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**INDIGENT CRIMINAL DEFENDANT'S CONSTITUTIONAL
RIGHT TO COMPENSATED COUNSEL**

*State v. Rush**

The Supreme Court has said that an indigent defendant's constitutionally guaranteed right to counsel extends to all criminal prosecutions in state¹ as well as federal courts,² and to the appellate³ and interrogation⁴ stages as well as the trial level.⁵ But in extending an indigent defendant's sixth amendment rights,⁶ the Court has yet to address itself to the question of whether the constitutional mandate is satisfied by the appointment of uncompensated counsel.⁷ This question recently confronted the New Jersey Supreme Court in *State v. Rush*,⁸ where an attorney assigned to represent defendants in two separate, nonmurder⁹ criminal prosecutions appealed from the lower court's decision that he was not entitled to compensation for services rendered or to reimbursement for out-of-pocket expenses necessarily incurred.

State v. Rush

In *Rush*, appellant argued first that his own constitutional rights were violated in that an assignment of counsel without compensation takes private property for public use without just compensation in violation of the due process clause of the fourteenth amendment. He further argued that the exaction of gratuitous service violates the equal protection clauses of both the federal and state constitutions,¹⁰ and constitutes involuntary servitude within the meaning of the thirteenth amendment and peonage prohibited by federal law.¹¹ The *Rush* court, while rejecting all of the above contentions, forecast that the due process

* 46 N.J. 399, 217 A.2d 441 (1966).

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² *Johnson v. Zerbst*, 304 U.S. 458 (1938).

³ *Douglas v. California*, 372 U.S. 353 (1963). The Court limited its holding to the first appeal following conviction.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 470 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁵ *Gideon v. Wainwright*, supra note 1.

⁶ "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

⁷ The phraseology is borrowed from Ervin, "Uncompensated Counsel: They Do Not Meet the Constitutional Mandate," 49 A.B.A.J. 435 (1963).

⁸ 46 N.J. 399, 217 A.2d 441 (1966).

⁹ The only New Jersey statute expressly dealing with the subject of compensation is N.J. Stat. Ann. § 2A:163-1 (1953), which provides for payment to assigned counsel "in a murder case." The statute has been narrowly construed so as to deny compensation to counsel assigned to represent a minor charged with juvenile delinquency involving homicide, *In re Steenback*, 34 N.J. 89, 167 A.2d 397 (1961), and to deny compensation to assigned counsel where there was a homicide but a murder indictment was not returned by the grand jury. *State v. Donaldson*, 36 N.J. 45, 174 A.2d 896 (1961). The "reasonable compensation" to be allowed under the statute has been interpreted as requiring more than a mere token or honorarium but less than the full compensation counsel would receive were the accused able to pay. *State v. Horton*, 34 N.J. 518, 531-32, 170 A.2d 1, 8 (1961). With respect to reimbursement for out-of-pocket expenses, see the discussion of *Horton*, infra note 18 and accompanying text.

¹⁰ "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, para. 1. "Private property shall not be taken without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation . . ." N.J. Const. art. I, para. 20.

¹¹ Rev. Stat. § 1990 (1875), 42 U.S.C. § 1994 (1964).

argument might be relevant in the future. "Conceivably the burden upon the bar could reach such proportions as to give the due process argument a force it does not now have."¹²

Of greater significance for present purposes was appellant's contention that an indigent defendant's constitutional rights are infringed by a denial of reasonable compensation and reimbursement of out-of-pocket expenses to his appointed counsel.¹³ As regards this latter contention, the constitutional question raised can be stated as follows: Are an indigent defendant's constitutional rights to equal protection of the laws and due process fully protected where his appointed counsel receives neither reasonable compensation nor reimbursement for out-of-pocket expenses?¹⁴

The *Rush* court, applying the previously announced doctrine of *State v. Horton*,¹⁵ agreed with appellant to the extent that protection of the indigent's constitutional rights required reimbursement of necessary out-of-pocket expenses to his appointed counsel. "The obligation of the State to provide the indigent with the means for an appropriate defense rises from an interplay of the constitutional rights to counsel, to a fair trial, and to equality before the law."¹⁶ It was error, *Rush* held, for the lower court to construe the *Horton* guidelines for reimbursement as applicable only in murder prosecutions.¹⁷ In *Horton* the New Jersey Supreme Court had stated: "The constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to proper defense in addition to the time and professional efforts of an attorney"¹⁸ *Rush*, however, while finding that reimburse-

¹² *State v. Rush*, 46 N.J. 399, 408, 217 A.2d 441, 446 (1966). For an example of one situation where a court has found this due process argument applicable, see *People v. Randolph*, 219 N.E.2d 337 (Ill. 1966). Here, the court said that a statute specifically limiting appointed attorney's compensation to \$500 (\$250 for counsel fees, \$250 for expert witnesses) for each defendant represented in a capital case "cannot constitutionally be applied where it appears . . . that appointed counsel cannot continue to serve because they are suffering an extreme, if not ruinous, loss of practice and income and must expend large out-of-pocket sums in the course of the trial." 219 N.E.2d at 341. In addition to the undue hardship on the attorney involved, the court's decision appears to have been partially an impairment of the accused's right to counsel. *Id.* at 340. See discussion accompanying notes 58-64 *infra*.

¹³ The court assumed that there was requisite standing to press these constitutional claims, apparently on the grounds that the applicant was not interested in "a dollar result for himself." The applicant had requested that "should he prevail, the award for his services be limited to six cents." *State v. Rush*, *supra* note 12, at 405, 217 A.2d at 444. The invocation of the constitutional rights of a third party, often frowned upon by the United States Supreme Court, e.g., *Tileston v. Ullman*, 318 U.S. 44 (1943), has been tolerated in unusual circumstances. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 257 (1953).

¹⁴ The question hinges alternatively on which provision of the fourteenth amendment one deems applicable. Justice Harlan, for example, would no doubt consider an equal protection argument irrelevant in this context, justifying his view on the premise that the equal protection clause imposes no obligation on the state to mitigate inequalities which have arisen independently of state action. See his dissenting opinions in *Griffin v. Illinois*, 351 U.S. 12, 34-39 (1956) and *Douglas v. California*, 372 U.S. 353, 360 (1963). Judging from the language of the majority opinions in these cases, both equal protection and due process considerations would appear important. For a critical appraisal of Justice Harlan's view, see Willcox & Bloustein, "The Griffin Case—Poverty and the Fourteenth Amendment," 43 *Cornell L.Q.* 1, 15 (1957).

¹⁵ 34 N.J. 518, 170 A.2d 1 (1961); see note 18 *infra* and accompanying text.

¹⁶ *State v. Rush*, *supra* note 12, at 416, 217 A.2d at 450.

¹⁷ *Ibid.*

¹⁸ *State v. Horton*, 34 N.J. 518, 534, 170 A.2d 1, 9 (1961). In outlining its guidelines, the court, in *Horton*, stated reimbursement to appointed counsel was required for:

ment of necessary out-of-pocket expenses was constitutionally required, rejected the claim that an indigent defendant is deprived of his constitutional rights where his appointed counsel does not receive reasonable compensation. The court found no data to support the view that assigned counsel serving gratuitously are less qualified or more apt to shirk their responsibilities than compensated counsel.¹⁹

But, though dismissing the constitutional arguments forwarded in support of compensation, the court nonetheless determined as a matter of state policy that it would no longer require gratuitous defense of the indigent in nonmurder cases.²⁰ This policy determination was based on what the court viewed as the steadily increasing burden of assignments, both in quantity and in the time required for each case, and the recent extensions of the defendant's sixth amendment rights. The court suggested "60% of the fee a client of ordinary means would pay an attorney of modest financial success" as the rate at which appointed counsel should be compensated by the county.²¹ The court delayed the effect of its ruling until January 1, 1967, in order that the legislature might have time to consider the question.²²

The Present Situation

It has been estimated that, depending upon the jurisdiction, thirty to sixty per cent of all those charged with crime cannot afford to hire a lawyer.²³

[T]he reasonable costs of necessary items such as experts, whether witnesses or not, medical examinations, scientific tests, photographs, depositions and transcripts, and, in essential circumstances, professional investigation In order that there may be assurance such expenditures are both necessary and reasonable, they should not be incurred, however, without advance authorization of the court granted after formal application. We think the assigned attorney is also entitled to receive reimbursement on the same theory for his reasonable and necessary miscellaneous out-of-pocket disbursements not falling within the more extensive categories mentioned . . . such as travelling expenses outside the local area, toll telephone costs, and incidental investigation disbursements, capable of specific itemization. Advance judicial approval should not be required for disbursements of this character which are minor in amount.

Id. at 534, 170 A.2d at 9-10.

¹⁹ *State v. Rush*, 46 N.J. 399, 405-06, 217 A.2d 441, 444 (1966).

²⁰ *Id.* at 412, 217 A.2d at 448.

²¹ *Id.* at 413, 217 A.2d at 448. The court found it unnecessary to explore the question of "whether the judiciary has the inherent power to order payment in the absence of statute," because statutory provisions were already in existence to meet the costs of providing counsel. N.J. Stat. Ann. § 2A:158-7 (1953) provides that the county treasurer shall pay "all necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment and conviction of offenders against the laws"

As the "necessary expenses" of the prosecution are the burden of the county, the court concluded that "within that category must fall the expense of providing counsel for an indigent accused, without which a prosecution would halt and inevitably fail under *Gideon v. Wainwright*" *State v. Rush*, supra note 19, at 414-15, 170 A.2d at 449. In light of the court's earlier holding, this language could not reasonably be read to mean that compensation of assigned counsel is constitutionally required. If it is not the expense, but only the duty to provide counsel that is "necessary," the court's conclusion that statutory provisions already exist to meet the costs of providing counsel is not supported by the argument.

²² *Id.* at 415, 170 A.2d at 449. In delaying the effect of its order, the court in no way withdrew from its position that the authority to grant compensation was within the purview of the judiciary. The delay was intended to give the legislature adequate time to reexamine the questions of which defender system was most practical from the standpoint of costs, and how best to distribute these costs between county and state. A commission appointed by the New Jersey legislature to study the problem apparently will recommend the creation of a statewide public defender system. N.Y. Times, Nov. 26, 1966, p. 37, col. 1 (city ed.).

²³ Kamisar, "The Right To Counsel and the Fourteenth Amendment: A Dialogue on 'the Most Pervasive Right' of the Accused," 30 U. Chi. L. Rev. 1, 5 n.21 (1962).

Approximately thirty per cent of the defendants in criminal cases in federal district courts cannot afford counsel.²⁴ In the state courts in 1962, the percentage of defendants who could not afford a lawyer in felony cases ranged from sixteen to sixty-four per cent with a median of forty-three per cent.²⁵ Hence the questions on which the *Rush* court focused are pertinent to a large proportion of all criminal cases.

Forty-six states presently authorize compensation to appointed counsel in one form or another.²⁶ In many of these, the compensation provided for is nominal and considerably below the rate suggested in *Rush*.²⁷ If reasonable compensation were found to be constitutionally required, the majority of these statutes would have to be modified. Only nine state statutes specifically provide for reimbursement of out-of-pocket expenses.²⁸ But in other states, where statutorily authorized compensation within a delineated range is left to the discretion of the court, the court's determination sometimes takes into account out-of-pocket expenses.²⁹

Congress has also provided for compensation and reimbursement of assigned counsel in federal criminal cases. The Criminal Justice Act of 1964³⁰ establishes specified rates of compensation, and in addition provides for a maximum compensation. This limit may, however, be exceeded in "extraordinary circumstances" where the district court certifies that extra compensation is necessary to provide "fair compensation" for protracted litigation.³¹ The act further provides for reimbursement of expenses reasonably incurred. It calls for advance authorization for specific expenditures by the district court. Retroactive ratification is permitted, however, where circumstances do not permit advance authorization.³²

Counsel's Constitutional Rights

The traditional approach to the question of reasonable compensation and reimbursement for out-of-pocket expenses has been to focus upon the constitutional rights of the attorney himself. Does the duty of gratuitous service, to which members of the bar are frequently subjected, deprive the attorney of property without due process of law? Does it deny him equal protection of the laws? Does it constitute involuntary servitude?

The attorney's own rights to compensation and reimbursement have been the subject of extensive litigation, and most jurisdictions have already passed upon the issue. Most courts have rejected these constitutional claims advanced by

²⁴ *Ibid.*

²⁵ Silverstein, *Defense of the Poor* 7-8 (1965).

²⁶ For a compilation of the various state statutory provisions on compensation, see *id.* at 253-67.

²⁷ E.g., W. Va. Code Ann. § 62-3-1 (1966) (maximum compensation \$50 for felony, \$25 for misdemeanor); N.M. Stat. Ann. § 41-11-3 (1953) (maximum fee of \$100 in non-capital cases).

²⁸ Silverstein, *supra* note 25, at 16; see, e.g., Minn. Stat. Ann. §§ 611.07, 611.071 (1964); N.H. Rev. Stat. Ann. § 604-A:4 (Supp. 1965).

²⁹ Silverstein, *supra* note 25, at 16; see, e.g., Mont. Rev. Codes Ann. § 94-6513 (1947) (county is liable for "such sum as the judge certifies to be a reasonable compensation").

³⁰ 18 U.S.C. § 3006A (1964).

³¹ Insofar as additional compensation is provided for in "extraordinary circumstances," the statute, unlike most analogous state statutes, would not necessarily fall before a subsequent ruling by the Supreme Court, were it to come, that reasonable compensation for appointed counsel is constitutionally required.

³² 18 U.S.C. § 3006A (1964). For a comprehensive examination of all aspects of this act, see Kutak, "The Criminal Justice Act of 1964," 44 Neb. L. Rev. 703 (1965).

attorneys in their own right.³³ Their holdings have usually been based on either of two grounds. *First*, the rendering of gratuitous service to indigent defendants at the court's behest has been considered a condition under which lawyers are licensed to practice.³⁴ *Second*, the duty of gratuitous service has sometimes been considered a correlative to special rights and privileges which have been conferred upon the attorney in his capacity as an officer of the court.³⁵ The *Rush* court echoed both these views when it said that the duty of gratuitous service is "an incident of the license to practice law . . ." and that "the duty to defend the poor is a professional obligation rationally incidental to the right accorded a small segment of the citizenry to practice law . . ."³⁷

Most of the recent decisions, like *Rush*, have based their holdings on an intermingling of these two views.³⁸ At least one court, however, has thoroughly rejected the first rationale and based its holding entirely upon the second.³⁹ Irrespective of which justification is employed, courts have held that because an applicant for admission to the bar is aware of the traditions of the profession, the duty of gratuitous service cannot be considered a "taking" within the meaning of the fifth amendment.⁴⁰ Another court has held that while a judge's

³³ See, e.g., *Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965); *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966); *Jackson v. State*, 413 P.2d 488 (Alaska 1966); *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143 (1966); *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966); *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943). See also *Hill v. Superior Court*, 46 Cal. 2d 169, 293 P.2d 10 (1956); *State v. Clifton*, 247 La. 495, 523-25, 172 So. 2d 657, 667-68 (1965).

³⁴ A contrary argument which won approval in the district court in *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964), but was ultimately rejected by the Ninth Circuit, 346 F.2d 633 (1965), hinges on an interpretation of two 1957 Supreme Court decisions, *Konigsberg v. State Bar*, 353 U.S. 252 (1957) and *Schwartz v. Board of Bar Exam'rs*, 353 U.S. 232 (1957). In *Schwartz*, the Court said: "any qualification [for admission to the bar] must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239. As an applicant's willingness or refusal to render services gratuitously is irrelevant to his fitness or capacity to practice law, it would appear that the duty of gratuitous service as a condition to licensing is invalid.

³⁵ In *Schwartz v. Board of Bar Exam'rs*, *supra* note 34, at 238-39, the Court said: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." If taken to mean that admission to the bar is a right and not a privilege, this second line of reasoning loses its substance.

³⁶ *State v. Rush*, 46 N.J. 399, 410, 217 A.2d 441, 447 (1966).

³⁷ *Id.* at 408, 217 A.2d at 445.

³⁸ *United States v. Dillon*, *supra* note 33; *Jackson v. State*, *supra* note 33; *State v. Clifton*, *supra* note 33.

³⁹ *Ruckenbrod v. Mullins*, 102 Utah 548, 553, 133 P.2d 325, 327 (1943): "[A] state cannot impose restrictions on the acceptance of the license which will deprive the licensee of his constitutional rights." But *id.* at 561-62, 133 P.2d at 331:

[Attorneys] enjoy the right to participate as officers in a judicial proceeding and the right to set the judicial machinery in motion. The court in admitting the attorney to practice presents him to the public as worthy of its confidence . . .

. . . . The attorney, because of his position as officer of the court, can be compelled by the court to render gratuitous services in the defense of indigents.

⁴⁰ *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), reversing 230 F. Supp. 487 (D. Ore. 1964), cert. denied, 382 U.S. 978 (1966); *Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965); *Jackson v. State*, 413 P.2d 488 (Alaska 1966). These decisions notwithstanding, an application for admission to the bar can hardly be said to entail "voluntary" submission to the duty of gratuitous service, despite the fact that an applicant is aware of these traditions. Indeed, the alternative—denying oneself the pursuit of a career for which his extended training and education qualify him—lends itself to the conclusion that gratuitous service is involuntary. In any event, the applicant to the bar before 1963 could hardly have been

request that an attorney represent an indigent defendant is a "taking" within the constitutional meaning of the word, it is nonetheless a "non-compensable" taking "which an attorney voluntarily assumes concomitant to receiving a license from the State"⁴¹

Arriving at their findings independently of federal constitutional considerations, three jurisdictions have held that attorneys appointed to represent indigent defendants in criminal proceedings *were* entitled to compensation from the public.⁴² Two of these courts have based their decisions upon state constitutional provisions,⁴³ and the other on a state statute of a general nature.⁴⁴ The language of one of these holdings, however, indicates that the court would have reached the same conclusion, even in the absence of the state constitutional provision,⁴⁵ on federal equal protection and due process grounds.⁴⁶

The Right to Counsel—Compensation

The *Rush* court rejected the view that an indigent defendant's constitutional rights require that his assigned counsel be compensated. Insofar as failure to reimburse assigned counsel for his necessary out-of-pocket expenditures *more clearly* places the indigent defendant's constitutional rights in jeopardy,⁴⁷ the court's distinction between compensation and reimbursement⁴⁸ appears to have been well drawn. But in stating that "the Constitution does not assure every man, indigent or not, that only a leader of the bar will speak for him,"⁴⁹ the court appears to have missed the main thrust of appellant's argument. The real question would appear to be not who represents the indigent defendant, but rather whether whoever represents him will do as competent a job without compensation as with compensation. That equality of skill in advocacy cannot be attained is irrelevant. Such a result was not contemplated by *Gideon v. Wainwright*,⁵⁰ nor

aware of the extent to which he was committed in light of Supreme Court pronouncements commencing with *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴¹ *Weiner v. Fulton County*, 148 S.E.2d 143, 144 (Ga. App. 1966).

⁴² *Knox County Council v. State*, 217 Ind. 493, 29 N.E.2d 405 (1940); *Ferguson v. Pottawattamie County*, 224 Iowa 516, 278 N.W. 223 (1938); *County of Dane v. Smith*, 13 Wis. 585 (1861).

⁴³ *Knox County Council v. State*, supra note 42, at 499, 29 N.E.2d at 408; *County of Dane v. Smith*, supra note 42, at 587.

⁴⁴ See, e.g., *Ferguson v. Pottawattamie County*, supra note 42, at 518, 278 N.W. at 224 where it was stated:

It is true that section 3631 [Iowa Code of 1935] makes no provision as to the amount of the compensation to be allowed for the services performed. In this case the court appointing the attorneys . . . was acting in obedience to express statutory authority, and, as such, an obligation arose on the part of the county to pay for the services rendered.

⁴⁵ "No man's particular services shall be demanded, without just compensation." Indiana Const., art. 1, § 21.

⁴⁶ If a law should be enacted requiring every person licensed by the state to render services, or furnish the materials of their business, to paupers gratuitously, much difficulty would be found in justifying a decision holding the law unconstitutional as depriving the green grocer or the restaurant operator of his goods, or as depriving the physician, or the barber, or the plumber, or the electrician, or the mechanical engineer of his services, without compensation, while adhering to a rule that licensed attorneys' services may be taken without compensation. Although the rule announced is contrary to the weight of authority, we are convinced of its soundness.

Knox County Council v. State, supra note 42, at 510, 29 N.E.2d at 412.

⁴⁷ See text accompanying notes 65-78 *infra*.

⁴⁸ See discussion in text accompanying note 19 *supra*.

⁴⁹ *State v. Rush*, 46 N.J. 399, 406, 217 A.2d 441, 444 (1966).

⁵⁰ 372 U.S. 335 (1963).

could it have been as a practical matter. But *Gideon* does require that every criminal defendant have available to him competent professional aid. To the extent that inadequate compensation of assigned counsel militates against such adequate representation, grave constitutional issues are raised. Hence, the question of whether or not an indigent defendant has a constitutional right to *adequately compensated* counsel may turn in the last analysis upon the effect of inadequate compensation on the quality of representation. Despite the *Rush* court's assertion that "a lawyer needs no motivation beyond his sense of duty and his pride,"⁵¹ there is some evidence to indicate that defendants with uncompensated assigned counsel generally do not fare as well as defendants with compensated counsel.

Defendants with assigned counsel may have a greater propensity to plead guilty.⁵² Moreover, there is a greater likelihood of a prison sentence following the guilty plea of a defendant with assigned counsel than there is following the same plea from a defendant represented by retained counsel. A recent docket survey of 51 sample counties selected on a national basis showed that in 49 of them "a higher proportion of defendants with assigned counsel were sentenced to prison. In 36 of these 49 counties the difference was 15% or more and in 24 of these the difference was 25% or more."⁵³ In most, if not all, of the counties surveyed, appointed counsels' compensation, where there was any, could at best be described as "nominal." Thus, contrary to the view expressed in *Rush*, there would appear to be considerable merit in the observation that "uncompensated counsel often provides representation in form only."⁵⁴ Indeed, it would appear that passage of the Criminal Justice Act was prompted by the belief that uncompensated counsel often provides the indigent defendant with only "minimal" representation.⁵⁵

If, from statistical data such as that offered above, it were concluded that there is a significant correlation between inadequate compensation and constitutionally subminimal representation, then a blanket rule, like the one in

⁵¹ *State v. Rush*, supra note 49, at 406, 217 A.2d at 444.

⁵² See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 34 (1963); Note, 76 Harv. L. Rev. 579, 597-98 (1963).

⁵³ Silverstein, supra note 25, at 25. For example, in Essex County, New Jersey (Newark), "38% of defendants with retained counsel were sentenced to prison and 62% placed on probation, but among defendants with assigned counsel, 68% went to prison and only 32% were placed on probation." *Ibid.* It should be noted that statistics such as those cited above can sometimes be misleading. The assigned-retained dichotomy embodied in the survey does not correspond precisely with the compensated-uncompensated dichotomy with which we are here concerned. But in light of facts that, at present, statutorily-authorized compensation, where it exists, is often only nominal (see note 27 supra and accompanying text), and that there has been a statutory trend since *Gideon* toward increasing such compensation, the 1962 pre-*Gideon* statistics upon which the survey is based would appear to bear some direct relation to the present discussion.

Statistics for selected federal districts prior to the passage of the Criminal Justice Act, when there was no compensation to appointed counsel in federal courts, are also available. These statistics indicated that defendants with assigned (uncompensated) counsel more frequently plead guilty and are more often sentenced to prison, while defendants with retained counsel more frequently are acquitted or released on probation. For the precise figures and an excellent discussion of the inadequacies of total reliance on statistical analysis, see Report of the Attorney General's Committee, supra note 52, at 33-34.

⁵⁴ Celler, "Federal Legislative Proposals To Supply Paid Counsel to Indigent Persons Accused of Crime," 45 Minn. L. Rev. 697 (1961). It should be noted that not all of the assigned counsel in these 51 sample counties were literally "uncompensated." See notes 26-29 supra, and accompanying text.

⁵⁵ See Kutak, supra note 32, at 725.

Gideon, requiring adequate compensation, might be called for. But these statistics do not lend themselves to such a far-reaching conclusion. While indicative of the significance of compensation as a factor in the degree of energy counsel expends on behalf of his client, the statistics cannot fairly be interpreted as illustrating that indigent defendants do not receive the "effective" assistance of counsel contemplated by the sixth amendment. To the extent that due process imposes only a "minimum-requirements" test on the right to counsel, the statistics are inconclusive. In the absence of a *presumption* that inadequate compensation of assigned counsel results in a denial of the indigent's right to effective assistance of counsel, the element of compensation is irrelevant in the context of a "minimum-requirements" test. The only concern would be whether or not these minimum requirements were met. Compensated, inadequate counsel no more meets the constitutional mandate than uncompensated, inadequate counsel. A purely perfunctory appearance by counsel without any study or preparation is already a basis for relief in appellate as well as in federal habeas corpus proceedings.⁵⁶ But only in the extreme case will the courts direct a new trial on the basis of incompetency or inadequacy of counsel.⁵⁷

In a recent decision, however, the Supreme Court of Illinois appears to have recognized that an indigent defendant's constitutional rights may be jeopardized if he is represented by inadequately compensated counsel, at least where severe hardship is visited upon the appointed attorney. In *People v. Randolph*,⁵⁸ the Illinois court held that a statute limiting compensation to \$500 could not constitutionally be applied under the facts presented.⁵⁹ In *Randolph*, the appointed attorneys had to take up new residences 150 miles from their homes after the case was transferred on a defense motion to another county in the state. It had taken nine weeks to select a jury. With four additional weeks of actual testimony concluded, the prosecution still expected to call from 60 to 100 more witnesses before closing its case. "The court's inherent power to appoint counsel," said the court, "necessarily includes the power to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendants' right to counsel is protected."⁶⁰

In reaching its decision, the Illinois court distinguished the earlier case of *People v. Zuniga*,⁶¹ in which it had reversed an order of the trial court awarding fees in excess of the statutory maximum to counsel for an indigent defendant.⁶² In *Zuniga*, appointed counsel had successfully defended an indigent defendant accused of murder. The attorney's petition for additional compensation was based solely on the claim that the state's failure to reasonably compensate counsel was an unconstitutional impediment to the indigent defendant's guaranty of effective representation. The *Zuniga* court never reached this constitutional issue, holding instead that appointed counsel lacked standing to raise it.⁶³ The

⁵⁶ *Jones v. Cunningham*, 313 F.2d 347 (4th Cir. 1963); see *Turner v. Maryland*, 318 F.2d 852 (4th Cir. 1963). But cf. *Kilgore v. United States*, 323 F.2d 369, 372 (8th Cir. 1963).

⁵⁷ See generally Comment, "Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings," 20 Sw. L.J. 136 (1966).

⁵⁸ 219 N.E.2d 337 (Ill. 1966).

⁵⁹ 219 N.E.2d at 340.

⁶⁰ *Ibid.*

⁶¹ 31 Ill. 2d 429, 202 N.E.2d 31 (1964), cert. denied, 380 U.S. 977 (1965).

⁶² *Id.* at 430, 202 N.E.2d at 32.

⁶³ For a discussion of the question of standing as it pertained to *State v. Rush*, see note 13 *supra*.

court noted, however, that even the indigent defendant could not under the circumstances have raised the issue insofar as the fact of his acquittal negated the possibility of denial of effective assistance of counsel.⁶⁴

The handling of *Zuniga* and *Randolph* is perhaps the product of a determination by the Illinois Supreme Court that the question of the constitutional necessity for compensation revolves ultimately around the factual setting of each case and does not require the formulation of a blanket rule for compensation. Whereas *Zuniga*, at one end of the spectrum, stands for the proposition that lack of reasonable compensation does not necessarily result in denial of effective assistance of counsel, *Randolph*, at the other end, suggests persuasively that inadequate compensation does, under certain circumstances, have such an effect.

Left unanswered, however, is the question of what criteria the appellate court is to employ in its case-by-case estimation of the effect of compensation on the quality of representation received by the indigent defendant. Arguably, the *Randolph* decision supplies one such criterion: Where the defendant's appointed counsel is reduced to near insolvency by virtue of inadequate compensation, there is a presumption that effective assistance of counsel has been denied.

Underlying this entire discussion has been the assumption that the constitutional inquiry terminates upon a showing that the indigent defendant has received "adequate" representation. But might it not be relevant, from a constitutional standpoint, that the quality of representation received by an indigent defendant would be better were his appointed counsel adequately compensated? While it is beyond the scope of the law to equalize the quality of representation received by indigent criminal defendants, it is nonetheless within the purview of the law, by granting adequate compensation, to maximize the quality of representation received by indigent defendants from their particular appointed counsel. Thus, another question which arises is whether the concept of "fundamental fairness" embodied in the fourteenth amendment requires that this latter approach be taken. This is a question which the courts have yet to face. If this question should be answered in the affirmative, at least two additional factors would have to be considered. *First*, while a generalization might fairly be made, it would be extremely difficult to decide whether or not the fact of inadequate compensation adversely affected the quality of representation received by a particular indigent defendant. *Second*, there would in all probability be a considerable judicial reluctance to make a public determination that a specific appointed attorney worked less effectively than he would have were he adequately compensated. Such a determination would in effect entail a charge that appointed counsel has breached both his duty to the defendant and to the court. These two factors, taken together, might well militate against the case-by-case analysis which the Illinois court in *Randolph* appears to have endorsed, and work to favor a blanket rule requiring reasonable compensation.

The Right to Counsel—Reimbursement

Absent a constitutional determination or statutory authorization to the contrary, the cost of vital items, such as expert medical testimony, upon which

⁶⁴ It would be a most unfortunate result if the very success of the defense itself foreclosed the last avenue for compensation. The treatment given to the question of standing in *Zuniga*, however, points in this direction. The interpretation given to the New Jersey statute authorizing compensation only in "murder cases" had the same unfortunate effect. See the discussion of *State v. Donaldson*, supra note 9.

many criminal cases ultimately turn, must be borne by appointed counsel. That the constitutional rights of indigent defendants are jeopardized by failure to reimburse their appointed counsel for such expenses is most readily apparent in the case of expenditures which are speculative but necessary, such as investigative costs.

Lack of reimbursement for expenses of investigation is especially disturbing, since the appointed lawyer faces the dilemma of cutting short his investigation or contributing his funds in addition to his time. Some lawyers, especially younger ones, can ill afford such cash outlays.⁶⁵

Even the most dedicated of attorneys may cut short his expenditures where they are not reasonably certain to produce positive results.

There is limited support in other cases for the *Rush* holding that the Constitution requires reimbursement of out-of-pocket expenses. In *Griffin v. Illinois*,⁶⁶ the Supreme Court held it to be a denial of due process for a state to refuse to furnish a free copy of the transcript of trial testimony where the presentation of such a transcript is a prerequisite to obtaining appellate review.⁶⁷ Basing its decision on a possible misconstruction of *Griffin*,⁶⁸ the Supreme Court of Nevada has held that the due process and equal protection clauses demand that a transcript of the first criminal trial be furnished at county expense to the attorney appointed to represent a defendant at retrial.⁶⁹ The Nevada court reasoned that the *Griffin* rule was more applicable in the case it was considering than in *Griffin* itself, because while there was no constitutional requirement that the states provide appellate review at all, there clearly was a requirement that defendant receive a fair trial.⁷⁰

In a somewhat analogous situation, however, the Arizona Supreme Court recently refused to extend *Griffin*. In two separate opinions, the court held that the constitutional rights of indigent defendants impose no duty on the county to pay for the services of a medical expert whose testimony constituted the essence of defendant's case,⁷¹ or for the incidental expenses of an appointed attorney incurred in defense, such as a copy of the transcript for the purpose of impeaching prosecution witnesses.⁷² In dismissing the constitutional claims, the court appears to have substituted rhetoric for logic:

And what about the cost of private investigators, both to investigate the facts of the case and the individual backgrounds of the jury panel? What about laboratory testing? Elaborate mock-ups of the scene of the crime? Intricate technical demonstrations for the courtroom?

Experience in the trial court leads to answers to these questions which

⁶⁵ Silverstein, *supra* note 25, at 17. For another discussion of the question of expenses of appointed counsel, see Comment, 26 La. L. Rev. 695 (1966).

⁶⁶ 351 U.S. 12 (1956).

⁶⁷ *Id.* at 19.

⁶⁸ Submission of the *Griffin* transcript was a procedural prerequisite to appellate review according to the majority of the Court. Cf. Justice Harlan's dissent in *Griffin v. Illinois*, 351 U.S. 12, 29 (1956). The Nevada transcript, on the other hand, was at most an indispensable aid to the newly appointed counsel.

⁶⁹ *State v. Eighth Judicial District Court*, 80 Nev. 478, 480, 396 P.2d 680, 681-82 (1964).

⁷⁰ *Id.* at 481, 396 P.2d at 682.

⁷¹ *State v. Superior Court*, 2 Ariz. App. 458, 409 P.2d 742 (1966).

⁷² *State v. Superior Court*, 2 Ariz. App. 466, 409 P.2d 750 (1966).

indicate that complete equality between the rich and the poor is a chimera well sought after, but unattainable.⁷³

But it is hardly enough to argue that, because complete equality in the courts is unattainable, there is therefore no constitutional mandate to mitigate existing inequalities. Even if, arguendo, equal protection is not a valid issue,⁷⁴ the *Rush* approach, requiring that assigned counsel be reimbursed for those expenditures deemed necessary for a proper defense, appears better equipped to achieve those minimum standards of fairness which due process exacts and to give substance to the demands of the sixth amendment.⁷⁵ The practical problem of soaring governmental expenses resulting from unnecessary expenditures made by overzealous attorneys can be met by prior application to the court for anticipated expenditures for particular items necessary and essential to a fair defense under the guidelines alluded to in *Rush*⁷⁶ and set forth in the earlier New Jersey case of *State v. Horton*.⁷⁷ Alternatively, statutory guidelines, similar to those employed in the Criminal Justice Act of 1964,⁷⁸ could be adopted.

CONCLUSION

The sixth amendment's guarantee of the right to counsel must be construed as entailing a right to an attorney reimbursed for reasonable out-of-pocket expenses, if it is to ensure the minimum standards of fairness to which an indigent defendant is entitled. In the absence of a clear correlation between the fact of inadequate compensation and inadequate assistance of counsel, compensation for services might nonetheless be required under a reading of the Constitution which affirmatively imposes upon the lawmaker the duty to maximize, where practical, the possibilities for higher quality representation.

Traditional bases for rejecting appointed counsel's claims to compensation and reimbursement as a matter of constitutional right, should be reexamined, if not from the standpoint of the attorney's own constitutional rights, then at least from the inequitable position in which indigent defendants are placed by such a determination. The *Rush* court took a step in this direction by holding that protection of an indigent defendant's constitutional rights requires that his appointed counsel be reimbursed for reasonably incurred out-of-pocket expenses. But insofar as its policy determination that appointed counsel be compensated was not based on constitutional grounds, even *Rush* may not have gone far enough.

⁷³ *State v. Superior Court*, supra note 71, at 463, 409 P.2d at 747. New Jersey is apparently less hesitant than Arizona to distinguish between supplying an indigent with transcripts of the trial proceeding and supplying him with personal dossiers of potential jurors. See note 18 supra.

⁷⁴ See note 14 supra.

⁷⁵ On the indigent defendant's right to aid in addition to being provided with counsel, see generally Note, 47 Minn. L. Rev. 1054 (1963), where it was observed that it is

[A] somewhat peculiar scale of values . . . [which] protects a defendant when the evidence used to convict him is trustworthy [but illegally obtained], and yet does not attempt to prevent a conviction that may be untrustworthy because of the accused's inability to afford the costs of a proper defense.

Id. at 1066.

⁷⁶ *State v. Rush*, 46 N.J. 399, 416, 217 A.2d 441, 450 (1966).

⁷⁷ 34 N.J. 518, 534, 170 A.2d 1, 9-10 (1961); see note 18 supra.

⁷⁸ 18 U.S.C. § 3006A (1964); see discussion accompanying note 32 supra.