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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A06-2101**

Jeffrey C. Morris, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed January 15, 2008**

**Affirmed**

**Dietzen, Judge**

**Dissenting, Ross, Judge**

Hennepin County District Court  
File Nos. 99001287, 99020103

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Considered and decided by Lansing, Presiding Judge; Dietzen, Judge; and Ross,  
Judge.

## UNPUBLISHED OPINION

**DIETZEN**, Judge

Appellant challenges the district court's order denying his motion requesting that legal counsel be appointed to represent him in his petition for postconviction relief, arguing that Minn. Stat. § 611.14(2) (2004) violates the Minnesota Constitution. Because we conclude that Minn. Stat. § 611.14(2) is not unconstitutional, we affirm.

### FACTS

In March 1999, appellant Jeffrey C. Morris waived his right to counsel and pleaded guilty to three counts of misdemeanor theft. Appellant did not file a direct appeal of the convictions.

In December 2005, appellant filed a petition for postconviction relief, seeking to withdraw his guilty plea, arguing that he was not competent to plead guilty or waive legal counsel due to his bipolar disorder. Appellant requested that legal counsel be appointed to represent him. In a letter to the court, the state public defender declined representation on the ground that Minn. Stat. § 611.14(2) (2004) does not provide for representation in misdemeanor postconviction proceedings. Appellant argued that the statute was unconstitutional.

Following the hearing, the district court filed an order denying appellant's postconviction petition. Later, a different district court judge filed a similar order denying appellant's motions. Appellant then filed a pro se notice of appeal along with a motion requesting appointment of counsel on appeal. This court denied appellant's

motion but directed that the state public defender be notified of appellant's request. Subsequently, the state public defender elected to represent appellant on this appeal.

### DECISION

Appellant contends that the district court erred in denying his motion for appointment of counsel in his postconviction proceeding, arguing that Minn. Stat. § 611.14(2) (2004) deprives him of his constitutional right to the assistance of counsel. The constitutionality of a statute presents a question of law that this court reviews de novo. *State v. Wolf*, 605 N.W.2d 381, 386 (Minn. 2000). “Statutes are presumed constitutional and will be declared unconstitutional with extreme caution and only when absolutely necessary.” *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004) (quotation omitted).

The Minnesota Constitution provides that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense.” Minn. Const. art. I, § 6. The right to the assistance of counsel extends to both misdemeanor and felony prosecutions. *State v. Nordstrom*, 331 N.W.2d 901, 903 (Minn. 1983); *State v. Cunningham*, 663 N.W.2d 7, 11 (Minn. App. 2003). If a defendant is financially unable to afford counsel, he is entitled to have a public defender appointed to represent him. Minn. Stat. § 611.14 (2006); Minn. R. Crim. P. 5.02. And there is a provision for the representation of misdemeanor defendants on appeal. *See* Minn. Stat. § 611.18 (2006) (providing for appointment of public defender “through appeal, if any,” for those qualifying for representation).

Respondent argued, and the district court agreed, that appellant's right to the appointment of legal counsel in a postconviction proceeding is limited by Minn. Stat. § 611.14(2). The statute provides:

The following persons who are financially unable to obtain counsel are entitled to be represented by a public defender:

...  
(2) a person appealing from a conviction of a felony or gross misdemeanor, or *a person convicted of a felony or gross misdemeanor*, who is pursuing a postconviction proceeding and who has not already had a direct appeal of the conviction . . .

Minn. Stat. § 611.14 (2004) (emphasis added).

Appellant does not challenge Minn. Stat. § 611.14(2) under the United States Constitution. The United States Supreme Court has held that there is no constitutional right to the appointment of counsel for indigent defendants pursuing a postconviction petition. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987). Instead, appellant contends that Minn. Stat. § 611.14(2) is unconstitutional under the Minnesota Constitution, which recognizes a broader right to counsel under article I, section 6.

Appellant relies heavily on *Deegan v. State* to support his argument that indigent misdemeanor defendants are entitled to appointed counsel in postconviction proceedings. 711 N.W.2d 89 (Minn. 2006). In *Deegan*, the defendant was convicted of two felonies—second-degree murder and kidnapping. *Id.* at 91-92. The *Deegan* court addressed whether a 2003 amendment to Minn. Stat. § 590.05 (2002) (defining right to appointment of counsel for indigent defendants) was unconstitutional. The 2003 amendment provided

that an indigent defendant who pleaded guilty, received the presumptive sentence or less, and did not pursue a direct appeal was not entitled to representation by the public defender in a postconviction proceeding. 2003 Minn. Laws 1st Spec. Sess. ch. 2, art. 3, § 2, at 1401; *Deegan*, 711 N.W.2d at 91.

The *Deegan* court held that the “2003 amendment to Minn. Stat. § 590.05 (2004) . . . violates the petitioner’s right to the assistance of counsel under the Minnesota Constitution,” and that “a defendant’s right to the assistance of counsel under article I, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding.” 711 N.W.2d at 91, 98. As a result, the *Deegan* court severed the 2003 amendment to Minn. Stat. § 590.05 (2004) and revived the version that existed immediately prior to the 2003 amendment.<sup>1</sup> *Id.* at 98.

Appellant argues that the holding in *Deegan* applies not only to felony and gross misdemeanor defendants, but also to misdemeanor defendants. We disagree and conclude that the holding in *Deegan* is limited to its facts and, therefore, only applies to

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<sup>1</sup> Prior to the amendment, Minn. Stat. § 590.05 (2002) read:

A person financially unable to obtain counsel who desires to pursue the remedy provided in section 590.01 may apply for representation by the state public defender. The state public defender shall represent such person under the applicable provisions of sections 611.14 to 611.27, if the person has not already had a direct appeal of the conviction. The state public defender may represent, without charge, all other persons pursuing a postconviction remedy under section 590.01, who are financially unable to obtain counsel.

felony and gross misdemeanor defendants. The historical development of postconviction review provides good reasons for limiting *Deegan* to its facts.

In 1976, our supreme court noted that “[t]he salient feature” of Minnesota’s postconviction statutes, along with federal case law, was that “a convicted defendant is entitled to at least one right of review by an appellate or postconviction court.” *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (citing *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486 (1965)). But the question in *Case* was whether the states were required to afford “state prisoners some adequate corrective process.” 381 U.S. at 337, 85 S. Ct. at 1487. There is no indication that *Case* intended to recognize a right to “one corrective process” for misdemeanor defendants.

We agree that the right of an indigent defendant to counsel on direct appeal is well-established. *See id.* at 96 (recognizing that right to counsel under *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963), was expressly limited to direct appeal). *Deegan* extends this right, under the state constitution, to a “first review by postconviction proceeding.” *Id.* at 97. But it does so in a case involving a felony defendant. And it does so in addressing the constitutionality of a statute that, because it applies only to those who receive “presumptive” sentences or less, could apply only to felony defendants. *See* Minn. Stat. § 590.05 (2004) (allowing the state public defender to decline representation if the person pleaded guilty and “received a presumptive sentence or a downward departure in sentence”).

We observe that the right to counsel on direct appeal established by the United States Supreme Court is based on equal-protection concerns. *See Douglas*, 372 U.S. at

357, 83 S. Ct. at 816 (stating that the denial of the right to counsel to an indigent in the only appeal he has of right would draw “an unconstitutional line . . . between rich and poor”). But as the United States Supreme Court has noted in declining to extend *Douglas* to collateral review in postconviction proceedings, “the tendency of all rights [is] to declare themselves absolute to their logical extreme.” *Ross v. Moffitt*, 417 U.S. 600, 611-12, 94 S. Ct. 2437, 2444 (1974) (quotation omitted). The Supreme Court has declined to extend the *Douglas* right to counsel to collateral review even in capital cases. *Coleman v. Thompson*, 501 U.S. 722, 756-57, 111 S. Ct. 2546, 2568 (1991). Yet appellant seeks to extend it to collateral review in misdemeanor cases.<sup>2</sup>

The dissent notes that the limited right to counsel applies during the implied-consent procedure, and argues that it would be anomalous to hold that misdemeanor defendants do not have a right to counsel in a postconviction review of their DWI conviction. See *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 836 (Minn. 1991) (recognizing limited right to counsel for drivers facing choice of submitting to testing). But the right to counsel has long been recognized in pretrial or trial proceedings in which no right to counsel would be extended on collateral review. See *Finley*, 481 U.S. at 555, 107 S. Ct. at 1993 (noting right to representation to defend against charges brought by the state does not extend to overturning a finding of guilt). If such a right exists in Minnesota for postconviction review by a misdemeanor defendant, it could only be derived from

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<sup>2</sup> This court has held that “petty misdemeanors are treated as misdemeanors for appeal purposes.” *State v. Tessema*, 515 N.W.2d 626, 627 (Minn. App. 1994). There is no authority limiting petty misdemeanants from filing a postconviction petition. Therefore, any extension of the *Douglas* equal-protection rationale to misdemeanants could arguably extend also to petty misdemeanants.

*Deegan*, not from any comparison with the limited pretrial right to counsel recognized in *Friedman*. See *Friedman*, 473 N.W.2d at 835 (recognizing limited right, “upon request,” to “reasonable opportunity” to seek an attorney’s advice). We conclude that *Deegan* does not establish such a right.

Finally, we observe that the state public defender may, in its discretion, represent a misdemeanor defendant pursuing a postconviction remedy. Minn. Stat. § 611.25, subd. 1(b) (2004). The state public defender’s representation of appellant in this appeal demonstrates that, despite the earlier denial of representation, the state public defender does exercise its discretion in favor of representation.

**Affirmed.**

**ROSS**, Judge (dissenting)

I respectfully disagree with the majority’s holding that the state constitution does not afford an indigent misdemeanor defendant the right to counsel on his first appeal, because I believe binding, recent precedent directs otherwise. I therefore dissent.

After accurately outlining the constitutional and statutory structure that frames the question of whether indigent misdemeanor defendants are entitled to appointed counsel in a first appeal during a postconviction proceeding, the majority recognizes and discusses the one case that controls the decision: *Deegan v. State*, 711 N.W.2d 89 (Minn. 2006). Based on its analysis of *Deegan*, the majority concludes that only felony defendants are entitled to appointed counsel. I agree with the premise that *Deegan* controls the question.

But in my view, *Deegan* does not invite the felony-misdemeanor distinction upon which the majority rests its conclusion today.

The majority takes a surgical approach to *Deegan*, narrowly construing its broadly stated holding and paring away one class of offenses from *Deegan*'s general proposition that "a defendant's right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding." *Id.* at 98. True, the *Deegan* matter involved a person convicted of more serious crimes than Morris; *Deegan* had been convicted of second-degree murder and kidnapping, felonies, while Morris was convicted of three counts of theft, misdemeanors. The rationale and logic of *Deegan*, however, seem to give little room for pause over this difference.

The *Deegan* court focused on the near futility of an indigent defendant's statutory right to a first appeal if he is denied appointed appellate counsel to assist in the appeal. The supreme court expressly framed the issue before it as being "whether the Minnesota Constitution requires the assistance of counsel to make [the statutorily required] one review *meaningful*." *Id.* at 97 (emphasis added). It rejected as unconstitutional a statute that allowed the public defender to decline to represent one subset of postconviction petitioners who had pleaded guilty and received a presumptive sentence, specifically reasoning that the statute thereby "deprives some defendants of meaningful access to one review of a criminal conviction." *Id.* at 98.

Applying the holding and rationale of *Deegan*, I see no basis on which to distinguish a misdemeanor defendant's right to appointed counsel from a felony

defendant's right to appointed counsel. In Minnesota, we value the right as applied to both alike. The right to first appeal for each level of offense arises from the same base: "[A] convicted defendant is entitled to at least one right of review by an appellate or postconviction court." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). And the state constitutional provision that affords the right to assistance of counsel "[i]n all criminal prosecutions," Minn. Const. art. I, § 6, has been interpreted to apply even to administrative implied consent procedures during detention of drivers, because those procedures bear on potential drunk-driving charges (which are often only misdemeanors). *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 836 (Minn. 1991). It is difficult to conceive that Article I, section 6, affords a drunk-driving misdemeanor defendant the right to counsel at the administrative stage of the proceedings under *Friedman* but would not extend to the same defendant after conviction on a first appellate review, simply because the offense is a misdemeanor.

More important, *Deegan's* holding rests expressly on reasoning and principles that apply equally to those accused of theft and those accused of kidnapping. For example, it is premised on the broad basis that "Minnesota statutes and case law [demonstrate] that *a criminal defendant* in Minnesota has the right to one review of his or her conviction," *Deegan*, 711 N.W.2d at 97 (emphasis added), and those statutes and case law afford this right to both misdemeanor and felony defendants alike. It is expressly concerned generally about the meaningfulness of that review. It focuses broadly on "*a defendant's* right to assistance of counsel" under the Minnesota Constitution, and although the majority discusses several federal opinions that limit the reach of the right to counsel

under the United States Constitution, *Deegan* highlights plainly, “We have previously demonstrated a willingness to interpret the right to counsel under the Minnesota Constitution independently of the United States Constitution.” *Id.* And while the majority notes that a federal case stands for the proposition that the right to counsel has been recognized in pretrial or trial proceedings in which no right to counsel would be extended on collateral, postconviction review under the federal Constitution, *Deegan* expressly distinguished “that a defendant’s right to the assistance of counsel under Article I, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding.” *Id.* at 98.

As the supreme court explained 40 years ago regarding the right as applied to a criminal prosecution, “it is simply impossible to draw a distinction between the right to counsel in misdemeanor, gross misdemeanor, and felony cases merely because they are called by different names.” *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 893 (1967). Although the federal Constitution entitles a defendant to counsel only if, determined retrospectively, his offense actually led to incarceration, *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S. Ct. 2006, 2012 (1972), in Minnesota, a defendant has the right to assistance of counsel determined prospectively for misdemeanors whenever a prosecution *may* lead to incarceration. *State v. Nordstrom*, 331 N.W.2d 901, 905 (Minn. 1983). Morris’s misdemeanor-theft charges exposed him to incarceration. *See* Minn. Stat. § 609.52, subd. 3(5) (1998) (establishing as the sentence for theft up to 90 days imprisonment or a fine up to \$700 or both). He therefore was entitled to counsel in the underlying criminal proceeding. And because the supreme court has expressed that the

lines between levels of offenses do not determine the application of the right to counsel generally, I cannot agree that *Deegan* can be factually distinguished merely on account of the misdemeanor level of Morris's offenses.

Reasonable minds might wrangle over whether our state constitutional departure from federal jurisprudence concerning the right to counsel charts the right course. But once that departure has been made by clear precedent—and it has—I think following it to its most logical conclusion requires us to apply *Deegan*'s broadly stated holding here.