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Constitutional Law: Indigent Misdemeanant's Right to Appointed Counsel: Lifting the Poverty Bar--A New Florida Standard

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to hire their own advocates."[53] These issues were not squarely treated in the instant case, although the Court's rationale seems clearly applicable to them.

Despite such unanswered questions, the instant decision has given the welfare recipient an impressive measure of procedural protection. Although rudimentary, the requirements of the pre-termination hearing should eliminate much of the bureaucratic bungling that has caused inestimable hardship to eligible recipients.[54] Unfortunately, the new procedures may inhibit the relaxed atmosphere that has been the goal of welfare hearings in Florida. Balanced against the enumeration of an explicit set of standards, however, such a disadvantage is probably justifiable. Moreover, while the instant decision will encourage judicial uniformity in dealing with welfare hearings, the language of the Court is broad enough to encourage expansion of the hearing requirement to other areas.

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CONSTITUTIONAL LAW; INDIGENT MISDEMEANANT'S RIGHT TO APPOINTED COUNSEL: LIFTING THE POVERTY BAR—A NEW FLORIDA STANDARD

State ex rel. *Argersinger v. Hamlin,* 236 So. 2d 444 (Fla. 1970)

The indigent petitioner was convicted of carrying a concealed weapon,[1] a misdemeanor, and sentenced to pay a 500 dollar fine or serve ninety days in jail. While imprisoned, he petitioned for a writ of habeas corpus, asserting that he was tried and convicted without having been advised either of his right to private counsel or that counsel would be appointed for him if he were indigent. Petitioner contended that this circumstance deprived him of the protections of the 6th and 14th amendments. The Supreme Court of Florida denied the petition and HELD, an indigent misdemeanant is entitled to court appointed counsel only when the offense carries a possible penalty of more than six-months imprisonment.[2]

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53. *Id.*

54. *See* examples cited in Kelly v. Wyman, 294 F. Supp. 893, 899-900 (S.D.N.Y. 1968).

1. FLA. STAT. §790.01 (1) (1969).

2. 236 So. 2d 444 (Fla. 1970).

In *Gideon v. Wainwright*[3] the United States Supreme Court held that denial of the right to counsel guaranteed by the 6th amendment was a denial of due process of law in violation of the 14th amendment. While *Gideon* involved a felony, nine states, either by statute, case laws, or court rule, have liberally construed the decision to provide counsel for all, or substantially all, misdemeanants.[4] Likewise, twenty-two states (including Florida) provide counsel only for certain misdemeanors[5] and nineteen states do not require court appointed counsel in any misdemeanor cases at all.[6]

The instant decision significantly departs from prior Florida decisions.[7]

3. 372 U.S. 335 (1963). Prior to *Gideon* the states were required to appoint counsel only in cases involving capital crimes. Powell v. Alabama, 287 U.S. 45 (1935). In federal courts the right to counsel has been held to be absolute, extending to all misdemeanors as well as felonies. Johnson v. Zerbst, 304 U.S. 458 (1938).

4. CAL. CONST. art. 1, §13 (3); ILL. REV. STAT. ch. 38, §113-3 (b) (Supp. 1969-1970); MD. ANN. CODE ch. 700, R. 719 (b) (1) (Supp. 1969); MASS. GEN. LAWS ANN. ch. 221, §340 (Supp. 1969); MINN. CONST. art. I, §6; N.H. REV. STAT. ANN. §604-A:1 (Supp. 1969); N.Y. CODE CRIM. PROC. §699 (McKinney Supp. 1969-1970); TEX. CODE CRIM. PROC. ANN. art. 26.05 (1966). Oregon has most recently joined this group by virtue of case decision. *See* Application of Stevenson, 254 Ore. 94, 458 P.2d 414 (1969). *But see* ORE. REV. STAT. §133.625 (Supp. 1967).

5. CONN. GEN. STAT. REV. §54-81 (a) (Supp. 1970-1971); DEL. CODE ANN. tit. 29, §§4601-07 (Supp. 1966); IDAHO CODE ANN. §§19-851, 852 (Supp. 1969); IND. CONST. art. I, §13; IOWA CODE §775.4 (1966); ME. REV. STAT. ANN. tit. 15, §810 (Supp. 1970-1971); MICH. CONST. art. I, §20; MONT. REV. CODES ANN. §95-1001 (4) (Supp. 1969); NEV. REV. STAT. §§171.370, 193.120-.140 (1968); N.J. STAT. ANN. §§2A:158-1, -22 (Supp. 1969-1970); N.M. STAT. ANN. §§21-1-1 (92), 41-22-1, -10 (Supp. 1969); N.D. CENT. CODE §29-07-01.1 (Supp. 1969); OKLA. STAT. ANN. tit. 22, §464 (Supp. 1969); UTAH. CODE ANN. §77-64-2 (Supp. 1969); VT. STAT. ANN. tit. 13, §6503 (Supp. 1969); W. VA. CODE ANN. §62-3-1 (Supp. 1970); WIS. STAT. ANN. §957.26 (Supp. 1969); N.C. Laws, 1969, ch. 1013; COLO. REV. STAT. ANN. §39-21-3 (2) (a) (Supp. 1969); ARIZ. R. CRIM. P. 163; PA. R. CRIM. P. 318. Florida is now in this group by virtue of the instant decision. *But see* FLA. STAT. §27.51 (1) (1969).

6. ALA. CODE tit. 15, §§318 (1)-(2) (Supp. 1969); ARK. STAT. ANN. §43-1203 (1969); GA. CONST. art. I, §2-105; HAWAII REV. STAT. §705-5 (1968); KAN. STAT. ANN. §62-1304 (1964); KY. REV. STAT. §453.190 (Supp. 1968); LA. CRIM. PROC. CODE ANN. art. 513 (West 1967); MISS. CODE ANN. §2505 (Supp. 1968); MO. REV. STAT. §545.820 (1959); NEB. REV. STAT. §§29-1803.01, -1804 (Supp. 1967), *as amended*, Neb. Laws 1969, ch. 238, §1804; OHIO REV. CODE ANN. §2941.50 (Page Supp. 1969); OHIO REV. CODE ANN. §2941.50 (Page Supp. 1969); R. I. GEN. LAWS ANN. §12-15-3 (Supp. 1967); S.C. CODE ANN. §17-507 (Supp. 1969); S.D. COMPILED LAWS ANN. §23-2-1 (Supp. 1970); TENN. CODE ANN. §§40-2014, -2028 (Supp. 1969); VA. CODE ANN. §19.1-241.1 (Supp. 1970); WASH. REV. CODE ANN. §10.01.110 (Supp. 1969); Until the instant decision Florida was also in this category. *See* FLA. STAT. §27.51 (1) (1969). Wyoming has not previously required court appointed counsel in misdemeanor cases. *See* Wyo. Laws 1953, ch. 180, §1. However, newly adopted WYO. R. CRIM. P. 6 appears to make broader provision for appointment of counsel.

7. The court arrives at the instant decision only after stating: "On the one hand is the decision of this court in *Fish* affirming a lower court which had denied a court-appointed counsel to indigent misdemeanants; and on the other hand are the Fifth Circuit federal courts—both trial and appellate—that with the aid of the Sixth and Fourteenth Amendments and the writ of habeas corpus are coercing our state courts in decisions that are as distinguished for their lack of uniformity as for their lack of sound precedent, *insofar as the applicability of* Gideon v. Wainwright . . . *to state trials of misdemeanor charges are concerned.*" 236 So. 2d at 443. *See generally* Note, Gideon, Escobedo, Miranda: *Begrudging Acceptance of the United States Supreme Court's Mandates in Florida*, 21 U. FLA. L. REV. 346 (1969).

The first post-*Gideon* case concerning whether counsel were to be appointed in misdemeanor cases was *Fish v. State*[8] in which the Supreme Court of Florida held that *Gideon* applied only to felonies. This position was continued in *Watkins v. Morris* where the court stated "there is no absolute, organic right to counsel in misdemeanor trials."[9] As recently as 1967 the court in *State* ex rel. *Taylor v. Warden of Orange County*[10] upheld *Fish* by denying a writ of habeas corpus to an indigent who, without trial counsel, was convicted of municipal ordinance violations.

While the Florida courts had previously refused to extend *Gideon* to misdemeanors, the United States Court of Appeals, Fifth Circuit, has held to the contrary since 1965.[11] In *Harvey v. Mississippi*[12] the defendant had been charged with a misdemeanor punishable by ninety days imprisonment and a 500 dollar fiine. In extending the right to counsel to misdemeanor cases the court reasoned that a layman in a court of law, whether charged with a misdemeanor or a felony, was in such a disadvantageous position that he had a right to the assistance of counsel.[13]

The court reaffirmed *Harvey* in *McDonald v. Moore,*[14] where the defendant was sentenced to serve six-months imprisonment or pay a 250 dollar fine after pleading guilty to a misdemeanor charge. Holding that defendant had been denied her right to counsel the court granted a petition for habeas corpus, assuming jurisdiction on the presumption that the Florida courts would not overrule the precedent established by *Fish.*[15]

Harvey and *Moore* were both narrowly decided, and it is not clear whether these decisions require a guarantee of counsel in all criminal cases.[16] A federal district court in Florida recently held that *Harvey* and subsequent cases guarantee counsel where the potential penalty resulting from conviction

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8. 159 So. 2d 866 (Fla. 1964).

9. 179 So. 2d 348, 349 (Fla. 1965).

10. 193 So. 2d 606 (Fla. 1967).

11. Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969); James v. Headley, 410 F.2d 325 (5th Cir. 1969); Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). *See also* Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969); Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968).

12. 340 F.2d 263 (5th Cir. 1965).

13. *Id.* at 269.

14. 353 F.2d 106 (5th Cir. 1965).

15. McDonald v. Moore, 353 F.2d 106, 107 (5th Cir. 1965).

16. In James v. Headley, 410 F.2d 325 (5th Cir. 1969), Justice Wisdom suggests that counsel should be provided in all proceedings where the defendant faces a potential loss of liberty for any length of time whatsoever "except those types of offense for which punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors, or otherwise." *Id.* at 334. *See also* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1968). Additional criteria for appointment of counsel suggested by Justice Wisdom were where the offense charged involved "moral turpitude"; where convictions may result in revocation of a license that might deprive one of his livelihood; or where the defendant's intelligence was limited and the issues involved were complex. 410 F.2d at 334. However, this particular portion of the opinion in *James* was not concurred in by the other justices. The exact position of the court thus remains obscure.

of all pending charges is more than ninety days incarceration.[17] However, since the United States Court of Appeals, Fifth Circuit, has never decided a case involving these issues where the penalty was *less* than ninety days in jail, the criterion for requiring appointment of counsel may eventually be reduced even below this ninety-day standard.

In explaining its rationale for adopting the six-month rather than the ninety-day test, the court in the instant case stated that its object was "to adopt the decision of the federal court of this judicial circuit that . . . most nearly approximates any decision . . . that might be adopted by the Supreme Court of the United States."[18] The court adopted the standard established in *Brinson v. State* in which a federal district court held that counsel was required whenever the defendant was charged with a "serious offense."[19] The measure of seriousness, the court reasoned, was directly related to the length of the sentence. In support of this position the court cited the Criminal Justice Act of 1964,[20] which divided federal public offenses into three categories: (1) felonies, (2) misdemeanors, and (3) petty offenses. Petty offenses were defined as any offense for which the potential penalty was a fine of 500 dollars or less or imprisonment for six months or less.[21]

The two assumptions upon which the instant decision is apparently based are that the "serious offense" standard promulgated in *Brinson* is valid and that the principles applicable to a determination of the right to a trial by jury also apply in determining the right to counsel. In *James v. Headley*,[22] however, the United States Court of Appeals, Fifth Circuit, expressly rejected the serious offense standard. The court argued that offenses were categorized in the Criminal Justice Act to facilitate systematic compensation of counsel, and that Congress never intended that those charged with petty offenses should be denied the right to appointed counsel.[23] Moreover, the court denied the validity of any constitutional distinction between felonies and misdemeanors or between gross and petty offenses because it saw little difference "between the loss of liberty for 181 days and the loss of liberty for 180 or fewer days."[24]

17. Wooley v. Consolidated City of Jacksonville, 308 F. Supp. 1194 (M.D. Fla. 1970).

18. 236 So. 2d at 443.

19. 273 F. Supp. 840, 843 (S.D. Fla. 1967). The court in *Brinson* derived this standard from *In re* Gault, 387 U.S. 1 (1967), a Supreme Court decision involving a juvenile's right to counsel.

20. Criminal Justice Act of 1964, 78 Stat. 552 (1964), *as amended*, 18 U.S.C. §3006A (1964).

21. 18 U.S.C. §1 (1964).

22. 410 F.2d 325, 329 (5th Cir. 1969).

23. "The bill as passed by the Senate is restricted in scope to felonies and misdemeanors other than petty offenses. The House version of the bill would cover all criminal cases, including petty offenses. . . . The constitutional mandate of the Sixth Amendment is without doubt applicable to petty offenses, but it is the view of the conferees that adequate representation may be afforded defendants in such cases without the need for providing for compensation for counsel. In this way, money appropriated under the act will not be dissipated from the areas of greatest need, cases involving representation for crimes punishable by more than 6 months' imprisonment." CONF. REP. No. 1709, 88th Cong., 2d Sess., U.S. CODE CONG. & AD. NEWS 3000, 3002-03 (1964).

24. 410 F.2d 325, 333 (5th Cir. 1969).

In the instant case the Florida supreme court analogized that since the right to trial by jury extends only to offenses punishable by more than six months imprisonment,[25] the right to counsel should be similarly limited. This reasoning was also attacked in *James* where the court concluded that the petty offense exception to the right to trial by jury does not require the imposition of a coextensive exception to the right to appointed counsel.[26] The *James* court indicated that the right to counsel may be more fundamental than the right to trial by jury[27] and cited with approval an opinion of the Supreme Court of Minnesota that stated: "It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel."[28]

Significantly, the instant decision abolishes older classification standards for right to counsel and inserts a standard based on the duration of potential imprisonment. Historically, crimes have been artificially classified into different categories such as felonies, misdemeanors, petty offenses, quasi-crimes, and high misdemeanors. The inequities of these classifications are apparent by virtue of the fact that what may be classified as a misdemeanor in one state may be a felony in another,[29] and punishment for the same crime may vary from place to place.[30] Even the classic definitions of a felony as an offense punishable by death or imprisonment in a state penitentiary for more than one year and of a misdemeanor as including all other offenses[31] is not uniformly accepted among the different jurisdictions.[32] In Florida, for instance, any crime punishable by death or imprisonment in the state prison is a felony; all other offenses are considered misdemeanors.[33] The differentiating factor is the place of imprisonment rather than its duration.[34] Although differences

25. *See, e.g.*, Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

26. James v. Headley, 410 F.2d 325, 333 (5th Cir. 1969).

27. *See* Goslin v. Thomas, 400 F.2d 594, 598 (5th Cir. 1968).

28. State v. Borst, 278 Minn. 388, 398, 154 N.W.2d 888, 894 (1967); cited by the court in James v. Headley, 410 F.2d 325, 333 (5th Cir. 1969). *See also* Comment, *Right to Counsel for Misdemeanants: A Post-Gideon View*, 22 Sw. L.J. 679 (1968).

29. *E.g.*, adultery is a felony in Florida (as in most states), FLA. STAT. §798.01 (1969); but a misdemeanor in Kansas, KAN. STAT. ANN. §21-908 (1964).

30. *E.g.*, the penalty in Mississippi for "promotion of gambling" can be up to 20 days imprisonment, MISS. CODE ANN. §2190 (1942); in New York the maximum penalty is one year, N. Y. PENAL LAW §225.05 (McKinney 1967).

31. The distinction between imprisonment for a year for a misdemeanor and imprisonment for a year and a day for a felony is really a distinction without a difference as far as the unrepresented (and possibly innocent) indigent misdemeanant is concerned. Even acknowledging the additional difference that a felon loses his civil rights, this should not be a distinction sufficient to deny the misdemeanant the right to counsel.

32. *E.g.*, kidnapping is considered a "high misdemeanor" in New Jersey and is punishable by life imprisonment, N.J. REV. STAT. §2A:118-1 (Supp. 1968).

33. FLA. STAT. §775.08 (1969).

34. There is, for example, one misdemeanor in Florida for which violators may be imprisoned for a maximum of five years and fined as much as $5000. FLA. STAT. §548. 01 (1969) (engaging in pugilistic exhibition or fight for profit).

among jurisdictions are not harmful in all cases they would never seem to justify a denial of basic constitutional rights.

While the principal decision laudably precludes many of the inequities caused by the artificial classification of crimes, it leaves unanswered several ancillary, but important, questions. One of these is whether a defendant charged with several counts of petty offenses is entitled to appointed counsel where each count carries a relatively minor penalty, but the sum total of all potential charges exceeds the six-month standard established in the instant decision. In *James v. Headley* the Fifth Circuit, United States Court of Appeals, indicated that each count should not be treated separately, but that the maximum potential sentence resulting from conviction of all counts should be considered.[35]

A related question is whether imprisonment for nonpayment of a fine should be considered in determining whether the potential penalty is within the six-month standard.[36] A recent decision of the Fifth Circuit answered this question in the affirmative[37] holding that when an indigent defendant is faced with a choice of a fine or imprisonment he has, in fact, no choice at all. One commentator has stated: "Clearly to levy a punishment which calls for the extraction of property from an indigent defendant, who by definition (and in fact) is a man destitute of property, is to lead him up a *cul de sac;* for it is the imposition of a punishment which the courts well know is not within the defendant's power to perform."[38]

A third question that the court leaves unanswered is whether defendants charged with violations of municipal ordinances will be protected by the instant case.[39] While in Florida no penalty for violation of a municipal ordinance may exceed six months, substantial periods of imprisonment may result from conviction of several counts of the same offense or multiple

35. 410 F.2d 325 (5th Cir. 1969). *See also* Wooley v. City of Jacksonville, 308 F. Supp. 1194 (M.D. Fla. 1970).

36. *See* Note, *Imprisonment of Indigents for Nonpayment of Fines,* 31 OHIO ST. L.J. 342 (1970).

37. Matthews v. Florida, 422 F.2d 1046 (5th Cir. 1970).

38. Comment, *Continuing Echoes of* Gideon's *Trumpet — The Indigent Defendant and the Misdemeanor; A New Crisis Involving the Assistance of Counsel in "A Criminal Trial,"* 10 S. TEX. L.J. 222, 267 (1968).

39. In interpreting and applying *Gideon* the Fifth Circuit has drawn no distinction between violations of state misdemeanors and violations of municipal ordinances — the latter also falling under the aegis of *Harvey. See, e.g.,* Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969). In Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968), the defendant was found guilty of violating several municipal ordinances and was fined $240 or, in lieu thereof, to serve 120 days in jail. The indigent defendant filed a writ of habeas corpus asserting he had been denied the guaranties of the sixth amendment. The Fifth Circuit remanded and ordered that the defendant exhaust all state remedies noting that the court had decided numerous cases extending the right to counsel since Florida's original decision of *Fish v. State* in 1964. As a result of the impact of these federal decisions the court of appeals concluded that Florida's judgment on the matter may have been altered and that effective state remedies might exist. Shortly after the instant decision was handed down, *Boyer* again came before the Florida supreme court, which on jurisdictional grounds refused to rule on the question of extending the right to counsel in municipal ordinance prosecutions. 232 So. 2d 169 (Fla. 1970).

violations. Since Florida courts have not considered municipal ordinance violations to be misdemeanors,[40] it is not clear that an indigent defendant would be protected by the instant case, even if "tacking" of counts to determine the total potential sentence were allowed.

The instant decision is undoubtedly a step in the right direction, however, the question remains whether any of the courts have gone far enough. The Supreme Court of Florida has recognized that "the basic and fundamental 'due process' right guaranteed by the 14th Amendment must be held to include the 6th Amendment right-to-counsel . . . ."[41] Nonetheless, the court is understandably reluctant to apply this right to the so-called "lowest echelons of petty offenders and hand out to them the free service of an elaborate and expensive public defender system to defend them against charges of overparking or other petty offenses."[42]

When the limitations of purse and personnel are realistically considered,[43] at what point should the constitutional obligation of right to counsel begin? Any expansion of the right to counsel will have a significant effect upon the bench and bar. In 1965 there were estimated to be approximately 5 million persons charged with misdemeanors each year throughout the United States (excluding minor traffic code violations), with an estimated 700,000 of them eventually being imprisoned.[44] Of these 5 million, approximately twenty-five per cent, or 1¼ million, were indigent.[45] Appointment of counsel for all these indigents would entail an eight-fold increase in the demand for court appointed lawyers.[46] As many as 20,000 full-time lawyers, both prosecution and defense, would be needed in order to meet the requirements of adequate

40. Generally speaking, violations of municipal ordinances are not considered crimes in Florida. *See* Note, *Municipal Ordinance Violations in Florida: Selected Due Process Considerations*, 22 U. FLA. L. REV. 580 (1970). However, convictions can result in imprisonment for substantial periods of time. For instance, violations of the municipal code in Tampa, Florida, can result in a $500 fine or six months imprisonment or both. TAMPA, FLA., CODE §1-7 (1953). Equal protection safeguards should not be denied to persons accused of violating municipal ordinances because the effect of conviction is, in essence, the same as that for misdemeanors.

41. 236 So. 2d at 444.

42. *Id.*

43. The commentators have addressed themselves to this problem and have offered a number of alternative solutions. *See generally* NATIONAL LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED (1959); Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968); Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1, 68-69, 77 (1963); Note, *The Indigent Misdemeanant's Right to Counsel—An Extension of* Gideon v. Wainwright, 18 DRAKE L. REV. 109 (1968); Note, *An Adequate Defense for the Indigent*, 59 J. CRIM. L.C. & P.S. 73, 84 (1968); Note, *Right to Counsel for Misdemeanants: A Post-*Gideon *View*, 22 SW. L.J. 679 (1968); Comment, *The Right to Counsel for Misdemeanants in State Courts*, 20 ARK. L. REV. 156 (1966); Comment, *Right to Court Appointed Counsel for Misdemeanants in Virginia*, 4 RICHMOND L. REV. 306 (1970); Comment, note 38 *supra*. *See also* State *ex rel.* Taylor v. Warden of Orange County, 193 So. 2d 606, 607 (Fla. 1967) (Ervin, J., dissenting opinion).

44. 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 10 (1965).

45. *Id.* at 125.

46. *Id.* at 123.

representation. In 1966 less than half the necessary lawyers were available.[47] The cost of adequately expanding representation has been variously estimated from $28 million to $158 million per year, depending on the type of appointed counsel system used.[48] A number of solutions to the myriad problems caused by expansion of constitutional rights have been suggested: (1) expansion of assigned counsel programs,[49] (2) greater use of law students,[50] (3) expansion of the public defender system,[51] (4) expansion of the Office of Economic Opportunity's legal services and program.[52] All solutions, however, require extensive funding for which adequate sources must be found.

Perhaps the most equitable and constitutionally sufficient standard would be that counsel must be appointed where the offense charged could result in imprisonment. Since criminal and quasi-criminal offenses are almost without exception punishable optionally with imprisonment, however, such a standard would unreasonably be a burden upon the legal system. A modified imprisonment-in-fact standard would seem preferable. That is, counsel should be appointed for indigent offenders where the sentence imposed usually results in imprisonment; however, counsel need not be provided in criminal trials where imprisonment is not the usual penalty, even though the statute or ordinance may provide for it.[53]

An imprisonment-in-fact situation would seem nearly always to exist when an indigent person is charged with an offense punishable by fine or imprisonment, since by definition in no case could such a person pay the fine.[54] Imprisonment in these cases would necessarily result except where sentence was suspended or adjudication was withheld. Such a situation would also seem to exist where a defendant whether indigent or not is likely to receive "straight time" because of past repetitive criminal conduct or the peculiarly aggravated character of the criminal act in question.

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47. Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 393-94 (1966). Additional demands for counsel will arise if the expansion of the right to counsel extends to pretrial and post-conviction representation, such as that provided for felons. *See generally* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963).

48. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 56-57 (1967).

49. *See* NATIONAL LEGAL AID & DEFENDER ASS'N, note 43 *supra*; Junker, note 43 *supra*; Note, *The Indigent Misdemeanant's Right to Counsel—An Extension of* Gideon v. Wainwright, *supra* note 43, at 115-17.

50. *See* note 48 *supra.*

51. *See* note 48 *supra.*

52. *See* Curran, *Unavailability of Lawyer's Services for Low Income Persons*, 4 VALPARAISO L. REV. 308 (1970).

53. In a survey conducted in Seattle, Washington, it was found that there was at least a small chance of imprisonment in all nontraffic cases. In three categories of traffic cases imprisonment was a distinct possibility: (1) where the offenses were hit-and-run, reckless, or drunk driving; (2) where the defendant was under suspension for ap revious violation; (3) where the defendant could not pay the fine imposed. *See* NATIONAL LEGAL AID & DEFENDER ASS'N, HOW TO ORGANIZE A DEFENDER OFFICE 40-48 (1967).

54. *Compare* People v. McMillan, 53 Misc. 2d 685, 297 N.Y.S.2d 941 (Orange County Ct., N.Y. 1967), *with* Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968).

In any case, implementation of an imprisonment-in-fact rule would require an initial (and time consuming) determination of indigency by the court. It is not unlikely that in some instances a defendant might be indigent to the extent that he could not retain counsel yet be solvent enough to pay the customary fine. Thus, determinations of indigence should be based in these cases upon ability to pay the fine rather than the ability to retain counsel. It would seem impractical as well as undesirable to suggest that courts inquire in advance into the particular facts of each case beyond noting the past criminal record of the accused. Even this limited inquiry may be criticized on the ground that it may cause prejudging of cases.

Adoption of a modified imprisonment-in-fact standard would also be problematical in that some unrepresented defendants would be sentenced to imprisonment when usual sentence in similar cases was otherwise. In such cases a new trial, with the assistance of counsel, should be conducted although it necessarily impairs judicial efficiency.[55]

While the problem of providing counsel to indigent misdemeanants is not an easy one to resolve it is evident that some solution is necessary. Since *Gideon* the Florida state courts and the United States Court of Appeals, Fifth Circuit, have been in conflict. The decision in the instant case will substantially diminish the controversy but will by no means extinguish it. The question in *Boyer* involving municipal ordinance violations, for instance, is not answered by the instant decision.[56] While the Fifth Circuit rule requires counsel, the Florida rule will not permit it. The result of such a position will likely be a continued "impasse existing between [the Fifth Circuit] and the Supreme Court of Florida over the right to counsel."[57] In the instant case all seven justices agreed that the right to counsel should be extended to include some misdemeanants, but three justices argued that the court did not extend the right far enough. Justice Boyd, speaking for the dissenting minority, asserted that *any* indigent charged with violating *any* state law *or* municipal ordinance punishable by imprisonment is entitled to counsel at government expense.[58]

The instant case indicates the need for the United States Supreme Court to enunciate its position. Since 1966 the Court has denied certiorari in three cases involving an indigent misdemeanant's right to appointed counsel.[59]

55. There are additional liabilities inherent in provision of right to counsel in imprisonment-in-fact situations. Although a man of means has the financial ability to be represented by counsel, there are many misdemeanors for which the expense of an attorney far outweighs any benefit expected from the use of his skills. To guarantee appointed counsel to the indigent for all imprisonment-in-fact offenses would, in essence, deny the nonindigent equal protection of the laws. Therefore, there must be some limitation upon this right. Counsel could be appointed for instance, only for those offenses for which counsel is usually utilized.

56. *See* notes 39-40 *supra* and accompanying text.

57. Colon v. Hendry, 408 F.2d 864, 865 (5th Cir. 1969).

58. 236 So. 2d at 446.

59. Heller v. State, 154 Conn. 743, 226 A.2d 521, *cert. denied sub nom.*, Heller v. Connecticut, 389 U.S. 902 (1967); DeJoseph v. State, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied sub nom.*, DeJoseph v. Connecticut, 385 U.S. 982 (1966); Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966).

In *Winters v. Beck*[60] Justice Stewart, in a dissenting opinion, pointed out that the "Court has a duty to resolve the conflict and clarify the scope of *Gideon v. Wainwright*."[61] The defendant in the instant case has applied for certiorari to the Supreme Court. The Court should unequivocally resolve the questions mentioned above, hopefully recognizing adequate constitutional requisites granting representation to all persons accused of offenses punishable with a loss of liberty. Until the Supreme Court acts, the state and federal courts will remain in hopeless conflict.[62]

HAL H. KANTOR

60. 385 U.S. 907 (1966).

61. *Id.* at 908.

62. Illustrative of the existing conflict are the following cases, which arose in Connecticut. In DeJoseph v. State, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied sub. nom.*, DeJoseph v. Connecticut, 385 U.S. 982 (1966), defendant, an indigent unable to afford counsel and therefore unrepresented, was convicted of a misdemeanor. His conviction was upheld by the state supreme court, and the United States Supreme Court denied certiorari. In Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966), the defendant was convicted of the same crime as the defendant in DeJoseph. The federal district court granted his petition for habeas corpus, holding that the state's failure to appoint counsel was a denial of due process of law.