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Indigent Defendant's Right to Council in Misdemeanor Cases

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freedom to those who would communicate ideas by conduct . . . as these amendments afford those who communicate ideas by pure speech." It is the idea or content of an expression which is protected under the Constitution, not the manner in which it is communicated.[18] If it is the conduct which the legislature seeks to repress, and not the idea, conduct may be punished "even though intertwined with expression".[19]

Street was convicted not because of what he said, but how he said it. The statute under which he was convicted sought not to repress his protests, but to repress conduct made criminal by the legislature. Although the *Street* court noted this distinction it rested its decision on the assertion that the defendant's conduct might have provoked a breach of the peace. The decision might well have rested upon the distinction between expression and criminal conduct.

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[18] *See* Lusk, *supra* note 2; Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 316 (1952).

[19] Cox v. Louisiana, 379 U.S. 536, 563 (1965).

CRIMINAL LAW — INDIGENT DEFENDANT'S RIGHT TO COUNCIL IN MISDEMEANOR CASES

Defendant John De Joseph advised the Connecticut Circuit Court that he was financially unable to employ an attorney and requested court-appointed counsel to aid him in his defense to a misdemeanor charge. De Joseph argued that the case of *Gideon* v. *Wainright*[1] had established a *right* to court-appointed counsel for indigent defendants. The Supreme Court there held:

> [*A*]*ny person* haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel

[1] 372 U.S. 335 (1963).

> is provided for him. . . . [S]tate and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials . . . in which *every defendant* stands equal before the law. This noble ideal cannot be realized if the poor man charged with *crime* has to face his accusers without a lawyer to assist him.[2]

The Connecticut judge denied De Joseph's request, stating that since the *Gideon* decision involved a defendant accused of a felony, its command was not applicable to persons charged with a misdemeanor only.[3] De Joseph petitioned the United States Supreme Court for a writ of certiorari to review his conviction on the ground that he had been denied his constitutional right to court-appointed counsel, but his petition was denied.[4]

The reasoning of the Connecticut court in its denial of De Joseph's request for court-appointed counsel represents an attitude which is characteristic of many state courts today.[5] However, this position seems to be an incorrect interpretation of the defendant's right to court-appointed counsel when the crime charged is a misdemeanor.[6] Different criteria are applied among the various states,[7] and also between the

[2] *Id.* at 344 (emphasis added).
[3] State v. De Joseph, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied,* 385 U.S. 982 (1966).
[4] De Joseph v. Connecticut, 385 U.S. 982 (1966).
[5] *See, e.g.,* Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied,* 385 U.S. 907 (1966); State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (App. Div. 1967); City of New Orleans v. Cook, 249 La. 820, 191 So. 2d 634 (1966); *See also* Pizzitola v. State, 374 S.W.2d 446 (Tex. Crim. App. 1964).
[6] *Compare* Comment, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases,* 19 Sw. L.J. 593 (1965), *with* Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused,* 30 U. CHI. L. REV. 1 (1962).
[7] *See, e.g.,* Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied,* 385 U.S. 907 (1966); People v. Mallory, 378 Mich. 538, 147 N.W.2d 66 (1967).

state and federal courts.[8] There is a pressing need for a clear standard governing the right to counsel and for its uniform application by state and federal courts. The Supreme Court avoided the opportunity to establish such a guideline in the *De Joseph* case and in a similar federal case decided three months earlier.[9]

If the premise is accepted that the *Gideon* decision established that the indigent defendant has a constitutional *right,* as opposed to simply the *need,* to be represented by counsel,[10] then analysis of this premise will obviate any controversy centering upon the *nature* of the offense with which the defendant is charged. That is, once the existence of the right is established, any deprivation of this right is unconstitutional regardless of whether it is classifed as a felony or a misdemeanor.[11] To conclude that this right is an absolute one, applicable to every criminal act regardless of the degree of severity, would be to ignore the practicalities of criminal law.

The necessity of making a distinction seems clear, but the present distinction is arbitarily drawn. The felony-misdemeanor line overlooks the important factor of the *burden* which a criminal penalty imposes on the defendant.[12] When viewed in light of the disruptive effect on the defendant's efforts to support his family, operate his business, obtain a new job, borrow money, and so on, the misdemeanant's nine month penalty weighs as heavily as the felon's fourteen month penalty. It is obvious that one should have the same constitutional rights as the other.

Another ground upon which the *De Joseph* decision is to be criticized stems from the fact that the federal judiciary

[8] *See, e.g.,* McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Pizzitola v. State, 374 S.W.2d 446 (Tex. Crim. App. 1964).

[9] Winters v. Beck, 385 U.S. 907 (1966).

[10] *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[11] Harvey v. Mississippi, 340 F.2d 263, 269 (5th Cir. 1965).

[12] *See* United States v. Barnett, 376 U.S. 681, 695 n. 12 (1964).

conforms to standards which often differ from the standards applied by state courts.[13] As part of the Criminal Justice Act of 1964,[14] Congress declared that indigent defendants charged "[w]ith felonies or misdemeanors, other than petty offenses" shall be provided counsel in all federal courts. The situation is made more confusing because the federal courts must appoint counsel in any serious misdemeanor case whereas many of the state courts are insistent on applying *Gideon* only in felony cases. The resulting confusion can best be illustrated by a comparison of *Arbo* v. *Hegstrom*[15] with *De Joseph*. With less than ten months difference in the dates of the trials, both defendants were accused and convicted of the same crime in Connecticut. Both men were indigent and were tried without the benefit of court-appointed counsel. The court ruled that the appointment of counsel for De Joseph was discretionary and that, therefore, his conviction must be affirmed.[16] After exhausting his state remedies, however, Norman Arbo petitioned the federal district court for a writ of habeas corpus and it was granted. In contrast to the *De Joseph* holding in the state court, this federal court in *Arbo* stated:

> [T]he state had an absolute obligation to appoint counsel to aid the accused, Norman Arbo, in the preparation of his defense.[17]

And so, as a result of the confusion in Connecticut, one defendant remained in jail and the other was released. Mr. Justice Stewart underlined this inconsistency in his dissent to the Supreme Court's denial of certiorari citing the disparity between *Arbo* and *De Joseph* and concluding:

> When the meaning of a fundamental constitutional right depends on which court in Connecticut a person

[13] Comment, *supra* note 6, at 599-605.
[14] U.S.C. § 3006A (1964).
[15] 261 F. Supp. 397 (D. Conn. 1966).
[16] State v. De Joseph, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966).
[17] Arbo v. Hegstrom, 261 F. Supp. 397, 400 (D. Conn. 1966).

> turns to for redress, I believe it is time for this Court to intervene.[18]

Another factor which contributes to current uncertain standards is the variety of meanings and definitions of "misdemeanor" which exist among the several states. Examples of such differences can be cited in the area of penalties, such as Arkansas' provision for a three year penalty for a certain misdemeanor[19] as compared to the customary penalty of less than a year:[20] likewise in the area of major classifications, such as the crime of adultery which is categorized as a felony in some states while considered a misdemeanor in others.[21] And so, even if the position is taken that the line is to be drawn between misdemeanors and felonies, it still appears that the Supreme Court should have granted certiorari to Mr. De Joseph and thereby established a uniform standard for the distinction between what constitutes a felony and what constitutes a misdemeanor.

The existing confusion and uncertainty allow the meaning of "justice" to vary among the different states, and between the state and federal courts. It allows the citizens of Mississippi to enjoy a freedom[22] that is not provided for a citizen of Arkansas.[23] In short, it allows the meaning of the United States Constitution to vary from state to state and

[18] De Joseph v. Connecticut, 385 U.S. 982, 983, *denying cert. to* 3 Conn. Cir. 624, 222 A.2d 752 (1966).

[19] ARK. STAT. § 41-805 (1964 Replacement).

[20] *See e.g.*, CAL. PENAL CODE § 199 (West 1957); 41 ARK. STAT. ANN. 106 (1964 Replacement); 13 ARIZ. REV. STAT. ANN. § 1645 (1939); and, OKLA. STAT. tit 21, § 10 (1961).

[21] *Compare* 13 ARIZ. REV. STAT. § 221 (1939); MASS. GEN. LAWS ANN. ch. 272, § 14 (1902); WIS. STAT. ANN. ch 944, § 16 (West 1955); *with* KAN. GEN. STAT. ANN. ch. 21 § 907 (Supp. 1963); and NEW JERSEY STAT. ANN. ch. 88 § 1 (1898).

[22] Harvey v. Mississippi, 340 F.2d 263, 269 (5th Cir. 1965).

[23] Winters v. Beck, 385 U.S. 907 (1966).

from court to court. Perhaps the words which best communicate this proposition are those of Mr. Justice Stewart:

> [S]urely it is at least our duty to see to it that a vital guarantee of the United States Constitution is accorded with an even hand in all the States.[24]

In the final analysis it is submitted that the present felony-misdemeanor criterion which is applied by the judiciary systems in determining which indigent defendants will be afforded the constitutional right of court-appointed counsel should have been given a critical analysis by the Supreme Court in light of (1) the concept of the *burden imposed* on the defendant by the penalty assessed, and (2) the *lack of uniformity* throughout the judiciary system.

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[24] Winters v. Beck, 385 U.S. 907-909 (dissenting opinion).