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The Anglo-American system of accusatorial, adversary criminal justice fills the average law student, if not most practicing lawyers, with visions of glamorized legal drama and pride of profession. Whether it should be a source of pride is questionable. Surely a legal battle between sometimes poorly matched antagonists with the fate of a third person in the balance is not an arrangement calculated to inspire the greatest confidence in the truth and justice of the verdict produced. The source of legal pride might be further questioned when it is derived from the successful prosecution or defense of a seemingly impossible case, especially one in which the successful protagonist had little belief in the justice of his cause. Yet these victories are often the most highly regarded. Surely, however, there can be no pride when the very core of the system is subverted. In a trial conducted without counsel the accusatorial, adversary approach is not only subject to criticism for its inherent shortcomings, but moreover, it becomes a hollow mockery of itself. The critical importance of legal counsel causes one to speculate: Why have the courts been so dilatory in requiring that counsel be made available to all defendants as an essential of basic legal fairness—constitutional due process? The problem has most often been considered and lamented in the case of the indigent criminal defendant.

In 1963 the American Bar Association commenced a national study under the research supervision of the American Bar Foundation to ascertain the procedures followed in each state in providing legal representation for indigent accused persons. Reporters, appointed in each state, worked with state bar association committees to gather the desired information. The field study in Montana was conducted by personal interviews, written questionnaires and docket studies.[1] Personal interviews were conducted in the five counties of Yellowstone, Cascade, Lewis and Clark, Ravalli and Musselshell. Docket studies were completed in Yellowstone, Cascade and Ravalli counties. These studies consisted of random samplings of cases in each of the three counties selected, followed by a complete examination of the selected cases by reviewing the docket sheets, minute entries and police records insofar as they were accessible. The

*Field work for this article was carried out under the direction of Lee Silverstein, Esq., Project Director of the American Bar Association's nationwide study of representation of indigent defendants, and under the research supervision of the American Bar Foundation.

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[1]The Montana field study was conducted in July, August and September of 1963. Personal interviews were held with members of the judiciary and the county attorney's office in each of the five counties included in the sample. Questionnaires were sent to all district court judges, all county attorneys and to defense attorneys who had represented indigent defendants in the five sample counties. The statistical information obtained from the field study is recorded in the tables following this article. See apps., Tables I through X.

remainder of the state was canvassed by questionnaires. The sum total of the information gathered forms the basis for this article insofar as it relates to the practices followed in providing defense counsel for indigent accused persons in the state of Montana. Hopefully the report is an accurate one, both for the sake of accuracy and because it is, in many respects, favorable.

The Montana law providing assigned counsel for indigent accused persons was originally enacted in 1871, eighteen years before Montana was admitted to statehood. The law of 1871 provided for assigned counsel, at the request of any accused person "about to be arraigned upon an indictment for a felony. . . ."[2] The present law, while similar to its nineteenth century predecessor has been expanded to include all indigent defendants who appear for arraignment, including not only felonies but also high misdemeanors over which the district courts have exclusive original jurisdiction.[3] The present law further liberalizes the procedure for providing assigned counsel by requiring the court to ask the defendant if he desires counsel rather than requiring the defendant to request counsel. Whether this particular change made any practical difference in the availability of counsel for indigent accused persons is impossible to ascertain. However, an accused person uninformed of his right to free counsel may be quite as imposed upon as one informed of a right he cannot exercise because of poverty.[4]

The time for providing assigned counsel as established by statute has not changed since 1871. It is still required that the assignment be made when the defendant appears for arraignment.[5] However, in the recent case of *Alden v. Montana*,[6] the Federal District Court for the District of Montana held that assigned counsel is required at preliminary examination on a non-capital felony charge.[7]

A companion statute providing compensation for an assigned attorney was passed in 1881.[8] The original law allowed the judge to certify "reasonable compensation" for the attorney's labor not to exceed $50 in any capital case, $25 in a non-capital felony case and $10 in any other case.[9] In 1903 the maximum limits of compensation were raised to $100

[2]Criminal Practice Act, Laws of Montana 1871-72, ch. 9, § 196, at 220. "If any person about to be arraigned upon an indictment for felony, be without counsel to conduct his defense, and he be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner, at all reasonable times."

[3]REVISED CODES OF MONTANA, 1947, § 94-6512. Hereinafter REVISED CODES OF MONTANA are cited R.C.M.

[4]This problem is currently at issue in Rohrer v. Montana, *petition filed*, Civil No. 1203, D. Mont., Nov. 25, 1964, before Federal District Court Judge Murray on petition for writ of habeas corpus.

[5]Criminal Practice Act, Laws of Montana 1871-72, ch. 9, § 196, at 220; R.C.M. 1947, § 94-6512.

[6]234 F. Supp. 661 (D. Mont. 1964).

[7]In reaching this conclusion the district court judge relied on the United States Supreme Court decision of White v. Maryland, 373 U.S. 59 (1963).

[8]Compensation of Counsel, Laws of Montana 1881, § 1, at 12.

[9]Compensation of Counsel, Laws of Montana 1881, § 1, at 12.

in a capital case, $50 in a non-capital felony case and $25 in any other case.[10] Finally in 1949 the law was amended by deleting all maximums and relying exclusively on the more flexible guide of "reasonable compensation" as certified by the district court judge.[11] The deletion of dollar limits has resulted in an increase in the fees paid assigned counsel.[12] However, for the most part the fees certified by the district court judges are relatively modest and not fairly subject to criticism.[13]

FOR WHOM IS COUNSEL APPOINTED?

By statute, appointed counsel must be made available to all indigent defendants who desire counsel and appear for arraignment in district court.[14] This means counsel is assigned for indigent defendants charged with felonies or high misdemeanors unless counsel is waived.[15]

When the accused is presented for arraignment he is asked if he has the means to retain counsel. If he gives a negative answer counsel is appointed unless waived. This procedure is apparently followed with some care throughout the state. However, a case is presently before the Montana Federal District Court on petition for writ of habeas corpus in which one of the allegations made by the petitioner is that he was asked only if he wanted counsel and was not advised that counsel would be furnished for him at state expense. He claimed that he waived counsel because he did not think he could afford a lawyer.[16] The prosecuting attorney who was examined at the hearing refused to commit himself as to whether the defendant was ever advised that counsel would be furnished at state expense.[17]

Some judges explain the nature of the offense, the possible penalty that may be invoked, the significance of the arraignment and the importance of counsel.[18] Many district court judges almost insist that counsel be appointed. This is especially true in the case of youthful first offenders whom the court desires to protect from their own ignorance of criminal proceedings. A less sympathetic but more obvious motive for this insistence is to protect the trial court record and to fend against the danger of having a conviction attacked collaterally by a petition for writ of habeas corpus after the evidence has evaporated.

In none of the sample counties is counsel provided for persons

[10]Laws of Montana 1903, ch. 33, § 1, at 46.
[11]R.C.M. 1947, § 94-6513.
[12]See Table II (amounts paid on guilty plea) and Table V (county costs for furnishing counsel).
[13]*Ibid.*
[14]R.C.M. 1947, § 94-6512.
[15]R.C.M. 1947, § 94-6512, -4916, -4917.
[16]*Rohrer v. Montana, supra* note 4
[17]*Ibid.*
[18]*Supra* note 1.

charged with misdemeanors.[19] This appears to be the pattern throughout the state, although in one county, not included in the sample, the county attorney stated that counsel is regularly offered to persons charged with misdemeanors.[20]

For the most part neither judges nor county attorneys favor the appointment of counsel in misdemeanor cases.[21] It was the consensus of the state judiciary that court appointed counsel for the defense of indigents accused of misdemeanors would place an unjustifiable burden on the bench, the bar and the taxpayer.[22] However, in the final analysis federal interpretations of "fair process" may require assigned counsel for persons charged with misdemeanors regardless of the attitude of the state bench and bar and notwithstanding the financial, administrative or legal burden it may entail.

Apart from Montana's internal law and practice in providing counsel for indigent defendants and of more immediate and critical import to members of the state bench and bar are the expanding requirements of due process imposed by the federal constitution. The Supreme Court, keeper of our national conscience, only recently has concerned itself with the problem of providing adequate legal assistance to the indigent accused.[23] In retrospect the slowness of the Supreme Court in requiring counsel for the indigent is difficult to fathom. If our adversary system of criminal justice has merit it surely must presuppose some equality of understanding and ability between the adversaries. Perhaps the legacy of history diverted the Court's attention for it was not until 1836 in England that the right to counsel was "formally given to defendants in cases of felonies other than treason."[24] In examining the theoretical basis of Anglo-American criminal justice and its reliance upon conflict to find truth, the failure to allow counsel must surely appear farcical in the extreme to future historians. In its diliatory extension of the right to counsel to the indigent it should appear not only as farcical, but also as a system giving full weight to the advantages of wealth.[25]

Once embarking on its course to make counsel available for indigent accused persons, the Supreme Court moved cautiously. In *Betts v. Brady*,[26] following the decision in *Johnson v. Zerbst*[27] the Court refused

[19] *Supra* note 1; *Cf.* Table IV.

[20] Interview With Russell K. Fillner, County Attorney, Forsyth, Montana, Jan., 1964. County Attorney Fillner commented further that it has been his experience that persons accused of misdemeanors do not desire legal counsel.

[21] See Table IV.

[22] *Supra* note 1; *cf.* note 20 *supra.*

[23] See, *e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963); *White v. Maryland, supra* note 7.

[24] Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

[25] The defendant's right to counsel was constitutionally recognized in this country with the ratification of the first ten amendments to the Constitution in 1791. See U. S. CONST. amend. VI, and MONT. CONST. art III, § 16.

[26] 316 U.S. 455 (1942).

[27] *Supra* note 23.

to apply to the states the requirement found in the sixth amendment that federal indigent defendants be furnished counsel. The Court, in *Betts* would go no farther than to say that since the fourteenth amendment gives no "inexorable command" for representation by counsel in every trial and since the petitioner before the Court was not subjected to a trial that was "offensive to the common and fundamental ideas of fairness and right . . ."[28] the conviction must be affirmed.

Perhaps the most logically reasoned portion of the opinion was the most detrimental. That was the all or nothing approach which reasoned that if counsel must be furnished to this criminal defendant who was not subjected to a trial that was offensive to common and fundamental ideas of fairness, then all indigent criminal defendants have an equally legitimate claim to appointed counsel, and further yet, since the fourteenth amendment due process clause includes property as well as life, indigent parties to civil litigation likewise could demand appointed counsel.[29] The reasoning is not without logic nor without justification.[30] The unfortunate element of such a dryly logical conclusion is that it fails to take clear notice of the inherent nature of constitutional law as an organic and changing thing. Willingness to draw lines, and for that matter, to be internally inconsistent may be one of the less exacting costs of ordered constitutional change. Nonetheless, since the Court was not prepared to go all the way, it failed to place more specific content in the words "fundamental fairness" beyond answering the case before the Court by finding no fundamental unfairness. This negative answer seemed to temporarily thwart further expansion of the concept of "fundamental fairness" in the area of assigned counsel. However, the refusal to give more expansive, as well as more specific content to the command of the fourteenth amendment was in its nature only a temproary refusal. More cases questioning the "fundamental fairness" of state criminal prosecutions were anxious to be heard and the Supreme Court was not prepared to reject them all. In 1962 the Court per Justice Douglas, held that because an habitual criminal charge was sufficiently serious and the issues sufficiently complex, conduct of the trial of such a charge without the presence of defense counsel was violative of fourteenth amendment due process.[31] And by 1963 the Court was prepared to make its momentous decision in *Gideon v. Wainwright*,[32] specifically overruling *Betts v. Brady*.[33]

[28] *Supra* note 26, at 473.

[29] *Ibid.*

[30] There is little good reason why an economically solvent litigant should have the incomparable advantage of counsel of which the destitute litigant is denied unless it be to insure that existing economic advantages not be disturbed. In the case of tort litigation it was this obvious inequity that led to the questionable practice of the contingent fee.

[31] Chewning v. Cunningham, 368 U.S. 443 (1962).

[32] *Supra* note 23.

[33] *Supra* note 26; See also the following pre-*Gideon* cases which eroded the holding in *Betts:* Chandler v. Fretag, 348 U.S. 3 (1954); Kinsella v. U.S. *ex rel.* Singleton, 361 U.S. 234 (1960); Ferguson v. Georgia, 365 U.S. 570 (1961); Hamilton v. Ala-

Gideon v. Wainwright must at the very least stand for the proposition that due process requires state appointed counsel for indigent accused persons charged with any offense which carries "the possibility of a substantial prison sentence."[34] The language and reasoning of the Court expressed in the majority opinion of Mr. Justice Black in his vehement attack on the opinion and decision in *Betts v. Brady* would certainly permit a more expanded interpretation:

> [R]eason 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.[35] (Emphasis added.)

Further, Mr. Justice Clark's concurrence is express in terms of destroying the illogical and unauthoritative distinction between capital and non-capital offenses as to the due process requirement of appointed counsel.[36] The thrust of his argument would cut equally well against an "arbitrary" distinction between felonies and misdemeanors. Thus an expansive theory of the case may be more realistic than any attempt to limit the decision narrowly to its facts.

Bolstered by the reasoning in *Douglas v. California*[37] existing federal standards might fairly be construed as requiring that indigent accused persons are constitutionally entitled to appointed counsel in all criminal cases. *Douglas v. California,*[38] was perhaps less striking in its impact simply because it followed *Gideon,* but may become more significant because it founded a right to appointed counsel for a criminal appeal on the constitutional requirements of equality between rich and poor. If the language in *Douglas* is liberally followed the constitutional standard might well require appointment of counsel for the poor in any case in which a wealthy man has a right to the assistance and presence of retained counsel.[39]

If the federal decisions are narrowly limited to their facts the procedure presently employed in Montana, at least as to the persons for whom counsel must be employed, is in conformity with the federal law as applied to the states.[40] If we allow more breadth to the constitutional decisions, if we take cognizance of the direction in which the Court is moving and if we remain alive to the notion that constitutional law is

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bama, 368 U.S. 52 (1961); *Chewning v. Cunningham, supra* note 31. For a careful development and explanation of this erosion see LOCKART, KAMISAR, & CHOPER, CONSTITUTIONAL CRIMINAL PROCEDURE (1964).

[34]*Gideon v. Wainwright, supra* note 23, at 351 (Harlan, J., concurring).

[35]*Gideon v. Wainwright, supra* note 23, at 344.

[36]*Gideon v. Wainwright, supra* note 23, at 347 (Clark, J., concurring).

[37]372 U.S. 353 (1963).

[38]*Ibid.*

[39]*Ibid.*

[40]See R.C.M. 1947, § 94-6512 relating to appointment of counsel at arraignment in district court. See text *infra* at 14 - 16 regarding appointment of counsel for indigent appellants in Montana.

organic in nature, we must quickly concede that the Montana law, even as to persons for whom counsel must be provided, is not going to remain adequate.

The question is very urgent and the problems to be faced are substantial. How can an expanded system of assigned counsel be financed? Can it be effectively administered? What must it be to accord with "fundamental fairness" and "due process"? Should we experiment with a public defender? The questions are obvious. The answers must be uncertain. In 1963, following the legislative session, a Criminal Law Commission was organized pursuant to legislative authorization[41] and under the direction of Associate Justice Wesley Castles.[42] This Commission has carefully reviewed the problem of assigned counsel. The tentative solution reached by the Commission will conform with the demands of "federal due process" whatever that concept is found to contain as it relates to requirements of counsel for the indigent defendant. Whether the proposal will prove costly and administratively cumbersome cannot be answered with absolute certainty. It is the consensus of the members of the Commission that it is the best possible answer to the problem. Basically, the proposal is: that as soon as the defendant charged with a felony is presented before any judicial officer he shall be advised of his right to counsel and that he is entitled to assigned counsel at state expense if he is financially unable to employ an attorney. The assignment of counsel would be made by a court of record and counsel would be available for all stages of the criminal process. If the offense charged were a misdemeanor and the accused were unable to employ counsel, counsel would be appointed if in the judgment of the district court, justice required the appointment. The defendant would be allowed to waive counsel, except that in all felony cases, if the defendant was under eighteen years of age he would be represented by counsel at every stage of the criminal process and waiver would not be allowed.

Since the right to assigned counsel extends only to persons unable to employ an attorney it is essential that the court has some legitimate standard or method of determining if the defendant is unable to employ counsel.[43] There are many factors that might be considered, such as salary or wages, ownership of property, savings, investments, pensions, unemployment compensation, social security, and resources of spouse, parents, or relatives. Also the defendant's ability to post bail may be another consideration. In practice, investigation of indigency in Montana is more by chance than by plan; and unless rebutting evidence is per-

[41]R.C.M. 1947, § 94-1001-1.

[42]The Commission is composed of judges from the Supreme Court of Montana and the district courts, practicing attorneys representing both prosecutors and defense counsel, and faculty members of the Montana State University Law School. In addition to Associate Justice Castles the members of the Commission are: Hon. Robert J. Nelson, Hon. W. W. Lessley, Hon. E. Gardner Brownlee, Louis Forsell, Esq., Russell K. Fillner, Esq., William F. Crowley, Esq., M. Dean Jellison, Esq., Charles F. Moses, Esq., John M. McCarvel, Esq., Prof. Edwin W. Briggs and Prof. Larry M. Elison.

[43]R.C.M. 1947, § 94-6513.

sonally known to the sheriff's office, the county attorney or the judge the defendant's own statement of indigency is usually accepted.[44] Although most of the replies from judges and county attorneys agreed that the determination of indigency is lenient, few thought it too lenient. The consensus of both prosecutors and judges in the state of Montana is that there is no abuse of the right to free counsel. In most cases, if an accused claiming indigency has some source of income, or available property it is generally limited and if the claimed indigent is forced to exhaust his limited funds it is not unlikely that it would create added strain on the county budget at some other point.[45]

Since the approach to the problem of determining indigency is liberal and does not seem to loom as a formidable obstacle, there is practically no case commentary on the question and very little attention has been given to any articulated standard. One Montana case that seemed to raise the question involved the attempt to obtain counsel at state expense by a defendant who had previously posted a $10,000 cash bond. The court was of the opinion that the ability to post a bond of this size indicated an ability to employ counsel and the failure to appoint counsel did not constitute a denial of his constitutional rights.[46] While the particular case probably raises no substantial problem, many cases undoubtedly do appear before the court in which an accused person has sufficient money to either post bond or employ an attorney, but not both. Should a defendant be required to elect between obtaining his release on bail and employing an attorney? This is only the periphery of the entire question of indigency. How should a relatively poor person be treated who has money to pay counsel but only at the expense of family savings, mortgaging his home, selling his means of transportation or any number of other financially destructive and morally depressing sacrifices? Theoretically if an accused has resources he must employ his own counsel and the court should not be concerned with the extent of his resources. What of the poor person whose financial solvency terminates during the course of his defense? Is he entitled to assigned counsel at state expense, or must his retained counsel continue in the case as a matter of professional responsibility? One might further question the basic fairness of requiring a wealthy man to exhaust his resources to defend his innocence while an indigent person defends his innocence at state expense. Perhaps this line of reasoning argues best for the establishment of a public defender system which is available for the defense of all persons charged with crime. If a well-to-do person is not satisfied with the calibre of the public defender's office he would be free to employ his own counsel. This would assure a minimum level of defense available to all persons charged with crime without regard to race, color, creed or wealth.

[44] *Supra* note 1.

[45] For example, the welfare department might be required to attend to the needs of the accused's family.

[46] State v. Fowler, 59 Mont. 346, 197 Pac. 847 (1921).

AT WHAT STAGE IS COUNSEL FIRST MADE AVAILABLE?

The practical pattern of criminal procedure in Montana is substantially influenced by constitutional and statutory provisions permitting a criminal action to be commenced without an indictment and without a preliminary examination.[47] A majority of all felony prosecutions are initiated by information after leave to file has been granted by the district court judge.[48] This procedure bypasses the preliminary examination and theoretically substitutes a hearing before a district judge. The hearing must not "be considered as a merely perfunctory one,"[49] although it is doubtful that the hearing is much more than perfunctory in most cases.[50] In some rural counties where the district judge is not regularly available the prosecutor may initiate most felony prosecutions by preliminary examination. However, this can be misleading since practically all preliminary examinations are evidently waived.[51] One county attorney claimed that he initiated all felony prosecutions by preliminary examination, adding, "I use a little psychology on the accused and he waives the preliminary examination, consequently I've never had a preliminary examination."[52] The case and statutory law supplemented by field research leads to the conclusion that a preliminary examination is not a regular procedural step in Montana. For this reason it may be that there is little justification for appointment of assigned counsel at preliminary examination.[53]

The Supreme Court in *White v. Maryland*[54] determined that a preliminary examination in Maryland in the case of petitioner White was a "critical" stage of the proceedings and without determining whether prejudice resulted concluded that lack of counsel at the preliminary hearing required reversal of the conviction.[55] Does this mean that it is essential to fair process that counsel be assigned at or before the preliminary examination in Montana? It might be argued that district court arraignment is early enough to provide counsel in Montana since the preliminary examination is not a regular procedural step. This would be in basic conformity with answers received from defense counsel in the state, a majority of whom maintained that counsel is appointed early

[47]MONT. CONST. art. III, § 8; R.C.M. 1947, § 94-6204; Comment, *Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?*, 25 MONT. L. REV. 135 (1963).

[48]See app. A in Comment, 25 MONT. L. REV. 135, 143 (1963).

[49]State *ex rel.* Juhl v. District Court, 107 Mont. 309, 316, 84 P.2d 979 (1938).

[50]*Supra* note 1. *But cf.* State *ex rel.* Donovan v. District Court, 26 Mont. 275, 67 Pac. 943 (1902); State ex rel. Harrison v. District Court, 135 Mont. 365, 340 P.2d 544 (1959); State *ex rel.* McLatchy v. District Court, 395 P.2d 245 (Mont. 1964).

[51]*Supra* note 1. This conclusion is supported by docket studies conducted in the sample counties.

[52]*Supra* note 1.

[53]*But see White v. Maryland, supra* note 7. It should be noted that Maryland's use of the preliminary examination in that particular case included allowing the defendant to plead to the charge.

[54]*Supra* note 7.

[55]*Id.* at 60.

enough under the existing practice, *i.e.* at arraignment.[56] However, this overlooks the obvious. If there is a preliminary examination, by its very nature it may be a critical stage of the proceedings and the right to assigned counsel would then be a requirement of due process. In *Alden v. Montana*[57] the Federal District Court, for the District of Montana, in ruling on a petition for a writ of habeas corpus stated:

> The combination of the County Attorney informing petitioner, in effect, that his prior convictions would not be filed against him if he pled guilty, but that they would be filed if he pled not guilty, together with the failure of the State to provide the assistance of counsel at the preliminary hearing, resulted in pleas of guilty that cannot stand in the face of the due process requirements of the Fourteenth Amendment.[58]

The federal district court relied on *White v. Maryland*[59] and *Hamilton v. Alabama*[60] which it claimed "make . . . clear that . . . right to counsel exists at all stages of the proceedings, and particularly at the preliminary hearing before the magistrate"[61] Although a plea of guilty was entered by the defendant in justice court in the *Alden* case there was no preliminary examination since the preliminary examination was waived. Further, the plea of guilty should in law have amounted to no more than a waiver of preliminary examination. Finally, the county attorney was not required to hold a preliminary examination and it is doubtful that he would have held one. He could have dismissed the complaint in justice court and made application for leave to file in the district court.[62] In view of these procedural facts it is questionable if the proceeding through which defendant, Alden, was carried prior to his arraignment in district court was "critical", at least in the same sense the preliminary examination in Maryland was considered to be critical by the Supreme Court in *White v. Maryland*.[63]

In *Alden* the federal district court made the expected and logical extension of the *Hamilton* and *White* cases to include other than capital crimes.[64] The federal court also pointed out that the Supreme Court did not base its holding on a showing of prejudice in either *Hamilton* or *White*.[65] However, the federal court failed to make a careful review of the proceeding at which defendant Alden was denied the assistance of counsel. It was not an arraignment or a preliminary examination but

[56] *Supra* note 1. Also, see Table III.
[57] 234 F. Supp. 661 (D. Mont. 1964).
[58] *Id.* at 670.
[59] 373 U.S. 59 (1963).
[60] *Supra* note 33.
[61] *Alden v. Montana, supra* note 57, at 670.
[62] MONT. CONST. art. III, § 8; R.C.M. 1947, § 94-6204.
[63] *Supra* note 59.
[64] In reaching this conclusion the district court judge relied on Justice Clark's concurring opinion in *Gideon v. Wainwright, supra* note 23.
[65] *Alden v. Montana, supra* note 57, at 671.

rather a first appearance before a magistrate. The court further failed to make any explanation as to why this particular proceeding was a "critical" stage in the criminal process as the Supreme Court did in *White v. Maryland*.[66] Finally the federal district court gave no consideration to the practical matter that there is no guarantee of a preliminary examination in Montana criminal procedure.[67]

Perhaps there should be a right to assigned counsel for the protection of one's rights at criminal proceedings in which the accused is not regularly present, for example at a grand jury proceeding or, in Montana, at the hearing to determine if leave to file an information should be granted. Although the defendant is not likely to be present at either of these proceedings, his right to continued freedom may be determined on the basis of a determination of probable cause to believe that he has committed an offense. However the main thrust of the *White* decision is not a specific concern with the right to counsel at a preliminary examination or any other proceeding to determine probable cause as such. Rather the importance of counsel at a proceeding in which a plea of guilty was taken and later introduced into evidence made the preliminary examination in Maryland in the *White* case a critical stage in the proceedings.[68] Insofar as the preliminary examination serves no purpose other than establishing probable cause to believe the defendant has committed an offense and should be held to answer, the presence of counsel should be no more compelling and the proceeding should be deemed no more critical than a grand jury investigation or a hearing to grant or deny leave to file an information. However, if the preliminary examination also functions to strengthen the prosecution's case by recording and perpetuating testimony or by eliciting damaging admissions or pleas of guilty that may serve as evidence at the trial, the proceeding is critical and the need for appointed counsel becomes much more apparent. This conclusion is also compatible with the decision in *Escobedo v. Illinois*[69] which required the presence of retained counsel during an investigation held prior to a preliminary examination, prior to an indictment or information and prior to any arraignment as an essential of one's right to counsel under the sixth amendment and applicable to the states via the fourteenth amendment.[70] Here again, because police elicited damaging admissions the investigative stage became "critical"—more critical perhaps than a preliminary examination.

If the *Escobedo* decision is extended to include the necessity of "appointed" counsel as well as retained counsel at the investigative stage, after arrest and after the investigation "has begun to focus on a particular suspect . . ."[71] as it may by reference to the reasoning and language

[66] *Supra* note 59.

[67] MONT. CONST. art. III, § 8; Comment, 25 MONT. L. REV. 135 (1963).

[68] *White v. Maryland, supra* note 59, at 60.

[69] 84 Sup. Ct. 1758 (1964).

[70] *Id.* at 1765.

[71] *Ibid.*

in *Gideon v. Wainwright,* "any person haled into court,"[72] *White v. Maryland,* "critical stage"[73] and the *Douglas v. California* theory of equality between rich and poor defendants,[74] there still may remain some practical and theoretical limitations on the right to counsel at preliminary examination. If the examination is solely limited to establishing probable cause and if no evidence is obtained at the preliminary examination that is or could be used to convict the defendant there is a far less compelling need for counsel at this stage than during police interrogation. The *Escobedo* decision is primarily concerned with interrogation conducted without the presence of retained counsel after the focus of the investigation has narrowed to a particular suspect.

In another light, apart from the question of counsel at preliminary examination, the *Escobedo* decision may have a powerful collateral impact. In requiring counsel at the investigative stage the case may be imposing upon the states a "little McNabb-Mallory rule"[75] which would require the exclusion of any confession obtained from the accused during an unnecessary delay in furnishing him with legal counsel. The development of *Escobedo* along these lines might be more protective than the *McNabb-Mallory* rule, particularly if it develops toward a demand that defense counsel be present when any confession or admission is made if the confession or admission is to be admitted into evidence. This would mean that a completely voluntary admission or confession given after counsel had been appointed, and involving no illegal police conduct and no unnecessary delay in the criminal process at any point would be inadmissible if given at a time when counsel was not present; for example an admission gratuitously made to a guard or fellow prisoner. The danger of deceit, coercion or other unfairness could most certainly be effectively removed if no confession or admission were admissible except those made in the presence of defense counsel.

In the recent decision of *Massiah v. United States*[76] the Supreme Court pointed in this direction although the facts are not without alloy. The petitioner, Massiah, was indicted and after retaining a lawyer pleaded not guilty and was released on bail. Before trial, petitioner's cohort, one Colson, in cooperation with government agents, engaged petitioner in an incriminating conversation. The conversation was picked up by a hidden radio transmitter and broadcast to a government agent. The Supreme Court per Justice Stewart, held the government agent's testimony as to the incriminating conversation inadmissible as violative of the specific guarantees of the sixth amendment on the theory that government agents

[72] *Gideon v. Wainwright, supra* note 23, at 344.

[73] *White v. Maryland, supra* note 59, at 60.

[74] *Douglas v. California, supra* note 37, at 357.

[75] McNabb v. United States, 318 U.S. 332 (1942); Mallory v. United States, 354 U.S. 449 (1957). The rule as stated by the *McNabb* and *Mallory* cases, *supra,* is that the arrested person must be taken before a committing magistrate without unnecessary delay, and failure to do so requires the exclusion of any confession or incriminating evidence obtained prior to the presentment.

[76] 84 Sup. Ct. 1199 (1964).

had deliberately elicited from the defendant incriminating statements after he had been indicted and when he was without the aid of counsel.[77] It should be noted that in this case the "damned" evidence was obtained while defendant was free on bail and at a time when the officers of the law were not imposing on the petitioner in any usual regard. But in the words of the majority opinion the defendant "was denied the basic protections of that guarantee [the sixth amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[78] It is true that in this case the element of indirect interrogation was present, conceding that Colson was acting as an agent of the government, but still the case seems to come close to an extended "little McNabb-Mallory rule" that would exclude pretrial admissions or confessions whenever they are made without benefit of counsel regardless of proof that there was no element of coercion and no delay in the criminal process.

As a practical matter this approach would effectuate the desire expressed by Justice Douglas that all admissions and confessions be excluded and the prosecution be forced to prove each element of each case exclusively by physical evidence or by testimony of witnesses limited to a portrayal of actions and excluding allusions to statements made by the accused.[79] As Mr. Justice White states in his dissent in the *Massiah* case:

> This is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by the accused. Carried as far as blind logic may compel some to go, the notion that statements from the mouth of the defendant should not be used in evidence would have a severe and unfortunate impact upon the great bulk of criminal cases.[80]

At a minimum the federal decisions seem headed to a conclusion that due process requires the presence of counsel as soon as administratively possible after arrest if leads, admissions, or confessions are to retain viable evidentiary value. If the process employed does not elicit admissions or confessions and does not secure leads, there is no effective means of protecting the defendant's right to counsel[81] since there is nothing that

[77] *Ibid.*

[78] *Id.* at 1203.

[79] See, *e.g.*, Watts v. Indiana, 338 U.S. 49, 57 (1949) (Douglas, J., dissenting). See also, Stroble v. California, 343 U.S. 181, 203-04 (1952) (Douglas, J., dissenting).

[80] *Massiah v. United States, supra* note 76, at 1204 (White, J., dissenting).

[81] In Mapp v. Ohio, 367 U.S. 643, 652-53 (1961), it was said: "The obvious futility of relegating the Fourth Amendment to the protection of other remedies (other than the exclusionary rule) has, moreover, been recognized by this Court since Wolf." See also People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, 911-12 (1955), where the court said:

> We have been compelled to reach that conclusion (that evidence obtained in violation of the constitutional guarantees is inadmissible) because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

can be excluded unless it be the defendant. Violated rights not protected by the exclusionary rule could be protected only by civil process or administrative remedy against the offending officer unless the Supreme Court is prepared to hold that jurisdiction may be forfeited as a result of the particular constitutional violation. If the loss of jurisdiction were to be permanent (and anything less would be wholly farcical) this would grant the defendant complete immunity from legal process for the crime with which he would have been charged.

Any legitimate attempt to conform to a present understanding of federal due process will require that every arrested person be taken before a magistrate without unnecessary delay and informed of his right to counsel and, if unable to employ counsel that counsel will be assigned to represent him at state expense.[82] Confessions and admissions made prior to the time counsel is first made available to the defendant or at any time subsequent thereto when counsel is not present must remain suspect, notwithstanding the known importance of allowing police officers the right to question the accused prior to affording him the right to contact an attorney.[83]

HOW COMPREHENSIVE IS THE RIGHT TO ASSIGNED COUNSEL?

Historically in Montana the right to assigned counsel has continued from and after arraignment, through trial, sentencing and appeal in all cases originating in the district courts of the state. In other proceedings such as habeas corpus, coram nobis, misdemeanor appeals and revocation of probation, appointment of counsel has been at most discretionary and rarely made.[84] In 1959 the Montana Supreme Court, speaking through its chief justice indicated that the right to assigned counsel after trial and the right to free transcripts for indigent defendants was limited to motions for new trial and felony appeals and did not encompass habeas corpus, coram nobis or misdemeanor appeals.[85] In making this statement the court was giving its interpretation of the effect of *Griffin v. Illinois*[86] on state court procedure. In *Griffin* the Supreme Court determined that failure to provide an indigent defendant with a transcript at state cost was a denial of due process and equal protection of the law inasmuch as failure to have a transcript barred appellate review. "Appellate review

[82]Hopefully the proposal of the Criminal Law Commission will adequately simplify the initial procedure and sufficiently outline the requisite steps to accomplish this objective. The tentative draft proposes a first presentment before a magistrate without unnecessary delay. At this first contact with a member of the judiciary the accused person would be informed of his basic constitutional rights, and, if indigent, he would be assigned counsel unless he waived the right thereto.

[83]See, *e.g.*, Crooker v. California, 357 U.S. 433, 441 (1958); Cicenia v. Lagay, 357 U.S. 504, 509 (1958); INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 172, 203-09 (1962).

[84]R.C.M. 1947, § 94-6512.

[85]WILKES, POST-CONVICTION CONSTITUTIONAL RIGHTS OF INDIGENT CRIMINAL DEFENDANTS: STATE INTERPRETATIONS OF GRIFFIN V. ILLINOIS 23, app. II (1959).

[86]351 U.S. 12 (1956).

has now become an integral part of the Illinois trial system . . .[87] [and a] state can no more discriminate on account of poverty than on account of religion, race or color."[88] Although the state of Montana has required assigned counsel on all felony appeals for the benefit of indigent criminal appellants and has required that they be furnished with transcripts at state expense since 1895[89] a more guarded statement as to the limits of assigned counsel might presently be made in view of the *Douglas v. California* case decided in 1963.[90] Unlike Griffin, Douglas was not denied appellate review. The California rules of criminal procedure provide that state appellate courts may make "an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed."[91] By contrast, if counsel is employed by the appellant the court passes on the merits of an appeal only after written briefs and oral arguments are presented by counsel. In appraising the procedure and in applying it to the case before the Court, in which the defendant had been denied the aid of appointed counsel after appellate investigation of the record, the Court stated:

> Absolute equality is not required; lines can be and are drawn and we often sustain them.[92] But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.[93]

The latent breadth of the *Douglas* decision coupled with the immediate local concern over federal supervision of state court criminal proceedings by the expanding use and scope of habeas corpus[94] may encourage the Montana Supreme Court to reconsider the need for assigned counsel beyond the trial and sentencing stage in proceedings apart from appeals and motions for new trials.

The Montana Supreme Court has noted on more than one occasion

[87] *Id.* at 18.

[88] *Id.* at 17.

[89] R.C.M. 1947, § 93-1904. However, in State v. Frodsham, 139 Mont. 222, 236, 362 P.2d 413, 420 (1961), the assigned attorneys were criticized for an unnecessarily lengthy transcript and the district court judge was requested to examine into the matter.

[90] Douglas v. California, 372 U.S. 353 (1963).

[91] *Id.* at 355.

[92] The Court cites Tigner v. Texas, 310 U.S. 141 (1940) and Goesaert v. Cleary, 335 U.S. 464 (1948). These cases upheld statutes which created special classes. In *Tigner* the class exempt from criminal sanctions for combinations in restraint of trade included farmers and stockmen. This exemption was held to be nonviolative of the equal protection clause of the fourteenth amendment. In *Goesaert* the special class of female persons eligible to be licensed as bartenders consisted only of wives and daughters of male bar owners. It is doubtful that the lines drawn in either of these cases or the reasons in support of them would justify the Court drawing a line between rich and poor in any criminal case.

[93] *Douglas v. California, supra* note 90, at 357.

[94] See, *e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963).

that there is no statutory provision for appointment of counsel in the supreme court and such appointments can be made only by the district courts.[95] Notwithstanding these prior determinations the Montana Supreme Court is now making appointments of counsel where the circumstances seem to require it in hearings on petitions for writs of habeas corpus.[96]

In this same vein the Montana Supreme Court is presently considering New Jersey's Post Conviction Relief Rule 3:10A which requires appointment of counsel for all indigents seeking post conviction relief.[97] The Montana Supreme Court sees the rule as a means of providing the most adequate relief possible by way of habeas corpus while at the same time supplying a means of partially stemming the tide of repeated habeas corpus petitions. The New Jersey rule calls for the assignment of counsel in each case if indigency is proved, if the petitioner has not affirmatively stated his intention to proceed pro se, and providing the petition is the first one filed under the rule by the petitioner. As to subsequent petitions attacking the same conviction, counsel would be assigned only upon application therefor and upon a showing of good cause.[98] Although habeas corpus is never res judicata[99] the apparent attempt of the approach visualized by the Montana Supreme Court would be to make the first hearing on a petition for a writ of habeas corpus as complete and final as is possible.

Probably the biggest single difficulty in reviewing constitutional safeguards via petitions for writs of habeas corpus is the failure to have an adequate record to establish what did happen at the preliminary examination and the arraignment. The law, the practice and the cases coming before the federal district court in Montana raise in concert the extreme importance not only of proceeding in accordance with federal requirements of due process but of making a very complete and careful record that is available to the reviewing court.

Beyond or separate from the right to counsel on appeal and for hearings on petitions for writs of habeas corpus is the question of assigned counsel for hearings on revocation of probation. The critical constitutional question facing the convicted probationer is what constitutional rights, if any, does he retain as a probationer? Basically the United States Constitution and the constitutions of most states fail to provide any specific safeguards for the convicted defendant.[100] The Supreme

[95]In re Pelke's Petition, 139 Mont. 354, 359, 365 P.2d 932, 934 (1961); Brown v. State, 140 Mont. 289, 292, 371 P.2d 262, 263 (1962).

[96]*Supra* note 1. However, funds to pay for such appointments are not readily accessible and may force a restriction upon the number made.

[97]N.J. POST-CONVICTION RELIEF RULES 3:10A.

[98]N.J. POST-CONVICTION RELIEF RULES 3:10A.

[99]Darr v. Burford, 339 U.S. 200, 214 (1950); *Fay v. Noia, supra* note 94, at 422.

[100]With the possible exceptions of the commands against double jeopardy and cruel and unusual punishment, the convicted defendant does not have any specific constitutional safeguards. See U.S. CONST. amend. V and amend. VIII.

Court in interpreting the Federal Probation Act noted that probation is a privilege and cannot be demanded as a right. " 'The court may revoke or modify any condition of probation or may change the period of probation.' There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination."[101] The question is best raised in a note in the 1959 Columbia Law Review: Is an interest which is granted as a matter of grace and retained as a matter of discretion altogether unprotected by the due process requirement of the Constitution? The note then argues that such an interest may be given protection in the light of certain recent Supreme Court decisions.[102] The same note points out that some states by statute grant a right to retained counsel for a hearing on revocation of probation, and further, some state courts have considered the right to retained counsel in such hearings to be an element of due process.[103]

The present Montana statutory law on probation, parole and clemency was enacted in 1955.[104] It provides for a board of pardons consisting of three appointed members charged with the responsibility of administering the "executive clemency, probation and parole system."[105] The act defines "probation" as "the release by the court without imprisonment . . . of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the board upon direction of the court."[106] The statute provides for a hearing on the breach of the conditions of release, which is to be conducted before the sentencing court which retains jurisdiction. The hearing is to be held without unnecessary delay after the arrest of the probationer is made.[107] The probation officer is required to submit a written report showing in what manner the defendant has violated the conditions of release. The hearing may be and usually is informal and summary. If the violation of the conditions of release is established the probation may be revoked and the probationer's conditional freedom terminated. The court may then order the defendant to serve the sentence imposed, any lesser sentence, or if imposition of sentence was suspended, the court may impose any sentence which might originally have been imposed.[108]

Since the statutory law of the state of Montana specifies the procedure which shall be followed in revoking probation, failure to follow such procedures in each case should be construed as a violation of the equal

[101]Burns v. United States, 287 U.S. 216, 221 (1932).
[102]Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 325 (1959).
[103]*Id.* at 328.
[104]R.C.M. 1947, §§ 94-9821 to -9851.
[105]R.C.M. 1947, § 94-9822.
[106]R.C.M. 1947, § 94-9823(a).
[107]R.C.M. 1947, § 94-9831.
[108]R.C.M. 1947, § 94-9832. See also *In re* Williams, *petition filed*, No. 10826, July 17, 1964, now before the Montana Supreme Court testing the legality of certain aspects of the law on suspended imposition of sentence. Basically the issue before the court is whether jail-based probation and suspended imposition of sentence followed by revocation of probation and imposition of sentence constitute double jeopardy.

protection of the laws and unconstitutional.[109] Beyond any failure to adhere to the procedures specified by statute, does the probationer have a right to be represented by counsel at the hearing on revocation of probation under the procedure outlined in the Montana statute? It can hardly be questioned that any proceeding which removes one from his community and places him in confinement is of critical importance to him and strongly affects his rights, if indeed he has any rights beyond those specified in the statute.

Under existing Montana law the revocation of probation may subject the probationer to the full force of the sentencing process. Hence if it is concluded that an attorney is important at sentencing, and certainly both assigned and retained counsel do continue to serve through judgment and sentence, then the reason for an attorney's presence at a revocation of probation hearing is doubly important. The hearing will not only ascertain facts to determine whether a condition of the release has been violated but also will conclude as a proceeding to sentence the probationer on the original charge on which he was convicted.

There seems to be no real support for the existence of any absolute right to counsel at a hearing on revocation of probation.[110] However, if retained counsel is permitted to appear and plead the case of the probationer at a revocation hearing it is conceivable the United States Supreme Court would determine that a responsibility is imposed upon the court to provide assigned counsel for an indigent probationer to satisfy the requirements of fourteenth amendment equal protection of the laws.[111] And in at least some revocation hearings in Montana the district courts have permitted retained counsel to represent the probationer.[112]

HOW COMPLETE IS THE PROTECTION AFFORDED BY THE RIGHT TO COUNSEL?

Are there any weaknesses in the protective shield that prospectively is to be held by all accused persons? Since at least some officers of the law and of the courts are known to resort to devious and ignorant means to solve crimes and to convict persons in derogation of constitutional standards, are there any junctures or means by which the legal shield for individual constitutional rights can be pierced by unscrupulous officers of the law once there has been an effective implementation of the right to counsel? First, there is no protection for the accused after arrest and before counsel is obtained or provided, and since it is neither administratively nor financially possible to provide patrol cars with de-

[109] *Douglas v. California, supra* note 90. In Hollandsworth v. United States, 34 F.2d 423 (4th Cir. 1929) the circuit court of appeals stated at 428: "The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him."

[110] *Supra* note 102. See also R.C.M. 94-9835 providing for right to Counsel at hearings before Board of Pardons.

[111] *Cf., Douglas v. California, supra* note 90.

[112] *In re Williams, supra* note 108.

fense counsel this gap cannot be closed physically. It can be rendered virtually impotent in the trial of the case by excluding all admissions and confessions obtained before defense counsel is retained, assigned or waived. Second, there is no protection after counsel is provided during those periods when counsel is not present with the accused. This gap can be rendered legally impotent only by excluding all admissions and confessions obtained in the absence of counsel.[113] Third, the defendant's quality of protection may be in direct relation to the ability and conscientiousness of his counsel. This problem is one of the most difficult to answer. Any meaningful solution must necessarily imply some kind of control over the manner in which defense counsel conducts the case. Any kind of control is a denial of the sanctity of the adversary system and an anathema to most attorneys. Anathema or not, it is obvious that the mere presence of counsel is no guarantee that the defendant will enjoy the *effective* assistance of counsel.

To help insure the effective assistance of counsel the Supreme Court has noted that the appointment of counsel must be made in such a manner and at such a time as to give meaning to the requirement.[114] In *State v. Blakeslee*[115] the Montana Supreme Court stated specifically "the rule which gives him [the accused] the right to counsel also means that counsel shall be given reasonable time to prepare before trial."[116] In *Blakeslee* the district court's failure to allow adequate time for preparation caused the Montana Supreme Court to overturn the conviction and remand for new trial.[117]

Casual appointments and failure to allow defense counsel adequate time to prepare are not the most usual shortcomings of the system of appointed counsel as it functions in Montana. Counsel in each county is selected on a rotating basis from a list of local attorneys. (In capital cases the judges regularly appoint two attorneys to defend the accused, at least one of whom is selected on the basis of experience.) Statistical evidence indicates that the lists are not comprehensive and not regularly followed in all counties.[118] Young and less experienced attorneys are given a majority of the appointments. Nearly one third of the reporting

[113]See text *supra* at 11 - 13 for consideration of this point in connection with discussion of *Escobedo* and *Massiah* cases.

[114]Powell v. Alabama, 287 U.S. 45 (1932); 1 DEFENDER NEWSLETTER 1 (Dec. 17, 1963). It is also noted in the Newsletter that, in answering the demands of *Gideon*, "some judges have reverted to the last century in seeking short cuts that provide counsel in name only, asking attorneys seated in the courtroom to have a brief talk with indigent defendants who wish to plead guilty and assigning unpaid attorneys for trials according to the old haphazard assigned counsel method." 1 DEFENDER NEWSLETTER, *supra*.

[115]131 Mont. 47, 306 P.2d 1103 (1957).

[116]*Id.* at 54, 306 P.2d at 1106.

[117]*State v. Blakeslee, supra* note 115. In the *Blakeslee* case counsel was appointed only three days prior to trial and after withdrawal of the attorney previously retained by the defendant. Further, the appointed counsel was engaged in another law suit during one of the three days prior to the trial. In the *Powell* case, *supra* note 114, counsel was assigned to represent the accused on the same day the trial was held.

[118]*Supra* note 1.

attorneys stated that they had defended in fewer than five criminal cases prior to their first appointment in 1962. One defense attorney stated that the judge's list in his county included *only* young lawyers.[119] Generally appointed defense attorneys have had far less legal experience than county attorneys. This difference in experience is emphasized when the comparison is based on experience in criminal law. Notwithstanding the inequality of experience between county attorneys and appointed defense attorneys, nearly all of the district court judges reported that appointed counsel was regularly as capable as retained counsel as well as being equal in ability and preparation to the county attorneys whom they opposed. It is, of course, possible that this conclusion is partially created by two collateral factors. The court is likely to be more notably and permanently impressed if the case is of a very serious nature, in which event counsel is apt to be selected from the ranks of the leading attorneys. Further the case of an accused who is poorly represented is not likely to appear very strong and the court might reasonably conclude that substantial justice is being done and defense counsel could not possibly do more under the circumstances.

The question of competent counsel seems to be an increasingly regular complaint in petitions for writs of habeas corpus.[120] Perhaps part of the problem is triggered by the courts explicit recognition that a different standard is applicable to appointed counsel vis a vis retained counsel. In *State v. Frodsham*[121] the court stated:

> [Since the] defendant had no voice in the choice of such counsel, . . . it appears to us that in the interest of justice it is incumbent upon us to consider the contended errors in spite of the fact that we have had to dismiss the appeal,[122] a far different situation would confront us here if the defendant had employed his own counsel, in which instance it would be the exercise of his own judgment on the ability of such counsel as he chose.[123]

In *Jones v. Montana*[124] the conviction was overturned by the Federal District Court for the District of Montana because the court was convinced that counsel had failed to adequately advise the accused of the difference between first and second degree burglary before allowing him to plead guilty to first degree burglary. The most obvious danger presented by such cases is that they tend to take the control of the case away from the defense attorney. In the *Jones* case there was undoubtedly some bargaining. Prior convictions were not charged and the sentence

[119] *Supra* note 1.

[120] *Supra* note 1. See, *e.g.*, Jones v. Montana, 235 F.Supp. 673 (D. Mont. 1964).

[121] 139 Mont. 222, 362 P.2d 413 (1961).

[122] *Id.* at 233, 362 P.2d at 418-19.

[123] *Id.* at 232, 362 P.2d at 418. The majority view seems to be that there is a significant legal distinction between retained and assigned counsel. See Annot., 74 A.L.R.2d 1390, 1406-11 (1960).

[124] *Supra* note 120.

given the defendant was less than could have been given him upon conviction of second degree burglary with prior convictions.[125]

It is a substantial question if second guessing trial counsel has any merit. The strategy of either a bargaining process or a trial may dictate action that in the floodlight of the sentence or the conviction appears unreasoned and incompetent. However, this may result from either the nature of the bargaining in the criminal process or the ineptness of some of our criminal procedures which allow a case to proceed on innuendo and inference which defense counsel cannot combat except by emphasizing them. This often means a calculated risk that looks like either the careful hand of legal genius after acquittal or the stupidity of careless and thoughtless counsel after conviction.

While availability of competent counsel is an essential aspect of the American system of criminal justice, court control over the actions and strategy of defense counsel should be exercised with great caution and restraint. Duly qualified members of the bar should be indulged every presumption of professional competency. When a breach is brought to the attention of the court, the court presumptively must act to safeguard the rights of the individual who has suffered at the hand of incompetent counsel. Reversals for incompetent counsel may, in many cases, allow the defendant to attempt dubious stratagems on the theory that if they are unsuccessful he can proceed again by showing the incompetence of counsel in utilizing such tactics. If court supervision of defense counsel is to be even limitedly exercised and sanctioned, it is doubtful that any good reason can be forwarded to limit this supervision to assigned counsel when the breach may be just as gross and the individual's rights just as sacred in the case of retained counsel.

A final consideration is the questionable protection that is afforded an accused person at every stage of the criminal process if counsel is waived. In *Johnson v. Zerbst* [126] the Supreme Court gave some indication of its attitude concerning the question of waiver:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.[127]

[125] *Jones v. Montana, supra* note 120. First degree burglary is punishable by imprisonment of not more than fifteen years nor less than one year. Second degree burglary is punishable by imprisonment for not more than five years. R.C.M. 1947, § 94-903. See also, R.C.M. 1947, § 94-4713 dealing with prior convictions.

[126] 304 U.S. 458 (1938).

[127] *Id.* at 465.

If this interpretation of effective waiver of counsel is imposed upon the states, as well it might be,[128] many questions can be raised and few immediate answers can be given. To make a waiver of counsel effective must the accused be experienced in the criminal process? Must he be of average or superior intelligence? Is it requisite that he have had substantial formal education? Must he be over some specified age?[129]

If the trial court must determine the effectiveness of a waiver what happens to admissions or confessions given to police officers after the defendant becomes entitled to counsel in those cases in which counsel has supposedly been waived but the propriety of the waiver has not been determined by the trial court? Is it then impossible to waive counsel before a justice of the peace at preliminary examination? Must the effectiveness of such a waiver be reconsidered at a later stage by the trial court? If so, what is the effect of the preliminary examination? Further, since *Johnson v. Zerbst* urges that a record of the determination of the meaningfulness of any waiver be kept,[130] will proof of waiver which is satisfactory to deny petitioner a writ of habeas corpus be nothing less than a complete record, and will any proceedings prior to the date of the recorded proceedings be naturally suspect insofar as the accused appeared without counsel?

Finally, the police officers and officers of the court may have an opening wedge to apply their devious arts by sub rosa encouragement of waiver of counsel through the bargaining process[131] or by the severity of the sentence meted out to convicted defendants who do not waive counsel.[132] The recent *Alden* decision[133] bears directly upon this question. The accused, Alden, appeared before a justice of the peace and was advised of his right to counsel and that he would have a right to appointed counsel when he was brought before the district court. After this appearance the petitioner asked the advice of the county attorney as to whether he should ask for a preliminary hearing and an attorney. The county attorney refused to advise the petitioner but informed him that if he continued to cooperate he would not file prior felony charges, but

[128]In 1 DEFENDER NEWSLETTER, *supra* note 114, at 5, it is pointed out that "since *Gideon* applied the Sixth Amendment counsel provision to the states . . . [and] because *Johnson* was the key case interpreting the Sixth Amendment, its language regarding waiver might now . . . apply to the states . . . [although] the rule does not seem to be . . . based on constitutional considerations.

[129]The tentative draft of the Montana Criminal Law Commission proposes to deny the right to waive counsel to anyone under the age of eighteen years charged with a felony.

[130]*Johnson v. Zerbst, supra* note 126, at 465.

[131]Alden v. Montana, 234 F. Supp. 661 (D. Mont. 1964).

[132]See United States v. Wiley, 184 F. Supp. 679, (N.D. Ill. 1960) in which Judge Campbell of the United States District Court of Illinois in sentencing the defendant stated at 681: "Had there been a plea of guilty in this case probably probation might have been *considered* under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the court in imposition of sentence." The court of appeals overturned the sentence. United States v. Wiley, 278 F.2d 500 (7th cir. 1960).

[133]*Alden v. Montana, supra* note 131.

if petitioner pleaded not guilty in district court, then the prior felony charges would be filed. Petitioner then waived counsel, pleaded guilty and was bound over to district court. Under these circumstances the federal court held that the petitioner had been denied "his right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States."[134] In reaching this conclusion the federal court answered the State's argument that petitioner expressly waived the appointment of counsel saying:

> [T]he waiver of counsel at that stage [district court] of the proceedings must necessarily have been influenced by the prior purported waiver of counsel and pleas of guilty without counsel in Justice Court, and by the threat of prior conviction charges hanging over his head.[135]

CONCLUSION

Is the activity of the federal judiciary and the present course it has charted in criminal procedure an aberration likely to be destructive of our law and society, or is it the logical and reasonable course toward a solution of the difficult problem of administering criminal law within the confines of fair process? It is exceedingly difficult to dispute the logic and essential fairness of requiring the presence of defense counsel at *every* stage of *every* criminal proceeding as long as we remain committed to an adversary system of criminal justice. The real concern to law enforcement officials is not the abstract right to counsel, but rather the collateral impact of the means of effectively implementing that right. According to the reports of Montana county attorneys, a majority of all crimes in the state are solved by the accused's own admission or confession. This conclusion seems to be in accord with the findings of Professor Inbau, former Director, Chicago Police Scientific Crime Detection Laboratory and Mr. Reid, former staff member, who claim:

> Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.[136] [And further,] criminal offenders . . . ordinarily will not admit their guilt unless questioned under conditions of privacy and for a period of perhaps several hours.[137]

The Supreme Court has on occasion noted the importance of police inter-

[134] *Id.* at 673.

[135] *Id.* at 672. The case is clouded in this particular regard since the defendant was never offered appointed counsel prior to reaching the district court, there being no provision for appointed counsel in justice court at first appearance or for preliminary examination.

[136] INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 204 (1962).

[137] *Id.* at 206.

rogation.[138] However, in contrast to any acceptance of the importance of police interrogation is the statement in *Escobedo v. Illinois:*

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.[139]

It is perhaps unfortunate that the Court did not make a more complete explanation of the stated problem in the context of the *Escobedo* case. Are we to infer that admissions or confessions are bad per se? Uncorroborated admissions or confessions may be suspect; coerced confessions are suspect and opposed to existing standards of fair conduct; but uncoerced and corroborated admissions and confessions are undoubtedly an important means of ascertaining facts that may be known only to the perpetrator of the crime. It seems of dubious validity to refuse information which can be corroborated and which is not tainted by any coercion. This does not argue for reliance upon confessions or admissions but it does argue for the use of all legitimate means to ascertain fact. It is certainly the height of absurdity to close our eyes to any available evidence which is neither unbelievable nor tainted by active police illegality. Admittedly this conclusion begs the question. Is it illegal police conduct to interrogate the accused without the presence of defense counsel? If confessions and admissions are not to be used unless made in the presence of defense counsel and if defense counsel is found to be incompetent if he allows the accused to confess—the ring is closed. And what will be the end thereof? Will effective law enforcement disintegrate, as many law enforcement officers claim? Will ways be found to circumvent the protection? Hopefully the logical and fair implementation of the right to counsel will cause us to re-evaluate the adversary system of criminal justice. Such a re-evaluation should lead immediately to a redefinition of the role counsel plays in the criminal process. Defense counsel of the old school remain prideful of their ability to exploit the technical errors of opposing counsel and weaknesses in the law; they are prideful of their ability to surprise the county attorney and to hypnotize a jury. These game techniques must be eliminated and all legal endeavor directed toward the search for fact within the confines of fair process. The criminal law must encourage full discovery procedures, adequate notice and increased ethical responsibility on the part of both defense counsel and prosecutor. If this be too idealistic and generally without practical significance then a still more radical modification of the adversary system must be demanded.

[138] In Cicencia v. Lagay, 357 U.S. 504 (1958), the Court states at 509: "[I]t can hardly be denied that adoption of petitioner's position would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." See also Croocker v. California, 357 U.S. 433 (1958).

[139] Escobedo v. Illinois, 84 Sup. Ct. 1758, 1764 (1964).

TABLE I

COUNTY	LOCATION	POPULATION	JUDICIAL DISTRICT	NO. JUDGES IN DISTRICT	REMARKS
Yellowstone [d]	Southeast	79,016	13th (Includes 5 counties)	3	Primarily urban; light manufacturing; agriculture; commercial center.
Cascade [d]	Central	73,418	8th (Includes 2 counties)	3	Primarily urban; light manufacturing; agriculture; air force base.
Lewis & Clark	West Central	28,006	1st (Includes 2 counties)	2	State capital; balanced economy; agriculture.
Ravalli [d]	Southwest	12,341	4th (Includes 5 counties)	3	Agriculture; ranching.
Musselshell	South Central	4,888	14th (Includes 4 counties)	1	Ranching; sparsely populated.

d. Docket studies were conducted.

TABLE II

County—	Felony Arrests 1962	Per Cent Indigent	% Indigent Waiving Counsel	Lawyers in Private Practice	No. of Appointments of Counsel in Felonies 1962	No. of Lawyers Serving	Typical Payment for Felony Guilty Plea
Cascade	74	75	35	93	27	25	$100.
Yellowstone	121	70	83	114	13	9	75.
Ravalli	18	80	30	9	12	4	150.
Lewis & Clark	40	85	35	72	14	7	75.
Musselshell	7	70	80	4	1	1	50.

TABLE III

	Senior Defense Attorneys[1]	Junior Defense Attorneys[2]	Total
Is Counsel Appointed Early Enough?			
Yes	12	10	22
No	2	3	5
No Answer	1		1
Is the Present System Fair?			
Yes	8	9	17
No	5	3	8
No Answer	2	1	3
Is Compensation Adequate?			
Yes	2	7	9
No	13	6	19

[1] Attorneys who have been practicing 10 or more years or who have handled 10 or more criminal cases.

[2] Attorneys who have been practicing less than 10 years and have handled fewer than 10 criminal cases.

TABLE IV

	Senior Judges[1]	Junior Judges[2]	Senior County Attorneys[3]	Junior County Attorneys[4]	Total
1. Ideal Stage for Appointment of Counsel					
Between Arrest and First Appearance	2	3	7	4	16
At First Appearance		1	4	2	7
Between First Appearance and Preliminary Hearing				2	2
At Preliminary Hearing			1	3	4
At Arraignment	7	3	6	6	22
No Answer					0
2. Kind of Cases and Proceedings for Which Counsel Should Be Appointed					
Sentencing	8	6	9	10	33
Habeas Corpus, Coram Nobis, Other Postconviction Remedies	5	2	12	10	29
Hearing on Revocation of Probation	4	2	9	10	25
Sexual Psychopath Hearing	4	2	11	11	28
Misdemeanors	1	2	4	2	9
Civil Commitment of the Mentally Ill	2	2	6	5	15
3. Is Present Compensation Adequate?					
Yes	9	5	12	9	33
No	0	2	4	6	12
No Answer			2	2	4
4. Should Out of Pocket Expenses Be Paid?					
Yes	14	1	8	8	21
No	1	1			2
No Answer	4	5	10	9	28

[1] Judges who have served on the bench 10 or more years.
[2] Judges who have served on the bench less than 10 years.
[3] County attorneys who have been county attorneys 5 or more years.
[4] County attorneys who have been county attorneys less than 5 years.

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TABLE V

Amounts Spent for Defense of Indigent Accused in 1962-63[1]

County	Population	Dollar Amount
Yellowstone	79,016	$3800[2]
Cascade	73,418	8026[2]
Lewis & Clark	28,006	3000
Ravalli	12,341	2050

[1] Sample appropriations throughout the state show unusual variations not based on population: For example, Gallatin County has appropriated $1100 for 1964-65 with a population of 26,045; Missoula County has appropriated $2000 for 1964-65 with a population of 46,454, and Silver Bow County has appropriated $4500 for 1964-65 with a population of 44,663.
The Gallatin figure may be misleading inasmuch as Gallatin County spent $1860 for assigned counsel in 1963-64 by tapping emergency funds.
Silver Bow County may have inadequate funds during the present fiscal year since $3534 has already been spent, primarily, as a result of one trial in which assigned counsel (2) received $1884.

[2] The amounts appropriated for the 1964-65 fiscal year in Yellowstone and Cascade Counties show minimal increases over prior years. The Yellowstone appropriation for 1964-65 is $3800 and the Cascade appropriation for 1964-65 is $9000.

TABLE VI

Retained and Assigned Counsel in Felonies — Montana, 1962

		Did Defendant Have Counsel?						Combination or Type Unknown			
	Total	Yes		No		Retained		Assigned			
County —	Sample	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Cascade	20	14	70	6	30	3	15	11	55	0	0	0	0
Ravalli	17	13	87	2	13	1	7	11	73	1	7	2	12
Yellowstone	50	29	58	21	42	16	32	13	26	0	0	0	0
Weighted Total Percentages		71		29		19		50		2		4	

TABLE VII

Was Felony Defendant Determined to Be Indigent?

	Total	Yes		No		No Data	
County —	Sample	No.	%*	No.	%*	No.	%
Cascade	20	12	63	7	37	1	5
Ravalli	17	15	100	0	0	2	12
Yellowstone	50	13	45	16	55	21	42

* Percentages were calculated without including the "no data" cases.

TABLE VIII

Frequency of Release on Bail of Felony Defendants.

	Total	Yes		No		No Data	
County —	Sample	No.	%*	No.	%*	No.	%
Cascade	20	2	11	17	89	1	0
Yellowstone	50	12	24	38	76	0	0
Ravalli	17	2	17	10	83	5	29

* Percentages were calculated without including the "no data" cases.

TABLE IX

Disposition in Felony Cases — Montana, 1962

County —	Total Sample	Plea Guilty	Dismissed	Found Guilty	Mental Commit-ment	Pending
Cascade	20	14	4	1	0	1
Ravalli	17	14	0	1	0	2
Yellowstone	50	35	8	5	2	0
Weighted Total Percentages		74	12	7	1	6

TABLE X

Sentencing in Felony Cases — Montana, 1962

County —	Total Sample	No Sentence No.	No Sentence %	Prison No.	Prison %	Probation No.	Probation %	Suspended Sentence No.	Suspended Sentence %	Fine No.	Fine %
Cascade	20	6	30	5	25	7	35	2	10	0	0
Ravalli	17	2	12	9	53	6	35	1	6	0	0
Yellowstone	50	10	20	27	54	0	0	12	24	2	4
Weighted Total Percentages			21		44		23		14		1

If a sentence was any combination of prison, probation, suspended sentence (without probation), and fine, it is recorded under each of these columns.