Will the Trumpet of Gideon Be Heard in All the Halls of Justice?

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COMMENTS

WILL THE TRUMPET OF GIDEON BE HEARD IN ALL THE HALLS OF JUSTICE?

SHERRYLL MARTENS DUNAJ*

I. Before Gideon—Historical Development of the Sixth Amendment Right to Counsel and Its Application to the States ............................................ 451
II. The Right of an Accused Non-Felon to Hire Counsel ..................... 452
III. The Practical Considerations of Granting an Absolute Right to Counsel .............................................................. 453
IV. Felonies, Misdemeanors, and Petty Crimes—The Problem of Definitions . 454
V. Can the Right to Counsel Be Analogized to the Right to a Jury Trial? ........................... 456
VI. Under the Federal Criminal Justice Act, Counsel Is Not Provided to "Petty Offenders"—Why Should the States Be Treated Differently? ........... 457
VII. Development of the Right to Counsel in the Various Jurisdictions—An Inconclusive Maze ................................................................. 458
A. Circuit Courts of Appeals .................................................... 458
   1. Eighth Circuit ............................................................ 458
   2. Fifth Circuit ............................................................ 458
B. Supreme Court of the United States ..................................... 461
C. The States ........................................................................ 462
   1. Arizona ......................................................................... 463
   2. Arkansas ....................................................................... 463
   3. California ....................................................................... 464
   4. Connecticut ................................................................... 464
   5. Louisiana ....................................................................... 465
   6. Massachusetts .............................................................. 465
   7. Michigan ....................................................................... 465
   8. Minnesota ...................................................................... 466
   9. Mississippi ..................................................................... 466
   10. New Jersey .................................................................... 467
   11. New York ...................................................................... 467
   12. North Carolina ............................................................. 468
   13. Ohio .............................................................................. 468
   14. Oregon ........................................................................ 469
   15. Wisconsin ..................................................................... 469
VIII. A Problem in Federalism—Florida vs. the Fifth Circuit .................. 470
IX. Collateral Attacks on Parole Revocations and on Enhanced Punishments for Second Offenders ......................................................... 473
X. Conclusion .......................................................................... 474

In 1963, the Supreme Court of the United States decided in Gideon v. Wainwright, 372 U.S. 335 (1963), that the sixth amendment right to counsel is a fundamental right, applicable to the states through the fourteenth amendment's due process clause and that "any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him." Since then, innumerable courts have

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This article does not in any way reflect the opinions or attitudes of Judge Fulton.

attempted to determine just how far this Supreme Court decision extends. Are the states required to inform the accused of his right to the aid of counsel and appoint a lawyer to represent him if he is indigent, where the accused is charged with a “petty offense,” a traffic offense, or a misdemeanor? Is the sixth amendment right to counsel less than absolute? If so, where must the line be drawn, and on what basis? Two United States Circuit Courts of Appeal have arrived at somewhat different conclusions in resolving this issue. The various federal district and state courts’ development of the question is as diverse as the states in which they sit.

I. BEFORE GIDEON—HISTORICAL DEVELOPMENT OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AND ITS APPLICATION TO THE STATES

The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

This guarantee was construed to mean that in federal courts counsel must be provided, unless intelligently waived, for defendants unable to employ counsel, and prior to Gideon, the sixth amendment’s right to counsel was held inapplicable to the states. The right, however, was extended to some of those accused in state courts under the fourteenth amendment’s guarantee of due process of the law, without reference to the sixth amendment. In Powell v. Alabama, young, uneducated Black men were hurried to trial for the rape of a White woman, a capital offense, without the effective aid of counsel, even though appointment of a lawyer was required by state law. The United States Supreme Court, in reviewing the case, held:

[...]

The Court in Powell extended the right to counsel to indigents accused by the state of capital crimes. Subsequently, the issue became whether this right would be extended to those accused of non-capital crimes.

2. Compare Beck v. Winters, 407 F.2d 125 (8th Cir. 1969) with James v. Headley, 410 F.2d 325 (5th Cir. 1969) and Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).
3. See section VII (C) infra.
4. U.S. Const. amend. VI.
9. Id. at 71.
In *Betts v. Brady*\(^\text{10}\) the Supreme Court resolved this issue by creating the "special circumstances" rule. The *Betts* court held that the appointment of counsel would be required in federal court trials and in those state trials where "special circumstances" existed which could operate to deny a fair trial under the due process clause.\(^\text{11}\) This rule was criticized by legal commentators,\(^\text{12}\) and in 1963, it was expressly overruled in *Gideon v. Wainwright*.\(^\text{13}\)

Gideon was charged with entering a poolroom with the intent to commit a misdemeanor, which was considered a felony under Florida law. The *Gideon* court held the right to counsel to be "fundamental" to a fair trial, in applying it to Gideon's conviction; however, since *Gideon*, courts have wrestled with the problems arising from the application of the decision. Precisely how fundamental is the right? Some courts have held *Gideon* applicable only to felons, for Gideon was charged with a felony. Others have held the decision to be absolute—applicable to all criminal cases—because there is no language in *Gideon* distinguishing felonies from non-felonies. Other courts have arrived at yet different conclusions.\(^\text{14}\)

Words can be gleaned from *Gideon* to support the view that it is applicable to all criminal cases including petty offenses and misdemeanors.\(^\text{15}\) On the other hand, the defendant Gideon was an accused felon, and thus, the decision could logically be limited to apply only to felony cases.

**II. The Right of an Accused Non-Felon to Hire Counsel**

Although it may seem incredible to some that the right to have one's own lawyer represent him could be questioned, it has been questioned in at least one case. In *Decker v. State*, 113 Ohio St. 512, 150 N.E. 74 (1925), the Ohio court held that accused persons have the right to retain counsel, and today there seems little question that there is a clear right to be represented by one's personally retained counsel.\(^\text{16}\) Thus, the problem of whether there is a right to counsel in non-felony cases only arises when a defendant is too poor to hire his own lawyer. If the accused is financially able to hire an attorney, the right to do so will not be denied.

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10. 316 U.S. 455 (1942).
11. Id. at 461-62.
12. See generally J. MEADOR, PRELUDES TO GIDEON (1967).
14. See section VII, infra.
15. [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental . . . in some countries, but it is in ours. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
III. THE PRACTICAL CONSIDERATIONS OF GRANTING AN ABSOLUTE RIGHT TO COUNSEL

The real practical issues behind this controversy are implementation and cost. For example, the Arkansas Supreme Court, in deciding that an accused charged with a misdemeanor is not entitled to counsel, commented upon the difficulties of implementing such a program:

Practical considerations must enter into these policy determinations. . . . [I]t must be recognized that the right to counsel is not an end in itself, but a means for achieving the most perfect justice possible in a given situation, which requires the striking of a balance between an ideal situation and what is humanly possible to achieve. Practical consideration of the impact of application of abstract constitutional principles . . . is not without precedent. . . .

The practical impossibility of implementing a system [of appointed counsel for accused misdemeanants] . . . is obvious when we consider that there are more justices of the peace in Arkansas than there are resident practicing lawyers and that there are counties in which there are no practicing lawyers. The impact of such a rule would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession.17

In People v. Letterio, the New York appellate court said:

We point out that the practical result of assigning counsel to defendants in traffic cases would be chaotic. Assigning counsel in but 1% of these cases could require the services of nearly half the attorneys registered in the state.18

The Fifth Circuit Court of Appeals, in a 1965 decision,19 commented that even if the court were to require the appointment of counsel in every criminal offense, there may not be enough lawyers available to appoint. "In Jacksonville, Florida . . . over 1,100 persons are charged in Municipal Court during an average week with non-felony offenses . . . [and] 60% are for traffic violations. There are less than 600 active members of the Jacksonville bar."20

On the other hand, without comment upon the number of lawyers available for appointment, the Oregon Supreme Court found that the cost of granting an absolute right to counsel would be minor:

We are not persuaded by the argument that the cost of providing counsel for indigent misdemeanants will be burdensome.

20. McDonald v. Moore, 353 F.2d 106, 109 n.3 (5th Cir. 1965).
See Aschenbrenner and Belt, Cost Study: The Defense of Indigents in Misdemeanor Cases in Oregon, Feb. 14, 1967. That study indicates that the cost of providing counsel to indigent misdemeanants in Oregon will amount to about $300,000 or about one-twentieth of the amount received annually from fines. ... We think the estimated amount is a modest fee for guaranteeing a fair trial in all criminal prosecutions.\(^2\)

In Mississippi, the Federal District Court for the Northern District, held that the failure of the state legislature to provide compensation for appointed lawyers in non-felony cases could not cause the court to limit constitutional guarantees.\(^2\) The court warned that continued "local inertia" would bring prosecutions of misdemeanors to a "grinding halt."

IV. FELONIES, MISDEMEANORS, AND PETTY CRIMES—THE PROBLEM OF DEFINITIONS

One of the problems which has grown out of the *Gideon* case\(^2\) is the problem of definitions. Gideon was convicted of a felony; thus, at the very least, the *Gideon* decision is applicable to accused felons. However, whether a crime is a felony or a misdemeanor has little or nothing to do with the nature of the criminal act—it depends upon the "character of the punishment" provided by the statute defining the crime.\(^2\)\(^4\) The distinction now commonly adopted, frequently by statute, is that offenses punishable by death, or by imprisonment in the state prison or penitentiary, are felonies; whereas, all others, including those punishable in the county jail, are misdemeanors.\(^2\)\(^5\)

In Iowa, bribery in an athletic contest was held to be a misdemeanor, even though the maximum penalty was ten years' imprisonment.\(^2\)\(^6\) Under Arkansas law, some misdemeanors are punishable by up to three years in jail.\(^2\)\(^7\) On the other hand, in Minnesota, a misdemeanor is punishable by no more than 90 days in jail or a $100 fine.\(^2\)\(^8\)

In *McDonald v. Moore*, the circuit court noted that misdemeanors under Florida law may be punishable by up to seven years; whereas, some felonies carry a maximum penalty of a little over a year. Commenting upon the incongruous results which could arise in creating a


\(^{24}\) 2 AM. JUR. 2D Criminal Law § 19 (1965).

\(^{25}\) Id.


\(^{28}\) MINN. STAT. § 609.02(3) (1969).
simple felony-misdemeanor rule applicable to a system such as Florida's, the court said:

We do not think it can be said that counsel must be appointed in all felony cases but not in any misdemeanor cases. We were informed by counsel for the State of Florida that one or more crimes, designated as misdemeanors under the Florida law, may be punished for as long as seven years. It can scarcely be said that a person charged with having committed such a misdemeanor would not be deprived of a fundamental right if denied the service of counsel, where the right to counsel is guaranteed to one charged with a felony for which the punishment may be no more than a year and a day.29

This labeling problem was also recognized by the federal district court in Brinson v. Florida, where the court said:

A definitional problem exists from one state to another state in labeling of the same offense. What is termed a felony in one state is called a misdemeanor in another. Thus, in some states such as Florida and Arizona, adultery is classed as a felony, but as a misdemeanor in other states such as Kansas. . . . Further illustrating the problem created by an arbitrary felony-misdemeanor classification is that even though a crime be classed as a felony or as a misdemeanor in all states, the possible punishment varies greatly from state to state. . . . Under modern legislation many so-called misdemeanors are more dangerous to life and limb than some felonies. . . . It therefore appears that the state's characterization of its criminal offenses cannot serve as a valid cut-off point when the right to assigned counsel [is considered].30

It seems incredible to this writer that the question of whether a crime is a misdemeanor or a felony depends upon the label given it by the state legislature and that that label can be used to delimit fundamental constitutional rights. Such a system is entirely too arbitrary.

The distinction between felonies and misdemeanors based upon the jail in which the accused may be imprisoned is not universally followed, however. Title 18 of the United States Code, section 1, defines the terms felony, misdemeanor, and petty offense in accord with the maximum term of imprisonment:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
(2) Any other offense is a misdemeanor.
(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

Assuming arguendo that the sixth amendment right to counsel is less than absolute, it seems far more rational to base the denial or granting of appointed counsel to an indigent accused upon the maximum time his liberty may be lost than upon the legislative categorization of the act of which he is accused.

For example, whether an accused is entitled, under the constitution, to a jury trial is based upon the maximum penalty to which the accused is subject—not upon the category of crime, as defined by the state, with which the defendant is charged. Duncan v. Louisiana, 391 U.S. 145 (1968). Petty offenders are not entitled to a trial by jury; a “petty offense” is one punishable by no more than six months in jail or a $500 fine or both. 8

Title 18 U.S.C., section 3006A, provides for compensation for counsel appointed to represent indigents accused of felonies or misdemeanors, as defined in section one of that title; however, petty offenders are not permitted compensated counsel. Apparently, section 3006A does not mean that the sixth amendment right to counsel is inapplicable to petty federal offenses; it simply means that counsel appointed to such cases will not be compensated under the Criminal Justice Act. 32

V. CAN THE RIGHT TO COUNSEL BE ANALOGIZED TO THE RIGHT TO A JURY TRIAL?

The petty—non-petty standard, now applicable to the sixth amendment's right to a trial by jury, has been urged by some to be equally applicable to the right to counsel. The Fifth Circuit laid this argument to rest, however, in its circuit. In James v. Headley, the court held:

The appellee erred in equating the right of trial by jury to the right to counsel. Because a charge is petty enough to lie outside the jury-trial requirement does not mean that it is also petty enough to allow suspension of the right to counsel. The petty-offense exception has not been applied uniformly to all Sixth Amendment rights [citing In re Oliver, 333 U.S. 257 (1948) (right to a public trial)]. . . .

The right to a lawyer's advice is peculiarly important in an accusatorial legal system such as ours. The elaborate defensive weapons courts and legislatures have fashioned for the individual are valueless if he lacks the understanding to use them.


33. 410 F.2d 325 (5th Cir. 1969).
The more fundamental nature of the right to counsel is also reflected in the fact that *Gideon* has been applied retroactively, while *Duncan* and *Bloom*, encompassing the right to jury trial, have not been so applied.\(^{34}\)

The Supreme Courts of Minnesota and Oregon have analyzed the proposed equation of the right to a trial by jury and the right to counsel in similar ways.\(^{35}\) The Minnesota court said, "[E]ven though the two rights derive from the same provisions of our Federal Constitution, they are not of equal significance when it comes to the matter of obtaining a fair trial."\(^{36}\) In summary, it would seem the two rights cannot be equated, for the right to a lawyer's aid would appear more basic to a fair trial than the right to be tried by a jury.

VI. UNDER THE FEDERAL CRIMINAL JUSTICE ACT COUNSEL IS NOT PROVIDED TO "PETTY OFFENDERS"—WHY SHOULD THE STATES BE TREATED DIFFERENTLY?

Title 18, United States Code, Section 1 defines "petty offenders" as those charged with crimes carrying penalties of no more than six months or $500 or both. And Section 3006A makes provision for compensation to lawyers appointed to represent indigents. However, this section does not include within its scope counsel for petty offenders.\(^{37}\) This does not mean, however, that counsel is not provided to indigents charged with petty crimes—it means only that they are not given *compensated* counsel.\(^{38}\) Rule 44, Federal Rules of Criminal Procedure (1968), reads as follows:

> Right to assigned counsel.
> *Every* defendant who is unable to obtain counsel shall be entitled to have counsel assigned. ... (emphasis added).\(^{39}\)

The Advisory Committee's notes on this Rule indicate that the intent was to broaden the right to counsel, extending it to petty offenders and to non-indigents who for other reasons are unable to retain counsel,\(^{40}\) even though these appointed lawyers would not be paid. Thus, the absolute right to counsel has been extended in the federal courts. In those districts and circuits which have required the states to grant counsel to indigent misdemeanants or petty offenders, the federal courts are not requiring of the states anything more than is required in the federal system.

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34. *Id.* at 331-33. *See also* Goslin v. Thomas, 400 F.2d 594, 597-98 (5th Cir. 1968).
VII. DEVELOPMENT OF THE RIGHT TO COUNSEL IN THE VARIOUS JURISDICTIONS—AN INCONCLUSIVE MAZE

A. Circuit Courts of Appeals

1. EIGHTH CIRCUIT

In 1968, the Federal Court of the Eastern District of Arkansas granted a habeas corpus petition to a petitioner who had been convicted, without the aid of counsel, of obscene and lascivious conduct, a misdemeanor.\(^4\) The ground for the petition was that the denial of assistance of counsel was a denial of the petitioner's sixth amendment right to counsel. On appeal to the Eighth Circuit, the district court was upheld.\(^5\) The circuit court held that the sixth amendment does not differentiate between misdemeanors and felonies—"all criminal prosecutions" are included in the amendment. But the court did not make the right to counsel as absolute as the amendment's language. The court said: "[W]e find it unnecessary to decide that all indigents have the right to assistance of counsel in all misdemeanor prosecutions. . . ."\(^6\) Granting or denying the right to appointed counsel merely on the basis of the crime's label—misdemeanor or felony—was expressly disapproved. (Some Arkansas misdemeanors are punishable by up to three year's imprisonment.) The eighth circuit suggested a six-month standard by citing Brinson v. Florida, 273 F. Supp. 840 (S.D. Fla. 1960) (6 month/$500 standard) and 18 U.S.C. section 3006A (Criminal Justice Act).\(^7\)

2. FIFTH CIRCUIT

In 1965, in Harvey v. Mississippi, a panel of Fifth Circuit judges reversed a Mississippi federal district court which had denied Clyde Harvey, an impoverished, unschooled Black farmer, his petition for a writ of habeas corpus. Harvey had been sentenced, without the aid of a lawyer, to ninety days in jail and fined five hundred dollars for possessing whiskey in violation of Mississippi law.\(^8\) The court held:

[T]he right to the assistance of counsel when entering a plea applies in state as well as federal tribunals is firmly established.

. . .

Waiver of such right to counsel cannot be presumed from the mere fact that the accused appeared without counsel or failed to request counsel. . . .

It is true that the cases which support appellant's argument all involved felony convictions, but their rationale does not seem

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42. Id. at 130.
43. Id. at 130 n.13.
44. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).
to depend on the often purely formal distinction between felonies and misdemeanors. One accused of crime has the right to assistance of counsel before entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon.\footnote{45}

\textit{McDonald v. Moore}\footnote{46} was decided by the Fifth Circuit shortly after the \textit{Harvey} case. Again the Fifth Circuit reversed a district court's denial of a misdemeanant's petition for writ of habeas corpus on the ground that the right to aid of counsel could not be arbitrarily denied all indigent non-felons. In this case, the petitioner was sentenced to six months in jail or a fine of $250 for each of the two misdemeanors of which she was convicted. The court noted the practical difficulties in effectuating a rule granting counsel to those indigents charged with misdemeanors but found itself bound by \textit{Harvey v. Mississippi}, which granted a writ of habeas corpus to a convicted misdemeanant because he was convicted without the benefit of counsel.\footnote{47}

Affirming a Louisiana federal district court,\footnote{48} the fifth circuit said in \textit{Goslin v. Thomas}:

Whatever may be the eventual interpretation of the \textit{Gideon} decision, it is clear that this circuit has adopted the broad view with respect to the rights to counsel in misdemeanor cases.\footnote{49}

In \textit{Goslin}, the petitioner had been sentenced to the maximum penalty for the misdemeanor of escape—one year.

Then, in October of 1968, Judge Brown, Chief Justice of the Fifth Circuit, took a different approach to the problem.\footnote{50} In \textit{Boyer v. Orlando}, the fifth circuit reversed the Florida district court, which had granted a writ of habeas corpus on the basis of \textit{Harvey, McDonald, and Goslin}. The basis for the reversal was that the petitioner had failed to "exhaust available state remedies," a requirement of 28 U.S.C. section 2254(b) (habeas corpus petitions by those in state custody). Because of what at that time was Florida's rigid position denying the right to counsel to those accused of misdemeanors, regardless of the potential jail term,\footnote{51} the district court had not required the usual "exhaustion," reasoning that appeals to the Florida courts on this issue would be futile. Judge Brown, ignoring \textit{Harvey, Goslin, and McDonald}, said that "[t]oo much has gone

\begin{itemize}
\item \textit{Id. at 268-69.}
\item 353 F.2d 106 (5th Cir. 1965).
\item \textit{McDonald v. Moore}, 353 F.2d 106, 109 n.3 (5th Cir. 1965).
\item \textit{Goslin v. Thomas}, 400 F.2d 594, 597 (5th Cir. 1968).
\item \textit{Boyer v. Orlando}, 402 F.2d 966 (5th Cir. 1968).
\item E.g., \textit{Watkins v. Morris}, 179 So.2d 348 (Fla. 1965); \textit{Fish v. State}, 159 So.2d 866 (Fla. 1964). This rule was somewhat modified in \textit{State ex rel. Argersinger v. Hamlin}, 236 So.2d 442 (Fla. 1970). See notes 131, 132 \textit{infra} and accompanying text.
\end{itemize}
over the dam . . . to assume that the Florida Supreme Court will perversely adhere to their decisions . . . .

In 1969, the fifth circuit reaffirmed its earlier decisions in a number of cases. In *James v. Headley*, the court reversed the district court which had denied petitions for writs of habeas corpus to two petitioners who were convicted, without the assistance of counsel, of various misdemeanors. The court said, “the right to counsel, as articulated in *Harvey*, is alive and well and living in this circuit. . . .” Although none of the offenses with which the petitioners were charged carried a maximum penalty of more than 60 days, the petitioners were sentenced to 600 and 240 days respectively (cumulating all the sentences and counting days served in lieu of a fine). The circuit court held that the charges could not be considered separately for purposes of calculating the possible sentence in determining the right to counsel. The case presented an ideal opportunity for the court to articulate just how absolutely the *Harvey* decision would be applied; however, because of apparent disagreement among the judges on the panel, this was not done. The writer of the *Headley* opinion, Judge Wisdom, said:

Judges Godbold and Simpson would rest the holding squarely on *Harvey*. The author of this opinion would go further. I start with the general principle that the Sixth Amendment establishes the right to counsel in “all criminal prosecutions.” There is, therefore, no constitutional distinction between felonies and misdemeanors, between gross and petty offenses, between the loss of liberty for 181 days . . . or fewer days . . . .

I take the position that regardless of labels, an offense is serious enough to require appointment of counsel if it may result in the loss of liberty for any period of time.

The flow of right-to-counsel-cases from the Fifth Circuit continued into 1970. Both *Shepherd v. Jordan* and *Matthews v. Florida* established

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52. Boyer v. Orlando, 402 F.2d 966, 967 (5th Cir. 1968). See note 127 infra and accompanying text.
55. The United States Supreme Court has recently held that where additional time in jail is imposed in lieu of a fine or costs which the defendant has been unable to pay, the additional time cannot bring the sentence over the maximum term permitted by the statute or ordinance. *William v. Illinois*, 399 U.S. 235 (1970). See also *Tate v. Short*, 91 S. Ct. 668 (1971).
57. Id. at 333-34.
58. Id.
59. Wooley v. Consolidated City of Jacksonville, 433 F.2d 980 (5th Cir. 1970); Shepherd v. Jordan, 425 F.2d 1174 (5th Cir. 1970); Matthews v. Florida, 422 F.2d 1046 (5th Cir. 1970); Capler v. City of Greenville, 422 F.2d 299 (5th Cir. 1970).
60. 425 F.2d 1174 (5th Cir. 1970).
61. 422 F.2d 1046 (5th Cir. 1970).
the manner in which maximum sentences would be calculated. The Matthews court said:

In computing the total potential penalty which may be imposed on a defendant, we suggest that the trial court not only consider the maximum possible sentence and fine under each charge, but also any additional sentence which might be imposed if the fine is not paid. . . . [T]his procedure gives a much more accurate representation of the gravity of the charges facing the defendant—especially an indigent defendant.62

That the court began to draw rules under which maximum sentences are to be counted indicates that the court does not intend to grant an absolute right to counsel, nor even a right whenever any incarceration is possible. If either of these rules were adopted, there would seem to be no need to establish a way in which to compute sentences. In Shepherd v. Jordan, the court, presented with the question of right to counsel in non-felony cases, cited Duncan v. Louisiana,63 a right to jury trial case which holds that those charged with "petty offenses" carrying a penalty of six months or under, would not be entitled to a trial by jury. The panel concluded that: "This Court can only say that the Sixth Amendment speaks to all criminal prosecutions, saving petty offenses which have been court excepted from its stricture."64 Without knowledge of prior cases decided by this circuit court, this statement would seem to establish a six-month/petty offense rule. Perhaps it could be said that this case receded from the Harvey v. Mississippi's 90-day rule. However, in October, 1970, the same court affirmed a district court opinion which held that an accused has the right to counsel if the potential penalty could amount to imprisonment of as much as ninety days or a fine of $500.65

To date, the rule in the Fifth Circuit is unclear. Apparently persons subject to a potential penalty of 90 days in jail have the right to assigned counsel. In Patterson v. Purdy, a writ of habeas corpus was granted to petitioner Patterson, who had been found guilty in the state court of operating a motor vehicle without a valid driver's license and sentenced to a total potential term of 47 days without benefit of counsel.66 This decision is, at this writing, being appealed to the fifth circuit; hopefully, it may result in the establishment of guidelines for the district courts within the circuit.

B. Supreme Court of the United States

The Supreme Court, in 1966 and 1967, was presented with the opportunity to rule on the question of the sixth amendment right to counsel of

62. Id. at 1049.
65. Wooley v. Consolidated City of Jacksonville, 433 F.2d 980 (5th Cir. 1970).
petty offenders, but the Court declined to hear the case. In Winters v. Beck, which came to the Court from the Arkansas Supreme Court, Justices Stewart and Black dissented from the Court’s denial of the petition for a writ of certiorari, because of the conflict between the Arkansas court and the United States Court of Appeals for the Fifth Circuit. Mr. Justice Black said:

No State should be permitted to repudiate [the words of Gideon] by arbitrarily attaching the label "misdemeanor" to a criminal offense. . . . I do suggest that the answer cannot be made to depend upon artificial or arbitrary labels of "felony" or "misdemeanor" attached . . . by 50 different States. . . . [I]t is at least our duty to see to it that a vital guarantee of the United States Constitution is accorded an even hand in all the States.

It has been suggested by some that the case of In re Gault, 387 U.S. 1 (1967), which concerned the application of due process to juvenile delinquency proceedings, has indicated the Supreme Court's position with respect to the right of counsel. It is said that the language in Gault clearly limits the application of Gideon to felonies or to serious offenses. The Court, in Gault, said:

[The juvenile] would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it.

At another point in the Gault decision, the Court speaks of the right to counsel as if it were based on the seriousness of the charge involved.

Thus far, however, much of the law in this area has been made in a single circuit—the fifth—and the district courts within that circuit. Eventually the Supreme Court will resolve the problem, probably when it is presented with a clearer conflict between circuits than presently exists.

C. The States

After trying to find a rule from the many cases deciding the issue of a non-felon's right to counsel, the Minnesota Supreme Court said:

[W]e can obtain no definite rule from the cases that have considered this question. There is no unanimity either in classifica-

69. Id.
71. In re Gault, 387 US. 1, 29 (1967).
72. Id. at 42.
73. Although this listing or summary is not intended to be all-inclusive, it does present
tion of cases as misdemeanors or in the conclusions that have been reached or the reasons for such conclusions.74

That this is so will be evidenced by the following:

1. ARIZONA

Arizona has established a "serious offense" rule in determining which of those indigent persons accused of non-felonies are entitled to appointed counsel. In a 1964 case,75 the Arizona Supreme Court found that an indigent defendant was illegally sentenced for a misdemeanor—assisting the escape of a convicted felon—because he was not accorded the aid of a court-appointed lawyer. The court found that any misdemeanor which is a "serious offense" carries with it the right to counsel. Whether an accused has been charged with a "serious offense" is determined by the nature of the offense, the extent of the potential penalty, and the complexity of the case. Then, in 1969, the Arizona court drew a mandatory dividing line at six months or $500.76 All cases wherein the accused could suffer a jail term of six months or more would carry the right to a lawyer's assistance. Further, the court established a permissive rule for cases carrying a penalty of less than six months. If the case is "serious" enough, the right may be accorded even though the offense is punishable by less than six months or $500; this determination would be made by the trial court in its discretion.

2. ARKANSAS

There is an apparent conflict between the eighth circuit, which includes the state of Arkansas, and the Arkansas Supreme Court. In Cableton v. State,77 the Arkansas court held that defendants charged with misdemeanors, regardless of the possible jail sentence, would not be entitled to counsel appointed by the court, for Arkansas law required appointed counsel only in felony cases. In reaching its decision, the court said that the United States Supreme Court had not yet decided the issue, and it would not try to anticipate what the Court would eventually do.78 The Cableton court, however, was clearly influenced by practical considerations. "The impact of [deciding otherwise] would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession."79

the majority of state court published opinions on this issue. For an excellent analysis of the various states' holdings, see State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967).

79. Id. at 538, 420 S.W.2d at 538-39.
On the other hand, the eighth circuit held that the sixth amendment
does not differentiate between felonies and misdemeanors, granting a
petition for writ of habeas corpus to one sentenced to 30 days in jail and
a $250 fine for obscene and lascivious conduct.\footnote{Beck v. Winters, 407 F.2d 125 (8th Cir. 1969).} In spite of this holding,
however, the eighth circuit seems to have spelled out a six-months or $500
general rule for granting counsel to indigents.

3. CALIFORNIA

The “rule” in California is clear—the right to the assistance of a
lawyer applies to \textit{all} cases, including those crimes labeled misdemeanors,
if the accused is susceptible to loss of liberty.\footnote{E.g., \textit{In re} Lopez, 2 Cal.3d 141, 465 P.2d 257, 84 Cal. Rptr. 361 (1970); \textit{In re} Render, 271 Cal. App. 2d 423, 76 Cal. Rptr. 522 (1969); \textit{In re} Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967); Blake v. Municipal Court, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966); \textit{In re} Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); \textit{Ex parte} Masching, 41 Cal. 2d 530, 261 P.2d 251 (1953).} The California courts
have based their holdings, for the most part, upon the state constitution,
which provides that “in criminal prosecutions, \textit{in any court whatever}, the
party accused shall have the right . . . to appear and defend in person
and with counsel.”\footnote{Cal. Const. art. I, § 13 (emphasis added).} Traffic cases, however, have been construed to be
non-criminal. Thus, it was held in \textit{Fallis v. Department of Motor
Vehicles} that the sixth amendment right to counsel does not apply to
traffic cases. However, the court did find a constitutional basis for the
right in non-criminal proceedings in the due process clause of the fifth
and fourteenth amendments and the fourteenth amendment’s equal pro-
tection clause—but the right to the assistance of counsel could not, in
these cases, be accorded absolutely.\footnote{\textit{Id.} at 386, 70 Cal. Rptr. at 602.}

4. CONNECTICUT

The Federal District Court sitting in Connecticut used a “special
circumstances” test for determining whether counsel was to be afforded
an indigent accused of the misdemeanor of non-support and sentenced
to a year in jail.\footnote{Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966).} The court discussed \textit{Gideon}, and found nothing in it to
limit its effect to felonies. The court said:

\begin{quote}
[I]t would be a gross perversion of solid constitutional doctrine
to find a rational distinction between one year in jail (a mis-
demeanor) and one year and a day in prison (a felony) . . . .
The Fifth Circuit has unhesitatingly refused to draw the line
even at prosecutions resulting in six month and ninety day
internments.\footnote{\textit{Id.} at 401.}
\end{quote}
In spite of this language, however, the court found it necessary to extend *Gideon* and instead based its holding in favor of the petitioner upon the "special circumstances" test (petitioner's inability to fend for himself) and the fact that there appeared to be an unasserted double jeopardy defense available to the petitioner which a lawyer would have recognized.

5. **LOUISIANA**

Louisiana apparently does not afford appointed attorneys to indigents accused of criminal offenses where the offenses are misdemeanors, regardless of the potential sentence.87 In a 1968 case, *State v. Rockeymore*, the Louisiana Supreme Court said:

Although it appears that the defendant had no attorney at the time of trial . . . [t]he United States Supreme Court has not held that an accused is entitled to counsel in a misdemeanor case . . . . [A]nd [i]t has never been the law of this state that a person charged with a misdemeanor is entitled as a matter of right to court-appointed counsel.88

The defendant in the *Rockeymore* case was sentenced to one year in jail after being found guilty of attempted theft, a misdemeanor. Louisiana is one of the states within the fifth circuit; thus, the state's position is contrary to and conflicts with the position of its federal court of appeals.89

6. **MASSACHUSETTS**

Citing *Gideon v. Wainwright*, a Massachusetts court held in 1966 that where the proceedings were sufficiently serious to result in confinement of the accused, he must be given the right to counsel, and the court must appoint a lawyer to represent him if he cannot afford his own.90

7. **MICHIGAN**

The defendant Mallory was convicted of a misdemeanor, receiving and concealing stolen goods valued under $100, without the assistance of counsel. A justice of the peace court sentenced him to 90 days. The defendant was on parole, and upon conviction for the misdemeanor, his parole was revoked. The defendant had not been granted a court-appointed lawyer because his crime was classified as a misdemeanor. In

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89. *See Section, VII (A) (2) supra.*
reviewing the conviction, the Michigan Supreme Court found the felony-misdemeanor distinction invalid.\(^9\)

It might be urged that the apparent distinction made in 18 U.S.C. § 3006A(b) ... between a felony or misdemeanor, on the one hand, and a "petty offense" has application [and] should be adopted by this Court. ... Scarcely can it be said, however, that a permissible maximum sentence of 3 months' imprisonment or $100 fine or both leaves the offense one to be regarded as so petty as not entitling the indigent accused to the assistance of counsel. His liberty is involved and in jeopardy. ...\(^9\)

However, "criminal cases" in Michigan apparently do not include ordinance violations.\(^9\)

8. MINNESOTA

The rule established by the Minnesota Supreme Court in its sweeping decision in *State v. Borst*, is that "counsel should be provided in any case, whether it be a misdemeanor or not, which may lead to incarceration in a penal institution."\(^9\)\(^4\) Subsequent Minnesota cases have adhered to this ruling.\(^9\)\(^5\) The *Borst* court said:

[R]ationalize as we will, it is simply impossible to draw a distinction between the right to counsel in misdemeanor ... and felony cases merely because they are called by different names. ... A defendant in court on a charge defined as a misdemeanor is as helpless to defend himself as he would be if he were charged with a ... felony. While a misdemeanor under our laws ... may not exceed 90 days in jail ... it nonetheless is a deprivation of liberty. ... [W]e decide that counsel should be provided in any case ... which may lead to incarceration in a penal institution.\(^9\)

The court left for the future the question of whether counsel should be provided where only a fine would be imposed.\(^9\)\(^7\)

9. MISSISSIPPI

In a civil rights class action brought on behalf of indigent juveniles who were charged with delinquency or misdemeanors and tried without

\(^{92}\) Id. at, 559, 147 N.W.2d at 72.
\(^{93}\) Id.
\(^{94}\) State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967).
\(^{95}\) State v. Collins, 278 Minn. 437, 154 N.W.2d 688 (1967); State v. Illingworth, 278 Minn. 434, 154 N.W.2d 687 (1967).
\(^{96}\) State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 893-94 (1967).
\(^{97}\) Id. But see Westberry v. Keith, 434 F.2d 623 (5th Cir. 1970), wherein the court found no basis to grant a writ of habeas corpus under 28 U.S.C. § 2254 (1964) to one who was merely fined and whose driver's license was revoked. In this case, petitioner had alleged that she was denied a court-appointed attorney.
counsel, a Mississippi federal court held that the sixth amendment right
to counsel had been applied by the fifth circuit "to misdemeanors as well
as to felonies."\textsuperscript{88} The district court said that \textit{Harvey v. Mississippi}, 340
F.2d 263 (5th Cir. 1965), stood for the proposition that counsel should
be afforded absolutely to \textit{all} those accused—including indigent misde-
meanants. The court went on to say that Mississippi’s failure to provide
compensation to lawyers who represent those accused of non-felonies was
of no consequence to the federal rights. Constitutional rights, the court
said, must nevertheless be upheld.\textsuperscript{99} The holding of this district court
probably goes further than the fifth circuit’s rule.

10. \textbf{NEW JERSEY}

The privilege of appointed counsel has been held applicable to \textit{all}
criminal trials in New Jersey. Where a citizen’s liberty is jeopardized,
the right of assigned counsel exists in municipal courts, in criminal and
quasi-criminal proceedings, and in cases where the defendant is charged
with crimes below the grade of misdemeanor, regardless of the fact that
these kinds of proceedings are handled in a summary fashion.\textsuperscript{100}

11. \textbf{NEW YORK}

The opportunity to have the services of a lawyer is a right available
to indigents charged with any crime which is tried in any New York
court.\textsuperscript{101} In \textit{People v. Witenski}, where the defendant was convicted of a
$2 theft and jailed for only a few days, the court held that defendant’s
right to counsel was violated by the failure to notify him of his right
to assigned counsel if he could not afford to hire a lawyer.\textsuperscript{102} However,
New York courts with jurisdiction over traffic offenses have no duty to
inform the accused of a right to counsel nor provide court-appointed
counsel for an indigent. The court, in \textit{People v. Letterio}, said:

\begin{quote}
[E]ven the Federal courts recognize the possibility of a rule
limiting the implementation of the right to counsel in the
prosecution of petty offenses. . . .
There are, historically, certain minor transgressions which
admit of summary disposition. New York has long deemed
traffic infractions as a form of misconduct distinguishable from
more serious breaches. . . .
We point out that the practical result of assigning counsel
to defendants . . . in but 1% of these millions of cases could
\end{quote}

99. \textit{Id.} at 1053.
Marincic}, 2 N.Y.2d 181, 139 N.E.2d 529 (1957); \textit{People v. McLaughlin}, 291 N.Y. 480, 53
N.E.2d 356 (1944).
require the services of nearly half the attorneys registered in this state.\textsuperscript{103}

However, the dissent in \textit{Letterio} could not find a rational distinction between a petty theft case where the defendant may be jailed for a few days and a traffic offense where the penalty may be far greater.\textsuperscript{104}

\section*{12. North Carolina}

We do not conceive it to be the absolute right of a defendant charged with a misdemeanor, petty or otherwise, to have court-appointed and paid counsel.\ldots

The Statute\ldots leaves the matter to the sound discretion of the presiding judge. Some misdemeanors and some circumstances might justify the appointment of counsel, but this is not true in all misdemeanors.\textsuperscript{105}

This rule was enunciated by the North Carolina Supreme Court in 1966. It was built upon and refined by subsequent decisions. In 1969, a state appellate court held that a defendant charged with a misdemeanor amounting to a "serious offense" has a constitutional right to the assistance of counsel during his trial.\textsuperscript{106} A "serious offense" was defined as one for which the authorized punishment exceeds six months or a $500 fine.\textsuperscript{107} Since then the "serious offense" six-month rule has been the law of North Carolina with respect to the right to appointed counsel.\textsuperscript{108}

\section*{13. Ohio}

The accused, in \textit{City of Toledo v. Frazier}, was convicted without the aid of counsel of operating a motor vehicle without a license, an ordinance violation considered a misdemeanor. The Ohio court held that the misdemeanant did not have a right to be apprised of his right to be represented by counsel and to have a counsellor appointed if he could not afford to hire a lawyer.\textsuperscript{109} The court said:

It is our considered judgment that the law of Ohio [not requiring appointed counsel in non-felonies] should be followed in this state until a mandate comes from the Supreme Court of the United States that the concept of the right to counsel\ldots

\begin{itemize}
\item \textsuperscript{103} 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965).
\item \textsuperscript{104} Id.
\item \textsuperscript{107} Id.
\item \textsuperscript{109} 10 Ohio App. 2d 51, 226 N.E.2d 77 (1967).
\end{itemize}
should be embraced within the due process clause of the Fourteenth Amendment... thereby coercing the legislature of Ohio... or the courts... to furnish defendants in misdemeanor cases with counsel at public expense.\textsuperscript{110}

14. OREGON

Misdemeanants who are indigent are entitled to appointed counsel in Oregon. Finding that the estimated expense of providing counsel for indigent misdemeanants would not be burdensome, the Oregon Supreme Court ruled in \textit{Application of Stevenson}\textsuperscript{111} that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances.

15. WISCONSIN

The Wisconsin rule is that counsel must be provided whenever the maximum penalty to which the accused is subject exceeds six months, and in other cases where the trial court, in its discretion, deems it desirable to appoint counsel.\textsuperscript{112} In computing the time under this rule, if an accused is charged with multiple misdemeanors, all the penalties must be added together, and if they, in total, exceed six months or \$500, counsel must be appointed.\textsuperscript{113}

IN SUMMARY

This admittedly brief excursion through some of the states which have decided the question of the applicability of the sixth amendment's right to counsel to those charged with non-felonies demonstrates the states' divergent and contradictory treatment of this problem. Several jurisdictions have found that an accused is not entitled to court-appointed counsel in any misdemeanor case. Other states have held the contrary. A third, middle ground position has been to afford counsel in "serious misdemeanors" or in misdemeanors with penalties up to a certain set time. Another approach is to construe traffic cases, for example, as non-criminal, and thus take them outside the right to counsel rule.\textsuperscript{114}

\textsuperscript{110} Id. at 60, 226 N.E.2d at 783.


\textsuperscript{112} State \textit{ex rel.} Plutshack v. State, 37 Wis.2d 713, 155 N.W.2d 549 (1968). See Melvin v. Burke, Case No. 63-C-52 (E.D. Wis. 1963); State \textit{ex rel.} Barth v. Burke, 24 Wis.2d 82, 128 N.W.2d 422 (1964).

\textsuperscript{113} State \textit{ex rel.} Plutshack v. State, 37 Wis.2d 713, 155 N.W.2d 549 (1968). The manner in which time is computed is comparable to the fifth circuit's method. See e.g., Matthews v. Florida, 422 F.2d 1046 (5th Cir. 1970).

\textsuperscript{114} See State \textit{ex rel.} Plutshack v. State, 37 Wis.2d 713, 722, 155 N.W.2d 549, 552 (1968).
The American Bar Association's Project on Minimum Standards for Criminal Justice recommended that counsel be provided in all proceedings punishable by a loss of liberty, regardless of their classification as misdemeanors, felonies or otherwise.115 The 1967 Presidential Commission Report on Crime suggested that counsel be appointed for indigents in all misdemeanors—except "traffic and similar petty charges."116

Regardless of which approach one may consider appropriate, a discrepancy exists between the states. The result is that an individual may be accorded the federal constitutional right in one state and be denied that right in another.117 Of course, lack of uniformity—especially considering the nature of her federal system—is not inherently bad, but the basic rights of the United States Constitution should be applied consistently throughout the nation.

VIII. A Problem in Federalism—Florida vs. the Fifth Circuit

The Florida Supreme Court and the United States Court of Appeals for the Fifth Circuit are at loggerheads over the issue of a non-felon's right to counsel. Regardless of the Fifth Circuit's holdings, Florida has drawn its own rule.

In 1964, the Supreme Court of Florida pronounced a felony-misdemeanor rule for its state; counsel would be provided for accused indigents charged with felonies, but not for those accused of non-felonies.118 The court based its holding upon the intent of the state's legislature in providing funds for appointed counsel in felony cases, but not in misdemeanor proceedings. Furthermore, the court found nothing in the Gideon decision requiring appointment of counsel in all cases.119

In the following year, the Fifth Circuit held in Harvey v. Mississippi that the sixth amendment right to counsel would be accorded to misdemeanants—at least to those misdemeanants subject to 90 days or more in jail.120

Then, shortly after the Fifth Circuit's holding in Harvey, the issue was again presented to the Florida Supreme Court. It held, in Watkins v. Morris, that an indigent traffic offender was not entitled to court-appointed counsel.121 The court was aware of the fifth circuit's contrary holding, for it said:

[W]e do not overlook Harvey v. State of Mississippi. . . . However, until authoritatively determined to the contrary by the Supreme Court of the United States, the rule in Florida is

115. ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE § 4.11 (1967).
116. PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY (1967).
118. Fish v. State, 159 So.2d 866 (Fla. 1964).
119. Id.
120. 340 F.2d 263 (5th Cir. 1965), See section VII (A) (2) supra.
121. Watkins v. Morris, 179 So.2d 348 (Fla. 1965).
that there is no absolute organic right to counsel in misde-
meanor trials.122

Then, in apparent hope that the Florida court would change its position, the Federal District Court for the Southern District of Florida denied a petition for habeas corpus, which alleged that the indigent petitioner had been denied counsel on the ground that the petitioner had failed to exhaust available state remedies, a prerequisite to petitioning the federal court for the writ under 28 U.S.C. section 2254.123 This holding required the petitioner to go to the state appellate courts and present this issue there before petitioning the federal court. The petitioner had urged that this should not be required of him, in view of the pronouncements of the Florida Supreme Court, because it would be a futile exercise. The federal court reasoned, however, that the 1967 Supreme Court juvenile due process case, In re Gault, could cause the Florida court to change its position.

In the light of the Gault decision . . . this Court cannot predict what the Florida Courts will do when again confronted with the problem in the instant case. Thus it cannot be said that petitioner has exhausted . . . state remedies.124


The Florida Supreme Court, meanwhile, reaffirmed its position, denying the right to counsel in all misdemeanor cases, in Taylor v. Warden of Orange County Prison Farms.126 But, in spite of this, late in 1968, Judge Brown, Chief Judge of the Fifth Circuit in reversing the federal district court, said:

Too much has gone over the dam in this flood stage dynamic development of overriding constitutional restrictions on state prosecution of criminal charges for us to assume that the Florida Supreme Court will perversely adhere to their decisions, recent as they are. Considering the deference and respect the Florida Supreme Court pays to our decisions in areas of federal . . . law, we cannot assume that Florida courts will ignore the impact of our recent decisions . . . [which] postdate the Florida decisions [Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965)] . . . [W]e

122. Id. at 349.
125. Brinson v. Purdy, 201 So.2d 260 (Fla. 3d Dist. 1967).
126. 193 So.2d 606 (Fla. 1967).
cannot conclude what their judgment would be today on an issue of fundamental justice in such a rapidly developing area.\textsuperscript{127}

Less than a year after this vote of confidence from Judge Brown, a Florida federal district court observed in \textit{Steadman v. Duff}:\textsuperscript{128}

\[\text{[I]t is apparent that no relief will be forthcoming from the Florida supreme court in the near future. . . . Comity must operate both ways, and the Florida courts have consistently refused to recognize the repeated federal mandates of the Fifth Circuit. Here the traditional presumption that state courts will protect constitutional rights in good faith has been overcome. . . . The time-honored principle of federalism cannot be made a shield to protect state courts reluctant to accept federal decisions.}\textsuperscript{129}\]

That an “impasse” existed between the state courts of Florida and the federal courts sitting in Florida and the Fifth Circuit was also recognized by the circuit court in \textit{Colon v. Hendry}.\textsuperscript{130}

Finally, in 1970, the Florida Supreme Court reconsidered its position and adopted a new rule, i.e., that the right to court-appointed counsel should be extended to non-felonies punishable by \textit{more} than six months imprisonment.\textsuperscript{131} The court’s reluctance in making this decision is shown by the following language:

\[\text{[W]e are by no means persuaded that the position we took in Fish, and the reasoning upon which it was based, are no longer valid. But our conclusion in this respect does nothing to extricate the trial courts of this state from the horns of the dilemma in which they now find themselves. On the one hand is the decision of this court in Fish affirming a lower court which had denied a court-appointed counsel to indigent misdemeanants; and on the other hand are the Fifth Circuit federal courts—both trial and appellate—that with the aid of the Sixth and Fourteenth Amendments and the writ of habeas corpus are coercing our state courts in decisions that are as distinguished for their lack of uniformity as for their lack of sound precedent, insofar as the applicability of Gideon v. Wainwright . . . to state trials of misdemeanor charges are concerned.}\textsuperscript{132}\]

\begin{thebibliography}{132}
\bibitem{127} Boyer v. Orlando, 402 F.2d 966, 967 (5th Cir. 1968). In spite of Boyer, however, Fifth Circuit panels continued to rule on right to counsel cases. Cf. Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969); James v. Headley, 410 F.2d 325 (5th Cir. 1969); Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969).
\bibitem{128} 302 F. Supp. 313 (M.D. Fla. 1969).
\bibitem{130} 408 F.2d 846, 865 (5th Cir. 1969).
\bibitem{131} State ex rel. Argersinger v. Hamlin, 236 So.2d 442 (Fla. 1970).
\bibitem{132} Id. at 443.
\end{thebibliography}
For direction in reaching this decision, the court looked to and adopted the six-month rule established in right-to-trial-by-jury cases and Judge Mehrtens' decision in *Brinson v. Florida*. The federal courts sitting in Florida and the Fifth Circuit appear to be rushing ahead to an absolute *Gideon* rule, and the new Florida six-month rule, out-of-step and contrary to the federal rule when it was adopted, may become obsolete.

In October, 1970, the Fifth Circuit affirmed a district court decision which applied the sixth amendment's right to counsel to accused indigents whose total potential penalty is ninety days or more. And, in that same month, Judge Eaton of the Southern District Court of Florida held that "any deprivation of liberty without counsel runs afoul of the Constitution." At this writing, no one is sure what the rule of the Fifth Circuit is. As Judge Eaton said, in his recent decision, "although no case in this circuit has extended the right to counsel to prosecutions that carried a total potential penalty...of less than ninety days, no case has established that there is a ninety day 'dividing line'..." On the other hand, as already noted, the Fifth Circuit has established rules for computing maximum sentences, an unnecessary act if the right to counsel will eventually be accorded to all those susceptible to incarceration. Thus, it may be that the rule will eventually be something less than absolute.

**IX. Collateral Attacks on Parole Revocations and on Enhanced Punishments for Second Offenders**

Two related problems have arisen with regard to the right to counsel in non-felony cases: (1) a parolee whose parole has been revoked because of a misdemeanor conviction in which he was not afforded counsel may be able to collaterally attack the revocation; and (2) second and third offenders who are susceptible to enhanced punishments because of their prior convictions may be able to collaterally attack any additional punishment given on this basis if the earlier convictions were obtained without the defendant a lawyer's aid.

Where it could not be determined whether the defendant was represented by counsel in prior felony convictions, the United States Supreme Court reversed a Texas court which had increased the defendant's punishment under the Texas recidivist statute. *Burgett v. Texas*, 389 U.S. 109 (1967). Citing this case, the Arizona Supreme Court held that a prior conviction for a petty crime, where the accused was unrepresented, could

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133. *See note 31 supra.*  
137. *Id.* at 3.  
not be used to increase the punishment for a new petty charge, because
the new petty offense would then become a "serious offense,"139 and, in
Arizona, Gideon applies to "serious offenses."140

On the other hand, the Wisconsin Supreme Court held:

[T]he validity of former misdemeanor convictions cannot be
collaterally attacked in a proceeding for additional punishment
under the repeater statute on a subsequent misdemeanor con-
viction for the reason that the former convictions are valid until
reversed. . . .

Whether or not prior misdemeanor convictions are proce-
durally antiseptic in no way affects the fact that prior contact
with the criminal law has not prevented subsequent violations.141

Furthermore, parole revocation may be collaterally attacked by a
parolee, whose parole has been revoked on the sole basis of a misdemeanor
conviction where he was not afforded court-appointed counsel and could
not afford to hire his own lawyer. A number of recent cases have vacated
parole revocations on this basis.142

X. CONCLUSION

This writer agrees with those who argue that the right to have the
aid of a lawyer must be given to all who may suffer the indignities of
incarceration. This is not to say that those who are guilty should go un-
punished, but that those accused of crimes for which valid defenses exist
should have the opportunity to present these defenses. As Justice Suther-
land said in Powell v. Alabama:143

Even the intelligent and educated layman has small and some-
times no skill in the science of law. If charged with crime, he is
incapable, generally, of determining for himself whether the
indictment is good or bad. He is unfamiliar with the rules of
evidence. Left without the aid of counsel he may be put on trial
without a proper charge, and convicted upon incompetent ev-
idence, or evidence irrelevant to the issue or otherwise inadmis-
sible. He lacks both the skill and knowledge adequately to
prepare his defense, even though he have a perfect one. He
requires the guiding hand of counsel at every step in the proceed-
ings against him. Without it, though he be not guilty, he faces
the danger of conviction because he does not know how to es-
tablish his innocence.

141. State ex rel. Plutshack v. State Dept. of Health & Soc. Services, 37 Wis. 2d 713, 726,
       155 N.W.2d 549, 556 (1968).
142. Sapp v. Wainwright, 433 F.2d 317 (5th Cir. 1970); Brantley v. Wainwright, Case
       No. 70-84-Civ-J (M.D. Fla., filed May 5, 1970); Mitchell v. Wainwright, 308 F. Supp. 436
       (M.D. Fla. 1969); Brown v. Wainwright, Case No. 68-189-Civ-J (M.D. Fla., filed Aug. 6,
143. 287 U.S. 45, 68-69 (1932).
Recently the United States Supreme Court has observed that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."  

A decision from the United States Supreme Court is needed to resolve this problem. Furthermore, when a lawyer is appointed, he should be adequately compensated for his work, to assure that he puts forth his best efforts. Under the Federal Criminal Justice Act, for example, the appointed lawyer may claim $10 an hour for out-of-court time and $15 an hour for trial time.  

On the other hand, the minimum bar fee in Dade County, Florida, for example, is $40 per hour for attorneys in practice less than five years.

The Founding Fathers recognized the need to have a lawyer's help in defending a criminal case. The sixth amendment reads: "In all criminal prosecutions the accused shall enjoy the right . . . to the Assistance of Counsel for his defense."

The words of Gideon v. Wainwright, however, seem especially appropriate to conclude this article: "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him."  

What lawyer could contend that this is not so?

146. Dade County Bar Ass'n, Schedule of Minimum Fees 3 (1970).