OPINION 65-189

Syllabus:

The Court of Common Pleas is not authorized by state law (specifically Sections 2941.50 and 2941.51, Revised Code) to pay for providing counsel at the preliminary hearing of an indigent person accused of a felony.

To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio
By: William B. Saxbe, Attorney General, October 20, 1965

Your request for my opinion reads as follows:

> "Can the Court of Common Pleas authorize payment of legal fees for representation at a preliminary hearing only? The facts are as follows: (1) A felony was committed; (2) An indigent defendant was arrested; (3) Request was made for an attorney; (4) The Court of Common Pleas appointed representation.
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> "At the preliminary hearing no probable cause was found and the defendant was dismissed. These are the facts that raise the question as to legal fees."

Section 2941.50, Revised Code, reads in pertinent part as follows:

> "After a copy of an indictment has been served or opportunity had for receiving it, or if indictment be waived under section 2941.021 of the Revised Code, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, * * *"
> (Emphasis added)

Section 2941.51, Revised Code, reads in pertinent part as follows:

> "Counsel assigned in a case of felony under section 2941.50 of the Revised Code shall be paid for their services by the county, and shall receive therefor;
>
> "* * * * * * * * *
>
> "(B) In other cases of felony, such compensation as the trial court may approve, not exceeding three hundred dollars and expenses as the trial court may approve." (Emphasis added)

The plain meaning of this authorization is that only after an indictment or written waiver of same is the Trial Court authorized to appoint and pay counsel for an indigent accused. The preliminary hearing pursuant to Section 2937.10, Revised Code, is by definition held before indictment or before written waiver of indictment. Therefore, clearly Section 2941.50, supra, does not authorize such appointment for a preliminary hearing. Furthermore, the operation of Section 2941.51, supra, being dependent on appointment pursuant to Section 2941.50, supra, does not authorize payment of an attorney appointed for the preliminary hearing. Also, before indictment there is no "trial court" referred to in Section 2941.51, supra, as the agent for fixing costs.

No other section of the Revised Code authorizes such payment. Although Chapter 2937, Preliminary Examination; Bail, Revised Code, requires that an accused be advised of his right to counsel, (Section 2937.02 (B), Revised Code), and in case of a felony to a preliminary hearing, it does not expressly authorize the appointment of such counsel for an indigent at this stage nor can a reasonable inference be made that such was the intention of the legislature. Section 2937.03, Revised Code, states inter alia:

> "If /the accused/ is not represented by counsel and expresses desire to consult with an attorney at law, the judge or magistrate shall continue the case for a reasonable time to allow him

to send for or consult with counsel... If the accused is not able to make bail, or the offense is not bailable, the court or magistrate shall require the officer having custody of accused forthwith to take a message to any attorney at law within the municipal corporation where accused is detained, or to make available to accused forthwith use of telephone for calling to arrange for legal counsel or bail."

This language speaks only of an accused's right to obtain his own counsel, it says nothing of the indigent accused. No reasonable inference can be made from this language that the legislature intended to authorize appointment of counsel at state expense at this stage in the proceedings, especially in light of their later express provision for such indigents in Section 2941.50, supra. Moreover, the legislature has recently reconsidered this matter of the rights of the indigent and in light of the United States Supreme Court mandate in Douglas v. California, 372 U.S. 353, (1963) that counsel be provided for indigent defendants on appeal, has passed Amended House Bill No. 362, which amends Sections 2941.50 and 2941.51, supra, to so provide. This legislation is effective November 11, 1965. See also: Section 2953.24, Revised Code. Obviously, the legislature is aware of the problems of the indigent who is charged with a felony; however, the legislature has not chosen to act regarding the appointment of counsel for such persons at the preliminary hearing. Any change that is made must come through the legislature.

Recent United States Supreme Court decisions have imparted the Sixth Amendment of the United States Constitution into the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, supra; White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964). See also: Powell v. Alabama, 287 U.S. 45 (1932). However, the denial of court appointed counsel at the pre-indictment proceedings in Ohio does not violate the Sixth Amendment. Dean v. Maxwell, 174 Ohio St., 193 (1963); Everhart v. Maxwell, 175 Ohio St., 514 (1964); Smith v. Maxwell, 177 Ohio St., 79 (1964); Freeman v. Maxwell, 177 Ohio St., 93 (1964). The current Ohio procedure is valid because none of the accused's rights are lost at the pre-indictment proceedings, nor any plea taken that cannot later be changed after counsel is appointed. In Freeman v. Maxwell, supra, the court said at page 94:

"As pointed out in Dean v. Maxwell, Warden, /supra/ * * * under Ohio Law, once counsel is appointed for an indigent, even after arraignment, such appointment places an accused in the same position as he was prior to the arraignment. After such appointment, the indictment may be attacked

by motion or demurrer and it would be an abuse of discretion to refuse to allow an accused to withdraw his former plea and enter a new plea thereto."

The holding in Dean v. Maxwell, supra, is supported by United States ex rel., Cooper v. Reincke, 333 F. 2d 608 (2d Cir. 1964) and DeToro v. Pepersack, 332 F. 2d 341 (4th Cir. 1964). It is not contradicted by White v. Maryland, supra, or Escabedo v. Illinois, supra; for in White the preliminary hearing was held to be "critical" only because a plea of guilty, later withdrawn, was used as an admission at the trial, while in Escabedo a confession was used against the accused at the trial. See comment in Pointer v. Texas, U.S. 13 L.ed. 2d 923, 925; 85 S. Ct. 1065, 1067 (1965).

The crucial test as to whether the denial of court appointed counsel for any part of the pretrial proceedings is unconstitutional is: "/Is the accused/ so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice /?/" (Emphasis added) Escabedo v. Illinois, supra, at 491. See also DeToro v. Pepersack, supra, at 343.

The trial is still all important as far as Sixth Amendment rights are concerned. Since the Ohio Supreme Court has definitely interpreted the preliminary procedure statutes as not affecting the trial because an accused is in the same position after indictment and the appointment of counsel as before, the Sixth Amendment is not violated by not appointing counsel at the preliminary hearing.

If the accused is not put in the same position by the court after counsel is appointed, any disposition of the case made thereafter may be subject to reversal on appeal or collateral attack under Section 2953.21, Revised Code. Dean v. Maxwell, supra; Johnson v. Maxwell, 177 Ohio St., 72 (1964).

My conclusion then is that the Court of Common Pleas is not authorized by state law (specifically Sections 2941.50 and 2941.51, Revised Code) to pay for providing counsel at the preliminary hearing of an indigent person accused of a felony.