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REPRESENTATION OF THE INDIGENT ACCUSED OF CRIME FROM THE VIEWPOINT OF COURT APPOINTED COUNSEL

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I. RIGHT OF THE ACCUSED INDIGENT PERSON TO HAVE COUNSEL

It has been long established that no person shall be deprived of life, liberty or property without due process of law,[1] and that every person shall have the assistance of counsel for his defense.[2] These rights were included in the Bill of Rights, and were made applicable to the states by the Fourteenth Amendment to the Constitution of the United States.

The State of Missouri, in its 1945 Constitution, as well as its prior constitutions, gives similar protections to its citizens. The Missouri Constitution provides that "in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel. . . ."[3] It has been required by law since 1835 in Missouri to appoint counsel for an accused indigent person in felony cases. Under the recent decision of the United States Supreme Court in *Gideon v. Wainwright*,[4] it was held that an accused indigent person was entitled to counsel at all important stages of all criminal proceedings. This includes the right to be represented by counsel where a person is charged with a serious misdemeanor.

Actually, the accused's right to counsel in a felony case exists, not merely from the time of arraignment through the remainder of the proceedings, but the right to counsel has been held by the Supreme Court of the United States to be a substantial right which an accused has from the time he is accused of a particular crime, unless waived. In the case of *Escobedo v. Illinois*,[5] the Supreme Court of the United States, in a five to four decision, held that incriminating statements made by the defendant during interrogation after his request to see his attorney had been denied, were inadmissible regardless of whether or not such incriminating statements were voluntarily made. The Court stated that this rule applies

*LL.B., University of Missouri, 1950; Shelton & Bradley, Lexington, Mo.

1. U.S. CONST. amend. V.
2. U.S. CONST. amend. VI.
3. Mo. CONST. art. I, § 18(a).
4. 372 U.S. 335 (1963).
5. —— U.S. ——, 84 Sup. Ct. 1758 (1964).

when the investigation ceases to be a general investigation and centers on a particular suspect:

> Petitioner had become the accused, and the purpose of the investigation was to "get him" to confess his guilt despite his constitutional right not to do so. . . . This was the "stage when legal aid and advice" were most critical to petitioner. . . . Petitioner had, for all practical purposes, already been charged with murder.[6]

Though my present thinking may not be wholly objective, it is the feeling of this writer that the *Escobedo* decision is based on sound reason and is good law. I suggest that the vast majority of the public and the bar feel that the personal constitutional rights of everyone, not just the innocent, should continue to be maintained and protected, not limited or emasculated. It is still better that some guilty go free than for any innocent to be found guilty; and unless the accused has the right to *effective* counsel, and unless the state proves the accused guilty beyond a reasonable doubt by substantial, competent evidence, rather than by use of incriminating statements extorted by deceit, trickery, coercion, or other methods—which may or may not be accurate and reliable—then there is a very real danger that innocent people will be wrongfully convicted of crimes they did not commit, or as in the case of homicide or robbery, they may be wrongfully convicted of a degree of an offense of which they are not guilty.

It is thus now clear that in other states, as well as Missouri, an indigent person accused of crime is entitled to have counsel.

II. Who Is an Indigent Person?

When a charge is filed in court against a defendant and he is brought to court by the officers for the first time and counsel does not appear with him, then the question immediately presented is whether or not the accused is indigent and is, therefore, entitled to have counsel appointed for him by the court. There does not appear to be any accurate way to determine this question or, at least, guide lines have not been established so far as this writer knows, but rather the matter is determined by each individual judge, principally by inquiry of the accused. Many times there is little, if any, question or doubt about whether an accused has funds with which to employ an attorney. On the other hand, there are times when an accused owns property as a tenant by the entirety with a spouse, when he may or may not be able to obtain money to employ counsel.

6. *Id.* at 1762.

The problem of whether an attorney should be appointed frequently arises in cases involving an unemancipated minor who does not have personal funds, but whose parents do have funds or property. Parents who would not question paying a grocery, clothing, hospital or medical bill, will refuse to go near the courthouse and refuse to employ counsel, knowing the court will do so. It has become common knowledge, by the class of persons who have been in contact with the criminal side of the law, or who are prone to become involved, that if a lawyer is not employed, the court will appoint a lawyer for them without charge to them. As a result, the right to have court appointed counsel is often abused and counsel is appointed at times when he should not be.

There have been instances when an accused did not have money to employ a lawyer, but who, after the appointment of the attorney, had money from some source to buy a bail bond. This perhaps is not common, but it has occurred. Of course, an accused out on bond, if he can find a job and will work, has an opportunity to obtain some money for defense purposes. However, those who are able to employ a lawyer, but have counsel appointed for them, are in the minority. The vast majority of defendants who have court appointed counsel are, no doubt, unable to employ counsel.

III. Demand for Court Appointed Counsel Is on Increase

Not only is the population in the metropolitan areas increasing with more crime for that reason, but also the *rate* of crime is increasing. In many rural areas, crime is increasing and, because of good roads, fast automobiles and the mobility of people, the rate of crime in areas surrounding metropolitan areas is also increasing. The result is that there are more defendants throughout Missouri needing court appointed counsel. According to statistics released by the Kansas City Bar Association, in the Circuit Court of Jackson County, lawyers were appointed in 394 cases in 1962. In the federal courts in Jackson County, seventy-five per cent of the defendants were unable to pay an attorney. Of course, these statistics only indicate the situation prior to the recent decision in the *Gideon* case.[7] The statistics for 1965 will be substantially higher.

A large segment of the bar in urban counties as Jackson County, Missouri, because of type of practice, age, and other reasons, does not receive frequent appointments by the court to represent indigent defendants.

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7. Gideon v. Wainwright, *supra* note 4.

In the rural areas, such as Lafayette County, where the senior members of the bar, for health and other reasons, are not usually appointed, the representation of indigent persons accused of crime by court appointment has become a real burden on the younger members of the bar. In Lafayette County some lawyers may be appointed to represent several defendants in one year. In the past Missouri circuit courts have been appointing counsel for indigent persons accused of crime in felony cases in the circuit court. Since the *Gideon* decision,[8] Missouri magistrate courts have in felony cases been appointing counsel to represent indigents at the time of arraignment. The responsibility of appointed counsel in such instances lasts through preliminary hearings and trial in the circuit court; and it may be extended to appeal, if one is taken.[9] In addition, counsel for indigents has been appointed in certain "serious" misdemeanor prosecutions.

The problem of providing counsel for the indigent will in the future become more serious and a greater burden on the bar. Some means for providing compensation for court appointed counsel should be established as hereinafter discussed.

IV. Counsel's Duties

Court appointed counsel for an indigent person has a duty to render professional service to the best of his ability, to the same extent as though he were being paid.

When the court appoints counsel to represent a defendant, it is rarely at a time that is convenient for the attorney. If in the office, the attorney is usually busy with pressing problems attempting to meet constant deadlines. If he is not in the office, he is, in all probability, in court or working on a matter which requires his absence from the office.

Upon receiving the call from the court or clerk of the court, the attorney goes to the courthouse as soon as possible in response to the call. There he is introduced to the defendant, his prospective client, and discusses the matter with him briefly. If there is no apparent reason why he cannot accept the case and serve, the appointment is made by the court unless it has already been made.

After the appointment is made, the attorney must interview his client, investigate the charges, interview witnesses, confer with the prosecuting attorney and work out a disposition of the charge or prepare for

8. *Ibid.*
9. Mo. Rule Crim. Proc. 29.01(c), effective March 1, 1964.

trial. Prior to trial, it may be necessary to do legal research and prepare and file preliminary motions to suppress evidence and to produce evidence. It may be necessary to take depositions and to interview witnesses endorsed on the information.

In the case of a felony there may be some investigation advisable prior to a preliminary hearing and the attorney must determine whether it is advisable to waive preliminary hearing. Usually, where counsel has been appointed in the magistrate court and the accused does not have funds available for use in his defense, it is suggested that it is not advisable to waive the preliminary hearing. The preliminary hearing can be used as an opportunity for the defense attorney to get information from the prosecuting witnesses and to some extent can be used as a means of discovery by the defense.

After the preliminary hearing is held, and the accused is bound over to the circuit court, the defendant's attorney will have further time to investigate the charges, to prepare the defense, which in nearly every case will require legal research, to take depositions and to file motions as suggested above. During this time, in order to interview his client, counsel will often be required to go to the jail, since many indigent accused are unable to make bond. When the information is filed in the circuit court and the accused is arraigned, counsel appointed by the magistrate court will appear to advise the client in pleading. The custom in some circuit courts to formally re-appoint counsel at this time. If a plea of "not guilty" is entered, the case will be set for trial.

In many, if not all cases, especially where there is only circumstantial evidence, it may be advisable to take depositions of various witnesses after the filing of the information, if counsel is to properly represent the defendant and is to be effective in the conduct of the defense. In the recent case of *State v. Aubuchon*,[10] one of the issues raised by defendant's court appointed counsel was that the trial court erred in not requiring the state, on defendant's motion, to advance the cost of depositions which defendant wished to take. The Missouri Supreme Court, construing Sections 550.040 and 550.050 RSMo. 1959, held that there was no statutory basis for taxing such costs against the state. The court stated:

> The taking of depositions at all, civil or criminal, is a privilege granted by the State and upon such terms as the State may fix. . . . [B]ut the legislature has certainly not provided for the payment

10. 381 S.W.2d 807 (Mo. 1964).

> or advancement of the cost of defendant's depositions and the courts have no authority to order any such payment. . . . We hold there is no statute or rule of court in Missouri which fairly requires or authorizes the State to pay for (except upon acquittal) or to advance the costs of depositions taken or desired by a defendant. We further hold that neither the failure to so provide nor the failure of the Court to so order is a violation of any constitutional rights of defendant, federal or state.[11]

Thus, although the indigent defendant does have the right to take depositions, as a practical matter depositions can not be taken unless the expense is borne by someone else. The result is that depositions that are taken in such cases are taken at the expense of the court appointed counsel. This is manifestly unjust and unfair.

In practice, where depositions are desirable or necessary, counsel has a duty to take the depositions. Without question that duty is being faithfully performed now, as it has been in the past. Where depositions are called for, court appointed counsel takes them even at his own expense. His self-respect and sense of duty as a lawyer, and his fidelity to his client require it.

Further, it is necessary for counsel to confer with the prosecuting attorney to seek some disposition of the charge favorable to the accused. If that does not appear possible, then it is necessary to prepare for trial. Prior to trial, depending upon the circumstances and the nature of the charge, it may become necessary to consider whether it is advisable for the defendant to ask for a change of venue. In more serious cases, this can be a major decision involving much responsibility.

If the case goes to trial, for most court appointed counsel it is necessary to spend much extra time on research and trial preparation because they have little experience in criminal practice, other than when appointed by the court. They are not as familiar with criminal law and procedure and are not as proficient in the trial of criminal cases and in protecting the record and the rights of the accused as they are in the trial of civil cases in fields with which they are familiar. Also, there are many attorneys who do not normally engage in trial work and for whom, when appointed to represent an accused, a trial becomes a greater burden. If only trial attorneys are appointed, then the representation of indigent persons becomes an added burden for those who devote their time to trial work.

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11. *Id.* at 812.

At the trial, if the accused is acquitted, the attorney's job is completed. If the accused is convicted, court appointed counsel has more work to do. He must consider the question of a motion for a new trial; and if there are any points which can be raised as a basis for error in the trial, counsel has a duty to prepare and file a motion for a new trial. This may involve research prior to the drafting and filing of the motion. If not, it most certainly will require research before the hearing and arguing of the motion.

If the motion for a new trial is sustained, then counsel must prepare for another trial. If the motion for a new trial is overruled, then counsel, with the defendant, must determine the advisability of filing an appeal.

If the court denies a motion for new trial and the defendant wishes to appeal, then the question arises whether trial counsel has a duty to prosecute the appeal for the indigent defendant. Under the *Gideon* case,[12] there is no question but that the indigent defendant is entitled to counsel on appeal. Furthermore, the Missouri Supreme Court Rules include the following provision:

> When a defendant is convicted of a felony, is sentenced therefor and desires to appeal, if it appears from a showing of indigency that the defendant is unable to employ counsel the trial court shall appoint counsel to represent him upon such appeal; such counsel may, in the discretion of the court, be the same counsel who represented the defendant at the trial or other counsel.[13]

Therefore, where there is an appeal, trial counsel or other court appointed counsel for the appeal has much responsibility and much more work to do which requires a substantial amount of time.

Counsel has a duty to examine the transcript of the trial proceedings for accuracy prior to filing. After the transcript has been filed, counsel has the duty to prepare a brief which will involve additional legal research. For court appointed counsel it usually will involve an unusual amount of research because, again, this is a field of law with which court appointed counsel is not normally thoroughly familiar and with which he is unable to keep abreast in carrying on his normal practice with the great demands on the average attorney's time.

After the brief is prepared and filed, the state will prepare and file a brief which counsel will need to study and following the receipt of which,

12. Gideon v. Wainwright, *supra* note 4.
13. *Supra* note 9.

he must again check the law and determine whether a reply brief should be filed.

When the case comes up for argument in the appellate court, court appointed counsel has the duty to appear and argue the appeal on behalf of the defendant.

After the appeal is argued, when the court renders its decision, it determines whether counsel's work has been completed. If the conviction is affirmed, unless there is substantial ground for making an application for a rehearing, counsel's work is finished, unless there is a basis for an appeal to the federal courts. In cases where the death penalty is involved, counsel may still have a lot of work to do in attempting to save the life of his client. If the conviction is set aside on appeal and the case remanded, then the original court appointed counsel or some other must again prepare for trial and go through trial of the case.

The question of a hung jury has not been mentioned. This occurs occasionally and if so, it may be necessary to try the case more than once before there is an appeal.

In the majority of cases where counsel is appointed, the defendant pleads guilty to a reasonable sentence and counsel is not required to go through all of the above proceedings. The above are potential duties which many court appointed attorneys have been called upon to perform. It is thus apparent that it may be not only a great professional responsibility, but a tremendous financial responsibility and sacrifice for the court appointed counsel who is appointed several times in one year or even appointed in one case that goes all the way through the trial and appellate procedures before it is terminated.

V. Compensation for Court Appointed Counsel

The representation of indigents by court appointment is becoming an ever increasing burden on the bar of this state. The cost of maintaining a law office and an active law practice, whether by a firm or by an individual, is substantial. Missouri Bar surveys show that thirty to thirty-five per cent of the average lawyer's income goes for the expense of operating and maintaining his law office.[14] Moreover, in handling litigation an attorney must have that measure of independence brought about by financial stability and adequate economic resources, so that the client's

14. The Missouri Bar Lawyer's Practice Institute, FS4 (Spring 1964 Series).

best interest is always the controlling factor and not the fee that might be involved.

Traditionally, the lawyer has been a community leader and that is as it should be. He has been active in his church, in scouting, in charity drives, in politics, in schools, and in other worthwhile causes which require his time and energy. Surveys made by The Missouri Bar have shown that in his practice the average Missouri lawyer does not have more than fifteen hundred productive or chargeable hours per year.[15] This is about six hours per day—and is probably nearer five.

It seems apparent that it is unfair and unreasonable to require the court appointed lawyer to continue to serve without compensation and to pay necessary expenses in the defense of indigents out of his own funds. It is too great a sacrifice. Some means of providing reasonable compensation for the time involved and necessary defense expenses should be provided. Doctors, dentists, and others furnishing services and goods to indigent people are not required by law to do so at their own expense. Although many physicians and others do make voluntary contributions of their services and goods to assist the poor, the overwhelming majority of such services and goods for the needy are financed through public funds or public charities. This is a burden which society has properly assumed. Why, then, should the practicing lawyer be compelled to furnish free legal services to indigent persons charged with crime? Why should not this burden, too, be properly borne by our society? Most of the indigent persons charged with criminal offenses are parasites on society and not even acquaintances of the attorney prior to appointment by the court. Why should an individual attorney give priority and furnish free service to a total stranger, who cannot pay because of his own lack of industry and initiative, in all probability, while the attorney neglects his own friends' and neighbors' business, for which they pay? Is it fair to the attorney? I think it is obvious that it is not.

The organized bar may properly take great pride in serving society and achieving justice for all, but it is not the organized bar that is furnishing free service; that is standing the expense; that is on the "firing line" in the court room: rather it is the individual lawyer assuming professional responsibility, serving at a financial loss and sacrifice to himself and his family. Why shouldn't society as a whole assume the burden of securing constitutional rights to the indigent? Surely, it cannot be the

15. *Ibid.* Also see, A LAWYER'S PRACTICE MANUAL 132 (1964).

responsibility of the individual lawyer, merely because he has a license to practice law, any more than it is the financial responsibility of the sheriff, the police, the prosecutor, or the judge, all of whom are compensated for their work. Society should bear the cost of legal aid in one way or another, just as it bears the cost of other necessities for indigents.

It has been held in a recent decision in the Federal District Court for Oregon,[16] that court appointed counsel for an indigent defendant was entitled to $3,804.54, computed at the rate of $35.00 per hour, as just compensation for services rendered. The court concerned itself in that case with only two questions: (1) whether there had been in fact, a "taking"; and (2) whether such "taking" was for a "public use." The Court said:

> For a court to order a member of its bar to give of his services under his license and of his office facilities and money . . . is an usurpation, utilization, and necessarily a "taking" of those compensable property interests of the attorney. . . . Each hour and day of the commandeered and appropriated services of the attorney was a total and complete taking of the present value thereof, as well as a destruction of the value of that hour or day to the other demands and enterprises of the attorney. Time of the lawyer, utilizing his expertise and backed with his law-office tangible help and facilities, is his only salable asset. . . . Moreover, since the constitutional right to legal counsel now requires for the indigent legal "representation in the role of an advocate" through trial, appeal, and attack of judgment of conviction . . . no longer should the "some people" in the legal profession alone bear the burden of the cost and expense of the . . . obligation of the sovereign in connection with the administration of criminal law to furnish and supply legal representation for the indigent. This public burden "in all fairness and justice, should be borne by the public as a whole."[17]

There seems to be a general lack of understanding by the public that court appointed counsel serve without pay. It is believed that the public should be made more aware of this fact. I do not believe the public would expect the members of the bar to assume such responsibilities and render such services as is being done and will be done in the future without compensation. I believe the public has a sense of fairness and would be receptive to a reasonable solution to the present problem.

There are possibly at least two practical ways in which compensation

16. Dillon v. United States, 230 F.Supp. 487 (D.Ore. 1964).
17. *Id.* at 493.

for court appointed counsel could be provided. One would be to establish a public defenders system, supported by taxes, throughout the state. For rural areas, it perhaps could be established on a circuit basis. In urban areas there would be no geographic problems. Secondly, compensation could be provided by the appropriation of funds and the authorization for the courts to allow reasonable compensation to court appointed counsel, based on the time spent on the individual case. This is a matter that requires legislative action and it should be brought to the attention of the legislature and prompt action should be taken, not only for the benefit of court appointed counsel, but for the benefits of society as a whole, because of its interest in the preservation of our constitutional rights and ideals of justice.

In conclusion, it seems clear that everyone accused of crime is entitled to the assistance of counsel in all cases and at all important stages; that the need or demand for court appointed counsel in the future will be much greater; that court appointed counsel has the responsibility and duty to defend the accused vigorously and to render the same professional services that would be rendered in any other case; that it is a great financial burden on a portion of the members for the bar to render free service to the indigent as court appointed counsel; and that fairness and justice require that some method should be found to provide fair and reasonable compensation to counsel appointed by the court to represent indigent defendants, and it is the hope of this writer that prompt, affirmative action will be taken by the bar and an informed public so this problem will receive attention and consideration.