Volume 70
Issue 3 *Issues 3 & 4*

Article 19

June 1968

Criminal Law--Misdemeanors--Indigent's Right to Appointed Counsel

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Some modification of the code of legal ethics may be necessary to resolve this conflict of interests.[41] As Justice Traynor well noted, "Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty."[42]

John Reed Homburg

Criminal Law—Misdemeanors—Indigent's Right to Appointed Counsel

D was charged with committing a misdemeanor. At the time of his arraignment he alleged he was financially unable to procure counsel. The court informed him that no counsel could be appointed and set the date for his trial. At the trial *D* offered no testimony, exhibits, or statements, and did not conduct cross-examination. He was found guilty and sentenced to a fine or *imprisonment in default of payment.* He paid the fine under protest and appealed. On appeal he was again denied appointed counsel. *D* then applied to the state supreme court for an alternative writ of mandamus. *Held,* writ issued and cause remanded to determine indigency. A defendant unable to procure counsel when he is charged with a misdemeanor punishable by incarceration is entitled to have counsel appointed to represent him. *State v. Borst,* 154 N.W.2d 888 (Minn. 1967).

The case raises the controversial question of the right of an indigent misdemeanant to have counsel appointed in his behalf in a state proceeding. The basis of such a right must come from the sixth amendment to the United States Constitution which in part provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."[1] This provision governs federal criminal proceedings and has been interpreted to mean that if the defendant cannot afford to retain counsel, such counsel must

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[41] For several months the American Bar Association has been giving consideration to a general revision of the statement of the standards of the legal profession, particularly through its Special Committee on Evaluation of Ethical Standards. *See* Comment, 53 A.B.A.J. 901 (1967).

[42] Hildebrand v. State Bar of California, 36 Cal. 2d 504, 522, 225 P.2d 508, 519 (1950) (dissenting opinion).

[1] U.S. CONST. amend. VI.

be provided by the court.[2] Failure to so provide counsel renders a subsequent conviction void.[3] This federal right of appointed counsel has also been extended to cases involving misdemeanors.[4]

The criminal defendant's rights in *state* prosecutions are not as well defined. The right to counsel was first applied only to state criminal prosecutions for capital offenses.[5] This was later extended to non-capital offenses, but then only under special circumstances.[6] This "special circumstances" rule was specifically overruled by the Supreme Court in the landmark case of *Gideon v. Wainwright.*[7] It was there decided that counsel was essential in state criminal proceedings for a fair trial and, consequently, must be provided for the indigent. It has also been decided that the indigent defendant has the right to appointed counsel on appeal[8] and must be given a transcript of the record on appeal.[9] The important question which remains unanswered is whether counsel must be provided in cases involving *misdemeanors.*

State courts, and federal courts entertaining post-conviction challenges to state court proceedings, have divided on the question; some states have resolved the issue by statutes which provide for such appointment.[10] Among the court decisions, three distinct trends

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[2] Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938). For the historical development of the right to counsel, see generally Comment, *Court Appointed Counsel for Indigent Misdemeanants,* 6 ARIZ. L. REV. 280 (1965); 19 CASE W. RES. L. REV. 367 (1968).

[3] Glasser v. United States, 315 U.S. 60 (1942); Walker v. Johnson, 312 U.S. 275 (1941).

[4] Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942). This extension applies to all but petty offenses under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964); *see also* FED. R. CRIM. P. 44.

[5] Powell v. Alabama, 287 U.S. 45 (1932).

[6] Betts v. Brady, 316 U.S. 455 (1942).

[7] 372 U.S. 355 (1963).

[8] Anders v. California, 386 U.S. 738 (1967); Swenson v. Boslar, 386 U.S. 258 (1967); Douglas v. California, 372 U.S. 353 (1962).

[9] Griffin v. Illinois, 351 U.S. 12 (1956).

[10] MICH. STAT. ANN. § 28.1253 (1954); S.D. CODE § 34.1901 (1939); TENN. CODE ANN. §§ 40-2002, 40-2003 (1955); W. VA. CODE ch. 62, art. 3, § 1 (Michie Supp. 1967). Minnesota, as pointed out in the principal case, also provides for such appointment of counsel, but only in cases involving felonies and gross misdemeanors. MINN. STAT. ANN. § 611.07 (1964). Two other state courts have decided that their statutes require the appointment of counsel in misdemeanor cases, although not expressly so provided in the statutes. CAL. PEN. CODE § 859 (1961), *In re* Johnson, 62 Cal. 2d 325, 398 P. 2d 420 (1965); N.Y. CODE CRIM. PROC. § 699 (McKinney 1958), People v. Witenski, 15 N.Y. 2d 392, 207 N.E. 2d 358 (1965).

can be seen: (1) the right to appointed counsel does *not* exist;[11] (2) the matter is within the sound discretion of the court;[12] (3) the right to appointed counsel *does* exist.[13] To further confuse the issue, what may be classified a misdemeanor in one state is a felony in another and even where the denomination is the same, the punishment may vary from state to state.[14] The Supreme Court has even confused its own position. The case of *In re Gault*[15] extended the right to counsel to juvenile delinquency cases holding that the right hinged on " . . . the seriousness of the charge and the potential commitment . . .,"[16] and stating that the right exists " . . . at least if a felony were involved. . . ."[17] As the court in the principal case points out,[18] this seemingly draws the line at felonies or serious charges. On the other hand, a Maryland case[19] involving the issue of a misdemeanant's right to counsel was remanded to the Maryland court by the Supreme Court for a disposition in conformity with *Gideon*.[20] Since the Maryland court had previously denied the existence of the right, the Supreme Court apparently held the *Gideon* decision applicable to misdeameanor cases, a conclusion also reached by the court in the principal case.[21] On three recent occasions the Supreme Court has been presented with the opportunity to resolve this conflict in its decisions but has refused to do so by denying certiorari in all three cases.[22]

One determinative test in deciding the issue of right to appointed counsel has been that if the crime involves a serious offense, then

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[11] McDonald v. Moore, 353 F 2d 106 (5th Cir. 1965); Winters v. Beck, 239 Ark. 1151, 397 S.W. 2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966); Watkins v. Morris, 179 So. 2d 348 (Fla. 1965); State v. Davis, 171 La. 449, 131 So. 295 (1930); City of Toledo v. Frazier, 226 N.E. 2d 777 (Ohio 1967); Brack v. State, 187 Md. 542, 51 A. 2d 171 (1947); Kissinger v. State, 147 Neb. 983, 25 N.W. 2d 829 (1947); Milliman v. State, 156 Tex. Cr. 88, 238 S.W. 2d 970 (1951); City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P. 2d 867 (1966).

[12] State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752 (1966), *cert. denied*, 385 U.S. 982 (1966); State v. Bennett, 266 N.C. 755, 147 S.E. 2d 237 (1966).

[13] Bolkovac v. State, 229 Ind. 294, 98 N.E. 2d 250 (1951); State v. Borst, 154 N.W. 2d 888 (Minn. 1967); State v. Blank, 241 Ore. 627, 405 P. 2d 373 (1965).

[14] Comment, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases*, 19 Sw. L.J. 593, 601 (1965).

[15] 387 U.S. 1 (1967), commented on in 70 W. VA. L. REV. 78 (1967).

[16] *In re* Gault, 387 U.S. 1, 42 (1967).

[17] *Id.* at 29.

[18] State v. Borst, 154 N.W. 2d 888, 891 (Minn. 1967).

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

[20] Patterson v. Warden, 372 U.S. 776 (1963).

[21] State v. Borst, 154 N.W. 2d 888, 892 (Minn. 1967).

[22] DeJoseph v. Connecticut, 385 U.S. 982 (1966); Cortinez v. Flournoy, 385 U.S. 925 (1966); Winters v. Beck, 385 U.S. 907 (1966).

counsel will be appointed.[23] As the court points out in the principal case,[24] there has been no agreement among the courts as to what is a "serious offense," and many times courts have refused to follow this test altogether.[25] Thus, it may be concluded that there is no definite rule to follow, a conclusion necessarily reached in the principal case.[26]

In *Borst* the Minnesota court arrived at a practical solution to the problem. It is obvious that a uniform rule cannot be made based on the felony-misdemeanor distinction or the "serious offense" test. The Supreme Court itself has said that " . . . 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."[27] Is this not true regardless of the crime a defendant may be charged with? Does the crime charged have any bearing on the individual's ability to defend himself? The obvious answers to these questions demonstrate that the right should not be based on differences in crimes, but on some other grounds, e.g., differences in punishment, as in the principal case. If a person faces a possible loss of liberty by incarceration, he should be entitled to a competent defense.[28]

As the court points out in *Borst,* the problems of cost and an insufficient number of lawyers have been raised as an argument against providing counsel for misdemeanants.[29] Several possible solutions have been advanced in solving these problems. One is either adopting a public defender system;[30] or where one is in existence, incorporating misdemeanors into it.[31] A second solution would be legal aid organizations.[32] Still another might be one of

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[23] State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964).
[24] State v. Borst, 154 N.W. 2d 888, 892 (Minn. 1967).
[25] *Id.*
[26] *Id.* at 893.
[27] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
[28] The concurring opinion in the principal case has formulated a slightly different rule. Appointed counsel would be provided except in cases of traffic violations and misdemeanors where incarceration is an alternative punishment. State v. Borst, 154 N.W. 2d 888, 896 (Minn. 1967) (concurring opinion). The American Bar Association has proposed still another rule. It provides for appointed counsel whenever punishment may involve loss of liberty unless it is not likely that punishment will be imposed. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, 37 (1967). This may be the most practical rule yet proposed.
[29] State v. Borst, 154 N.W. 2d 888, 894 (Minn. 1967).
[30] *See Generally* Byrd, ASSISTANCE TO THE INDIGENT PERSON CHARGED WITH CRIME, 2 GA S.B.J. 197.
[31] This was a solution advanced by the court in the principal case. State v. Borst, 154 N.W. 2d 888, 895 (Minn. 1967) (dictum).
[32] A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED, 68 (1959).

three provided for in the federal court system.[33] These include representation by private attorneys, attorneys furnished by the bar, or a system containing a combination of both of these. Of course, these solutions would only provide attorneys, not their fees. No one solution appears to be better than others. Whatever the source or funding for the adopted plan, it must be remembered that the right of the individual to adequately defend himself against a possible loss of liberty " . . . is too sacred a right to be sacrificed on the altar of expedience."[34]

John Charles Lobert

Evidence—Expert Witnesses—Qualification of Specialist as Expert Witness in Medical Malpractice

P, experiencing vision loss in his right eye, consulted *D*, an ophthalmologist. *D* informed *P* that he had a cataract formation on the eye and advised a corrective operation, which was performed in August of 1962. After the operation *P* made periodic visits to the office of *D* where he was told each time that his progress was normal. Though *D* continually assured *P* that he would recover his vision, *P* continued to suffer from vision loss in his right eye. Finally, in May, 1963, *D* told *P* that he had retina trouble in the right eye and that he could do nothing to improve his vision. Subsequently, in February, 1965, *P*, having trouble with his left eye, went to *X*, a different specialist. *X* performed a cataract operation on the left eye in March, 1965, and informed *P* that more than half of the iris of the right eye was missing and that his eye was permanently damaged. In May, 1965, *P* brought a malpractice action in the Court of Common Pleas in Kanawha County, West Virginia. Part of *P's* evidence was the expert testimony by deposition of Z, an ophtalmologist from New York. After *P* rested his case *D* moved for and obtained a directed verdict on the grounds that the cause of action was barred by the pertinent statute of limitations. *P* appealed and the circuit court reversed; but *D* was sustained on his cross assignment of error, the circuit court holding the testimony of *Z* inadmissible. The case was remanded for retrial, but *P* appealed. *Held* the Supreme Court of Appeals reversed in part and remanded.

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[33] The Criminal Justice Act of 1964, 18 U.S.C. § 3006(A)(a) (1964).
[34] State v. Borst, 154 N.W. 2d 888, 895 (Minn. 1967) (dictum).