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THE RIGHT TO COUNSEL AT THE PRELIMINARY HEARING

EDWARD H. HUNVALD, JR.*

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

Amendment VI, Constitution of the United States

That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel . . . .

Section 18(a), Article I, Constitution of Missouri

In 1938, the Supreme Court of the United States in Johnson v. Zerbst1 ruled the sixth amendment of the federal constitution required the appointment of counsel to represent indigent accused in federal criminal proceedings unless the right to counsel were properly waived.

In 1942, in Betts v. Brady,2 the court ruled the sixth amendment applied only to federal prosecutions, and the due process clause of the fourteenth amendment did not require the appointment of counsel to represent indigent accused in all state prosecutions. Whether criminal trial without counsel resulted in a denial of due process was to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.3

The idea that due process required representation by counsel only

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1. 304 U.S. 458 (1938).
2. 316 U.S. 455 (1942).
"[W]e are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . ."

(109)
in certain criminal trials gave rise to problems. What "special circumstances" need be present in order to establish that the trial without counsel constituted a "denial of fundamental fairness, shocking to the universal sense of justice"?

In 1963, the necessity of finding special circumstances to support a denial of fundamental fairness, and consequently a denial of due process, came to a definite end. In 1963, the Court, in *Gideon v. Wainwright*, overruled *Betts v. Brady* and specifically repudiated the idea that "appointment of counsel is not a fundamental right, essential to a fair trial."

It is now clearly established that the guarantee of counsel at trial is a fundamental right and obligatory upon the states as a part of due process of law. Any criminal trial without counsel, unless that right is intelligently and competently waived, is denial of a fundamental right without regard to the particular circumstances of the case.

To state the proposition in a slightly different fashion: there is a federally protected right to counsel at trial in state criminal prosecution; the failure to appoint counsel for indigent defendants is, unless the right to counsel is waived, a denial of that right; the remedy is the setting aside of the conviction; and all that need be shown to secure this remedy is that the right was denied.

Left unanswered by *Gideon* is the question of at what point in the criminal process the state is required to appoint counsel for indigents. It is clear that the right to be represented by counsel at trial of necessity includes representation prior to trial to allow for adequate preparation. But what right to appointed counsel does an indigent defendant have at the earlier stages of the criminal process? Some indications can be found.

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5. 372 U.S. at 343-44. The language appears in *Betts v. Brady*, supra note 2, at 471.

6. It has been pointed out that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, supra note 1, at 464.

7. "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell v. Alabama*, supra note 3, at 57.
In *Hamilton v. Alabama*, the Court reversed a conviction and death sentence for breaking and entering with intent to ravish because the defendant was not represented at the arraignment. The nature of an arraignment varies in different jurisdictions. It usually includes the formal reading of the charge, whether by indictment or information, and the calling upon the accused to plead. The Court noted that in Alabama the arraignment is also the point where the plea of insanity must be entered, and where certain motions must be made. This was sufficient for the Court to find that the arraignment in Alabama "is a critical stage in a criminal proceeding," and consequently counsel must be provided for an indigent defendant at that time. There was no indication that the defendant had in any way been prejudiced by the failure to have counsel then. The Supreme Court of Alabama had stated that, under Alabama law, Hamilton should have had counsel at the arraignment, but did not reverse the conviction because there was "no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty." The Supreme Court of the United States ruled that there was no need for a showing of prejudice:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted: ... In this case ... the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

The *Hamilton* case was decided before *Gideon v. Wainwright* overruled *Betts v. Brady*. *Gideon v. Wainwright* removed any distinction between capital and non-capital cases as far as the right to counsel is concerned. Thus the apparent limitation of *Hamilton* to capital cases is not

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10. Pleas in abatement, and motions to quash on grounds the grand jury was improperly selected. *Hamilton v. Alabama*, supra note 8, at 53-54.
11. Id. at 54.
14. Justice Clark concurring in *Gideon v. Wainwright*, supra note 5, at 348-49, said: "That the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from the Court's interpretation. ... It is equally clear from the above cases [Bute v. Illinois, 333 U.S. 640 (1948), Uveges v. Pennsylvania, 335 U.S. 437 (1948) and Hamilton v. Alabama, supra note 8] ... that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and
controlling. The other limitations may be important. Arraignment is the
time of pleading, and, in Alabama, the time for making motions that
possibly may not be made later. The assistance of counsel is needed for
there are choices to be made—choices which may have an effect on the
subsequent proceedings. Counsel is needed so that the choices may be
exercised with understanding. But it should be remembered that in Ham-
ilton there was no showing of any choice that was made from which the
accused suffered in the slightest.

White v. Maryland15 involved an earlier stage in the criminal process,
the preliminary hearing. As with the term “arraignment,” there is some
difference as to the meaning of “preliminary hearing” among various
jurisdictions. In the White case, after being arrested the defendant was
brought before a magistrate for a “preliminary hearing.” The hearing
was postponed for a little over two months. When the “hearing” was held,
the defendant, not represented by counsel, pleaded guilty to a charge of
murder. The “arraignment” was set for a month later, but since defend-
ant was without counsel, counsel was appointed and the arraignment
postponed. When the arraignment was held, defendant pleaded not guilty
and not guilty by reason of insanity. At the trial, the defendant’s plea
of guilty at the “preliminary hearing” was admitted without objection.
The defendant was ultimately found guilty and sentenced to death.

On appeal the Court of Appeals of Maryland affirmed the conviction
and disposed of defendant’s contention of denial of the right to counsel
at the preliminary hearing by pointing out that:

there was no requirement (nor any practical possibility under our
present criminal procedure) to appoint counsel for the appellant
at the preliminary hearing before the magistrate . . . nor was it
necessary for appellant to enter a plea at that time.16

As to the contention that there was error in admitting the evidence
of his plea of guilty at his trial, the Maryland court simply observed:

no objection to the testimony as to the plea appears in the record
and therefore the question is not properly before us, since it was
not raised below and decided by the trial court. . . . However, we

point out, without further discussion, that the contention is without merit.\textsuperscript{17}

The Supreme Court of the United States in a per curiam opinion reversed the conviction on the basis of \textit{Hamilton v. Alabama}.

As to the argument that the preliminary hearing was not a “critical stage” the court 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.

We repeat what we said in \textit{Hamilton v. Alabama}, . . . that we do not stop to determine whether prejudice resulted: “Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.”\textsuperscript{18}

The plea which White made at the preliminary hearing was not binding upon him. He later (after counsel was provided him) pleaded not guilty and it was on the not guilty plea that he was tried. The only effect that the plea made at the preliminary hearing had upon his trial was that his words were admitted at the trial.\textsuperscript{19}

It is difficult to evaluate the significance of the subsequent use of his plea against him. The court clearly points out that the decision is not based upon the existence of any prejudice resulting from the absence of counsel.\textsuperscript{20} But it may be the decision does rest upon the possibility of prejudice arising at trial. It also may be that the decision rests upon the simple proposition that at the preliminary hearing the defendant was faced with two choices—to plead or not and what to plead—choices which he is in need of the assistance of counsel to evaluate. The failure to provide counsel at this critical point is a denial of counsel.

What if an accused is without counsel at a preliminary hearing, and he is not asked to plead and he does not plead? This situation arose in \textit{Pointer v. Texas},\textsuperscript{21} but the question of right to counsel was not decided.

\textsuperscript{17} Id. at 619-20, 177 A.2d at 879.
\textsuperscript{18} White v. Maryland, supra note 15, at 60.
\textsuperscript{19} He was tried before a three judge court sitting without a jury.
\textsuperscript{20} In a footnote to White v. Maryland, supra note 15, at 60, the court states: “Although petitioner did not object to the introduction of this evidence at the trial . . . the rationale of \textit{Hamilton v. Alabama} . . . does not rest . . . on a showing of prejudice.”
\textsuperscript{21} 380 U.S. 400 (1965).
Pointer was given a preliminary hearing on a charge of robbery and was not represented by counsel. Witnesses were examined by the state and some efforts at cross-examination were made by Pointer and a co-defendant. Pointer was subsequently indicted and stood trial. At the time of the trial, Phillips, a witness who had testified at the preliminary hearing, was out of the jurisdiction. The trial court admitted, over objection, a transcript of Phillips' testimony at the preliminary hearing.

The Supreme Court of the United States reversed the conviction, ruling that:

the Sixth Amendment's right of an accused to confront the witnesses against him is ... a fundamental right and is made obligatory on the States by the Fourteenth Amendment.\(^\text{22}\)

The use of Phillips' testimony, taken at a time when defendant was not represented by counsel and was thus deprived of opportunity to cross-examine by counsel, was a denial of the right of confrontation.

Pointer also argued that the failure to appoint counsel for him at the preliminary hearing was a deprivation of his right to counsel.

The court noted that the preliminary hearing in Texas differs from the preliminary hearing in *White v. Maryland* and from the arraignment in *Hamilton v. Alabama* because no pleas are accepted and:

the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective states, we cannot say that the *White* case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record and that question we reserve. In this case ... [it is] clear that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him.\(^\text{23}\)

Whatever doubts the Supreme Court of the United States might have as to the right to appointed counsel at a preliminary hearing, the

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22. *Id.* at 403.
23. *Id.* at 402-03.
Supreme Court of Missouri has none. As might have been expected, after *White v. Maryland* the question of the right to appointed counsel at the preliminary hearing was raised in a series of cases by enterprising prisoners attempting to attack their convictions in collateral proceedings and by convicted defendants on appeal.\(^{24}\) Although not the first case in this series, *State v. Owens*\(^{25}\) most clearly raised the problem. The earlier Missouri cases indicated that the court did not consider the failure to appoint counsel at the preliminary hearing to be a violation of constitutional rights. However, in these earlier cases the failure to raise properly or preserve the issue was a possible grounds for the decision.\(^{28}\) Owens was arrested on a charge of illegal possession of narcotics on May 21, 1963. On that same date he was taken before a judge of the St. Louis Court of Criminal Correction for a preliminary hearing. According to the defendant, he was not informed of his rights to counsel.\(^{27}\) The only witness who testified was one of the two police officers who made the arrest and who discovered the narcotics. The judge found the testimony sufficient to establish probable cause that Owens had committed a felony and ordered him held for trial. At the preliminary hearing Owens did not testify, was not requested to make any statement, nor was he "there imposed upon in any manner."\(^{29}\)

There is no allegation here and certainly no fact or circumstance in the record from which there is a possible inference that by reason of the preliminary hearing the state either sought or gained

\(^{24}\) State v. Engberg, 391 S.W.2d 868 (Mo. 1965) (motion to vacate sentence); State v. Owens, 391 S.W.2d 248 (Mo. 1965) (appeal); State v. Small, 386 S.W.2d 379 (Mo. 1965) (motion to vacate sentence); State v. Phelps, 384 S.W.2d 616 (Mo. 1964) (appeal); State v. Worley, 383 S.W.2d 529 (Mo. 1964) (motion to vacate sentence); State v. McMillian, 383 S.W.2d 721 (Mo. 1964) (motion to vacate sentence); State v. Gagallarritti, 377 S.W.2d 298 (Mo. 1964) (appeal from conviction).

\(^{25}\) Supra note 24.

\(^{26}\) In State v. Gagallarritti, *supra* note 24, the point was raised for the first time in the brief on appeal. Defendant had waived the preliminary hearing and when later represented by counsel announced he was ready to stand trial. In *State v. Worley, supra* note 24, the point was raised in after-trial motion two years later. State v. McMillian, *supra* note 24, is not clear when the issue was raised, but defendant had waived the hearing and later with counsel waived formal arraignment and announced ready for trial. In State v. Small, *supra* note 24, defendant had counsel at the arraignment and pleaded guilty, and apparently the point was not raised until motion to vacate. In *State v. Engberg, supra* note 24, defendant waived preliminary hearing and had counsel appointed for trial. It is not clear when the point was first raised. In *State v. Phelps, supra* note 24, the point may have been properly raised; the decision does not indicate when the objection was made.

\(^{27}\) State v. Owens, *supra* note 24, at 250.

\(^{28}\) Id. at 253.
the slightest advantage or that there was any over-reaching. In short . . . the appellant does not point to the record and attempt to demonstrate the slightest prejudice or infringement of his right to a fair trial in the circuit court resulting from his lack of counsel at the preliminary hearing.29

It is interesting to note the court’s attitude toward the requirement of prejudice at trial in order for there to be a denial of the constitutional right to counsel resulting from the lack of counsel at the preliminary hearing. In support of its opinion the court quoted from a case that is of doubtful force:

While the case may have been modified in other respects, Crooker v. State of California, . . . validly applicable here is the statement that “state refusal of [an accused’s] request to engage counsel violated due process not only if the accused is deprived of counsel at trial on the merits, * * * but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of ‘that fundamental fairness essential to the very concept of justice.’” (Brackets in original.)30

The emphasis upon the requirement of prejudice at trial is not consistent with the later views of the Supreme Court of the United States.31 However, the Missouri Supreme Court then continued with a quotation from a recent federal court of appeals decision which presents a more defensible position:

In our view, Hamilton and White teach that an accused is denied rights afforded him under the sixth amendment when he

29. Id. at 254.
30. Id. at 254. Crooker v. California, 357 U.S. 433 (1958), involved a claim of the denial of the right to consult with counsel during a period of police interrogation. A confession obtained during that period was admitted at trial. In rejecting Crooker’s claim that the denial of his constitutional rights required reversal of the conviction the Supreme Court, at page 439, used the language quoted by the Missouri Supreme Court. In Escobedo v. Illinois, 378 U.S. 478 (1964), the court reversed a conviction based upon a confession obtained while the defendant was denied the right to counsel at the police interrogation stage. The Supreme Court in Escobedo did not specifically overrule Crooker, but instead attempted to distinguish it, and then stated that to the extent it was inconsistent with the principles of Escobedo, it was not controlling. In a footnote, at 492, the Court added that the authority of Crooker had been weakened by the decisions in Hamilton v. Alabama, supra note 8, White v. Maryland, supra note 15, and Massiah v. United States, 377 U.S. 201 (1964). Although not overruled, Crooker v. California is doubtful authority.
31. E.g., Gideon v. Wainwright, supra note 4; Hamilton v. Alabama, supra note 8; White v. Maryland, supra note 15.
is subjected to arraignment or to a preliminary hearing without the assistance of counsel, where events transpire that are likely to prejudice his ensuing trial. The Court, in each case, refused to speculate as to whether in fact prejudice actually occurred.

... [I]f the effectiveness of legal assistance ultimately furnished an accused is likely to be prejudiced by its prior denial, the earlier period may be deemed a critical stage in the judicial process and a conviction obtained in such circumstances is rendered invalid. We see nothing in the Supreme Court decisions, however, that would permit us to extend the duty of the State to appoint counsel in proceedings where even the likelihood of later prejudice arising from the failure to appoint is absent.32

Failing to find any harm resulting to Owens from the lack of counsel at the preliminary hearing, the Missouri court affirmed his conviction.

Is the preliminary hearing in Missouri a “critical stage” in the criminal process? This question cannot be answered adequately without an understanding of the role of the preliminary hearing in the criminal process. The problem is complicated because it is not completely clear what the full purposes of a preliminary examination are. Neither is it completely clear what is meant by a “critical stage.”

Originally the preliminary examination was for the benefit of prosecution; now it is, at least theoretically, solely for the benefit of the accused.33 It is supposed to be a device for sifting out unwarranted felony prosecutions at as early a time as possible. By requiring the prosecution to establish a basis for going to trial, and discharging those accused as to whom this basis cannot be established, those accused who are the victims of unfounded complaints can avoid the expense and embarrassment of a trial. Even more important to an indigent is the danger of being confined in jail to insure his presence for a trial that ought not even be held. The magistrate is supposed to determine whether there is sufficient evidence to warrant “binding over” the accused to answer a felony charge in the circuit court. If the evidence is insufficient, the accused is to be discharged.


33. See Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 53-58 (1947); Comment, THE PRELIMINARY HEARING—AN INTERESTING ANALYSIS, 51 IOWA L. REV. 164 (1965).
If there is sufficient evidence, in addition to binding over, the magistrate also has the obligation to set bail if the offense is bailable.\textsuperscript{34} 

Is the fact that these decisions are made sufficient to make the preliminary hearing a "critical stage"? Of what value is the assistance of counsel at this stage? First there is the question of whether or not the accused should waive the holding of a preliminary examination. Since it is for his benefit, he may, if he chooses, waive it. Since most people do not understand what is to be gained or lost from having a preliminary hearing, a layman is not able to properly evaluate his choice unless he has the assistance of counsel. The Missouri rules recognize this by providing:

The accused may waive a preliminary examination after consultation, or after being afforded the right of consultation, with his counsel.\textsuperscript{35}

There is, however, no provision for supplying this assistance to an indigent.

If the preliminary hearing is held then evidence will be presented for the determination of whether or not the accused is to be held for trial. The accused may cross-examine the witnesses and present evidence in his own behalf. The procedure of offering evidence, of examining and cross-examining witnesses, is similar to that followed at a trial.\textsuperscript{36} It is a judicial proceeding in which the state is represented by counsel. It is foolish to think that a layman can adequately exercise his options of cross-examination and presenting evidence without the assistance of counsel. He does not have the training necessary to conduct an effective cross-examination; he does not have the legal qualifications to be able to effectively present

\textsuperscript{34} Mo. R. Crim. P. 23.08, 23.03. "[A] preliminary hearing . . . does not put an accused on trial for the commission of the offense charged; but merely inquires whether there is probable cause for believing a felony has been committed and that the accused is guilty thereof—this for the purpose of binding him over for trial or committing him to jail in event he fails to give sufficient bail, if the required facts are found and the offense is bailable. In other words, the statutes [on preliminary hearings] are merely in aid of the arrest and detention of the accused, not of his conviction." State v. Graves, 352 Mo. 1102, 1111, 182 S.W.2d 46, 52 (1944).

\textsuperscript{35} Mo. R. Crim. P. 23.02. The most important decision to be made at this stage and the one that is most beyond the capabilities of the ordinary layman is whether or not to waive the preliminary hearing. In some instances the only "assistance" an unrepresented accused receives is the "advice" of the police to waive the hearing. See Miller & Dawson, \textit{Non-use of the Preliminary Examination: A Study of Current Practices}, 1964 Wis. L. Rev. 252.

\textsuperscript{36} Mo. R. Crim. P. 23.03: "The accused may cross-examine witnesses against him and may introduce evidence in his own behalf. So far as is practicable, the preliminary examination shall be conducted in the same manner as the trial of criminal cases in circuit courts."
evidence in his behalf or to know what evidence he ought to present. He probably does not understand the limited nature of the issue to be decided—it is not his guilt or innocence but simply whether there is sufficient evidence to warrant further proceedings.

The Missouri rules recognize the importance of having counsel at the preliminary hearing by providing that an accused may send for counsel to assist him. There is, however, no provision for supplying this assistance to an indigent.

If a “critical stage” means a stage in the criminal process at which what happens will be of serious consequence, and the assistance of counsel is needed to be able effectively to make the necessary decisions, then the preliminary hearing is a “critical stage.” The results of the hearing can be the loss of his liberty pending trial, and the necessity of having to stand trial. These are very important matters. An accused is given the opportunity to affect the decisions that are made at the preliminary hearing. He cannot competently and intelligently decide whether or not to waive the hearing and what to do at the hearing if one is held unless he has the assistance of counsel.

However, this is not the meaning of a “critical stage” as viewed by the Missouri Supreme Court. In the cases where the court has considered whether there was a denial of counsel at a “critical stage” the question has not been simply, “was there a denial of counsel?” but rather: “Should the conviction be reversed because of what happened (or did not happen) at the preliminary hearing?” The conviction is not a result of the preliminary hearing but is a result of the trial. To the Missouri Supreme Court, then, the question of whether the preliminary hearing is a “critical stage” depends upon its effect on the trial.

37. Mo. R. Crim. P. 23.03: “The magistrate before whom an accused is brought shall advise the accused of the charge against him . . . . The accused shall be allowed a reasonable time to advise with his counsel and shall be permitted to send for counsel if he so desires.”

38. If an accused is bound over he is entitled to be released on bail. If he is indigent the chance of bail being set at a figure he can meet is slight. Representation by counsel may be of considerable assistance in obtaining release on bail. If he is bound over to answer to a capital offense he is not entitled to be released on bail if “the proof is evident or the presumption great.” Mo. Const. art. I, § 20. Counsel could be of considerable help in demonstrating that a capital offense is bailable. Even when there is no question but that the offense is bailable, counsel can be of assistance in presenting matters that may result in bail being set at a very low figure, or none at all. See Field, Granting Bail to Indigent Defendant, 29 Mo. L. Rev. 72 (1964).

39. See cases cited supra note 24.
If a plea of guilty were taken at the preliminary hearing and evidence of this admitted at trial, then clearly the preliminary hearing would have been a "critical stage" and the lack of counsel at that stage would be grounds for reversal of the conviction. But there is, as has been pointed out, no requirement that actual prejudice be shown.\textsuperscript{40} If the definition of "critical stage" is dependent upon what happens at the trial, then the question of whether or not the preliminary hearing is a critical stage is dependent upon whether anything occurs as a result of lack of counsel which has a sufficient possibility of resulting in prejudice at trial.

Is the preliminary hearing in Missouri a "critical stage" under this approach? Normally no pleas are made.\textsuperscript{41} If testimony given at the preliminary hearing in absence of defense counsel is later offered at trial, it is inadmissible because of the denial of the right of confrontation.\textsuperscript{42} If an ordinary preliminary hearing is held and the accused is not afforded counsel, is there a sufficient possibility that prejudice may result at trial from this alone?

There is some possibility of harm at trial resulting. If defense counsel is present at the preliminary hearing he may be able to acquire information from the evidence offered by the prosecution that will result in the defense counsel being better able to prepare for trial. If the accused alone is present he hears all the evidence presented but he is not able to understand and appreciate the legal significance and possible trial uses of it. The lawyer is.

By cross-examining witnesses under oath, an attorney may be able to "discover" much information that otherwise might be difficult to obtain.\textsuperscript{43} With the limited amount of discovery allowed in criminal cases, this can be an important consideration. It is certainly a factor that should be considered in deciding whether or not to waive the hearing. It is true that depositions can be taken by a defendant in a criminal case,\textsuperscript{44} but

\textsuperscript{40} See discussion of \textit{White v. Maryland} and \textit{Hamilton v. Alabama}, supra.

\textsuperscript{41} In \textit{State v. Owens}, supra note 24, the accused did plead not guilty at the preliminary hearing at a time when he had no counsel. However, the only effect of this plea was to require the holding of the preliminary hearing. In some parts of the state, apparently, accused are asked to plead at the preliminary hearing and if they plead guilty, this is taken to be a waiver of the preliminary hearing. See Brief for Appellant, \textit{supra} note 17, \textit{State v. Owens}. Cf. \textit{Miller & Dawson}, \textit{supra} note 35.

\textsuperscript{42} \textit{Pointer v. Texas}, \textit{supra} note 21.

\textsuperscript{43} See \textit{Miller & Dawson}, \textit{supra} note 35. Cf. \textit{Washington v. Clemmer}, 339 F.2d 715 (D.C. Cir. 1964). Among the most useful information that can be acquired are statements that can be used for impeachment purposes at trial.

\textsuperscript{44} \textit{Mo. R. CRIM. P. 25.10}.
when the defendant is indigent the opportunity to take depositions is greatly limited, for he has no funds to pay for them and a recent decision holds that the state is under no obligation to advance the money necessary for them.\textsuperscript{45} For an indigent, the preliminary hearing may be the only effective means of discovery.

However, these and other possibilities of prejudice\textsuperscript{46} are speculative. The loss, if any, may not be irreparable. For example, information not learned at the preliminary hearing may be acquired in other ways. In \textit{State v. Owens}\textsuperscript{47} the accused acquired considerable information at a hearing on his motion to suppress; this was the same information that would have been acquired at the preliminary hearing.

Yet, while speculative, these harms are possible, and it is arguable that the preliminary hearing in Missouri is a critical state in the criminal process even if the definition of critical stage is limited to the effects at trial. The Missouri court has, however, rejected this argument.

There is a right to be represented by counsel at the preliminary hearing.\textsuperscript{48} And, it is submitted, the failure to provide counsel for an indigent accused is a denial of that right.

If the preliminary hearing were simply a review of the basis for the detention of an accused, involving a process similar to that supposed to be followed by a magistrate before issuing a warrant for arrest and containing no adversary features,\textsuperscript{49} then perhaps “fairness” would not re-

\textsuperscript{45} State v. Aubuchon, 381 S.W.2d 807, 813 (1964): “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. As a corollary to the foregoing and \textit{not} as a ground for the ruling, we note that defendant could have taken freely the depositions of any and all desired witnesses upon written interrogatories.”

\textsuperscript{46} It is questionable whether written interrogatories are an adequate substitute for depositions. It is doubtful that many attorneys would consider them an equivalent means of inquiry.

\textsuperscript{47} Supra note 24.

\textsuperscript{48} In Lambus v. Kaiser, 352 Mo. 122, 124, 176 S.W.2d 494, 495 (En Banc 1943), the court noted that the federal and state constitutions “both guarantee the accused the right to counsel ‘in criminal prosecutions.’ Under either of these provisions there can be no doubt but that an accused at a preliminary examination is entitled to be represented by counsel if he wishes and opportunity of counsel must not be denied him.”

As to when a criminal prosecution begins, see \textit{State ex rel. Lamar v. Impey, 365 Mo. 437, 283 S.W.2d 480 (En Banc 1955).}

\textsuperscript{49} See Scurlock, \textit{Arrest in Missouri}, 29 U. KAN. CITY L. REV. 117, 133-151
quire that the accused even be present either in person or by counsel. But the preliminary hearing in Missouri is more than this. It is an adversary proceeding (granted the hearing is for a limited purpose); the state has allowed the accused the opportunity to be represented by counsel and the assistance of counsel is necessary for the adequate presentation of the accused's side (granted again the hearing is only for a limited purpose).

It is a violation of our concept of "fairness" to allow representation by counsel at an important stage in the criminal process and then to deny this representation to some because they are unable to pay for it.

In *Griffin v. Illinois*⑤0 the Supreme Court of the United States ruled that a state could not deny an appellate review because the appellant was indigent and could not afford to pay for a transcript, while allowing appeals to those who could afford this expense.

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all... But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clause protect persons like petitioners from invidious discriminations.⑤1

In *Douglas v. California*⑤2 this idea was extended to representation by counsel on appeal:

In *Griffin v. Illinois*... we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There... the right to a free transcript on appeal was in issue. Here the issue is whether

⑤1. *Id.* at 18.

or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has." 53

If the state grants a right to appeal and the right to be represented by counsel on that appeal, these rights cannot be denied because the appellant cannot afford to pay for them. There is no requirement of prejudice resulting from the denial of counsel. There is no necessity of showing that the appeal might have reached a different result if counsel had been present. 54 Although it is possible to conduct a "fair" review of a criminal conviction when the appellant is not represented by counsel and the state is, 55 there is an advantage in having an appeal presented by an attorney. The state cannot grant this advantage to some and deny it to others because they cannot pay for it.

The same arguments apply to representation by counsel at the preliminary hearings. There is no inherent necessity of having a preliminary hearing. In Missouri it is required only in felony cases and is dispensed with in misdemeanor cases. 56 But once having granted an accused the op-

53. Id. at 355.
54. Efforts to limit the appointment of counsel for indigent appellants to "worthy" appeals have not been successful. Douglas v. California, supra note 52. See also Lane v. Brown, 372 U.S. 477 (1963), and Draper v. Washington, 372 U.S. 487 (1963).
55. Prior to the decision in Douglas v. California, Missouri did not appoint counsel to represent indigents on appeal. "On July 9, 1963, we amended our Rule 29.01 so as to require the appointment of counsel on appeal for indigent defendants in felony cases; while the rule could not legally be effective for six months, this Court requested immediate compliance. The judgment and sentence involved here was rendered . . . two and one-half years prior to the ruling in Douglas. . . . At that time, and for generations past, it was and has been the universal practice of this Court to consider on the merits, regardless of the presence of counsel or the filing of any brief, all questions sufficiently raised in a motion for new trial and to consider independently of any motion all matters of record. . . . In this Court we have frequently seen criminal cases where privately employed counsel have elected not to brief and argue on appeal, but have left the merits to the Court's independent consideration. It has not been our practice to determine (as did the California Court in Douglas) whether any "good * * * could be served by appointment of counsel?"; rather, we have proceeded to consider the merits, and, in effect, to brief for the defendant upon a full transcript, all those points which counsel would have been permitted to brief and argue had he appeared. It is probable that as large a percentage of criminal judgments have been reversed in this Court without counsel, as have been reversed with counsel." State v. Donnell, 387 S.W.2d 508, 513-14 (1965).
56. In misdemeanor cases the prosecuting attorney determines if there is a sufficient basis on which to proceed. Mo. R. Crim. P. 21.04. Preliminary hearings are also not required when an indictment has been returned.
portunity to have the validity of his detention to answer criminal charges determined by an independent judicial officer, this opportunity must be given on an equal basis. Even if it is possible to have a "fair" hearing on this question without allowing the accused the assistance of counsel, once the state has allowed this assistance, it ought not be able to deny this assistance on account of poverty.

If it is correct, as has been argued, that the lack of counsel at the preliminary hearing may prejudice an accused as to those matters determined at the hearing, and may possibly prejudice his subsequent trial; and if, as has been argued, the failure to appoint counsel to represent the indigent at the preliminary hearing is an invidious discrimination against the poor, then why has the Missouri Supreme Court persisted in maintaining:

Neither the federal nor state constitution, nor any of our statutes require the magistrate to appoint counsel for the accused at the preliminary hearing.67

It is most certainly not because the court lacks consideration for the rights of an accused.68 The answer lies in the remedy being sought by those who claim to have been denied their constitutional rights.

If an indigent appellant is improperly denied a free transcript in the course of his appeal, the remedy is to give him a free transcript and let him continue his appeal. If an indigent appellant is improperly denied representation by counsel on appeal, the remedy is to grant him an appeal.


58. See quotation supra note 48. However, there have been times when the Missouri Supreme Court's interpretation of the federal rights and how they might be enforced has differed from that of the federal courts. See Montgomery v. Eidson, 123 F. Supp. 292 (W.D. Mo. 1954); Houston v. Eidson, 119 F. Supp. 778 (W.D. Mo. 1954); Young v. Parker, 355 Mo. 245, 195 S.W.2d 743 (En Banc 1946); Montgomery v. Parker, 355 Mo. 245, 195 S.W.2d 745 (En Banc 1946). These cases are discussed in Reitz, Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960). Cf. Williams v. Kaiser, 323 U.S. 471 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945).
with counsel.  

Yet what other remedy is there?

It is arguable that a valid preliminary hearing is a requisite to a valid information being filed. If the information is not valid, any conviction based upon it cannot stand.

The Missouri rules provide:

No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county where the offense is alleged to have been committed.

The supreme court has stated that the failure to accord this right is not jurisdictional and thus cannot be attacked in a collateral proceeding, nor is there any necessity that the information recite that a preliminary examination was held or waived. But where the lack of a preliminary hearing is properly raised by a motion to quash the information, and the matter is preserved for appeal, then the appellate court can consider it and can reverse the conviction.


60. Of course, if he has been acquitted there will be no relief sought. In this situation the loss to him from the lack of counsel may be much greater. He may have had to stand trial on charges that might have been dismissed at the preliminary hearing and, more likely, he has had to spend time in jail awaiting trial on an offense of which he is found to be innocent.


62. Buckley v. Hall, 215 Mo. 93, 114 S.W. 954 (1908). What may or may not be raised in a collateral proceeding has changed since this decision. "Ordinarily the absence of a preliminary examination does not ipso facto deprive the circuit court of jurisdiction." Lambus v. Kaiser, supra note 48, at 126, 176 S.W.2d at 497. Cf. State v. Pippey, 335 Mo. 121, 71 S.W.2d 719 (1934).

63. Buckley v. Hall, supra note 62.

64. State v. McNeal, 304 Mo. 119, 262 S.W. 1025 (1924); see also State
If the failure to appoint counsel to represent an indigent at the preliminary hearing is a denial of his constitutional rights without regard to its effect on the subsequent trial, then these rights must be protected. If the Missouri court is correct that there is no violation of fundamental rights unless the trial is somehow affected by the prior lack of counsel, some cases will have to be reversed when this possibility of prejudice occurs. In either event, it would be far better to provide counsel for the indigent at the preliminary hearing than to run the risk that the Supreme Court of the United States will decide that the failure to appoint counsel for indigents at the preliminary hearing (as it is constituted in Missouri) is a denial of the accused's constitutional rights, or to run the risk that in any particular case the clear possibility of prejudice will be present and require reversal of the conviction.

The obvious and simple solution is for the Missouri Supreme Court, through its rule-making power, to require that counsel be appointed to represent indigents at the preliminary hearing. There is no sound reason why counsel should be denied at this stage in Missouri criminal procedure.

ex rel. McCutchan v. Cooley, 321 Mo. 786, 12 S.W.2d 466 (En Banc 1928), where the remedy was a writ of prohibition.

65. A committee appointed by the Supreme Court of Missouri recently recommended: "[C]ounsel should be appointed in felony cases in time to function at the preliminary examination. The present Missouri law does not require appointment at this stage, and nothing in the federal decisions indicates such a requirement. The right to a preliminary hearing, however, is an important right and the decision about whether to proceed with this examination or to waive it should be one which is deliberately made after consultation with counsel.

"The Committee does not feel that the Bar will be severely burdened by a requirement of counsel for preliminary hearing. The preliminary can serve as a valuable means of discovery in an area in which discovery is generally restricted. Most of the work required of counsel in connection with a preliminary hearing will have to be done at some stage of the proceedings anyway." Report of the Committee on the Defense of the Indigent Accused, 6-8 (1965).

Some magistrates in Missouri do appoint counsel to represent the indigent at the preliminary hearing even though there is no statute or rule authorizing this. Bus see Op. ATT'Y GEN. 207 (Mo. June 21, 1963). Several states provide for the appointment of counsel at the preliminary hearing stage. See SILVERSTEIN, THE DEFENSE OF THE POOR (1965) App., Table 5.

See also Sparkman v. State, 27 Wis.2d 92 —— , 133 N.W.2d 776, 780-81 (1965), where, after noting that the case before them did not require a decision on the question, the court announced a ruling that henceforth counsel should be appointed at the preliminary hearing. After reviewing the reasons why counsel was needed at the preliminary examination, the court concluded: "But we think a most compelling ground of public policy is the prevention of the possibility of the violation of constitutional right of a fair trial occurring at the trial itself.

"[T]he must be recognized that the appointment of counsel at the preliminary examination would tend to insure fairness at the trial stage and to avoid the type of situation which led to a reversal in White v. Maryland . . . ."