

MAGISTRATE COURTS:
COUNSEL, APPOINTMENT OF:
MISDEMEANORS:
INDIGENTS:

(1) Magistrate courts of this state have the power to appoint counsel to represent indigent defendants accused of misdemeanors.

(2) Counsel must be appointed in all misdemeanor cases of more than minor significance and in all cases where prejudice might result.

(3) No plea of guilty to a misdemeanor charge may be taken in the absence of counsel unless the accused has intelligently waived his right to be represented by counsel

June 21, 1963

OPINION NO. 207

Honorable Robert A. Young
State Senator
Twenty-fourth District
3500 Adie Road
St. Ann, Missouri



Dear Senator Young:

This is in response to your request for an opinion concerning certain powers and responsibilities of our magistrate courts. Your request is in two parts as follows:

1. "To what extent does a Magistrate have jurisdiction, power or authority to appoint counsel for indigent defendants accused of crimes?"
2. "What procedural safeguards must be observed by Magistrates in accepting pleas or in connection with trials of criminal cases, in order to comply with the requirements of Gideon v. Wainright 83 Sup. Ct. 792?"

Preliminary to approaching these questions some brief discussion of the decision of the Supreme Court of the United States in Gideon vs. Wainright, U.S. _____, 83 Sup. Ct. 792, 9 L. Ed.2d 799, is necessary. That decision was rendered March 18, 1963, and overruled a previous decision, Betts vs. Brady, 316 U.S. 455, rendered in 1942. The new doctrine, enunciated by the Supreme Court of the United States, is to the effect that indigent defendants in all criminal cases are entitled, as a matter of right, to be represented by appointed counsel in state court trials guaranteed by the Sixth Amendment to the Constitution of the United States now held to bind the states under the Fourteenth Amendment. Previously, in Betts vs. Brady, it was held that the Sixth Amendment did not bind the

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states. Until Gideon, the states were required by United States Supreme Court interpretation to provide indigents with appointed counsel in "serious" cases only. (Uveges vs. Pennsylvania, 335 U.S. 437, 69 Sup. Ct. 184, 93 L. Ed. 127.) The Supreme Court of Missouri has called attention to the anomalous nature of this doctrine on at least two occasions. State vs. Glenn, 317 S.W.2d 403, 407:

" * * * we do not readily see why the requisites of due process should vary according to the severity of the permissible punishment. * * *"

State vs. Warren, 321 S.W.2d 705, 709:

" * * * we see no readily apparent reason why the minimum standard for due process of law should depend upon the permissible punishment. * * *"

Although the crime charged in Gideon's case was a felony, the Supreme Court of the United States did not limit the language employed by it requiring appointment of counsel to application in felony cases only. This, despite the urging of amicus curiae that it do so. Neither did it limit the scope of its decision to the particular court of general jurisdiction involved.

Specifically, the principal opinion in Gideon's case states:

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

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What is there decided is perhaps best expressed in the concurring opinion of Mr. Justice Clark:

"That the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the amendment and from this court's interpretation."

The obvious burden of this opinion is that the states are obligated to provide counsel in the appropriate situation, which brings us to consideration of your first question.

I.

Since territorial days our courts, having jurisdiction of felony cases, were required by law to appoint counsel to serve without pay for indigents in capital cases. In the general statutory revision of 1835 such courts were required to appoint counsel to serve without pay for indigents in all felony cases. That provision has been carried down to this day and is now found in both Section 545.820, RSMo 1959, and Missouri Supreme Court Rule 29.01.

In addition to the statutory provision and court rule there is authority to the effect that our courts have the inherent power to appoint counsel to serve indigents in all cases (civil and criminal). State ex rel. Gentry et al. vs. Becket et al., 174 S.W.2d 181, 184[4,5]. But the underlying authority for this statement is to the effect that this particular power is predicated upon the common-law right of "courts of record" to regulate practice before them.

As stated in Gentry, supra:

"Attorneys are a privileged class; they only are permitted to practice in the courts; and they are officers of the court. The law confers on them rights and privileges, and with them imposes duties and obligations to be reciprocally enjoyed and performed. * * *"

See also Clark vs. Austin, 101 S.W.2d 977, 988[6-9].

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Although the magistrate courts of this state are not vested with jurisdiction to try felony cases, they are endowed with certain of the judicial power of this state by Article V, Section 1, Constitution of Missouri, 1945, and they are made "courts of record" by Section 517.050, RSMo 1959. Hence by virtue of the authority aforesaid they must be and are vested with the authority to appoint counsel to represent indigents in criminal trials.

The Supreme Court of the United States has stated unequivocally in Gideon that a judgment obtained in a criminal case against an indigent defendant who appears without counsel cannot stand in view of the Sixth Amendment to the Constitution of the United States unless the right there guaranteed is shown to be waived intelligently, understandingly and in the light of full knowledge of said right. If our magistrate courts lacked the power to appoint counsel to serve indigent defendants, then clearly they would lack the power to render a valid judgment against an indigent who refused to waive his right to counsel -- this cannot be.

Lest this opinion and the opinion of the Supreme Court of the United States in Gideon's case create consternation with reference to minor offenses (minor traffic cases, minor disturbance of the peace, etc.), we should point out that Gideon has not finally disposed of the entire question.

By Title 18, Section 3401, United States Code, United States Commissioners are vested with authority to try petty offenses. A "petty offense" is described in Title 18, Section 1(3) as one involving a penalty of six months' imprisonment or less or five hundred dollars fine or less, or both. In Title 18, Section 54(b) (4) it is specifically provided that the federal rules of criminal procedure are not to apply to the trial of petty offenses (it is within these rules that the various federal courts are required and empowered to appoint counsel to represent indigent defendants in criminal cases). In Title 18, Section 3402, it is provided that the Supreme Court of the United States promulgate rules for the conduct of the trial of petty offenses before United States Commissioners. That Court has made such rules but has not required or empowered the United States Commissioners to appoint counsel in these cases, and we find no decision of any superior federal court vitiating a judgment of conviction by a United States Commissioner by virtue of his failure to appoint counsel to serve an indigent defendant.

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Therefore, it may very well be that judgments will be permitted to stand in minor cases where the defendant has been unable to obtain counsel and has not been provided one by the court so long as no manifest prejudice has resulted. However, application of this doctrine (if doctrine it may be called) should be approached with extreme caution so as to avoid the slightest suggestion of prejudice or unfair advantage.

II.

With respect to your second question, Mr. Justice Sutherland of the Supreme Court of the United States provided the answer in 1932 while dealing with the common-law rule respecting the right to counsel in *Powell vs. Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 166. He states:

"Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel."

He then goes on to say:

"As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. 'For upon what face of reason,' he says, 'can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?' One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused

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shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

To this we can only add that no criminal proceeding should be taken in the absence of counsel unless it can be clearly established that the defendant intelligently waives counsel or that in minor cases none of the following will have a prejudicial bearing:

1. The gravity of the offense charged;
2. The nature of the issue, i.e., whether simple or complex;
3. The age of the accused;
4. The mental capacity of the accused;
5. The background and conduct of the accused including amount of education and experience;
6. The accused's knowledge of the law and court procedure including knowledge thereof presumably gained from previous prosecutions;
7. The ability and willingness of the court to protect the accused during the proceedings (see Annotation, 93 L. Ed. 149).

It should be kept in mind that what is stated here does not specifically apply to the conduct of preliminary hearings before magistrates in this state. Although the opinion request does not touch upon the subject we think it advisable to mention that the Supreme Court of the United States has indicated that the guarantee of the right to counsel does not pertain solely to the conduct of the trial but may bear directly upon all of the proceedings against the accused if, at the particular stage of the proceeding under consideration some matter of defense or tactic is deemed waived or some right lost if not properly asserted. Hence the Supreme Court of the

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United States reversed in Hamilton vs. Alabama, _____ U.S. _____, 7 L. Ed.2d 114, 82 Sup. Ct. _____, because an accused without counsel having pleaded not guilty on arraignment without raising the defense of insanity at that time as required by Alabama law was deemed to have waived the defense and could not raise it in subsequent proceedings.

In Walton vs. Arkansas, _____ U.S. _____, 9 L. Ed.2d 9, 83 Sup. Ct. _____, a judgment was vacated and remanded because the accused was not represented by counsel at the time of arraignment in the course of which he acknowledged the voluntariness of his confession and such acknowledgment was later used in evidence against him at the trial, the court stating:

" * * * We are unable to conclude from the record filed in this court either that petitioner had counsel at the time of the arraignment proceedings or, if not, that he was advised of his right to have counsel at such proceedings and that he understandingly and intelligently waived that right."

In White vs. Maryland, _____ U.S. _____, 10 L. Ed2d 193, 83 Sup. Ct. _____, a state conviction was reversed upon the following facts: Accused was brought before a magistrate for preliminary hearing upon a capital offense without counsel where he pleaded guilty. In due course he was arraigned in a court of general jurisdiction where he was represented by appointed counsel and made pleas of not guilty and not guilty by reason of insanity. At the trial the plea of guilty made by him before the magistrate was introduced into evidence and was not objected to. Nevertheless, as against the contention of the State of Maryland that " * * * Under Maryland law there was 'no requirement (nor any practical possibility under their present criminal procedure) to appoint counsel' for petitioner at the 'preliminary hearing * * * nor was it necessary for appellant to enter a plea at that time.' * * *", the Supreme Court of the United States said: "Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel."

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This should stand as an admonition to our prosecuting attorneys as well as to our magistrate judges to avoid the occurrence of any situation at preliminary hearings which, because of the absence of defense counsel, would create inhibiting factors to further prosecution of the case.

CONCLUSION

1. The magistrate courts of this state have the power to appoint counsel to represent indigent defendants accused of misdemeanors.

2. In every criminal case coming before a magistrate judge the accused should be advised of his right to appear by counsel. If the accused is indigent, counsel should be appointed to represent him where the case is of more than minor significance and when prejudice might otherwise result. If the indigent accused desires to plead guilty or otherwise proceed without counsel, it should first be shown that he has been advised of his right to have counsel appointed to represent him, how and why counsel could be of benefit to him and that he has the capacity to waive his rights intelligently.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

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