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§4:10 Constitutional and Statutory Provisions

United States Constitution, Fifth Amendment: No person shall be deprived of life, liberty, or property, without due process of law

United States Constitution, Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

Texas Constitution, Art 1, Sec 10 [H]e shall have the right of being heard by himself or counsel, or both.

V.A.C.C.P. Art. 1.05. Rights Of Accused

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself, or counsel, or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. No person shall be held to answer for a felony unless on indictment of a grand jury.

V.A.C.C.P. Art. 1.051

(a) A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding. The right to be represented by counsel includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding.

§4:20 Right to Counsel in General

The right to counsel exists under both the Fifth and Sixth amendments to the U.S. Constitution. McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991); Upton v. State, 853 S.W.2d 548 (Tex.Cr.App. 1993).

While there is a difference between the Fifth Amendment and Sixth Amendment rights to counsel, neither is superior or greater than the other. Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L.Ed.2d 261 (1988).

The right to counsel attaches in any criminal trial the result of which is to deprive a defendant of his liberty, regardless of how petty the offense; and no person may be imprisoned where he was tried without counsel, unless he knowingly and intelligently waives counsel. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1972).

Neither Art. 1, §19 of the Texas Constitution (the state due course of law provision) or V.A.C.C.P. Art. 1.05 confer a right to counsel independent of that guaranteed by Art. 1, §10 of the Texas Constitution. McCambridge v. State, 778 S.W.2d 70 (Tex.Cr.App. 1989).

A suspect also has the right to counsel under V.A.C.C.P Art. 38.22 when dealing with police in a custodial setting.

A juvenile is entitled to an attorney at all phases of the juvenile proceeding; except that the right to counsel at a detention hearing may be waived. Family Code §51.10.

§4:30 Fifth Amendment Right to Counsel

The Fifth Amendment guarantees that no person shall be compelled to be a witness against himself. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). A suspect undergoing custodial interrogation has the Fifth Amendment right to the assistance of counsel in his dealings with law enforcement agents. Miranda. This right includes both the right to consult with a lawyer prior to questioning, as well as the right to have a lawyer present during questioning. Miranda.

Persons charged with contempt of court and facing possible incarceration have a right to be represented by counsel at the contempt proceeding. Ex parte Gonzales, 945 S.W.2d 830 (Tex.Cr.App. 1997).

A defendant may forfeit his right to have counsel present during a psychiatric interview by the state if he demonstrates intent to present expert psychiatric

testimony as to his future dangerousness. Lagrone v. State, 942 S.W.2d 602 (Tex.Cr.App. 1997).

§4:31 Invocation of Fifth Amendment Right to Counsel

If an accused clearly invokes his Fifth Amendment right to counsel during custodial interrogation by the police, all interrogation must cease, and any subsequent waiver of counsel, to be effective, must be the product of either accused-initiated communications with the police, or police-initiated with the accused in the presence of counsel. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981); Upton v. State, 853 S.W.2d 548 (Tex.Cr.App. 1993).

Where an accused has made it known that he intends to deal with law enforcement only through counsel, counsel must be present at the time the accused is approached for further interrogation. Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L.Ed.2d 489 (1990); Murphy v. State, 801 S.W.2d 917 (Tex.Cr.App. 1991).

If an accused expresses his desire to deal with the police only through counsel, he is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police. Smith v. State, 779 S.W.2d 417 (Tex.Cr.App. 1989); citing Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981).

An accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of his Fifth Amendment right to counsel. McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991).

Once an accused has invoked his Fifth Amendment right to counsel, this right is invoked for interrogation on the specific crime for which he is suspected, as well as for any other crime and by any other interrogators. McNeil v. Wisconsin; Upton v. State, *supra*.

Whether or not an accused has sufficiently invoked his right to counsel is measured on a totality of the circumstances basis. Smith, *supra*.

Events occurring outside the presence of the suspect and entirely unknown to him can have no bear-

ing on his capacity to comprehend and knowingly relinquish a constitutional right. Terrell v. State, 891 S.W.2d 307 (Tex.App. — El Paso 1994, *pet. ref'd*), citing Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986).

Police conduct such as not informing the suspect that his family has retained an attorney for him is irrelevant to the inquiry into the effectiveness of the suspect's waiver of counsel, absent a showing that such conduct prevented the suspect from attaining awareness and comprehension of the information conveyed in the Miranda warnings and the consequences of abandoning those rights. Terrell, *supra*, citing Moran v. Burbine, *supra*.

§4:31.1 Equivocal Invocation of Fifth Amendment Right

If the accused's invocation of his right to counsel is equivocal, interrogation may continue for the limited purpose of discovering whether the accused wants to consult an attorney or proceed without an attorney. Lucas v. State, 791 S.W.2d 35 (Tex.Cr.App. 1989).

A request for counsel that is ambiguous in scope will be afforded a broad rather than a narrow interpretation. Smith v. State, 779 S.W.2d 417 (Tex.Cr.App. 1989), citing Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93 L.Ed.2d 920 (1987); *see also*, Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L.Ed.2d 631 (1986).

Further questioning of the suspect may be permitted for the limited purpose of clarifying an equivocal invocation of the right to counsel. Jamail v. State, 787 S.W.2d 372 (Tex.Cr.App. 1990); Smith v. State, *supra*.

However, where the invocation of the right to counsel is clear, a suspect's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Smith v. State, *supra*, citing Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490, 83 L.Ed.2d 488 (1984).

§4:31.2 Sufficient Invocation of Right to Counsel

A formal or absolute demand for an attorney is not required to sufficiently invoke the right. All that is necessary is that the suspect indicate in some