

WHEN A DEFENDANT'S RIGHT TO COUNSEL ATTACHES Criminal Law & Procedure: Counsel: Right to Counsel

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Counsel

A defendant's right to counsel under the Sixth Amendment and the Fourteenth Amendment to the United States Constitution attaches to any point in the criminal process in which the substantial rights of the defendant may be affected or to any critical stage in the proceedings. In addition, some states have enacted statutes that provide that a criminal defendant has a right to counsel in any adversarial judicial proceeding.

An accused person is not generally entitled to the assistance of counsel until a criminal prosecution is brought against the accused person. A criminal prosecution arises when adversarial proceedings are initiated against the accused person. A criminal prosecution begins when the accused person is formally arrested and is taken before a magistrate or when the accused person is indicted or is charged with an offense in a complaint or an information. The right to counsel does not attach until formal charges have been initiated against the accused person. For example, the right to counsel does not attach to a pre-indictment lineup. However, if the accused person is in custody and is subjected to questioning by the police, the accused person has a right to counsel to protect his or her right against self-incrimination under the Fifth Amendment to the United States Constitution. The Fifth Amendment right to counsel attaches when an investigatory process becomes accusatory and when it begins to focus on the accused person.

After a defendant has been charged with an offense, the defendant's right to counsel does not attach to the defendant's initial appearance before a magistrate if the magistrate merely advises the defendant of his or her right to counsel and of his or her other rights. However, the defendant's right to counsel attaches if bail is set, if the defendant enters a plea, or if a preliminary hearing on the charges occurs.

A defendant's right to counsel may also attach to a pretrial confrontation between the defendant and the prosecution if the presence of counsel is necessary to preserve the defendant's rights. If any prejudice to the defendant could be avoided by the presence of counsel, the defendant is entitled to counsel at the pretrial confrontation.

A defendant is entitled to counsel at his or her arraignment. An arraignment is considered a critical stage of the proceedings against the defendant. An arraignment is a proceeding whereby the defendant is brought before a judge or a magistrate to plead to the charges in his or her indictment or information. The defendant is also entitled to counsel at a post-indictment lineup if the defendant is physically present at the lineup. However, the defendant is not entitled to counsel when blood samples or saliva samples are taken from the defendant after the defendant is indicted.

A defendant's right to counsel attaches to a preliminary hearing. A preliminary hearing is a proceeding that determines whether there is probable cause that a crime has been committed and that the defendant committed the crime. The defendant's right to counsel attaches if the defendant changes his or her plea after he or she has been arraigned. The defendant's right to counsel also attaches to the trial and to the trial court's entry of judgment and sentence.

After a defendant has been convicted of a crime, the defendant is entitled to counsel at a probation revocation proceeding, at an extradition proceeding, at all appellate proceedings, and at a habeas corpus proceeding.

A defendant's right to counsel may be applied retroactively. For example, if the defendant was deprived of his or her right to counsel at a critical stage of a former proceeding, the defendant may be granted post-conviction relief based on the denial of such right. Also, the defendant's conviction in a former proceeding may not be admitted in a subsequent criminal prosecution if the defendant was denied his or her right to counsel in the former proceeding.