CRIMINAL LAW—INDIGENT PETTY OFFENDERS ACCORDED RIGHT TO APPOINTED COUNSEL—*Rodriguez v. Rosenblatt*, 58 N.J. 281, 277 A.2d 216 (1971).

Mrs. Gloria Rodriguez was charged in the Municipal Court of Camden with a simple assault and battery,[1] the maximum penalty for which is imprisonment for six months and a fine of five hundred dollars.[2] The violation is a disorderly person offense and is legislatively considered to be a petty one.[3] The defendant, being indigent, requested that counsel be assigned, and the municipal court judge refused. Mrs. Rodriguez then filed a complaint in superior court seeking to restrain the prosecution in the municipal court until she was afforded free counsel. The superior court entered an order dismissing her complaint. Meanwhile, in the Municipal Court of Trenton, James Conley pleaded guilty to the charge of using a narcotic drug[4] and was tried and convicted of a second charge of possession of narcotic paraphernalia.[5]

1 N.J. STAT. ANN. § 2A:170-26 (1971) provides:

> Any person who commits an assault or an assault and battery is a disorderly person.

2 N.J. STAT. ANN. § 2A:169-4 (1971) provides:

> Except as otherwise expressly provided, a person adjudged a disorderly person shall be deemed to have been guilty of a petty offense and shall be punished by imprisonment in the county workhouse, penitentiary or jail for not more than 6 months, or by a fine of not more than $500.00 or both.

3 *Id.* The various categories of crimes in the several states are inconsistent. However, classifications as to felonies, misdemeanors and petty offenses are generally determined by the seriousness of the possible sentence. *See, e.g.*, 18 U.S.C. § 1 (1970), which provides in part:

> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

In State v. Doyle, 42 N.J. 334, 348, 200 A.2d 606, 613-14 (1964), the court expressed New Jersey's nomenclature:

> Criminal codes in New Jersey have not utilized the felony-misdemeanor nomenclature or classification of the English common law. . . . Our present crimes act makes all criminal offenses (other than treason . . . and murder . . .) misdemeanors or high misdemeanors . . . . Petty offenses are designated disorderly person offenses. . . . Misdemeanors, with rare exceptions, are punishable by a fine of not more than $1,000 or imprisonment for not more than three years, or both. . . . High misdemeanors . . . are punishable generally by a fine of not more than $2,000 or imprisonment for a maximum term of seven years, or both.

For the purpose of this paper the term "petty offense" will be defined as any offense punishable by less than six months imprisonment or a fine of not more than $500, or both.

4 Law of December 17, 1964, ch. 227, § 1, [1964] N.J. Laws 854-55 (repealed 1970); *see* N.J. Stat. Ann. § 24:21-20 (Supp. 1971-72).

5 N.J. STAT. ANN. § 2A:170-77.5 (1971) prohibits the possession of a hypodermic syringe by anyone who is not duly licensed to possess one.

Both charges are disorderly person offenses.[6] The defendant's plea to the first charge and his trial and conviction of the second were both accomplished without any tender or assistance of counsel. He was sentenced to serve two consecutive three-month terms. On appeal, the Mercer County Court affirmed his conviction but modified his sentence by providing that his terms be served concurrently. Each defendant filed a notice of appeal to the appellate division, but the New Jersey Supreme Court granted certification before argument took place.[7]

The court, after consolidating both cases, unanimously held Conley's convictions to be improper since he was imprisoned without the assistance of assigned counsel. As to Mrs. Rodriguez, the court held that, although the superior court had acted within its discretion in refusing to grant injunctive relief, the cause would be remanded to the municipal court for proceedings consistent with the views expressed in its opinion.[8]

The issue, as framed by the court, was "whether indigent defendants charged in municipal court proceedings with disorderly person offenses are entitled to have counsel assigned to them."[9] Although the court answered in the affirmative, its decision rested on policy considerations rather than on constitutional grounds.[10] The court felt that proper steps should "be taken to protect unrepresented indigent defendants against injustices" resulting from their inability to defend themselves in municipal court proceedings.[11] The court, however, recognized a need for flexibility. An absolute rule affording counsel to indigents on the municipal court level would theoretically require the state to furnish counsel to all petty offenders, including the hypothetical indigent " 'who has parked too near a fireplug.' "[12] On the other hand, the harsh view that counsel should not be assigned at all was rejected as being inconsistent with the requisites of fundamental fairness.[13]

---

6 N.J. STAT. ANN. § 2A:169-4 (1971).

7 Rodriguez v. Rosenblatt, 58 N.J. 281, 284-85, 277 A.2d 216, 217-18 (1971).

8 *Id.* at 296, 277 A.2d at 223-24.

9 *Id.* at 283, 277 A.2d at 217.

10 *Id.* at 294, 277 A.2d at 223.

11 *Id.*

12 *Id.* at 288, 277 A.2d at 220 (quoting from Creighton v. North Carolina, 257 F. Supp. 806, 808 (E.D.N.C. 1966). *See* McDonald v. Moore, 353 F.2d 106, 108 (5th Cir. 1965), wherein the court stated:

> It seems unlikely that a person in a municipal court charged with being drunk and disorderly, would be entitled to the services of an attorney at the expense of the state or the municipality. Still less likely is it that a person given a ticket for a traffic violation would have the right to counsel at the expense of the state.

13 58 N.J. at 294, 277 A.2d at 223.

Adhering to this concept of flexibility, *Rodriguez* established no rigid standard for determining when counsel should be assigned to indigent petty offenders. However, being forced to draw the proverbial line somewhere, the court held that counsel should be afforded if "the particular nature of the charge is such that imprisonment in fact or other consequence of magnitude is actually threatened or is a likelihood on conviction . . . ."[14] Under this general guideline municipal court judges will continue "to have broad discretion to assign free counsel to indigent defendants whenever justice so requires."[15] The court went on to additionally provide:

> In those rare instances where there is a plea or a trial proceeds without any tender or assignment of counsel and actual imprisonment or other consequence of magnitude looms appropriate to the municipal judge despite the preindications to the contrary, the defendant should be given the option of starting anew with suitable safeguards including, where necessary, trial before a substituted municipal judge.[16]

Thus, the *Rodriguez* ruling will necessitate a case-by-case approach to the problem of providing indigents with counsel in the municipal courts.

One of the noticeable aspects of the *Rodriguez* decision is the court's refusal to address itself to the substance of the constitutional issues involved, except to state that there is "no inflexible constitutional compulsion to assign counsel without cost to indigents charged . . . with disorderly person or other petty offenses."[17] Since *Powell v. Alabama*,[18] judicial reliance has been placed on the Constitution in extending the right to counsel to indigent defendants. In that case, several defendants were convicted of rape and sentenced to death without the assistance of counsel. The court held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .[19]

---

14 *Id.* at 295, 277 A.2d at 223.

15 *Id.*

16 *Id.*

17 *Id.* at 294, 277 A.2d at 223. The court also stated:

> [W]e may fairly proceed on the assumption that there is at present no controlling Supreme Court determination that all indigent petty offenders are constitutionally entitled to assigned counsel without cost.

Id. at 287, 277 A.2d at 219.

18 287 U.S. 45 (1932).

19 *Id.* at 71. A capital crime is defined as "[o]ne in or for which death penalty may, but need not necessarily, be inflicted . . . ." BLACK'S LAW DICTIONARY 263 (4th ed. 1951).

Shortly thereafter, *Johnson v. Zerbst*[20] expanded this rule by requiring the appointment of counsel to all indigent defendants charged with a crime in a federal prosecution[21] and decided that the lack of counsel is a jurisdictional bar to a valid conviction.[22] Following *Johnson*, the Court of Appeals for the District of Columbia Circuit in *Evans v. Rives*[23] stated that the right to counsel is not dependent upon the seriousness of the crime, since "the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."[24] Faced with the issue of whether, in non-capital cases, to apply the sixth amendment right to counsel to the states through the due process clause, the Supreme Court, in *Betts v. Brady*,[25] decided negatively, unless there were special circumstances "shocking to the universal sense of justice . . . ."[26] This reasoning subsequently became known as the "special circumstances" rule.[27]

In the past, however, the Court only paid lip service[28] to this rule, and actually circumvented *Betts* by easily finding special circumstances warranting the appointment of counsel.[29] Finally, explicitly overruling

---

20 304 U.S. 458 (1938).

21 *Id.* at 463:

> The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel (footnote omitted).

22 *Id.* at 468, wherein the Court stated:

> If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction . . . . If this requirement . . . is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus*.

23 126 F.2d 633 (D.C. Cir. 1942). In *Johnson* the defendants were convicted of feloniously uttering and passing counterfeit $20 Federal Reserve Notes, and were sentenced to four and a half years in the federal penitentiary. Evans was charged with willful non-support of his minor child and was sentenced to a year in jail. The District of Columbia therefore argued in *Evans* that the sixth amendment guarantee of the right to counsel extends only to "serious offenses." *Id.* at 638.

24 *Id.* at 638.

25 316 U.S. 455 (1942), *overruled,* Gideon v. Wainwright, 372 U.S. 335 (1963).

26 *Id.* at 462.

27 Gideon v. Wainwright, 372 U.S. 335, 350 (1963) (Harlan, J., concurring).

28 *Id.* at 351:

> To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

29 The Court found special circumstances in the following cases: Carnley v. Cochran, 369 U.S. 506 (1962) (illiteracy of defendant); Chewning v. Cunningham, 368 U.S. 443 (1962) (seriousness of charge and complexity of issues); McNeal v. Culver, 365 U.S. 109 (1961) (ignorant, mentally ill defendant incapable of conducting own defense); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956) (number, complexity and seriousness of the charges); Massey v. Moore, 348 U.S. 105 (1954) (insane defendant mentally incompetent to conduct own defense); Rice v. Olson, 324 U.S. 786 (1945) (complex question of federal

Betts,[30] the Court in *Gideon v. Wainwright*[31] held that all indigents charged with a serious offense were entitled to appointed counsel, and labeled *Betts* " 'an anachronism when handed down.' "[32] It has been suggested that *Gideon* was only of moderate impact because "Gideon would have been provided with counsel if charged with a felony in 45 states";[33] but the broad language of the Court seemed to imply an extension of the rule to all criminal prosecutions.[34] The specific question of whether counsel must be appointed for indigents charged with misdemeanors has not yet been decided by the Court.[35]

Despite the Supreme Court's failure to expressly extend the right of counsel to petty offenders, it has been expanding the rights of indigents based upon the equal protection clause of the fourteenth amendment. To deny an indigent a trial transcript for appeal purposes was determined, in *Griffin v. Illinois*,[36] to be violative of that clause, since "[t]here can be no equal justice where the kind of trial a man gets

jurisdiction involving offense committed on Indian Reservation). Justice Harlan, concurring in *Gideon*, commented on the "special circumstances" rule:

> The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.

372 U.S. at 351.

30 372 U.S. at 345.

31 372 U.S. 335 (1963).

32 *Id.* at 345.

33 Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 104 (1969) (footnote and italics omitted).

34 372 U.S. at 344:

> [A]ny 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.

35 *See, e.g.*, Beck v. Winters, 407 F.2d 125 (8th Cir.), *cert. denied*, 395 U.S. 963 (1969); DeJoseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752 (App. Div.), *certification denied*, 153 Conn. 747, 220 A.2d 771, *cert. denied*, 385 U.S. 982 (1966); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909, *cert. denied*, 385 U.S. 925 (1966); Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966). All of these cases involved the misdemeanants' or petty offenders' right to counsel.

In the *Beck* case, Charlie Beck, without the assistance of counsel, was convicted of a violation of a municipal ordinance and was sentenced to 30 days in jail plus another 254 days in lieu of payment of his fine. The Supreme Court of Arkansas affirmed his conviction, and his petition for certiorari to the Supreme Court was denied.

Subsequently, Beck was granted a writ of habeas corpus in the federal district court on the grounds that the interaction of the "dollar-a-day" statute with the $254.00 fine plus a 30 day sentence constituted a serious offense. Winters v. Beck, 281 F. Supp. 793 (E.D. Ark. 1968). The Court of Appeals for the Eighth Circuit affirmed this decision, but certiorari was again denied by the Supreme Court, thus having allowed two different results to stand.

36 351 U.S. 12 (1956); *cf.* Gardner v. California, 393 U.S. 367 (1969) (free transcript of habeas corpus hearing must be provided to indigent who subsequently re-petitioned for that relief).

depends on the amount of money he has."[37] Employing this same rationale, *Douglas v. California*[38] held that an attorney must be appointed to those indigents who wished to appeal a criminal conviction as a matter of right, and that a denial of counsel in these circumstances was invidious discrimination.[39] And in the case of *Tate v. Short*,[40] it was held to be a denial of equal protection to limit punishment to payment of a fine for those able to pay it, while converting the fine to imprisonment for those unable to pay.[41]

The importance of counsel in all proceedings which threaten to deprive a person of his life or liberty is illustrated by Supreme Court decisions which have extended the right to appointed counsel to state pre-trial procedures[42] and probation revocation proceedings.[43] The necessity of an attorney in a criminal proceeding was best expressed by the words of Justice Sutherland:

> 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.[44]

If the role of counsel is so fundamentally important, why then have many jurisdictions still refused to extend the right to counsel to indigents charged with offenses punishable by imprisonment for six months or less?[45] Various explanations have been advanced. The major

---

37 351 U.S. at 19.

38 372 U.S. 353 (1963).

39 *Id.* at 355.

40 401 U.S. 395 (1971).

41 *Id.* at 399.

42 *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Gilbert v. California, 388 U.S. 263 (1967) (lineup); White v. Maryland, 373 U.S. 59 (1963) (arraignment); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment).

43 Mempa v. Rhay, 389 U.S. 128 (1967).

44 Powell v. Alabama, 287 U.S. 45, 69 (1932).

45 *See, e.g.*, Burrage v. Superior Court, 105 Ariz. 53, 55, 459 P.2d 313, 315 (1969) (indigent must be provided with counsel where possible punishment exceeds six months imprisonment, $500 fine or both); State v. Morris, 275 N.C. 50, 59, 165 S.E.2d 245, 251 (1969) (indigent entitled to appointed counsel when punishment for offense exceeds six months imprisonment); City of Toledo v. Frazier, 10 Ohio App. 2d 51, 61, 226 N.E.2d 777, 783

reason asserted for not finding a Federal Constitutional mandate is that the Supreme Court has impliedly decided that such a requirement does not exist.[46] This implication arises from cases similar to *Rodriguez* in which certiorari was denied[47]—these denials being interpreted as manifesting the Court's unwillingness to extend the right beyond its present scope. A second explanation for denying the existence of such a right is drawn from the Court's refusal to extend to petty offenders the right to trial by jury.[48] The latter argument supposes that the right to trial by jury and the right to counsel are of equal dignity since both emanate from the sixth amendment; and the denial of the right to a jury trial in a petty offense implies a denial of the similar right to counsel. The Supreme Court of Minnesota, in *State v. Borst*,[49] commented on the speciousness of this comparison:

> [E]ven though the two rights derive from the same provisions of our Federal Constitution, they are not of equal significance when it comes to the matter of obtaining a fair trial. It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel.[50]

(1967) (state constitution does not require courts to appoint counsel to indigent defendant charged with offense punishable by six months imprisonment); Hortencio v. Fillis, 25 Utah 2d 73, 75, 475 P.2d 1011, 1012 (1970) (indigent not entitled to appointed counsel for an offense punishable by less than six months imprisonment); Hendrix v. City of Seattle, 76 Wash. 2d 142, 153, 456 P.2d 696, 704, *cert. denied*, 397 U.S. 948 (1970) (municipal court not required to supply counsel to indigent charged with offense less serious than felony); State *ex rel.* Plutshack v. State Dep't of Health and Social Servs., 37 Wis. 2d 713, 724-25, 155 N.W.2d 549, 555 (1969) (indigent charged with an offense punishable by six months imprisonment is entitled to appointed counsel). *See generally* Comment, *supra* note 33, at 133, where author states that nineteen states do not supply counsel to indigents charged with offenses less serious than felonies.

46 People v. Dupree, 42 Ill. 2d 249, 255, 246 N.E.2d 281, 284 (1969); Hendrix v. City of Seattle, 76 Wash. 2d 142, 146-47, 456 P.2d 696, 700-01 (1969), *cert. denied*, 397 U.S. 948 (1970). For a discussion of the *Hendrix* case *see* Note, *Misdemeanant's Right to Counsel: Legislative Inaction Resolves Constitutional Doubts?*, 46 WASH. L. REV. 185 (1970).

47 *See* cases cited note 35 *supra*.

48 Baldwin v. New York, 399 U.S. 66 (1970) (dictum); Duncan v. Louisiana, 391 U.S. 145 (1968) (dictum). *But see* District of Columbia v. Colts, 282 U.S. 63 (1930) (defendant charged with reckless driving, for which the maximum punishment was $100 fine or 30 days imprisonment, entitled to jury trial). The late Justice Black, dissenting from the Court's adoption of the U.S. Magistrates' Rules declared that "Baldwin did not overrule Colts" and went on to state:

> Nor do our previous decisions justify restricting an indigent's right to assignment of counsel to the class of misdemeanors defined as "petty". . . .

39 U.S.L.W. 3331 (U.S. Feb. 2, 1971).

49 278 Minn. 388, 154 N.W.2d 888 (1967).

50 *Id.* at 398, 154 N.W.2d at 894 (quoted with approval in James v. Headley, 410 F.2d 325, 333 (5th Cir. 1969)).

Minnesota is one of the minority of states which assigns counsel to indigents threatened with imprisonment for less than six months.[51]

An indication of the present Supreme Court's attitude on the issue of whether the Constitution requires that counsel be assigned to indigents charged with petty offenses can be extrapolated from the Court's recent promulgation of its Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.[52] The Court therein prescribed that indigents charged with minor offenses are entitled to assigned counsel.[53] The Court made no such provision with regard to indigents charged with petty offenses but merely required that such defendants be informed of their "right to counsel."[54] Thus, under these Rules, an indigent's right to appointed counsel is made dependent upon whether he is charged with a "minor" or "petty" offense. The late Justice Black, with whom Justice Douglas joined, vigorously objected to the Court's issuance of these Rules and observed that they "suggest [that] there exists no right to . . . assigned counsel for 'petty offenses.' "[55] He went on to state that the Constitution made no such exception.

---

51 *See, e.g.*, Miller v. Birnbaum, 327 F. Supp. 554 (D. Idaho 1971) (sixth amendment mandates appointment of counsel for indigents in all criminal cases where conviction might result in loss of liberty); *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965) (indigents charged with misdemeanor punishable by less than six months entitled to appointed counsel in municipal and other inferior courts); Mulcahy v. Commonwealth, 352 Mass. 613, 227 N.E.2d 326 (1967) (conviction reversed where indigent not properly advised of right to counsel under court rule requiring appointed counsel for any crime with possible sentence of imprisonment); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967) (indigent must be provided with counsel in any case which might lead to incarceration); Hunter v. State, 288 P.2d 425 (Okla. Crim. Ct. App. 1955) (where deprivation of liberty is possible, trial court is under a duty to assign counsel to indigents); Stevenson v. Holzman, 254 Ore. 94, 458 P.2d 414 (1969) (no person may be deprived of his liberty without assistance of counsel); ILL. ANN. STAT. ch. 38, § 113-3b (Smith-Hurd 1968) (counsel shall be provided in all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel); N.H. REV. STAT. ANN. §§ 604-A:1, -A:2 (Supp. 1971) (defines petty offense as any misdemeanor the penalty for which does not provide for either imprisonment or a fine exceeding $500 and provides for the appointment of counsel to indigents in all but petty offenses); TEX. CODE CRIM. PRO. ANN. art. 26.04 (1966) (indigent accused is entitled to appointed counsel when charged with a felony or misdemeanor punishable by imprisonment, and under Texas statutes misdemeanor is defined as any offense not punishable by death or confinement in the penitentiary, TEX. PENAL CODE ANN. art. 47 (1952)); MD. ANN. CODE Rule 719(b)(2) (Cum. Supp. 1971) (counsel must be appointed where offense is punishable by imprisonment for six months or more, fine of $500 or more, or both, and may be assigned in any other case at the judge's discretion). *See generally* Comment, *supra* note 33, at 133, where author concludes that nineteen states supply counsel to indigents charged with petty offenses (although author defines them as misdemeanors).

52 39 U.S.L.W. 3330-32 (U.S. Feb. 2, 1971).

53 *Id.* at 3330, Rule 2(b).

54 *Id.*, Rule 3(b).

55 *Id.* at 3331.

> By its own terms, the [Sixth] Amendment makes no exception for so-called "petty offenses". Despite previous decisions engrafting a petty offense exception onto the Amendment, I cannot see where this Court derives the power to so alter the Constitution.[56]

He then proceeded to criticize the Court for adopting procedural rules which embodied highly disputed substantive constitutional issues.

> A very plausible reading of today's action is that we have prescribed that defendants in the federal system have no right to jury trial or assigned counsel where the maximum possible penalty does not exceed six months. But both of these issues have occasioned lively controversy in previous cases. [citations omitted]. I consider it entirely inappropriate for the Court to indirectly suggest answers to these serious constitutional issues when it is acting in "a rule making" capacity and has no case or controversy before it. Such action is likely to lead to embarrassment and confustion [*sic*] when the same issues are presented to us in an adversary context and we must pass directly upon the validity of these Rules.[57]

The Supreme Court has recently granted certiorari in the case of *State ex rel. Argersinger v. Hamlin*[58] which will present, in just such an adversary context, the issue of whether an indigent charged with a petty offense is entitled to assigned counsel. In that case the Supreme Court of Florida held that indigents threatened with less than six months imprisonment are not entitled to appointed counsel.[59] It can be inferred from the Court's issuance of these Rules that it will affirm the Florida court's ruling by holding that the Constitution does not require that indigents charged with a petty offense be appointed counsel. This, however, is mere conjecture.

Aside from the Supreme Court's implications, the other reasons advanced for the failure of the courts in the various states to provide counsel for indigents charged with petty offenses are: (1) this is a function of the legislature;[60] (2) petty offenses do not rise to the technical status of "crime," and therefore, "the full panoply of constitutional

---

56 *Id.* at 3332.

57 *Id.*

58 236 So. 2d 442 (Fla. 1970), *cert. granted*, 401 U.S. 908 (1971).

59 *Id.* at 444.

60 *See* Hortencio v. Fillis, 25 Utah 2d 73, 75, 475 P.2d 1011, 1012 (1970), where the court stated:

> We are of the opinion that it should be left to the Legislature, if it so desires, to expand the system of assigned counsel to misdemeanor cases and to provide for the expenditure of public funds for that purpose.

See also Cableton v. State, 243 Ark. 351, 356-57, 420 S.W.2d 534, 537-38 (1967) (requirement of appointed counsel for indigents charged with misdemeanor must come from the legislature or express decision of the Supreme Court); Hendrix v. City of Seattle, 76 Wash. 2d 142, 153, 456 P.2d 696, 704 (1969) (legislature and not judiciary should decide if counsel should be provided in misdemeanor prosecutions).

protections" attendant to a criminal charge does not arise;[61] (3) errors committed at the indigent's summary trial can be corrected on appeal;[62] and (4) the fear of swamping the state's inferior courts,[63] because of (a) the great number of petty offenses tried,[64] (b) the insufficient number of lawyers,[65] and (c) the inevitable increase in the time and cost of municipal proceedings.[66]

---

61 State v. Zucconi, 93 N.J. Super. 380, 387, 226 A.2d 16, 20 (App. Div.), *aff'd*, 50 N.J. 361, 235 A.2d 193 (1967) (municipal court conviction of careless driving); *see* State v. Macuk, 57 N.J. 1, 9-10, 16, 268 A.2d 1, 5, 9 (1970) (motor vehicle violation is a petty offense not a crime and *Miranda* warnings not applicable); *In re* Buehrer, 50 N.J. 501, 518, 236 A.2d 592, 601 (1967) (petty offenses are beyond concept of crime within intent of state constitution's provisions for indictment and trial by jury); State v. Maier, 13 N.J. 235, 278, 99 A.2d 21, 47 (1953) (summary proceedings before municipal magistrates are not criminal prosecutions under state constitutional provision requiring a speedy public trial by an impartial jury in all criminal prosecutions); State v. Shoopman, 11 N.J. 333, 335-36, 94 A.2d 493, 494 (1953) (careless driving offense is statutory violation not a crime, and acquittal of municipal court prosecution for violation is not a bar to criminal prosecution on grounds of double jeopardy).

62 *See* Doss v. North Carolina, 252 F. Supp. 298, 305 (M.D.N.C. 1966) (lack of counsel in inferior court not a denial of due process to indigent defendant since he had trial de novo in superior court); Stevenson v. Holzman, 254 Ore. 94, 106, 458 P.2d 414, 420 (1969) (dissenting opinion) (indigent having right of appeal from municipal court not entitled to appointed counsel therein); Hendrix v. City of Seattle, 76 Wash. 2d 142, 165, 456 P.2d 696, 711 (1969) (aggrieved indigent defendant can rectify any prejudice due to lack of appointed counsel on appeal). For a criticism of this reasoning *see* Note, *Right to Counsel—Municipal Ordinance Violators*, 46 N.D.L. REV. 374, 378, 381 (1970).

Under N.J. STAT. ANN. § 2A:3-6 (Supp. 1971-72), a municipal court conviction can be appealed to the county court and under N.J.R. 3:22-6(a) (1971) an indigent defendant will be assigned counsel and the court will waive the filing fees. Indigent appeals to the New Jersey Supreme Court and the Appellate Division of the Superior Court are governed by N.J.R. 2:7-1 *et seq.* (1971). It is the function of the county court, when hearing an appeal from a conviction in the municipal court, to determine the case completely anew on the record made in the municipal court. State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964). *See also* N.J.R. 3:23-1 *et seq.* (1971) for the method and time of appeal from convictions in courts of limited jurisdiction.

63 *See* Brinson v. Florida, 273 F. Supp. 840, 845 (S.D. Fla. 1967) ("demands upon the bench and bar would be staggering and well-nigh impossible"); Arbo v. Hegstrom, 261 F. Supp. 397, 400 (D. Conn. 1966) (system could break under the "sheer weight of the demands"); Creighton v. North Carolina, 257 F. Supp. 806, 809 (E.D.N.C. 1966) ("administration of justice must not be thrown into senseless chaos").

64 58 N.J. at 287, 277 A.2d at 219:

> [I]t must be borne in mind that traffic complaints approaching three million, and other complaints including disorderly person charges approaching a quarter of a million, are being filed annually in our municipal courts.

See notes 111 & 112 and accompanying text, *infra*.

65 *See, e.g.*, James v. Headley, 410 F.2d 325, 334 (5th Cir. 1969) ("simply not enough lawyers to go around"); McDonald v. Moore, 353 F.2d 106, 108-09 (5th Cir. 1965) ("in many urban areas there would be a requirement for more lawyers than could be made available").

66 *See* Hendrix v. City of Seattle, 76 Wash. 2d 142, 164, 456 P.2d 696, 710 (1969), where the court surmised:

> The prosecuting officials will be forced to dismiss innumerable cases rather than incur the expense and delay involved in supplying counsel at public expense.

For any one of the above reasons, the New Jersey Supreme Court refused to find a constitutional mandate for appointment of counsel to indigent petty offenders, although provision for a constitutional extension of this right had explicitly been made in the New Jersey Court Rules.[67] Perhaps the court felt constrained to await the United States Supreme Court's decision in the *Argersinger* case. The court, however, also refused to decide this issue under the New Jersey Constitution, which contains an article almost identical to the sixth amendment.[68] The court was admittedly apprehensive about the possible practical problems that would be created by a broad constitutional rule which affords counsel to all indigent petty offenders.[69] Apparently viewing a rule of such dimension as overly burdensome, the *Rodriguez* court adopted instead its flexible standard.

RIGHT TO COUNSEL IN NEW JERSEY

Prior to *Rodriguez*, in *State v. Horton*,[70] the Supreme Court of New Jersey declared that the appointment of counsel for indigents was a matter "of absolute right under state law."[71] A similar view had also been expressed by the state's appellate courts. In *State v. Ballard*[72] the appellate division held that "[t]he [non-indigent] accused's right to

---

Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1258 (1970), where the author concludes:

> The principal reason for the judicial reluctance to make any comprehensive extension of the right to counsel is probably a fear of the costs of such an extension. Though the reasons proffered for the denial of counsel for certain offenders have been sometimes characterized as being of a "practical" nature, the real concern of the courts has been with the costs, in both monetary and manpower terms. (footnote omitted).

67 N.J.R. 3:27-2 (1971) provides in part:

> Every person charged with a non-indictable offense shall be advised by the court of his right to retain counsel or, if indigent and *constitutionally* or otherwise entitled by law to counsel, of his right to have counsel assigned without cost. (emphasis added).

68 N.J. CONST. art. 1, par. 10 provides in part:

> In all criminal prosecutions the accused shall have the right . . . to have the assistance of counsel in his defense.

A New Jersey court has held that this section should be given "the same meaning and force that is attributed to the Sixth Amendment." Zasada v. State, 19 N.J. Super. 589, 595, 89 A.2d 45, 47 (App. Div. 1952).

69 58 N.J. at 287, 277 A.2d at 219.

70 34 N.J. 518, 170 A.2d 1 (1961) (compensation held inadequate for defense of indigent charged with murder).

71 *Id.* at 522, 170 A.2d at 3.

72 15 N.J. Super. 417, 83 A.2d 539 (App. Div. 1951), *aff'd*, 9 N.J. 402, 88 A.2d 537 (1952) (petitioner alleging a denial of his right to engage counsel should be granted habeas corpus hearing despite a twelve year delay).

[engage] counsel is a fundamental one. . . . guaranteed by Article I of the Constitution of New Jersey."[73] In *State v. Davis*[74] the court declared that "the appointment of counsel for an indigent defendant in a criminal case is a fundamental constitutional right essential to a fair trial . . . ."[75] Only one year ago an appellate court stated that "[t]he right to the aid of counsel is not a mere formality, it is the essence of justice."[76] Recognizing the importance of counsel, a New Jersey Court Rule specifically directs that counsel be appointed for indigent juveniles in proceedings to be heard on the court's formal calendar.[77]

Only one prior New Jersey case, however, had considered whether counsel should be appointed to indigent defendants in the municipal court. The case of *In re Garofone*[78] involved a petition for a writ of habeas corpus based on the allegation that petitioner had been denied his right to counsel. He had been charged with five offenses, four of which were indictable and one of which was a violation of the Disorderly Persons Act[79] (whereas *Rodriguez* involved *only* disorderly person offenses). The superior court confronted the issue of whether "the municipal court [is] compelled to appoint counsel for violations of the Disorderly Persons Act?"[80] The court answered affirmatively by holding:

> Upon principle, the same rules apply to crimes and *quasi*-criminal offenses, for liberty of the citizen is in jeopardy in either

---

73 *Id.* at 420, 83 A.2d at 541.

74 92 N.J. Super. 289, 223 A.2d 208 (App. Div. 1966) (indigent must be offered assigned counsel and intelligently and understandingly waive that right before he can be allowed to plead guilty to charge of unlawful entry and larceny).

75 *Id.* at 292, 223 A.2d at 210.

76 State v. Edge, 111 N.J. Super. 182, 187, 268 A.2d 35, 38 (App. Div. 1970) (accused is entitled to the assistance of counsel at time of pre-trial identification by rape victim).

77 N.J.R. 5:3-3(a) (1971) provides in part:

> In juvenile matters the court shall advise the juvenile and his parents, guardian, or custodian of their right to retain counsel and, if counsel is not otherwise provided for the juvenile, and the matter is listed to be heard on the formal calendar . . . or is a referral hearing . . . or if the juvenile is otherwise constitutionally or by law entitled to counsel, the court shall refer the juvenile to the Office of the Public Defender or assign other counsel to represent him . . . .

78 80 N.J. Super. 259, 193 A.2d 398 (L. Div. 1963), *aff'd*, 42 N.J. 244, 200 A.2d 101 (1964).

79 The other offenses included three counts of receiving stolen goods, and one count of larceny. The petitioner waived indictment and trial by jury, and pleaded not guilty to all the offenses and was tried in the municipal court without counsel. *Id.* at 267-68, 193 A.2d at 402-03.

80 *Id.* at 270, 193 A.2d at 405. For a discussion of summary proceedings under the Disorderly Persons Act *see* Chief Justice Vanderbilt's opinion in State v. Maier, 13 N.J. 235, 99 A.2d 21 (1953).

> case. I therefore find that the privilege of having counsel assigned exists in all criminal trial courts, including the municipal court.[81]

The New Jersey Supreme Court certified the State's appeal before argument in the appellate division, and although affirming the trial court's decision, the court did not decide the question of whether counsel must be provided to each indigent who is charged with a violation of the Disorderly Persons Act.

> Since here this charge was tried along with charges of crime, the right to assigned counsel should not be disputed. We reserve, however, the question whether one tried for every disorderly persons offense must be furnished counsel. Ordinarily counsel is supplied upon request, and it may be that the incidence of indigency is much smaller because the cost of defense is less than on a charge of crime, but nonetheless the subject is troublesome, and since this case does not require a definitive decision, we think it better to withhold one.[82]

In the eight years since *Garofone*, the subject has not become less troublesome, and the flexible standard adopted in *Rodriguez* needs further judicial clarification. First, to what offenses does the decision apply? The court originally frames the issue in terms of "disorderly person offenses"[83] but later includes "other petty offenses."[84] Secondly, how will the courts define "consequences of magnitude"? And finally, will the court or the legislature authorize some method of compensating assigned counsel in these cases?

In New Jersey, all crimes are indictable and any offense not indictable is not a crime in the technical sense of the word.[85] The state has downgraded certain offenses to a level below that of crime. The advantage to the state is that these offenses can be summarily disposed of, and the advantage to the defendant is that he is not convicted of a crime. Thus the defendant is spared the disadvantages and social disgrace of a criminal conviction.[86] The *Rodriguez* court failed to clarify whether the holding applies only to disorderly person offenses or to the vast spectrum of other petty offenses and municipal ordinance violations heard in the municipal courts.[87] Most traffic prosecutions for example,

---

81 *Id.* at 272, 193 A.2d at 406.

82 *In re* Garofone, 42 N.J. 244, 246, 200 A.2d 101, 102 (1964).

83 58 N.J. at 283, 277 A.2d at 217.

84 *Id.* at 294, 277 A.2d at 223.

85 *In re* Buehrer, 50 N.J. 501, 517-18, 236 A.2d 592, 601 (1967); State v. Doyle, 42 N.J. 334, 348-49, 200 A.2d 606, 613-14 (1964); State v. Maier, 13 N.J. 235, 240-41, 99 A.2d 21, 23-24 (1953).

86 80 N.J. Super. at 271, 193 A.2d at 405.

87 *See* N.J. STAT. ANN. § 2A:8-21 (1952) (jurisdiction of the municipal courts includes

are typically regarded as trivial, and rarely result in imprisonment; yet, the consequences of a conviction can be severe. Driving while on the revoked or suspended list carries a possible maximum penalty of six months imprisonment and a one-thousand dollar fine.[88]

What constitutes "consequences of magnitude" is speculative. It is possible that a substantial fine might be considered as such a consequence if the defendant is indigent. In fact, the mere conviction of a quasi-criminal offense could entail consequences of magnitude even if the sentence is minimal. Conviction of a narcotics offense subjects the offender to the Narcotic Users Registration Act, requiring registration with the chief of police of his home town, and the carrying of an identification card.[89] Anyone so convicted is disqualified from certain

---

violations of laws governing motor vehicles, traffic, fish and game, municipal ordinances, disorderly persons, welfare board, child abuse, bastardy and foster homes). *See also* N.J. STAT. ANN. § 2A:8-22 (Supp. 1971-72).

88 N.J. STAT. ANN. § 39:3-40 (Supp. 1971-72). This statute also provides that if a person operates a motor vehicle in violation of this section and while doing so is involved in an accident resulting in personal injury "the punishment *shall* include imprisonment for not less than 45 days." (emphasis added). N.J. STAT. ANN. § 39:3-37 (1961) further provides that any "person who gives a fictitious name or address or makes any other misstatement of fact in his application for registration . . . or driver's license" is subject to a maximum penalty of one year imprisonment and a $500.00 fine. *Cf.* N.J. STAT. ANN. § 39:4-129(a) (Supp. 1971-72) (driver involved in an accident resulting in personal injury or death who leaves scene of such accident shall be fined $100.00 or imprisoned for 30 days or both for the first offense, and for a subsequent offense, fined $500, imprisoned for 6 months or both); N.J. STAT. ANN. § 39:4-50(a) (Supp. 1971-72) (person who operates or permits another to operate a motor vehicle while under the influence of liquor or drugs is subject to a maximum penalty of 3 months imprisonment and a fine of $500 and an automatic 2 year suspension of his license, for his first offense; a second offender is mandatorily imprisoned for 3 months, and forfeits his license for 10 years); N.J. STAT. ANN. § 39:4-96 (1961) (reckless driving punishable by imprisonment up to 60 days, or by a fine of $200.00 or both).

89 N.J. STAT. ANN. § 2A:169A-2 (1971) provides in part:

> Every person residing within the State of New Jersey who shall be convicted, or has been convicted . . . of any such crime or offense [relating to narcotics], shall . . . register with the chief of police of the municipality in which he resides . . . .

N.J. STAT. ANN. § 2A:169A-4 (1971) provides in part:

> Every person so registered shall be given a card of identification . . . upon which shall appear his name, registry number, the date and place of registration, a description of his residence, the date or length of his proposed stay in the municipality . . . and every such person so registered shall carry with him such card of identification and any failure to do so or to present the same, when so requested by a police officer, shall be deemed to be a violation of this act.

N.J. STAT. ANN. § 2A:169A-5 (1971) provides in part:

> Every person so registered shall, within twenty-four hours after entering any municipality . . . report to the chief of police . . . and shall exhibit . . . his identification card and furnish such information relating to his intended residence or whereabouts . . . and such other information as such chief of police or officer shall require of him.

professions, such as pharmacy,[90] dentistry,[91] or nursing.[92] Also, it has been held that driving while intoxicated and on the revoked list constitutes an instance of "notoriously disgraceful conduct" warranting disqualification from appointment to a civil service job.[93] Another significant consequence is the fact that a guilty plea to a motor vehicle infraction in municipal court is admissible against a defendant in a subsequent civil action.[94] Therefore, although the criminal penalty may be minor, civil liability could be quite severe. It should also be recognized that many municipal authorities take note of quasi-criminal convictions in deciding whether or not to issue a license,[95] and some municipalities reserve the right to revoke an existing license if the licensee violates either a state law or a municipal ordinance.[96]

Perhaps the most significant aspect of the court's decision will be its subsequent implementation. Neither the court, nor the memorandum issued by Edward McConnell,[97] the Administrative Director of the Courts, was very specific in regard to just how the municipal courts will determine the status of indigency. The memorandum merely provided that "the court should consider the fee ordinarily charged by attorneys to handle such cases."[98] One attorney, who was assigned under the *Rodriguez* decision, made the following observation about the supposed indigency of his client:

> With absolutely no attempt to criticize the Court where I appeared, I must point out that cash bail in the amount of $500.00 was posted.[99]

---

90 N.J. STAT. ANN. § 45:14-12 (Supp. 1971-72).

91 N.J. STAT. ANN. § 45:6-7 (1963).

92 N.J. STAT. ANN. § 45:11-32 (1963).

93 Toth v. New Jersey Civil Serv. Comm'n, 90 N.J. Super. 389, 217 A.2d 882 (App. Div. 1966). *See* N.J. STAT. ANN. § 11:23-2 (1960) which provides in part:

> The commission may refuse to examine an applicant, or after examination to certify an eligible who:
>
> . . . .
>
> d. Has been guilty of a crime or of infamous or notoriously disgraceful conduct . . . .

94 Liberatori v. Yellow Cab Co., 35 N.J. Super. 470, 114 A.2d 469 (App. Div. 1955); *cf.* Mead v. Wiley Methodist Episcopal Church, 23 N.J. Super. 342, 349-50, 93 A.2d 9, 12 (App. Div. 1952).

95 NEWARK, N.J., REV. ORDINANCES § 24:1-12(a) (1966) provides in part:

> An application for a [taxicab] driver's license . . . . shall contain the following information:
>
> . . . .
>
> (7) Whether the applicant has ever been convicted of a high misdemeanor, misdemeanor, violation of the disorderly persons statutes or a violation of this chapter.

96 NEWARK, N.J., REV. ORDINANCES § 24:1-51(a) (1966) provides in part:

> All taxicab licenses . . . may be . . . revoked . . . if the licensee:
>
> . . . .

Another attorney made a similar observation:

> I was recently assigned an "indigent" defendant accused of a disorderly persons violation. After several court appearances, a finding of guilt was entered and the defendant was fined $200.00. When asked by the Municipal Court Judge how much time he would need to pay, he promptly said he could pay at the rate of $50.00 a week.[100]

This difficulty in determining indigency was recognized by the Cumberland County Bar Association, which issued some suggested criteria.

> An unmarried applicant with no dependents whose income exceeds $2,500.00 per year does not qualify. If an applicant and his or her spouse have an income exceeding $3,500.00 per annum, they are ineligible, but a $500.00 deduction is permitted for each child . . . .[101]

This standard appears to be much too harsh. Perhaps, it would be more equitable to forsake uniformity and allow municipal court judges to approach the problem on a case-by-case basis, considering those factors relevant to an eligibility determination under the Public Defender Act.

> Need shall be measured according to the financial ability of the defendant to engage and compensate competent private counsel and to provide all other necessary expenses of representation. Such ability shall be recognized to be a variable depending on the nature, extent and liquidity of assets and on the disposable net income of the defendant on the one hand, and on the nature of the charge, the effort and skill required to gather pertinent information, render advice, conduct trial or render other legal services, and probable expenses to be incurred, on the other hand.[102]

Another problem raised by the *Rodriguez* decision is the consequential burden placed upon New Jersey attorneys. As pointed out in the Administrative Director's memorandum, "there is no provision, either in this opinion, the court rules, or the statutes, which presently

---

(3) Violated any other ordinance of the city or laws of the state of New Jersey or the United States, the violation of which reflect unfavorably on the fitness of the licensee to offer public transportation . . . .

97 *Supreme Court Establishes Right to Assigned Counsel in Petty Offenses*, 94 N.J.L.J. 421, 441 (1971).

98 *Id.* at 441.

99 *Id.* at 464 (letter to the editor).

100 *Id.* at 1080. (Random Thoughts)

101 O'Neil, *et al.*, *Assignment of Counsel to Indigent Defendants in Municipal Court—A Suggested Plan*, N.J.S.B.J. 39, 41 (No. 57, Fall, 1971).

102 N.J. STAT. ANN. § 2A:158A-14 (1971) (in part).

authorizes a court to compensate assigned counsel in these cases."[103] The State Office of Legal Services is no longer authorized to provide counsel in these cases since, under *Rodriguez*, such services are now legally required.[104] It can be anticipated that Legal Services will be confronted with the same difficult task facing the municipal court judges, that is, determining what is a consequence of magnitude. Thus, until the Public Defender Act is amended so as to provide counsel for non-indictable offenses or some other steps are taken, assigned counsel will be reimbursed only for his expenses.

In an attempt to lessen the burden on its attorneys, the Cumberland County Bar Association has suggested that certain dates be designated each month, on which cases involving indigents would be heard and one or more attorneys could be assigned to defend those cases on that date.[105] In this manner, the number of annual appearances could be decreased. Another plan, put forth by the Mercer County Bar Association, limits the attorneys who can be assigned to those admitted to practice in New Jersey for five years or less.[106] This does not appear to be a valid solution since it places an unreasonable burden on newly admitted attorneys and raises the issue of equal protection by supplying the indigent defendant with only inexperienced counsel.[107] Mr. Joseph Grause, President of the New Jersey State Bar Association, cautioned New Jersey attorneys not to overreact against the *Rodriguez* ruling, but urged them to make an attempt to work under the "new system."[108] He went on, however, to express his deep concern, stating:

> If indeed it proves to be an unreasonable infringement upon attorneys' right to fair compensation, or an unreasonable burden on our practice, we can then seek redress or amelioration on the basis of facts, not just fears.
>
> If it turns out that lawyers have the feeling of being taken ad-

---

103 94 N.J.L.J. at 441 (1971).

104 *Id.*

105 N.J.S.B.J., *supra* note 101, at 41.

106 *Mercer County Starts Indigent Program for Municipal Courts*, 94 N.J.L.J. 530 (1971).

107 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 2.2, at 7 (Tentative Draft):

> Assignments should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.

108 *Grause Cautions Against Over-Reaction to Assigned Attorneys for Municipal Courts*, 94 N.J.L.J. 577 (1971).

> vantage of, then the Court has undermined its meritorious intention of providing every citizen with the full protection of the law.[109]

Approximately six months after the *Rodriguez* decision, the Administrative Director sent a letter to the mayor of each municipality advising him to request that his municipality appropriate funds for both a municipal prosecutor and a municipal defender.[110] This was apparently the sole administrative attempt to obtain compensation for assigned counsel.

It would seem that the municipal courts generate enough funds to finance some type of assigned counsel program. In fact, slightly over 3,000,000 complaints were filed in New Jersey's 523 municipal courts in the year ending August 31, 1970. Over 2,800,000 of these dealt with motor vehicle violations, and 2,100,000 were simple parking tickets, most of which (91%) were disposed of through the violations bureau by a guilty plea and waiver of trial. But from these 3,000,000 complaints, the municipal courts collected $21,000,000 of revenue through fines, costs, and bail forfeitures while expending only $6,500,000 to maintain operations. This left an excess of $14,500,000 which was divided among the municipalities, counties and state.[111] Furthermore, it is likely that the indigency rate at the inferior court level will be lower than at the county court level, since the cost for defending a petty offense charge will usually be much less.[112]

---

109 *Id.*

110 Letter from Edward B. McConnell, Administrative Director of the Courts of N.J., to the mayor of each municipality, November 3, 1971.

111 ADMINISTRATIVE OFFICE OF THE COURTS: STATE OF NEW JERSEY, PROCEEDINGS IN THE MUNICIPAL COURTS (1970).

One of the effects of *Rodriguez* will probably be a reduction in the amount of revenue collected, since fewer defendants may be convicted if supplied with counsel, coupled with a corresponding rise in operating costs. Thus future excesses will in all likelihood be less than $14,500,000.

112 *In re* Garofone, 42 N.J. 244, 246, 200 A.2d 101, 102 (1964) ("indigency is much smaller because the cost of defense is less than on a charge of crime"); *see* Comment, *The Right of the Indigent Misdemeanant to Appointed Counsel,* 16 S.D.L. REV. 400, 410 (1971). The median fee for an appearance in a municipal court proceeding seems to be $100.00 according to the minimum fee schedules of the county bar association published in the 1971 NEW JERSEY LAWYERS DIARY AND MANUAL. On the other hand, for defense of a misdemeanor or high misdemeanor the least a defendant should expect to pay seems to be around $800.00. This is a minimum fee, and does not include the costs of investigation, arguing motions and other miscellaneous chores.

Chief Justice Desmond of New York also points out the difficulty of claiming indigency at the inferior court level in his dissenting opinion in People v. Letterio, 16 N.Y.2d 307, 315, 213 N.E.2d 670, 674, 266 N.Y.S.2d 368, 374 (1965):

> Since almost all of these defendants are either owners of automobiles or employed as drivers of automobiles the number who could successfully plead indigence would be very small indeed.

Had this decision been founded upon the right to counsel provisions of either the Federal or New Jersey Constitutions, many of the above problems would have been obviated. If all indigent petty offenders were constitutionally entitled to appointed counsel, there would be no need for defining a consequence of magnitude. Appellate review concerning an alleged abuse of discretion arising from a denial of appointed counsel would be eliminated and collateral attacks and proceedings seeking post-conviction relief would be minimized, since each indigent defendant would have had the assistance of counsel at trial.[113] As an added benefit, the system of justice and the courts in general would likely receive more respect from the public at large, for the simple reason that "the local courts of first instance . . . . [come] in direct contact with thousands where the other trial courts only reach hundreds and where the appellate courts reach very few indeed."[114]

In conclusion, it would be wise to remember the words of Chief Justice Vanderbilt, when he advised that "the [municipal] courts exist to perform an indispensable function of government and not for the purpose of producing a profit."[115] With this in mind, the burden of the *Rodriguez* ruling appears to be minimal, especially when viewed as the price of living in a society founded upon "Equal Justice Under Law."

David J. Issenman

See also Comment, *Judicial Problems in Administering Court-Appointment of Counsel for Indigents*, 28 WASH. & LEE L. REV. 120 (1971), for a discussion of the meaning and determination of indigency.

113 *Cf.* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970). The author discusses whether or not a defendant should be allowed to proceed pro se and concludes that he should not. *But see* State v. Borst, 278 Minn. 388, 404-05, 154 N.W.2d 888, 898 (1967) where Justice Peterson, dissenting, pointed out:

> It is a matter of general knowledge that many people who can afford to do so nevertheless do not engage counsel in defense of traffic violations . . . . The indigent defendant will not be so inhibited and . . . . is accordingly granted *more than equal* protection of the laws. (footnotes omitted).

114 Vanderbilt, *The Municipal Court—The Most Important Court in New Jersey: Its Remarkable Progress and Its Unsolved Problems*, 10 RUTGERS L. REV. 647, 650 (1956).

115 *Id.* at 656.