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Duty to Advise Indigent of Right to Counsel at State Expense

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DUTY TO ADVISE INDIGENT OF RIGHT TO COUNSEL AT STATE EXPENSE

I. INTRODUCTION

Petitioner, hereinafter referred to as defendant, brought a writ of error coram nobis in the Nebraska District Court to set aside his robbery conviction, based on his guilty plea, on the ground that he did not intelligently waive his right to counsel at his arraignment. Defendant alleged a denial of due process under the Fourteenth Amendment and of his constitutional and statutory right to counsel under the law of Nebraska. Proof showed that the trial court advised defendant that he was "entitled to be represented by counsel," and that defendant misunderstood this to mean he could have a lawyer only if he paid for one. The writ was denied, and an appeal was taken to the Supreme Court of Nebraska. *Held*: The trial court's statement sufficiently informed him of his constitutional rights. *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

The court did not mention other facts appearing in the record.¹ The defendant was seventeen; he had dropped out of school in the ninth grade for medical reasons; he was married and father of a child; he had had no previous experience with the law; and his parents also misunderstood the court for his father was hard of hearing and his mother answered the court's question about an attorney by saying, "We can't afford it." The importance of these facts will be brought out in discussing two issues raised by this case: Are Nebraska judges under any duty to inform indigent defendants of their right to counsel *at state expense*? Is this defendant sufficiently "indigent" to qualify for counsel at state expense?

II. DUTY TO INFORM

Assuming that defendant was "indigent," does the judge have a duty under Nebraska law to inform him of his right to counsel at state expense? Broadly, there are two aspects to this question: (1) Nebraska's duty under the Federal Constitution; and (2) Nebraska's duty under her own Constitution and statute.

¹ These facts were taken from the statements of facts as given in the Briefs for Appellant and Appellee, *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

A. NEBRASKA'S FEDERAL DUTY

Although the right to counsel guaranteed by the Sixth Amendment² does not of itself apply to the states through the Due Process Clause of the Fourteenth Amendment, it has long been clear that the concept of "fundamental fairness" embodied in due process requires the states to provide counsel for indigent criminal defendants under some circumstances.³ Indeed, the right to counsel at state expense for indigent defendants is absolute and subject to no exceptions in capital cases,⁴ though, to be sure, an intelligent

² "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. CONST., amend. VI. All the states have similar provisions in their constitutions, except Virginia, which provides the right by statute. See Appendix, BEANEY, *RIGHT TO COUNSEL IN AMERICAN COURTS* 237-39 (1955). For a listing of early state statutes covering the indigent's right to counsel, see also *Betts v. Brady*, 316 U.S. 455, 467 (1942).

There has been a great deal of material written on the general subject of right to counsel. The following list is far from complete:

23 C.J.S. *Criminal Law* § 979 (1940); 14 AM. JUR. *Criminal Law* § 174 (1938).

Annot., 3 A.L.R.2d 1003 (1949). See especially the cases cited in the supplement service.

Annot., *Accused's Right to Counsel Under the Federal Constitution*, 93 L.Ed. 137 (1948) and 2 L.Ed.2d 1644 (1958). Other annotations on related subjects are footnoted in these annotations.

Note, 34 NEB. L. REV. 711 (1955); Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559 (1951); Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15 (1952); Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281 (1955); Balter, *Assignment of Counsel in Federal Courts to Defend Indigent Persons Accused of Crimes*, 24 CALIF. S.B.J. 114 (1949); Holtzoff, *The Right of Counsel under the Sixth Amendment*, 20 N.Y.U.L.Q. REV. 1 (1944); Note, *The Right to Benefit of Counsel under the Federal Constitution*, 42 COL. L. REV. 271 (1942); Comment, *The Right to Counsel in Misdemeanor Cases*, 48 CALIF. L. REV. 501 (1960).

Extensive bibliographies may be found on the subject in WHARTON, *CRIMINAL PROCEDURE* § 2012-16 (1957) and BEANEY, *supra*, at 241-60 (1955).

³ *Betts v. Brady*, 316 U.S. 455 (1942).

⁴ ". . . [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." *Powell v. Alabama*, 287 U.S. 45, 71 (1932). See also *Williams v. Kaiser*, 323 U.S. 471 (1945).

waiver of counsel in a capital case would doubtless be sustained.⁵ On the other hand, due process probably does not, except in extreme instances, require a state to appoint counsel for indigent defendants in minor misdemeanor cases.⁶ Whether counsel must be appointed for such defendants in non-capital felony and serious misdemeanor cases is governed by the doctrine of *Betts v. Brady*.⁷ That case held that the right to counsel in such cases depends upon the circumstances of each case and that due process requires counsel at state expense only where the absence of counsel denies the "essentials of liberty and justice."⁸

The following cases will serve to illustrate the operation of the *Betts* Doctrine. In *Uvages v. Pennsylvania*,⁹ a seventeen year-old defendant pleaded guilty to four separate counts of burglary. Because of the defendant's age, inexperience, and the complexity of the charges against him, failure of the state to appoint counsel in that case was a denial of due process:

... [E]ach case depends on its own facts. Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or prosecuting officials, and the complicated nature of the offense charged and possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . the accused must have legal assistance . . . whether he pleads guilty or elects to stand trial, whether he requests counsel or not.¹⁰

In *Pennsylvania v. Cloudy*,¹¹ defendant was arraigned on eight charges of burglary, twelve charges of larceny, eight charges of

⁵ *Carter v. Illinois*, 329 U.S. 173 (1946); *Quicksall v. Michigan*, 339 U.S. 660 (1950).

⁶ *Nullinian v. State*, 156 Tex. Crim. 88, 238 S.W.2d 970 (1951); *Kissinger v. State*, 147 Neb. 983, 25 N.W.2d 829 (1947); *Brack v. State*, 187 Md. 542, 51 A.2d 171 (1947). However, some states by statute provide that a person accused of a misdemeanor has a right to appointed counsel. *E.g.*, W. VA. CODE ANN. § 6190 (Supp. 1953); COLO. STAT. ANN. c. 48 § 502 (1952); MICH. COMP. LAWS § 775.16 (1948). On this subject see 48 CALIF. L. REV. 501, *supra* note 2.

⁷ 316 U.S. 455 (1942).

⁸ *Id.* at 475.

⁹ 335 U.S. 437 (1948). Among the major cases construing the *Betts* case are: *Canizio v. New York*, 327 U.S. 82 (1946); *De Meerleer v. Michigan*, 329 U.S. 663 (1947); *Bute v. Illinois*, 333 U.S. 640 (1948); *Gibbs v. Burke*, 337 U.S. 733 (1949); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Palmer v. Ashe*, 342 U.S. 134 (1951); *Moore v. Michigan*, 355 U.S. 155 (1957).

¹⁰ *Uvages v. Pennsylvania*, 335 U.S. 437, 441 (1948).

¹¹ 350 U.S. 116 (1956). See also *Rice v. Olson*, 324 U.S. 786 (1945), which involved an Indian charged with burglary on a federal reservation who

forgery and more. The Supreme Court held that no layman could have understood the accusation and that the prisoner should therefore have been offered the right to be represented by counsel. In *Cash v. Cluver*,¹² decided only last year, a twenty year-old farm boy was convicted of burglary and sentenced to fifteen years. He had counsel at his first trial and the result was a hung jury. He did not have counsel at his second trial because no attorney would take his case for the fee his mother was able to offer. The Supreme Court required Florida to provide him with counsel at state expense and failure to do so was held to be a denial of due process.

Applying *Betts* to the instant case, defendant Johnson was faced with a grave and complex charge.¹³ He was young, inexperienced and uneducated. He knew nothing of law and had no previous experience in a criminal court. Under the *Betts* Doctrine, these are exactly the circumstances which "will render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair." Johnson would seem to be entitled to counsel at state expense under the Due Process Clause of the Fourteenth Amendment.

Of course, the Nebraska trial judge told defendant Johnson that he was "entitled to be represented by counsel" and it might be argued that Nebraska has therefore discharged its duty under due process and that defendant waived his right to counsel. It is submitted, however, that due process not only requires the state trial judge to offer counsel at state expense under the circumstances of this case but also to make sure that any waiver of counsel is intelligently made.¹⁴ In order for a waiver to be intelligent it must be made with an apprehension of the nature of the charges,

was held unable to defend himself in a state court because of the complicated jurisdictional question. Cf. *Williams v. Kaiser*, 323 U.S. 471 (1945); *Tompkins v. Missouri*, 323 U.S. 485 (1945); *House v. Mayo*, 324 U.S. 42 (1945).

¹² 358 U.S. 633 (1959).

¹³ Defendant pleaded guilty to a violation of NEB. REV. STAT. § 28-414 (Reissue 1956): "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned [from three to fifty years]." There are suggestions in appellant's brief that defendant came into possession of the money while attempting to prevent complaining witness from committing rape on a third person. Brief of Appellant, p. 5, *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

¹⁴ *Jenkins v. State*, 57 N.J. Super. 93, 154 A.2d 29 (1959), citing a leading case on this point: *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

the range of allowable punishments, the possible defenses, and the circumstances in mitigation thereof.¹⁵ Due process requires that the state trial judge make certain that the "waiver is understandingly and wisely made [and this can be done] only from a penetrating and comprehensive examination of all the circumstances under which the plea is made."¹⁶

*Carter v. Illinois*¹⁷ is a good example of a complete discharge of the state's duty to examine the waiver. The trial judge there explained to defendant the consequences of a plea of guilty, his right to have a lawyer appointed by the court, his right to a trial before a jury and the degree of proof that would be required to justify a verdict of guilty after a plea of not guilty. Defendant insisted, however, that he wanted to plead guilty, and since there were no facts showing immaturity or inability to comprehend, the plea was accepted and the judgment of conviction affirmed.

Certainly the action of the trial judge on Johnson's arraignment did not measure up to these standards. In the first place, the most that the record shows is that defendant was informed of a right "to be represented by counsel" and the judge's actual words are not of record. Secondly, a fair reading of the United States Supreme Court cases requires that every reasonable presumption be indulged *against* a waiver of the right to counsel.¹⁸ Furthermore, although the trial judge said nothing to defendant about counsel *at state expense*, there would still be no intelligent waiver even on the assumption that the judge had done so, if, as the defendant contended, the trial judge subsequently allowed defendant's mother to explain, "The boy says 'no' we'll not have a lawyer, *we can't afford it!*"¹⁹ In such a case the judge would have known that de-

¹⁵ *Jenkins v. State*, 57 N.J. Super. 93, 124, 154 A.2d 29, 46 (1959).

¹⁶ *Von Moltke v. Gillies*, 332 U.S. 708 (1948). It should be noted that *Von Moltke* is a federal case laying down a rule which has been adopted in New Jersey.

¹⁷ 329 U.S. 173 (1946). For an exhaustive analysis, see Annot., *Duty to Advise Accused as to Right to Assistance of Counsel*, 3 A.L.R.2d 1003 (1949), and supplements.

¹⁸ *Glasser v. United States*, 315 U.S. 60 (1942). "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Id.* at 70. As examples of state courts which refuse to indulge in presumptions of regularity, see *Gholson v. Commonwealth*, 308 Ky. 82, 212 S.W.2d 537 (1948); *Stonebreaker v. Smyth*, 187 Va. 250, 46 S.E.2d 406 (1948). *Contra*, *Edgemon v. State*, 195 Tenn. 496, 500, 260 S.W.2d 262, 264 (1953); *People v. Brown*, 397 Ill. 529, 74 N.E.2d 706 (1947).

¹⁹ Brief of Appellant, p. 15, *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

fendant and his parents did not fully understand his right to counsel at state expense and could not have made a "penetrating and comprehensive examination of all the circumstances" under which defendant waived his right. Allowing the waiver under such circumstances would probably amount to a denial of due process.

But assuming the above analysis of the instant case to be incorrect, (either because *Betts* does not apply or because defendant intelligently waived his right to counsel), one other federal constitutional consideration remains—equal protection of the law.²⁰ Nebraska offers to all indigent criminal defendants accused of a felony the right to be represented by court appointed counsel. But the practical effect of the instant case is to provide counsel only where the judge happens to inform the accused fully of his right or where the accused happens to know that "entitled to counsel" means counsel at state expense. Such haphazard enforcement of constitutional rights may well deny equal protection of the law.²¹ If so, Nebraska was under an equal-protection duty to offer this defendant counsel at state expense.

B. NEBRASKA'S STATE DUTY

Let us now assume the absence of any federal constitutional questions in *Johnson*. The question of state law still remains. Is the decision sound in the light of relevant social policy and other state decisions under comparable local law? Article I, section 11, of the Nebraska Constitution provides:

In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel. . . .

Section 29-1803 of the Nebraska Statutes provides in part:

When any person shall be indicted for an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel not

²⁰ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

²¹ The leading recent case, *Griffin v. Illinois*, 351 U.S. 12 (1956), held that a refusal to grant appeal solely because defendant was too poor to buy a transcript was a denial of equal protection of the law. The holding has been extended to require counsel for an indigent's appeal. *People v. Pitts*, 6 N.Y.2d 288, 160 N.E.2d 523 (1959). See also Annot., 55 A.L.R.2d 1072, 1085 (1957). The possibility that *Griffin* requires counsel in misdemeanor cases is discussed in 48 CALIF. L. REV. 501 (1960), and in 11 W. RES. L. REV. 649 (1960).

exceeding two, if the prisoner has not the ability to procure counsel. . . .

Looking at these provisions alone, one would expect that a Nebraska judge would have a duty under state law to inform "such persons" of their right to counsel at state expense. However, Nebraska case law is otherwise.²² In *Alexander v. O'Grady*,²³ for instance, the Nebraska Supreme Court interpreted the above statute to mean that failure to insist on the right to counsel is an implied waiver of the right. This is true, of course, only where the right to counsel under state law is involved. Where the *Betts* Doctrine applies, failure to request counsel is not a waiver.²⁴

There is some support in other states for Nebraska's interpretation. New York's statute, for instance, provides that if defendant appears without counsel "he must be asked if he desires aid of counsel."²⁵ *People v. Fink*,²⁶ a burglary and petit larceny case, is the latest in a line of cases involving a misunderstanding of the judge's explanation under this statute.²⁷ The following instructions were held to be adequate:

Q. You are entitled to a lawyer and a trial, if you so desire, or you can plead guilty or not guilty.

A. I plead guilty to the case.²⁸

The defendant's "personal interpretation of the advice he was given . . . is not good ground for relief."²⁹ This line of cases, however, is weakened by *People v. Hirsch*³⁰ where the defendant stated:

Q. Do I understand that if I ask for counsel, my bail will be revoked?

A. I don't know that this is so, but if you are prepared to proceed without counsel, you may do so.³¹

²² Compare the following cases: *In re Carper*, 144 Neb. 623, 14 N.W.2d 225 (1944); *Duggan v. Olson*, 146 Neb. 248, 19 N.W.2d 353 (1945); *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1950); and of course the instant case, *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

²³ 137 Neb. 645, 290 N.W. 718 (1940).

²⁴ See note 18 *supra*.

²⁵ N.Y. CODE CRIM. PROC. §§ 8, 308.

²⁶ 8 App. Div. 2d 859, 186 N.Y.S.2d 825 (1959).

²⁷ *People v. Crimini*, 278 App. Div. 998, 105 N.Y.S.2d 620 (1951); *People v. Ivers*, 285 App. Div. 845, 136 N.Y.S.2d 748 (1955).

²⁸ *People v. Fink*, 8 App. Div. 2d 859, 860, 186 N.Y.S.2d 825, 826 (1959).

²⁹ *Ibid.*

³⁰ 3 App. Div. 915, 162 N.Y.S.2d 602 (1957).

³¹ *Id.* at 916, 162 N.Y.S.2d at 603.

On appeal it was held that these remarks were sufficiently misleading to amount to misinformation and that the line of cases culminating in the *Fink* case was not therefore controlling.

Other states have given a contrary interpretation to statutory provisions similar to those of New York and Nebraska.³² South Dakota provides that the accused "must be informed by the court that it is his right to have counsel."³³ In a recent case,³⁴ involving a 21 year-old Nebraska resident charged with molesting a minor child, the South Dakota Court held the following instructions to be insufficient:

Q. You are, in addition, advised that you are entitled to be represented by an attorney at all stages of the case if you so desire . . . do you understand these rights?

A. I believe I do, Your Honor.³⁵

Since he was not informed that the court would appoint counsel for him, his waiver of the right to counsel was involuntary and unintelligent.

The North Dakota statute provides: "If he desires and is unable to employ counsel, the court must assign counsel."³⁶ This statute was interpreted to require that one accused of first degree murder must be informed of his right to counsel at state expense. The following conversation was fatally defective:

Q. Do you also understand that you have a legal right to hire an attorney and fight this case through the courts?

A. Yes, Sir.

Q. Do you wish that?

A. No, Sir.³⁷

Although the court could have reached this result under the Due Process Clause of the Fourteenth Amendment, it chose to rely solely on an interpretation of the above quoted statute.

³² For a fairly complete discussion of the conflicting views, see BEANY, *op. cit. supra* note 2, at 94-98. See also Note, 34 NEB. L. REV. 711 (1955); Note, *Duty to Advise Minor Defendant*, 83 U. PA. L. REV. 797 (1935). Representative authorities are collected in WHARTON, CRIMINAL PROCEDURE § 2015 (1957).

³³ S.D. CODE § 34.3506 (1939).

³⁴ *State v. Jameson*, 91 N.W.2d 743 (S.D. 1958).

³⁵ *Id.* at 744.

³⁶ N.D. REV. CODE § 29—1303 (1943).

³⁷ *State v. Magrum*, 76 N.D. 527, 545, 38 N.W.2d 358, 367 (1949).

Indiana does not even have a statute. However, its constitution provides that "accused shall have the right to be heard by himself and counsel."³⁸ Compare Nebraska's constitution, which provides that "accused shall have the right to appear and defend in person or by counsel."³⁹ What duty does this language impose on the trial judge? In *Winn v. State*,⁴⁰ an Indiana trial judge said to a defendant charged with armed robbery:

Q. Do you have an attorney?

A. No, Sir.

Q. Do you want one?

A. No, Sir.⁴¹

The court held that this was not an intelligent waiver. The language of the opinion shows a keen insight into the relationship of the federal Constitution to the Indiana Constitution:

Both this court and the United States Supreme Court have consistently held that, there can be no valid judgment against a defendant in a criminal case unless he has been offered, and, if so desired, provided with adequate counsel. . . . The court erred in failing to advise appellant, on his arraignment, that he was *entitled to have competent counsel represent him at public expense* if he was without money, means, or credit to pay for it himself.⁴²

In short the trial judge was under a duty to advise defendant of his right to counsel at state expense.

The South Dakota, North Dakota, and Indiana cases are probably representative of the better-reasoned weight of authority. Imposing a duty on the trial judge to inform defendants of right to counsel at state expense is no extra burden on the judge and obviates the expense of processing appeals of improper trials.⁴³ Finally such a duty eliminates the possibility of federal reversal on the ground that absence of counsel denied due process of law.

³⁸ IND. CONST. art. 1, § 13.

³⁹ NEB. CONST. art. 1, § 11.

⁴⁰ 232 Ind. 70, 111 N.E.2d 653 (1953).

⁴¹ *Id.* at 72, 111 N.E.2d at 655.

⁴² *Id.* (Emphasis added).

⁴³ Statistics show that the number of in forma pauperis petitions to the United States Supreme Court increased four-fold between 1939 and 1949. See BEANEY, *op. cit. supra* note 2, at 202.

III. DEFINITION OF INDIGENCY

The *Johnson* case raises an additional question of whether defendant, even if he had the *right*, could *qualify* for counsel at state expense. The statute provides counsel "if the person has not the ability to procure counsel."⁴⁴ How does a judge determine ability to procure counsel?

Usually, indigency is a question of fact⁴⁵ and will depend on a number of factors including whether the case is civil or criminal.⁴⁶ Other courts have held in criminal cases that the presence of rich relatives is immaterial,⁴⁷ that the possession of some property or income is not controlling,⁴⁸ and that the fact that the defendant began with counsel will not foreclose appointment of counsel when his funds are later exhausted.⁴⁹

*Fisher v. State*⁵⁰ involved a Nebraska statute which provides free transcripts in criminal appeals if the defendant is unable to pay.⁵¹ The appellant in that case obtained a free transcript even though her husband was employed and earning fifty dollars a week.

In the civil area the leading case is *Adkins v. E. I. DuPont de Nemours & Co.*⁵² There petitioner stated that she was a widow 74 years of age, that she had a home appraised at 3,450 dollars, that her only source of income was rent from parts of her home and that without such income she would be unable to purchase the necessities of life. The estimated cost of her appeal was 4,000 dollars. The United States Supreme Court held:

We cannot agree with the court below that one must be absolutely destitute to enjoy the benefits of this statute. . . . To say that no persons are entitled to the statute's benefits until they have sworn

⁴⁴ NEB. REV. STAT. § 29-1803 (Reissue 1956).

⁴⁵ *State v. Hill*, 239 Iowa 675, 32 N.W.2d 398 (1948); *United States v. Gicinto*, 114 F. Supp. 929 (W.D. Mo. 1953).

⁴⁶ The subject is generally discussed in 24 C.J.S. *Criminal Law* § 1710 (1940), and in the Digest system under Criminal Law key 1077.

⁴⁷ *Rastralli v. State*, 76 So. 2d 271 (Fla. 1954).

⁴⁸ Compare *Gaston v. State*, 106 So. 2d 622 (Fla. 1958), with *Braden v. Commonwealth*, 277 S.W.2d 7 (Ky. 1955).

⁴⁹ *Cash v. Cluver*, 358 U.S. 633 (1959).

⁵⁰ 153 Neb. 226, 43 N.W.2d 600 (1959). See also *Altis v. State*, 109 Neb. 776, 192 N.W. 327 (1923), where the court held that the judge can hear testimony on the question of poverty and also on the question of whether defendant has by his own act made himself unable to pay.

⁵¹ NEB. REV. STAT. § 24-342 (Reissue 1956).

⁵² 335 U.S. 331 (1948).

to contribute . . . the last dollar they have or can get . . . would be to . . . throw its beneficiaries into the category of public charges.⁵³

To the extent that these precedents are applicable to the instant case, this defendant is probably "unable to pay." The State's brief, to be sure, points out:

It strikes one as amazing that a family with the father working, which owns its own home and automobile, would balance the scale of justice with a pocket book, only seeking legal service if it were free.⁵⁴

On the other hand, defendant testified that he himself did not have the money and that his parents would have to mortgage their home to raise the money.⁵⁵ Perhaps the fact that his parents could or would help is immaterial⁵⁶ but if not, then certainly his parents run the risk of joining the defendant's wife and child as public charges if they mortgage all they have to raise the money.

This does not, of course, totally dispose of the problem of defining indigency. Should the judge consider such factors as that a defendant is about to inherit a large estate, that rich but rejected relatives are willing to hire an attorney, that the defendant could pay part of the expenses, or that the defendant is himself an attorney and does not need one appointed? The most satisfactory answer to each question is beyond the scope of this comment,⁵⁷ but it is submitted that each case should depend on the amount of money required, the nature of the proceeding, the availability of other means of securing defendant's rights and the seriousness of the consequences which would follow a denial of his right to proceed as an indigent.

⁵³ *Id.* at 339. This language was relied on in a New Jersey case, where the plaintiff and his wife did not work but lived on an income of less than \$1,000 a year derived from rented rooms in a semi-apartment house. "Thus the plaintiff is not wholly destitute but if the house had to be sold to pay for the costs of the appeal, he might well become a public charge." *Sejeck v. Singer Mfg. Co.*, 113 F. Supp. 281 (D.N.J. 1953).

⁵⁴ Brief of Appellee, p. 18, *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

⁵⁵ Brief of Appellant, p. 14, *Johnson v. State*, 169 Neb. 783, 100 N.W.2d 844 (1960).

⁵⁶ *Rastralli v. State*, 76 So. 2d 271 (Fla. 1954).

⁵⁷ A good beginning, in addition to note 46 *supra*, would be Annot., 55 A.L.R.2d 1072, 1085 (1957), and the annotated statutes under *forma pauperis*.

IV. CONCLUSION

The instant case is unsound as a matter of federal and state law. Defendant, because of age, inexperience, indigency and the serious charge against him had a federal right to appointed counsel. Failure to inform him fully of this right made his waiver unintelligent and permitting such a waiver denied him due process and equal protection. Furthermore, the decision appears to be unsound as a matter of local Nebraska law.⁵⁸ To obviate such cases as *Johnson*, the Nebraska Statutes should be amended to include a clear statement of the judge's duty to advise defendants fully of all their rights, to provide for a complete record at the arraignment stage, and to provide a clear definition of what circumstances amount to "indigency."

Richard E. Gee, '62

⁵⁸ In addition, it seems unfair. "There is something wrong with a system of Government which rations justice in accordance with the thickness of a man's wallet." Messerman, *Indigent's Right to Counsel on Appeal*, 11 W. RES. L. REV. 649, 660 (1960).