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Repository Citation

Dale E. Bennett, *Right to Counsel - A Due Process Requirement*, 23 La. L. Rev. (1963)

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RIGHT TO COUNSEL — A DUE PROCESS REQUIREMENT

Dale E. Bennett*

One of the fundamental Bill of Rights provisions of the Federal Constitution is the statement, in the sixth amendment, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This provision has been construed as requiring, unless there is a waiver, that an indigent defendant in federal criminal prosecutions shall have counsel furnished by the government.¹ However, *Betts v. Brady*² held that the sixth amendment was only applicable to federal courts; and that the "due process" clause of the fourteenth amendment did not require court-appointed counsel for indigent defendants in state courts. While "due process" appeared to require the appointment of counsel for indigent defendants in capital cases,³ the appointment of counsel was generally considered a matter to be determined by the various state legislatures. The United States Supreme Court's recent decision in *Gideon v. Wainwright* has, however, directly and unequivocally overruled *Betts v. Brady*, and has held that the right to counsel stated in the sixth amendment lays down a rule so fundamental and essential to a fair trial that it is applicable to criminal proceedings in state courts under the "due process" requirements of the fourteenth amendment. *Gideon* does not hold that all provisions of the Bill of Rights apply to the states as criteria of "due process" under the fourteenth amendment; but it broadly states that those guarantees which are "fundamental safeguards of liberty" are applicable to state proceedings.⁴ Justice Black, who delivered the Court's opinion, cited and quoted from a number of Supreme Court decisions which, prior to *Betts v. Brady*, had treated court-appointed counsel as "a fundamental right, essential to a fair trial."

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1. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

2. 316 U.S. 455 (1942).

3. *Powell v. Alabama*, 287 U.S. 45 (1932); *Hamilton v. Alabama*, 82 Sup. Ct. 157 (1961).

4. 83 Sup. Ct. 792, 794 (1963), relying upon *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

"Not only these precedents," stated Justice Black, "but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."⁵

Gideon v. Wainwright is eminently sound in reversing *Betts v. Brady* and holding that the right to counsel in a non-capital felony case (breaking and entering) is a fundamental "due process" requirement. The *Gideon* decision leaves much to be desired, however, by its failure to specify how far this requirement is to extend. Justice Black's general phrases, "any person haled into court" and "a poor man charged with crime" (emphasis added), are broad enough to include defendants charged with misdemeanors. To extend the right of court-appointed counsel to misdemeanor cases would be fraught with practical difficulties and would not be supported by those basic considerations of necessity and inherent fairness which demand free counsel in felony cases. It would mean that counsel must be provided at almost prohibitive cost, in a multitude of minor cases where the offense charged involves no possibility of imprisonment in the state penitentiary or forfeiture of civil rights. These trials are simply and expeditiously conducted, and financially able defendants frequently choose to handle their own cases before the trial judge.

The opinions of the Supreme Court Justices in *Gideon v. Wainwright* afford no clear answer to this problem, but it may

5. 83 Sup. Ct. 792, 796 (1963). Mr. Justice Black continues: "A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequate to prepare his defense, even though he have a perfect one.'" *Id.* at 497.

be plausibly argued that the United States Supreme Court has actually held only that the right to counsel is a "due process" requirement in felony cases. The criterion laid down by Justice Black is whether the appointment of counsel for an indigent defendant is "a fundamental right, essential to a fair trial."⁶ While the right to counsel is essential to a proper presentation of the defendant's case in a felony trial before a jury, the assistance of counsel does not have the same "due process" significance in the informal proceedings which are followed in misdemeanor trials. Justice Harlan, in a concurring opinion, suggests that the *Gideon* decision may be limited to felony cases.⁷ Future decisions will, undoubtedly, provide a more definitive answer to this question. In the meantime this writer ventures a suggestion that the right to counsel to assist in the defense of a misdemeanor case is not such a fundamental right that it should be clothed with "due process" characteristics.

Louisiana's present statute law is very tersely stated. Article 142 of the Code of Criminal Procedure simply affirms the defendant's general right to have the assistance of counsel for his defense.⁸ Assignment of court-appointed counsel to indigent defendants is provided for in Article 143,⁹ which limits state-provided counsel to *felony* cases, including so-called "relative felonies" punishable with or without hard labor. Procedures for appointment of counsel are worked out, in large measure, by local court practice; with some guidance from decisions of the Louisiana Supreme Court. Now that *Gideon v. Wainwright* has held that "due process" requires the appointment of counsel for the indigent defendant in a felony case, Louisiana courts must check their local practices to be sure that they fully conform. The sixth amendment has been construed to mean "that

6. *Id.* at 794.

7. *Id.* at 801: "The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in non-capital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to *all* criminal cases need not now be decided)."

8. LA. R.S. 15:142 (1950) drafted in conformity with LA. CONST. art. I, § 9.

9. LA. R.S. 15:143 (1950).

"The law in every state makes some provision for assigning counsel to represent indigent defendants. Indeed, most states provide for counsel in the case of all crimes save the least significant. In a few, however, state-provided counsel is available only in capital cases. In others, only alleged felons may ask for free legal assistance." PAULSEN, *THE PROBLEM OF ASSISTANCE TO THE INDIGENT ACCUSED* 15 (1961), prepared for Joint Committee on Continuing Legal Education of the A.L.I. and A.B.A.

in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently relinquished,"¹⁰ and this same requirement would apply to the right to counsel in state felony cases. Full implementation of the defendant's right to counsel requires the court to inform an unrepresented defendant, before he pleads to the indictment at arraignment, of his rights relative to court-appointed counsel.¹¹ The Louisiana Supreme Court has held, in *State v. Youchunas*,¹² that the minutes of the court must show either that the defendant was represented by counsel or that a defendant appearing without counsel intelligently relinquished his right to counsel. However, where a defendant was sentenced after a plea of guilty, *State v. Hilaire*¹³ held that the jurisprudential requirement of *Youchunas* did not apply, and it was not necessary for the minutes to show that counsel had been appointed or understandingly waived. The *Hilaire* exception was posited on a very sound practical basis. Justice Fournet declared:

"For us to hold otherwise at this time, after the several courts of this State have been accepting pleas of guilty at arraignment without assigning counsel to the accused under the practice and procedure long prevailing, would only serve as an avenue for the release of a majority of the inmates of the Louisiana State Penitentiary who are now serving under pleas of guilty."¹⁴

While it would be impractical to impose the *Youchunas* minute entry requirement upon existing convictions upon pleas of guilty, it serves as a sound guide for procedure in future cases. The defendant's right to counsel at the arraignment, to assist him in determining whether to plead guilty or go to trial on the merits, is an important right. Competent and intelligent relinquishment of the right is a matter which under *Youchunas*, should be shown on the minutes of the court.

10. 83 Sup. Ct. 792, 794 (1963), relying on *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938), wherein Mr. Justice Black declared: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused — whose life or liberty is at stake — is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."

11. See FED. R. CRIM. PROC. Rule 44 (1946); N.J. Rules of Court, Rule 1:12-9(a); A.L.I. CODE OF CRIM. PROC. § 203 (1930) listing thirteen states requiring such notification by the court.

12. 187 La. 281, 174 So. 356 (1937).

13. 216 La. 972, 45 So.2d 360 (1950), discussed in 11 LA. L. REV. 234 (1951).

14. 216 La. 972, 978, 45 So.2d 360, 362 (1950).

The time when counsel are assigned to indigent defendants is a matter of utmost significance. Article 143 of the Louisiana Code of Criminal Procedure does not specify the time for appointment of counsel. It has been a frequent practice to appoint counsel *after* the defendant pleaded at the arraignment, and then to give appointed counsel a reasonable time within which to withdraw any motion, plea, or waiver made by the defendant and to enter any other motion or plea.¹⁵ With the right to counsel in felony cases raised to a "due process" level, it would appear that the defendant should be afforded his right to have court-appointed counsel *before* he makes his plea at the arraignment. One writer states:

"The better view is that one needs the advice of counsel on the crucial question of how to plead. Some judges have taken the position that how one pleads doesn't matter much because counsel are always free to change a plea later. However, once a plea of guilty has been entered, a very damaging admission has been made, and counsel may be understandably reluctant to try to undo the harm later by changing the plea. State courts are practically unanimous in agreement that the right to counsel accrues at the arraignment."¹⁶

Appointment of counsel prior to arraignment, as after the prosecution is instituted by indictment or information, might be helpful. However, it would not be sufficiently significant to justify the great burden it would place upon the bar of the state.¹⁷

The need for counsel is particularly urgent in capital cases. Thus, regardless of any statutory mandate or "due process" requirement, some courts follow the laudable practice of appointing counsel for indigent capital defendants as promptly as possible after arrest. In capital cases assignment of counsel

15. *State v. Lyons*, 180 La. 158, 156 So. 207 (1934). Thus if the delayed appointment of counsel was improper, it only constituted "harmless error."

16. FELLMAN, *THE DEFENDANT'S RIGHTS* 123 (1958). The right of appointment of counsel before the defendant pleads at the arraignment is further supported by A.L.I. CODE OF CRIM. PROC. § 203 (1930); and FED. R. CRIM. PROC. Rule 44 (1946).

17. "While it would admittedly be a good thing if the defendant could get counsel immediately after arrest, no jurisdiction has thought it practicable to enact a statute giving that right. . . . the difficulty of administration of appointment of counsel shortly following the arrest of the accused probably precludes the measure without widespread adoption of the public defender system." Comment, *Right to Counsel*, 44 KY. L.J. 103, 111 (1955). Only one state requires that counsel be appointed before arraignment. CALIF. PENAL CODE § 859 (requiring assignment of counsel at the preliminary examination).

should not be made dependent upon the indigency of the unrepresented defendant, nor should it be necessary for the defendant to request court-appointed counsel. Automatic appointment of counsel for unrepresented capital defendants may occasion special problems where the defendant prefers to conduct his own defense or is otherwise antagonistic to appointed counsel. In this situation the role of court-appointed counsel is a difficult one, and the guiding jurisprudential principles are somewhat conflicting. Some cases intimate that it may be contrary to principles of constitutional "due process" to deny a defendant the right to be heard, in proper person, in his own case.¹⁸ The defendant's participation in the conduct of the trial, where he insists upon handling his own case, is a matter coming within the trial judge's discretionary control over the orderly process of the court. The general attitude is succinctly stated by a New Jersey court which declared that "counsel is not required to dance to the prisoner's tune."¹⁹ While appointed counsel's task is sometimes difficult, the most obstreperous and antagonistic defendant will usually tend to cooperate with a sincerely helpful attorney; and it appears somewhat incompatible with "due process" and a fair trial that a socially disoriented defendant should stand trial for a capital offense without the assistance of counsel.

If the rule of *Gideon v. Wainwright* is, following broad language employed in Justice Black's opinion, extended to misdemeanor cases, the various states will be presented with a very serious practical and financial problem. It will hardly be feasible to impose a burden of uncompensated representation of indigent misdemeanants upon members of the local bar, as is presently done in felony cases. The answer might be adoption of a modest fee scale, a state-wide public defender system, or a combination of the two. The public defender system is violently opposed by one prominent writer who states, "of all the fields of private right, this field of representation is the last field where we ought to permit the Government to move an inch

18. *Adams v. United States*, 317 U.S. 269 (1942); *Price v. Johnson*, 334 U.S. 266 (1948); *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945); *State v. White*, 163 La. 386, 111 So. 795 (1927); *State v. Penderville*, 2 Utah 2d 281, 272 P.2d 195 (1954).

19. *State v. Rinaldi*, 58 N.J. Super. 209, 156 A.2d 28, 30 (1959). See also *State v. Ingram*, 316 Mo. 268, 289 S.W. 637 (1926); *People v. Glenn*, 96 Cal. App. 2d 859, 216 P.2d 457 (1950); *People v. Lepur*, 175 Cal. App. 2d 798, 346 P.2d 914 (1959) stating that a defendant does not have the right to act as his own attorney where he is represented by counsel.

inside the gate. . . . the adoption of the public defender system would bring our government so close to the police state that we ought to shun it like the plague."²⁰ Two other writers answer this argument by stating that

"The real test is what the Public Defender has been employed by the government to do — not who is giving him his livelihood. His duties are to represent the indigent defendant to the best of his ability and to see that he receives a fair and impartial trial. . . . His duties are the same as those of a lawyer that is paid by a defendant who has ability to pay. . . . The Public Defender plan is consistent with the American form of government because it tends to protect the rights and liberties of individuals against the state."²¹

It is sincerely hoped that future United States Supreme Court decisions will not extend the indigent defendants "due process" right to court-appointed counsel beyond the actual holding of *Gideon v. Wainwright*, *i.e.*, where the defendant is charged with a felony. If the holding is limited to felony cases the problem will be the relatively simple one of enunciating state procedures which will fully and clearly implement the indigent defendant's right to counsel.²² If the holding is extended to misdemeanor cases it will give rise to many practical problems, not the least of which is financial, which will challenge the ingenuity and sound judgment of state legislatures and policy makers.

*Douglas v. California*²³ is another recent United States Supreme Court decision which is of marked significance in charting the "due process" and "equal protection" requirements as to right to counsel. In *Douglas* the court held with three Justices dissenting, that the "denial of counsel on appeal to an indigent would seem to be a discrimination at least as invidious as that

20. Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A.J. 219 (1956).

21. Harrington & Getty, *The Public Defender: A Progressive Step Towards Justice*, 42 A.B.A.J. 1139 (1956). These writers survey the results of the Public Defender System of Chicago, Cook County, Illinois, and conclude: "The Public Defender has earned a good name in Cook County by giving adequate service to many clients which could not have been procured elsewhere and stands as a landmark in advancement in criminal procedure. . . . The years of its operation have not created anything like or bordering on a police state, nor has any constitutional right of any accused been frittered away."

22. In the Louisiana State Law Institute's draft of a Revision of the Louisiana Code of Criminal Procedure (now in process), Tentative Title XIV, *Right to Counsel* (Exposé Des Motifs No. 18, March 1962), provides a complete statement of the indigent defendant's right to counsel in felony cases.

23. 83 Sup. Ct. 814 (1963).

condemned in *Griffin v. Illinois*,²⁴ where the indigent defendant was denied a free transcript of the record which was essential for his appeal. While admitting that "absolute equality is not required," Justice Douglas stated that when the appeal of an indigent defendant is decided without the benefit of counsel, "an unconstitutional line has been drawn between rich and poor."²⁵ The significance of counsel to assist the indigent defendant with his appeal arises out of a consideration of the appeal as "an inseparable part of the process through which the individual's guilt or innocence of the charges brought against him by the state is established."²⁶

The *Douglas* decision will cause much soul-searching and present serious practical problems to the majority of states which, like Louisiana,²⁷ do not make provision for the furnishing of counsel to assist an indigent defendant with his appeal.²⁸

24. *Id.* at 815, agreeing with Justice Traynor's statement in *People v. Brown*, 55 Cal. 2d 64, 71, 357 P. 2d 1072, 1076 (1960).

25. 83 Sup. Ct. at 816.

26. A footnote to Justice Traynor's concurring opinion in *People v. Brown*, 357 P. 2d 1072, 1075 (1960) quotes from the conclusion a report of a special subcommittee of the New York City Bar Association and the National Legal Aid Association, *Equal Justice for the Accused*, that "'any defender system should make provision for the continuance of representation through appeal in appropriate cases. An appeal when grounds exist is an inseparable part of the process through which the individual's guilt or innocence of the charges brought against him by the state is established. Counsel is needed to assist with the determination of whether an appeal should be taken and, if an appeal is taken, to prepare and present it.'"

27. The leading Louisiana case concerning defendant's right to counsel for appeal is *State v. Garcia*, 144 La. 435, 436, 80 So. 648, 649 (1919), where the defendant was represented by counsel at the trial but was denied court-appointed counsel on appeal. Justice Provosty, speaking for the Louisiana Supreme Court, stated, "So far as we know, this court has not once in the more than a hundred years of its existence appointed counsel to represent an accused. There would be practical difficulties in the way. This court sits in New Orleans only, and cases come for all over the state. Lawyers would have to come without pay from distant parishes to assist accused in this court, or the burden of assisting accused from all over the state would have to be imposed upon the few lawyers in this city who practice in the criminal courts. A practice sanctioned by the consensus of a century should not be easily disturbed." Justice Provosty concludes his discussion of this point by stating that the refusal to appoint counsel for the appeal was not a violation of the defendant's general right to counsel under Section 9 of Article XI of the Louisiana Constitution.

28. After pointing out that "state practice varies," Justice Traynor's scholarly footnote (see note 26 *supra.*) lists Indiana and Wisconsin as requiring the appointment of counsel on appeal in all felony cases, and Wyoming as making the appointment of appellate counsel discretionary with the Supreme Court. Nine states are listed as requiring appointment of counsel on appeal "only in capital cases." (Alabama, Florida, Georgia, Illinois, Kansas, Nebraska, North Carolina, Oklahoma, and Oregon.) A number of states are listed which, in varying ways and with some limitations, provide that counsel appointed for the trial have "discretion to appeal at public expense." (Iowa, Michigan, Minnesota, "in good faith and on reasonable grounds"; Mississippi, "Capital cases only"; Nevada and Pennsylvania.)

This difficulty is twice compounded by the fact that *Douglas* held that "equal protection" was denied by a California procedure under which the state appellate court was to make a preliminary investigation of the record and determine whether there was any substantial basis for an appeal.²⁹ The Supreme Court gives no indication of what means, if any, may be properly adopted to protect a state from the harassment of being required to appoint counsel to represent the defendant in taking meaningless and frivolous appeals. This was the principal basis of vigorous and well-reasoned dissents by Justices Clark and Harlan. Justice Clark cited imposing statistics showing that 96 percent of *in forma pauperis* appeals in federal courts were frivolous, and pointed out that the purpose of the California procedure, which was held invalid, was to screen out those clearly unfounded appeals where the appointment of an attorney would be a "useless gesture." "With this new fetish for indigency," Justice Clark aptly suggests, "the Court piles an intolerable burden on the State's judicial machinery."³⁰ Justice Harlan stressed the sound principle that equal protection does not require that state "to give to some [the indigent] whatever others can afford." The due process and equal protection clauses set a relative standard of inherent fairness, and the state "could never be expected to satisfy an affirmative duty—if one existed—to place the poor on the same level as those who can afford the best legal talent available."³¹ While due process requires the state to provide the indigent defendant with free counsel for the trial of felony cases,³² it does not necessarily demand the appointment of free counsel to assist him in relatively simple misdemeanor trials. Similarly, the indigent defendant's constitutional right to counsel to assist with his appeal should not be a blanket right which makes no distinction between possibly well founded and clearly frivolous appeals.

It may be that the formulation of a statutory pattern for mandatory counsel on appeal, but with a screening procedure such as California attempted, is not practical. Under present Louisiana procedures, which make no specific provision for right to counsel for appeals, counsel appointed to represent an in-

29. "When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." Justice Douglas, 83 Sup. Ct. at 816.

30. *Id.* at 817.

31. *Id.* at 819.

32. *Gideon v. Wainwright*, 83 Sup. Ct. 792 (1963).

igent defendant at the trial of the case usually continue to represent him on appeal—often at considerable personal expense and sacrifice. Such appellate representation is almost always afforded where a capital verdict has been rendered. Legislative imposition of a general duty of appellate representation would be difficult to administer and likely to result in many patently unfounded appeals.

In view of *Douglas v. California*, appointed counsel's obligation in representing an indigent defendant may be construed as including the taking of an appeal where there is a reasonable basis for such action. One of the principal hardships of free appellate representation is the cost of providing a transcript of the trial record. Thus, the *Douglas* decision makes some method of providing free transcripts for appeals almost imperative. It is also eminently fair that court-appointed counsel who elect to take an appeal to the Louisiana Supreme Court should be reimbursed for reasonable and necessary out-of-pocket expenses. The nature and amount of such reimbursement, who is to bear the cost, and the appropriation of funds for that purpose are matters for special legislative or police jury consideration and action.³³ Such reimbursement for reasonable expenses would be limited to appeals taken to the Louisiana Supreme Court, and would not extend to those heavy expenses which are incurred when appeals are taken to the United States Supreme Court on "due process" and "equal protection" grounds.

While the full impact of the *Gideon* and *Douglas* decisions is not certain, they establish two important constitutional requirements concerning the indigent defendant's right to court-

33. The trend to permit court-appointed counsel "to appeal at public expense" is clearly shown in statutory and jurisprudential materials cited in Justice Traynor's exhaustive footnote to his concurring opinion in *People v. Brown*, 55 Cal. 2d 64, 357 P. 2d 1072, 1075 (1960). While Connecticut does not have a statutory provision, the appellate court has developed the rule that the public defender may, in a proper case, seek advance approval from the trial court for certain expenses of appeal. *State v. Klein*, 95 Conn. 451, 112 Atl. 524 (1920); *State v. Zukauskas*, 132 Conn. 450, 45 A. 2d 289 (1946).

California law provides that if counsel is appointed on appeal, the court shall fix a reasonable fee to be paid by the State. CALIF. PENAL CODE § 1241. In *The Problem of Assistance to the Indigent Accused*, published by a Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association 30 (1961) Monrad G. Paulsen states: "A most important aspect of the assignment system in the United States is that compensation is either non-existent or very low. Fifteen states have no mandatory provision to pay assigned counsel. In most others the pay is inadequate: In Illinois a maximum of \$150.00 is set in a non-capital case; in the North Dakota District Court the fee is \$25.00 per day and \$50.00 per day in County Court. Texas provides for "up to \$10.00 per day in Court."

appointed counsel. *Gideon v. Wainwright* holds that the right to counsel in a felony case is a matter of fundamental due process which must be fully implemented for indigent defendants by the state. Whether the right to court-appointed counsel for the less crucial and relatively simple misdemeanor trial is also a right of due process stature is open to serious doubt, for constitutional due process is necessarily a relative concept. *Douglas v. California* holds that equal protection, blended with a touch of due process, requires the state to provide the indigent defendant with counsel for an appeal after conviction. Whether this means that the defendant can always demand counsel, even where there is no plausible ground for an appeal, is not clear. In striking down the California procedure, which sought to distinguish between bona fide and frivolous appeals, the Supreme Court indicated that it might go that far. However, the vigorous three-judge dissent would indicate that equal protection may not demand such an extreme result. Possibly a system which required counsel for an appeal after a capital conviction, but left a determination of the propriety of taking an appeal in non-capital cases with the court-appointed counsel who tried the case, might satisfy the requirements of *Douglas*. Future United States Supreme Court decisions may provide a more complete answer to these problems, and it is hoped that they will strike a reasonable balance between the basic needs of an indigent defendant and the extent of the burden of court-appointed representation which should be placed on the state.