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## Constitutional Law—Right to Counsel—Waiver

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CONSTITUTIONAL LAW—RIGHT TO COUNSEL—WAIVER\*—The sixth amendment to the United States Constitution entitles one charged with a crime to the assistance of counsel as an essential jurisdictional prerequisite to the court's authority to deprive the accused of his life or liberty.<sup>1</sup> Lack of counsel will not bar conviction if the accused competently and intelligently<sup>2</sup> waives his right to be represented.<sup>3</sup> The United States Supreme Court has said that "courts indulge every reasonable presumption against waiver"<sup>4</sup> and "do not presume acquiescence in the loss of fundamental rights."<sup>5</sup> For example, even a plea of guilty will not automatically waive the right to counsel.<sup>6</sup> To further protect the rights of the indigent accused, the high Court has said that the record or at least an allegation and evidence must show that the accused was offered counsel and intelligently waived his right.<sup>7</sup>

In *State v. Vaughn*,<sup>8</sup> the defendants were charged with a noncapi-

\* *State v. Vaughn*, 393 P.2d 711 (N.M. 1964); *Sanders v. Cox*, 395 P.2d 353 (N.M. 1964).

1. *Powell v. Alabama*, 287 U.S. 45 (1932) (life); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (liberty). The sixth amendment was originally enforced only against the federal government, *United States v. Dawson*, 56 U.S. (15 How.) 467, 487 (1853), but in *Gideon* the Supreme Court held that right to counsel was fundamental and essential to a fair trial and "made obligatory upon the states by the Fourteenth Amendment." *Gideon v. Wainwright*, *supra* at 342. For the pre-*Gideon* history of the development of right to counsel, from a right to bring a lawyer to court to the right of an indigent to have counsel appointed, see Beane, *Right to Counsel in American Courts* (1955).

2. What constitutes competence and intelligence in waiving the right to counsel will not be covered by this comment. See Annot., 71 A.L.R.2d 1160 (1960). The subject of the annotation mainly concerns waiver by minors, but the elements discussed could apply generally.

3. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). *Johnson* is a federal case but is no longer distinguishable in state prosecutions on that ground:

We have held that the guarantees of the First Amendment . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment . . . and the right to counsel guaranteed by the Sixth Amendment, *Gideon v. Wainwright* . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.

*Malloy v. Hogan*, 378 U.S. 1, 10 (1964).

4. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

5. *Ibid.*

6. *Rice v. Olson*, 324 U.S. 786, 788 (1945).

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Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.

*Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

8. 393 P.2d 711 (N.M. 1964).

tal felony<sup>9</sup> when brought before the Justice of the Peace, and they entered a plea of not guilty.<sup>10</sup> At the preliminary hearing<sup>11</sup> they asked for counsel<sup>12</sup> and were told they would have to hire a lawyer.<sup>13</sup> Unable to do so, they represented themselves.<sup>14</sup>

When bound over to district court they were appointed counsel.<sup>15</sup> After a verdict of guilty was returned, the defendants moved for a new trial<sup>16</sup> on the grounds that they were denied their constitutional right to counsel at the preliminary hearing. The motion was denied. On appeal to the New Mexico Supreme Court, *held*, Affirmed.<sup>17</sup> There is a constitutional right to appointed counsel at the preliminary hearing,<sup>18</sup> but if counsel is appointed at a later stage and counsel and accused are then questioned about the denial of the right to appointed counsel at the preliminary hearing, a failure to object to the denial amounts to an express waiver of the right.<sup>19</sup>

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9. The defendants were charged with escaping from the New Mexico State Penitentiary, a crime punishable by a sentence of two years to life. N.M. Laws 1955, ch. 143, § 1, now covered by N.M. Stat. Ann. §§ 40A-22-9, -29-3 (B) (Repl. 1964).

10. N.M. Stat. Ann. § 41-3-1 (Repl. 1964) provides:

When the defendant is brought before the magistrate upon arrest . . . the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also his right to waive an examination [preliminary hearing] before any further proceedings are had.

This proceeding is commonly called the magistrate's arraignment because the accused is usually required to plead. There is apparently no statutory authority for the plea.

11. N.M. Stat. Ann. § 41-3-8 (Repl. 1964). The popular name is preliminary hearing, but the statutory language is preliminary examination. Article 3 of Chapter 41, N.M. Stat. Ann. (Repl. 1964), apparently encompasses both proceedings herein referred to as the magistrate's arraignment and the preliminary hearing. The compilers of the statutes have captioned Article 3 as "Preliminary Examination." See N.M. Stat. Ann. §§ 41-3-1 to -16 (Repl. 1964).

12. Record, pp. 19-20, *State v. Vaughn*, 393 P.2d 711 (N.M. 1964).

13. The statute provides that the accused is to be told that he has a right to be represented by counsel at every stage, but the magistrate is not authorized to appoint counsel for indigents. N.M. Stat. Ann. § 41-3-1 (Repl. 1964). *But see* the discussion of District Court Rule 92 at note 54 *infra* and accompanying text.

14. One of the defendants asked when counsel would be appointed; he was told that counsel would be appointed only at the district court. He chose to waive the preliminary hearing. The other two defendants went through the motions of presenting a defense, cross-examining witnesses, etc.

15. New Mexico has appointed counsel for indigents in all felony cases at the district court stage since 1937. N.M. Stat. Ann. § 41-11-2 (Repl. 1964). The defendants asked the court to appoint a second attorney after becoming dissatisfied with the first appointee. The court refused, so the defendants said they would conduct the trial themselves. The attorney attended the trial and attempted to help the defendants. Record, p. 40, *State v. Vaughn*, 393 P.2d 711 (N.M. 1964).

16. A new attorney was appointed for the motion for new trial. He and another member of the same firm took the case on appeal.

17. *State v. Vaughn*, 393 P.2d 711, 716 (N.M. 1964).

18. *Id.* at 713.

19. *Id.* at 715.

In *Sanders v. Cox*,<sup>20</sup> the petitioner was charged with three separate noncapital felonies. At the magistrate's arraignment the petitioner entered a plea of guilty to each charge but the prosecution elected to hold a preliminary hearing.<sup>21</sup> The petitioner was not represented by counsel at the preliminary hearing but was later appointed counsel at the district court. He was eventually sentenced to the penitentiary on the basis of his plea of guilty. He petitioned the New Mexico Supreme Court for a writ of habeas corpus on grounds that he had been denied the right to counsel at the preliminary hearing and also before that hearing, *i.e.*, at the magistrate's arraignment.<sup>22</sup> The New Mexico Supreme Court, *held*, Writ of habeas corpus denied.<sup>23</sup> There is no absolute constitutional right to counsel prior to the preliminary hearing in a noncapital case<sup>24</sup> and the right to counsel at the preliminary hearing is waived if the counsel appointed at a later stage does not show the trial court that some prejudice resulted.<sup>25</sup>

To find that the defendants in *Vaughn* had waived their right to counsel at the preliminary hearing, the court used the following reasoning: (1) There is a right to be represented by counsel at the preliminary hearing,<sup>26</sup> which may be waived;<sup>27</sup> (2) in New Mexico

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20. 395 P.2d 353 (N.M. 1964).

21. The facts were taken from the reported opinion.

22. See note 10 *supra*.

23. *Sanders v. Cox*, 395 P.2d 353, 354 (N.M. 1964).

24. A discussion of what should be the earliest critical stage in a noncapital case is beyond the scope of this comment. The United States Supreme Court has not ruled directly on the point, but it should be noted that Mr. Justice Clark, concurring in *Gideon*, said that the Court had now done away with the distinction between capital and noncapital felonies on the right to counsel issue. *Gideon v. Wainwright*, 372 U.S. 335, 347-48 (1963) (concurring opinion).

25. *Sanders v. Cox*, 395 P.2d 353, 354 (N.M. 1964).

26. The court said that there was a right to counsel at every critical stage and that "the preliminary examination may be such a critical stage," *State v. Vaughn*, 393 P.2d 711, 713 (N.M. 1964), and also said that "it may be assumed that [defendants] . . . knew of their constitutional right to have had the assistance of counsel at their preliminary examination . . ." *Id.* at 715. For this holding in a noncapital case the court relied on *White v. Maryland*, 373 U.S. 59 (1963), a capital case, indicating that possibly it was taking Mr. Justice Clark's advice that the distinction between capital and noncapital felonies had been abolished. See note 24 *supra*. In *White*, the Supreme Court said that what made the Maryland proceeding critical was the plea entered before the magistrate. *White v. Maryland*, *supra* at 60. In New Mexico, normally two pleas are taken before the accused has the actual preliminary hearing; first, at the so-called magistrate's arraignment, and again just prior to the hearing. The court in *Vaughn* did not emphasize this point although the defendants had given pleas both times. Record, pp. 18-19, *State v. Vaughn*, 393 P.2d 711 (N.M. 1964). The statutes apparently do not provide for a plea at this stage. N.M. Stat. Ann. §§ 41-3-1 to -16 (Repl. 1964). But see Poldervaart, New Mexico Justice Manual 163 (1958).

27. *State v. Vaughn*, 393 P.2d 711, 714 (N.M. 1964), citing *Moore v. Michigan*, 355 U.S. 155 (1957).

a criminal defendant may make a plea in abatement prior to district court arraignment and have the case remanded to the committing magistrate to correct constitutional errors made at the preliminary hearing;<sup>28</sup> (3) at a pre-trial conference the trial judge asked the defendants and their appointed counsel if they had any objections to the proceedings before the magistrate and all said no;<sup>29</sup> (4) since the defendants did not ask to remand, they in effect waived any objection to the denial of their right to counsel at the preliminary hearing.<sup>30</sup>

In *Carnley v. Cochran*,<sup>31</sup> the United States Supreme Court reversed a conviction and remanded to the state court because "the record [did] not show that the trial judge offered and the petitioner declined counsel."<sup>32</sup> In *Vaughn*, the record did not show that the trial judge at the pre-trial conference "offered" the defendants the information that they had been denied the right to counsel at the preliminary hearing and could remand for another hearing with counsel. This so-called pre-trial conference is not a creature of the New Mexico statutes on criminal procedure and there was no transcript of the proceedings. However, the New Mexico Supreme Court found that the conference of April 3, 1963 concerned "the denial of counsel to [defendants] at the preliminary."<sup>33</sup>

The trial judge in *Vaughn* did keep his handwritten notes of the pre-trial conference but in his order denying the new trial he was careful to say only that he asked each defendant and their appointed attorney "whether they had any objections to the proceedings at and during the Preliminary Hearing."<sup>34</sup> This was the only statement of record and certainly does not indicate that the conference concerned denial of right to counsel. Furthermore, a negative reply to such a general question would not seem to indicate a waiver of a

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28. *State v. Vaughn*, 393 P.2d 711, 714 (N.M. 1964), citing *State ex rel. Hanagan v. Armijo*, 72 N.M. 50, 380 P.2d 196 (1963) and *State v. Rogers*, 31 N.M. 485, 247 Pac. 828 (1926).

29. Record, p. 39, *State v. Vaughn*, 393 P.2d 711 (N.M. 1964).

30. "An intelligent waiver of the right to remand just as effectively waives the right to the preliminary as does waiver before the magistrate." *State v. Vaughn*, 393 P.2d 711, 714 (N.M. 1964).

31. 369 U.S. 506 (1962).

32. *Id.* at 513.

33. *State v. Vaughn*, 393 P.2d 711, 715 (N.M. 1964).

34. *Id.* at 713.

constitutional right under the cases decided by the United States Supreme Court.<sup>35</sup>

But *Carnley v. Cochran* also states that if the waiver was not made for the record "there must be an allegation and evidence which show, that an accused was offered counsel but . . . rejected the offer. Anything less is not a waiver."<sup>36</sup> Even with this test the court in *Vaughn* had a problem since the allegation and evidence of waiver were not shown by testimony in the record on appeal. The court could have believed that the lack of objection to the trial judge's very general question about the preliminary hearing was enough to constitute a waiver of a constitutional right, but this would clearly be erroneous under the United States Supreme Court precedents.<sup>37</sup> It is possible that the attorneys and the court discussed the matter on oral argument and it was shown exactly what was discussed at the pre-trial conference. That might have resolved the issue for the appellate court, but it is doubtful that such a presentation is what the United States Supreme Court meant by allegation and evidence.

Perhaps sensing the weakness of the finding, without facts in the record, that the defendants were actually told of their right to counsel and had then made an affirmative waiver, the court in *Vaughn* justified the finding with the following presumption:

In view of the fact that defendants had the assistance of counsel at the first hearing before the trial judge on April 3, 1963<sup>38</sup> . . . it may be assumed that they not only knew of their constitutional right

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35. *Moore v. Michigan*, 355 U.S. 155, 161-62 (1957), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), all indicate that the accused must be asked if he desires counsel and he can then decline the offer. If he does decline, waiving his right, he would later have the burden of showing that the waiver was not intelligent and competent.

One case goes even further and states that if the accused waives the right to counsel the judge must make more than a routine inquiry and assure himself that the waiver was valid. The opinion of the court was "signed" by its author and three others. The latter fact plus the odd circumstances of this wartime civil liberties case may make it an isolated opinion. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (opinion of Black, J.).

Two pre-*Gideon* 5-4 decisions support the opposing view: *Bute v. Illinois*, 333 U.S. 640 (1948), and *Carter v. Illinois*, 329 U.S. 173 (1946). Under these holdings the due process clause of the fourteenth amendment did not require the record to show that the state court inquired about defendant's desire to be represented.

36. *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). See note 7 *supra* and accompanying text.

37. See note 35 *supra*.

38. The "hearing" referred to by the court was the pre-trial conference.

to have had the assistance of counsel at their preliminary examination, but had been advised as well concerning their right to have the information abated and the case remanded . . . .<sup>39</sup>

No direct authority exists for this presumption, which seems to propose that constitutional rights may be waived by acquiescence to the later appointment of counsel.<sup>40</sup> In *Vaughn*, where the defendants clearly expressed their desire for assistance of counsel at the preliminary hearing and later asked that their trial counsel be replaced, the presumption is certainly strained.<sup>41</sup>

What does *Sanders v. Cox*, coming less than two months after *Vaughn*, do to the holding in *Vaughn*? *Sanders* says that there are no cases supporting the contention that a person accused of a non-capital felony has a right to counsel prior to the preliminary hearing.<sup>42</sup> In *Vaughn* the court held that a person accused of a noncapital felony had a right to counsel at the preliminary hearing, citing no cases to support the contention.<sup>43</sup> On this point, then, it is arguable that *Sanders* weakens *Vaughn* by making the capital-noncapital distinction.

It is obvious that the court in *Sanders* did extend the capital-noncapital distinction to the preliminary hearing as well as proceedings prior to the hearing and hence apparently overruled *Vaughn*. The court did not say this, of course, but it did say that now the defendant has to show that prejudice resulted at the hearing to prevail on a claim of denial of right to counsel at the preliminary hearing. This was the test for the right to counsel at the

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39. *State v. Vaughn*, 393 P.2d 711, 715 (N.M. 1964).

40. The court in *Vaughn* relied on *State v. Garcia*, 47 N.M. 319, 142 P.2d 552 (1943), and *Orr v. State*, 200 Ind. 27, 161 N.E. 269 (1928), for this point. In *Garcia* the defendant had the advice of counsel when brought before the judge for arraignment, but later fired his lawyer and voluntarily changed his plea to guilty. *Garcia* relied entirely on *Orr*. In *Orr*, the accused pleaded not guilty, later changed the plea to guilty and was convicted. His attorney moved for a new trial, but the trial judge denied the motion after a review of all the evidence. The Indiana Supreme Court also reviewed the evidence and held that the trial judge had not abused his discretion in denying the new trial. By way of dictum it noted that apparently the accused had able counsel and was fully advised of his rights and defenses. *Orr v. State*, *supra* at 29, 161 N.E. at 270.

41. The only advice the defendants had which was on the record was the district attorney's statement that they could not have an attorney appointed at the preliminary hearing. Record, pp. 19-20, *State v. Vaughn*, 393 P.2d 711 (N.M. 1964). It does not reasonably follow, after requesting counsel at the preliminary hearing, that if and when the defendants were told that the district attorney was wrong, they would docilely waive all objections.

42. *Sanders v. Cox*, 395 P.2d 353 (N.M. 1964).

43. *State v. Vaughn*, 393 P.2d 711, 713, 715 (N.M. 1964).

trial level in state courts before *Gideon v. Wainwright*; i.e., only those charged with a capital crime had an absolute right to counsel, and others had to show after conviction that they had been prejudiced by the denial due to special circumstances.<sup>44</sup> Limiting *Gideon* to its facts, the New Mexico court probably reasoned that it could still use the prejudice test for pre-trial proceedings.<sup>45</sup> In *Vaughn*, the court did not discuss whether any prejudice had resulted<sup>46</sup> because it did not make the capital-noncapital distinction. The court simply said that the defendants had a right to counsel at the preliminary hearing, and those defendants had been charged with a noncapital crime.

Under the pre-*Gideon* rule the defendant could raise the issue of denial of right to counsel resulting in prejudice on appeal and on petition for habeas corpus. The court, even the United States Supreme Court, would then examine the facts and decide whether prejudice had in fact resulted.<sup>47</sup> But in *Sanders* the New Mexico court refused to make an independent ruling on whether prejudice resulted.<sup>48</sup> The court instead said that since the petitioner's trial attorney saw the transcript of the preliminary hearing, the attorney had to raise any question of prejudice before the trial judge or the issue of denial of right to counsel at the hearing was waived. "A defendant in a criminal case may not acquiesce in any error and

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

45. See note 25 *supra* and accompanying text. But see the recent opinion of the Second Circuit Court of Appeals:

Before *Gideon*, it may have been possible to argue that the more egregious cases of prejudice could be rectified if pleas of guilty were reviewed for 'fundamental fairness.' But it was precisely this sort of elusive and unsatisfactory inquiry into the possibility of prejudice which *Gideon* sought to inter once and for all. Indeed, the overruling of *Betts* by *Gideon* seems grounded on two fundamental assumptions: that a criminal defendant compelled to act without the advice of counsel will always be disadvantaged thereby, and that the precise degree of that disadvantage can never be satisfactorily measured by an after-the-fact search for prejudice. Since the considerations which impelled the *Gideon* Court to abandon the 'fundamental fairness' test seem equally applicable to guilty pleas, there would seem no warrant for resurrecting a rule of law which has been so thoroughly discredited.

*United States ex rel. Durocher v. LaVallee*, 330 F.2d 303, 308-09 (2d Cir. 1964), cert. denied, 377 U.S. 998 (1964).

46. The evidence was uncontradicted that the defendants in *Vaughn* had escaped from the penitentiary. Since the purpose of the preliminary hearing is only to find probable cause, it would seem that a defendant might have a heavy burden in showing prejudice which would demand reversal.

47. See, e.g., *Carnley v. Cochran*, 369 U.S. 506 (1962).

48. *Sanders v. Cox*, 395 P.2d 353, 354 (N.M. 1964).



later assign such error for his discharge from custody."<sup>49</sup> If the court meant that the defendant had acquiesced in the denial of right to counsel by not raising the issue at the trial level, the court would clearly be overlooking the admonition of the United States Supreme Court that "we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."<sup>50</sup> In other words, the defendant in *Sanders* could not waive this right by mere acquiescence in his attorney's lack of objection. He did not know of any right or privilege at that point; how, therefore, could he have intentionally abandoned any objections he might have had?<sup>51</sup>

It can be argued that *Vaughn* and *Sanders* are distinguishable, and that the latter did not overrule the former. In *Sanders*, the defendant had pleaded guilty at his preliminary hearing. He had in effect decided not to challenge the State's assertion that there was probable cause. Indeed, the plea of guilty before the magistrate automatically waives the right to a preliminary hearing,<sup>52</sup> but the State chose to have a hearing. In *Vaughn*, on the other hand, the defendants pleaded not guilty and therefore put the issue of probable cause squarely before the magistrate at the preliminary hearing. Common sense might dictate that the accused would have more need for counsel in the *Vaughn* situation, and the court would not bother to look for prejudice, but would hold the denial of counsel unconstitutional.

But saving *Vaughn* as precedent by this distinction really depends on finding that the court in *Sanders* is correct in saying that a plea of guilty makes a difference on the issue of right to counsel. If the district attorney is not sure of the case he has before him and requests a preliminary hearing, it can be argued that maybe the defendant should not have been so sure of his plea, and needs coun-

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49. *Ibid.*

50. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

51. Since *Sanders* had appointed counsel at the district court stage, why didn't the supreme court use the *Vaughn* argument of a presumption that he was told of his right to counsel and the right to remand by the attorney? (See note 40 *supra* and accompanying text.) This point is interesting only because one might think initially that the court in *Sanders* could have found a waiver without devising the prejudice test. But during the hearing before the supreme court on *Sanders'* petition, the attorney who had been appointed for the original trial testified that he had not considered telling the defendant of any possible denial of a constitutional right at the preliminary hearing. [This testimony is on tape which is not a part of the permanent record of the case. The author of this comment attended the hearing.]

52. *State v. Alaniz*, 55 N.M. 312, 316-17, 232 P.2d 982, 984 (1951).

sel at the preliminary hearing as much as anyone. Furthermore, the United States Supreme Court has ruled that "a defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary."<sup>53</sup> It would seem that if the State decided to have a preliminary hearing, and if there really is a right to counsel at the preliminary hearing for a noncapital felon, then the fact that the accused pleads guilty before the hearing cannot affect his right to have the assistance of counsel. Assuming no waiver, *Vaughn* should control and the petitioner in *Sanders* would be granted a writ of habeas corpus on the basis of the denial of right to counsel at the preliminary hearing. The alternative would be to fall back on the capital-noncapital distinction, overrule *Vaughn*, and demand that prejudice be shown regardless of the plea.

It must be noted that the court only has to wrestle with these problems for prosecutions which began before September 1, 1964, the effective date of Rule 92 of the Rules of Civil Procedure for the New Mexico District Courts.<sup>54</sup> Under Rule 92, the district court must appoint an attorney to represent an indigent defendant at the preliminary hearing, when the request of a bona fide indigent is certified to the court by the committing magistrate. The accused may waive the right to representation by counsel at the preliminary

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53. *Rice v. Olson*, 324 U.S. 786, 788 (1945).

54. N.M.R. Civ. P. 92:

1. The assistance of counsel is a fundamental right in all criminal proceedings wherein a defendant is accused of a felony or any crime punishable by a possible penitentiary sentence. In all such cases, the district court of each judicial district within the state shall designate by appointment one or more attorneys to represent any indigent defendant who requests counsel at a preliminary hearing and all subsequent proceedings in connection with the defendant's defense or appeal if requested.

2. It shall be the duty of the judge of any inferior court, sitting as a committing magistrate, immediately upon any defendant's being brought before him following his arrest upon a charge constituting a felony, to inform such person of his right to assistance of counsel at every stage of the proceeding, and that if he is indigent, that counsel will be appointed to represent him. If after being so informed, unless waived as hereinafter provided and such person is in fact indigent, the judge of such inferior court shall immediately certify such facts in writing to the district court, requesting the appointment of counsel on behalf of such defendant by the district judge. Immediately upon receipt of such certification, it shall be the duty of the district court to appoint counsel to represent the indigent person so charged at the preliminary hearing and in all subsequent proceedings. Nothing herein shall be considered as preventing the intelligent waiver by any defendant of the right to representation by counsel at the preliminary hearing, but such waiver must be in writing and certified to by the committing magistrate. (The foregoing Rule 92 to be effective on and after September 1, 1964.)

hearing, but the waiver must be in writing and certified to by the magistrate. But since the real issue for the state courts is the effect of *Gideon v. Wainwright*, and since *Gideon* has been held to apply retroactively,<sup>55</sup> the court is faced with a flood of habeas corpus petitions for pre-Rule 92 denials of counsel.

The New Mexico court may have thought that *Gideon* would probably not be limited to its facts for very long.<sup>56</sup> Therefore, instead of dismissing all petitions for writ of habeas corpus by per curiam opinions, when the only issue was denial of counsel before the trial for one accused of a noncapital crime, the court went ahead and developed other theories to keep the prison gates from flying open. As shown by the *Vaughn* and *Sanders* cases, the latter approach may give the court more problems than solutions.

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55. United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir. 1964), *cert. denied*, 377 U.S. 998 (1964).

56. This is a very safe assumption. For example, see the odyssey of Marvin Doughty, who pleaded guilty without counsel to a noncapital crime and was imprisoned on the basis of that plea. Doughty petitioned the Supreme Court of Ohio for writ of habeas corpus and the writ was denied. *Doughty v. Sacks*, 173 Ohio St. 407, 183 N.E.2d 368 (1962). The United States Supreme Court granted certiorari and then remanded for further consideration in light of *Gideon v. Wainwright*. *Doughty v. Maxwell*, 372 U.S. 781 (1963). The Ohio court on remand distinguished *Gideon* on the grounds that *Gideon* had specifically asked for assistance, pleaded not guilty, and had to conduct his defense on his own, whereas Doughty never requested counsel and pleaded guilty. *Doughty v. Sacks*, 175 Ohio St. 46, 191 N.E.2d 727 (1963). Up again on certiorari, the United States Supreme Court in a per curiam opinion reversed, without remanding, citing *Gideon v. Wainwright*. *Doughty v. Maxwell*, 376 U.S. 202 (1964).