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Date: September 3, 2020

Re: Constitutional considerations related to legal representation/participation by non-lawyers

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This memorandum explores constitutional issues and considerations related to legal representation / participation by non-attorneys.

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." "Whatever else it may mean, the right to counsel ... means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *Brewer v. Williams,* 430 U.S. 387, 389, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

There is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment. *See Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (stating "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects

... [r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients ... in court."). The United States Supreme Court did not extend the Sixth Amendment to encompass the right to be represented in court by a layman. *Id.* Additionally, every federal circuit which has considered the question has held there is no right to representation by persons who are not qualified attorneys. *See Pilla v. American Bar Ass'n,* 542 F.2d 56, 58–59 (8th Cir.1976) (affirming the district court opinion which determined that individuals in civil and criminal cases do not have a constitutional right to be represented by lay counsel). *See also United States v. Anderson,* 577 F.2d 258, 261 (5th Cir.1978) (stating "[t]here is no sixth amendment right to be represented by a non-attorney"); *United States v. Scott,* 521 F.2d 1188, 1191–92 (9th Cir.1975) (determining that the word "counsel" in the Sixth Amendment guaranteeing an accused the right to have the assistance of counsel for his defense does not include friends or advisors of an accused who declines an attorney and represents himself); *United States v. Grismore,* 546 F.2d 844, 847 (10th Cir.1976) (stating " '[c]ounsel' as referred to in the Sixth Amendment does not include a lay person, rather 'counsel' refers to a person authorized to the practice of law"); and *United States v. Jordan,* 508 F.2d 750, 753 (7th Cir.1975) (stating "[t]he district court is not obligated to appoint counsel of defendant's choice where the chosen

attorney is not admitted to practice"); *See also United States v. Tools*, No. CR. 07-30109-01-KES, 2008 WL 2595249 (D.S.D. 2008).

> The federal courts have concluded that there is "insubstantial historical support" for the contention that a defendant has a right to have an unlicensed layman assist him under the Sixth Amendment. See, Fair v. Givan, supra. The refusal to permit a layperson to represent the appellant does not violate appellant's constitutional rights to freedom of speech, freedom of association, and due process of law. See, United States v. Schmitt (C.A. 8, 1986), 784 F.2d 880, 882.

City of Shaker Heights v. Carroll, No. 51832, 1987 WL 7442, at *1–2 (Ohio Ct. App. Mar. 5, 1987).

> In addition to most of the federal courts that have passed upon this question, the states appear unanimous or nearly so that "counsel" means attorney and no right to lay counsel exists. A *partial* listing of cases would include: *Skuse v. State,* 714 P.2d 368 (Alaska App.1986); *State v. Wheeler,* 37 Conn.Supp. 693, 435 A.2d 372 (1981); *State v. Brake,* 110 Idaho 300, 715 P.2d 970 (1986); *Kimble v. State,* 451 N.E.2d 302 (Ind.1983); *State ex rel. Stephan v. O'Keefe,* 235 Kan. 1022, 686 P.2d 171 (1984); *State v. Goodno,* 511 A.2d 456 (Me.1986); *People v. Brewer,* 88 Mich.App. 756, 279 N.W.2d 307 (1979); *Higgins v. Parker,* 354 Mo. 888, 191 S.W.2d 668 (1945), *cert. denied,* 327 U.S. 801, 66 S.Ct. 902, 90 L.Ed. 1026 (1946); *People v. Felder,* 47 N.Y.2d 287, 418 N.Y.S.2d 295, 391 N.E.2d 1274 (1979); *State v. Benson,* 376 N.W.2d 36 (N.D.1985); *State v. Hamilton,* 732 P.2d 505 (Utah 1986); *City of Seattle v. Shaver,* 597 P.2d 935 (Wash.App.1979).

Bauer v. State, 610 So. 2d 1326, 1327 fn.2 (Fla. Dist. Ct. App. 1992).

It should be noted that in federal court, a party may represent himself or be represented by an attorney, but cannot be represented by a non-lawyer. *See, e.g., Eagle Assocs. v. Bank of Montreal,* 926 F.2d 1305, 1308-09 (2d Cir.1991) (reviewing authorities); *Turner v. America Bar Ass'n,* 407 F.Supp. 451, 477

(N.D.Tex.1975), *aff'd sub nom. Taylor v. Montgomery,* 539 F.2d 715 (7th Cir.1976), *and Pilla v. American Bar Ass'n,* 542 F.2d 56 (8th Cir.1976). It follows that an "unlicensed laymen [such as Bennett] cannot under the Constitution demand the right to represent other litigants." *Turner,* 407 F.Supp. at 478. *See Neilson v. State of Michigan*, 181 F.3d 102 (6th Cir. 1999) (rejecting Plaintiff's § 1983 claim alleging that that the denial of representation by a non-licensed attorney violated his right to counsel under the Sixth Amendment.)

> In United States v. Stockheimer, 385 F. Supp. 979, 983 (W.D. Wis. 1974), aff'd, 534 F.2d 331, cert. denied, 429 U.S. 966 (1976), Judge Doyle noted that the United States Constitution does not require that every attorney who represents a defendant be licensed by some state to practice law. But the constitution does not give a defendant the right to be represented by a non-licensed attorney or lay person. The federal trial court, under this federal rule, may allow a non-licensed attorney to represent a defendant in that court if the court is satisfied that the 'counsel' is (1) legally trained and (2) qualified to represent the defendant in that criminal case. Id. Only then may the trial court, in its discretion, allow a non-licensed attorney to practice in a court of law. There is no constitutional right to have an unlicensed attorney or layperson assist a defendant in a criminal case under the sixth amendment. Turner v. American Bar Ass'n, 407 F. Supp. 451, 476-77 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D. Wis. 1975), aff'd sub nom Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976); Fair v. Givan, 509 F. Supp. 1086, 1090 (N.D. Ind. 1981).

State v. Kreyer, 112 Wis. 2d 672, 333 N.W.2d 732 (App. 1983).

A criminal defendant's Sixth Amendment right to the effective assistance of counsel is fundamental to providing a defendant with a fair trial. *See United States v. Cronic,* 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (footnote

omitted). Generally, a convicted defendant's claim that his counsel's assistance was so defective as to require reversal of a conviction must satisfy two components: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The phrase 'effective assistance of counsel' means, quite plainly, that the defendant is entitled to assistance by a competent attorney who, through his or her representation of the defendant, plays the role necessary to ensure that the trial is fair." *Bourdon v. Loughren*, 386 F.3d 88, 96-97 (2d Cir. 2004).

Several courts have concluded that representation by an individual who is not a licensed attorney is a per se violation of the Sixth Amendment right to effective counsel. *See United States v. O'Neil,* 118 F.3d 65, 70–71 (2d Cir.1997) (stating that it is a per se violation of the Sixth Amendment "where the attorney was not licensed to practice law because he failed to satisfy the substantive requirements of admission to the bar"); *United States v. Mouzin,* 785 F.2d 682, 697 (9th Cir.1986) (stating that an individual who had never been admitted to practice law and thus "who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective

representation of counsel' for purposes of the Sixth Amendment"); *Solina v. United States,* 709 F.2d 160, 168–69 (2d Cir.1983) (finding the graduate of an accredited law school who had failed the New York bar examination twice and had not been admitted to any other bar provided ineffective counsel under the Sixth Amendment); *United States v. Myles,* 10 F.Supp.2d 31, 35 (D.D.C.1998) (noting the "per se rule [under the Sixth Amendment] applies where the defendant is represented by an individual who has never been admitted to any court's bar"); and *United States v. Dumas,* 796 F.Supp. 42, 46 (D.Mass.1992) (determining that "if a defendant is convicted while represented by someone *who has never been admitted to any court's bar,* that defendant is deemed to have been denied counsel as a matter of law"). Thus, if this court found the appointment of lay counsel to trigger the protections afforded by the appointment of "counsel" within the meaning of the Sixth Amendment, it would be fundamentally inconsistent with the general rule that an individual must be a licensed professional attorney before he can be considered effective assistance of counsel under the Sixth Amendment. *United States v. Tools*, No. CR. 07-30109-01-KES, 2008 WL 2595249 fn. 1 (D.S.D. June 27, 2008). The Sixth Amendment has been interpreted to guarantee the right to effective assistance of counsel in a criminal prosecution and to appointment of counsel if the person cannot afford counsel and wants to be represented. *Powell v. Alabama,* 287 U.S. 45 (1932); *Gaston*

L. Edison v. State, No. 02C–019109–CR00209, 1992 WL 156032, at *7 (Tenn.Crim.App. July 8, 1992). Counsel has consistently been held by the courts to mean a licensed attorney. *State v. Sower,* 826 S.W.2d 924, 929 (Tenn.Crim.App.1991); *United States v. Cooper,* 493 F.2d 473 (5 Cir.); *Williams v. State*, No. W2014-00312-CCAR3CD, 2015 WL 150443 (Tenn. Crim. App. Jan. 12, 2015).

> In certain contexts prejudice is presumed. *Id.* The circumstances that constitute such per se violations of the Sixth Amendment right to counsel are rare. **The per se rule applies where the defendant is represented by an individual who has never been admitted to any court's bar, or if the defendant is represented by someone with little or no legal training who is masquerading as an attorney**. *See United States v. Novak,* 903 F.2d 883 (2d Cir.1990); *Solina v. United States,* 709 F.2d 160, (2d Cir.1983); *Harrison v. United States,* 387 F.2d 203, 212 (D.C.Cir.1967) ("layman masquerading as a qualified attorney" cannot provide assistance of counsel), *rev'd on other grounds,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). **"The principle applied in such cases is that one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment."** *United States v. Mouzin* (9th Cir.1986), 785 F.2d 682, 697.

United States v. Myles, 10 F. Supp. 2d 31, 35 (D.D.C. 1998) (emphasis added).

On the other hand, courts have found no per se Sixth Amendment violation where defendants were represented by attorneys not licensed in the jurisdiction where the case was handled. *See Farr v. United States*, 314 F.Supp. 1125 (W.D.Mo.1970), aff'd, 436 F.2d 975 (8th Cir.) cert. denied, 402 U.S. 947, 91

S.Ct. 1639, 29 L.Ed.2d 116 (1971) (Sixth Amendment not violated by defendant's representation before Federal District Court by an attorney not licensed to practice before that court but licensed to practice in another jurisdiction.) and *Johnson v. State*, 225 Kan. 458, 590 P.2d 1082 (1979) (Sixth Amendment not violated by defendant's representation by an attorney who was under suspension for non-payment of attorney registration fee). with *People v. Felder*, 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979) (Sixth Amendment violated where defendant was represented by a layman, who was masquerading as an attorney and "had not completed law school or otherwise satisfied the prerequisite for the practice of law."); *People v. Wilson*, 626 P.2d 709, 710 (Colo. App. 1980), *aff'd,* 652 P.2d 595 (Colo. 1982)

> We agree with the United States Court of Appeals in this jurisdiction that, "[s]tanding alone, the mere fact of a trial attorney's nonmembership in the local bar is not necessarily sufficient to find that the right to effective counsel was breached." *United States v. Butler,* 504 F.2d 220, 223–224 (D.C.Cir.1974); *see also In re Brown,* 454 F.2d 999, 1004 (D.C.Cir.1971) (recognizing that "[p]articipation in litigation—even criminal litigation—by nonmembers of the local bar simply by obtaining leave of court is a common event in this and other courts"). Unlike the situation in *Butler,* moreover, *see supra* note 4, there is no evidence here—as counsel on appeal concedes—that trial counsel misrepresented his bar status to the court. Nor does Ransom contend that counsel's clinic employer, including the director who was assisting him, was unaware of counsel's bar status. Furthermore, although counsel acknowledged that this was his "first or second jury trial," Ransom does not allege that counsel had no other relevant trial experience. Finally, counsel had been admitted to practice law in Maryland for sixteen months before he began

> to represent Ransom, and he was employed as a supervised fellow in the Georgetown Criminal Justice Clinic when he received that appointment. Counsel, we must say, was not an untutored neophyte.

Ransom v. United States, 947 A.2d 1127, 1129 (D.C. 2008).