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Opinions—Criminal Procedure—Misdemeanant's Right to Counsel: Legislative Inaction Resolves Constitutional Doubts?—Hendrix v. Seattle, 76 Wn. 2d 142, 456 P.2d 696 (1969)

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OPINIONS — CRIMINAL PROCEDURE — MISDEMEANANT'S RIGHT TO COUNSEL: LEGISLATIVE INACTION RESOLVES CONSTITUTIONAL DOUBTS? —*Hendrix v. Seattle*, 76 Wn. 2d 142, 456 P.2d 696 (1969).

Since *Gideon v. Wainwright*[1] was decided, a major question has been: to what crimes does the indigent's[2] constitutional right to trial counsel at public expense extend? The Washington and Oregon Supreme Courts recently considered the question and reached conflicting results.

In Oregon, the defendant was charged with the crime of disorderly conduct, a misdemeanor,[3] and convicted in the Municipal Court of Portland. On appeal the Oregon Supreme Court reasoned that representation by an attorney is a "necessary ingredient of a fair trial regardless of the seriousness of the crime,"[4] and that "if the sixth amendment requires the appointment of counsel for indigent misdemeanants in the federal courts, it must require like appointment in the state court."[5]

In Washington, the defendant was arraigned before the Seattle Municipal Court on two separate charges of disorderly conduct, a misdemeanor.[6] His request for counsel on grounds of indigency was denied and he was subsequently convicted and sentenced to serve 180 days consecutively on each charge. Upon review, the superior court held that indigents have a constitutional right to appointed counsel. But, upon appeal, the Washington Supreme Court reversed, reasoning that "[W]here reasonable doubts exist as to the constitutional duty or prohibition affecting the legislative branch of government, they should be resolved in favor of the legislature's action or inaction." *Hendrix v. Seattle*, 76 Wn.2d 142, 145-46, 456 P.2d 696, 700 (1969) (5-4 decision).

1. 372 U.S. 335 (1963); *See generally* Morris, *Poverty and Criminal Law*, 38 WASH. L. REV. 667 (1963); Junker, *The Right To Counsel In Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968); Comment, *Continuing Echoes Of Gideon's Trumpet—The Indigent Defendant And The Misdemeanor; A New Crisis Involving the Assistance of Counsel in "A Criminal Trial,"* 10 S. TEX. L. J. 222 (1968).

2. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 17-33 (1963), for a discussion of standards for determining indigence.

3. PORTLAND, ORE., POLICE CODE § 16-601 (1960).

4. Application of Stevenson, — Ore. —, 458 P.2d 414, 417 (1969), *noted in* 9 WASHBURN L.J. 469 (1970).

5. 458 P.2d at 418.

6. SEATTLE, WASH., CODE § 12.11.020 (1969).

The different results reached by the two courts are not easily explained. There seem to be no significant differences in the state constitutions.[7] Neither court had any significantly different constitutional or policy arguments presented to it.[8] Nevertheless, the Oregon Supreme Court found a constitutional right to appointed counsel for indigent misdemeanants and the Washington Supreme Court, using a formula for judicial restraint, concluded the Constitution confers no such right. It is the purpose of this note to evaluate the Washington court's treatment both of the federal constitutional issue and of public policy questions; and to discuss whether deference to the legislature is appropriate in either context.

I. JUDICIAL RESTRAINT

Applying the formula of restraint that doubts about the existence of a constitutional duty affecting the legislature are to be resolved in favor of legislative inaction,[9] the *Hendrix* court set out to determine whether a "doubt" about the indigent misdemeanant's constitutional right to appointed counsel arises from narrow interpretations of *Gideon v. Wainwright*[10] in United States Supreme Court cases[11] and denials of certiorari[12] subsequent to *Gideon*. After concluding that a doubt regarding the constitutional right exists, the court purported to look to the legislature for the resolution of the doubt since the legisla-

7. WASH. CONST. amend. X provides:
In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. . . .
ORE. CONST. art. I, § 11 provides:
In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . .

8. The only difference with regard to the policy aspect of the cases was a study cited in the *Stevenson* respondent's brief indicating the yearly cost to the state of Oregon for appointing counsel for indigent misdemeanants would be less than $350,000. *See* appendix A to brief of Respondents at 107-114, Application of Stevenson, — Ore. —, 458 P.2d 414 (1969).

9. 76 Wn.2d at 145-46, 456 P.2d at 700.

10. 372 U.S. 335 (1963) holding that the sixth amendment's right to counsel applies to the states through the due process clause of the 14th amendment. *Gideon* was a felony case.

11. Mempa v. Rhay, 389 U.S. 128 (1967); *In re* Gault, 387 U.S. 1 (1967). *See* notes 18-20 and accompanying text, *infra*.

12. Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966); DeJoseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752 (1966), *cert. denied*, 385 U.S. 982 (1966). *See* text accompanying notes 23-31, *infra*.

ture is affected.[13] Legislative inaction on the matter apparently pointed the court to the conclusion that there is no constitutional right.

It would appear that the court, in looking to the legislature for resolution of the "doubt," may be suggesting that a court should defer the responsibility of resolving constitutional questions to the legislature.[14] Of course the legislature, theoretically, considers the constitutionality of every enactment, but the final interpreter of the constitution has traditionally been the courts. The judiciary has a special competence in the area of constitutional adjudication.[15] When a constitutional question, involving particular litigants, comes before a court, the court is under a duty to resolve the issue[16] rather than to refer the parties to the legislature, or to defer to the legislature the resolution of the issue.

Although the Washington court's formulation of the doctrine of judicial restraint could lead one to the conclusion that the court was deferring to the legislature the resolution of a constitutional question, in the final analysis the court did not follow its own formula. Discussion of the constitutional issue concluded:[17]

> We are of the opinion, therefore, that although everyone accused of a crime has a right to counsel, he does not have a constitutional right to counsel at public expense when charged with a misdemeanor in municipal court; and the municipal court is under no constitutional duty to supply counsel at public expense in misdemeanor prosecutions. . . .

The conclusion expressed in this language seems to be assumed in the court's subsequent discussion of policy considerations. Thus, one is led to conclude that the court, in fact, decided the Constitution, as presently interpreted, does not compel recognition of a right to appointed counsel for misdemeanants, and, after considering policy questions, decided that the doctrine of judicial restraint required the

13. In concluding its discussion of the constitutional issue, the court said: "Whether counsel shall be supplied in such cases is left by the constitutions, we think, to the legislative and not the judicial branches of government."
76 Wn.2d at 153, 456 P.2d at 704.

14. Justice Rosellini's dissent notes this problem. 76 Wn.2d at 168-69, 456 P.2d at 712-13.

15. *See* Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 24 (1968).

16. *Id.* at 6.

17. 76 Wn.2d at 153, 456 P.2d at 704.

court to defer to the legislature for the creation of such a right as public policy may demand.

Such an approach can be criticized on two grounds. First, the court did not convincingly resolve the constitutional question, and second, even assuming no constitutional right exists, it was of questionable propriety to defer the policy issue to the legislature.

II. THE CONSTITUTIONAL ISSUE

The court rested its apparent conclusion that there is no constitutional right on two grounds: 1) a narrow reading of *Gideon* found in post-*Gideon* cases; and 2) the denial of certiorari by the United States Supreme Court of cases involving the counsel for misdemeanants issue.

It is true that *Gideon* involved a felony and the conventional analysis would interpret *Gideon* to apply only to felony cases. It is also true that cases subsequent to *Gideon* such as *Mempa v. Rhay*[18] and *In re Gault*[19] referred to *Gideon* as establishing the right to appointed counsel in felony cases. However, the argument can be made that the scope of the constitutional right to counsel is not limited to felonies by *Gideon* and subsequent cases. The subsequent interpretations could be read to describe the established right in felony cases and not necessarily to limit the right to felony cases.[20] Even if one accepts the position that *Gideon* did not extend the right to misdemeanants,[21] its rationale could have been applied in *Hendrix*. Certainly a misdemeanant, just as a felon, does not have the necessary skill to prepare his defense adequately.[22] Not only did the Washington court fail to

18. 389 U.S. 128 (1967).
19. 387 U.S. 1 (1967).
20. In Mempa v. Rhay, 389 U.S. 128, 134 (1967), Mr. Justice Marshall said: "[I]n Gideon v. Wainwright . . . this Court held . . . that there was an absolute right to appointment of counsel in *felony cases*." (emphasis added). In *In re* Gault, 387 U.S. 1, 29 (1967) the court said:

> If he had been over 18. . . . [h]e would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it.

21. *See* Junker, *The Right to Counsel In Misdemeanor Cases*, 43 WASH. L. REV. 685, 691 (1968) where he says:

> It is clear by this time, however, that what was once in doubt—whether *Gideon* itself ruled cases such as *Winters* and *DeJoseph*—was no longer in question, the ambgiuty having been resolved against inclusion of misdemeanor offenses.

22. *Id.* at 692.

explain why this reasoning does or does not apply to the misdemeanant, but the court did not even consider *Gideon*'s rationale.

In relying on United States Supreme Court denials of certiorari, the Washington court admitted that traditionally such denials have no substantive significance,[23] but reasoned that because strong dissents were written to denials of certiorari in *Winters v. Beck*[24] and *DeJoseph v. Connecticut*,[25] those denials are not without importance. To appreciate the court's error in relying on denials of certiorari, one need only consider the case of *Winters v. Beck*.

Defendant Winters was convicted of a misdemeanor[26] and sentenced to thirty days in jail and fined $254.00, but since he was an indigent, he was required to serve 284 days in jail as provided by the Arkansas "dollar-a-day" statute.[27] His petition to the Supreme Court of Arkansas was denied and the United States Supreme Court denied certiorari.[28] Winters then filed for a writ of habeas corpus. The United States District Court decided that although the sixth amendment does not require the appointment of counsel for indigent defendants in all misdemeanor cases, counsel should be appointed for Winters, since he was not charged with a "petty offense."[29] The United States Supreme Court again denied certiorari in the habeas corpus proceeding.[30] Given the dissimilar results in the state and the federal proceedings, both of which were refused review at the highest level, it is obvious that one cannot maintain that by denying certiorari the United States Supreme Court has indicated an opinion. A denial of certiorari is, at best, neutral on an issue.[31]

III. PUBLIC POLICY

Even if one were persuaded by the Washington court's conclusion that existing interpretations of the constitution do not compel appointment of counsel for misdemeanants, its reasons for deferring to the

23. 76 Wn.2d at 146, 456 P.2d at 700.
24. 239 Ark. 1093, 397 S.W.2d 364 (1966), *cert. denied*, 385 U.S. 907 (1966).
25. 3 Conn. Cir. 624, 222 A.2d 752 (1966), *cert. denied*, 385 U.S. 982 (1966).
26. Little Rock, Ark., Code § 25-121 (1961).
27. Ark. Stats. Ann. § 43-1203 (1964).
28. 385 U.S. 907 (1966).
29. 281 F. Supp. 793 (E.D. Ark. 1968).
30. 407 F.2d 125, *cert. denied*, 395 U.S. 963 (1969).
31. *See* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950).

legislature to establish a right based on the demands of public policy are not convincing. Analogizing from the fact that Congress passed the Criminal Justice Act,[32] providing counsel for misdemeanants in federal cases, the court concluded that it is exclusively within the legislature's jurisdiction to decide whether indigent misdemeanants should be provided with counsel.[33] However, the right to counsel in misdemeanor cases was recognized in lower federal courts before Congress acted.[34]

Refusing to formulate even a serious/minor offense distinction, the Washington court discussed at length the many different Seattle ordinances, and concluded that it would be difficult to define and administer a right to counsel using a case-by-case approach.[35] Difficulty of administration is certainly a factor to be considered, but one wonders how much weight it should be given as against a defendant's interest in an adequate defense. Further, that various statutory schemes exist may be one reason for concluding that the problem should be solved on a case-by-case approach locally.

The argument upon which the Washington court seemed to rely

32. 18 U.S.C. § 3006-A(b) (1964).

33. To support this view the *Hendrix* court related that the legislature has the power to define and classify crimes. 76 Wn.2d at 155, 456 P.2d at 705. It is difficult to appreciate this argument. No one would doubt that the legislature has the power to determine the elements of a particular crime, and to establish the punishment for its commission. However, when a court decides that certain "crimes" require the appointment of counsel it is not usurping the legislature's prerogative to define and classify crimes. If one were to accept the court's argument, one would have to conclude that the United States Supreme Court was without authority to decide, in Bloom v. Illinois, 391 U.S. 194 (1968), that certain "serious crimes" require a jury trial if the defendant so requests. *See also* State v. Towne, 64 Wn.2d 581, 392 P.2d 818 (1964); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

34. Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942). *See also* Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965), where the court appointed counsel for a defendant who was fined $500 and sentenced to ninety days in jail.

35. *See* 76 Wn.2d at 158, 456 P.2d at 707, where the court said:

> Aside from our questionable power to direct this, the inevitable consequence of such a policy will compel the busiest courts in our judicial system to proceed, case-by-case, to study carefully innumerable cases in advance of trial and ascertain not only whether the offense charged shall be classified as serious or minor, but also whether the defendant on trial will, upon conviction, deserve a serious or minor sentence.

Compare Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), *with Hendrix* to see the Alaska court's reasoning *contra* to *Hendrix* on the problem of classifying cases.

most heavily is that an increased tax burden would result were the court to declare that such a right existed:[36]

> The decision to provide any of these services without cost in courts of limited jurisdiction, we think, should not be preempted by the courts but left with that branch of government which has the power to levy taxes, appropriate the moneys and employ and pay the personnel essential to do the job.

However, the court failed to meet respondent's argument that the legislature may have indicated it is looking to the courts for definition of the right to appointed counsel.[37] In 1965 the Washington legislature amended R.C.W. § 10.01.110, which provided for funds for attorneys who are appointed to defend indigent felons. The amendment added the proviso[38] "that this section shall apply to such other proceedings and at such other times as may be constitutionally required." Arguably, the statute would not provide funds for municipal courts, and the amendment refers to requirements of the Constitution, not to judicially created rights based on public policy. However, the basic view is expressed that the courts should determine when counsel should be provided, and provides a partial answer to the court's concern for fiscal matters.

The dominant theme in *Hendrix* is the court's concern with the doctrine of judicial restraint—deferring to legislative "action or inaction"[39] when the legislature is affected.

Though the court decided the constitutional question, deference to inaction—the legislature's failure to provide expressly for appointed counsel for indigent misdemeanants—may well have tipped the balance

36. 76 Wn.2d at 163, 456 P.2d at 709-10. *See* Baker v. City of Fairbanks, *supra* note 35, for an argument rejecting this *in terrorem* approach in a case involving the right to jury trial in misdemeanor cases.

37. Brief for Respondent at 23, *Hendrix:*

> [T]he Legislature recognized, as its Proviso indicates, that the right to counsel is not primarily a legislative but a constitutional question. The Legislature sought only to deal with the mechanics of the appointment of counsel and to provide for the compensation of counsel appointed to represent indigents. It recognized that the right to appointed counsel might be constitutionally required in other proceedings and at other times. Accordingly, it expressly made the benefits of RCW 10.01.110 applicable to such other situations to avoid the necessity of enacting new legislation as the right to counsel was expanded to include situations not in terms covered by the section.

38. WASH. REV. CODE § 10.01.110 (1965).

39. *See* text accompanying note 15, *supra.*

in the determination. It is submitted that the court should not defer to legislative inaction at all, since courts so acting are thereby "shifting the responsibility to an institution which has already evaded it, or at least refrained from assuming it."[40] Legislative inaction may mean[41]

> no more than that the legislature has not considered the problem. It may mean that there shall be no change in the law. It may mean that it has concluded that the principles and rules should be evolved by the courts. . . .
>
> Or the legislature may have acted for a variety of narrow political reasons not related to public policy, the popular will, or public needs.

The courts should be very careful to determine in what instances a legislature is likely to conclude "that the principles and rules should be evolved by the courts." One area where such legislative inaction might well be interpreted as deference to the courts is when constitutional questions are involved. As indicated above,[42] the judiciary has traditionally been the interpreter of the Constitution, so it is not unlikely that the legislature would defer to the courts in this area of special competence.[43]

The Oregon court analyzed the merits of the constitutional problem.

40. Hart, *Comment On Courts And Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 40, 47 (1959).

41. Breitel, *The Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 1, 12 (1959); For another discussion of the legislative method of deferring to the courts *see* Breitel, *Lawmakers*, 65 COLUM L. REV. 749, 762 (1965).

42. *See* text accompanying note 15, *supra*.

43. *Compare* Halvorson v. Birchfield Boiler, Inc., 76 Wn.2d 759, 458 P.2d 897 (1969), a decision decided subsequent to *Hendrix* in which the same four justices—Finley, Rosellini, Hill, and Hamilton—again dissented, seeming to accept the argument that in certain instances the court should not defer to legislative inaction.

In *Halvorson* the plaintiff sued an employer for personal injuries caused by an employee who had become intoxicated at his employer's Christmas party. The court held that the employer was not liable for injuries caused by his employee, concluding:

> It may be that the social and economic consequences of "mixing gasoline and liquor" should lead to a rule of accountability by those who furnish intoxicants to one who becomes a tortfeasor by reason of intoxication, but such a policy decision should be made by the legislature. . . .

76 Wn.2d at 765, 458 P.2d at 900. But Justice Finley in dissent argued that:

> Legislation is not required and never has been. The instant case is one peculiarly suited to the judicial process. . . .
>
> Legislative inaction is not proof of inexorable social or public policy.

76 Wn.2d at 768, 458 P.2d at 902. He urged that the judiciary has a special competence in the area of tort law and should assert its responsibility.

The Washington court's treatment of the constitutional issue, colored by its predilection for restraint, involved only the mechanical application precedent. There was no due process analysis. Certainly an appeal to determine whether the lower court was correct in deciding that due process requires counsel be appointed should make some reference to the demands of due process.[44]

In the discussion of whether public policy compels judicial recognition of a right to appointed counsel for misdemeanants, the Washington court engaged in what could be one-half of a due process analysis. The issues of administrative difficulty and cost were properly considered. However, the court undertook no analysis of the costs imposed on Mr. Hendrix and those similarly situated in being deprived of counsel. Evidently the court was striving to accommodate the doctrine of separation of powers, but it reached an accommodation by a one-sided approach to the merits of the issue raised by the respondent. The state's problems were thoroughly discussed. The respondent's position was not.

Finally, whatever may be said of the court's handling of the issue presented as a matter of public policy or its analytical omissions in deciding the constitutional issue, one apparent underpinning of its decision is more disturbing. For the court it was virtually dispositive that the United States Supreme Court has not held an indigent misdemeanant has a right to appointed counsel. Admittedly that Court is the ultimate arbiter, but that the Washington court looks to the United States Supreme Court rather than to Congress confirms that the constitutional issue is for judicial determination.

The Oregon court used a rationale provided by the United States Supreme Court to extend constitutional coverage to a situation on which the latter has not yet directly ruled. The Washington court, eschewing any use of tools of constitutional analysis, refused to conclude that the protections of the Contitution extend beyond where the United States Supreme Court has explicitly held they extend.

44. The Washington Supreme Court did not discuss the issue of equal protection. If a court were going to resolve the constitutional question adequately, it should consider the argument that denying a person the right to counsel on grounds of poverty would violate the fourteenth amendment's equal protection clause as interpreted in Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963).

Therein lies the fundamental difference between the approaches taken by the two state courts.[45]

In a federal system, state courts should be involved in the development of constitutional law, particularly where issues are of substantial local interest and where local conditions vary. The United States Supreme Court, should it determine to decide the issue of the misdemeanants' right to appointed counsel, will not be able to draw on the Washington court for a balanced analysis of what due process may require in that context.

45. See Baker v. City of Fairbanks, *supra* note 35, for an Alaska decision extending United States Supreme Court holdings on right to jury trial for misdemeanants.