**OPINION**
**67-59**

November 15, 1967 (OPINION)

Honorable Halvor L. Halvorson, Jr.

County Judge

Ward County

RE: Courts - County Courts of Increased Jurisdiction - Appointment of Counsel for Indigents

This is in response to your request for an opinion on the following question:

> "* * * *Does the judge of a county court with increased jurisdiction have the power to appoint counsel at state expense for indigent defendants under the provisions of Chapter 259 of the 1967 Session Laws? Should you find that power to appoint counsel is not provided under this new law, I would like your opinion as to whether this power exists under the Constitution or any other statute by implication or otherwise."

You also ask for an opinion whether or not the county court with increased jurisdiction has the authority to appoint counsel at state expense to represent indigent defendants in criminal cases where the offense involved is a misdemeanor.

Chapter 259 of the 1967 Session Laws was primarily adopted as enabling legislation to provide the authority to appoint counsel for indigents in criminal cases where the situation demands it. The decisions of the U.S. Supreme Court in Gideon v. Wainwright, Escebedo v. Illinois, and Miranda v. Arizona, as well as the Sixth Amendment of the Constitution of the United States, prompted and were to a great degree responsible for the adoption of Chapter 259.

Section 29-07-01.1 as created by Chapter 259 authorizes a magistrate to appoint counsel for a defendant charged with the violation of a state criminal law. This power is without limitation except that it must be on a charge of violating a state criminal law. This limitation would exclude the appointment of an attorney for a defendant charged with the violation of a municipal ordinance, etc., or some other violation not deemed a violation of state criminal law.

The term "magistrate" is defined in section 12-01-04, subsection 12, as follows:

> DEFINITIONS OF TERMS. In this chapter, unless the context or subject matter otherwise requires:
>
> 12. 'Magistrate' signifies any judge of the supreme court or of the district court, county justice, police magistrate, and such other officer or officers as are authorized and empowered to issue warrants for the arrest of persons

accused of crime;

* * * *."

It is noted that this definition is limited to the chapter involved, but nevertheless it is in harmony with section 29-01-13, subsection 5, which defines the term "magistrate" and is as follows:

> DEFINITIONS. As used in this title, unless the context or subject matter otherwise clearly requires:
>
> 5. A 'magistrate' is an officer authorized by law to issue a warrant for the arrest of a person charged with a crime or public offense;
>
> * * * *."

It is also in harmony with section 29-01-14, which provides as follows:

> WHO ARE MAGISTRATES. The following officers are magistrates:
>
> 1. The judges of the supreme court, with authority to act as such throughout the state;
>
> 2. The judges of the district courts, with authority to act as such throughout the judicial districts for which they respectively are elected; and
>
> 3. As limited by law directing the place of exercising their jurisdiction and authority, county justices, police magistrates and, when authorized by law, the judges of the county courts, including those with increased jurisdiction, with authority each to act as such throughout the county or the judicial subdivision in which the county, city, or municipality for which he is elected or appointed, is located."

The above section has application here because obviously the definition is intended to apply throughout the Code, except where the express language indicates otherwise. The Legislature being mindful of the recent rules prescribed in criminal cases provided authority for appointment of counsel at the earliest stage possible under the present judicial structure. By adopting section 29-07-01.1, the need for sections 29-01-27 and 27-08-31 no longer existed.

Section 29-07-01.1 is a separate provision of law. It is fully operative by itself and is not dependent upon some other provision of law for its implementation or effectiveness. Likewise, section 29-07-01 is also fully operative without the aid of any other statute. It sets forth the duties of a magistrate where an accused is brought before him on a charge of which he has no jurisdiction or authority to try and determine. This section cannot serve as a basis to establish what a magistrate shall or may do in instances where he is authorized or has jurisdiction to try and determine the matter before him. If this section were construed as a limitation on the magistrate, the absurd and ridiculous result would be that the

magistrate could not inform the accused of his constitutional rights when he has jurisdiction to try and determine the matter before him. The ostensible purpose is to the contrary.

The repeal of sections 29-01-27 and 27-08-31 further illustrate that section 29-07-01.1 was to operate independently and that it was not a limitation on the magistrates' authority to appoint counsel. Any other conclusion would be contrary to the purpose for which Chapter 259 was enacted. A different conclusion would also result in saying that no district judge or county judge, or supreme court judge, could appoint counsel for indigents, except possibly through inherent powers vested in such officials. Because of the conclusion reached herein, we need not enter that phase of the question.

The term "trial judge" as used in section 29-07-01.1 is not a work of art but takes on the ordinary meaning of such term and refers to any judge who tries the case, and is not limited to a district judge. Also, the term "appropriate judge" is not a work of art. Such term refers to any person officially and legally acting in the office or position of judge, whether it be justice court, county court, district court or supreme court. If the terms "trial judge" or "appropriate judge" were to have referred to district judges only, the Legislature could easily have modified such expressions with the term "district."

The term "criminal case" embraces both felonies and misdemeanors. If the Legislature had intended to limit the appointment to felony cases it could easily have used the term "felony" instead of the broad term "criminal cases."

We are also mindful that the U.S. Supreme Court has held that the provisions of the Sixth Amendment apply to the states and that the right of the accused "to have the assistance of counsel for his defense" is applicable to the states as well as the federal government. The purpose of Chapter 259 was to give broad authority to the appropriate persons to meet all of the contingencies that might arise as a result of the rules set forth by the U.S. Supreme Court as pertaining to criminal cases. In this respect it was well that the Legislature did enact such broad authority because in the Gault case the U.S. Supreme Court amongst other things held that juveniles were entitled to be represented by counsel if the matter involved a possible commitment or placing the juvenile in custody of some institution or child's detention home.

It is therefore our opinion that county courts of increased jurisdiction have the authority to appoint counsel for indigents in criminal cases involving the violation of a state criminal law at any time, including instances where it has jurisdiction to try and determine the case regardless whether the charge is a felony or a misdemeanor. The reasonableness must be determined by the judge as provided for in the statute. By arriving at this conclusion we are not suggesting that the Court routinely appoint counsel for indigents in every misdemeanor, but only in such cases where the Court deems it to be justified and reasonable. Neither is this opinion to be construed that counsel must be appointed for a misdemeanor. It merely concludes that such authority exists.

HELGI JOHANNESON

Attorney General