Washington Law Review

Volume 41
Number 3 *The Common Market—A Symposium; Annual Survey of Washington Law*

6-1-1966

Criminal Law: Right to Counsel—Critical Stage Test in Non-Confession Cases

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should be allowed to prosecute smaller firms and then use the results of these cases, if favorable, against larger firms who may be less recalcitrant after the earlier successful action. As the Supreme Court stated in *Moog Industries*, "[W]hether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency."[24] The "patent abuse of discretion" defense allowed by the court in the principal case will, if generally recognized, severely limit the broad enforcement discretion previously granted the FTC.

CRIMINAL LAW: RIGHT TO COUNSEL—CRITICAL STAGE TEST IN NON-CONFESSION CASES

Defendant was arrested for driving under the influence of alcohol, a misdemeanor. After being taken to jail, his requests to call an attorney were denied in accordance with a police department regulation.[1] Defendant's counsel submitted that, if contacted, he would have ordered a chemical, blood-alcohol test administered by a physician. Convicted in police court and superior court, defendant appealed to the Washington Supreme Court, which reversed and dismissed the charges. *Held:* The time immediately following arrest for driving under the influence

[24] 355 U.S. at 413. See also Tait, *supra* note 17, at 76, 81.

[1] Tacoma Police Dep't Reg. 46, which provides: "No person charged with an offense, an element of which is intoxication, shall be denied the right of making such a telephone call after four hours have elapsed from the time of his arrest." The majority declared the Tacoma regulation to be in conflict with the mandate of WASH. REV. CODE § 9.33.020(5) (1956):

> No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats *for the purpose of exhorting from such person incriminating statements or a confession.* Any person violating the provisions of this section shall be guilty of a misdemeanor. (Emphasis added).

Judge Finley, in dissent, felt that the italicized phrase limits the section's operative effect to denials of opportunity to communicate for the purposes enumerated. 67 Wash. Dec. 2d at 747, 409 P.2d at 882. The section has only been applied previously to challenge the admissibility of confessions when defendant alleged denial of communication for the purpose of inducing incriminating statements. State v. Haynes, 58 Wn. 2d 16, 364 P.2d 935 (1961), *rev'd*, 373 U.S. 503 (1963) (reversal based in part upon § 9.33.020(5)); State v. Miller, 68 Wash. 239, 112 Pac. 1066 (1912). Nevertheless, it may be argued that the legislature intended not only to penalize coerced confession practices, but to encourage communication between prisoners, family, and counsel. This inferred policy is effectuated by the majority's assertion of conflict between the police regulation and § 9.33.020(5).

of alcohol is a "critical stage" in criminal proceedings, during which defendant is entitled to counsel under the sixth amendment to the federal constitution.[2] *City of Tacoma v. Heater,* 67 Wash. Dec. 2d 721, 409 P.2d 867 (1966).

In *Hamilton v. Alabama,*[3] the United States Supreme Court held that a defendant is entitled to counsel at any "critical stage" in the proceedings against him. In *Escobedo v. Illinois,*[4] the Court extended sixth amendment protection to pre-arraignment proceedings. Since *Escobedo,* courts have differed on when a right to counsel attaches. Further, the extent of sixth amendment right to counsel in misdemeanor cases has rarely been considered, and the few available decisions manifest no definite constitutional doctrine.

The court in the principal case recognized that delay dissipates evidence of intoxication and renders tests to establish sobriety meaningless. The majority accepted defense counsel's statement that, if called, he would have attempted to procure a blood-alcohol test to establish defendant's innocence. Accordingly, the majority reasoned that the four hours after defendant's arrival at the jail constituted a "critical stage" in the proceedings, because defendant could have established a defense only during that time. The court concluded that no distinction should be drawn between misdemeanors and felonies, citing the precise language of the sixth amendment granting right to counsel in "all criminal prosecutions," and noting that no such distinction was drawn by the Supreme Court in *Gideon v. Wainright.*[5]

The principal case could be interpreted as carrying the "critical stage" test to the point that right to counsel attaches upon arrest. As the Supreme Court noted in *Escobedo,*[6] the time between arrest and indictment (or information in state courts) is perhaps the most critical in the criminal process. But this interpretation is guarded against in the principal case by the court's express limitation of the issue to "crime[s] involving the element of intoxication."[7] Subsequent deci-

[2] The majority opinion refers to WASH. CONST. art. I, § 22, which provides that "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, ..." but concludes that "the state constitutional provision should receive the same definition and interpretation as that which has been given to a like provision in the federal constitution by the United States Supreme Court." 67 Wash. Dec. 2d at 723, 409 P.2d at 869. The rest of the court's analysis is based upon the sixth amendment.

[3] 368 U. S. 52 (1961).

[4] 378 U. S. 478 (1964).

[5] 372 U. S. 335 (1963).

[6] 378 U. S. at 488.

[7] 67 Wash. Dec. 2d at 723, 409 P.2d at 869.

sions of the Washington court also refute an interpretation of the principal case as extending right to counsel to the time of arrest.[8] In *Summers v. Rhay*,[9] a preliminary hearing at which the defendant pleaded not guilty was held not to be a "critical stage" because no defenses were lost, nor any evidence obtained, during the hearing.[10] Juxtaposed, the principal case and *Summers* distinguish between permissible and impermissible denial of counsel in post-arrest proceedings according to the impact of denial at the trial. In the principal case, a defense may have been lost through denial of counsel; in *Summers*, no harmful consequences of denial resulted. It follows that right to counsel does not attach upon arrest, when based on the "critical stage" test, but only when denial of counsel may prejudice the merits of defendant's case. The holding in the principal case that defendant was entitled to counsel within four hours of his arrival at the jail should be interpreted, in accordance with the court's delineation of the issue, as limited to cases involving the element of intoxication. According right to counsel upon arrest for persons accused of crimes involving intoxication is an exception founded upon the possible loss of *ex*culminating evidence in a short time. It should be observed that the court's phrase, "crime[s] involving the element of intoxication," may be applied to all crimes premised upon defendant's intoxication.[11] In addition, the rationale may apply when defendant alleges, in defense to a crime requiring specific intent, that intoxication incapacitated him from entertaining the requisite intent.[12]

[8] State v. Louie 68 Wash. Dec. 2d 283, 410 P.2d 608 (1966); Summers v. Rhay, 67 Wash. Dec. 2d 889, 410 P.2d 608 (1966).

[9] Summers v. Rhay, *supra* note 8.

[10] 67 Wash. Dec. 2d at 892, 410 P.2d at 410:

> In the instant case, appellant pleaded not guilty at the preliminary hearing. Nothing that there occurred could in any way have prejudiced his defense, had he elected to go to trial. Not until his arraignment following the filing of an information did he enter a plea of guilty to the offenses for which he is not incarcerated. It follows that the preliminary hearing in the instant case was not a critical stage in the proceedings; hence, the justice court did not err in denying appellant's request that counsel be appointed to represent him at that hearing.

[11] Washington statutes proscribe criminal sanctions for intoxication under sundry circumstances: WASH. REV. CODE §§ 9.48.130 (1956) (liability of intoxicated physician for professional acts causing death); 9.68.040 (1959) (appearing in public place while intoxicated); 9.91.020 (1957) (operating railroad, steamboat, vehicle, etc.); 66.44.110 (1961) (intoxication in public place); 71.08.010 (1959) (punishment for intoxication in public place as a breach of the peace); 77.16.070 (1955) (hunting while intoxicated).

[12] WASH. REV. CODE § 9.01.114 (1956):

> *Intoxication no defense.* No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the

Two problems raised by application of the "critical stage" test merit examination. First, the analysis employed in determining whether denial occurred at a "critical stage," and consequently whether defendant's right to counsel had attached, is often influenced by events transpiring after counsel was denied. In the principal case, defendant's need for a lawyer was manifest at the time of denial. But in other "critical stage" cases, defendant's need for a lawyer *at the time of denial* may not become apparent until his trial. In both *Hamilton v. Alabama*[13] and *Pointer v. Texas*,[14] defendant was denied counsel during a preliminary hearing. In *Hamilton*, holding the preliminary hearing to be a "critical stage," the Court emphasized admission into evidence at the trial of defendant's withdrawn guilty plea from the preliminary hearing. In *Pointer*, the Court declined to find a "critical stage," apparently because no harmful consequences of denial appeared at trial. In those cases defendant's need for counsel, and consequently his right to counsel, was determined in the light of events transpiring at the subsequent trial. Thus, the "critical stage" test governs by hindsight,[15] providing no identifiable criterion for police. It is suggested that application of the "critical stage" test should center upon circumstances as of the time of denial. Right to counsel, as distinguished from the consequences of its denial, should be determined, not by the presence or absence of actual harm, but by the possibility of harm, resulting from denial, inherent in the post-arrest proceeding in question. Thus, hopefully, identifiable guidelines may be established for police which will minimize present uncertainty as to when a defendant's right to counsel attaches. While this approach may be expected to alleviate the administrative quandry facing law enforcement agencies, it imparts a rigidity to analysis which renders the court's task more difficult. When, as now, the court considers facts at *and after* denial to determine when right to counsel attached, its capacity to reach an intuitively "right" result on the appeal is en-

fact of his intoxication may be taken into consideration in determining such purpose, motive or intent.

See State v. Byers, 136 Wash. 620, 241 Pac. 9 (1925).

[13] 368 U. S. 52 (1961).

[14] 380 U. S. 400 (1965).

[15] An uncritical passage in Summers v. Rhay, 67 Wash. Dec. 2d at 891, 410 P.2d at 610, illustrates this hindsight application of the "critical stage" test. Discussing White v. Maryland, 373 U. S. 59 (1963), the Washington court declared: "The Supreme Court of the United States held that, when, at the trial on the merits, the plea of guilty entered at the preliminary hearing was introduced in evidence, the preliminary hearing thereby became a critical stage in the proceedings...." Arguably when the "critical stage" test is applied, the police are unable to determine in post-arrest proceedings whether the accused has a constitutional right to counsel.

hanced. Yet reversal for denial of counsel, if that seems the "right" result in a case, is practically and conceptually impossible unless it be found that right to counsel had attached at the time of denial. Consequently, if the court chooses to limit itself to circumstances as of the time of denial to find a "critical stage," the post-arrest proceedings which are held to be within this category may be expected to proliferate.

The second problem in application of the "critical stage" test is the type of prejudice required for reversal, once right to counsel has attached and defendant's request for counsel has been denied. A number of courts appear to invoke a concept which may be termed "institutional prejudice."[16] Institutional prejudice does not call for a finding of actual prejudice; reversal follows denial of the constitutional right without regard to its actual impact on the defendant. The conviction is reversed to prevent prejudice to the institutional values of the criminal process. In the principal case, the majority relied upon institutional prejudice,[17] while the minority insisted upon a finding of actual prejudice.[18] The institutional prejudice approach, however, would appear to be inconsistent with adoption of a "critical stage" analysis dependant solely on circumstances as of the time of denial. It is desirable to maintain the court's capacity to reach a "right" result on the appeal, based on all the facts. This capacity is diminished by limiting "critical stage" analysis to facts as of the time of denial. But this limitation may be justified as a reasonable solution to the administrative aspects of the problem of when defendant's right to counsel attaches. The court's capacity for flexibility is also diminished by unqualified application of the institutional prejudice approach, requiring reversal once right to counsel has attached and been denied. Recent judicial analysis has centered around the question of "critical stage," *i.e.*, whether defendant's right to counsel had attached. It is suggested that this analytical flexibility be transferred to determination of the

[16] White v. Maryland, 373 U. S. 59 (1963); Hamilton v. Alabama, 368 U. S. 52 (1961); Columbe v. Connecticut, 367 U. S. 637 (1961) (concurring opinion of Douglas, J.); Smart v. Balokom, 352 F.2d 502 (5th Cir. 1965); United States v. Morgan, 222 F.2d 673 (2d Cir. 1955); *But see* Walton v. United States, 202 F.2d 18 (D.C. Cir. 1953).

[17] 67 Wash. Dec. 2d at 728, 409 P.2d at 872: "Under the 'critical stage' rule, the denial to the defendant of the assistance of his attorney after the officers had conducted their tests and questioning, violated his constitutional right to have counsel and due process, *and any conviction obtained thereafter was void.*" (Emphasis added.)

[18] 67 Wash. Dec. 2d at 729, 409 P.2d at 872 (Finley, J., dissenting); 67 Wash. Dec. 2d at 748, 409 P.2d 883 (Hamilton, J., dissenting).

type of prejudice required to warrant reversal. On the other hand, the concept of institutional prejudice is not without merit. Cases involving denial of counsel during defendant's trial may justifiably be resolved by resort to institutional prejudice. Yet when denial occurs at a point more remote from the "criminal prosecution," institutional prejudice should be relegated to the status of a factor considered in conjunction with, not in derogation of, actual prejudice.

The court in the principal case did not consider the arguable applicability of the United States Supreme Court's decision in *Escobedo v. Illinois*.[19] *Escobedo* could be interpreted as holding that right to counsel is *absolute for all purposes* when police procedure shifts from investigatory to accusatory, in relation to the defendant. Under this interpretation, the majority in the principal case need not have applied the "critical stage" test because the defendant was an "accused" upon arrest.[20] Nevertheless, the *Escobedo* opinion appears to limit itself to confession cases:

> We hold only that when the process shifts from investigatory to accusatory—when the focus is upon the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult with his lawyer.[21]

It has been asserted that *Escobedo* is "in fact a sixth amendment right to counsel case as opposed to a fifth amendment confession case."[22] Such assertions indicate the significance of the Supreme Court's concentration upon deprivation of counsel, rather than voluntariness, when examining confessions.[23] Two vital facts in *Escobedo* were that defendant was, in effect, the accused, and the police were attempting "to 'get him' to confess."[24] Moreover, the crucial distinction between investigation and accusation drawn by the Court is meaningful only

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[19] 378 U. S. 478 (1965).

[20] "The effect of Escobedo is to extend the 'critical stage' of Hamilton forward into the pre-indictment investigation to the point at which the process shifts from investigatory to accusatory." Comment, *The Curious Confusion Surrounding Escobedo v. Illinois*, 32 U. CHI L. REV. 560, 567 (1965).

[21] 378 U. S. at 492 (Emphasis added).

[22] Comment, 32 U. CHI. L. REV. 560, 579 (1965).

[23] Recent law review treatments of extended right to counsel have been, significantly, in a confession context. *E.g.*, Erker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964); Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24 (1960); Comment, 31 U. CHI. L. REV. 313 (1964); Comment, 73 YALE L. J. 1000 (1964); Note, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 154, 217 (1964).

[24] 378 U. S. at 485.

in a confession context. It would appear that courts face alternative tests for determining when right to counsel attaches: the "critical stage" test of *Hamilton* should be applied in non-confession cases; the investigatory-accusatory distinction of *Escobedo* should be applied in confession cases. Accordingly, the principal case was correct in not adverting to *Escobedo*.

The extent of a right to counsel in misdemeanor cases has never been explicitely considered by the United States Supreme Court.[25] In holding misdemeanors within the sixth amendment right to counsel, the principal case relied upon broad statements in *Gideon v. Wainright*.[26] The misdemeanor question was not, however, either at issue or discussed in *Gideon*. Analogizing to decisions of the Supreme Court which deny misdemeanants the right to jury trial,[27] it is difficult to sustain right to counsel in misdemeanor cases on constitutional language alone.[28] More recent decisions, however, indicate that right to counsel may be extended to misdemeanors. In *Holt v. Commonwealth*,[29] the Court held that a conviction for contempt, apparently a misdemeanor under state law,[30] violated due process. The Court stated in dictum that the defendants were entitled to counsel.[31] In

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[25] Comment, *The Right to Counsel in Misdemeanor Cases*, 48 CALIF. L. REV. 501 (1960); However, see Comment, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases*, 19 SW. L.J. 593 (1965).

[26] 372 U. S. 335 (1963). For example, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him..." *Id.* at 344.

[27] District of Columbia v. Clawans, 300 U.S. 617 (1936); Shick v. United States, 195 U.S. 65 (1904). *Accord*, State *ex rel.* O'Brien v. Towne, 64 Wn. 2d 581, 392 P.2d 818 (1964).

[28] Grammatically, the sixth amendment phrase, "all criminal prosecutions," applies equally to right to jury trial and right to counsel. Therefore, it would seem that the phrase would be interpreted to mean the same thing when applied to both rights. A possible ground for distinguishing between these two rights is formulated in Morris, *Poverty and Criminal Justice*, 38 WASH. L. REV. 667, 697 (1963):

> However, there is doubt that retained counsel could be barred from [a misdemeanor trial] without denying a defendant his right to fair trial. Consequently, the counterargument arises that if a fair trial is denied when retained counsel is excluded from a petty offense trial, then a fair trial is similarly denied when an indigent defendant fails to be represented by counsel.

The assertion that retained counsel cannot be barred from misdemeanor trials is well grounded. See State v. Davis, 171 La. 449, 131 So. 295 (1930); Brack v. State, 187 Md. 542, 51 A.2d 171 (1947); Kissinger v. State, 147 Neb. 983, 25 N.E.2d 829 (1947), 27 NEB. L. REV. 87 (1948); Milliman v. State, 156 Tenn. 88, 238 S. W. 2d 70 (1951).

[29] 381 U. S. 131 (1965).

[30] VA. CODE § 18.1-292. In the five classes of cases within this statute, a judge may punish for contempt summarily. The conviction in Holt fell either under the first class, limited by VA. CODE § 18.1—295 to not more than $50 and/or ten days, or the third class in which the penalty is within the judge's discretion. See Yoder v. Commonwealth, 107 Va. 823, 57 S.E. 581 (1907).

[31] 381 U. S. at 136.

Patterson v. Warden, Maryland Penitentiary,[32] involving denial of counsel in a misdemeanor case, the Supreme Court remanded a Maryland conviction for consideration in the light of *Gideon.*[33] The fifth circuit has held a state misdemeanor prosecution within the purview of the sixth amendment, stating, "such disadvantages and consequences [from lack of counsel] may weigh as heavily upon an accused misdemeanant as an accused felon."[34] However, the Criminal Justice Act of 1964 provides counsel only for felonies and misdemeanors other than "petty offenses."[35] Petty offenses are those for which the penalty is not more than five hundred dollars fine or six months in jail, or both.[36] While the Criminal Justice Act is not constitutional authority, it expresses a congressional balancing of need for counsel in misdemeanor prosecutions against practical considerations. The effect of right to counsel upon bench and bar has historically resulted in such balancing.[37] Adequate defense for the accused[38] becomes a less compelling factor with the diminishing gravity of his offense and consequent punishment. Conversely, a conflicting social interest in the most productive use of judicial and legal resources becomes more compelling. In cases such as parking violation trials, which more closely resemble

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[32] 327 U.S. 776 (1963).

[33] The Maryland court, in turn, applied the rationale of *Gideon* and remanded for a new trial. Patterson v. State, 231 Md. 509, 191 A.2d 237 (1963).

[34] Harvey v. Mississippi, 340 F.2d 263, 269 (5th Cir. 1965). *Accord,* Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942) (misdemeanants prosecuted in federal court are entitled to counsel).

[35] 78 Stat. 552 (1964), as amended, 18 U.S.C. § 3006 A (1964). Note, however, that proposed FED. R. CRIM. P. 44 requires appointment of counsel for "every defendant." The Advisory Committee's notes state that the rules accord a broader right to counsel than that for which compensation is provided in the Criminal Justice Act because Rule 44 applies to petty offenses to be tried in the district courts.

[36] 18 U. S. C. § 1 (1958).

[37] Thus, Powell v. Alabama, 287 U. S. 45 (1932), limited right to counsel in state prosecutions to capital cases. In Betts v. Brady, 316 U.S. 455 (1942), the "special circumstance" rule was gradually worn away, and *Betts* was overruled expressly in Gideon v. Wainwright, 372 U.S. 335 (1963). These cases represent a movement in favor of the defendant, when balancing the individual's right to counsel and society's conflicting practical demands. English development proceeds from the opposite direction, first allowing representation by counsel in misdemeanor cases, but not allowing representation by counsel even in the most serious felonies until 1695. See Heidebough & Becker, *The Right to Counsel in Criminal Cases—An Inquiry into the History and Practice in England and America,* 28 NOTRE DAME LAW. 351 (1953). Authorities tracing English development are collected in Comment, 48 CALIF. L. REV. 501 n.3 (1960).

[38] While counsel is important to the conduct of a defense in court, it is more important that counsel be available to "investigate the facts and participate in those necessary conferences between counsel and accused..." Powell v. Alabama, 287 U. S. 45, 61 (1932). The consequent demands on lawyers' time points to the desirability of a public defender system. For pro and con views on public defenders, see Dimrock, *The Public Defender: A Step Towards A Police State?,* 42 A.B.A.J. 1139 (1956); J. AM. JUD. SOC'Y 174 (1949); Stewart, *The Public Defender System is Unsound in Principle,* 32 J. AM. JUD. SOC'Y 115 (1949).

administrative regulation than criminal prosecutions, right to counsel appears inappropriate. In the principal case, facing no controlling authority, the court should have balanced these conflicting interests before extending right to counsel to misdemeanants.

COMPENSATION FOR CONDEMNATION OF LAND ENHANCED IN VALUE BY AGRICULTURAL ALLOTMENT

Defendant's farm, including 550 acres devoted to production of cotton under an acreage allotment from the Department of Agriculture, was condemned by the federal government for an irrigation project. Defendant retained the right under section 1378(a) of the Agricultural Adjustment Act[1] to transfer its cotton quota to other property under its ownership, and did so. Trial before a jury resulted in an award to defendant based on the value of its property as a cotton farm, less the value of the section 1378 right retained.[2] The government objected on the ground that the enhanced value to the land resulting from the cotton allotment was not compensable when the owner utilized his right to reestablish the allotment on other land. On appeal, the Ninth Circuit Court of Appeals affirmed. *Held:* Enhancement in land value resulting from a cotton allotment, reduced by the value of the section 1378 right retained, must be included in determining compensation for

[1] The Agricultural Adjustment Act of 1938 § 378(a), added by 72 Stat. 995 (1958), as amended, 7 U. S. C. § 1378(a) (1965), provides in part:

> Notwithstanding any other provision of this chapter, the allotment determined for any commodity for any land from which the owner is displaced because of acquistion of the land for any purpose, other than for the continued production of alloted crops, by any Federal, State, or other agency having the right of eminent domain shall be placed in an allotment pool and shall be available only for use in providing allotments for other farms owned by the owner so displaced. Upon application to the county committee, within three years after the date of such displacement . . . any owner so displaced shall be entitled to have established for other farms owned by him allotments which are comparable with allotments determined for other farms in the same area which are similar except for the past acreage of the commodity. . . .

Commodities, the allotments for which are subject to the section 1378 right, are corn, wheat, rice, peanuts, tobacco, and cotton.

[2] Defendant's witnesses set a valuation of $1,050,000 for the land with the allotment attached. The government's experts assigned a value of $865,000, of which $413,000 was enhancement by virtue of the allotment and $452,000 was the value of the land alone. 350 F.2d at 685.

The portion of the trial court's instruction relating to the proper method for the jury to arrive at a valuation was, 350 F.2d at 685 n.2:

> It is my advice that the most reasonable approach to a solution of this problem is for you first to agree upon the fair market value of Citrus Valley Farm on July 1,