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RIGHT TO COURT-APPOINTED COUNSEL FOR MISDEMEANANTS IN VIRGINIA

The Virginia Constitution makes no specific guarantee of the right to counsel for those charged with a crime as is provided in the federal Constitution,[1] but the Supreme Court of Appeals has declared this to be a fundamental right within the Virginia Bill of Rights.[2] Such right is intended to apply to all persons regardless of their financial status,[3] so if a person charged with a felony proceeds in forma pauperis, it is the duty of the court to appoint counsel to defend him.[4] The right to court-appointed counsel has been extended to persons being questioned concerning a felony,[5] to those being tried for a felony,[6] to those effecting an appeal for a felony conviction,[7] and to juveniles during confinement hearings in state juvenile courts.[8] However, it has never been extended to those charged with a misdemeanor in Virginia.

The problem of how far the right to court-appointed counsel should be extended has arisen as a result of the United States Supreme Court's decisions that the duty to provide counsel for indigent defendants ap-

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[1] U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[2] "He [the accused] shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers. . . ." VA. CONST. art. I, § 8 (1902). This section has been interpreted as guaranteeing the right to counsel in felony trials. *See* Barnes v. Commonwealth, 92 Va. 794, 23 S.E. 784 (1895). *See also* Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967); Morris v. Smyth, 202 Va. 832, 120 S.E.2d 465 (1961); Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953); Watkins v. Commonwealth, 174 Va. 518, 6 S.E.2d 670 (1940).

[3] VA. CODE ANN. § 19.1-241.1 (Cum. Supp. 1968).

[4] VA. CODE ANN. § 19.1-241.3 (Cum. Supp. 1968).

[5] *See* Cardwell v. Commonwealth, 209 Va. 68, 161 S.E.2d 787 (1968); Johnson v. Commonwealth, 208 Va. 740, 160 S.E.2d 793 (1968); Dailey v. Commonwealth, 208 Va. 452, 158 S.E.2d 731 (1968); Durham v. Commonwealth, 208 Va. 415, 158 S.E.2d 135 (1967).

[6] VA. CODE ANN. § 19.1-241.1 (Cum. Supp. 1968). *See also* Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953); Watkins v. Commonwealth, 174 Va. 518, 6 S.E.2d 670 (1940).

[7] *See* Thacker v. Peyton, 206 Va. 771, 146 S.E.2d 176 (1966); Cabaniss v. Cunningham, 206 Va. 330, 143 S.E.2d 911 (1965).

[8] *See In re* Gault, 387 U.S. 1 (1967); Gregory v. Peyton, 208 Va. 157, 156 S.E.2d 624 (1967); Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966); VA. CODE ANN. § 16.1-173 (Cum. Supp. 1968). *See also* Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967). For a criticism of the juvenile's right to counsel in Virginia, *see also* 3 U. RICH. L. REV. 316 (1969).

plies to state,[9] as well as federal, courts.[10] The right was first extended only to those persons charged with capital offenses[11] who were so unfamiliar with the processes of the law that they could not adequately defend themselves.[12] Later the Court established the "special circumstances" rule,[13] extending the right to those charged with felonies only if the special circumstances of the case, such as ignorance of the defendant or complexity of the defense, required that counsel be appointed to insure due process.[14] Finally, in *Gideon v. Wainwright*,[15] the Supreme Court rejected the "special circumstances" standard and further extended the right to court-appointed counsel to all persons charged with felonies who could not afford retained counsel.[16]

The *Gideon* decision, strictly interpreted, applies only to those persons charged with a felony. However, the opinion left open the possibility of its application to misdemeanor cases as well.[17] As a result,

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[9] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *cf.* Powell v. Alabama, 287 U.S. 45 (1932).

[10] *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

[11] *See* Powell v. Alabama, 287 U.S. 45 (1932). Nine Negroes were charged with raping two white girls in Alabama. The trial judge appointed the entire Scottsboro bar to defend them, never specifically assigning an attorney to their defense. The defendants were thus denied due process of law guaranteed by the Fourteenth Amendment.

[12] However, the Supreme Court in *Powell* recognized that even educated persons who had no legal training would not be able to prepare an adequate defense if charged with a crime. An unjust conviction could result merely because the accused did not know how to properly assert his innocence. This line of reasoning was later reinforced in *Gideon*. *See* Uveges v. Pennsylvania, 335 U.S. 437 (1948).

[13] *See* Betts v. Brady, 316 U.S. 455 (1942).

[14] "[W]hile want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.* at 473. *See generally* Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948); 42 COLUM. L. REV. 1205 (1942); 22 S. CAL. L. REV. 259 (1949); 91 U. PA. L. REV. 78 (1942); 33 VA. L. REV. 731 (1947).

[15] 372 U.S. 335 (1963).

[16] The defendant was accused of breaking and entering with intent to commit a misdemeanor, which is a felony in Florida. He was refused appointed counsel and received a five year prison sentence. The Court held that the sixth amendment's right to counsel was "fundamental and essential to a fair trial" and made binding on the states by the fourteenth amendment. *Id.* at 342.

[17] "The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should be extended to *all* criminal cases need not now be decided.)" *Id.* at 351. (Harlan, J., concurring opinion).

many conflicting decisions[18] have arisen as to whether *Gideon* should be so extended. Some states have gone so far as to extend the right to court-appointed counsel to persons charged with any crime which could possibly result in loss of liberty.[19] Others have adopted the less liberal position of providing counsel only in the more serious misdemeanor cases,[20] while a minority still refuse appointed counsel to any person charged with a misdemeanor.[21]

Adding to the difficulty created by the language in *Gideon* is the fact that the Supreme Court has denied certiorari in three cases[22] arising since that decision, all of which specifically raised the issue of the right to court-appointed counsel for one charged with a misdemeanor. Many courts have interpreted this refusal as an indication that *Gideon* was intended to apply *only* to those charged with felonies.[23] The Court's refusal to face the issue was criticized by Justice Stewart:

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[18] *Compare* Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967); Stevenson v. Holzman, ... Ore. ..., 458 P.2d 414 (1969); *with* Watkins v. Morris, 179 So. 2d 348 (Fla. 1965); State v. Brown, 250 La. 1023, 201 So. 2d 277 (1967); City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967); Hendrix v. City of Seattle, ... Wash. ..., 456 P.2d 696 (1969).

[19] *See, e.g., In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965). California draws no distinction between felonies, misdemeanors, and petty offenses in extending the right to court-appointed counsel.

[20] *See* People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965). Some states have adopted modified rules for the application of appointed counsel. Arizona now requires that counsel "*must* be provided in all cases where the maximum [punishment] exceeds $500 in fines or six months imprisonment, or both, and *may* be provided if the trial court in its discretion believes that the complexity of the case is such that the ends of justice require legal representation." Burrage v. Superior Court, 105 Ariz. 53, 459 P.2d 313, 315 (1969). In North Carolina, the judge may appoint counsel for persons charged with misdemeanors if in his opinion such appointment is warranted. *See* N.C. GEN. STAT. § 15-4.1 (1963).

[21] For an extensive survey of the right to court-appointed counsel as applied by each state, *see generally* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 719 (1968).

[22] Winters v. Beck, 239 Ark. 1039, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966); Cortinez v. Flournoy, *cert. denied*, 385 U.S. 925 (1966); State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966). *But see* Patterson v. State, 227 Md. 194, 175 A.2d 746 (1961), *rem. sub nom. per curiam*, 372 U.S. 776, *rev'd sub nom. per curiam*, 231 Md. 509, 191 A.2d 237 (1963). Here the defendant was convicted of a misdemeanor and sentenced without being given the right to appointed counsel. The Supreme Court remanded the case to be tried in light of *Gideon*, whereupon the Maryland appellate court decreed that the defendant should have had appointed counsel. Therefore, the inference is that *Gideon* was meant to apply to serious misdemeanor cases.

[23] *See, e.g.*, Hendrix v. City of Seattle, ... Wash. ..., 456 P.2d 696 (1969).

> I think this Court has a duty to resolve the conflict and clarify the scope of *Gideon v. Wainwright.* I do not suggest what the ultimate resolution of this problem should be, but I do suggest that the answer cannot be made to depend upon artificial or arbitrary labels of "felony" or "misdemeanor" attached to criminal offenses by 50 different States. . . . [S]urely it is at least our duty to see to it that a vital guarantee of the United States Constitution is accorded with an even hand in all the States.[24]

Not only are there conflicting decisions among the state courts themselves, but there has also arisen a divergence in the opinions of state and federal courts[25] as to the application of this right. Under existing statutes[26] and rules of procedure,[27] the federal courts now guarantee the right to court-appointed counsel to any person charged with a crime, be it a felony or a misdemeanor (excluding petty offenses). Thus, anyone facing a charge for which the punishment is greater than six months imprisonment and a fine of five hundred dollars[28] has the right to a court-appointed attorney. The state courts, on the other hand, are compelled by *Gideon* to extend this right only to those charged with felonies. As a result, an indigent person charged with a misdemeanor in a state court is not guaranteed the same due process rights as one similarly charged in a federal court, absent a statute so providing.

No Virginia cases have been reported specifically raising the issue of the right to court-appointed counsel for misdemeanants, but the policy of the state seems to have been made clear by its legislature.[29] By statute, the right to appointed counsel is specifically extended to those charged with a felony.[30] Although this basic right has been guaran-

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[24] Winters v. Beck, 385 U.S. 907, 908 (1966) (dissenting opinion).

[25] An example of such a dual standard exists in Florida. The Fifth Circuit Court of Appeals has extended the right to appointed counsel to those charged with misdemeanors. *See* James v. Headley, 410 F.2d 325 (5th Cir. 1969); Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969) (dictum); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). However, the Florida Supreme Court has refused to extend the right beyond felonies. *See* Watkins v. Morris, 179 So. 2d 348 (Fla. 1965).

[26] *See* Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (1968).

[27] *See* FED. R. CRIM. P. 44(a) (Cum. Supp. 1969). Rule 44(a) is broader than the Criminal Justice Act of 1964 in that the rule extends the right to appointed counsel to defendants charged with petty offenses and to defendants unable to obtain counsel for other than financial reasons. *See* Notes of Advisory Comm. on Rules, FED. R. CRIM. P. 44(a) (Cum. Supp. 1969).

[28] *See* 18 U.S.C. § 1 (1969).

[29] *See generally* Manson, *The Indigent in Virginia,* 51 VA. L. REV. 163 (1965).

[30] "In any case in which a person is charged with a *felony* and appears for any hearing

teed in Virginia for many years, the statute in its present form was adopted three years after *Gideon*, indicating that the legislature strictly construed *Gideon* as extending the right to court-appointed counsel only to those charged with felonies.[31] In doing so, Virginia joined a minority of states[32] which restrict this right to felony cases.

The use of the statutory distinction between felony and misdemeanor as the criterion for the application of this right creates a standard which is far too arbitrary. A felony in Virginia is any crime punishable by death or a term of imprisonment in the state penitentiary, whereas a misdemeanor is defined as any crime other than a felony.[33] Since these definitions may vary from state to state, they do not serve as a satisfactory basis on which to rest the application of a fundamental constitutional right.[34] In Virginia, misdemeanor offenses are punishable by up to twelve months in jail,[35] while felonies are usually punishable by a year or more in prison. "It would be a gross perversion of solid Constitutional doctrine to find a rational distinction between one year in jail (a misdemeanor) and one year and a day in prison (a felony)." [36]

The absurdity of such a method of determination is emphasized in situations in which a person is charged with several counts of the same misdemeanor. For example, consider the situation in which a person is accused of passing several bad checks[37] to different banks over a period of time, each check being under the statutory amount required

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before any court without being represented by counsel, such court shall, before proceeding with the hearing, appoint an attorney at law to represent him and provide such person legal representation throughout every stage of proceeding against him." VA. CODE ANN. § 19.1-241.1 (Cum. Supp. 1968) [emphasis added].

[31] Virginia has guaranteed by statute since 1948 the right to court-appointed counsel to those charged with a felony. The statute was reworded by the Virginia Legislature in 1966 with no indication of extending the right beyond felony cases.

[32] Among other states denying appointed counsel in any misdemeanor cases are Alabama, Arkansas, Florida, Misssissippi, South Carolina, and Tennessee. *See* Junker, *supra* note 20, at 720-21.

[33] VA. CODE ANN. § 18.1-6 (1960). Most states, however, have foreseen the Supreme Court's extension and have taken appropriate action by legislative enactment or judicial decision to include at least some misdemeanants.

[34] *See generally* State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967); Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962).

[35] VA. CODE ANN. § 18.1-9 (Cum. Supp. 1968).

[36] Arbo v. Hegstrom, 261 F. Supp. 397, 401 (D. Conn. 1966). The defendant was convicted after pleading guilty to a charge of nonsupport (a misdemeanor). The trial court's failure to inform defendant of his right to court-appointed counsel was held to be a denial of due process.

[37] VA. CODE ANN. § 6.1-115 (1966).

for a felony[38] charge. It is very likely that he could be convicted of several counts and receive an aggregate sentence of well over a year in jail,[39] but since the crime with which he was charged is termed a misdemeanor by statute, he is denied the right to court-appointed counsel in Virginia. Compare that situation with one in which the defendant is charged with snatching a purse containing a five dollar bill. Such a crime, although termed a felony,[40] could possibly result in a short or suspended sentence, especially if it were a first offense for a youthful defendant. But here, even though the term of imprisonment may be much less than in the first example, the defendant has the right to have counsel appointed to defend him. Situations such as these illustrate the injustice in the system presently in effect in Virginia.

There are, of course, practical reasons for not extending the right to court-appointed counsel to all persons charged with any crime, even though ideally this would be desirable. To provide free counsel in every case involving possible loss of liberty would create, no doubt, an unbearable burden on the members of the bar and on the state treasury.[41] Even if this right were extended only to all non-traffic violations with possible penalties of loss of liberty, the burden would doubtlessly be too great. However, a less arbitrary line can be drawn than the one now in effect, which relies on the statutory definitions of felony and misdemeanor.

In order to remedy the present situation, it is necessary to have a more subjective and elastic method of determining when the right to appointed counsel should be invoked. One possible solution is to supply court-appointed attorneys to those charged with an offense which is likely to result in a substantial loss of liberty,[42] regardless of whether the offense is termed a felony or misdemeanor. The designation of which offenses warrant court-appointed counsel should be

[38] VA. CODE ANN. § 18.1-100 (Cum. Supp. 1968).

[39] In many states misdemeanants can be subjected to terms of imprisonment which are much longer than the maximum statutory penalty through "dollar-a-day" statutes. Such statutes add an extra day to the defendant's sentence for each dollar of his fine which he is unable to pay. The result is a discrimination against indigent defendants who must work off their fines by extended jail sentences. *See generally* Winters v. Beck, 281 F. Supp. 793 (E.D. Ark. 1968), *aff'd*, 407 F.2d 125 (8th Cir. 1969), *cert. denied*, 395 U.S. 963 (1969).

[40] VA. CODE ANN. § 18.1-100 (Cum. Supp. 1968).

[41] *See generally* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 52 (1967) [hereinafter cited as TASK FORCE REPORT]; Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, TASK FORCE REPORT 152.

[42] Junker, *supra* note 20, at 708.

left within the discretion of the trial judge, to be decided according to his experience in that type of case, while considering the punishment which this particular crime usually carries. If, in the judge's opinion, the crime with which a defendant is charged usually involves a substantial jail sentence or a complex defense,[43] the accused should be informed of his right to have counsel appointed. A method such as this would supply a rationale to the application of the right, and situations such as the one mentioned above, where the defendant is charged with several counts of a misdemeanor, would not arise. The defendant would be allowed a court-appointed attorney according to the probable length of his sentence, rather than the statutory classification of the charge.[44]

The use of a more subjective method of appointing counsel would still produce the problem of supplying the increased demand for legal assistance, even though attorneys would only be appointed to indigent defendants in selected cases. Some relief to members of the bar might be provided by allowing third year law students to defend and prepare cases for indigent persons charged with misdemeanors.[45] By instituting a closely supervised, accredited course available to certain third year students, law schools would be creating a valuable means of supplementing an otherwise theoretical curriculum with practical experience in the actual workings of the judicial system. More importantly, such a plan would provide some assistance for indigent persons charged with misdemeanors, where none existed previously.

An imminent repercussion of such an extension of the right to appointed counsel would be a slowing down of the "assembly-line" [46] process which frequently characterizes misdemeanor proceedings today. A substantial deceleration would require the addition of more courts to our judicial system on the misdemeanor level. However, the effect of such a deceleration could be mitigated by withholding the right to court-appointed counsel in misdemeanor cases until appealed to a court

[43] "Many misdemeanors carry substantial jail sentences and heavy fines; they may involve complicated factual and legal questions that require the technical resourcefulness of a lawyer. Moreover, a misdemeanor charge may be the defendant's first criminal involvement, and the disposition of the charge may have great bearing on his potential for a productive future." TASK FORCE REPORT 53.

[44] *See* Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150 (1963).

[45] Such programs have been used for several years in states such as Connecticut, Florida and Massachusetts. *See* TASK FORCE REPORT 62.

[46] *See generally* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

of record to be tried de novo.[47] Such solution would allow courts not of record to deal quickly with cases in which the accused wishes to admit his guilt and receive his punishment without further delay.[48]

The trend of the Supreme Court decisions in this area over the last forty years indicates that the Court will extend the right to appointed counsel to those charged with misdemeanors. Virginia's reluctance to take this step prior to such a decision has undoubtedly been a result of the practical considerations mentioned above concerning the demand on the state's financial and legal resources, in conjunction with the failure of the Supreme Court to enunciate its position on the subject. However the burden on the finances and manpower of the state may not be as overwhelming as initially indicated.[49] The cost of such a system, if feasable, should be accepted by Virginia as a necessary sacrifice for the extension of due process to as many indigent persons as possible who are faced with criminal charges.

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[47] *See, e.g.*, Manson, *supra* note 28, at 175.

[48] *See* VA. CODE ANN. § 16.1-132 to -136 (1960). Since appeal of a midemeanor conviction to a court of record is a matter of right, due process requirements would be satisfied if counsel were appointed only in courts of record. As a practical matter, the majority of misdemeanor cases in courts not of record involve uncomplicated cases in which the assistance of counsel would not be necessary.

[49] *See* TASK FORCE REPORT 55.