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Criminal Law--State Not Constitutionally Obligated to Provide Counsel for Indigent Misdemeanant [*City of Toledo v. Franzier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967)]

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Recent Decisions

CRIMINAL LAW — STATE NOT CONSTITUTIONALLY OBLIGATED TO PROVIDE COUNSEL FOR INDIGENT MISDEMEANANT

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

Recent decisions of the United States Supreme Court have placed particular emphasis on securing to the accused in a State prosecution the procedural safeguards contained in the fourth, fifth, and sixth amendments. However, the process whereby the Court has extended the guarantees of a particular amendment to State prosecutions has been a piecemeal process which has frequently resulted in considerable ambiguity as to whether the standard by which the guarantee is to be effectuated in State prosecutions is equal to or something less than the federal standard. The recent decision of the Lucas County Court of Appeals in *Frazier v. City of Toledo*,[1] although ultimately decided on a statutory basis, raises the still unresolved constitutional issue of whether the sixth amendment right to court-appointed counsel made applicable to the States in *Gideon v. Wainwright*[2] is limited solely to felony prosecutions or whether that right also extends to misdemeanors.

After arrest the accused was brought before the municipal court and advised that he was charged with operating a motor vehicle without a valid operator's license.[3] Defendant pleaded guilty to the charge and was sentenced to 6 months in jail and fined $210. On appeal defendant contended that the court's failure to advise him of his right to counsel, and, if indigent, to provide court-appointed counsel, deprived him of due process of law and rendered his conviction unconstitutional. The court of appeals reversed the conviction holding that by virtue of State statute, one accused of a misdemeanor must be advised of his right to retain counsel,[4] but that

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[1] 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).

[2] 372 U.S. 335 (1963).

[3] TOLEDO, OHIO, MUNIC. CODE § 21-9-1 (1964) defines this offense as a misdemeanor punishable by imprisonment of not more than 6 months or a fine of $500 or both.

[4] OHIO REV. CODE ANN. § 2937.02 (Page Supp. 1966) provides: "When, after arrest, the accused is taken before a court or magistrate . . . the court or magistrate shall, before proceeding further: . . . . (B) Inform the accused of his right to have counsel and the right to a continuance in the proceedings to secure counsel." The court reasoned

the State or municipality is not constitutionally obligated to furnish counsel to an indigent misdemeanant.[5]

The sixth amendment provides that "In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[6] Since this fundamental guarantee does not distinguish between felonies and misdemeanors, a literal reading of its provisions would apparently indicate an absolute right to representation for those, rich or poor, accused of any crime in any court.[7] However, since the sixth amendment does not apply directly to the States,[8] any attack upon State criminal procedures as being violative of the constitutional right to counsel must be predicated on the applicability of the due process or equal protection clauses of the 14th amendment to the States. An examination of the Supreme Court cases involving the due process standard of the right to counsel imposed on State courts reveals a progression approaching a literal reading of the sixth amendment through the due process clause.

In *Powell v. Alabama*[9] the standard imposed required appointment of counsel to indigent defendants only in capital cases. In *Betts v. Brady*,[10] the standard was extended to include felonies where, because of the "special circumstances" of the case, the accused could not possibly get a fair trial without the aid of counsel. In the landmark case of *Gideon v. Wainwright*,[11] the Court abandoned the special circumstances limitation and declared the right to

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that since this provision is not expressly limited to felony prosecutions, it must also apply to misdemeanors.

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

[6] U. S. CONST. amend. VI (emphasis added).

[7] Johnson v. Zerbst, 304 U.S. 458 (1938) held that under the sixth amendment an indigent defendant in a federal felony prosecution has a right to court-appointed counsel, unless completely and intelligently waived. The right was later extended to misdemeanors. Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942). Although the Supreme Court has never ruled directly on the question of the indigent misdemeanant's right to appointed counsel in federal courts, there are strong dicta indicating that the right is absolute. *See, e.g.*, Bute v. Illinois, 333 U.S. 640, 666 (1948); Foster v. Illinois, 332 U.S. 134, 136 (1947); *cf.* FED. R. CRIM. P. 44. *But see* CRIMINAL JUSTICE ACT OF 1964, 18 U.S.C. § 3006A(b) (1964).

[8] Various tests have been devised to apply parts of the Bill of Rights to the States through the due process clause of the 14th amendment. The prevalent viewpoint appears to favor the following standard: "A provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory on the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[9] 287 U.S. 45 (1932).

[10] 316 U.S. 455 (1942).

[11] 372 U.S. 335 (1963).

counsel to be a fundamental and essential requisite of due process. However, the *Gideon* holding is equivocal, for although it clearly establishes an absolute right to counsel in State felony prosecutions, it is unclear whether the right was intended to encompass misdemeanors.[12] The failure of the Court to rule definitively in this respect has caused a wide divergence in interpretation among the jurisdictions and a resultant unequal, and therefore unjust, application of constitutional guarantees.

There is much in Mr. Justice Black's majority opinion in *Gideon* to support the conclusion that the Court did not confine its holding to felonies.[13] Of particular significance is *Patterson v. Warden*,[14] a per curiam decision of the same term in which the Court vacated the indigent petitioner's misdemeanor conviction which had been affirmed by the Maryland Court of Appeals[15] and remanded the case for "further consideration in light of *Gideon v. Wainwright*."[16] The broad language of the majority opinion in *Gideon* and the Court's treatment of the *Patterson* case indicate that its holding in *Gideon* was not predicated on a strict felony-misdemeanor dichotomy.[17] On this basis the federal courts have consistently held that

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[12] The majority opinion of Justice Black speaks of the right to counsel in broad terms. *See* note 13 *infra*. However, the concurring opinion of Justice Harlan specifically confines the holding. *See* note 29 *infra*.

[13] Justice Black speaks of the right to counsel in broad terms which seem inclusive of misdemeanors:

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, *any person* haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged *with crime* to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which *every defendant* stands equal before the law. This noble ideal cannot be realized if the poor man charged *with crime* has to face his accusers without a lawyer to assist him. 372 U.S. at 344 (emphasis added).

[14] 372 U.S. 776 (1963).

[15] Patterson v. State, 227 Md. 194, 175 A.2d 746 (1961).

[16] 372 U.S. at 776. Patterson was subsequently granted a new trial. Patterson v. State, 231 Md. 509, 191 A.2d 237 (1963).

[17] In the more recent case of Malloy v. Hogan, 378 U.S. 1 (1964), which held the fifth amendment privilege against self-incrimination applicable to the States by reason of the 14th amendment, the court said: "We have held that . . . the right to counsel guaranteed by the Sixth Amendment, Gideon v. Wainwright, . . . [is] . . . to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 10. This language tends to support the proposition that *Gideon* made the due process standard of the right to counsel coextensive with the federal standard.

Gideon requires State courts to appoint counsel to defend indigent misdemeanants.[18]

Despite the precedent established by the federal courts, the courts in Arkansas,[19] Connecticut,[20] Florida,[21] Louisiana,[22] New Jersey[23] and North Carolina[24] have refused to recognize any constitutional obligation to appoint counsel in nonfelony cases even when a misdemeanor conviction carries a substantial prison sentence. Thus, as a result of the equivocal nature of *Gideon* and the Supreme Court's repeated refusal to clarify that holding,[25] a double standard of the due process guarantee has evolved allowing indigent misdemeanants convicted in State courts without the aid of counsel to obtain habeas corpus relief in the federal courts.

A particularily blatant example of the injustice produced by the present conflict between the federal and State courts over the due process standard of the right to counsel is evident in Connecticut. In *DeJoseph v. State*,[26] the defendant's conviction for criminal nonsupport, a misdemeanor, was upheld by the Connecticut Supreme Court despite the fact that he could not afford a lawyer. His petition for certiorari was denied by the United States Supreme Court[27] and he therefore remained in jail. However, Arbo, another defendant convicted of the very same crime, petitioned the federal district court for a writ of habeas corpus and the writ was granted on the ground that the State's failure to appoint counsel deprived him of due process of law.[28] Since the State did not appeal, Arbo went

[18] McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. State, 340 F.2d 263 (5th Cir. 1965); Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967); Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966); Petition of Thomas, 261 F. Supp. 263 (W.D. La. 1966). *See also* Wilson v. Blabon, 370 F.2d 997 (9th Cir. 1967) (dictum). Where the State supreme court has already ruled that an indigent misdemeant has no constitutional right to appointed counsel, the defendant need not exhaust his State remedies before filing for a writ of habeas corpus in a federal court since it would be futile to do so. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967).

[19] Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364, *cert. denied*, 385 U.S. 907 (1966).

[20] DeJoseph v. State, 3 Conn. Cir. 624, 222 A.2d 752, *appeal denied*, 220 A.2d 771 (Conn.), *cert. denied*, 385 U.S. 982 (1966).

[21] Fish v. State, 159 So. 2d 866 (Fla. 1964).

[22] State v. Thomas, 249 La. 742, 190 So. 2d 909 (1966).

[23] State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (App. Div. 1967).

[24] Sherron v. State, 268 N.C. 694, 151 S.E.2d 599 (1966).

[25] DeJoseph v. Connecticut, 385 U.S. 982 (1966); Winters v. Beck, 385 U.S. 907 (1966).

[26] 3 Conn. Cir. 624, 222 A.2d 752, *appeal denied*, 220 A.2d 771 (Conn. 1966).

[27] 385 U.S. 982 (1966).

[28] Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966).

free. It seems unlikely that the Supreme Court will long allow such injustice and inconsistency to continue. It should be noted that Mr. Justice Stewart rendered a strong dissent to the denial of certiorari in the *DeJoseph* case in which he was joined by Justices Black and Douglas. The recent addition of Mr. Justice Marshall to the Court may produce the necessary four votes to secure a hearing of the question of an indigent misdemeanant's right to appointed counsel in State courts and a resolution of the present conflict.

In the principal case, the court of appeals chose the more restrictive interpretation of *Gideon.* Having been unpersuaded by the precedent established in the federal courts and relying heavily on Mr. Justice Harlan's concurring opinion in *Gideon*[29] and the fact that the Supreme Court has twice denied certiorari in right-to-counsel cases involving misdemeanors,[30] the Ohio court concluded that ". . . the law in Ohio should stand until the Supreme Court has spoken, *a priori,* to the contrary."[31] Thus, the law in Ohio as interpreted by the Lucas County Court of Appeals is that by virtue of the Ohio statute,[32] an indigent misdemeanant has a statutory right to be advised of his right to retain counsel, but no constitutional right to court-appointed counsel at State expense. Since by definition indigent defendants are unable to retain counsel, the statutory right cannot possibly have any meaning for them.

While asserting that extension of an absolute right to counsel in all criminal cases would place an intolerable burden on the administration of criminal justice in State courts, the Ohio court did suggest that the special circumstances rule of *Betts v. Brady,* overruled by *Gideon,* might still be operative with respect to misdemeanors.[33] Under this rule it is for the court to determine from "an appraisal of the totality of facts in a given case"[34] whether a

[29] Justice Harlan states in his concurring opinion that "Whether the rule [of Gideon] should extend to *all* criminal cases need not now be decided." 372 U.S. at 351.

[30] DeJoseph v. Connecticut, 385 U.S. 982 (1966); Winters v. Beck, 385 U.S. 907 (1966). In Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967), the court specifically rejected the argument that the denial of certiorari in the *Winters* case is determinative of the indigent misdemeant's right to appointed counsel. "Invariably it is held that a denial of certiorari jurisdiction does not carry with it the presumption that the appellate court affirms *sub silentio* the action taken by the lower court." *Id.* at 887.

[31] 10 Ohio App. 2d at 60, 226 N.E.2d at 783.

[32] OHIO REV. CODE ANN. § 2937.02 (Page Supp. 1966).

[33] "The reasoning and rule evolved in Betts v. Brady, 316 U.S. 455, of special circumstances in felony cases . . . may still be viable when applied to misdemeanors, because that rule takes a hard look at the natural manifestations of the human condition." 10 Ohio App. 2d at 59, 226 N.E.2d at 782.

[34] 316 U.S. at 462.

denial of the sixth amendment guarantee would result in a loss of liberty without due process of law. Factors to be weighed by the court include the seriousness of the offense, the severity of the possible penalty, and the ability of the accused to fend for himself without assitance from one trained in the law.[35] After weighing these factors, the court concluded that although Frazier faced 6 month's deprivation of liberty and a $210 fine, his case was not serious enough to warrant appointed counsel.

The special circumstances standard has the advantage of economy because it eliminates the cost of appointing counsel where, in the opinion of the court, an attorney would not materially aid the accused. Yet, it is not always possible to determine this question before trial, or even in retrospect on appeal because the indigent layman (most probably poorly educated and inarticulate) does not know rules of evidence, is unable to conduct effective cross-examination, will not make timely objections or motions, and thus will often be without grounds for appeal. Of necessity, the special circumstances rule is a subjective test which, owing to the inherent differences in the sensibilities of individual judges, will inevitably result in an unequal application of constitutional guarantees.

Whatever the due process standard of the right to counsel ultimately adopted by the Supreme Court, it is obvious that the felony-misdemeanor dichotomy completely fails as a meaningful criterion. Under this standard any State can defeat constitutional rights by arbitrarily labeling offenses as "misdemeanors." In terms of the loss of liberty there is no rational distinction between 1 year in jail for a misdemeanor conviction and 1 year and a day in prison for a felony conviction.[36] A conviction on several misdemeanor charges may result in years of incarceration. Even if the misdemeanant only receives a heavy fine, if he is unable to pay the fine, his punishment may be converted to a substantial jail sentence under "dollar-a-day" statutes found in many States.[37]

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[35] The pre-*Gideon* special circumstances rule has been applied to misdemeanors in many States. *See, e.g.*, State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964); People v. Agnew, 250 P.2d 369 (Cal. Super. Ct. 1952); Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951).

[36] In Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942) the court stated that "so far as the right to assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

[37] *See, e.g.*, OHIO REV. CODE ANN. § 715.57 (Page 1954) which provides for the conversion of fines to jail sentences at $3 per day in certain cases. In effect such statutes make the nature of a defendant's punishment dependent upon his economic status, *viz.*, a rich man merely pays a fine while the poor man, solely because of his poverty, is deprived of his liberty. A strong argument can be made that such a discrimina-

It is readily apparent that the present state of constitutional law respecting the right to counsel is arbitrary and inadequate, promoting unequal rather than equal justice under the law. State courts, applying one standard of due process, are convicting people while federal courts in the same State, applying a different standard, are freeing them. The result is a considerable waste of time, effort, and money. The essential problem is to establish a feasible standard that will insure an equal application of constitutional guarantees. The most rational standard and the one most consistent with the letter and spirit of the 14th amendment[38] would demand that counsel be appointed in all criminal prosecutions where a conviction could result in a loss of liberty.[39] The traditional argument leveled against such a criterion is that it would place an intolerable economic and administrative burden on State courts whose dockets are already overflowing. However, the fact that Texas, Massachusetts, and New York[40] have voluntarily adopted just such a standard

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tion in the nature of the punishment inflicted on the indigent defendant is violative of the 14th amendment guarantee of equal protection of the laws. *Cf.* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Robinson v. California, 370 U.S. 660 (1962) (the eighth amendment prohibition against cruel and unusual punishment).

[38] The 14th amendment provides that no State shall "deprive any person of life, *liberty*, or property without due process of law." U.S. CONST. amend. XIV (emphasis added).

[39] Even this standard, however, would not solve the problem raised by the "dollar-a-day" statutes. *See* note 37 *supra* and accompanying text.

[40] TEX. CODE CRIM. PROC. art. 26.04 (Vernon 1965) provides that the "[c]ourt shall appoint counsel (a) whenever the court determines at an arraignment or at any time prior to arraignment that an accused charged with a felony or a misdemeanor punishable by imprisonment is too poor to employ counsel."

GEN. RULE 10, GEN. RULES SUPREME JUDICIAL CT. MASS., 347 Mass. 809 (1964) provides that:

> If a defendant charged with a crime, for which a sentence of imprisonment may be imposed, appears in any court without counsel, the judge shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

For a recent decision involving the application of this statutory guarantee see Mulcahy v. Commonwealth, 227 N.E.2d 326 (1967).

N. Y. CODE CRIM. PRO. § 699 (1967) provides that:

> 1. In the cases in which the courts of special sessions or police courts have jurisdiction, at the time the defendant is first brought before the magistrate and before any further proceedings are had:
>
> . . . .
>
> (b) If he appear without counsel, the magistrate must inform him that he has the right to the aid of counsel in every state of the proceedings, and further inform any person charged with a crime as defined in section seven hundred twenty-two-a of the county law that if he desires the aid of counsel and is financially unable to obtain counsel, then counsel shall be assigned.

N. Y. COUNTY LAW § 722-a (1965) provides that:

indicates that it is economically feasible and that traditional fears may be unfounded.[41]

The recent decision of the Supreme Court in *In re Gault*[42] may

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> For the purposes of this article, the term "crime" shall mean a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof.

The State constitutions of Michigan and Oklahoma have been interpreted to require the appointment of counsel in all criminal prosecutions where the accused faces a loss of liberty upon conviction. *See* People v. Mallory, 378 Mich. 538, 147 N.W.2d 66 (1967); Hunter v. State, 288 P.2d 425 (Okla. Crim. 1955).

[41] On the federal level, the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (1964) provides for the appointment of counsel in federal prosecutions of indigent defendants in all cases other than petty offenses. A petty offense is defined as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both." 18 U.S.C. § 1 (1958). If the Supreme Court is to adopt a standard for State courts under the 14th amendment requiring the appointment of counsel in all cases where incarceration is a possible penalty, certainly the federal courts must be held to at least as strict a standard under the sixth amendment. Thus, if the due process standard suggested is adopted, the Court will in effect be declaring unconstitutional that portion of the Criminal Justice Act which provides for the appointment of counsel only where the possible penalty exceeds 6 months imprisonment. Aside from practical considerations of timing, the fact that an act of Congress is involved may account for the Court's reluctance to review right to counsel cases involving misdemeanors. *See* cases cited note 25 *supra.* In this respect, however, it should be noted that in Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) the court declared unconstitutional a State conviction of a misdemeanant where the maximum penalty was only 90 days in jail. It would appear from the *Harvey* case that the constitutionality of the Criminal Justice Act as relates to the appointment of counsel may be open to serious question if section 3006A(b) is given a literal application.

However, an examination of the legislative history of the Criminal Justice Act reveals that it was not the intent of Congress to deprive the indigent petty offender of the right to appointed counsel. The bill as first passed by the House provided for the appointment of counsel "In every criminal case in which the defendant appears without counsel . . . and . . . is financially unable to obtain counsel." H.R. 7457, 88th Cong., 2d Sess., 110 CONG. REC. 460 (1964). However, the Senate version, S. 1057, 88th Cong., 1st Sess. (1964), restricted the appointment of counsel to crimes other than petty offenses and a joint conference was appointed to resolve the dispute. The joint conference adopted the Senate bill which contained the petty offense limitation for the reasons stated in the Conference Report:

> The Constitutional mandate of the sixth amendment is without doubt applicable to petty offenses, but it is the view of the conferees that adequate representation may be afforded defendants in such cases without the need for providing for compensation for counsel. In this way, money appropriated under the act will not be dissipated from the areas of greatest need, cases involving representation for crimes punishable by more than 6 months' imprisonment. H.R. REP. No. 1209, 88th Cong., 2d Sess. (1964).

Whereas a literal reading of section 3006A(b) would indicate that counsel need not be appointed to represent petty offenders, the Conference Report indicates that the indigent petty offender does have an absolute right to appointed counsel, but that in such cases counsel must serve gratuitously as had been the practice in all cases in federal courts before funds were made available under the Act. This construction of section 3006A(b), making the right to appointed counsel absolute, tends to support its constitutionality and should be favored.

[42] 387 U. S. 1 (1967).