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CAN WE AFFORD TO PROVIDE TRIAL COUNSEL FOR THE INDIGENT IN MISDEMEANOR CASES?

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In spite of the recent advances made in extending the constitutional right to counsel for indigent defendants in criminal proceedings, there are three additional areas in which the United States Supreme Court will probably have to rule concerning the bounds of this right. The issues that must be faced will arise from: (1) misdemeanor cases; (2) collateral proceedings arising out of criminal actions; and (3) certain types of civil matters. However, this article is limited to a discussion of some of the arguments for broadening the scope of representation under the sixth and fourteenth amendments to include the right to counsel in misdemeanor cases in which the defendant may lose his liberty.

BENCH MARKS IN THE DEVELOPMENT OF THE RIGHT TO COUNSEL

To view the misdemeanant problem in its historic perspective, it is helpful to note the principal steps in the development of the right to counsel. A chronological account such as the following gives some idea of the growth of the concept.

At common law the question was not the right to have a lawyer provided, but rather the right to retain counsel. Oddly enough, English law permitted an accused to have counsel in misdemeanor cases before it allowed a lawyer to assist one charged with a felony.¹ In 1695, Parliament gave a defendant accused of treason the right to retain counsel and, upon his request, required the court to appoint a lawyer.² It was not until 1836, however, that a defendant charged with a felony was permitted counsel.³ England waited until 1903 to provide for the appointment of counsel in all felonies.⁴

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1. See J. STEPHENS, *A HISTORY OF CRIMINAL LAW OF ENGLAND* 341 (1883).

2. 7 & 8 Will. 3, c. 3, § 1 (1695).

3. W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 9 (1955).

4. 3 Edw. 7, c. 38, § 1 (1903).

The first American colony to guarantee the right to employ counsel was Rhode Island, in 1660.⁵

The historic case of *Powell v. Alabama*⁶ partially bridged the gap between the theory of the right of counsel as a "fundamental principle of liberty and justice" and what is required in state trials under the due process clause of the fourteenth amendment. *Powell*, however, seemed to limit the rule to certain capital cases:

All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance . . . it is the duty of the Court . . . to assign counsel for him as a necessary requisite of due process of law⁷

Since the sixth amendment said nothing about counsel being provided for indigent defendants, court interpretation was needed. In *Johnson v. Zerbst* Justice Black said, "The Sixth Amendment withholds from the federal courts, in all criminal proceedings, the power and authority to deprive the accused of his life or liberty unless he has or waives the assistance of counsel."⁸

A step backward was taken in *Betts v. Brady*,⁹ where the Supreme Court ruled that the failure to appoint counsel in a noncapital case was not a denial of due process where a fair trial was held, thus refusing to incorporate the sixth amendment right into the fourteenth amendment.

In 1963, *Betts* was specifically overruled in *Gideon v. Wainwright*,¹⁰ a unanimous ruling which applied the sixth amendment guarantee to state procedure through the due process clause of the fourteenth amendment and left no doubt that the right to counsel is "fundamental and essential to a fair trial."

*In Re Gault*¹¹ held that in proceedings to determine delinquency which may result in commitment to an institution, a minor (and his parents) must be advised of his right to be represented by a lawyer, and that if he is unable to pay, counsel will be appointed.

5. II R.S. Colonial Records, 1664-77, (Barrett) at 239.

6. 287 U.S. 45 (1932).

7. *Id.* at 61.

8. 304 U.S. 458, 463 (1938).

9. 316 U.S. 455 (1942).

10. 372 U.S. 335 (1963).

11. 387 U.S. 1 (1967).

The right to counsel in a hearing to revoke probation was established in *Mempa v. Rhay*.¹²

There are several other landmark decisions regarding the right to counsel in other types of cases and at various stages of the criminal process, but textual discussion of them is not necessary for this introduction.¹³

ATTEMPTS TO BROADEN THE RIGHT TO COUNSEL TO EMBRACE MISDEMEANORS

Mr. Justice Harlan, in his concurring opinion in *Gideon*, was probably thinking of misdemeanor cases when he stated, "Whether the rule should extend to *all* criminal cases need not now be decided."¹⁴ However, in 1966 the Supreme Court denied certiorari in *Winters v. Beck*,¹⁵ a misdemeanor case in which an indigent defendant had been convicted and sentenced to 30 days in jail and required to pay a fine. The facts and the legal questions in this important case are adequately set forth in the dissent of Justice Stewart, who said in part:

The petitioner, an indigent Negro, was arrested on a charge of "immorality," a misdemeanor under an ordinance of Little Rock, Arkansas. Later the same day he was brought before the municipal court, where, after pleading not guilty, he was tried, convicted, and sentenced to 30 days in jail and a \$254 fine, including costs. He was unable to pay the fine, so his punishment was converted under the Arkansas "dollar-a-day" statute (Ark. Stat. Ann. Sect. 19-2416 (Repl. 1956)) to imprisonment for 9½ months.

At his trial the petitioner was not represented by counsel. He did not ask for the assistance of counsel and was not informed by the trial judge, or by anybody else, of any right to counsel, appointed or retained. The judge did not advise him of the nature of the charges against him, of the possible penalty, or of his right to make objections, cross-examine witnesses, present witnesses in his own behalf, or to have a trial de novo in the county circuit court under Ark. Stat. Ann. Sections 44-155, 509 (Repl. 1964). Not surprisingly, the petitioner did not object to the evidence offered by the prosecution, did not cross-examine the prosecution witnesses, did not present witnesses in his own behalf, and did not exercise his

12. 389 U.S. 128 (1967).

13. See Ashman, *Representation for the Poor in State Rulemaking*, 24 VAND. L. REV. 2 n.5 (1970).

14. 372 U.S. 335, 351 (1963).

15. 385 U.S. 907 (1966).

right to a trial de novo in the county circuit court. Also not surprisingly, the petitioner did not question the vagueness of the charge against him nor the validity of converting a sentence of 30 days into one of 9½ months solely because of his poverty¹⁶

Later in the same year the Court again refused to review a misdemeanor conviction in which the maximum penalty was one year imprisonment.¹⁷ This time, Justice Stewart was joined by Justices Black and Douglas in dissent.

It should be noted that this dissent, as did the one in *Winters*, pointed out that the majority was at odds with a lower court decision. Justice Stewart, citing *Arbo v. Hegstrom*,¹⁸ commented: "Arbo was set free. The petitioner, convicted of the same offense in the same State, remains in jail. When the meaning of a fundamental constitutional right depends upon which court in Connecticut a person turns to for redress, I believe it is time for this Court to intervene."¹⁹

In *Cortinez v. Flournoy*²⁰ the Court declined to review a decision of a Louisiana court which involved counsel in a misdemeanor case.

Several state courts²¹ have found a constitutional right to counsel in misdemeanor cases. One of the principal cases so holding is *State v. Borst*,²² in which Chief Justice Knutson, after reviewing the law of Minnesota, a substantial number of cases of other jurisdictions, and much other literature on the right to counsel, stated:

Until we have a definitive decision by the Supreme Court of the United States as to whether Gideon required the appointment of counsel for an indigent charged with a misdemeanor as defined by our laws, as a Sixth Amendment right, we choose not to guess at what it may eventually hold by basing our decision on the Fed-

16. *Id.*

17. *DeJoseph v. Connecticut*, 385 U.S. 982 (1966).

18. 261 F. Supp. 397 (D. Conn. 1966). Arbo was charged with criminal nonsupport, the identical offense with which the petitioner here was charged. The federal district judge held that *Gideon* guaranteed Arbo the right to have counsel appointed.

19. 385 U.S. 982, 983 (1966).

20. 385 U.S. 925 (1966).

21. See *Patterson v. State*, 227 Md. 194, 175 A.2d 746 (1961), which was decided before *Gideon*. The Maryland court held that there was no constitutional right to assigned counsel in misdemeanor cases. When *Patterson* reached the Supreme Court certiorari was granted, and the matter was remanded for further consideration in light of *Gideon*. The Maryland court thereafter reversed the conviction.

22. 278 Minn. 388, 154 N.W.2d 888 (1967).

eral Constitution or even on our state constitution. In the exercise of our supervisory power to insure the fair administration of justice, we decide that counsel should be provided in any case, whether it be a misdemeanor or not, which may lead to incarceration in a penal institution.²³

Some courts have not attempted to draw the line at "serious offenses" when considering the right to counsel in misdemeanor cases.²⁴ In *City of Tacoma v. Heater*²⁵ the Supreme Court of Washington apparently construed *Gideon* as extending to misdemeanors:

[T]he *Gideon* case . . . means that every defendant has a constitutional right to counsel in all criminal prosecutions. The court made no distinction between misdemeanors and felonies insofar as the applicability of this provision is concerned.²⁶

This case is significant even though the Washington Supreme Court subsequently rendered a decision which seemed inconsistent with the rationale of *City of Tacoma v. Heater*. The later decision said that the 1966 opinion "does not stand for the proposition that the court in misdemeanors must provide counsel, but rather for the right to one's own retained counsel."²⁷

The Court of Appeals of Alabama also read into *Gideon* the right to have a lawyer appointed for an indigent charged with a misdemeanor.²⁸ In so holding, the court quoted three sentences from *Gideon*:

- 1) ". . . Any person *haled into court*, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him.
- 2) ". . . The widespread belief that lawyers in *criminal courts* are necessities, not luxuries.
- 3) "This noble ideal cannot be realized if the poor man charged with *crime* has to face his accusers without a lawyer to assist him."²⁹

23. 154 N.W.2d at 894.

24. *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965); *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967); *Evans v. Rives*, 126 F.2d 633 (5th Cir. 1942). See also *In re Johnson*, 42 Cal. Rptr. 228, 398 P.2d 420 (1965); *State v. Blank*, 241 Ore. 627, 405 P.2d 373 (1965); *State ex rel. Barth v. Burke*, 24 Wis. 2d 82, 128 N.W.2d 422 (1964).

25. 67 Wash. 2d 733, 409 P.2d 867 (1966).

26. 409 P.2d at 869.

27. *Hendrix v. City of Seattle*, 76 Wash. 142, 456 P.2d 696, 706 (1969).

28. *Irvin v. State*, 44 Ala. App. 101, 203 So. 2d 283 (1967).

29. 203 So. 2d at 286.

Going a step further, a circuit court in Oregon held that the distinction between a crime and a "quasi-criminal act" was illogical when a jail sentence was a possible consequence. *Stevenson v. Shields*³⁰ held that an indigent defendant convicted of violating a city ordinance and sentenced to jail for six months had a right to court appointed counsel.

REPORTS OF STUDIES AND OTHER PUBLICATIONS OF LEGAL SCHOLARS

Persuasive arguments for the need to have legal representation at misdemeanor trials can be found in the writings of many experts in the field of criminal justice administration. Rather than attempting to make an exhaustive list, we mention only a few of the principal ones.

In the Report of the President's Commission on Law Enforcement and Administration of Justice, the Commission recommends:

The objective to be met as quickly as possible is to provide counsel to every criminal defendant who faces a significant penalty, if he cannot afford to provide counsel himself. This should apply to cases classified as misdemeanors as well as to those classified as felonies.³¹

In a study made by a special committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association in 1959, the first recommendation on methods of providing defense counsel was:

The system should provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction.³²

One of the standards promulgated by the National Legal Aid and Defender Association provides that:

Every defender system should provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony, misdemeanor or other charge where there is a possibility of a jail sentence.³³

30. *Stevenson v. Shields*, 2 CRIM. L. REP. 2173, *aff'd sub nom.* *Stevenson v. Holzman*, 254 Ore. 94, 458 P.2d 414 (1969).

31. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 150 (1967).

32. *EQUAL JUSTICE FOR THE ACCUSED* 26 (1959).

33. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *HANDBOOK OF STANDARDS* 15 (1965).

In the Report to the National Defender Conference in 1969, several reasons were given for providing counsel for defendants charged with misdemeanors:

One strong point in favor of representation in misdemeanor cases is that courts of limited jurisdiction are the courts with which most citizens come in contact with. To encourage respect for the law, these courts should be models of fairness, courtesy and efficiency. Providing competent counsel will not guarantee all of those qualities but it should be the first positive step in realizing those ideals. In addition to making the first dose of justice palatable, counsel's presence should also insure the speedier solution of contested cases, more equitable plea bargaining and fairer sentencing after a finding of guilt. Many misdemeanants who simply do not belong behind bars do not possess the ability to convince a harried and hurried judge to be lenient. Several misdemeanor court projects sponsored by the National Defender Project have demonstrated that the presence of counsel results in a substantial reduction of the percentage of guilty defendants who are incarcerated. (E.g., Boston, Mass. Moreover, statistics in Boston indicate that first offenders given lenient treatment after representation by counsel have a markedly lower tendency to recidivate.) It may be that we are only now scratching the surface of the problem of disposition of minor charges. Perhaps the future holds a system of diversion from the criminal process of many cases involving minor offenses. Such an approach would allow for more efficiency in trying the cases that should go to trial and also save much of the time and expense that is now expended in arresting, booking, jailing, trying and sentencing persons who for good reasons should be diverted from the criminal system at an early stage for informal correction or social referral. Should such a practice arise there is a need for defense counsel to appear as early as possible to suggest and encourage the diversion of appropriate cases.³⁴

The American Bar Association Project on Minimum Standards for Criminal Justice recommends that:

Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, re-

34. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, REPORT TO THE NATIONAL DEFENDER CONFERENCE 30, 31 (1969).

ardless of their denomination as felonies, misdemeanors or otherwise.³⁵

The Federal Criminal Justice Act of 1964 provides that an accused should be afforded counsel in all but petty offenses, which the Act defines as those for which the penalty does not exceed six months incarceration or a fine of \$500 or both.³⁶

REPRESENTATION NOW PROVIDED

In the federal courts the right of the indigent accused to representation is stated very clearly and simply in Rule 44 of the Federal Rules of Criminal Procedure:

Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the Commissioner at court through appeal, unless he waives such appointment.³⁷

Compensation for such representation is provided for by the Federal Criminal Justice Act of 1964,³⁸ which states:

In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense . . . the court shall advise the defendant . . . that counsel will be appointed. . . .

As already indicated, three United States courts of appeal have held that the constitutional right to counsel extends to misdemeanor cases:

35. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 37, 38 (Approved Draft 1968). See the Commentary for a listing of states that are divided on this issue, showing those that rely upon "sound discretion of the court" and those having statutes covering the matter.

36. 18 U.S.C. § 3006A(b) (1970). See *Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) for supporting statements and bibliography.

37. FED. R. CRIM. P. 44.

38. 18 U.S.C. § 3006A(b) (1970).

the fifth, *Harvey v. Mississippi*,³⁹ the seventh, *Singleton v. Woods*,⁴⁰ and eighth, *Beck v. Winters*.⁴¹

An analysis of the 50 states reveals that 36 have laws requiring appointed counsel in misdemeanors.⁴² Twenty-two of these states require appointed counsel when the possible penalty is less than six months imprisonment. Eleven states require appointed counsel only when the possible penalty exceeds six months imprisonment. In the other three states, the scope of the right to counsel could not be accurately determined. Counsel is normally appointed for indigent misdemeanants in at least 29 of the 36 states recognizing the right to counsel in misdemeanors. In three additional states, appointment of counsel in misdemeanors is within the discretion of the trial court. Only 11 states do not recognize any right to counsel at all in misdemeanors.⁴³

COMMENTS ON OBJECTIONS MADE TO EXTENDING THE RIGHT TO COUNSEL

Cost

It has been argued that it will cost too much money to provide counsel for those charged with misdemeanors. Chief Justice Knutson refers to this in his opinion in *State v. Borst*.⁴⁴

39. See *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965) involving a misdemeanor punishable by up to a \$500 fine and up to 90 days in jail; *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965) where there was a sentence of six months and a fine of \$250 on each of two counts; *Goslin v. Thomas*, 400 F.2d 594 (5th Cir. 1968) where the defendant was charged with escape, an offense punishable by one year in prison; *James v. Headley*, 410 F.2d 325 (5th Cir. 1969) a case in which the defendants were charged with a number of petty offenses each punishable by 60 days but subjecting the defendants to total sentences of 600 and 240 days respectively; and *Bohr v. Purdy*, 412 F.2d 321 (5th Cir. 1969) involving two offenses punishable together by 90 days and \$750. Recently, the right was extended to ordinance violations, *Shepherd v. Jordan*, 425 F.2d 1174 (5th Cir. 1970).

40. See *Singleton v. Woods*, 440 F.2d 835 (7th Cir. 1971), where the seventh circuit held that a state trial judge's failure to advise an indigent misdemeanor defendant of his right to court-appointed counsel on appeal violated the defendant's sixth amendment right to counsel and his fourteenth amendment right to equal protection of the laws. The court did not decide whether the right to counsel extends to all misdemeanors.

41. See *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969), where the court held that there was a right to appointed counsel in at least some misdemeanors, but failed to set out a mechanical test for determining when counsel must be provided. The district courts within the circuit have not enforced *Beck* to date.

42. This conclusion is based upon a survey conducted by the National Legal Aid and Defender Association in 1970 by John D. Shullenberger, staff attorney, and Jack L. Phelps, law student at Northwestern University.

43. See Appendix A for state provisions and practices.

44. 278 Minn. 388, 154 N.W.2d 888, 894-95 (1967).

The arguments most frequently advanced in support of denial of appointment of counsel in misdemeanor cases are that it will cost too much and that there are . . . insufficient attorneys to represent all misdemeanants.

He answers this by saying:

We realize the practical difficulties of applying the rule we announce here. There is no statutory provision for compensating appointed counsel in misdemeanor cases. However, such services must be procured, and until the legislature can meet and make such provision for compensation, or extend the public defender system so that these cases are handled through its offices, it may be possible that counsel can be procured without great expense.

When *Gideon* was decided, it might have been impossible for the states to implement the right to counsel in all offenses punishable by incarceration. At that time a number of states did not regularly provide counsel in noncapital felony cases.⁴⁵ Few states had any organized system for providing defense services.⁴⁶ This is no longer so.

Since *Gideon*, great strides have been made in implementing the right to counsel. There are now over 400 organized defender services in the country.⁴⁷ A growing number of states have every jurisdiction covered by a defender system.⁴⁸ Many of these organizations already provide counsel in all offenses punishable by incarceration.⁴⁹

As more and more states have turned to an organized system for implementing *Gideon*, valuable experience has been gained from the many programs that provide effective counsel for indigent criminal defendants. The National Defender Project of the National Legal Aid and Defender Association alone has administered \$6 million in grants to fund a variety of defender systems in the years 1965-71. Some 73 demonstration programs were initiated, regularly evaluated, and studied. As a result, con-

45. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 17 (1962).

46. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STATISTICS OF LEGAL AID AND DEFENDER WORK IN THE UNITED STATES AND CANADA (1965).

47. THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION'S DIRECTORY OF LEGAL AID AND DEFENDER SERVICES 43-63 (1971), lists 408 offices providing defender services.

48. *Id.*, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Massachusetts, Minnesota, New Jersey, and Rhode Island all have statewide defender systems. New York has fifty-seven offices; California has forty-four.

49. This includes public defender offices in California, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, and Pennsylvania.

siderable expertise has been gained in devising suitable defender programs for jurisdictions with widely divergent needs. Moreover, when a jurisdiction utilizes some form of organized defender system, the cost of guaranteeing the right to counsel is not as great as it would be under a noncoordinated assignment plan.

One of the few specific cost studies on the problem of defending indigents in misdemeanor cases was conducted in 1966-67 by the Oregon State Public Defender Committee.⁵⁰ The summary chart projects the cost of appointing counsel in misdemeanor cases where a jail sentence could be imposed as follows:

1967-68—\$270,071 (for 5,630 defendants)

1968-69—\$298,949 (for 6,232 defendants)

The average attorney's fee was calculated from the statutory fee for appointed counsel. The average fee actually paid for felony representation in 1964-65 in the state was \$67.57. Taking into account the time differences in representing defendants in misdemeanor matters and those in felony cases among other factors, the researchers arrived at an estimated average fee for representation of misdemeanants of \$47.97.

After a discussion of the state revenue from fines, the study concludes:

We have refrained from arguing the merits or demerits of appointing counsel in misdemeanor cases in the body of this cost study. Justice should not be calculated in terms of dollars and cents. Nonetheless, it seems appropriate to observe that if the administration of criminal justice produces over six million dollars in revenue yearly to the people of the State of Oregon, surely we can afford to spend 3.5% or less than 1/28th of that amount to insure equal justice for the poor in Oregon.

In March 1971, the National Legal Aid and Defender Association surveyed its defender members to determine the cost of providing counsel in all misdemeanors.⁵¹ Twenty of the offices responding provided

50. COST STUDY—THE DEFENSE OF INDIGENTS IN MISDEMEANOR CASES IN THE STATE OF OREGON (1967). This 34 page document was prepared by Lawrence A. Aschenbrenner, Public Defender, State of Oregon, and William H. Belt, Executive Secretary, Judicial Council of Oregon.

51. Approximately 250 questionnaires were mailed. Seventy-two offices responded. Thirty-five of the 72 offices responding provide counsel in all offenses punishable by incarceration. Twenty of the 72 offices responding provide counsel in all offenses

counsel in all offenses punishable by incarceration and had information showing what percentage of their budget was devoted to misdemeanor representation.⁵² Only four of the 20 offices devoted more than 50 percent of their budget to misdemeanor representation.⁵³ Sixteen of the 20 devoted 50 percent or less to misdemeanors⁵⁴ and 10 devoted 40 percent or less to misdemeanors.⁵⁵ Thus, it can be seen that guaranteeing the right to counsel in all offenses punishable by incarceration will not bankrupt the states.⁵⁶

Some additional data on the cost factor is provided by a field study made for the American Bar Foundation in 1965.⁵⁷ Even though it is difficult to estimate the number of misdemeanor cases, the study concludes that "it seems fair to say that about 5,000,000 persons a year are charged with misdemeanors in state courts."⁵⁸

As to the number who are indigent, the study concludes, "The very limited information available does indicate that a considerably larger proportion of felony than of misdemeanor defendants are indigent."⁵⁹

punishable by imprisonment exceeding six months. Only 13 of the 72 offices responding did not provide counsel in any misdemeanors. Four offices (federal defender and law school programs) answered the question as not applicable.

52. While 35 offices provide counsel in all offenses punishable by incarceration, only 22 had data showing what percentage of the budget was devoted to providing counsel in misdemeanors. Two of the 22 provide counsel only in misdemeanors. Thus, 20 of the offices responding provide counsel in felonies and misdemeanors and have data showing the percentage of their budget devoted to misdemeanors.

53. These offices are in Logan County, Illinois (70%); Chemung County, New York (70%); Saratoga County, New York (60%); and Lawrence County, Pennsylvania (85%).

54. These 16 offices are in Bakersfield County, California (34%); Contra Costa County, California (48%); Sacramento County, California (27%); Santa Clara County, California (34%); Solano County, California (50%); Yuba County, California (50%); Connecticut—statewide defender system—(50%); Honolulu, Hawaii (22%); Hilo, Hawaii (48%); McLean County, Illinois (25%); Dutchess County, New York (30%); Monroe County, New York (18%); Nassau County, New York (40%); Oneida County, New York (40%); Franklin County, Pennsylvania (12%); and Seattle, Washington (43%).

55. These 10 offices are in Bakersfield County, California (34%); Sacramento County, California (27%); Santa Clara County, California (34%); Honolulu, Hawaii (22%); McLean County, Illinois (25%); Dutchess County, New York (30%); Monroe County, New York (18%); Nassau County, New York (40%); Oneida County, New York (40%); and Franklin County, Pennsylvania (12%).

56. Note 50 *supra* and accompanying text.

57. See L. SILVERSTEIN, A.B.F. REPORT ON THE DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN COURTS 9, 10, 123-25 (1965).

58. *Id.*

59. *Id.*

Further, the study adds:

It is impossible to estimate what percentage of misdemeanor defendants are unable to afford adequate defense, but it seems safe to say that it is definitely not more than 50% of the estimated 5,000,000 such defendants a year, and probably not more than 25%. If the latter figure is reasonably accurate, there are 1,250,000 indigent defendants a year. If each case were defended—at an average cost of \$50—the total cost would be \$62,500,000 for all state courts.⁶⁰

This total is based upon the assumption that every indigent misdemeanant will be represented, which is an unlikely practice since many defendants waive the right to have counsel.

Some doubt as to the validity of the estimate that the number of misdemeanors (requiring representation) outnumber the felonies eight-to-one has been raised by the results of a study conducted recently under the auspices of the National Legal Aid and Defender Association.⁶¹ In fact, the ratio of misdemeanors to felonies varies from a low of 0.55 to 1 to a high of 2.71 to 1.⁶² From this part of the survey report it can be seen that the number of indigent misdemeanants actually represented by counsel is considerably smaller than that projected by the A.B.F. study.

Realizing that more time is usually required to defend one charged with a felony, two highly regarded public defender offices were consulted in order to get specific data to compare the caseload of a lawyer who represents defendants in felony charges with a defender who handles misdemeanor cases. Table II of Appendix B supports the estimate that an attorney can handle twice as many misdemeanor cases as can his

60. *Id.*

61. This was a part of a two-semester senior research project carried out by Mr. Phelps in the early part of 1971 while he was a third-year student at Northwestern University School of Law.

62. See Table I in Appendix B. It is important to note that this material is based upon recent replies from states that have recognized and implemented the right to have counsel appointed for all indigents accused of offenses punishable by incarceration. These states are California, Connecticut, Delaware, Massachusetts, Minnesota, New Hampshire, New York, Oregon, and Pennsylvania. However, the data collected from Delaware, New Hampshire, and Massachusetts was inclusive or not relevant for the purposes of this analysis. Data from Hawaii is included, because counsel is appointed for indigent defendants in all criminal cases except minor traffic charges. Material is included from counties in other states where counsel is required by ordinance or court rule.

counterpart in the felony department. The information shows a 1.8 to 1 ratio for one office and a 2.15 to 1 for the other for 1967-68.

Another comparison was made from data received from a large public defender office in California regarding the number of attorneys required to handle preliminary hearings, trial of felony cases, and misdemeanor matters. Information as to the total number of cases in each type of proceeding, the number of lawyers, and the caseload per attorney is summarized in Table III of Appendix B. This data indicates that the average caseload of lawyers handling misdemeanor cases was more than twice the average caseload of the lawyers representing those charged with felonies.

In estimating the increase in misdemeanor representation from the practice of providing lawyers for defendants charged with offenses that carry more than a six-month sentence to one for all offenses punishable by incarceration, data from three public defender offices following the six-month standard and from six providing coverage under the incarceration standard were used for purposes of comparison. Table IV of Appendix B suggests that the increase will range from 10 to 20 percent.

An attempt is made to suggest statistics for a "model" jurisdiction where 12 lawyers represent 1,800 defendants annually. This is done by projecting data from Tables II, III and IV on the number of attorneys needed to implement the right of counsel under three situations: (1) in felony cases only; (2) in all offenses punishable by imprisonment exceeding six months; and (3) in all offenses punishable by incarceration. This is another way of estimating the manpower need if the right to counsel is guaranteed in misdemeanor cases.

For this projection, we assume that the average felony caseload is 150—admittedly a heavy assignment for a defender—and that the average misdemeanor caseload is 300. For instance, in the model situation, if the jurisdiction adopts the six-month standard for providing counsel in misdemeanor cases, four attorneys will be handling 1,200 cases per year—an average of 300 per lawyer. Under the more liberal arrangement where all indigent defendants who face the possibility of incarceration in misdemeanor charges are provided counsel, nine lawyers will be required to handle the 2,700 cases. Considering other cost items, this should not be an impossible strain on the criminal defense budget.

Manpower

The second argument mentioned by Chief Justice Knutson, and raised by others, relates to shortage of manpower. Here, too, we must look

beyond the raw statistics in an attempt to assess the true situation as to cost and the number of lawyers required. For instance, the A.B.F. study points out that we must take into consideration some specific differences that exist in processing misdemeanor cases compared to procedures for cases that involve felonies, and lists six such differences:

1. Most misdemeanors are prosecuted by complaint and information rather than by grand jury indictment. This makes for speedier disposition.
2. The preliminary hearing is a rarity in misdemeanors and in many states does not exist at all.
3. Bail is usually set at a much lower amount in misdemeanors than in felonies.
4. The same judge who is only a committing magistrate in felony cases will usually have jurisdiction to try a misdemeanor and impose sentence. For this reason the misdemeanor trial quite often occurs when the defendant first appears before the magistrate. Summary, informal procedure is typical, especially in courts manned by lay judges. Jury trials are uncommon.
5. Misdemeanor cases are less vigorously prosecuted by the state's attorney than are felony cases. This is partly a matter of allocating limited resources to the more serious crimes.
6. In many counties misdemeanor trials are held at any number of magistrates' courts located throughout the county, with a right of appeal and trial *de novo* in the court of general jurisdiction. By contrast, felony trials are usually concentrated in the court of general jurisdiction, which sits only at the county seat.⁶³

Weight is given to the significance of these observations by the Report of the Conference on Legal Manpower Needs of Criminal Law, which estimated that an "experienced prosecutor can efficiently dispose of about 250 felonies in a year . . . This includes dispositions of all kinds It was estimated that a prosecutor could efficiently dispose of about 1,000 misdemeanors a year." As to the defense, the Conference reported:

On the basis of a crude survey of present practice, it is estimated that a public defender can efficiently appear in 150 felony cases per year Estimates of the number of misdemeanor cases which a defender could handle efficiently ranged from less than

63. See L. SILVERSTEIN, *supra* note 57, at 125.

300 per year to nearly 1,000 per year depending on local circumstances

The best estimate of the conference of the number of lawyers working full time on prosecution and defense needed to satisfy the demand for lawyers in felony and misdemeanor cases is 15,000-20,000.⁶⁴

The report estimated that there were approximately 300,000 lawyers in the nation. Of these, 4,000 were full-time prosecutors or their equivalent, 400 were defenders, and between 2,000 and 5,000 were lawyers who serve more than occasionally as retained defense counsel. "Thus," the report stated, "the lawyer manpower presently in the field meets less than half the estimated need."

RESOURCES

Manpower

In order to establish some basis for assessing existing resources against the need that would exist if all indigent defendants were afforded the right to counsel, we must consider the present manpower in defender offices and the possibility of increasing that resource.

In 1963, the year *Gideon* was decided, there were only 115 jurisdictions that had organized defender services.⁶⁵ In 1966, the date of the Conference on Legal Manpower, there were 198 offices.⁶⁶ By the middle of May, 1970, the number had increased to 321.⁶⁷

The assistance available through law school clinic programs cannot be overlooked. In addition to supplementing the work of lawyers in such areas as investigations, interviews, and research, many states permit law students, under supervision, to represent clients in court proceedings. Thirty states and the District of Columbia have adopted student

64. See REPORT OF THE CONFERENCE ON LEGAL MANPOWER NEEDS OF CRIMINAL LAW, 41 F.R.D. 389-418 (1967). The Conference, held at Airlee House, Virginia in 1966, was sponsored by three groups; The President's Commission on Law Enforcement and Administration of Justice, the A.B.A. Project on Minimum Standards for Criminal Justice, and the National Defender Project of the National Legal Aid and Defender Association.

65. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STATISTICS ON LEGAL AID AND DEFENDER WORK (1963).

66. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STATISTICS ON LEGAL AID AND DEFENDER WORK (1966).

67. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STATISTICS ON LEGAL AID AND DEFENDER WORK (1970).

practice rules.⁶⁸ The American Bar Association adopted a model rule in 1969.⁶⁹ At least 90 law schools have established some form of "clinic" project.⁷⁰ Many of these are operated in cooperation with public defender offices.

As to the availability of lawyers generally, it is encouraging to note the increase in the enrollment in law schools. According to a survey made of the 146 A.B.A. approved schools, there was a 20 percent increase in 1970 over the previous year.⁷¹ The A.B.A. Section on Legal Education and Admissions to the Bar reported a jump in enrollment from 68,386 law students in 1969 to 82,041 in 1970. "This was by far the largest annual increase in post-World War II years," said the chairman of the Section. The report stated that more than 74,000 candidates took the Law School Admissions Test during the 1969-70 test year, a 23 percent increase over the previous year.

A passing reference should be made to the possibility of increasing legal manpower by employing paraprofessionals to perform tasks that do not require legal training. The Conference on Legal Manpower, referred to earlier, considered this additional resource. After listing the many activities of defense lawyers, the Conference report stated, "In the course of this discussion it was noted that some of these functions might be susceptible to performance by nonlawyer auxiliaries, thus reducing the need for lawyers." In 1968, the A.B.A. appointed a Special Committee on Lay Assistants for Lawyers. The Committee reported in August of 1970 that plans were being made to develop a two and four year curriculum for training lay assistants.⁷² A three-week pilot project aimed at developing a model on-the-job training program for paraprofessionals was held by this Committee in San Francisco, August 18 through September 5, 1970.⁷³

Funding

Considerable impetus to the law school project will be provided by funds from the federal government if Congress can be persuaded to

68. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATES RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS (1971).

69. *Id.* at 29.

70. J. KLEIN, LAW SCHOOL LEGAL AID PROGRAMS: A SURVEY, (NLADA Monograph No. 1, 1969).

71. A.B.A. News Release, March 1971.

72. 41 A.B.A. REP. 1002 (1970).

73. See A.B.A. SPECIAL COMMITTEE ON LAY ASSISTANTS, TRAINING FOR LEGAL ASSISTANTS (Preliminary Draft 1971).

fund Title II of the Higher Education Act. In 1968 this Act was amended to permit the funding of legal clinic programs in law schools. Unfortunately, the 1971 House bill did not include funds. The Senate voted \$1,000,000 for the project, but the Conference Committee eliminated the appropriation. The trouble seems to be that those who see the need for such a resource have not made sufficient effort to convince Congress that funding is urgently needed.

The second possibility for federal assistance to encourage a wider range of legal services for the poor is the Model Cities program of H.U.D. Thirty-five legal services projects in 22 jurisdictions have already been approved in the first designation of 60 "Model Cities."⁷⁴ Ten of these are in the criminal justice field.

An even more promising federal resource is the Law Enforcement Assistance Administration of the Department of Justice.⁷⁵ President Nixon's budget for fiscal 1972 calls for appropriation of \$698.4 million for L.E.A.A.—an increase of \$162.2 million over the last year.⁷⁶ However, of the \$184 million expended last year by the states, only \$1.8 million (or less than one percent) went for defender services. Several local defender offices and two state public defender services (Illinois and Michigan) have received funds.⁷⁷

This discussion of the economic aspects of the problem may be summarized by again quoting Chief Justice Knutson:

In any event, neither of these arguments is sufficiently persuasive to deny the accused person, who may wind up in jail because he doesn't know how to defend himself, the proper tools with which to present what defense he may have.⁷⁸

CONCLUSION

A judicial recognition of the constitutional right to counsel in misdemeanor cases would be a logical development in a legal system which

74. H.U.D. memorandum *Legal Services in Model Cities*, Feb. 4, 1970.

75. The L.E.A.A. was created by the Omnibus Crime Control Act of 1968, under which money is funneled to the states in block grants. Local units of government and local organizations apply directly to the state planning agencies for funds to improve the administration of justice.

76. 50 N.C.C.D. News 1-4 (March/April 1971).

77. Marshall Hartman, N.L.A.D.A. National Director of Defender Services, has outlined procedures for defender offices to follow in their efforts to get L.E.A.A. funding. See Director's Newsletter Dec. 11, 1970.

78. *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888, 894 (1967).

seeks to assure that no one will be deprived of life or liberty without due process of law.

In 1932, the Supreme Court held in *Powell*⁷⁹ that in the case of an illiterate defendant charged with a capital offense, assignment of counsel was a necessary part of due process. Ten years later the Court said that under certain circumstances or in connection with other elements, denial of counsel in a non-capital felony deprived a defendant of due process of law, even though the fourteenth amendment did not incorporate that sixth amendment guarantee.⁸⁰ In *Gideon v. Wainwright*⁸¹ the Court held that the sixth amendment was a fundamental right essential to a fair trial under the fourteenth amendment.

The lower courts are now divided on the question of whether the Constitution requires that counsel be provided indigent defendants in misdemeanor cases.⁸² This disparity ranges from the "serious offense" rule⁸³ to the "special circumstances" rule⁸⁴ to the "petty offense" rule.⁸⁵ These differences make it imperative that the Supreme Court resolve the matter.

Aside from the cost factor, which relevant statistics show is not as great today as it may have been earlier, there are other considerations, not the least of which is the attitude of a defendant who feels that he has not had a fair trial. This point is emphasized in the A.B.A. Standards for Criminal Justice:

Minor offenses may have major significance in terms of the interests to be served by providing defense services. It is at this level that the largest number of people confront the administration of criminal justice. If they are to develop respect for its processes it must treat them fairly; and providing counsel to those unable to retain their own is essential to the development of that respect. Moreover, those who are charged with major offenses often have a record of prior convictions for minor ones. This suggests the importance of using the processes of the law at the level of minor offenses to try to prevent recidivism and reverse the tendency of

79. 287 U.S. 45 (1932).

80. *Betts v. Brady*, 316 U.S. 455 (1942).

81. 372 U.S. 335 (1963).

82. *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965). Here Judge Warren Jones of the fifth circuit discusses the validity of the felony-misdemeanor distinction.

83. *Patterson v. State*, 227 Md. 194, 175 A.2d 746 (1961), *remanded in* *Patterson v. Warden*, 372 U.S. 776 (1963).

84. *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).

85. *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965).

petty criminality to lead to aggravated forms of antisocial conduct. Providing counsel at the lower levels may counter to some degree the pressure to mass-produce justice and in this and other ways serve the ends of rehabilitation.⁸⁶

So, with a logical extension of *Gideon*, noting that the Constitution makes no distinction between a short prison term and a long one, with the increasing manpower resources, with the cost factor not exorbitant, and with the promising benefits related to rehabilitation, it is now time to require the appointment of counsel for all indigent defendants charged with misdemeanors where there is a possibility of incarceration.

APPENDIX A

Alabama

Alabama comes under the fifth circuit rule. In addition, the Alabama Code requires that counsel be appointed to represent indigents accused of "serious crimes."⁸⁷ In *Irvin v. State*,⁸⁸ the defendant was convicted of obtaining money by issuing a worthless check. The Alabama Supreme Court held that this misdemeanor was a "serious crime" within the meaning of the statute, and that if the accused was indigent, he was entitled to appointed counsel. Without deciding what constitutes a "serious crime," the court said that the trial judge must make the determination in each case by considering the relevant circumstances, including the potential penalty and the complexity of the defense. It is not clear to what extent these rights are implemented.

Alaska

Alaska is one of the few remaining states that does not recognize the right to counsel in misdemeanors. However, the Alaska Supreme Court recently rejected the "petty offense" standard in a jury trial case, *Baker v. City of Fairbanks*,⁸⁹ and its reasoning would logically require a similar holding if the court is ever faced with the question of the right to counsel in misdemeanors.

86. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 39 (Approved Draft 1968).

87. ALA. CODE tit. 15, § 318(1) (1969 Supp.).

88. 44 Ala. App. 101, 203 So. 2d 283 (1967).

89. 417 P.2d 386 (Alaska 1970). Compare ALASKA R. CRIM. P. 39(a)-(b) with MAGISTRATES R. 1(j).

Arizona

In *State v. Anderson*,⁹⁰ the Arizona Supreme Court held that counsel was required in "serious misdemeanors." The court said the trial judge must make the determination in each case by considering the relevant circumstances, including the potential penalty and the complexity of the defense. In *Burrage v. Superior Court*,⁹¹ the court modified the *Anderson* test. Counsel must now be appointed where the potential penalty exceeds six months imprisonment or a \$500 fine or both, and the defendant must be advised of his right to counsel. It appears that courts are implementing the right, although they must appoint private counsel rather than the public defender in misdemeanors.⁹²

Arkansas

While Arkansas comes under the eighth circuit rule, the Arkansas Supreme Court's holdings in *Winters v. Beck*⁹³ and *Cabelton v. State*,⁹⁴ have not been expressly overruled by that court.

California

In *In re Johnson*,⁹⁵ the California Supreme Court held that the right to counsel applied to all misdemeanors. The right is based on the state constitution and applies in any case where loss of liberty may occur upon conviction. The record must affirmatively show that the accused was advised of his right to appointed counsel and expressly waived it. This requirement is strictly enforced.⁹⁶ The right is fully implemented in California.⁹⁷

Colorado

The public defender is required to represent indigents accused of all misdemeanors and may represent indigents charged with municipal ordinance violations.⁹⁸ Because of personnel shortages, the Colorado

90. 96 Ariz. 123, 392 P.2d 784 (1964).

91. 105 Ariz. 53, 459 P.2d 313 (1969).

92. See *Lee v. Superior Court*, 106 Ariz. 165, 472 P.2d 34 (1970).

93. 239 Ark. 1093, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966).

94. 243 Ark. 351, 420 S.W.2d 534 (1967).

95. 62 Cal. Rptr. 325, 398 P.2d 420, 422 (1965).

96. See *Black v. Municipal Court*, 51 Cal. Rptr. 771, 774 (1966).

97. Information obtained through N.L.A.D.A. questionnaire, note 42 *supra*.

98. COLO. REV. STAT. ANN. § 39-21-3 (Supp. 1969).

Public Defender is only representing defendants charged with offenses punishable by imprisonment exceeding six months.⁹⁹

Connecticut

*State v. Simmonds*¹⁰⁰ holds that the right to counsel applies to misdemeanors and requires a knowing waiver of the right, but it does not decide whether the right is limited. Counsel is provided in all misdemeanors except minor traffic offenses, and one circuit in the state is conducting a pilot project to determine the cost of providing counsel in all offenses punishable by incarceration, including minor traffic offenses.¹⁰¹

Delaware

The court must advise the defendant of his right to counsel.¹⁰² The public defender represents indigent misdemeanants, and he may prosecute any appeals that he considers to be in the interest of justice.¹⁰³ The right to counsel is implemented in Delaware.¹⁰⁴

Florida

Florida falls under the fifth circuit rule, but the state courts do not recognize the right to counsel to the same extent the federal courts have.¹⁰⁵ Counsel must be provided where the potential penalty exceeds six months imprisonment, and notice is required.¹⁰⁶ Counsel appears to be sporadically appointed.¹⁰⁷ In Miami Beach, counsel is provided for all misdemeanors.¹⁰⁸

Georgia

In 1938 a Georgia appellate court held that the state constitution

99. Information obtained from Public Defender for the State of Colorado.

100. 5 Conn. Cir. 178, 247 A.2d 502 (1968).

101. Information obtained from the Chief Public Defender for the Circuit Courts of the State of Connecticut.

102. DEL. R. CRIM. P. 26 (1970).

103. DEL. CODE ANN. tit. 46, § 4604(2) (Supp. 1968).

104. THE INSTITUTE OF JUDICIAL ADMINISTRATION, THE CRIMINAL COURTS OF DELAWARE at 146-155 (1966).

105. Compare *Bohr v. Purdy*, 412 F.2d 321 (5th Cir. 1969), with *State ex rel. Argeringer v. Hamlin*, 236 So. 2d 442 (Fla. 1970).

106. *Id.* at 444.

107. Information obtained through N.L.A.D.A. questionnaire, note 42 *supra*.

108. Information obtained from the Public Defender of Miami Beach.

required appointed counsel in misdemeanors,¹⁰⁹ but the case was apparently never followed.¹¹⁰ However, since *Harvey v. Mississippi*,¹¹¹ Georgia has followed the fifth circuit rule with respect to misdemeanors and has implied that the right to counsel extends to ordinance violations.¹¹² It appears that counsel is not regularly appointed in some courts.¹¹³

Hawaii

Since 1968, Art. I, Sec. 11 of the Constitution of the State of Hawaii requires appointed counsel for indigents accused of an offense punishable by imprisonment for more than 60 days. But in effect, counsel is required in all cases except minor traffic violations.¹¹⁴ Counsel is regularly appointed for indigent misdemeanants and all qualified defendants are advised of their right to appointed counsel.¹¹⁵

Idaho

An indigent charged with an offense punishable by more than six months imprisonment or more than a \$300 fine is entitled to appointed counsel and must be informed of the right.¹¹⁶ The right is implemented.¹¹⁷

Illinois

Trial counsel must be appointed to represent any indigent accused where the possible penalty includes incarceration, if the defendant requests counsel.¹¹⁸ However, the court has no duty to inform misdemeanants of the right if the most severe sentence is a fine.¹¹⁹ There is

109. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938).

110. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 725 (1968).

111. 340 F.2d 263 (5th Cir. 1965).

112. See *Perry v. State*, 120 Ga. App. 304, 170 S.E.2d 350 (1969); *Taylor v. City of Griffin*, 113 Ga. App. 304, 149 S.E.2d 177 (1966).

113. *Shepard v. Jordan*, 425 F.2d 1174, 1176 (5th Cir. 1970).

114. OFFICE OF THE PUBLIC DEFENDER, REPORT ON THE HAWAII DEFENDER PROGRAM 6 (1970).

115. Information obtained from the Public Defender of the State of Hawaii.

116. IDAHO CODE ANN. §§ 19-851, -853 (Supp. 1969).

117. Information obtained from the Public Defender of Ada and Boise Counties and from the Public Defender of the Sixth Judicial District, Idaho.

118. ILL. ANN. STAT. ch. 38, § 113-3(b) (Smith-Hurd 1969).

119. *People v. Dupree*, 42 Ill. 2d 249, 251, 246 N.E.2d 281, 282 (1969).

no data on the number of misdemeanants represented by appointed counsel, but counsel is regularly appointed in some jurisdictions.¹²⁰

Indiana

Case law recognizes the right to counsel in misdemeanors.¹²¹ However, counsel is not routinely appointed.¹²²

Iowa

Iowa comes under the eighth circuit rule. The Iowa Supreme Court recently held that counsel must be appointed for indigents accused of any offense punishable by imprisonment for more than 30 days, and that the accused must be advised of the right.¹²³ It is not clear whether the courts have begun appointing counsel.

Kansas

Kansas does not recognize the right to appointed counsel in misdemeanors.¹²⁴

Kentucky

Both trial and appellate counsel are required for indigents where the offense charged carries the possible punishment of a fine greater than \$500, confinement over 12 months, or confinement in a penitentiary.¹²⁵ The defendant must be informed of these rights. The actual practice is unclear.

Louisiana

Louisiana comes under the fifth circuit rule, but the state courts have held that the right to counsel does not extend to misdemeanors or ordinance violations.¹²⁶

120. Information obtained from the Public Defender of Ogle County and the Public Defender of McLean County, Illinois.

121. *Speight v. State*, 239 Ind. 156, 155 N.E.2d 752 (1959); *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951).

122. *Junker*, *supra* note 110, at 721.

123. *Wright v. Denato*, — Iowa —, 178 N.W.2d 339 (1970).

124. KAN. STAT. ANN. § 22-4503 (Supp. 1970).

125. KY. R. CRIM. P. 8.04 (1969).

126. *State v. Brown*, 250 La. 1023, 201 So. 2d 277 (1967); *City of New Orleans v. Cook*, 249 La. 820, 191 So. 2d 634 (1966).

Maine

The court must inform indigent misdemeanants of their right to counsel at all stages of the proceeding, but the appointment of counsel appears to be discretionary.¹²⁷ It is not clear whether counsel is routinely provided for indigent misdemeanants.

Maryland

Indigent defendants are entitled to appointed counsel when charged with an offense carrying a maximum penalty of imprisonment for six months or more or a fine of \$500 or more, and the courts have a duty to advise the defendant of his right to appointed counsel.¹²⁸ It appears that counsel is regularly appointed, and at least one county requires counsel in all offenses punishable by incarceration.¹²⁹

Massachusetts

If a defendant charged with a crime for which a sentence of imprisonment may be imposed appears in court without counsel, the judge must inform him of his right to counsel.¹³⁰ The right is fully implemented.¹³¹

Michigan

If the offense charged is punishable by more than three months in jail, the indigent defendant is entitled to counsel both at trial and on appeal.¹³² A defendant charged with an offense punishable by more than three months in jail appearing without counsel must be informed of his right to court-appointed counsel.¹³³ An indigent charged with an offense punishable by incarceration for three months or less is entitled to appellate counsel, but not trial counsel.¹³⁴

127. ME. DIST. CT. CRIM. R. 44 (1970).

128. *Manning v. State*, 237 Md. 349, 206 A.2d 563 (1965).

129. Information obtained from the Public Defender of Baltimore and the Public Defender of Montgomery County, Maryland.

130. *MacDonnel v. Commonwealth*, 353 Mass. 277, 230 N.E.2d 821 (1967).

131. NATIONAL DEFENDER PROJECT, REPORT TO THE NATIONAL DEFENDER CONFERENCE 9, 10 (1969).

132. *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967).

133. MICH. COMP. LAWS ANN. § 775.16 (1968).

134. *People v. Lewis*, 15 Mich. App. 225, 166 N.W.2d 491, 492 (1968). *See also* *People v. Brooks*, 16 Mich. App. 759, 168 N.W.2d 658 (1968) (revocation of parole for misdemeanor conviction without representation of counsel remanded on this and other grounds).

Minnesota

While Minnesota comes under the eighth circuit rule, it extends the right to counsel even further. Counsel must be appointed to represent an indigent defendant charged with an offense punishable by incarceration.¹³⁵ Counsel is routinely appointed.¹³⁶

Mississippi

Mississippi has followed the fifth circuit rule, including the requirement that the defendant must be advised of his right to counsel.¹³⁷ The actual practice with respect to appointment is unclear, but as late as September, 1968, some courts were not appointing counsel.¹³⁸

Missouri

Missouri falls under the eighth circuit rule, but state law requires appointed counsel only in felony cases.¹³⁹

Montana

The appointment of counsel in misdemeanors is within the discretion of the trial court.¹⁴⁰

Nebraska

State law provides for appointed counsel only in felonies.¹⁴¹

Nevada

Counsel must be provided for indigents accused of misdemeanors punishable by more than six months in jail or more than a \$500 fine or both where the defendant requests counsel.¹⁴² It appears that the right is implemented.¹⁴³

135. *State v. Borst*, 278 Minn. 388, 154 N.W.2d 288 (1967).

136. Information obtained from the Public Defender for the State of Minnesota, and from NATIONAL DEFENDER PROJECT, *supra* note 131, at 11.

137. *Deaton v. State*, — Miss. —, 227 So. 2d 827 (1969).

138. See *Phillips v. Cole*, 298 F. Supp. 1049, 1050 (N.D. Miss. 1968).

139. MO. ANN. STAT. § 545.820 (1949) and Mo. R. CRIM. P. 29.01a (1949).

140. MONT. REV. CODES ANN. §§ 95-1001 (1969).

141. NEB. REV. STAT. § 29-1803 (1964).

142. NEV. REV. STAT. §§ 171.88, 193.140 (1969).

143. Information obtained from the Public Defender of Clark County (Las Vegas), Nevada.

New Hampshire

An indigent accused of an offense where the possible penalty is either incarceration or a fine exceeding \$500 is entitled to appointed counsel. The defendant must be advised of his right.¹⁴⁴ The right is implemented.¹⁴⁵

New Jersey

Counsel must be provided for any offense punishable by more than six months incarceration or a fine of more than \$500 or both, and the defendant must be advised of his right.¹⁴⁶ Counsel is routinely appointed.¹⁴⁷ It has been held that, even though there is no constitutional requirement for appointment of counsel for petty offenders facing imprisonment for under six months, "simple justice" demands that counsel be appointed for indigents.¹⁴⁸

New Mexico

An indigent is entitled to counsel when accused of a misdemeanor punishable by confinement for more than six months, and the defendant must be advised of his rights.¹⁴⁹ It is not clear whether counsel is routinely appointed.

New York

The court must advise the defendant of his right to appointed counsel, and must appoint counsel for the defendant if he is indigent and desires counsel.¹⁵⁰ The requirement excludes traffic offenses.¹⁵¹ Counsel is routinely appointed.¹⁵²

North Carolina

Counsel must be provided for indigents accused of crimes punishable

144. N.H. REV. STAT. ANN. §§ 604-A:1, 604-A:2 (Supp. 1970).

145. JUDICIAL COUNCIL OF THE STATE OF NEW HAMPSHIRE, THE TWELFTH REPORT OF THE JUDICIAL COUNCIL 26-28 (1968).

146. *Garofone v. State*, 44 N.J. 244, 200 A.2d 101 (1964).

147. NATIONAL DEFENDER PROJECT, *supra* note 131, at 11-12.

148. *Rodriguez v. Rosenblatt*, 58 N.J. 281, 277 A.2d 216 (1971).

149. N.M. STAT. ANN. §§ 41-22-2(D), 41-22-3(A) (Supp. 1969).

150. *People v. Witeniski*, 15 N.Y.2d 392, 395, 207 N.E.2d 358, 360 (1965).

151. *People v. Letterio*, 16 N.Y.2d 307, 213 N.E.2d 670 (1965).

152. Information obtained through N.L.A.D.A. questionnaire, *supra* note 42.

by more than six months in jail or more than a \$500 fine, and defendants must be advised of these rights.¹⁵³ While no empirical data is available, the flood of cases seeking to clarify the right indicates that it is being enforced.¹⁵⁴

North Dakota

North Dakota has extended the right to counsel for indigent misdemeanants even further than the eighth circuit, and the defendant must be informed of his right to counsel.¹⁵⁵ Since the North Dakota Supreme Court only recently decided these questions, it is doubtful that counsel is yet routinely appointed.¹⁵⁶

Ohio

Ohio has expressly rejected the extension of *Gideon* to misdemeanors,¹⁵⁷ but at least two cities require counsel in misdemeanors.¹⁵⁸

Oklahoma

In a pre-*Gideon* case, the Oklahoma Court of Criminal Appeals held that counsel was required for indigent misdemeanants.¹⁵⁹ The case has not been followed in practice.¹⁶⁰ However, Oklahoma recently passed enabling legislation that will permit larger municipalities to establish a public defender system to provide counsel for indigent ordinance violators.¹⁶¹ Moreover, the doctrine of *Burgett v. Texas*,¹⁶² was applied to misdemeanors in *Mure v. State*.¹⁶³

153. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1965).

154. See, e.g., *Bennett v. Hurley*, 315 F. Supp. 1131 (E.D.N.C. 1970) (two year sentences on each of 14 misdemeanors for a total of 10 years vacated and remanded); *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970) (approval of 6 month sentence). But see *State v. Hickman*, 9 N.C. App. 592, 176 S.E.2d 910 (1970) (6 month sentences on 3 misdemeanors for total sentence of 1 year affirmed).

155. *State v. Heasley*, 180 N.W.2d 242 (N.D. 1970).

156. *Heasley* was decided on September 24, 1970.

157. *City of Toledo v. Frazier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).

158. These cities are Columbus and Cincinnati. Information obtained from the Legal Aid and Defender Society of Columbus and the Voluntary Defender's Office of Cincinnati.

159. *Hunter v. State*, 288 P.2d 425 (Okla. Crim. 1955).

160. Junker, *supra* note 110, at 731.

161. OKLA. STAT. ANN. tit. 11, §§ 959.1 to 959.3 (Supp. 1970-71).

162. 389 U.S. 109 (1967).

163. 478 P.2d 926, 928 (Okla. Crim. 1970).

Oregon

Counsel must be provided for indigents accused of misdemeanors and ordinance violations.¹⁶⁴ If counsel is not provided, a jail sentence cannot be imposed. The defendant must be advised of his right to counsel. The right is implemented.¹⁶⁵

Pennsylvania

Counsel must be provided for indigents charged with indictable misdemeanors, and the defendant must be advised of his right to counsel.¹⁶⁶ It appears that counsel is routinely appointed.¹⁶⁷

Rhode Island

The appointment of counsel in misdemeanors is within the discretion of the court.¹⁶⁸ Counsel is not provided in the first trial court, but is appointed for the defendant on trial de novo.¹⁶⁹

South Carolina

The right to counsel is guaranteed in misdemeanors punishable by felony-length imprisonment.¹⁷⁰

South Dakota

South Dakota is in the eighth circuit. Moreover, state law requires that counsel be provided in misdemeanors.¹⁷¹ It appears that the court must inform the defendant of his rights.¹⁷² It is unclear whether counsel is routinely appointed.

Tennessee

Counsel is required in misdemeanors, and the defendant must be advised of his right.¹⁷³ It appears that counsel is not routinely appointed.¹⁷⁴

164. *Stevenson v. Holzman*, 254 Ore. 94, 458 P.2d 214 (1969).

165. Information obtained from the District Court of Multnomah County, from the Municipal Court of Portland, and from the N.L.A.D.A. questionnaires, *supra* note 42.

166. PA. R. CRIM. P. 318(b) (1969).

167. Information obtained through N.L.A.D.A. questionnaires, *supra* note 42.

168. R.I. GEN. LAWS ANN. § 12-15-3 (1969).

169. Information obtained from the Public Defender of Rhode Island.

170. *See, e.g., State v. Cowart*, 251 S.C. 360, 162 S.E.2d 535 (1968).

171. S.D. COMP. LAWS ANN. § 23-2-1 (Supp. 1970).

172. *Id.*

173. TENN. CODE ANN. §§ 40-2002, 40-2003 (1956).

174. *See* TENNESSEE BAR ASSOCIATION REPORT, DEFENSE OF INDIGENTS 3 (1966).

Texas

Texas is in the fifth circuit. State law requires that counsel be provided to an indigent accused of a misdemeanor punishable by imprisonment.¹⁷⁵ The actual practice is unclear.

Utah

An indigent is entitled to appointed counsel when charged with a crime punishable by more than six months in either jail or prison.¹⁷⁶ The defendant apparently must be advised of his right.¹⁷⁷ The right appears to be implemented.¹⁷⁸

Vermont

An indigent accused of a misdemeanor or ordinance violation punishable by imprisonment for more than 60 days or a fine over \$1,000 is entitled to appointed counsel, and the defendant must be advised of his right to counsel.¹⁷⁹ It is unclear whether counsel is actually appointed.

Virginia

Only indigent felons are entitled to appointed counsel.¹⁸⁰ However, a federal district court recently held that the right to counsel applied to misdemeanors.¹⁸¹

Washington

The Washington Supreme Court expressly rejected the notion that *Gideon* extends to misdemeanors.¹⁸² The Seattle Public Defender, however, provides counsel for indigent misdemeanants in the Seattle municipal courts.¹⁸³

West Virginia

Counsel must be appointed for a defendant accused of any offense

175. *Satterwhite v. State*, 423 S.W.2d 592, 593 (Tex. Crim. 1968); TEX. CODE CRIM. PROC. art. 26.04 (1966).

176. *Hortencio v. Fillis*, 25 Utah 2d 73, 475 P.2d 1011, 1012 (1970).

177. UTAH CODE ANN. § 77-64-1(4) (Supp. 1969).

178. Information obtained from the Salt Lake Legal Defender Association.

179. VT. STAT. ANN. tit. 13, § 6503 (Supp. 1970).

180. VA. CODE ANN. § 19.1-241.1 (Supp. 1970).

181. *Marston v. Oliver*, 324 F. Supp. 691 (E.D. Va. 1971).

182. *Hendrix v. City of Seattle*, 76 Wash. 142, 456 P.2d 696 (1969).

183. Information obtained from the Public Defender of Seattle.

punishable by incarceration, and the court has the duty to advise the defendant of his right to counsel.¹⁸⁴ It is unclear whether courts have begun appointing counsel on a regular basis.

Wisconsin

Counsel must be appointed to represent all indigents charged with misdemeanors where the potential penalty exceeds six months. The right appears to have been implemented.¹⁸⁵ In Milwaukee, counsel is available for all indigent misdemeanants.¹⁸⁶

Wyoming

Every indigent defendant is entitled to counsel, and notice of the right must be given.¹⁸⁷ Apparently counsel is not regularly appointed.¹⁸⁸

APPENDIX B

TABLE I

<i>Jurisdiction</i>	<i>Misdemeanor Defendants Represented</i>	<i>Felony Defendants Represented</i>	<i>Ratio of Misdemeanants Represented to Felons Represented</i>
1. Sacramento County, ¹⁸⁹ California Public Defender			
1965-66	1,077	790	
1966-67	2,087	928	
1967-68	2,724	970	
3 year Totals	5,888	2,688	2.19 to 1

184. *Moats v. Jancó*, 8 CRIM. L. REP. 2285 (W. Va. 1971).

185. NATIONAL DEFENDER PROJECT, *supra* note 131, at 95.

186. Information obtained from the Milwaukee County Defender Project.

187. WYO. R. CRIM. P. 56 (1957).

188. Information obtained from the Cheyenne Justice of the Peace Court.

189. 1967-68 SACRAMENTO PUBLIC DEFENDER ANNUAL REPORT 24 (1968), [hereinafter cited as SACRAMENTO DEFENDER].

TABLE I—Continued

<i>Jurisdiction</i>	<i>Misdemeanor Defendants Represented</i>	<i>Felony Defendants Represented</i>	<i>Ratio of Misdemeanants Represented to Felons Represented</i>
2. Santa Clara County, ¹⁹⁰ California Public Defender			
1965-66	1,840	1,052	
1966-67	2,254	1,217	
1967-68	2,265	1,183	
1968-69	3,007	1,775	
1969-70	3,158	2,189	
5 year Totals	12,524	7,415	1.66 to 1
3. Kern County, ¹⁹¹ California Public Defender			
3/24/69-6/30/69	296	309	0.96 to 1
4. Solano County, ¹⁹² California Public Defender			
11/4/68-6/30/69	585	513	1.14 to 1
5. Yolo County, ¹⁹³ California Public Defender			
1968-69	474	399	1.18 to 1
6. Santa Barbara County, ¹⁹⁴ California Public Defender			
7/1/69-12/31/69	757	541	1.39 to 1
7. Fulton County, ¹⁹⁵ Georgia Public Defender			
	720	1,244	0.58 to 1

190. 1965-66 SANTA CLARA PUBLIC DEFENDER REPORT vi and x; [hereinafter cited as SANTA CLARA DEFENDER]; 1966-67 SANTA CLARA DEFENDER vii and xi; 1967-68 SANTA CLARA DEFENDER 10a and 12a; 1968-69 SANTA CLARA DEFENDER 8 and 15a; and 1969-70 SANTA CLARA DEFENDER 8 and 21a.

191. VI, II No. 2 CALIFORNIA DEFENDERS NEWSLETTER 8 (1969).

192. *Id.*

193. VI, II No. 3 CALIFORNIA DEFENDERS NEWSLETTER 4 (1969).

194. *Id.*

195. 1967-68 PUBLIC DEFENDER OF FULTON COUNTY ANNUAL REPORT 4, 8, 9 (1968).

TABLE I—Continued

<i>Jurisdiction</i>	<i>Misdemeanor Defendants Represented</i>	<i>Felony Defendants Represented</i>	<i>Ratio of Misdemeanants Represented to Felons Represented</i>
8. Ogle County (Rochelle), ¹⁹⁶ Illinois Public Defender 1970	233	85	2.75 to 1
9. Connecticut Circuit ¹⁹⁷ Courts—Statewide Public Defender 1970, 4th quarter	1,370	1,375	0.99 to 1
10. Montgomery County, ¹⁹⁸ Maryland Public Defender 1970	1,000	600	1.67 to 1
11. Hennepin County ¹⁹⁹ (Minneapolis), Minnesota Public Defender 1970	2,004	850	2.36 to 1
12. Multnomah County ²⁰⁰ (Portland), Oregon Court-Appointed Counsel 1970	1,002	1,836	0.55 to 1

The Public Defender represented 600 misdemeanor defendants in the ten months of the reporting period during which counsel was provided in misdemeanor cases. The average monthly misdemeanor caseload was used to project an annual caseload of 720.

196. Information obtained from the Ogle County Public Defender.

197. Information obtained from the Chief Public Defender for the Circuit Courts of Connecticut.

198. Information obtained from the Public Defender of Montgomery County. While Maryland requires appointed counsel for offenses punishable only by imprisonment exceeding six months, *Manning v. State*, 237 Md. 349, 206 A.2d 563 (1965), Montgomery County Ordinance 6-59 requires appointed counsel for all offenses punishable by incarceration.

199. The data for Hennepin County were obtained from the Public Defender for the State of Minnesota and the Public Defender for the Fourth Judicial District.

200. The data for Multnomah County were obtained from the Portland Municipal Court and the Multnomah County District Court.

TABLE II

<i>Jurisdiction</i>	<i>Average Annual Misdemeanors Per Attorney</i>	<i>Average Annual Felonies Per Attorney</i>	<i>Ratio</i>
Sacramento County, ²⁰¹ California—1967-68	563	313	1.8 to 1
Santa Clara County, ²⁰² California—1968-69	499	232	2.15 to 1

TABLE III

	<i>Preliminary Hearing</i>	<i>Superior Court Felonies Cases</i>	<i>Misdemeanors</i>
Number of Public Defender Cases ²⁰³	2,120	1,350	3,973
Number of Attorneys ²⁰⁴	4	6	8
Average Caseload Per Attorney	530	218	499

TABLE IV

<i>Jurisdiction</i>	<i>Misdemeanors</i>	<i>Felonies</i>	<i>Percentage of Misdemeanors to Total Caseload</i>
SIX-MONTH STANDARD Municipal Courts ²⁰⁵ Baltimore, Maryland 9/21/70-2/28/71	720	1,102	39.78
Clark County ²⁰⁶ (Las Vegas), Nevada 1970	485	728	39.89
Colorado ²⁰⁷ Statewide Public Defender	4,200	4,500	48.27

201. 1967-68 SACRAMENTO DEFENDER 4.

202. 1968-69 SANTA CLARA DEFENDER 8, 15a; 1968-69 SANTA CLARA COUNTY PUBLIC DEFENDER REPORT, WEIGHTED WORKLOAD AND STAFF COMPARISONS OF PUBLIC DEFENDER AND DISTRICT ATTORNEY OFFICES IN FELONY AND MISDEMEANOR CASES 1, 3, 5 (1969) [hereinafter cited as SANTA CLARA CASELOAD STUDY].

203. SANTA CLARA COUNTY CASELOAD STUDY 1, 3, 5.

204. *Id.*

205. Information obtained from the Baltimore Public Defender.

206. Information obtained from the Clark County Public Defender.

207. Information obtained from the Public Defender of Colorado. Although COLO. REV. STAT. ANN. § 63-39-213(2)(a) (1963) requires the public defender to defend all

TABLE IV—Continued

<i>Jurisdiction</i>	<i>Misdemeanors</i>	<i>Felonies</i>	<i>Percentage of Misdemeanors to Total Caseload</i>
ALL MISDEMEANORS PUNISHABLE BY INCARCERATION			
Santa Clara County ²⁰⁸ (San Jose), California			
1965-70	12,524	7,514	62.5
Connecticut Circuit ²⁰⁹ Courts			
Statewide Public Defender			
1970, 4th quarter	1,370	1,375	49.91
Montgomery County ²¹⁰ (Rockville), Maryland			
Public Defender			
1970	1,000	600	62.5

TABLE V

PROJECTED DEMAND FOR APPOINTED COUNSEL

	FELONIES			MISDEMEANORS			<i>Additional Attorneys Required</i>
	<i>Number of Attorneys</i>	<i>Number of Cases</i>	<i>Average Caseload Per Attorney</i>	<i>Number of Attorneys</i>	<i>Number of Cases</i>	<i>Average Caseload Per Attorney</i>	
Felony							
Standards ²¹¹	12	1,800	150				
Six-Month							
Standard ²¹²	12	1,800	150	4	1,200	300	4
Incarcera-							
tion							
Standard ²¹³	12	1,800	150	9	2,700	300	9

indigents accused of misdemeanors, the Colorado Public Defender has adopted the six month standard because of a personnel shortage. The Colorado Public Defender estimates that ten additional attorneys would be necessary to provide counsel in all misdemeanor cases in the State.

208. See note 190 *supra*.

209. See note 197 *supra*.

210. See note 198 *supra*.

211. The right to counsel is guaranteed in felonies only.

212. The right to counsel is guaranteed in all offenses punishable by more than six months imprisonment.

213. This right to counsel is guaranteed in all offenses punishable by incarceration.