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THE PROPOSED DEFENSE OF INDIGENTS ACT IN SOUTH CAROLINA

I. TEXT OF THE PROPOSED ACT

Section 1. When a person is charged with a crime, he shall be advised that he is entitled to counsel if not already represented. If such person is charged with a crime for which a sentence of six (6) months or more may be imposed, he may request counsel. If counsel is requested and it is determined that the accused is financially unable to obtain an adequate defense, counsel shall be assigned to represent him as provided hereafter. A person financially unable to employ counsel who is charged with a crime for which a sentence of less than six (6) months may be imposed may also apply to have counsel assigned to represent him, and, if in the opinion of the Judge, such appointment is warranted, counsel shall be assigned to represent such person. Any Circuit Judge shall, in his discretion, appoint counsel for an indigent defendant in any case even though no application is made to him, if, in his opinion, such assignment is warranted to protect the rights of such defendant.

Section 2. A person who applies to have counsel assigned to represent him shall sign under oath an Affidavit that he is financially unable to obtain an adequate defense and that he is without sufficient funds to employ counsel. Such person shall list on the application such assets as he owns. The application to have counsel assigned and the Affidavit shall be substantially as set out in Form No. 1. If a person has some assets available to pay counsel but such assets are not sufficient to employ private counsel, such assets as the applicant can pay will be paid to the administrator and assigned counsel will be provided.

Section 3a. There is hereby created a claim against the assets and estate of a person who is provided a defense under this act, in an amount equal to the cost of the defense as determined pursuant to Sections 6 and 9 of this Act, less such amount which the defendant paid on his defense.

Section 3b. Such claim shall be filed in the Office of the Clerk of Court in the County where the defendant was assigned counsel, but the filing of a claim does not constitute a lien against the real or personal property of the defendant unless such claim is reduced to judgment by giving the defendant 30 days notice...
that a judgment will be filed. When a claim is reduced to a judgment, it shall have the same effect as judgments generally, except as modified by this Act.

Section 3c. The claim and judgment provided for in subsection (a) above shall include the garnishment of wages in excess of the amount necessary to provide for the necessities of life for the defendant and his dependents, as established by the Court according to guidelines provided for by the Supreme Court.

Section 3d. The claim created in subsection (a) above shall be subject to the Homestead Exemption as provided for in S. C. Code Ann. § 34-1 to -14 (1962). The Court may, in its discretion for good cause, provide in any case, by Order, that the claim or judgment provided for in subsection (a) above be waived, modified or withdrawn.

Section 3e. The claim provided for in subsection (a) above shall be good for a period of 10 years. The Attorney General shall be responsible for administering this Section. All monies collected under this section shall be paid to the State for the benefit of the program established by this Act.

Section 4. A defendant may waive the right to have counsel appointed in any case except a capital felony, if such waiver is voluntarily and understandably made, by the execution of a written waiver.

Section 5. A defendant with or without counsel may plead guilty but the trial judge shall inform the accused of the nature of the charge and the possible consequences of his plea, and as a condition of accepting the plea of guilty shall examine the defendant and shall ascertain that the plea was freely, understandably and voluntarily made without undue influence, compulsion or duress, and without promise of leniency, but a defendant without counsel cannot plead guilty to an indictment charging a capital felony. Unless the Judge determines that the plea of guilty was so made, it shall not be accepted.

Section 6. The South Carolina Supreme Court shall have authority to make rules and regulations for the implementation of this Act relating to the manner and method of assignment of counsel, the determination of indigency, the waiver of counsel and related matters, the adoption and approval of plans by county bar associations regarding the method or assignment of counsel among the licensed attorneys of the county and such other
matters as shall be provided for the protection of the constitutional rights of all persons charged with crime.

Section 7. Upon application by the indigent defendant or his appointed attorney, reasonable expenses to insure his defense shall be allowed and payment shall be made by the State Treasurer. The payment shall be directed by an Order of the trial or resident Judge to the State Treasurer in the form and manner authorized by the rules of the Supreme Court. All applications for expenses shall be in the form of an Affidavit that such expense is reasonable and necessary and shall be signed by the defendant or the appointed attorney, if one has been appointed.

Section 8. A defendant who has been convicted and has been sentenced for six (6) months or more may apply for the appointment of counsel for appeal and if there is any reasonable justification for the appeal, as determined by the administrator, counsel shall be assigned for such appeal. If the administrator determines that there is no reasonable ground for appeal, he shall state the reasons for his determination and shall forward his findings with the application for counsel to the Court for final determination.

Section 9a. A defendant who has been convicted and has been sentenced for six (6) months or more may apply, as hereinafter provided, for the appointment of counsel for the filing of a writ of habeas corpus. The application for counsel may be filed with the Defense Administrator in the County where the defendant is incarcerated or with the Defense Administrator where the sentence was imposed which the defendant is attacking. If there is any reasonable justification for the proceeding counsel shall be initially assigned in the County of application.

Section 9b. A writ of habeas corpus may be filed with the Court in the jurisdiction where the defendant is incarcerated or in the jurisdiction where the sentence was imposed which is under attack. When the writ of habeas corpus is filed in the jurisdiction where the defendant is incarcerated, the Court may in its discretion, transfer the proceeding to the Court which imposed the sentence under attack unless there exists good cause, shown in the application, for retaining the proceeding where filed.

Section 9c. The Court receiving a writ of habeas corpus shall, without delay, determine whether the proceeding is to be trans-
ferred, without the necessity of hearing the matter on its merits. Upon transfer, the appropriate defense administrator shall notify the Defense administrator of the County to which the action is transferred, who shall immediately designate counsel for the purpose of representing the defendant, and the initial counsel shall be relieved.

Section 10. When an appeal or writ of habeas corpus is taken under this section, necessary trial and hearing transcripts and records shall be furnished at State expense.

Section 11. Any County bar association as provided for in Section 2 may adopt the plan for the naming and designation of the attorneys in the county to serve as assigned counsel. The plan adopted by a county bar association and approved by the Resident Judge and the Supreme Court shall be certified to the County Administrator, established by this Act, and such plan shall constitute the method by which counsel shall be selected in the county to represent indigent defendants charged with crime in that county. All appointments and assignments of counsel for indigent defendants in the county shall be made in conformity with the plan unless the resident or presiding judge, in his discretion, deems it proper in the furtherance of justice to appoint as counsel an attorney who is not on the plan or list certified to the county administrator, and if so, he is authorized to assign as counsel to represent an indigent defendant attorneys not listed on the plan.

Section 12. When an attorney is appointed to represent an indigent defendant, the Court shall determine an attorney’s fee which shall be reasonable and commensurate with time consumed. Such attorney shall be paid at the rate of $10.00 per hour for time spent out of Court and $15.00 per hour for time spent in Court. In no event shall such fee exceed the sum of $500.00 in a non-capital case and $750.00 in a capital case.

Section 13. No attorney shall be appointed as counsel for indigent defendants in a Court of any county except the county in which he resides or maintains an office or engages in substantial practice except by consent of counsel so appointed or unless the judge, in his discretion, deems that the appointment is necessary in the ends of justice, and such appointment is approved by the Supreme Court.

Section 14. No indigent defendant shall be entitled or per-
mitted to select or specify the attorney who shall be assigned to represent him.

Section 15. There shall be appointed for each county or group of counties which have joined together for the purpose of complying with this Bill a defense administrator by the resident circuit judge upon the recommendation of the county bar association. The defense administrator shall be an attorney at law and when there is more than one recommendation from a multi-county district, the Judge shall appoint the administrator. The defense administrator shall file, maintain and keep current the plan for the assignment of counsel applicable to the county as certified to him by the county bar association. The administrator shall keep records which will reflect the name of each defendant, the name of the attorney appointed to represent him, the date of the appointment, the appointing judge, the amount of time expended by the attorney for investigation, research and trial, the expenses incurred and the result.

Section 16. The county administrator shall be responsible for receiving all requests for counsel by persons accused of crime, shall be responsible for investigating the indigency of the applicants for counsel and have such applicant for counsel complete and sign under oath an Affidavit of Indigency in the form substantially as set out in Form No. 1. If an applicant is entitled to have counsel assigned to him, the defense administrator shall make such assignment in accordance with the rules of the county bar association as certified to him and shall notify the attorney so assigned and the resident or circuit judge of the assignment. The assignment by the administrator must be confirmed by Order of the presiding or resident circuit judge or county judge. If an applicant for assigned counsel has some assets but cannot employ private counsel the administrator shall assign to him counsel, but shall receive from the applicant such funds as the applicant has available for employment of counsel and shall pay same into the fund. The county administrator shall perform such other duties including representing defendants in courts as are assigned to him by the rules of the Supreme Court or by the rules of the county bar association as approved by the resident judge and the Supreme Court.

Section 17. The county administrator shall be paid the following:

1. In the counties with a population under 10,000—$600 per year.
2. In the counties with a population between 10,000 and 20,000—$900 per year.

3. In the counties with a population between 20,000 and 30,000—$1,200 per year.

4. In the counties with a population between 30,000 and 40,000—$1,500 per year.

5. In the counties with a population between 40,000 and 50,000—$1,800 per year.

6. In the counties with a population between 50,000 and 60,000—$2,100 per year.

7. In the counties with a population between 60,000 and 80,000—$2,400 per year.

8. In the counties with a population between 80,000 and 100,000—$2,700 per year.

9. In the counties with a population over 100,000—$3,000 per year.

The county may supplement the salary of the county administrator and may assign to him duties in addition to those set forth herein, if such duties are submitted to and approved by the resident judge and filed with the county administrator and the Supreme Court. When two or more counties join together for the purpose of establishing a defense system, the appointed administrator shall receive both amounts designated above.

Section 18. Any county may establish or approve the representation of indigent defendants by a public or private defender, paid by a public or private group or corporation, provided the rights of person represented are protected as provided for in this Act and provided the representation is approved by the County Bar Association, the Resident Circuit Judge and the Supreme Court.

Section 19. If so authorized by the county bar association, the resident circuit judge and the Supreme Court, a county administrator may employ such assistants, investigators, stenographers and other personnel as may be necessary to carry out the duties assigned to him.
II. BACKGROUND OF THE PROPOSED DEFENSE OF INDIGENTS ACT

LOWELL W. ROSS

In March 1628, Parliament won from King Charles I the "Petition of Right" which guaranteed that a man should not be imprisoned without a trial.\(^1\) This was one of the great building blocks of English freedom. Of equal importance in the wall between freedom and bondage is *Gideon v. Wainwright*\(^2\) in which the Court held that an indigent person accused of a crime must be provided with counsel.

Both of these significant human rights are the result of man’s search for justice and have their origin in antiquity. All prejudices aside, it is extremely difficult to determine which of these rights is of greater importance, yet one of them is considered to be deeply embedded in our criminal law as an absolute right and the other is considered, at least by some, to be a product of a radical Court.

The Great Sanhedrin which conducted the most famous trial in the recorded history of the human race recognized the right of an accused person to representation.\(^3\) Under the Mosaic Code, one member of the Great Sanhedrin had to defend a person who stood before that body accused of a violation of the laws. Without such a defense, any sentence the Sanhedrin might impose was invalid.\(^4\)

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\(^1\) Rogers, McDonald, and Ross, Columbia, South Carolina. The writer is indebted to James C. Blakely, Jr., Clerk of the South Carolina Bar Association Committee on Legal Services to the Poor, for his assistance in the research and drafting of this article.

\(^2\) The article is an analysis of the Report of the Special Committee on Legal Services to the Poor. The committee was composed of the following members: Lowell W. Ross, chairman, Benny R. Greer, Esquire, vice-chairman, Donald V. Richardson, III, Esquire, and Brantley Phillips, Esquire, members of drafting sub-committee; John H. Nolen, Esquire, and Arthur G. Howe, Esquire, solicitor consultants; Bobby M. Pruitt, Esquire, and W. Brantley Harvey, Jr., Esquire, legislative consultants; and Paul A. Sansbury, Esquire, of counsel.

1. 2 CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES—A NEW WORLD 185 (1956). The jury system had been evolving since 1189. After 1625 it existed substantially as we know it today.


3. The Great Sanhedrin had two presiding officers, a religious chamber composed of twenty-three priests, a law chamber composed of twenty-three scribes, and a popular chamber made up of twenty-three elders.

The right to counsel in our law has been a long time in the making. Before 1695, persons accused of treason or a felony were permitted to have counsel as to questions of law but not as to facts.5 In 1695 Parliament passed an act which provided that a person charged with treason was entitled to counsel on matters of both law and fact and that if the accused could not afford counsel, the trial court was authorized to appoint a lawyer to represent him.6

The Colonial legislature of South Carolina adopted the 1695 English act in 17127 and in 1731 extended the right to counsel to all capital cases by providing that an accused had the right "to make his and their full defense, by counsel learned in the law. . . . And in case any person . . . shall desire counsel, the court . . . is hereby authorized and required immediately, upon his or their request, to assign . . . such and so many counsel not exceeding two as the person or persons shall desire, to whom such counsel shall have free access at all reasonable times." The substance of this provision has survived until today both in the Constitution8 and by legislative enactment.10

When one considers the other basic rights which have been won by English speaking people down through the years and the basic necessity for the right of counsel to make the right to a trial of any benefit, the surprising thing is not that the effective right to counsel has been established but, rather, that it took so long for the right to be guaranteed and that judicial decision was the method used to give it to the people. Although Gideon had shocking effect on the administration of criminal law when handed down, twenty-five years from now those who will think back to such things will undoubtedly be shocked that anyone ever doubted the effective right to counsel as a necessary part of our adversary process.

South Carolina is one of the six states which do not provide for compensating counsel appointed to represent indigent de-

6. The Treason Act, 1695, 7 & 8 Will. 3, c. 3. The distinction between fact and law insofar as felony trials are concerned was not abolished until 1863. Trails for Felony Act, 1836, 5, 7, & 8 Will. 4, c. 114, § 1.
7. 2 S.C. STATUTES 539 (Cooper's ed. 1837).
8. 3 S.C. STATUTES 289 (Cooper's ed. 1837).
fendants. The courts have imposed the responsibility of representing indigent defendants on the theory that a lawyer is an officer of the court. This system now deserves a new analysis in view of the revolution in criminal law. Members of other professions perform charity work on a voluntary basis and in so doing render a valuable service to their communities. It is only in the legal profession, however, that the members are ordered to perform a particular service. The attorneys of South Carolina have traditionally served their state and its citizens voluntarily and have not, individually or otherwise, contested the power of the courts to assign indigent clients to them.

Some argue that paying lawyers for representing indigent defendants is socialization of the law. Others maintain that substantial good will favoring the bar in general is generated by the public being aware of the services its members render to the poor without compensation. First of all, the meager fees that will be paid to attorneys under the proposed bill will not make any significant impact upon the income of the bar. The true effect will be to shift some of the burden of providing legal representation for those who cannot afford to pay for it to society. Secondly, the argument relating to good will overlooks the fact that the general public does not know what the members of the legal profession do for the poor, and, even if it did, it is doubtful


12. There has been considerable controversy over the question of whether the payment of fees to lawyers appointed to represent indigent defendants is compulsory. Recently, in State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966), the Supreme Court of New Jersey held that all lawyers assigned to represent indigent defendants must be paid. In that case, the court gave the legislature until January 1, 1967 to establish a satisfactory system. See Dillon v. United States, 239 F. Supp. 487 (D.C. Ore. 1964) rev'd, 364 F.2d 633 (9th Cir. 1965); Webb v. Baird, 6 Ind. 13 (1854); Annot., 130 A.L.R. 1439, 1444 (1944). Apparently Indiana, Iowa, Wisconsin, and New Jersey are the only states in which the courts have held that court appointed attorneys are entitled to compensation.

This problem was discussed in an editorial appearing in The State, Saturday, December 18, 1965 as a result of the Honorable Thomas B. Greneker’s order requiring Florence County to pay 200 dollars each to two court-appointed attorneys for the legal services they rendered to indigent defendants. The editorial was critical of Judge Greneker’s order, saying that if the court could order payment of attorneys fees from tax funds, it could order the payment of medical fees for treatment of the sick. The editor failed to recognize that furnishing counsel is done to satisfy a constitutional guarantee. There is no such guarantee of medical services.
that such knowledge would have much effect upon the reputation of the bar.\textsuperscript{13}

There are several systems which could be used to provide indigent defendants with counsel: (1) an assigned counsel system, (2) a private defender system, (3) a public defender system, (4) a combined assigned-defender system.

(1) An Assigned Counsel System. Under this system the court assigns private counsel to represent indigents when necessary. A partial assigned counsel system is now operative by virtue of section 17-507 of the Code, which provides for assignment of counsel for persons accused of any capital offense. Apparently there is no other provision under the South Carolina law for assignment of counsel and no provision whatsoever for payment of counsel or for payment of costs or expenses. Before \textit{Gideon}, the assignment of counsel was made in capital cases and, since \textit{Gideon}, assignments have been made in capital and non-capital cases, but the methods of assigning counsel vary from circuit to circuit and from judge to judge.

(2) A Private Defender System. Under this system counsel is provided through an office financed by private donations of various firms, corporations or institutions. This system would not be adequate since it would only work in large metropolitan areas where there are sufficient resources to provide for such an office. No such systems are now in existence in South Carolina.

(3) A Public Defender System. Under this system there would be created the office of public defender in each county or a combination of counties, which would be financed by funds appropriated by the county or state. The public defender would defend all indigent defendants.

(4) Combined Systems of Assigned Counsel and Public or Private Defenders. This system attempts to utilize the best parts of the other systems. It permits the bar to participate in the program without requiring that it assume all of the burden of

\textsuperscript{13} Related to the problem of compensating attorneys for representing indigent defendants is providing funds to enable such a defendant's attorney sufficient funds to adequately prepare a defense. An adequate defense often requires employing doctors, investigators, photographers, handwriting experts, and other expert witnesses who require payment for their services. A lawyer assigned to represent an indigent defendant is placed in a peculiar position. If he does not expend the money from his resources necessary to acquire the needed items, the person he is defending may well seek a writ of habeas corpus at some later time asserting that he was denied an adequate defense.
representation and the burden of paying the expenses of the defense.

The most difficult problem in devising any method for providing counsel for indigents in South Carolina is meeting the requirements of Escobedo v. Illinois.14 This case held that:

[W]hen the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.15

It is fairly well settled law that the guarantee of counsel comes into being at the so-called "critical stages" of criminal proceedings,16 but what constitutes a critical stage is unknown. The United States Supreme Court held in White v. Maryland17 that a preliminary hearing in Maryland was a critical stage. The Supreme Court of South Carolina has held that a preliminary hearing was not a critical stage18 on the ground that the defendant would not be prejudiced.19

Based on the trend of the cases as evidenced by White v. Maryland,20 and the interpretation given them by various courts21 one could say that future federal cases will make it mandatory that, under certain circumstances, counsel must be as-

15. Id. at 492. Escobedo had been arrested without a warrant, interrogated in connection with a murder and released. He was again taken into custody for questioning after an accomplice implicated him. Shortly after his arrest, his lawyer arrived and requested to talk to his client, but his request was denied. Escobedo repeatedly requested permission to talk with his lawyer, but was also denied permission. After intensive interrogation, the police extracted an incriminating statement from the accused. The interrogation had taken place prior to indictment and at no time had Escobedo been advised of his right to remain silent. The statements given to the police were used at his trial and he was convicted. The Supreme Court of the United States reversed.
19. "In South Carolina, the Preliminary Hearing serves the purpose of determining whether the State can show probable cause . . . , and he is not permitted to plead or even make a sworn statement. . . ." State v. White, 243 S.C. 238, 242, 133 S.E.2d 320, 321 (1963).
signed immediately upon arrest, at preliminary hearings, before interrogation or at any time when counsel would have or could have preserved rights, brought to light favorable evidence, established weaknesses in the state's case, or otherwise developed advantages which disappear with the passage of time. A defendant may not be prejudiced at a preliminary hearing by what transpires, but failure to assign counsel who could have advised the defendant to ask for a preliminary hearing and could have developed favorable advantages during a hearing may contravene the federal standard.

It seems that it is essential to a legal conviction, as determined by the federal courts, that every accused be advised that he is entitled to counsel and that, if a request is made, he be given counsel at the "critical stage." The critical stage might well be ten minutes after arrest, it might be the next day or the next week. In any event, the present system in South Carolina of having counsel appointed by the court immediately before arraignment is not workable. There must be available a person to receive requests for assignment of counsel, determine eligibility, and assign counsel promptly. If an accused is questioned without notification of his rights or has made a confession under questionable circumstances, there is a serious question as to whether any conviction of the accused would stand. It is therefore quite possible for admitted criminals to go free because the state has not complied with the requirements of the United States interpretation of due process.

It is imperative, therefore, that some system be devised for notifying persons as soon as possible after their arrest of their rights to counsel, and some system must be devised for furnishing counsel promptly.

The best system which can be instituted in South Carolina is a paid assigned counsel system and an administrator in each county to administer the program with the option given to each county to permit the administrator to represent defendants in court if the county bar association desires. Under this system, a


24. See Annot. 3 A.L.R.3d 1269 (1966). In this extensive annotation, the problem discussed is at what point in the criminal process, between arrest and arraignment, the accused is entitled to the advice of counsel.
defense administrator, who would be a local attorney, would be appointed in each county by the resident judge upon the recommendation of the county bar association. The appointment of counsel would be made by a plan prepared by the county bar association, approved by the resident circuit judge and the Supreme Court of South Carolina. The duties of the administrator would be to advise persons accused of crime that they are entitled to counsel, to determine indigency, and to make preliminary assignments of counsel in accordance with the county plan. This plan permits early assignment of counsel, an essential element of any workable plan.

Counsel would be paid from a state fund at the rate of fifteen dollars per hour for court time and ten dollars for out-of-court time with a maximum of 500 dollars for non-capital cases and 750 dollars in capital cases.

Defendants would, at the time of application for counsel, sign a pauper's oath, and pay any available monies into the fund. The proposed bill creates a claim against the assets of the defendant equal to the cost of the defense but gives the court the power to modify or waive the claim and the pay of administrators is to be based upon the population of the county to be served.

III. Comments on the Proposed Defense of Indigents Act

E. B. Latimer*

A. Introduction

Justice cannot depend on the size of a man's pocketbook. Yet until the Supreme Court decided in Gideon v. Wainwright\(^1\) that counsel must be provided by the state to every person "charged with crime,"\(^2\) that principle was essentially absent from state jurisprudence. That was an inevitable result, but very few states had the foresight to make provision for it. As early as 1731, however, South Carolina had a statute\(^3\) requiring the appointment of counsel in capital cases when requested by an accused, but it was not until 1932 that the Supreme Court of the United States held in Powell v. Alabama\(^4\) that the principle of the 1731

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2. Ibid.
4. 287 U.S. 45 (1932).
South Carolina statute was essential to "due process law" as applied to the states. Rarely did any state provide for appointment of counsel in other than capital cases and Betts v. Brady held that this practice satisfied the requirements of "due process of law." The dissent of four justices in Betts foreshadowed later developments.

B. South Carolina Practice

South Carolina recognizes the requirements of Gideon. Trial judges now formally advise all defendants without counsel of their right to have court-appointed counsel or to waive that right. But that advice is not given until arraignment, which takes place after indictment by the grand jury. Furthermore in South Carolina appointment of counsel is not consistently applied, and it is this lack of a uniform procedure which could lead to abuses and shortcomings resulting in a variety of brands of justice. Mr. Justice Tom C. Clark characterizes most systems of assigning counsel as "archaic, slipshod and ineffective."6

Two threshold problems will exist under any system: who is indigent and when must counsel be appointed? Today in South Carolina if a man asks for counsel and says he cannot afford it, counsel will be appointed, and it is the responsibility of counsel to guard against free representation being given those who can really afford it. No procedure exists in this state now to determine indigency. As previously stated, counsel in South Carolina is appointed at arraignment. The case of White v. Maryland requires appointment of counsel when the "critical stage" of the criminal proceeding is reached, and defines a "critical stage" as the stage of criminal proceedings where "rights are preserved or lost."7 What this means is still subject to interpretation by the Supreme Court and is not at all clear. White held that the preliminary hearing in Maryland was a "critical stage" since the defendant entered a plea when he had no counsel. At the trial the plea of guilty at the preliminary hearing was introduced into evidence. The conviction was reversed. South Carolina provides a preliminary hearing only if a defendant demands it within ten days before the next term of General Sessions Court,8

5. 316 U.S. 455 (1942).
8. Ibid.
but the accused is not allowed to plead or to make a sworn state-
ment.10 Rather, the preliminary hearing serves to determine
whether the state can show probable cause in order to hold the
defendant.11 The federal court in Williams v. South Carolina12
held that the absence of counsel at the preliminary hearing is not
a ground for a new trial, and that failure to provide an attorney
in time to demand such a hearing does not deny due process.
Thus, arraignment is the first "critical stage" under South Caro-
lina procedure.

Undoubtedly, Gideon has increased the case load of all courts
in South Carolina. Habeas corpus petitions are booming. The
following statistics speak for themselves: 1958-59 fiscal year—18
habeas corpus proceedings; 1959-60—85 proceedings; 1960-61—
185 proceedings; 1961-62—64 proceedings; 1962-63—110 proce-
dings; 1963-64—120 proceedings; 1964-65—178 proceedings. Trial
court proceedings have been considerably slowed down. Judge
John Grimball of the fifth judicial circuit, which handles more
criminal cases than any other circuit, estimates that at every
term of General Sessions Court for Richland County seventy-
five to one hundred lawyers are appointed to represent indigent
defendants.

To alleviate part of this situation, the General Assembly
amended the 1962 Code by adding section 17-359.1, to wit:

Any judge before whom a petition for writ of habeas corpus
is made by any person in confinement who has been tried and
convicted by a court of competent jurisdiction, shall upon
issuance of the writ of habeas corpus transfer the matter for
hearing to any judge of any court of competent jurisdiction
in the county where the person was convicted.

All habeas corpus petitions will now be handled by the coun-
ties in which the petitioners were sentenced rather than by Rich-
land County, where the petitioners are incarcerated.

In state courts nationally it has been estimated that fifty to
seventy-five percent of defendants are indigent and that ninety-
five percent plead guilty. Attorneys must be appointed for these
defendants, but this is too heavy a burden to rest entirely on the
shoulders of the state bar. Where more than thirty percent of
all defendants annually require the appointment of attorneys

11. Ibid.
because of indigency, Congress enacted the Criminal Justice Act in 1964, providing for the appointment and payment of counsel for indigents in federal cases. Yet, with over fifty percent of the persons accused of crimes being unable to afford legal representation, South Carolina is one of only six states in the entire nation which do not provide paid counsel for indigent defendants. It should be remembered that the poor are served in almost every other professional area at public expense through welfare legislation. Action is urgently needed in South Carolina.

One improvement was instituted in Richland County on January 1, 1965, when a special investigator took office. His job is to check the city and county jails once a week to see who is in jail, why, and who wants a lawyer; to check on claims of indigency and to ask the judge to appoint an attorney if the defendant cannot pay; and finally, to assist defense attorneys who have legitimate need for further investigation of any matter they think will help their case.

A startling and yet refreshing development in South Carolina procedure occurred on December 15, 1965. Judge T. B. Greneker ordered Florence County to pay each of three court-appointed attorneys a fee of 200 dollars for representing indigent defendants in General Sessions Court. In issuing this order Judge Greneker said, "I may go to jail for this . . . (It) is something of a test . . . But I just want to see if anybody will be foolish enough to overrule it."

*Gideon v. Wainwright* has created many problems in its wake. Judge John Grimball has summarized the problems and possible solutions in an excellent article appearing in the May, 1964 issue of *Transcript*, where he said:

The usual indigent defendant is totally devoid of any sense of loyalty to his appointed attorneys and completely ungrateful for the services performed on his behalf. Such an accused, if convicted, will stop at nothing to regain his freedom. He will with alacrity make the most damaging, libelous accusations against the Court, the Solicitor, and his

15. *Special Committee of the S.C. Bar Ass'n, Report on Legal Services to the Poor, finding no. 3.
appointed counsel, if he feels that it will assist him in some legal process to gain his freedom. But when more than one attorney participates in the defense, it is protection to everyone engaged in the trial against subsequent false accusations as to the manner in which the trial was conducted and concerning any negotiations for a possible plea of guilty that may have taken place. (In Richland County two attorneys are almost always appointed to relieve a single attorney of criticism by a defendant who is convicted.)

. . . .

The Courts should be provided with public defenders or with a system of paying for the services of lawyers (appointed to represent indigent defendants) or a combination of these two systems. . . . It is not reasonable, fair or just to ask or to require the lawyers of South Carolina to pick up the entire tab for the defenses of indigent defendants by giving their time and skill for this purpose . . . . [P]rotection of the constitutional liberties of the people of this State is a public matter and the cost should be met by the taxpayers at large and it should not be foisted upon the members of the legal profession on the sole basis that they are skilled in this kind of work. The bench and bar must close ranks in this situation and see to it that proper financial arrangements are made to effectively take care of the defense of indigent citizens charged with crime.

. . . .

To my certain knowledge, all lawyers are ready and willing to their fair share of this type of work but it is an imposition and an unfair burden to require them to carry the whole burden and to assume the complete responsibility for this activity.

C. The Proposed Bill

The South Carolina Bar Association is acutely aware of the problem and has appointed a committee on legal services to the poor, Lowell W. Ross, Chairman. The task of the committee was to draft a proposal for legislation to meet the impact of the Gideon case. The committee recognized that "the magnitude of the problem far exceeds the capacity of South Carolina lawyers to meet it on charity basis. Public financial support is urgently needed to assure equal justice for the poor."18

18. SPECIAL COMMITTEE OF THE S.C. BAR ASS'N, REPORT ON LEGAL SERVICES TO THE POOR, findings no. 5 and 6.
In recommending legislation the committee faced the "serious question if an indigent defendant who is provided a non-paid, non-volunteer lawyer is furnished counsel in accordance with the requirements of Gideon." That is the primary hurdle facing opponents of legislation for paying counsel fees. Furthermore, it is "patently unconstitutional to deny to an indigent defendant funds to adequately prepare his defense."  

The recommended plan of the committee has been referred to the Office of the Attorney General of South Carolina for comment, the basis for much of which will be a comparison with the Federal Criminal Justice Act of 1964. The South Carolina plan is entitled "The Defense of Indigents Act," and it would apply to any defendant who is "financially unable to obtain an adequate defense." In addition to this standard, four other standards are set up by the Criminal Justice Act of 1964 to determine whether a defendant is eligible under the act. He must be financially unable to obtain representation; to obtain counsel; to pay counsel whom he has retained; or to obtain investigative, expert or other services necessary to an adequate defense in his case. With this test uppermost, we now proceed to consider the Defense of Indigents Act as proposed for South Carolina.

Section 1 of the proposal requires that a person charged with a crime be advised of his right to counsel if he is not already represented. In South Carolina a person is charged with a crime at the time of arrest. We recommend that the arresting officer inform the accused within a reasonable time after his arrest that he can request court-appointed counsel if he cannot afford to retain private counsel. Further, the police should provide the defense administrator (see section 15) with a daily list of persons arrested, and indicate for each person whether or not he has his own counsel and requests that counsel be appointed or wishes to waive counsel. The administrator should interview those who waive counsel and explain to them the significance of waiver. This procedure should be used in order to have the defendant reaffirm his waiver of counsel for the record after being fully advised. By use of the daily list counsel may enter the picture at the earliest convenient stage. Under the federal act repre-

19. Id., "Problems".
20. Ibid.
21. Id., "Recommended Plan" § 1.
sentation is provided at every stage of the proceeding, beginning with the appearance before the United States Commissioner and continuing through appeal. South Carolina would do well to follow this procedure closely. The South Carolina General Assembly can act voluntarily at the present time. It may be faced with a federal court edict in the matter at some future date. Whether our procedure of appointing counsel at arraignment is soon enough is a matter of serious doubt.

Section 1 provides for the appointment of counsel when "a person is charged with a crime" and it appears possible that counsel may be paid even for representation in city and magistrate courts.

Under the proposal counsel must be appointed for a crime involving a possible sentence of six months. If the sentence be less, the judge may appoint counsel if he feels "such appointment is warranted." The question whether counsel must be appointed in misdemeanor cases has not yet been decided by the Supreme Court.

Section 2 provides for assignment of counsel where a person has some assets but not enough to employ private counsel. Under the Criminal Justice Act, if the defendant at any stage of the proceedings, including an appeal, becomes financially unable to pay counsel he has retained, the court may appoint counsel.

24. Fed. R. Crim. P. 5(b) provides that the "Commissioner shall inform the defendant of the [charges] against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. . . ." Fed. R. Crim. P. 5(c) provides that "the defendant shall not be called upon to plead" before the Commissioner, who instead holds the preliminary hearing to determine whether probable cause exists "to believe that an offense has been committed and that the defendant has committed it."


26. However, the Fifth Circuit has rejected the "serious offense" rule for misdemeanors and has extended the right of counsel to "petty offenses." In Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) the defendant was charged with "possession of whiskey," which is a misdemeanor under Mississippi law, punishable by a fine up to 500 dollars and up to ninety days in jail. He pled guilty and received the maximum sentence, but no counsel was provided and his sentence was set aside. In McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965) the defendant pled guilty to charges of illegally possessing and selling whiskey, both of which were misdemeanors under Florida law. She was sentenced to serve six months in jail or pay a fine of 250 dollars for each offense. The conviction was set aside.

Under the proposed act, South Carolina is safe under McDonald and probably under Harvey, but neither decision is satisfied by present law. There is little doubt that Gideon applies to misdemeanors, and it would be wise for South Carolina to recognize this fact early.
Presumably, counsel could be appointed under the proposal at any time when the defendant became indigent. This is as it should be.

Section 4 provides for waiver of counsel if it is "voluntary and understandably" made in writing. In *Pitt v. MacDougall* the South Carolina Supreme Court held that failure to request counsel is not a waiver, nor may waiver be presumed from a silent record. It must affirmatively appear either in the record or through evidence that counsel was offered but was "intelligently and understandably rejected." An offer of counsel must be made. The federal act is intended to discourage waiver of counsel by allowing a defendant to revoke his waiver and to apply for counsel at any stage of the proceedings. Presumably the proposed South Carolina act grants the same right although it is not affirmatively stated. It would probably be unconstitutional not to do so.

Section 7 authorizes "reasonable expenses to insure his defense" when applied for by an indigent defendant or his appointed counsel. This includes, but is not limited to, fingerprint, psychiatric, and ballistic experts as well as criminal investigators, etc. However, the proposed act applies only to appointed counsel, while the federal act applies also to retained attorneys. The federal act meets the constitutional guarantee much more clearly than the proposed state act by focusing its attention on providing the most effective representation rather than concentrating solely on appointed counsel who must fend for himself. Not many retained lawyers can afford to provide all the services required. The fee is often large enough to meet only personal expenses and few defendants can afford all the necessary services. Furthermore, ex parte proceedings on the application to the court for approval of expenses for services, other than counsel, are advisable to remove the necessity of disclosing the defense prematurely. Presumably the broad rule-making power of the Supreme Court of South Carolina under section 6 could provide for this. The federal act makes specific provision for an ex parte proceeding in section 2006(e). There is no specific provision in the proposed act for ratification by anyone of expenses which had to

be made before receiving approval of the court. Probably there is room to include this, but it is uncertain.

Of particular significance is the fact that the South Carolina proposal sets no limit on expenses for services other than counsel, except the requirement that they be reasonable,\textsuperscript{32} while the federal act sets a limit of 300 dollars to be paid to any person or organization for such services.\textsuperscript{33}

Professor of Law James A. Lake, Sr., of the University of Nebraska feels that

\textit{[T]he issue of reimbursement for investigative expenses should not turn on whether any evidence usable to the defendant was secured by the expenditure, or, in other instances, whether the defense actually used at the trial evidence secured by the expenditure. Such a test is unrealistic and unduly restrictive. It encourages trial counsel to explore only those avenues of inquiry which he can foresee will prove fruitful, when every attorney knows that a good lawyer-like job of investigation often entails turning many stones, some yielding nothing usable for the defense. Likewise, perfectly legal defense strategy may be impeded by a rule which requires evidence turned up in an investigation to be used before reimbursement will be forthcoming. Much more preferable would be a rule which authorizes public payment for any investigation which would be undertaken by a diligent attorney proceeding in a lawyer-like way to prepare a defense for his client, and permits a judge to approve the expense upon finding that the proposed search appeared to be reasonably necessary for this purpose.}\textsuperscript{34}

Under the South Carolina proposal counsel is appointed at three separate stages: before trial (section 1), for appeal (section 8), and for the filing of a petition for a writ of habeas corpus (section 9). The federal act makes one appointment for trial and appeal but none at all for habeas corpus\textsuperscript{35} or other collateral matters. South Carolina has substantially improved on the federal act with regard to such collateral matters.

\textsuperscript{32} South Carolina Proposed Defense of Indigents Act § 7.  
\textsuperscript{34} 44 Neb. L. Rev. 751, 775 (1965).  
In addition separate fees are to be paid by the state for each separate stage of the proceedings in South Carolina. Thus, a lawyer representing the defendant at the trial, on appeal, and for filing of a petition for a writ of habeas corpus earns three separate fees. The federal act provides similarly as far as it goes. The South Carolina proposal improves on the federal act by providing a fee for each attorney, while the federal act only provides a single fee for all trial counsel and a single fee for all appellate counsel, no matter how many lawyers are involved at either stage. However, the federal act does have a saving clause which South Carolina should consider. It is section 3006A(d), which provides that "in extraordinary circumstances, payment in excess of the limits [300 dollars for misdemeanors and 500 dollars for felonies] may be made if the District Court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the Chief Judge of the Circuit." The saving clause does not apply to appeals. South Carolina would provide an absolute limit on counsel fees of 500 dollars for non-capital cases and 750 dollars for capital cases.

It is considered appropriate that South Carolina provide for additional compensation in extraordinary circumstances, substantially in accordance with the federal procedure.

The major improvement over the federal act is found in section 18 of the proposal, which allows the establishment of public or private defender programs by any county, with the approval

36. This view is based on the provisions in § 1 (counsel at trial), § 8 (defendant may apply for counsel on appeal), § 9(a) (appointed counsel's filing of a habeas corpus writ), and § 12 (payment of fees when attorney is appointed).

37. 78 Stat. 552, 18 U.S.C. 3006A(d) (1964), provides for a separate claim for compensation and reimbursement to be made to the district court and to each appellate court in which the attorney has appeared for the defendant. The limits also appear in this section.

38. Section 12 of the proposed Defense of Indigents Act provides that "when an attorney is appointed to represent an indigent defendant," the attorney will be paid a fee.


of the county bar association, the resident circuit judge, and the
supreme court. Extensive efforts to provide this "local option"
in the federal system failed. However, the success of public de-
defender systems in more than 110 cities and counties mainly in
California, Connecticut, Illinois, Indiana and Massachusetts, is
evidence that it will work in the right atmosphere. Georgia and
Florida have both instituted such a system, and it works well
in both states. The Office of the Attorney General takes no posi-
tion on the desirability of establishing defender systems in any
particular county. If a county is interested, then a defender
system is well worth serious consideration.

Section 10 of the proposal provides that trial and hearing
transcripts and records necessary to an appeal or writ of habeas
corpus will be provided at state expense. It is unclear whether
transcripts of preliminary hearings or coroner's inquest hearings
would be supplied at any level of the proceedings.

Section 11 provides for the establishment of plans under which
counsel for indigents would be appointed. Any plan used must
comply with the requirements of the sufficiency of counsel as
set out in Tillman v. State\textsuperscript{42} which are:

(1) Counsel must be a member of the Bar in good standing.

(2) Counsel must give "his client his complete loyalty."

(3) Counsel must serve his client "in good faith to the best
of his ability."

(4) Counsel's service must be "of such character as to preserve
the essential integrity of the proceedings as a trial in a
court of justice."

(5) Counsel "is not required to be infallible, nor to do the im-
possible, since the defendant is entitled to a fair trial and
not a perfect one or a perfect result."

In summary, the Office of the Attorney General favors the
prompt enactment of the proposed Defense of Indigents Act.
Our comments are merely suggestions for improvement and are
not intended as anything other than constructive criticism.

\textsuperscript{42} 244 S.C. 259, 264, 136 S.E.2d 300 (1964).
A. Introduction

There is an urgent need for substantial revision of South Carolina's administration of criminal justice. The rapid and important changes in this field at the national level have rendered the bulk of federal and state standards obsolete. *Gideon v. Wainwright*, 1 *Escobedo v. Illinois*, 2 *White v. Maryland*, 3 *Rideau v. Louisiana*, 4 and *Jackson v. Denno* 5 are cases of the 60's. These cases reflect a renewed faith in the adversary system as a means of distributing justice.

In theory, American criminal administration, more than any other field of law, relies upon the adversary system. The suspect is presumed innocent until proven guilty beyond reasonable doubt. The prosecution is burdened with constitutional restrictions. Where potential abuse may develop, the Constitution strikes the balance in favor of the accused.

In the modern era it is not always fully understood that the adversary system performs a vital social function and is the product of long historical experience. The state trials in sixteenth- and seventeenth-century England demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interests of the community. The adversary system is the institution devised by our legal order for the proper reconciliation of public and private interests in the crucial areas of penal regulation. As such, it makes essential and invaluable contributions to the maintenance of the free society. 6

The paths of reform are not always clear. Decision makers are confronted with difficult policy choices. The key competing social policies are the protection of the citizenry from both crim-
inal conduct and police abuse. Both past and present decisions are usually based upon assumptions of fact which are not subject to verification. Many of the recent innovations by the Supreme Court would have undoubtedly been adopted by the states had they seriously considered the problems. Thus the states, through inaction, have seemingly abdicated their role as designers of their destiny to federal regulation. Yet local government continues to be the more ideal source of reform, since only officials at that level can be fully aware of the real local needs and peculiarities. Today one thing is certain: the states must meet modern conceptions of justice and fairness, either through their own initiative or by federal mandate.

A brief review of how South Carolina handles some of its criminal procedure problems suggests the great need for new evaluation. The area of police interrogation and arrest is a prime example. While other states experiment with "stop-and-frisk" statutes\(^7\) to protect the police officer while questioning a dangerous suspect, or "two hour detention" statutes\(^8\) for interrogation, South Carolina offers no statutory guide or protection to its enforcement officers. Antiquated statutes that governed the related area of search and seizure were recently described as more restrictive of law enforcement than is required under either the state or federal constitutions.\(^9\) While the police could flout these rules prior to Mapp v. Ohio,\(^10\) they must now abide by procedural safeguards or let the criminal go free.

Many lawyers familiar with the value of discovery in civil litigation would be shocked by the inadequacy of discovery devices in criminal cases. A guilt determining process which fails to detect and impede surprise, subterfuge and suppression has poor reliability. The sometimes expressed fears that discovery leads to perjury and intimidation are for the most part nonsense.\(^11\) In any event, broad judicial discretion could prevent most abuse.\(^12\)

\(^7\) See, e.g., N.Y. CRIMINAL CODE § 180(a).
\(^8\) UNIFORM ARREST ACT § 2 (1942). The Uniform Act has been adopted in four states. PAULSON & KADISH, CRIMINAL LAW AND ITS PROCESSES 832 (1962).
\(^12\) See Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 CALIF. L. REV. 56, 99-101 (1961).
Many other areas need reconsideration and revision. The existing bail system is costly and places an unfair burden on the poor.\textsuperscript{13} Most of the other problems in criminal law administration are governed more by bad practice than by sound principles. There are, in addition, many areas in the South Carolina substantive criminal law, such as insanity, conspiracy, and theft, that are illogical and unsuitable for handling modern criminal problems.

The Defense of Indigents Act is a giant step forward toward solution of the most critical problem in the criminal administration field. \textit{Gideon v. Wainwright}\textsuperscript{14} has made it clear that counsel for the defense is just as vital a part of the adversary system as the judge or the prosecutor. Without counsel the other safeguards are usually ineffectual. Thus, this proposal, which attempts to implement \textit{Gideon}, is especially worthy of analysis and comment.

\textbf{B. Determination of Indigency}

Section 16 places the responsibility of investigating and determining indigency upon the defense administrator. Suppose a suspect has only 200 dollars, which will probably be needed for investigation expenses? Suppose he has only a car worth 200 dollars, which he uses to transport himself to and from work? Suppose he has a wife and children who are dependent solely upon him for support? Judge Prettyman has raised further questions:

But suppose that, although he has no ready cash, he has a good job. Or suppose he has assets such as a car, a television set or a refrigerator. Suppose he has a good job and some cash but has a wife and children. Suppose he has no readily convertible asset but has an equity in a home. Suppose he has in his pocket a hundred dollars but owns not another sou. Suppose he earns plenty but spends more and so is always in debt. Suppose he has nothing himself but has a wealthy father, a thrifty brother, or a kindly employer or friend. Suppose he can make no present payment but could

\textsuperscript{13} The South Carolina bail system, in its present form, may violate due process. See Foote, \textit{The Coming Constitutional Crisis in Bail—Part Two}, 113 U. PA. L. Rev. 1125, 1180-85 (1965). In any event, there is no good reason why a more enlightened system cannot be adopted. For recommendations see LaFaye, \textit{Alternatives to the Present Bail System}, 1965 U. ILL. L.F. 8.

\textsuperscript{14} Supra note 1.
make a satisfactory installment arrangement. Suppose he cannot pay a fee commensurate with the service needed but could pay a small proportion of it. Suppose his wife works and really supports the family and is willing, if need be, to shoulder the burden of his defense even though for what reason no objective observer can discern. The fact is there are no authoritative, or generally accepted, standards for evaluating indigency for these purposes. There is no guidebook for determining when, under a variety of financial circumstances, the community should supply legal service without cost to a person accused of crime.16

Section 16 does not attempt answers. The administrator is given total discretion as to whether an alleged indigent is qualified to receive appointed counsel. Practice will probably vary from county to county, but inflexible standards would produce greater evil. "Poverty must be viewed as a relative concept." However, section 16 could have provided some guidance without creating arbitrary results. For example, the administrator should uniformly take into account family obligations when determining whether counsel should be assigned, or how much the accused should be required to contribute toward his defense. The South Carolina Supreme Court has been granted authority in section 6 to formulate such implementing standards.

As a practical approach to the problem of determining indigency, counsel should probably be appointed whenever a person claims inability to pay. If the administrator denies appointment and the defendant fails to obtain counsel on his own, the trial would be suspect: an otherwise valid conviction would hinge upon the administrator's decision. In addition, any extensive examination of individual cases will be expensive, and automatic appointment would reduce the need for such investigations. A further restraint is the fact that a judgment can be obtained against the person for defense counsel fees and other expenses. Of course, this approach would be misused and it may be wise legislative policy to permit the investigation and refusal of counsel as a check against abuse.

C. Assignment

Section 1 states that when a person is charged with a crime, he shall be advised of his right to counsel. Does this mean that the police must advise an accused of his right to counsel immediately upon arrest? Or must there first be a formal charge by indictment before he is so advised? Is he to be advised by a policeman, magistrate or by the defense administrator?

The proposed act does not provide for a required procedure. This silence is perhaps justified on the grounds that due process standards are too uncertain at present for the adoption of specific rules. Section 6 gives the South Carolina Supreme Court authority to establish the procedure. This task should be considerably less difficult in the near future. The United States Supreme Court has heard several cases involving these and other points raised in Escobedo and it has been widely predicted that the Court is prepared to clarify the constitutional minimum.17

The present South Carolina practice of waiting until arraignment before counsel is appointed is probably unconstitutional. The accused is usually in jail for months awaiting trial. During this interval his rights to bail, counsel and protection against self-incrimination are often suspended. Escobedo has already embraced the principles that "the time a defendant needs counsel most is immediately after arrest" and "representation must be provided early if it is to be effective."18 It is unlikely that the Court will radically depart from this philosophy.

Section 1 also provides that if the accused requests counsel and is determined to be indigent, counsel will be appointed. The appointment of counsel is seemingly conditioned upon the defendant's request. Persons suffering from mental illness may not be able to meet this prerequisite. Others, through ignorance, may remain silent. Does silence constitute automatic waiver? This unnecessary ambiguity should be clarified by amendment. Section 4 requires waiver of the right to counsel to be a written, affirmative act. Counsel should be immediately appointed in all cases except where the person has executed a written waiver.

Under section 1 the possibility of a six months' sentence determines whether a person is automatically entitled to appointed

18. Supra note 2. For discussions of the present South Carolina laws on when the right to counsel begins see Myers, Criminal Law and Procedure, 17 S.C.L. Rev. 37-40 (1966); Comment, 17 S.C.L. Rev. 741 (1965).
counsel. The court retains discretion to appoint counsel to defend a person against lesser charges. The six months' standard has the advantage of being workable—whether fair may depend upon whether the courts are willing to appoint counsel to defend against questionable prosecutions when minor offenses are involved.

The bill's proposal may profitably be compared with the federal standard. The Criminal Justice Act of 1964 provides that: "In every criminal case in which the defendant is charged with a felony or misdemeanor, other than a petty offense," he shall be advised that counsel will be appointed to represent him if he is financially unable to obtain counsel.19 What constitutes a petty offense depends upon the nature of the offense. The crime of reckless driving, which carried a maximum sentence of thirty days or 100 dollars fine, could not be classified as a petty offense because it was an act of obvious depravity.20 Yet the regulatory crime of dealing in second-hand books without a license is a petty offense, even though punishable by a maximum sentence of ninety days or 300 dollars fine.21

The constitutional requirement is uncertain. In a recent Fifth Circuit case22 a guilty plea to an illegal possession of whiskey charge was reversed because the defendant had not been advised of his right to assigned counsel. The maximum punishment for the offense was ninety days. Under this standard even the federal "petty offense" approach is suspect. Whether the six months' standard will meet due process criteria cannot be answered and must await future federal developments.

D. Appeal and Habeas Corpus

Indigents who have been convicted and sentenced for at least six months may have assigned counsel on appeal or for filing a writ of habeas corpus. Section 8 conditions the right to assigned counsel upon a finding by the defense administrator that there is "reasonable justification for the appeal." If he finds that no reasonable justification exists then he presents the matter to the court which makes the final determination. Douglas v. California23 extended the right to counsel in crim-
inal cases to appeals. Section 8 is an attempt to meet that standard. Unfortunately, the qualification of "reasonable justification" impairs the effort. Douglas relied upon the Griffin v. Illinois rationale that a state "may not grant appellate review in such a way as to [discriminate] against some convicted defendants on account of their poverty."25 In Douglas assigned counsel was denied because the state court "had 'gone through' the record and had come to the conclusion that 'no good whatever could be served by appointment of counsel.'"26 The condemned procedure has obvious similarities to the qualification in section 8.

This opinion is further buttressed by examining Griffin v. Illinois and its aftermath. In Griffin the Supreme Court held that the equal protection clause required either furnishing transcripts at state expense to appealing indigents or else liberalizing its appeal procedure to the point where lack of a transcript would not, in effect, deny the right to be heard on the merits. Under Griffin, the indigent's right to a transcript cannot be conditioned upon a decision by the trial judge that the trial was fair.27 Similarly, the belief by the judge that the appeal would be frivolous cannot be a basis for denial.28 Section 10, which provides for transcripts at state expense, is seemingly conditioned upon the appeal meeting the "reasonable justification" condition of section 8. In any event, since the equal protection clause prohibits the denial of a transcript on the grounds that the appeal is determined frivolous, it would also bar the denial of counsel for like reasons.

Assigned counsel in habeas corpus proceedings is on a different footing. In Douglas it was noted:

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory release beyond that stage in the appellate process in which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted

25. Id. at 18.
as a matter of right to rich and poor alike from a criminal conviction.  

Although assigned counsel is not constitutionally required in habeas corpus cases, section 9a, permitting appointment, is a very desirable feature of the proposed bill. If the state provides an unqualified right to counsel on appeal, the requirement of "reasonable justification" before appointment in habeas corpus proceedings is not too onerous.

E. Compensation

The most important feature of the proposed act is section 12 which provides for compensation of counsel. I have recently suggested elsewhere that the state's failure to compensate attorneys assigned to indigents is unsatisfactory and may result in a denial of due process. Non-compensation is sometimes defended on the grounds that the legal profession is solely responsible for and should finance representation of the poor. The criminal process however is not initiated by the legal profession but by government and for the achievement of basic governmental purposes. It is a process which has the potentiality of imposing the most severe penalties on the persons proceeded against. Thus government is obligated to strive for a reliable and fair process. This is, in part, achieved by adequately compensating those who contribute their services toward the fulfillment of that obligation.

Under present South Carolina practice the attorney must not only gratuitously contribute his services, he is not reimbursed for out-of-pocket expenses necessary for an adequate defense. The assigned counsel must pay for such items as fees for doctors and other professionals, travel expenses of witnesses, and investigators. This obvious inequity could too often result in valuable but expensive defense evidence being withheld by the suspect's own counsel. Section 7 offers needed relief by permitting payment of reasonable expenses. Reimbursement is conditioned upon a finding by the judge that the expenses are necessary and reasonable.

29. Supra note 23, at 356.
F. Reimbursement by the Accused

The act does not propose that free legal services be given to indigents in criminal actions. Recipients must, to the extent of their ability, pay back any sums expended for their defense. Section 3a creates a claim against the indigent which may be reduced to judgment under section 3b. In addition, section 2 and section 16 give the defense administrator power to require the suspect initially to turn over any available funds. Section 3a places the ultimate responsibility of handling claims upon the attorney general.

It does not seem unduly harsh to require indigents found guilty of crimes to repay expenditures in their behalf. If the person has been found innocent of the charges and he has already been required to expend his last assets for his defense, perhaps he should be relieved of further imposition. This is possible under section 3d which permits the court to waive, modify, or withdraw the judgment whenever to do so will promote justice.

A further difficulty may arise in the administration of the reimbursement provisions. The defense administrator is not specifically required to advise the accused that a judgment will be obtained and that he will be ultimately forced to pay for any costs. Yet the administrator should and probably will offer such advice. There is a real danger that the person may feel that he would rather do without counsel than have a judgment obtained against him. Particularly if the accused is clearly guilty, or has confessed, he will not discern the benefits of counsel. Most defendants are unqualified to judge the value of counsel. Legal advice is unquestionably of great value in criminal prosecutions. For example, when the suspect is guilty and wishes to plead guilty to the crime or crimes charged, a negotiated guilty plea between the solicitor and defense counsel will usually result in the ultimate punishment being considerably reduced. The statutory protection offered in the proposed act is the requirement in section 4 that the written waiver of counsel must be voluntarily and understandingly made. In practice the administrator should take great care in completely informing persons of the importance of counsel.

The South Carolina bail system, in addition to being basically unfair, aggravates the indigency problem. When a person must
remain in jail during the pre-trial period, his earning power is interrupted and his inability to pay for defense expenses is intensified. This is particularly acute when the person has a family that is dependent upon him for support. In addition, the state must pay for his maintenance during this period of incarceration. An enlightened pre-trial release program should considerably reduce the public costs.

G. Miscellaneous Provisions

Section 15 permits counties to join together and adopt a plan which must be approved by the South Carolina Supreme Court. This provision should result in cost advantages and create administrative ease.

Section 16 allows counties to utilize a public defender. Although public defender systems have been sharply criticized, they have proved workable and less costly in some states. Without exploring the pros and cons, it is desirable that each county have the flexibility to adopt the plan that most nearly satisfies its needs.

Section 5 requires the trial judge to investigate the plea of guilty and determine that it "was freely, understandably and voluntarily made without undue influence, compulsion or duress, and without promise of leniency." This provision is an excellent check on potential abuse that might arise from negotiated pleas. There is little doubt that some assigned counsel will not act in their client's interests. They may become quite forceful in their efforts to have the suspect plead guilty, but with the trial judge closely examining the guilty plea, this danger is minimized.

H. Conclusion

The proposed bill is a laudable piece of legislation. Any criticisms are minor and the flaws easily corrected. Several areas are uncertain, but the South Carolina Supreme Court, under section 6, has the full power to adopt clarifying rules and regulations. The act is worthy and South Carolina needs the act.