Gideon at 50:
A Three-Part Examination of Public Defense in America

Part 3 — Representation in All Criminal Prosecutions: The Right to Counsel in State Courts

National Association of Criminal Defense Lawyers

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Gideon at 50:

A Three-Part Examination of Public Defense in America[1]

PART 3

Representation in All Criminal Prosecutions: The Right to Counsel in State Courts

A 50-State Survey of Right to Counsel Standards

By

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime … Foster the integrity, independence and expertise of the criminal defense profession … Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's more than 9,000 direct members — and 90 state, local and international affiliate organizations totaling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know first-hand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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FOREWORD

The Sixth Amendment to the Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." The language of this Amendment is straightforward and unequivocal. Yet, far too often, people accused of crimes across the United States do not receive the assistance of counsel. NACDL is at the forefront of the effort to ensure that people who end up in our criminal justice system — more than ten million people each year, often poor and often of color — receive competent and adequately resourced counsel. Indeed, NACDL views this pursuit as one of the foremost civil rights battles of this generation.

The persistent problem of the frequent lack of access to justice has been widely recognized in recent years. Indeed, even the United States Department of Justice readily acknowledges the problem. Speaking on the occasion of the 50th anniversary of the landmark Supreme Court decision in *Gideon v. Wainwright*, Attorney General Eric Holder observed, "[D]espite half a century of progress — even today, in 2013, far too many Americans struggle to gain access to the legal assistance they need. And far too many children and adults routinely enter our juvenile and criminal justice systems with little understanding of the rights to which they're entitled, the charges against them, or the potential sentences they face."

The continuing failure of our criminal justice system to live up to the constitutional mandate to provide counsel comes at a time when the need of people accused of criminal offenses for counsel has never been greater. Our system simultaneously: provides prosecutors extraordinary discretion in making charging decisions; frequently detains people pending trial, even those accused of non-violent offenses; imposes harsh, unforgiving, and often draconian sentences; and saddles those convicted of even minor crimes with collateral consequences that permanently impair a person's ability to pursue education, employment, and government benefits. An unrepresented defendant under these circumstances has little or no chance of obtaining a just outcome.

As part of its observation of the *Gideon* anniversary, NACDL launched several initiatives to promote public defense reform, one of which was the publication of "Gideon at 50: A Three-Part Examination of Public Defense in America." Part 1*, Rationing Justice: The Underfunding of Assigned Counsel Systems,* documented the widespread failure to provide adequate compensation for appointed counsel, resulting in defendants being appointed counsel who lack the requisite background, training, and resources to provide effective assistance of counsel. Part 2, *Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*, which focused on how states define who is indigent enough to qualify for court-appointed counsel, demonstrated that unrealistic financial eligibility guidelines routinely result in the denial of counsel altogether to accused persons who in reality cannot afford to retain competent counsel.

The Supreme Court, in *Gideon* and subsequent cases, has held that the right to counsel applies to all cases that may result in incarceration. This final report, Part 3, *Representation in All Criminal Prosecutions: The Right to Counsel in State Courts*, notes that many states have recognized, given the myriad significant and sometimes permanent collateral consequences that attach to convictions even for minor offenses, the right to counsel should apply to all criminal prosecutions, not merely those that may result in incarceration. However, even states that require the provision of counsel in all criminal prosecutions frequently fail to meet that requirement. NACDL believes there is an emerging consensus that our country must not only recognize the terms of the Sixth Amendment, but also must carry out its mandate by ensuring that counsel is provided in "all criminal prosecutions." NACDL will continue to work tirelessly to turn this consensus into a reality and hopes that this final report will serve as a useful tool for all litigators and reformers in their continuing efforts to ensure full compliance with the Sixth Amendment. Not having to stand alone in a criminal court is a civil right.

Barry Pollack

President, NACDL

REPRESENTATION IN ALL CRIMINAL PROSECUTIONS: THE RIGHT TO COUNSEL IN STATE COURTS

Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail.... When the deprivation of property rights and interest is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.

Argersinger v. Hamlin, 407 U.S. 25, 48 (1972)

Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings....We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

Scott v. Illinois, 440 U.S. 367, 373-74 (1979)

NACDL urges all states and U.S. territories to adopt such constitutional provisions, laws or regulations necessary to guarantee that every accused person, irrespective of financial capacity to engage counsel, shall be guaranteed counsel at the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered.

Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers, Feb. 19, 2012

Introduction

Over fifty years ago, the Supreme Court decided *Gideon v. Wainwright*, a case where an indigent defendant who had been charged with a felony in a state court was denied the assistance of counsel for his defense. The Court found that "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 a fair trial unless counsel is provided for him."[2] The "obvious truth" that an indigent defendant needs the assistance of counsel in order to be assured a fair trial would seem to be true whether a defendant faced a felony or a misdemeanor charge. However, in several cases decided after *Gideon*, the Court came to the conclusion that the Sixth Amendment right to counsel did not apply to all criminal prosecutions, but only those where an indigent defendant was actually incarcerated following conviction.

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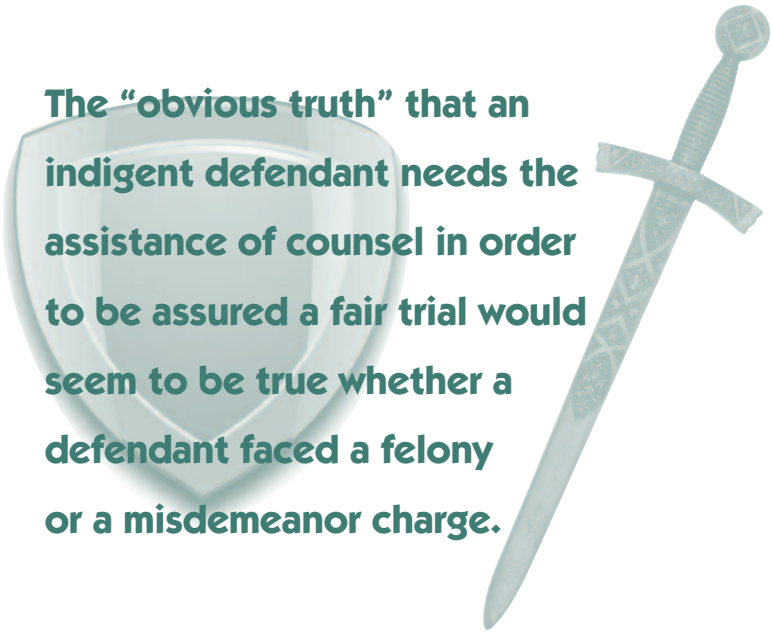
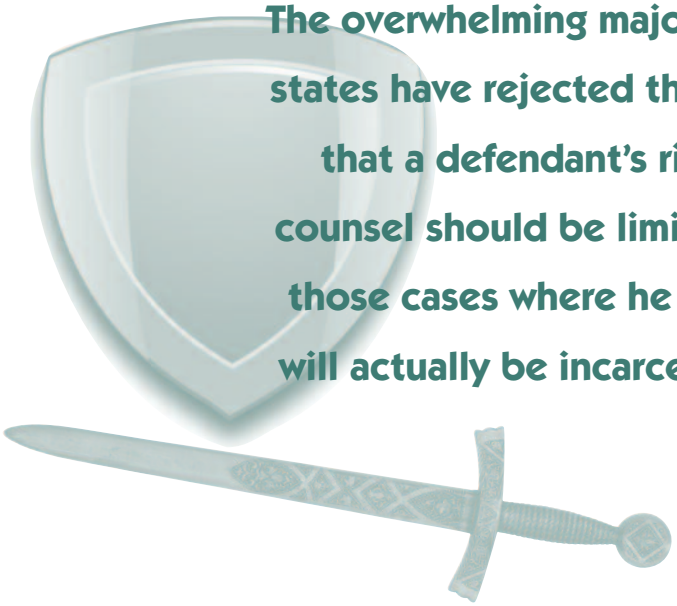


This 50-State Survey of the Right to Counsel in State Courts documents how states have chosen to implement the mandate of *Gideon*. While Supreme Court decisions subsequent to *Gideon* have limited a defendant's right to counsel to cases that will actually result in incarceration, the overwhelming majority of states have rejected the idea that a defendant's right to counsel should be limited to those cases where he or she will actually be incarcerated.



The overwhelming majority of states have rejected the idea that a defendant's right to counsel should be limited to those cases where he or she will actually be incarcerated.

This report does not examine whether the states are complying with the standards required by *Gideon* or their own broader right to counsel. Numerous recent reports have documented the severe underfunding of the public defense function across the country and the resulting failures to provide counsel when required by law. In Pennsylvania, the Administrative Office of Pennsylvania Courts reports that 27% of all defendants facing misdemeanor charges are not represented by counsel.[3] In Texas, the Texas Indigent Defense Commission estimates that 25% of misdemeanor defendants appear without counsel.[4] NACDL has found that jurisdictions in Florida and South Carolina routinely fail to inform defendants of their right to counsel and fail to appoint counsel when it is constitutionally required.[5] The Sixth Amendment Center has identified similar problems in Delaware and Utah.[6] The New York State Office of Indigent Legal Services has acknowledged that "persons deemed eligible for indigent legal defense services continue to be arraigned without counsel at first appearance" despite the fact that state law requires the actual presence of counsel at arraignment.[7] Indeed, the deprivation of this right has gained such notoriety as to warrant hearings in the United States Congress. The Chairman of the Senate Judiciary Committee recently called the failure to provide counsel "a widespread problem" and noted that "the Supreme Court's Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day."[8]

Still, many states have, on paper if not in practice, made counsel available to criminal defendants based on the offense charged or the mere possibility of incarceration. Though the unanimous decision of *Gideon* dealt with a felony charge, the Supreme Court was divided over the application of the right to counsel to misdemeanor cases. Those divisions are reflected in the way states have decided to implement the right to counsel, but the vast majority of states have recognized the "obvious truth" that whether a defendant charged with a misdemeanor is actually incarcerated following conviction should not affect the right to have the "guiding hand of counsel at every step in the proceedings."

The Sixth Amendment Right to Counsel

The Special Circumstances Rule

The need for the assistance of counsel to present an adequate defense was first recognized by the Supreme Court in *Powell v. Alabama*,[9] more than

The language used by the Court in *Gideon* makes clear that the right to counsel plays a central role in our criminal justice system.

30 years before the Court's landmark decision in *Gideon v. Wainwright*.[10] Using language that would echo throughout the *Gideon* decision, the Court stated:

> 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 adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.
>
> *Powell v. Alabama*,
> 287 U.S. 45, 68-69 (1932)

The Court's reasoning in *Powell* is based on the assumption that non-lawyers are incapable of defending themselves. The Court does not believe that even the "intelligent and educated layman" could adequately defend him or herself. Our adversarial criminal justice system simply cannot function properly without the "guiding hand of counsel."[11]

Prior to the Supreme Court's decision in *Gideon*, the decision whether or not to appoint counsel for an indigent defendant was governed by the Court's decision in *Betts v. Brady*.[12] In *Betts*, the Court found "that appointment of counsel is not a fundamental right" and "has generally been deemed one of legislative policy."[13] The Court did hold that trial courts have the power "to appoint counsel where that course seems to be required in the interest of fairness."[14] Instead of a categorical rule requiring the appointment of counsel in all criminal cases, the Court limited the appointment of counsel to those cases which present "special circumstances."

Gideon v. Wainwright

Two decades after the creation of the "special circumstances rule," the Court revisited its decision in *Betts* and declared that the Sixth Amendment right to counsel is indeed a fundamental right. In overruling *Betts*, the Court characterized that decision as "an abrupt break with its own well considered precedents."[15] By eliminating the "special circumstances rule," the Court restored "constitutional principles established to achieve a fair system of justice."[16] The language used by the Court in *Gideon* makes clear that the right to counsel plays a central role in our criminal justice system:

> Not only these precedents 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 a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Gideon v. Wainwright,
372 U.S. 335, 344 (1963)

The language used by the Court in *Gideon* is sweeping. Without an attorney, the fairness of the adversarial system is cast into doubt. Lawyers are absolutely necessary in criminal cases, and the right to counsel is a fundamental right.

While *Gideon* dealt with a felony charge, as had *Powell*, the Court's decision was based on the right to counsel under the Sixth Amendment "in all criminal prosecutions." Still, whether the Sixth Amendment requires the appointment of counsel to indigent defendants in every case or only in felony cases remained an open question following *Gideon*.[17] That question would be answered almost a decade later by the Supreme Court in *Argersinger v. Hamlin*.[18]

Actual Incarceration

In *Argersinger*, the Court rejected the idea that a distinction should be made based on the seriousness of the offense and concluded that "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."[19] That reasoning is entirely consistent with the justifications offered in *Powell* and *Gideon* that average people are simply unable to effectively represent themselves in criminal proceedings. However, while rejecting the idea that the classification of the offense should impact the applicability of the Sixth Amendment's right to counsel, the Court did not rule that the Sixth Amendment actually applies to "all criminal prosecutions."[20] The Court ruled that a defendant's conviction must result in incarceration for the right to attach.[21]

The Court's decision to limit the right to counsel to cases of actual incarceration is completely at odds with its reasoning in *Powell* and *Gideon* as well as being internally inconsistent, since the

Court recognizes that even "petty" offenses can involve complex legal issues. The Court recognized that "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are not any less complex than when a person can be sent off for six months or more."[22]

Not long after the decision in *Argersinger*, the Court declined to extend the right to counsel to a defendant who was only facing a fine, reiterating that the right to counsel under the Sixth Amendment is tied to incarceration.[23] In *Scott v. Illinois*,[24] the defendant was convicted of theft and fined $50 although the maximum sentence authorized was a $500 fine, one year in jail, or both.[25] The various concurring opinions filed in *Argersinger* created some ambiguity as to the limitations imposed on the right to counsel in cases where incarceration was authorized but not actually imposed. The Court's holding in *Scott* reinforced the actual incarceration standard:

> Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
>
> *Scott v. Illinois,*
> 440 U.S. 367, 373-74 (1979)

Argersinger and *Scott* ignore the emphasis in *Powell* and *Gideon* on the ability of defendants to effectively represent themselves and instead focus only on the penalty imposed. The Court's development of the right to counsel under the Sixth Amendment underwent a radical shift. While initially counsel was seen to be essential for due process of law and for fundamental fairness, those concerns about the legitimacy of the process were ultimately cast aside in favor of a "one day in jail rule." While the right to counsel began as a procedural right, it has become tied to the outcome of a case. The formerly "obvious truth" that a layperson is not capable of adequately defending himself was replaced by the dubious classification of an offense as serious only if it results in incarceration.[26]

While the right to counsel began as a procedural right, it has become tied to the outcome of a case.

This reasoning is also at odds with the Court's recognition that a defendant may elect to risk incarceration following conviction in order to avoid the collateral consequences of the conviction itself. In *Padilla v. Kentucky*,[27] the Court found that the failure to advise a noncitizen criminal defendant that a plea of guilty would result in deportation constituted ineffective assistance of counsel. The Court's reasoning was based on the recognition that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[28] The Court acknowledges in *Padilla* what Justice Powell recognized in *Argersinger*, that "[s]erious consequences also may result from convictions not punishable by imprisonment."[29]

In addition, defendants who are denied counsel because they will not be incarcerated following a conviction are at a severe disadvantage when attempting to negotiate a plea bargain. The Supreme Court has noted that 97% of federal convictions and 94% of state convictions are the result of guilty pleas.[30] The Court has recognized that our current criminal justice system "is for the most part a system of pleas, not a system of trials."[31] Plea bargains have been described by the Court as "central to the administration of the criminal justice system."[32] The Court also recognized the practical effect of a criminal justice system that relies almost exclusively on plea bargaining: "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[33]

The danger for uncounseled defendants is twofold. First, they may agree to plead guilty without knowing any of the collateral consequences that follow a conviction. Second, because of their inability to effectively negotiate with a prosecutor, they may agree to plead guilty to a more serious offense than was warranted by the facts and circumstances of the case.

The Right to Counsel in State Courts

While the Supreme Court has found that the Sixth Amendment to the United States Constitution requires that counsel be provided to an indigent defendant before a court can impose a sentence of incarceration, states have the option of providing counsel to indigent defendants even when actual incarceration does not occur following a conviction. The Supreme Court's rulings concerning the extent of the right to counsel under the Sixth Amendment set a standard that states must not go below, but which in no way preclude states from extending additional rights to criminal defendants.

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Problems with the Actual Incarceration Standard

The actual incarceration standard proposed in *Argersinger* and adopted in *Scott* has been criticized because it fails to take into account the complex legal issues that arise in many misdemeanor charges or the severe collateral consequences of a criminal conviction.[34] Consider Justice Powell's

A defendant should not be compelled to choose between posting bond and retaining counsel.

concurrence in *Argersinger* wherein he questions the wisdom of relying solely on actual incarceration as the test:

> In *Powell v. Alabama* and *Gideon*, both of which involved felony prosecutions, this Court noted that few laymen can present adequately their own cases, much less identify and argue relevant legal questions. Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap will be incapable of defending themselves. The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label "petty."
>
> *Argersinger v. Hamlin*,
> 407 U.S. 25, 47-48 (1972)

NACDL policy provides that "every accused person, irrespective of financial capacity to engage counsel, shall be guaranteed counsel at the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered."[35] The American Bar Association has endorsed a policy of providing representation to all indigent defendants when they are charged with any offense that is punishable by incarceration, regardless whether incarceration is ultimately imposed.

> Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.
>
> ABA Standards for Criminal Justice,
> Providing Defense Services,
> 5-5.1 Criminal Cases

The American Bar Association has also acknowledged that this policy goes beyond the requirements of *Argersinger*: "The effect of this standard is to provide counsel for all defendants who are actually jailed, and also to make counsel available for all defendants who, while not incarcerated, are prosecuted for offenses subject to jailing."[36]

Consider the many possible legal complexities of cases involving the possession of small amounts of drugs or drug paraphernalia. These types of possessory offenses, even though they may only be misdemeanors and judges may elect not to impose a jail sentence following a conviction, implicate an array of complex

procedural issues and fundamental rights, including a defendant's right to be free from unreasonable searches and seizures under the Fourth Amendment. It is difficult to see how a defendant who is without counsel would be able to effectively litigate issues surrounding the legality of a search or seizure made by police officers that uncovers contraband on the defendant's person.

In addition to the complexities of substantive criminal law and criminal procedure that a defendant faces when charged with a misdemeanor, defendants face severe consequences based solely on a conviction even if they never spend any time actually incarcerated. The ABA's National Inventory of Collateral Consequences of Conviction has identified nearly 9,000 collateral consequences that can occur as a result of a misdemeanor conviction.[37] Misdemeanor convictions can impact employment, professional licenses, business licenses, government grants and loans, government benefits, education, political and civic participation, housing, family rights, and motor vehicle licenses.

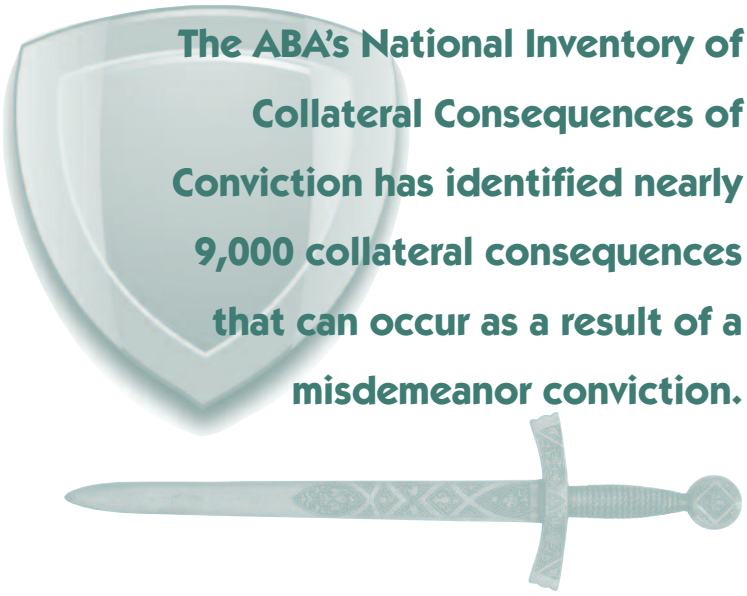
Another critique of the actual incarceration standard is that the presiding judge or magistrate must, at the time a defendant makes his or her first appearance or shortly thereafter, make a formal declaration that no sentence of imprisonment will be imposed if the defendant is convicted. This requires judges or magistrates to make predictions regarding the likely sentence they will impose when cases are first presented to them, even though they may know very little about the facts and circumstances.[38]

There is also a concern that by allowing judges and magistrates to dispense with appointed counsel if they agree not to impose legislatively authorized sentences of imprisonment, they are undermining the legislative determination of available punishments. Consider the following observation made by Justice Powell in *Argersinger*:

> [J]udges will be tempted arbitrarily to divide petty offenses into two categories – those for which sentences of imprisonment may be imposed and those in which no such sentence will be given regardless of the statutory authorization. In creating categories of offenses which by law are imprisonable but for which he would not impose jail sentences, a judge will be overruling de facto the legislative determination as to the appropriate range of punishment for the particular offense.
>
> *Argersinger v. Hamlin*, 407 U.S. 25, 53 (1972)

State Policies on Appointment of Counsel

The result is that states have not embraced actual incarceration as the appropriate test for when counsel must be appointed in criminal cases. Only fourteen states do not require the appointment of counsel unless a defendant will actually



be incarcerated: Alabama, Arkansas, Connecticut, Florida, Kansas, Maine, Massachusetts, Mississippi, Montana, North Dakota, Ohio, South Carolina, Vermont, and Virginia. The other thirty-six states and the District of Columbia appoint counsel even in cases where a defendant will not be incarcerated following a conviction. Legislatures in just nine states – Arkansas, Connecticut, Florida, Maine, Massachusetts, Montana, North Dakota, Vermont, and Virginia – have enacted statutes that codify the actual imprisonment standard by giving trial judges the statutory authority to try cases without counsel if they will not impose a jail sentence upon conviction.

It is worth considering the impact of a misdemeanor conviction in those states that permit a judge or magistrate to avoid appointing counsel for an indigent defendant by not imposing a jail sentence upon conviction. As of September 12, 2016, the ABA's National Inventory of Collateral Consequences of Conviction had identified the following number of collateral consequences for a misdemeanor conviction in the states that do not require the appointment of counsel where a defendant will not be incarcerated if convicted: 100 in Arkansas, 115 in Connecticut, 268 in Florida, 202 in Maine, 219 in Massachusetts, 105 in Montana, 177 in North Dakota, 78 in Vermont and 141 in Virginia, in addition to 238 Federal consequences because of a misdemeanor conviction.[39] These consequences include loss of employment, professional licenses, business licenses, government grants and loans, government benefits, education, political and civic participation, housing, family rights, and motor vehicle licenses, among other potentially devastating obstacles and disadvantages. In Virginia, for example, a misdemeanor conviction can be the basis for the denial of a wide variety of professional licenses, from a license to practice law to a barber's, cosmetologist's, or nail technician's license.[40] In Massachusetts and Connecticut, as in many states, a misdemeanor conviction can be grounds for eviction from public housing,[41] and in Florida from a mobile home park.[42]

States With No Appointed Counsel if No Incarceration	Number of Collateral Consequences for Misdemeanor Conviction
Arkansas	100
Connecticut	115
Florida	268
Maine	202
Massachusetts	219
Montana	105
North Dakota	177
Vermont	78
Virginia	141
Federal	238

A Better Standard: Authorized Imprisonment[43]

Perhaps because of the difficulty of making a determination regarding a potential sentence if the defendant is convicted at an initial appearance, sixteen states direct that counsel be appointed where a sentence of incarceration is authorized or where a judge or magistrate believes that a sentence of incarceration is likely to occur in the event of a conviction: Alaska, Arizona, Colorado, Georgia, Idaho, Iowa, Kentucky, Michigan, Missouri, New Jersey, North Carolina, Pennsylvania, Tennessee, Texas, Utah, and West Virginia. Missouri requires the appointment of counsel when a conviction "would probably result in confinement;"[44] North Carolina requires the appointment of counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;"[45] and Utah requires the appointment of counsel "if the defendant faces a substantial probability of deprivation of liberty."[46]

Twenty states guarantee defendants the right to counsel based on the fact that they have simply been charged with a crime or based on the potential sentence authorized by statute. This approach is consistent with the American Bar Association's Standards for Providing Defense Services, which calls for the appointment of counsel "in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise."[47] In these states, the ultimate sentence that is imposed is not relevant to a determination concerning a defendant's right to counsel: California, Delaware, Hawaii, Illinois, Indiana, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Washington, Wisconsin, and Wyoming. There are various ways in which states have chosen to implement the right

Twenty states guarantee defendants the right to counsel based on the fact that they have simply been charged with a crime or based on the potential sentence authorized by statute.

to counsel in criminal proceedings. In states like California and New York, the right to counsel in all criminal prosecutions has been established by statute. In states like Indiana and Iowa, the state supreme court has interpreted the state constitution to require counsel in misdemeanor prosecutions where a sentence of incarceration is authorized, even if it is not ultimately imposed. Other states have created state-wide public defense systems and have authorized assigned counsel to represent defendants based on the severity of the charge or the potential sentence.

Fines and Collateral Consequences

In addition to incarceration, several states regard the imposition of a substantial fine as requiring the appointment of counsel. In Vermont, the imposition of a $1,000 fine triggers the right to counsel;[48] in North Carolina counsel must be appointed if a fine of more than $500 is likely to be imposed;[49] in Maryland if an offense is merely punishable by a $500 fine, counsel must be appointed.[50]

While imprisonment or substantial fines are often the touchstones for the right to counsel in state courts, several states consider the potential collateral consequences of a conviction (a major

Several states consider the potential collateral consequences of a conviction

factor underlying NACDL's Right to Counsel Resolution). Alaska requires the appointment of counsel for any "serious offense," which has been defined as any offense "which may result (1) in incarceration, (2) in the loss of a valuable license, or (3) in a fine heavy enough to indicate criminality."[51] In New Jersey, actual imprisonment is not the only consequence that requires the appointment of counsel. New Jersey's Supreme Court has determined that due process requires that counsel be appointed for indigent defendants whenever they face any "consequence of magnitude":

> The importance of counsel in an accusatorial system such as ours is well recognized. If the matter has any complexities the untrained defendant is in no position to defend himself and, even where there are no complexities, his lack of legal representation may place him at a disadvantage. The practicalities may necessitate the omission of a universal rule for the assignment of counsel to all indigent defendants and such omission may be tolerable in the multitude of petty municipal court cases which do not result in actual imprisonment or in other serious consequence such as the substantial loss of driving privileges. But, as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.
>
> *Rodriguez v. Rosenblatt*, 58 N.J. 281, 295 (1971)

Other states also take consequences other than incarceration into account. In Wyoming, a defendant who is charged with a crime of domestic violence and who is consequently in danger of being disqualified from possessing a firearm is provided with counsel even if the judge does not intend to impose a sentence of incarceration.[52]

States With Appointed Counsel if Fines or Collateral Consequences	Fine or Collateral Consequence Triggering Appointment of Counsel
Alaska	Loss of valuable license or heavy fine
Maryland	Offense punishable by $500 fine
New Jersey	Any "consequence of magnitude"
North Carolina	Likely fine exceeding $500
Vermont	Imposition of $1000 fine
Wyoming	Domestic violence charge with possible loss of firearms right

When the Supreme Court adopted the actual incarceration standard in *Scott*, Justice Brennan, in a dissenting opinion, pointed out that Aubrey Scott, who had been convicted of an offense that was punishable by up to one year in jail and a $500 fine, would have been "entitled to appointed counsel under the current laws of at least 33 States."[53] Justice Brennan's argument that the actual imprisonment standard did not reflect the prevailing wisdom regarding the right to counsel was true then and it is true now. Today, Aubrey Scott would be entitled to assigned counsel for his defense at trial in at least 38 states and the District of Columbia.

The Right to Counsel at the First Appearance

Once it has been established that an indigent criminal defendant is entitled to counsel, the question arises: At what point in the criminal proceedings must counsel be appointed? As noted above, NACDL staunchly believes that counsel is required at "the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered."[54] The Supreme Court has always emphasized the critical role that defense counsel plays throughout criminal proceedings. Over eighty years ago, the Court found that the absence of appointed counsel prior to the commencement of trial amounted to a denial of due process under the Fourteenth Amendment:

> [T]he circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.
>
> *Powell v. Alabama*, 287 U.S. 45, 57 (1932)

The Court has made it clear that "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[55]

State Procedures

The procedures that govern the initial appearance (sometimes called an arraignment) of a defendant vary to some degree among the fifty states. Typically, at a defendant's initial appearance before a judge or a magistrate, a defendant is informed of the charges against him or her and of various rights such as the right to counsel. The court also determines whether there is probable

Justice Brennan's argument that the actual imprisonment standard did not reflect the prevailing wisdom regarding the right to counsel was true then and it is true now.

cause for the case to go forward and a decision is made regarding pre-trial release. A judge or magistrate typically has the option of releasing a defendant without any conditions, other than the promise to return to court, to release a defendant subject to certain conditions (such as a promise to stay away from the complainant), or to require that a defendant post cash bail or a bail bond before being released from custody.

Release decisions are not simply based on objective information but often involve complex legal analysis with the goal of making a pretrial determination about the likelihood of conviction and the probable sentence if the defendant is convicted. Judges and magistrates are generally required to take into consideration certain facts about each defendant — including employment history, ties to the community, prior criminal record, or prior record of failing to appear — when making a decision regarding pretrial release. While this type of information might sometimes be obtained directly from the defendant or by viewing court records, such is not always the case. The involvement of defense attorneys at the pretrial stage can assist judges in making better release decisions by providing verified information about a defendant's background and potentially valuable arguments regarding viable defenses.

The Supreme Court has not established a bright line rule regarding when an initial appearance constitutes a "critical stage" of the proceedings which requires the guiding hand of counsel.

Data from studies in the mid-1960s, 1985, and 2002 confirms that representation at the pretrial stage does make a difference.[56] In a 2002 study in Baltimore, empirical data showed that "counsel's effective advocacy and offering of credible information . . . succeeded in gaining pretrial release on recognizance for two and a half times as many defendants charged with misdemeanors and non-violent crimes than those defendants without a lawyer."[57] Additionally, for those defendants who did have monetary conditions of bail set, being represented by an attorney made a defendant two and a half times more likely to have bond set at an affordable level as compared to unrepresented individuals.[58]

Without the involvement of attorneys, defendants are more likely to be detained pretrial, at substantial cost to individuals as well as society as a whole. Actual pretrial incarceration, even for a brief period of time, can have a serious impact on indigent defendants. The loss of employment, housing and even child custody can be the result of brief pretrial detention.[59] Furthermore, pretrial detention for more than 24 hours has been associated with higher rates of additional criminal activity both during the pretrial release period as well as years later.[60]

The Right to Counsel at all Critical Stages

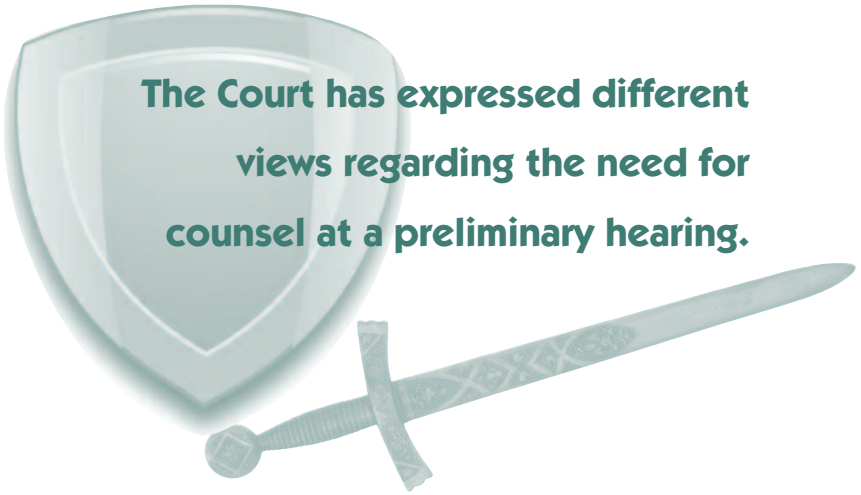
The Supreme Court has not established a bright line rule regarding when an initial appearance constitutes a "critical stage" of the proceedings which requires the guiding hand of counsel. Instead the Court will "scrutinize any pretrial confrontation of the accused to determine whether the presence of counsel is necessary to

preserve the defendant's basic right to a fair trial," and the Court will "analyze whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid the prejudice."[61]

At an arraignment on a capital charge where a defendant is called upon to enter a plea and where procedural rights can be waived, the Court has said that counsel must be actually present to enable the accused to plead intelligently.[62] The Court has expressed different views regarding the need for counsel at a preliminary hearing. In *Coleman v. Alabama*, the Court concluded that a preliminary hearing under Alabama law, where defense counsel was afforded the right to cross-examine witnesses and where counsel could make arguments regarding bail, was a critical stage of the proceedings that required the presence of counsel.[63] But just five years later, the Court ruled in *Gerstein v. Pugh* that, under Florida law, a hearing to determine probable cause for detaining an arrested person pending further proceedings was not a critical stage of proceedings which required the presence of counsel.[64] The Court found that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel."[65]

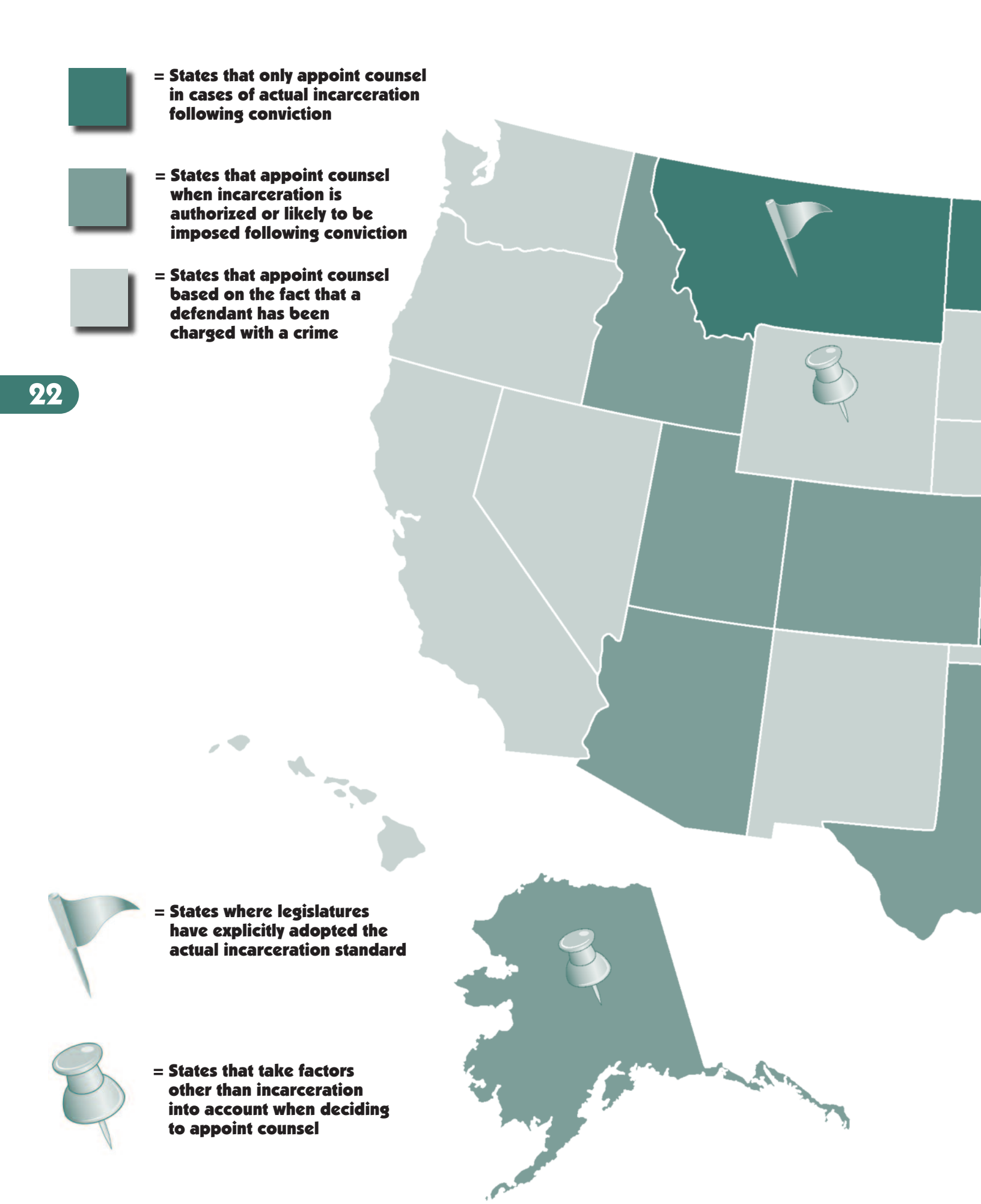
It is important to recognize that the Court's decision in *Gerstein* does not specifically address the need for counsel during an adversarial proceeding where a judicial officer has wide discretion regarding the conditions of pretrial release:

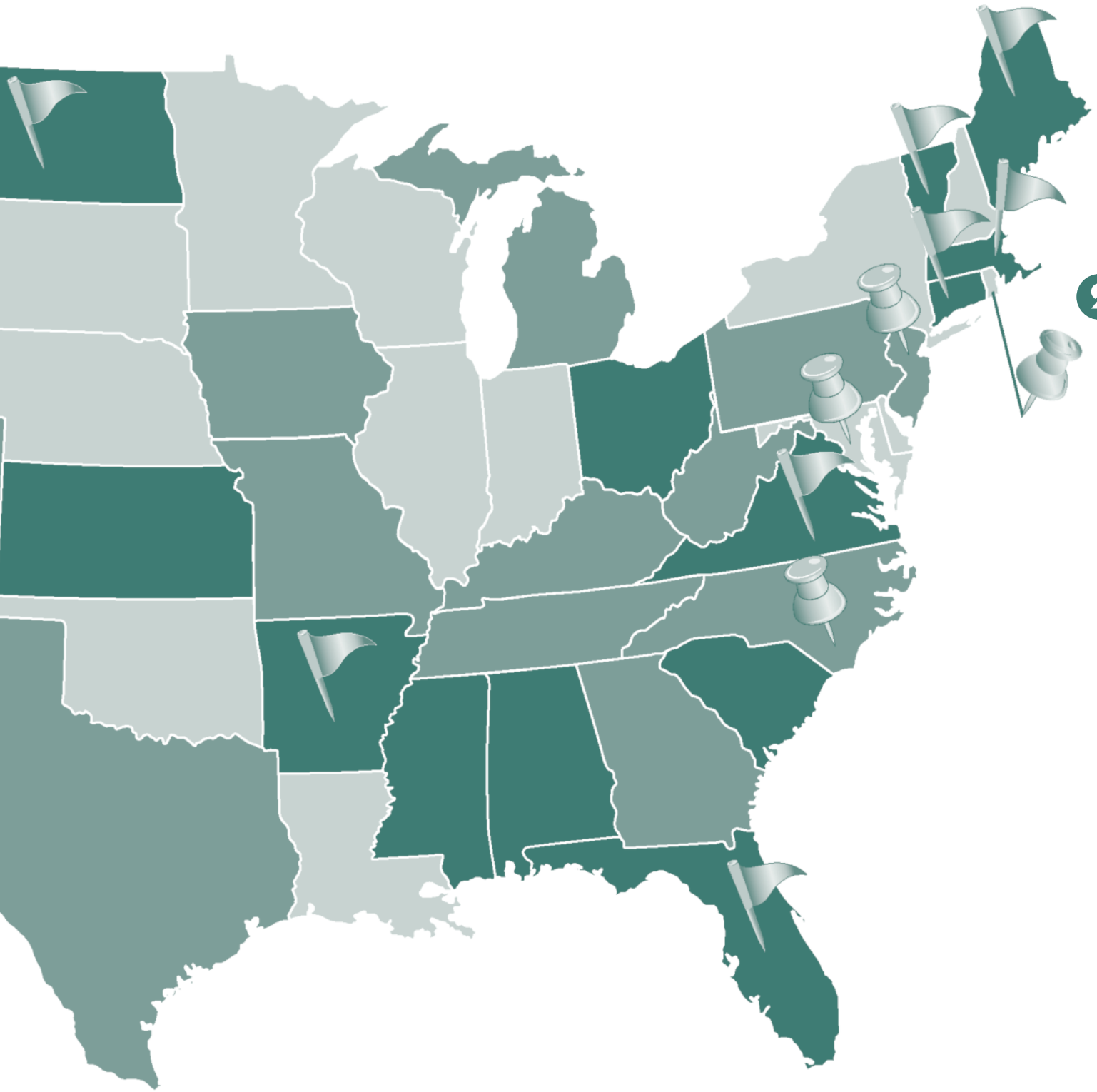
> Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release.
>
> *Gerstein v. Pugh*,
> 420 U.S. 103, 123-24 (1975)



In *Gerstein* the Court based its decision on the belief that probable cause "can be determined reliably without an adversary hearing."[66]

The Court's most recent decision regarding the right to counsel at a defendant's first appearance leaves doubt as to whether the Court regards the setting of bail as a critical stage of the criminal proceedings. In *Rothgery v. Gillespie County*, the Court reaffirmed that the right to counsel under the Sixth Amendment attaches "when the gov-


= States that only appoint counsel in cases of actual incarceration following conviction
= States that appoint counsel when incarceration is authorized or likely to be imposed following conviction
= States that appoint counsel based on the fact that a defendant has been charged with a crime
= States where legislatures have explicitly adopted the actual incarceration standard
= States that take factors other than incarceration into account when deciding to appoint counsel



RIGHT TO COUNSEL STANDARDS IN THE 50 STATES

Two recent decisions from state supreme courts held that the initial appearance is a critical stage of the proceedings because a defendant's pretrial liberty interests are adjudicated at that time.

ernment has used the judicial machinery to signal a commitment to prosecute."[67] That being said, the Court does not regard the attachment of the right to counsel to automatically require the actual presence of counsel:

> Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any "critical stage" of the post attachment proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.
>
> *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 212 (2008)

Unfortunately, the Court's admonition that counsel must be appointed within a reasonable time *after* the right to counsel has attached did not establish that the initial appearance before a judge or a magistrate as automatically a critical stage of the proceedings.

The First Appearance as a Critical Stage

Two recent decisions from state supreme courts take a different view. The New York State Court of Appeals has held that the initial appearance is a critical stage of the proceedings because a defendant's pretrial liberty interests are adjudicated at that time:

> [A]rraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs… it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents. There is no question that a bail hearing is a critical stage of the State's criminal process.
>
> *Hurrell-Harring v. State*, 15 N.Y.3d 8, 20, 930 N.E.2d 217, 223 (2010)

The Maryland Court of Appeals reached the same conclusion regarding the right to counsel at an initial appearance where a defendant's pretrial liberty interests were impacted:

> At a defendant's initial appearance before a District Court Commissioner…the defendant is in custody and, unless released on his or her personal recognizance or on bail, the defendant will remain incarcerated until a bail review hearing before a

judge. Consequently, we hold that, under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner.

DeWolfe v. Richmond,
434 Md. 444, 464,
76 A.3d 1019, 1031 (2013)

These decisions are consistent with NACDL's policy and with the American Bar Association's Standards for Providing Defense Services, which call for the appointment of counsel "to the accused as soon as feasible and, in any event, after custody begins, *at appearance before a committing magistrate*, or when formal charges are filed, whichever occurs earliest."[68]

In 1998 the ABA Criminal Justice Section successfully proposed a resolution recommending that "all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance at which bail is set."[69] This ABA resolution is consistent with those recently approved by the National Right to Counsel Committee, organized by The Constitution Project, which urges the appointment of counsel "prior to the initial bail and release hearings" and the "opportunity for defense counsel" at the hearings "to present information supporting the least onerous pretrial release conditions appropriate."[70] A comment in support of these recommendations summarizes what should occur after a defendant's custody begins:

> An assigned defense lawyer should be appointed at the earliest time to ensure that he or she has the opportunity to interview the defendant prior to the first appearance hearing and to provide adequate opportunity to prepare an argument. Preparation includes access to a telephone to call family members, friends, and other individuals who can verify information needed to establish a defendant's community ties, and access to a defendant's criminal history and appearance in court.[71]

This is comparable to NACDL's 2012 Resolution guaranteeing counsel at the first appearance at which "liberty is at stake or at which a plea of guilty to any criminal charge may be entered."[72]

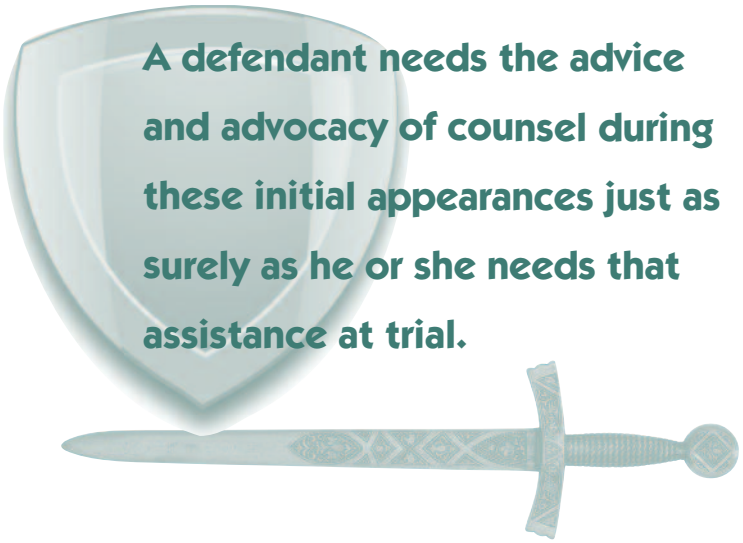
Many feel that it is time for the ABA to revise its Ten Principles of a Public Defense Delivery System to explicitly address defense counsel's role at defendant's initial hearing on pretrial release, which should include "the defense lawyer interviewing the client in advance of the release determination and serving at the hearing as defendant's advocate when bail is fixed or other conditions imposed."[73]

The American Bar Association's Standards for Providing Defense Services call for the appointment of counsel "to the accused as soon as feasible and, in any event, after custody begins, *at appearance before a committing magistrate*, or when formal charges are filed, whichever occurs earliest."

Nevertheless, most states do not provide counsel to an indigent defendant at his or her first appearance before a judge or magistrate when pretrial liberty interests are adjudicated. According to one study, lawyers are never present at the first bail hearing in 8 states, while defenders appear infrequently or in just token jurisdictions in 17 states, and in 11 other states a poor person stands a 50% or better chance

of obtaining an assigned lawyer's representation, depending upon where the arrest occurred.[74] Defendants are typically informed of their right to counsel at a first appearance and a judge or magistrate will often attempt to determine if they are indigent and require the appointment of counsel, but defense counsel is not actually present when an initial decision is made regarding a defendant's right to pretrial release.

This is significant because in almost every jurisdiction a judge or magistrate is required to consider the seriousness of the charge, the likelihood of conviction, and any potential defenses that an accused might have when making a determination regarding pretrial release. An initial appearance where a judge or magistrate is required to make a predictive judgment regarding the likelihood of conviction and sentence goes far beyond simply determining whether there is probable cause to believe that a crime has been committed. A defendant needs the advice and advocacy of counsel during these initial appearances just as surely as he or she needs that assistance at trial.



When recognizing the importance of the Sixth Amendment right to counsel, the Supreme Court has also pointed out "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty…. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."[75]

Ultimately, the rationale underlying the Supreme Court's recognition that counsel must be provided when incarceration may result from a criminal charge would seem to suggest that the same right must exist with respect to pretrial incarceration. It makes little sense to require that counsel be assigned to indigent defendants who face actual incarceration if found guilty following a trial but to deny counsel to those same defendants in a pretrial proceeding where a judge or magistrate must assess the likely outcome of trial and can deprive that defendant, although still presumed innocent, of his or her liberty pending trial. The fact that counsel may be appointed soon after the initial appearance in no way cures what amounts to a violation of an indigent defendant's Sixth Amendment right to counsel at their initial appearance.

Conclusion

The Supreme Court's decisions in *Argersinger* and *Scott* enable states to avoid appointing counsel for the indigent in criminal cases as long as a defendant was not sentenced to incarceration. However, as this 50-State Survey on the Right to Counsel in State Courts demonstrates, the "actual incarceration" standard for the appointment of counsel under the Sixth Amendment announced in *Argersinger* and adhered to in *Scott* has not been generally adopted by the states. To be sure, even in those states that provide for a broader right to counsel, compliance is spotty at best. Thus while compliance is a matter of great concern,[76] the vast majority of states have laws pro-

viding for the appointment of counsel in cases where imprisonment is authorized, even if it is never imposed as a sentence.

Similarly, although the Supreme Court has not yet recognized that an initial appearance where a judge or a magistrate has the power to order the pretrial detention of a defendant is a critical stage of the proceedings, several state supreme courts have recently found that the initial appearance is a critical stage of the proceeding that requires the presence of counsel. Nonetheless, the majority of state procedures concerning the appointment of counsel contemplate that counsel will be assigned, but not actually present, at the initial appearance, which means indigent defendants typically have their pretrial liberty interests adjudicated without the benefit of counsel.

Prior NACDL *Gideon at 50* reports have documented how states underfund assigned counsel programs and limit access to counsel through financial eligibility guidelines. The general lack of funding for assigned counsel programs combined with specific procedures that unfairly deny counsel to indigent defendants demonstrates that states are reluctant to devote the financial resources necessary to make the promise of *Gideon* a reality. That being said, this report demonstrates that the overwhelming majority of states have expressed agreement with the principle "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him."[77]

The fact that so many states have recognized that the actual incarceration standard is insufficient to protect due process opens the door to a fairer criminal justice system — one that truly honors the importance of defense counsel when accused persons face the mighty machinery of the states and the potentially life-altering consequences of pretrial detention and a conviction for any offense. Still, this leaves reformers with two major challenges: (1) the need to ensure that where the right to counsel has been granted by court interpretation or statute, it is implemented in practice, and (2) the imperative of securing an expansion of the Supreme Court's interpretation of the right to counsel to ensure that no person may suffer the loss of liberty or a criminal adjudication without the benefit of counsel.■

Endnotes

1. Part 2 of GIDEON AT 50 focused on how states define indigency. That report revealed how states use unrealistic financial eligibility guidelines for assigned counsel. This practice results in the denial of counsel to defendants who cannot afford to retain counsel. In light of that report, NACDL resolved to no longer use the term "indigent defense" since the constitutional requirement to provide counsel is not limited to the "indigent" but includes any defendant who cannot afford to retain counsel without substantial hardship. Instead, NACDL has elected to use the term "public defense" instead of "indigent defense." *See* NACDL Resolution Renaming the Champion of Indigent Defense Award (Feb. 20, 2016) available at https://www.nacdl.org/resolutions/2016mw01/.

2. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

3. SIXTH AMENDMENT CENTER, ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS (2015).

4. *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the Senate Committee on the Judiciary*, 114th Cong. (May 13, 2015) (testimony of Prof. Robert C. Boruchowitz), available at https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Boruchowitz%20Testimony.pdf.

5. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS (2011) and NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS (2016).

6. *See* SIXTH AMENDMENT CENTER, THE CRUCIBLE OF ADVERSARIAL TESTING: ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS (2014) and SIXTH AMENDMENT CENTER, THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL LEVEL INDIGENT DEFENSE SERVICES (2015).

7. New York State Office of Indigent Legal Services, Counsel at First Appearance, https://www.ils.ny.gov/content/counsel-first-appearance.

8. *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the Senate Committee on the Judiciary*, 114th Cong. (May 13, 2015) (testimony of Sen. Chuck Grassley), available at https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Grassley%20Statement1.pdf

9. *Id.;* 287 U.S. 45 (1932).

10. 372 U.S. 335, 344 (1963).

11. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

12. *Id.;* 316 U.S. 455 (1942).

13. *Betts v. Brady*, 316 U.S. 455, 471 (1942).

14. *Id*. at 472.

15. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

16. *Id*.

17. *See id*. at 351 ("Whether the rule should extend to all criminal cases need not now be decided.") (Harlan, J., concurring).

18. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

19. *Id*. at 36-37.

20. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment,* 11 U. PA. J. CONST. L. 487 (2009).

21. *Argersinger,* 407 U.S. at 37 ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

22. *Id*. at 33.

23. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *see also* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011) ("While some states have gone beyond *Scott* to provide counsel in all criminal cases, in cases involving substantial fines, or for all cases involving offenses punishable by imprisonment (regardless of whether a sentence of imprisonment is imposed), other states have hewn to *Scott*'s minimal requirement. Some states allow trial courts to avoid appointing counsel simply by certifying that they will not impose incarceration regardless of the seriousness of the misdemeanor offense or the possibility that it will carry other consequences. [In Florida and Maine, courts can use this mechanism even for felony offenses.] The number of defendants convicted without counsel may well be increasing in the current depressed economy as states look to save money by cutting back on both incarceration and counsel.") (footnotes omitted).

24. *Scott v. Illinois*, 440 U.S. 367 (1979).

25. *Id*. at 368.

26. Note that the court in a later case held that a suspended sentence also is considered a sentence of incarceration that requires an indigent person be appointed counsel. *Alabama v. Shelton*, 535 U.S. 654 (2002). Shelton was accused of third-degree assault, a misdemeanor carrying a maximum sentence of one year in prison and a $2,000 fine. Although the court repeatedly warned Shelton of

the dangers of representing himself during his trial, the judge did not offer him counsel at the state's expense. Shelton represented himself both in the local court and the Alabama Circuit Court and was convicted. The Circuit Court gave Shelton a 30-day suspended sentence and placed him on unsupervised probation for two years. After the lower appeals court affirmed, the Alabama Supreme Court reversed the defendant's suspended sentence and vacated his probation. The State of Alabama then sought certiorari.

The United States Supreme Court affirmed the Supreme Court of Alabama's decision, holding that the Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. "A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point 'result[s] in imprisonment,' *Nichols v. United States*, 511 U. S. 738, 746; it 'end[s] up in the actual deprivation of a person's liberty,' *Argersinger*, 407 U. S., at 40. This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow." *Alabama v. Shelton*, 535 U.S. at 662. This language makes it clear that any time a defendant is facing a suspended sentence where a failure to comply with a condition could lead to incarceration, a lawyer must be appointed.

27. *Padilla v. Kentucky,* 559 U.S. 356 (2010).

28. *Id*. at 368 (citation omitted).

29. *Argersinger,* 407 U.S. at 48 (Powell, J., concurring).

30. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf).

31. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

32. *Frye*, 132 S. Ct. at 1407. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id*. (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

33. *Frye*, 132 S. Ct. at 1407.

34. *See generally* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 Cornell L. Rev. 697, 699–700 (2002) (observing the "imposition of collateral consequences has become an increasingly central purpose of the modern criminal process"); John P. Gross, 22 Wm. & Mary Bill Rts. J. 80–87 (describing the rise of collateral consequences over the last several decades); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts,* 45 U.C. Davis L. Rev. 277, 297–303 (2011) (noting the "most pervasive collateral effect of a misdemeanor conviction is the ability to find and keep work").

35. NACDL Resolution, Right to Counsel at Initial Appearance Before a Judicial Officer at Which Liberty Is at Stake or at Which a Plea of Guilty to Any Criminal Charge May Be Entered (Feb. 19, 2012) [hereinafter NACDL Right to Counsel Resolution], available at https://www.nacdl.org/About.aspx?id=21882.

36. ABA Standards for Providing Defense Services, Standard 5-5.1: Criminal Cases, cmt.

37. The ABA National Inventory of Collateral Consequences of Conviction contains 47,979 total entries as of September 12, 2016. By limiting the search to consequences triggered by misdemeanor offenses, the database produces 8,925 results: http://www.abacollateralconsequences.org/search/.

38. *Argersinger*, 407 U.S. at 53 (1972) ("The judge will therefore be forced to decide in advance of trial – and without hearing the evidence – whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.").

39. ABA National Inventory of Collateral Consequences of Conviction, http://www.abacollateralconsequences.org, last checked September 12, 2016.

40. *See* 18 VAC 41-20-20.

41. *See* ALM GL ch. 121B § 32 and Conn. Gen. Stat. § 8-45a.

42. *See* Fla. Stat. § 723.061.

43. While providing counsel when imprisonment is authorized is consistent with current ABA Standards and Guidelines for the provision of public defense, NACDL has adopted a policy that calls for the provision of counsel, without regard to financial eligibility, at the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered. See NACDL Right to Counsel Resolution, *supra* note 35.

44. Mo. Sup. Ct. R. 31.02(a).

45. N.C. Gen. Stat. Ann. § 7A-451(a)(1).

46. Utah R. Crim. P. 8(a).

47. ABA Standards for Providing Defense Services, Standard 5-5.1: Criminal Cases.

48. Vt. Stat. Ann. tit. 13, § 5201(4).

49. N.C. Gen. Stat. Ann. § 7A-451(a)(1).

50. Md. Code Ann., Crim. Proc. § 16-101(1) and (2).

51. *Alaska Pub. Defender Agency, Juneau Office v. Superior Court of First Judicial Dist. at Juneau*, 584 P.2d 1106, 1109 (Alaska 1978); *see also Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971).

52. Wyo. Stat. Ann. § 7-6-102.

53. *Scott v. Illinois*, 404 U.S. 367, 388 (1979) (Brennan, J., dissenting).

54. See NACDL Right to Counsel Resolution, *supra* note 35.

55. *United States v. Wade*, 388 U.S. 218, 226 (1967).

56. The Constitution Project, Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing 33-34 (2015).

57. *Id.* at 11, citing Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail*, 23 Cardozo L. Rev 1719, 1720 (2002).

58. *Id.*

59. *See, e.g.,* Vera Institute, Incarceration's Front Door: The Misuse of Jails in America (February 2015) (Updated 7/29/15).

60. Laura and John Arnold Foundation, Research Summary: Pretrial Criminal Justice Research (2013).

61. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

62. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963).

63. *Coleman*, 399 U.S. at 9.

64. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

65. *Id*. at 122.

66. *Id*. at 120.

67. *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

68. ABA Standards for Providing Defense Services, Standard 5-6.1: Initial Provision of Counsel (emphasis added).

69. The resolution was adopted in August 1998 and is available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/20110325_aba_112d.authcheckdam.pdf.

70. *See* The Constitution Project, Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing (2015).

71. *Id*. at 37.

72. *See* NACDL Right to Counsel Resolution, *supra* note 35.

73. Norman Lefstein, *Time to Update the 'ABA Ten Principles' for the 21st Century*, The Champion®, March 2016 at 42.

74. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333 (2011).

75. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

76. *See* Nat'l Ass'n of Criminal Def. Lawyers, Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts (2011) and Nat'l Ass'n of Criminal Def. Lawyers, Summary Injustice: A Look at Constitutional Deficiencies in South Carolina's Summary Courts (2016).

77. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). ■

STATE STATUTES AND COURT DECISIONS ON THE APPOINTMENT OF COUNSEL TO INDIGENT DEFENDANTS[78]

ALABAMA

A defendant shall be entitled to be represented by counsel in any criminal proceedings held pursuant to these rules and, if indigent, *shall be entitled to have an attorney appointed to represent the defendant in all criminal proceedings in which representation by counsel is constitutionally required*. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

AL ST RCRP Rule 6.1(a)

ALASKA

The Public Defender Agency statute requires representation for any "serious offense" and the Alaska Supreme Court has defined "serious offense" as any offense, the direct penalty for which may result (1) *in incarceration*, (2) *in the loss of a valuable license*, or (3) *in a fine heavy enough to indicate criminality*.

Alaska Stat. Ann. § 18.85.100(a)(1); Alaska Stat. Ann. § 18.85.170(5)(A); *Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971); *Alaska Pub. Defender Agency, Juneau Office v. Superior Court of First Judicial Dist. at Juneau*, 584 P.2d 1106, 1109-10 (Alaska 1978).

ARIZONA

An indigent defendant *shall be entitled to have an attorney appointed to represent him or her in any criminal proceeding which may result in punishment by loss of liberty* and in any other criminal proceeding in which the court concludes that the interests of justice so require.

Ariz. R. Crim. P. 6.1(b).

ARKANSAS

Whenever an indigent is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel, the court *shall appoint counsel to represent the indigent, unless the indigent is charged with a misdemeanor and the court has determined that under no circumstances will incarceration be imposed as a part of the punishment if the indigent is found guilty*. A suspended or probationary sentence to incarceration shall be considered a sentence to incarceration if revocation of the suspended or probationary sentence may result in the incarceration of the indigent without the opportunity to contest guilt of the offense for which incarceration is imposed.

Ark. R. Crim. P. 8.2(b).

CALIFORNIA

In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her.

Cal. Penal Code § 987(a).

COLORADO

The state public defender shall represent as counsel… each indigent person who is under arrest for or charged with committing a felony… indigent persons charged in any court with crimes which constitute misdemeanors and *in which the charged offense includes a possible sentence of incarceration*… and such persons charged with municipal code violations as the state public defender in his or her discretion may determine…

Colo. Rev. Stat. Ann. § 21-1-103(1) and (2).

CONNECTICUT

In any criminal action… the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant, *unless, in a misdemeanor case, at the time of the application for appointment of counsel, the court decides to dispose of the pending charge without subjecting the defendant to a sentence involving immediate incarceration or a suspended sentence of incarceration with a period of probation or the court believes that the disposition of the pending case at a later date will not result in a sentence involving immediate incarceration or a suspended sentence of incarceration with a period of probation and makes a statement to that effect on the record.*

Conn. Gen. Stat. Ann. § 51-296(a).

DELAWARE

When representing an indigent person, the Office of Defense Services shall: Counsel and defend the indigent person, whether held in custody without commitment or *charged with a criminal offense*, at every stage of the proceedings following arrest.

Colo. Rev. Stat. Ann. § 21-1-103(1) and (2).

DISTRICT OF COLUMBIA

In all cases where a person faces a loss of liberty and the Constitution or any other law requires the appointment of counsel, the court shall advise the defendant or respondent that he or she has the right to be represented by counsel and that counsel will be appointed to represent the defendant or respondent if such person is financially unable to obtain counsel. Unless the defendant or respondent waives representation by counsel, the court, if satisfied after appropriate inquiry that the defendant or respondent is financially unable to obtain counsel, shall appoint counsel to represent that person.

D.C. Code § 11-2602.

FLORIDA

Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by incarceration including appeals from the conviction thereof. In the discretion of the court, *counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor or violation of a municipal ordinance if the judge, at least 15 days prior to trial, files in the cause a written order of no incarceration certifying that the defendant will not be incarcerated in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation revocation*… the court may discharge appointed counsel unless the defendant is incarcerated or the defendant would be substantially disadvantaged by the discharge of appointed counsel.

D.C. Code § 11-2602.

GEORGIA

The circuit public defender shall provide representation in the following actions and proceedings: Any case prosecuted in a superior court under the laws of the State of Georgia i*n which there is a possibility that a sentence of imprisonment or probation or a suspended sentence of imprisonment may be adjudged*.

Ga. Code Ann. § 17-12-23(a)(1).

HAWAII

Any indigent person who is *arrested for, charged with, or convicted of an offense or offenses punishable by confinement in jail or prison*… shall be entitled to be represented by a public defender.

Haw. Rev. Stat. § 802-1(a)(1).

IDAHO

An indigent person who is being detained by a law enforcement officer…or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel is so entitled. A "serious crime" means any offense the penalty for *which includes the possibility of confinement, incarceration, imprisonment or detention in a correctional facility, regardless of whether actually imposed*.

Idaho Code Ann. § 19-852 (1)(a); Idaho Code Ann. § 19-851(5).

The proper inquiry when making a decision to appoint counsel is not whether a defendant "was likely to be imprisoned, but whether by the terms of the statute he could have been imprisoned for over six months or fined more than $300."

State v. Hardman, 120 Idaho 667, 669, 818 P.2d 782, 784 (Ct. App. 1991).

ILLINOIS

Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge… In all cases, *except where the penalty is a fine only*, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel.

725 Ill. Comp. Stat. Ann. 5/113-3(a) and (b).

INDIANA

Prior to the completion of the initial hearing, the judicial officer shall determine whether a person who requests assigned counsel is indigent. If the person is found to be indigent, the judicial officer shall assign counsel to the person.

Ind. Code Ann. § 35-33-7-6(a).

Under the Indiana Constitution there is "a right to counsel *for all persons charged with a criminal misdemeanor, regardless of whether the charge ultimately results in the misdemeanant's imprisonment.*"

Brunson v. State, 182 Ind. App. 146, 148, 394 N.E.2d 229, 231 (1979).

IOWA

An indigent person is entitled to the appointment of one attorney in all cases.

Iowa Code Ann. § 815.10(1)(b).

Under the Iowa Constitution "*an accused in a misdemeanor criminal prosecution who faces the possibility of imprisonment under the applicable criminal statute has a right to counsel.*"

State v. Young, 863 N.W.2d 249, 281 (Iowa 2015).

KANSAS

If the municipal judge has reason to believe that *if found guilty, the accused person might be deprived of his or her liberty* and is not financially able to employ counsel, the judge shall appoint an attorney to represent the accused person.

Kan. Stat. Ann. § 12-4405; *State v. Long*, 43 Kan. App. 2d 328, 337, 225 P.3d 754, 759 (2010)(Acknowledging that the State of Kansas uses the "actual incarceration" rule).

KENTUCKY

A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime…is entitled to be represented by an attorney to the same extent as a person having his or her own counsel is so entitled.

Ky. Rev. Stat. Ann. § 31.110(1)(a).

A "serious crime" includes: a felony; *a misdemeanor or offense any penalty for which includes the possibility of confinement.*

Ky. Rev. Stat. Ann. § 31.100(8)(a) and (b).

LOUISIANA

"Public defender services" or "indigent defender services" means the providing of legal services to indigent persons in criminal proceedings *in which the right to counsel attaches under the United States and Louisiana constitutions.*

La. Rev. Stat. Ann. 15:143(9).

An indigent defendant in Louisiana has the constitutional right to appointed counsel in any misdemeanor case punishable by a term of imprisonment. La. Const. Art. I, § 13.

State v. Stevison, 721 So. 2d 843, 844 (La. 1999).

MAINE

If the defendant in a proceeding in which the crime charged is murder or a Class A, Class B, or Class C crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant elects to proceed without counsel… If a defendant in a proceeding in which the crime charged is a Class D or Class E crime appears without counsel, the court shall advise the defendant of the defendant's right to be represented by counsel at every stage of the proceeding unless the defendant elects to proceed without counsel. If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel, *unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed*.

M.R.U. Crim. P. 44(1).

The court shall set the term of imprisonment as follows: in the case of a Class D crime, the court shall set a definite period of less than one year; or in the case of a Class E crime, the court shall set a definite period not to exceed 6 months.

Me. Rev. Stat. tit. 17-A, § 1252(2)(D),(E).

MARYLAND

Indigent defendants or parties shall be provided representation under this title in a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense.

Md. Code Ann., Crim. Proc. § 16-204(b)(1)(i).

A "serious offense" means: a felony; a misdemeanor or offense punishable by confinement for more than 3 months or a fine of more than $500.

Md. Code Ann., Crim. Proc. § 16-101(1) and (2).

MASSACHUSETTS

A person charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the commonwealth, the person or on the court's own motion, shall not be *appointed counsel if the judge, at arraignment, informs such person on the record that, if the person is convicted of such offense, the person's sentence shall not include any period of incarceration*. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Mass. Gen. Laws Ann. ch. 211D, § 2B.

MICHIGAN

When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed. If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel if the person is eligible for appointed counsel under the Michigan Indigent Defense Commission Act.

Mich. Comp. Laws Ann. § 775.16.

Indigent criminal defense services are provided to a defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge."

Mich. Comp. Laws Ann. § 780.983(d)(i).

MINNESOTA

The following persons who are financially unable to obtain counsel are entitled to be represented by a public defender: a person charged with a felony, gross misdemeanor, or misdemeanor.

Minn. Stat. Ann. § 611.14(1).

Before trial, *the prosecutor may certify a misdemeanor offense as a petty misdemeanor if the prosecutor does not seek incarceration, and seeks a fine at or below the statutory maximum for a petty misdemeanor.* Subject to the following exception, certification takes effect only on approval of the court and consent of the defendant.

Minn. R. Crim. P. 23.04.

A petty misdemeanor means a *petty offense which is prohibited by statute, which does not constitute a crime* and for which a sentence of a fine of not more than $300 may be imposed.

Minn. Stat. Ann. § 609.02(4)(a).

MISSISSIPPI

When any person *shall be charged with a felony, misdemeanor punishable by confinement for ninety days or more*… the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, *may, in the discretion of the court, appoint counsel to defend him.*

Miss. Code. Ann. § 99-15-15.

When any person shall be arrested and charged with a felony, a misdemeanor… then the arresting authority shall afford such person an opportunity to sign an affidavit stating that such person is an indigent and unable to employ counsel. Upon the signing of such affidavit by such person, the public defender shall represent said person unless the right to counsel be waived by such person… When any person shall be arrested and charged with a misdemeanor, the presiding judge or justice, upon determination that the person is indigent as provided in this section, and that representation of the indigent is required, shall appoint the public defender whose duty it shall be to provide such representation. *No person determined to be an indigent as provided in this section shall be imprisoned as a result of a misdemeanor conviction unless he was represented by the public defender or waived the right to counsel.*

Miss. Code. Ann. § 25-32-9(1).

MISSOURI

In all criminal cases the defendant shall have the right to appear and defend in person and by counsel. If any person *charged with an offense, the conviction of which would probably result in confinement*, shall be without counsel upon his first appearance before a judge, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel… If at any stage of the proceedings it appears to the court in which the matter is then pending that because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant, the court shall then appoint counsel.

Mo. Sup. Ct. R. 31.02(a).

MONTANA

If the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a misdemeanor and incarceration is a sentencing option if the defendant is convicted, during the initial appearance *the court may order that incarceration not be exercised as a sentencing option if the defendant is convicted. If the court so orders, the court shall inform the defendant that the assistance of counsel at public expense through the office of state public defender is not available* and that time will be given to consult with an attorney before a plea is entered. If incarceration is waived as a sentencing option, a public defender may not be assigned.

Mont. Code Ann. § 46-8-101(3).

NEBRASKA

At a felony defendant's first appearance before a court, the court shall advise him or her of the right to court-appointed counsel if he or she is indigent. If he or she asserts indigency, the court shall make a reasonable inquiry to determine his or her financial condition and may require him or her to execute an affidavit of indigency. If the court determines him or her to be indigent, it shall formally appoint the public defender to represent him or her in all proceedings before the court and shall make a notation of such appointment and appearances of the public defender upon the felony complaint. *The same procedure shall be followed by the court in misdemeanor cases punishable by imprisonment.*

Neb. Rev. Stat. § 29-3902.

NEVADA

Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent the defendant at every stage of the proceedings from the defendant's initial appearance before a magistrate or the court through appeal, unless the defendant waives such appointment.

Nev. Rev. Stat. Ann. § 178.397.

Every crime which may be punished by death or by imprisonment in the state prison is a felony. Every crime punishable by a fine of not more than $1,000, or by imprisonment in a county jail for not more than 6 months, is a misdemeanor. Every other crime is a gross misdemeanor.

Nev. Rev. Stat. Ann. § 193.120(2),(3) and (4).

NEW HAMPSHIRE

In every criminal case in which the defendant is charged with a felony or a class A misdemeanor and appears without counsel, the court before which he or she appears shall advise the defendant that he or she has a right to be represented by counsel and that counsel will be appointed to represent him or her if he or she is financially unable to obtain counsel.

N.H. Rev. Stat. Ann. § 604-A:2(I).

Misdemeanors are either class A misdemeanors or class B misdemeanors when committed by an individual. A class A misdemeanor is any crime so designated by statute within or outside this code and any crime defined outside of this code for which the maximum penalty, exclusive of fine, is imprisonment not in excess of one year. A class B misdemeanor is any crime so designated by statute within or outside this code and any crime defined outside of this code for which *the maximum penalty does not include any term of imprisonment* or any fine in excess of $1,200.

N.H. Rev. Stat. Ann. § 625:9(IV)(a),(b); see also RSA 651:2, IV(a) regarding maximum fine.

NEW JERSEY

The Public Defender shall…provide for the legal representation of any person charged with a disorderly persons offense or with the violation of any law, ordinance or regulation of a penal nature *where there is a likelihood that the persons so charged, if convicted, will be subject to imprisonment* or, in the opinion of the court, any other consequence of magnitude.

N.J. Stat. Ann. § 2A:158A-5.2 (West).

The importance of counsel in an accusatorial system such as ours is well recognized. If the matter has any complexities the untrained defendant is in no position to defend himself and, even where there are no complexities, his lack of legal representation may place him at a disadvantage. The practicalities may necessitate the omission of a universal rule for the assignment of counsel to all indigent defendants and such omission may be tolerable in the multitude of petty municipal court cases which do not result in actual imprisonment or in other serious consequence such as the substantial loss of driving privileges. But, as a matter of simple justice, *no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.*

Rodriguez v. Rosenblatt, 58 N.J. 281, 295, 277 A.2d 216, 223 (1971).

NEW MEXICO

A needy person who is being detained by a law enforcement officer, or *who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel* and to be provided with the necessary services and facilities of representation, including investigation and other preparation. The attorney, services and facilities and expenses and court costs shall be provided at public expense for needy persons.

N.M. Stat. Ann. § 31-16-3(A).

A "serious crime" includes a felony and *any misdemeanor or offense which carries a possible penalty of confinement for more than six months.*

N.M. Stat. Ann. § 31-16-2(D).

NEW YORK

The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action. If he appears upon such arraignment without counsel, he has the following rights… To have counsel assigned by the court if he is financially unable to obtain the same; except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

N.Y. Crim. Proc. Law § 170.10(3)(c).

The Criminal Procedure Law clearly provides broad statutory protection to all defendants accused of felonies and misdemeanors without reference to the potential sentence attached to the crime.

People v. Ross, 67 N.Y.2d 321, 326, 493 N.E.2d 917, 920 (1986).

NORTH CAROLINA

An indigent person is entitled to services of counsel in the following actions and proceedings: *Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged.*

N.C. Gen. Stat. Ann. § 7A-451(a)(1).

NORTH DAKOTA

An indigent defendant facing a felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right. *An indigent defendant facing a non-felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right or the magistrate determines that sentence upon conviction will not include imprisonment.*

N.D. R. Crim. P. 44(a)(1),(2).

OHIO

Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.
Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. *When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him*, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.

Ohio Crim. R. 44(A),(B).

"Serious offense" means any felony, and any misdemeanor *for which the penalty prescribed by law includes confinement for more than six months.*
"Petty offense" means a misdemeanor other than a serious offense.

Ohio Crim. R. 2(C),(D).

OKLAHOMA

The Indigent Defense System shall have the responsibility of defending all indigents, as determined in accordance with the provisions of the Indigent Defense Act *in all capital and felony cases and in all misdemeanor and traffic cases punishable by incarceration.*

Okla. Stat. Ann. tit. 22, § 1355.6(A).

OREGON

Counsel must be appointed for a defendant who…is before a court on any of the following matters: Charged with a crime.

Or. Rev. Stat. Ann. § 135.050 (5)(a).

PENNSYLVANIA

Counsel shall be appointed: in all summary cases, *for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed*; in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel; in all cases, by the court, on its own motion, when the interests of justice require it.

Pa. R. Crim. P. 122(A)(1),(2) and (3).

RHODE ISLAND

If a defendant appears in Superior Court without counsel, the court shall advise the defendant of his or her right to counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant is able to obtain his or her own counsel or elects to proceed without counsel.

Super. R. Crim. P. 44.

If a defendant appears in District Court without counsel, the court shall advise the defendant of his or her right to be represented by counsel. *If the offense charged is punishable by imprisonment for a term of more than six months or by a fine in excess of $500, the court shall advise the defendant of his or her right to assignment of counsel and shall assign counsel to represent the defendant at every stage of the proceeding* unless the defendant is able to obtain his or her own counsel or elects to proceed without counsel.

Dist. R. Crim. P. 44.

SOUTH CAROLINA

Any person *entitled to counsel under the Constitution of the United States* shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto. The fact that the accused may have previously engaged and partially paid private counsel at his own expense in connection with pending charges shall not preclude a finding that he is financially unable to retain counsel.

S.C. Code Ann. § 17-3-10.

SOUTH DAKOTA

In any criminal investigation or in any criminal action… if it is satisfactorily shown that the defendant or detained person does not have sufficient money, credit, or property to employ counsel and pay for the necessary expenses of his representation, the judge of the circuit court or the magistrate shall, upon the request of the defendant, assign, at any time following arrest or commencement of detention without formal charges, counsel for his representation, who shall appear for and defend the accused upon the charge against him, or take other proper legal action to protect the rights of the person detained without formal charge.

S.D. Codified Laws § 23A-40-6.

At the time of arraignment for a violation of a Class 2 misdemeanor or a violation of an ordinance or at the time of the hearing for a petty offense, the circuit court judge or magistrate may conclude and state on the record, in the defendant's presence, that the defendant will not be deprived of his liberty if he is convicted. The circuit court judge's or magistrate's statement that the defendant will not be deprived of his liberty if he is convicted shall be made before the defendant enters his plea. *If the defendant is not in custody and if the court has concluded that he will not be deprived of his liberty if he is convicted, an indigent defendant charged with violating a Class 2 misdemeanor, an ordinance not having a penalty greater than a Class 2 misdemeanor or a petty offense, is not entitled to court assigned counsel.*

S.D. Codified Laws § 23A-40-6.1.

Misdemeanors are divided into two classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction: Class 1 misdemeanor: one year imprisonment in a county jail or two thousand dollars fine, or both; Class 2 misdemeanor: *thirty days imprisonment in a county jail or five hundred dollars fine, or both.*

S.D. Codified Laws § 22-6-2(1)(2).

TENNESSEE

For the purposes of this part, an "indigent person" is one who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney: In any criminal prosecution or juvenile delinquency proceeding *involving a possible deprivation of liberty.*

Tenn. Code Ann. § 8-14-201(1).

TEXAS

A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding… an indigent defendant is entitled to have an attorney appointed to represent him *in any adversary judicial proceeding that may result in punishment by confinement* and in any other criminal proceeding if the court concludes that the interests of justice require representation.

Tex. Crim. Proc. Code Ann. § art. 1.051(a)(c).

UTAH

A defendant charged with a public offense has the right to self-representation, and if indigent, has the right to court-appointed counsel *if the defendant faces a substantial probability of deprivation of liberty*.

Utah R. Crim. P. 8(a).

The defense services provider shall be assigned to represent each indigent and shall provide the legal defense services necessary for an effective defense, *if the indigent is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison* if: the indigent requests legal defense; or the court on its own motion or otherwise orders legal defense services and the defendant does not affirmatively waive or reject on the record the opportunity to be provided legal defense.

Utah Code Ann. § 77-32-302(1)(a),(b).

VERMONT

Every defendant *charged with a serious crime* as defined in 13 V.S.A. § 5201(4) who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the judicial officer through appeal, unless he waives such appointment.

Vt. R. Crim. P. 44(a).

A "serious crime" includes: a felony; a misdemeanor the maximum penalty for which is a fine of more than $1,000.00 or any period of imprisonment *unless the judge, at the arraignment but before the entry of a plea, determines and states on the record that he or she will not sentence the defendant to a fine of more than $1,000.00 or a period of imprisonment* if the defendant is convicted of the misdemeanor.

Vt. Stat. Ann. tit. 13, § 5201(4).

VIRGINIA

If the charge against the accused *is a crime the penalty for which may be incarceration*, and the accused is not represented by counsel, the court shall ascertain by oral examination of the accused whether or not the accused desires to waive his right to counsel… However, *if, prior to the commencement of the trial, the court states in writing, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion, that a sentence of incarceration will not be imposed if the defendant is convicted, the court may try the case without appointing counsel*, and in such event no sentence of incarceration shall be imposed.

Va. Code Ann. § 19.2-160.

WASHINGTON

The public defender must represent, without charge to any accused, every indigent person who is or has been arrested or charged with a crime for which court appointed counsel for indigent defendants is required either under the Constitution of the United States or under the Constitution and laws of the state of Washington.

Wash. Rev. Code Ann. § 36.26.070.

The right to a lawyer *shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination* as felonies, misdemeanors, or otherwise.

Wash. Super. Ct. Crim. R. § CrR 3.1(a).

WEST VIRGINIA

In any criminal proceeding in a magistrate court in which *the applicable statutes authorize a sentence of confinement* the magistrate shall at the time of the initial appearance advise a defendant of his right to counsel and his right to have counsel appointed if such defendant cannot afford to retain counsel.

W. Va. Code Ann. § 50-4-3 (West).

Proceedings where indigent defendants are entitled to representation include "*criminal charges which may result in incarceration*".

W. Va. Code Ann. § 29-21-2(2).

Appointment of counsel is not required in Municipal Court proceedings that involve minor traffic offenses where under no conditions will a judge impose a jail sentence or a fine so onerous that it could subject the defendant to a contempt charge.

State ex rel. Kees v. Sanders, 192 W. Va. 602, 606, 453 S.E.2d 436, 440 (1994).

WISCONSIN

As soon as practicable after a person has been detained or arrested in connection *with any offense that is punishable by incarceration*, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel.

Wis. Stat. Ann. § 967.06(A).

The public defender shall represent as counsel any needy person who is under arrest for or formally charged with having committed a serious crime.

Wyo. Stat. Ann. § 7-6-104(a).

A "serious crime" means: any felony or misdemeanor under the laws of the state of Wyoming for which incarceration as a punishment is a practical possibility, provided, however, that counsel need not be appointed for a misdemeanor if the judge, at the initial appearance, determines and states on the record that he will not sentence the defendant to any period of imprisonment if the defendant is convicted of the misdemeanor; and *any misdemeanor offense… a conviction of which is a "misdemeanor crime of domestic violence"… and which may therefore result in the disqualification of the person to possess firearms… regardless of the determination of the judge that he intends not to impose a term of incarceration for the state offense.*

Wyo. Stat. Ann. § 7-6-102(v)(A),(B).■

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