cause, or its presentation on appeal, *but who is not the principal attorney of record for the party.*" --Black's Law Dictionary.

"OF COUNSEL refers to an attorney who aids in the preparation of a case, but who is not the principal attorney of record for the case." See also "on the brief." --Barron's Law Dictionary

The assistance "of counsel" is demonstrated in one way by the

"designation on a brief indicating the names of persons who contributed to the written product . . . Many reported cases list the attorneys of record and all persons 'on the brief.'" --Barron's Law Dictionary.

Here again the name[s] of the person[s,] attorney[s] who are NOT the attorney[s] of record, who contributed to the brief *must* be "on the brief" in order to attempt to prove that an accused receives the assistance "of counsel." None of the briefs in my case list the name of any person but ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!]; therefore, I have been denied and have been made subject to the deprivation of my right to the effective assistance of counsel and all actions, proceedings and related orders are fatally defective and void *ab initio*.

This deprivation is undisputed and the individuals responsible include, but are not limited to, members of the State BAR association monopoly (see the Sherman Anti-Trust Act), alleged attorneys, licensed or unlicensed, alleged judges, alleged prosecuting attorneys, the Supreme Court "in this state" and the members of the legislature "in this state." See the Compact States Act of 1934 for the definition of the phrase "in this state."

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] is the "principal attorney record in the case," the one "regularly retained in my cause;" however, by definition, his purpose and his actions are NOT those "of counsel." Therefore, I have been, in any and ALL alleged actions against me, denied and deprived, without the required and guaranteed due process of the law and without just compensation, of my property: my unalienable "right to counsel" guaranteed and protected under the Sixth Amendment, that has been defined as the "effective assistance of counsel."

This defect is deceptive and misleading; and, it is inherent in the very nature of the legal "system" itself, therefore, it is a species of FRAUD.

Simply put, in the eloquent words of the ruling below, the right TO counsel has been defined

by the courts to mean the effective assistance **OF** counsel, as defined above.

"[T]he right **to** counsel is the right to the effective assistance **of counsel!**"  
*McMann v. Richardson*, HYPERLINK "<http://www.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=397&invol=759>" \l "771" 397 U.S. 759, 771 n.14 (1970).

I have proved my case and it stands now as a conclusive presumption in law and it is the Truth. Moreover, that assistance of counsel must "afford" effective aid in a specific manner:

"From the beginning of the cases holding that counsel must be appointed for defendants unable to afford to retain a lawyer, the Court has indicated that appointment must be made in a manner that affords "**effective aid in the preparation and trial of the case.**" *Powell v. Alabama*, HYPERLINK "<http://www.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=287&invol=45>" \l "71" 287 U.S. 45, 71-72 (1932); *Glasser v. United States*, HYPERLINK "<http://www.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=315&invol=60>" \l "70" 315 U.S. 60, 70 (1942).

In *Powell*, the court also said that

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, 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 have a perfect one. He requires the guiding hand **of counsel** at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

"A critical stage of prosecution includes every instance in which the **advice of counsel** is necessary to ensure a defendant's right to a fair trial or in which the **absence of counsel** might impair the preparation or presentation of a defense." (*United States v. Hidalgo*, 7 F.3d 1566 [11th Cir. 1993]).

*Ipsa facto*, I have also been denied and deprived of the "advice of counsel" and I have been unlawfully and deleteriously subjected instead to "the absence of counsel."

Furthermore, it is a well-settled issue that,

"The Sixth Amendment right **to counsel** is so fundamental to a fair trial and so to due process of law that it was made obligatory upon the States by the Fourteenth Amendment . . . [and it] rested on **the obvious truth that lawyers are necessities, not luxuries**; a criminal trial is thus not conducted in accord with due process of law unless the defendant has counsel to represent him. As we have made clear, **the guarantees of counsel cannot be satisfied by mere formal appointment.** *Avery v. Alabama*, 308 U.S. 444, 446. (1940). That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is

fair. *Strickland*. Because the right **to counsel** is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits. The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction that fails to meet the standards of due process of law. Unless a defendant charged with a serious offense has **counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice**, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. --*Cwyler v. Sullivan*.

Accused needs “an attorney **to meet the adversary presentation of the prosecutor**,” See e.g., *Douglas v. California*, 372, U.S. 353, 358 (1963), noting the benefit of **counsel’s examination into the record, research of the law, and marshalling of arguments on [client’s] behalf**. Counsel’s failure was particularly egregious in that it essentially **waived respondent’s opportunity to make a case on the merits**; in this sense, it is difficult to distinguish respondent’s situation from that of **someone who had no counsel**.

In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, and the consequent loss of liberty, is **unlawful**. To be sure, respondent did have **nominal representation** when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation **at trial**—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”

--From Appellate Advocacy.

“An applicant must not only show incompetence, but must also show that the deficient conduct so undermined the proper functioning of the adversarial process that **the trial cannot be relied upon as having produced a just result**. --*Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on **inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation**. *Howard*, 126 Idaho at 233, 880 P.2d at 263. – *State v. Beorchia*, (Ct. App. 2001), Opinion No. 42.

The court made statements, on the record, in support of the experience level of ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!], by saying (despite the refusal and failure of ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] to produce a *bona fide* “license to practice law,” practicing law being a “profession” or an “occupation”), that “he was a lawyer;” however, this is insufficient, and the dispositive facts of the instant claim for ineffective (or absence of) assistance, center on performance, not experience, as required by Idaho case law (below) and as guaranteed by the National Constitution, a certified copy of which has been submitted as an exhibit in evidence in the instant case.

“Trial counsel’s performance must be evaluated objectively, not subjectively, for ineffective assistance claim; **dispositive facts** upon which ineffective assistance claims succeeds or fails **center on performance, not on level of experience**. U.S.C.A.

Const. Amend. 6. See *Aragon v State*, Idaho Supreme Court, No. 16742, 760 P.2d 1174.

It is undisputed that, by definition, and since ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] has [FILL IN YOUR ATTORNEYS DEFICIENCIES HERE: SUCH AS, “failed to returned my phone calls” and/or has failed to respond to my letters” and/or has failed to respond to my requests for information,” and/or “has provided me with false or misleading information,” and/or “has failed to appear at an appointment made by me,” and/or “has refused to argue briefs filed by me,” and/or “has violated provisions of his Code of Professional Conduct,” (or whatever your local BAR association calls it, with specific examples here or below), and/or “has concealed material information from me,” and/or “has a conflict of interest in the instant case,” etc. etc.] that I have been “left without the aid of counsel” and I have not received "effective aid in the preparation and trial of the case.” I hereby demand a dismissal with prejudice [or a reversal] in the instant case for the reasons set forth above and for good cause showing, as supported by the following summary of deficiencies of ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!]

**SUMMARY OF DEFICIENCIES IN PERFORMANCE OF ATTORNEY**

**[NAME OF PETTIFOGGER SHYSTER GOES HERE!]**

The advice of ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] did not meet the competency standard demanded of attorneys in criminal cases.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to investigate or perform other pretrial functions.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to ensure that a jury would be selected properly.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to advocate for me.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to pursue defenses available to me.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] did not properly advise me as to a plea.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to communicate the entire plea offer and falsely represented terms of a plea offer, thereby making my guilty plea uninformed and, therefore, it was not made knowingly, intelligently

and voluntarily, but this failure worked toward the coercion of my guilty plea.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to present important evidence and testimony.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to argue defendant's briefs.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] failed to request proper jury instructions.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] did not engage in certain pretrial procedures and his decision was not based on a legitimate strategy, but, in fact, may have been legal malpractice or fraud. In any case, it is undisputed that I was prejudiced by these errors and omissions.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] did not place the terms of the plea agreement on the record.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] is not qualified (licensed) to practice law.

ATTORNEY [NAME OF PETTIFOGGER SHYSTER GOES HERE!] had/has a conflict of interest in the instant case.

#### CONCLUSION AND *RECTUS ROGARE*

WHEREAS, the facts and the law contained herein are before this court; and, WHEREAS, the facts and the law contained herein are the Truth; and WHEREAS, we hold said Truths to be self-evident; and, WHEREAS, self-evident Truths are undisputed and incontrovertible, no oral argument is requested, for no words can alter or overcome these Truths; and, WHEREAS, Truth is Sovereign: She comes from God and bears His message, from whatever quarter her great eyes may look down upon you; Psalms 117:2; John 8:32; II Corinthians. 13:8; THEREFORE; this court must perform its duty under the Rule of Law, do Justice, *Rectum Rogare*, and DISMISS WITH PREJUDICE [OR REVERSE] the instant case without delay for "Justice delayed is Justice denied."

*Rectus Rogare* - "to do right; to petition the judge to do right." --Black's Law Dictionary, 4th edition.

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