North Dakota Law Review

Volume 46 | Number 3 Article 8

1969

Criminal Law - Right to Counsel - Municipal Ordinance Violators

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support, and when insurance can be obtained to cover nearly every risk,[54] public policy will no longer allow protection of the hospital or blood bank because of their "humane" function at the expense of the innocent consumer. North Dakota and other states have proclaimed policy by legislating against implied warranties on the "sale" of blood, but they cannot prevent the oncoming trend of strict liability protection to the defenseless consumer.

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CRIMINAL LAW — RIGHT TO COUNSEL — MUNICIPAL ORDINANCE VIOLATORS—The indigent respondent was arrested for disorderly conduct, a violation of the Police Code of the City of Portland. A plea of not guilty was entered. The respondent was not advised by the municipal court that if he was unable to employ counsel, the court would appoint counsel to represent him. After respondent was convicted and sentenced to six months in jail, he filed a petition for, and was granted a writ of habeas corpus by the circuit court of Multnomah County. Appeal was taken by the officer responsible for his custody, who claimed that a person charged with a municipal ordinance violation had no constitutional right to court appointed counsel. The Supreme Court of Oregon, one judge dissenting, *held* that the Sixth Amendment to the United States Constitution, as well as the Oregon Constitution extended the right to counsel to misdemeanants, including those accused of violating municipal ordinances. The court further stated that no person may be deprived of his liberty who has been denied the assistance of counsel as so guaranteed by the Sixth Amendment. *Stevenson v. Holzman*, ——*Ore.*——, 458 P.2d 414 (1969).

The Oregon Supreme Court relied primarily on the language of the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence.[1]

This constitutional right was first made applicable to the states

upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1122 (1959). Prosser notes that the public outcry has been greatest in food cases, and that extension of this policy to other products will depend upon probable danger, frequency of injury, and reasonable public expectation. The rule of strict tort liability as set out by the RESTATEMENT (SECOND) OF TORTS § 402 A, comment M (1965), does not depend on the laws of contract or sale. The seller is strictly liable for his defective products whether there has been a representation or not. Rather than proceed in warranty, it would seem simpler to regard the liability of the Blood Bank as one of strict liability in tort. *See generally* Greenman v. Yuba Power Products, Inc., 57 Cal. 2d 697, 377 P.2d 897 (1963); Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

54. *See* VANCE, INSURANCE § 6 (3d ed. 1951); *cf.* Annot., 25 A.L.R.2d 141 (1952); 15 AM. JUR. 2d *Charities* § 154 (1964).

1. U. S. CONST. amend. VI.

in capital cases in *Powell v. Alabama*,[2] then applied on a case by case standard to the states in *Betts v. Brady*.[3] Subsequently this right was made binding upon the states in all cases of serious offenses in *Gideon v. Wainwright*,[4] where Justice Douglas stated:

> [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.[5]

The application of that statement was limited by Justice Harlan in concurrance, who assured that *Gideon* should not be given full application to state proceedings, but should be applied only to cases which ". . . carry the possibility of a substantial prison sentence."[6] The Supreme Court has reinforced Justice Harlan's limited interpretation of *Gideon* by denying certiorari in at least three cases applying to misdemeanants and the right to counsel.[7] Justice Stewart favored certiorari in *Winters v. Beck*[8] to clarify the scope of *Gideon*, and to see that the Court fulfilled the duty to apply a vital guarantee of the United States Constitution evenly in all states, rather than making the determination depend on arbitrary felony or misdemeanor classifications.

The most notable extension of the right to counsel in a state court prior to Stevenson was the Minnesota decision of *State v. Borst*.[9] In *Borst*, the right to counsel was granted to all indigent misdemeanants who faced a potential jail sentence. The Minnesota Court based their decision upon their supervisory powers over the administration of justice, and not on any constitutional grounds.[10] This position was taken because: the United States Supreme Court had not yet given an answer on the matter; the states were in hopeless confusion regarding the classification of acts as misdemeanors or felonies; and the results of similar cases in other jurisdictions varied widely.[11]

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2. Powell v. Alabama, 287 U. S. 45 (1932).
3. Betts v. Brady, 316 U. S. 455 (1942).
4. Gideon v. Wainwright, 372 U. S. 335 (1963).
5. *Id.* at 344.
6. *Id.* at 351 (Harlan, J. concurring).
7. DeJoseph v. Connecticut, 385 U.S. 982 (1966); Cortinez v. Flournoy, 385 U.S. 925 (1966); Winters v. Beck, 385 U.S. 907 (1966).
8. Winters v. Beck, 385 U.S. 907, 908 (1966). "No State should be permitted to repudiate those words [referring to the language " . . . any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. at 344 (1963)] by arbitrarily attaching the label 'misdemeanor' to a criminal offense." *Id.* at 908, where a footnote indicates that in Arkansas, some misdemeanors are punishable by up to three years imprisonment.
9. State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967).
10. *Id.* at 894.
11. *Id.* at 892-93. *See also* the following cases granting misdemeanants the right to counsel: McDonald v. Moore, 353 F.2d 106, (5th Cir. 1966) (Containing dicta, however, at 108 that traffic offenses should be excluded.); Harvey v. Mississippi, 340 F.2d 263, (5th Cir. 1965); Phillips v. Cole, 298 F. Supp. 1049 (D. Miss. 1969) (deals with juveniles.); Rutledge v. Miami, 267 F.Supp. 885 (S.D. Fla. 1967); *In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967); State v. Collins, 278 Minn. 437, 154 N.W.2d 688

In the present case, the Oregon Court failed to equate the right to counsel to that of a jury trial, yet pointed out that the Supreme Court had very recently affirmed the denial of a jury trial in petty offense cases.[12] However, the Oregon Court alluded to the distinction made in *Borst* that the right to counsel is more essential to a fair trial than is the right to a jury:

> It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel. Consequently, we do not consider the cases involving the right to a jury trial controlling in this area.[13]

The non-application of the petty offense rule to all constitutional guarantees was emphasized by reliance on a recent decision of the Supreme Court, where the denial of a transcript of the municipal court proceedings at public expense to an indigent convicted of drunken driving was found to be a denial of equal protection as guaranteed by the Constitution.[14] For this reason the present court relied on language from *Gideon* to reinforce the ideal that counsel is required for ". . . every step in the proceedings against him . . .",[15] including the right to counsel. The Oregon Court states as its policy: "The assistance of counsel will best avoid conviction of the innocent——an objective as important in the municipal court as in a court of general jurisdiction."[16]

The Oregon Court placed secondary reliance upon two older Federal decisions,[17] which state that counsel should be provided in all cases, regardless of the length of potential loss of liberty.[18] The Oregon Court fails to recognize, however, that since these cases were decided, the Criminal Justice Act of 1964 has been codified,[19] which requires appointed counsel only for indigents charged with

(1967); State v. Illingsworth, 278 Minn. 434, 154 N.W.2d 678 (1967). *Contra,* Brinson v. State, 269 F. Supp. 747 (S.D. Fla. 1967) (traffic offense); Winters v. Beck, 239 Ark. 1151, 297 S.W.2d 364 (1965), *cert. denied,* 385 U.S. 907 (1966); State v. McCrowe, 272 N.C. 523, 158 S.E.2d 337 (1968); Hendrix v. Seattle, ——Wash. 2d——, 456 P.2d 696 (1969).

12. Frank v. United States, 395 U.S. 147 (1969). In this case the court found the determining factor upon which to classify an offense as petty or serious should be the severity of the penalty authorized, and where no maximum penalty is authorized, the severity of the penalty actually imposed should be determinative. *Quaere* how the latter standard can be applied prospectivly. Nevertheless, the Court referred to Congress' determination that petty offenses are those misdemeanors which do not carry a penalty exceeding six months imprisonment or a fine of $500 or both, as announced in the Criminal Justice Act of 1964, 18 U.S.C. § 1 (1964).

13. State v. Borst, 278 Minn. 388, 154 N.W.2d 888, 894 (1967).

14. Williams v. Oklahoma, 395 U.S. 458 (1969).

15. Gideon v. Wainwright, 372 U.S. at 345 (1963).

16. Stevenson v. Holzman, ——Ore. at——, 458 P.2d at 418 (1969).

17. Johnson v. Zerbst, 304 U.S. 458 (1938); Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

18. Johnson v. Zerbst, 304 U.S. at 463, 467 (1938); Evans v. Rives, 126 F.2d at 638 (D.C. Cir. 1942).

19. 18 U.S.C. § 3006A (1964).

other than petty offenses in the Federal Courts. A petty offense has been defined as any offense carrying a maximum penalty of less than six months imprisonment and/or a $500.00 fine.[20] While the court did not specifically refer to the language of *James v. Headley*,[21] a 1969 decision, they did mention the case. *James* considered the Criminal Justice Act of 1964 to set standards for determining when counsel should be *compensated* in Federal Courts, and *not* a limitation of fundamental constitutional rights.[22] This view is further supported by a reading of the Federal Rules of Criminal Procedure, Rule 44, which extends the right to counsel to all criminal proceedings.[23]

The dissent in *Stevenson* considered the adoption of Rule 44 of the Federal Rules to be one of public policy, and not grounded on any constitutional right,[24] because the Federal Rule was adopted only after arrangements for funding had been provided. The dissent also took issue with the majority reliance on the Oregon constitutional provision[25] and interpreted that provision as applying only to felony cases tried in the circuit courts of the state, and not to courts of inferior jurisdiction.[26]

The *Stevenson* decision is contrary to a recent Washington Supreme Court decision[27] where the court ruled that while everyone may have a right to counsel, they do not necessarily have a right to counsel at public expense when charged with a misdemeanor in municipal court. The court stated:

> Perhaps ours would be a better society if the right to have counsel implied a corresponding duty in the state to supply counsel, but the constitutions now in force contain no such apparent mandate and impose the duty on the state only in prosecutions for felonies.[28]

The Washington Court refused to stretch beyond the felony rule for the right to appointed counsel by citing numerous Supreme Court cases recognizing the right to counsel only in felony proceedings.[29] The Washington Court reinforced its finding by alluding to

20. 18 U.S.C. § 1 (1964).
21. James v. Headley, 410 F.2d 325 (5th Cir. 1969).
22. *Id.* at 331.
23. FED. R. CRIM. P. 44(a). "The right to and assignment of counsel is made available to every defendant unable to secure counsel." The note of the Advisory Committee states that this amended rule extends the right to counsel to petty offenses to be tried in the district courts and to defendants unable to secure counsel for reasons other than financial.
24. Stevenson v. Holzman, ——Ore. at——, 458 P.2d at 419 (1969).
25. ORE. CONST, art. I, § 11 "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel; . . ."
26. Stevenson v. Holzman, ——Ore. at——, 458 P.2d at 420 (1969).
27. Hendrix v. Seattle, ——Wash. 2d——, 456 P.2d 696 (1969).
28. *Id.* at 703.
29. *Id.* at 701-02.

the argument that if a right to counsel is recognized for so-called petty offenses and municipal ordinance violations, our system of inferior courts would lose their effectiveness to handle large volumes of judicial business at a minimum cost and delay. The court extended this reasoning by stating that through granting the right to counsel, a snowballing effect would result. The Washington Court feared that the indigent defendant would also be entitled to the rights to clinical and psychiatric examinations, court reporters, and investigation capabilities, a cost and burden which could unduly hamper and compound the effectiveness of these inferior courts as well as the entire system of justice.[30]

The Washington Court, as well as the dissent in *Stevenson*, reasoned that if an indigent felt he did not have a fair trial he could always appeal, and the appellate court could direct appointment of counsel for the indigent.[31] This rationale seems to beg the question, because if the interests to be served are those of the defendant, could they not be served better by seeing that the injustice never occurred in the first place, rather than correcting any prejudicial errors on appeal? The appeal argument is also weakened because of the lack of a record from such inferior courts, and the handicap under which an attorney must operate who enters the case only on appeal, with no record of prior proceedings to rely upon.

After the *Stevenson* decision had been handed down, the question of the right to counsel in municipal courts arose in North Dakota via an inquiry to and subsequent opinion rendered by the Attorney General.[32] That opinion pointed out that under section 29-07-01.1 of the North Dakota Century Code (Supp. 1969) an indigent defendant charged with a violation of a state criminal law may have counsel appointed by the court, the cost to be incurred by the county wherein the offense took place. The Attorney General believed that the emphasis on "state criminal law", as well as the provision for payment by the county made it clear that such statute should not apply to municipal ordinance violations. The opinion pointed out in contrast that because another code section makes municipal court proceedings governable by state law concerning justice court proceedings,[33] section 29-07-01.1 could also be applied to municipal courts. The North Dakota Supreme Court has recognized that certain city ordinances may be criminal in nature,[34] thus no semantic obstacle appeared to prevent the appointment of counsel for an indigent city ordinance violator by the municipal judge based on

30. *Id.* at 709-10.
31. *Id.* at 711.
32. OP. N. D. ATT'Y GEN. (Nov. 17, 1969).
33. N.D. CENT. CODE § 40-18-11 (1968).
34. Minot v. Whitfield, 71 N.W.2d 766 (N.D. 1965).

state law. The Attorney General refrained from stating whether or not a city judge may or may not make such appointment of counsel, because apparently one city judge in the state (identity unknown) had already done so, and thus the Attorney General felt he should avoid comment on an act by a member of the judiciary. In the absence of a state statute, state supreme court decision, or a United States Supreme Court decision on the matter, the Attorney General ruled that no duty exists on the part of a municipal judge to appoint counsel for an indigent defendant. However, he implied that such appointments may be permissively made until it is judicially determined to the contrary.

North Dakota has authorized the imposition of a maximum sentence of 30 days in jail and a $500.00 fine in any of the municipal courts of the state.[35] While the preceeding statute purports to establish a limit of a 30 day jail sentence in the municipal courts, in effect the municipal courts may effectively sentence a convicted person for up to 3 months for any one offense.[36] This result is possible pursuant to the "work-off" provisions allowing persons to work off their unpaid fines at $5.00 per day while in jail.[37] Thus, a relatively long jail term by nearly any person's standards is possible in the municipal courts.

In the absence of any state court determinations as to the right to counsel for indigent city ordinance violators, it seems that the serious crime classification of six months imprisonment will impose a limitation on effective sentencing without the right to counsel. This limitation will result from the recent decision of *Winters v. Beck*,[38] and will at least be applicable in the Eighth Circuit. In

35. N.D. CENT. CODE § 40-05-06 (Supp. 1969).
36. N.D. CENT. CODE § 40-18-12 (1968).
37. N.D. CENT. CODE § 40-11-12 (1968).
38. 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).

Winters, an indigent, had been convicted of immorality, a misdemeanor under the provisions of a Little Rock city ordinance. The municipal court fixed punishment at 30 days in jail and assessed a fine of $254.00. Because of his indigency, he was unable to pay the fine and thus pursuant to ARK. STAT. ANN. § 19-2416 (1956) was sentenced to the County Penal Farm for 284 days. He did not ask, nor was he informed by the trial judge of a right to counsel. After his time for appeal to the county court had expired because of ignorance regarding his appropriate remedies, he did secure counsel who filed, and was denied a writ of habeas corpus by the Little Rock municipal court, and the Pulaski Circuit Court. The Arkansas Supreme Court subsequently denied his petition, Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), finding no duty imposed on a trial court to appoint counsel for a defendant charged with a misdemeanor. This denial was appealed to the United States Supreme Court, and certiorari was denied. Winters v. Beck, 385 U.S. 907 (1966).

Winters, however, perfected a later petition for a writ of habeas corpus to the United States District Court, Winters v. Beck, 281 F. Supp. 793 (E.D. Ark. 1968), where the court held that the definition of a petty offense (in 18 U.S.C. § 1(3) (1964), is any misdemeanor, the penalty for which does not exceed imprisonment for six months or a fine of more than $500.00 or both), should apply in this case, and thus the charge in this case did not constitute a serious offense. The conviction was found to be invalid, however, based on the interaction of the Arkansas work-off statute previously cited, and the $254.00 fine imposed. The court found that the combination of the punishment in this case pursuant to the statute did constitute a serious offense, and that the failure of the court to appraise the defendant of his rights to counsel did constitute a constitutionally invalid

Winters the United States District Court ruled that the interplay of the Arkansas work-off statute with the combined jail sentence and fine brought the sentence within the serious crime classification referred to in *Gideon*. Because the serious crime classification resulted, the conviction was ruled invalid following the unconstitutional denial of the right to counsel.[39] Based on this decision, and considering the subsequent history of the case, it must be accepted that even under the application of the work-off statutes, the maximum sentence which can be imposed in any court without the right to counsel is imprisonment of six months.

An additional element which makes trial without the benefit of counsel troubling in North Dakota municipal courts is that the municipal judge need not have any legal training in cities of under 3,000 people.[40] Even in cities of over 3,000 a layman may act as municipal judge if no attorney is available to perform the function.[41] Thus, the indigent city ordinance violator, often a stranger in the community, finds himself not only denied the assistance of counsel, but also appearing before a municipal judge who is perhaps not familiar with the rules of evidence, burdens of proof, or rules of law applicable to any particular case. To further hamper the rights of the accused, the judge is often well acquainted with the local police because both are residents in a frequently small community (and perhaps even lifetime friends), factors further tending to promote belief of the police officer and utter disbelief of the accused.[42]

An example of the potential for unfairness the North Dakota lay judge procedure can foster is the unconfirmed report of an Indian defendant who was arrested by a city policeman for a driving offense, and subsequently charged with resisting arrest because he wanted the police to take his wife to a place of safety rather than leaving her in the car. The defendant was tried by the municipal judge *over the telephone,* and fined $50.00, with no advice as to his rights ever given other than that the police desk sergeant asked the defendant whether he was guilty or not. This case was reportedly retried on a subsequent date, resulting in a $10.00 fine.

This author does not wish to imply that injustices in the

conviction and sentence. *Aff'd,* 407 F.2d 125 (8th Cir. 1969); *cert. denied,* 395 U.S. 963 (1969). *See also* Justice Stewart's dissent in DeJoseph v. Connecticut, 385 U.S. 982 (1966). The current status of such work-off statutes will be heard by the Supreme Court. Williams v. Illinois, No. 1089, 38 U.S.L.W. 3267.

39. 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. N.D. CENT. CODE § 40-18-01 (1968).

41. N.D. CENT. CODE § 40-18-01 (1968).

42. This comment is in no way intended to cast poor reflections on any city judge in the state; however, the possibilities enunciated do seem possible, and in many cases probable to the author.

43. N.D. CENT. CODE § 40-18-19 (Supp. 1969).

municipal courts will not result where only attorneys act as judges, or that they will occur more in courts administered by a lay judge. The point to be made is that the probability for reversible error and prejudicial treatment as a point of law is perhaps greater in a court presided over by a lay judge than with a professional, legally trained judiciary.

The situation in the county justice courts is somewhat better than the municipal court picture in that county justices are required to be attorneys.[44] However, exceptions also exist to allow for lay county justices.[45] It is to be noted, as previously referred to, that provisions do exist for permissive appointment of counsel before these courts, but *quaere* whether such right is made known to the defendant, or whether he must request the assistance of counsel. It is a miscarriage of justice when the defendant in a criminal misdemeanor or city ordinance prosecution may be required to appear without the assistance of counsel, and yet the prosecution may have at its disposal the services of a city or county attorney.

Granted, the right to appeal does exist,[43] but this procedure should be used to correct prejudicial errors which could not have been avoided or were overlooked at the trial court. The defendant should be entitled to all guarantees to a fair trial in *all* steps of the criminal proceedings, not only at the appellate level.

The inadequacies of municipal courts in North Dakota were recently pointed out by the senior district court judge in North Dakota, Eugene Burdick of the Fifth Judicial District. Judge Burdick advocated abolition, or at least a reduction in the jurisdiction of our municipal courts to improve the State's system of criminal justice.[46]

If it may be assumed that the position of the present Oregon decision is eventually accepted by the North Dakota Supreme Court, or the United States Supreme Court, the argument will be raised, as it was in Washington, that such a system of procedural safeguards will be too expensive for the state to absorb.[47] One proposal to meet this objection would be the establishment of a public defender system, in a cooperative city-county type program. While the scope of this comment is too restrictive to go into detail regarding such a program, it would seem that some system could be established in the state to provide the requisite protection to allow the defendant to at least face his accusers on equal terms. The Oregon Court dismissed the prohibitive cost argument, and stated that the cost

44. N.D. CENT. CODE § 27-18-02 (1970).

45. N.D. CENT. CODE § 27-18-06 (1970).

46. Remarks by Judge Eugene Burdick, Fifth Judicial District of North Dakota, made to a Conference of State Officers held in Grand Forks, North Dakota, on March 23, 1970. Grand Forks Herald, March 23, 1970, at 1, col. 2 and at 9, col. 4.

47. Hendrix v. Seattle, ——Wash. at——, 456 P.2d at 710 (1969).

of providing counsel to indigent misdemeanants and city ordinance violators would amount to about one-twentieth of the annual receipts of the state and its municipalities from fines, ". . . a modest fee for guaranteeing a fair trial in all criminal prosecutions."[48] The Minnesota Court also recognized the practical difficulties involved in providing counsel for indigent misdemeanants, and stated that until the legislature could enact procedures to provide for such counsel, perhaps the public defender could absorb the burden.[49]

Once the decision has been made by a state court to extend the right to counsel beyond the "serious crime" classification, the most difficult portion of the decision remains, that is where should the line be drawn? *Stevenson* alluded to the position that the denial of the assistance of counsel will preclude the imposition of a jail sentence,[50] implying that in no case can the right to counsel be denied where a jail sentence is possible. In *Borst*, the Minnesota Supreme Court extended the right to counsel to all indigent defendants where the sentence may lead to incarceration in a penal institution.[51] The court specifically avoided the question of providing counsel where only a fine could be imposed, although recognition was given to Minnesota's work-off statute,[52] and it was stated that in the event a person were jailed for failure to pay a fine, the rule of the case should apply.[53]

The concurring opinion in *Borst* took a somewhat more relaxed position and stated:

> I would draw a different line for now and exclude from the operation of the rule any violations of highway traffic regulation statutes and those cases of violations of the criminal code constituting misdemeanors where incarceration is only the alternative punishment upon failure to pay the fine or to comply with other conditions imposed by the court.[54]

The rationale for this determination is that a difference exists between confinement in the workhouse and imprisonment in the state penitentiary. The concurrence felt that in cases of incarceration on failure to pay the fine, while the accused may be indigent for the purposes of hiring counsel, he may be able to pay a fine, thus the key to the workhouse is really carried in the defendant's pocket.[55]

48. Stevenson v. Holzman, ——Ore. at——, 458 P.2d at 419 (1969).
49. State v. Borst, 278 Minn. 388, 154 N.W.2d at 895 (1967).
50. Stevenson v. Holzman, ——Ore. at——, 458 P.2d at 418 (1969).
51. State v. Borst, 278 Minn. 388, 154 N.W.2d at 894 (1967).
52. MINN. STAT. ANN. § 574.35 (1947); *see also* § 641.10 (Supp. 1970).
53. State v. Borst, 278 Minn. 388, 154 N.W.2d at 894 (1967).
54. *Id.* at 896.
55. *Id.* Based on a reasonably accepted fee schedule of $20.00 per hour, even a relatively minor case requiring two hours of investigation and preparation, one appearance to enter a plea, and a subsequent hearing on the merits of the case, the attorney's fee could easily amount to $100.00. This amount is more than most fines for moving traffic violations.

The reason for excluding traffic regulation offenses is that they are commonly considered to be less serious transgressions, and that a more summary disposition without the benefit of defense counsel is not inherently unfair.[56]

A more liberal view as to where the line should be drawn to provide counsel for indigent defendants was adopted in the *James* decision.[57] In *James*, the court started with the position that the Sixth Amendment established the right to counsel in all criminal prosecutions, and that the application of the maxim ". . . *de minimis non curat lex*, provides a lawful, logical, and practicable basis for excluding trifling criminal prosecutions."[58] The opinion stated that counsel should be provided where the loss of liberty for any period would result, and for those offenses involving moral turpitude, such as where a license revocation could deprive the licensee of his livelihood, or where a defendant's intelligence, or the complexity of the issues involved would render the proceedings inherently unfair.[59] While this test seems to be sound at first glance, it really does nothing more than to restore the old case-by-case test applied in *Betts*.[60]

The court in *James* advocated extending, and not limiting the right to counsel, pointing out that it is at the minor offense level where the largest number of people confront the criminal justice system. It is at this "working level" of criminal justice that respect for law can be developed through fair treatment to all defendants. This treatment can be guaranteed to be fair only through the presence of counsel to insure that all standards and safeguards are afforded to prevent the conviction of innocent defendants.[61]

As is evident from the foregoing comment, the point at which to draw the line for granting the right to counsel to indigent misdemeanants and municipal ordinance violators is not easy to establish. This writer is convinced, however, that no matter how difficult the task may be, and regardless of the fact that the United States Supreme Court has refused to draw the line,[62] it is a definition which must be established by the states, as did Oregon and Minnesota.

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56. State v. Borst, 278 Minn. 388, 154 N.W.2d at 897 (1967); *see also* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 703 (1968).
57. James v. Headley, 410 F.2d 325 (5th Cir. 1969); *See also* Note, 22 SW. L. J. (1968).
58. James v. Headley, 410 F.2d 325, 334 (5th Cir. 1969).
59. "For example, although no social stigma attaches to parking overtime, stigma does attach to the offense of drunken driving or to hit-and-run drivers fleeing the scene of an accident." *Id.*
60. Betts v. Brady, 316 U.S. 455 (1942).
61. James v. Headley, 410 F.2d at 335 (5th Cir. 1969).
62. *See*: Justice Harlan's concurrance in Gideon v. Wainwright, 372 U.S. at 349 (1963), where he recognized that the state ocurts have failed to recognize the evolution of the *Betts* principle, and in fact paid only lip service to such principle. Justice Harlan stipulates that the full application of the special circumstances rule to all serious offenses does nothing more than make explicit something foreshadowed in their decisions, and which must now be made certain by the Supreme Court.

This line may be drawn based on the Sixth Amendment as was done in *Stevenson*, or by the approach taken in *Borst*, nevertheless, an extension of the principle presented by *Gideon* appears necessary.

Regarding North Dakota law, it is apparent that the need exists to provide some remedy for the accused indigent to insure that he receives a fair and impartial trial, and is not subjected to a "kangaroo court". As for where the minimum right to counsel should be established, this writer would favor a modified Minnesota approach and provide the indigent defendants the right to counsel whenever a jail sentence could be imposed, exclusive of minor traffic offenses. However great the price may be, in this day of challenge and unrest it must be insured that all levels of the judicial proceedings are as fair and impartial as possible. One of the most appropriate means of establishing a fair and impartial hearing for indigent municipal ordinance violators is to provide them with their constitutionally guaranteed right to the assistance of counsel at public expense, subject to the aforementioned limitations.*

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* The reader's attention to this problem in North Dakota is directed to a study of the Burleigh County North Dakota Bar Association, Providing Counsel for the Indigent Accused A Regional Survey, (January 1, 1970). This study was received by the University of North Dakota School of Law subsequent to the completion of this comment. It is notable that the study recommends the adoption of a form of public defender system within North Dakota.