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Argersinger v. Hamlin
 Right to Counsel Expanded to Include
 Offenses Which May Result in Imprisonment

ON JUNE 12, 1972 THE UNITED STATES SUPREME COURT HELD IN *Argersinger v. Hamlin*,¹

. . . that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.²

Although, all of the ramifications of this decision have not yet been felt, American Bar Association president, Robert W. Meserve has estimated that the decision will require the legal profession to provide representation in some additional two to four million cases per year for indigent defendants alone.³

Because *Argersinger* is an important extension of the Court's holding in *Gideon v. Wainwright*,⁴ it is illuminating to recall the *Gideon* case and some subsequent events.

In *Gideon v. Wainwright*⁵ the Supreme Court held that the Sixth Amendment⁶ right to counsel was guaranteed to defendants in state courts by reason of the Fourteenth Amendment's due process clause⁷ and that such defendants, who were unable to afford counsel, were entitled to court appointed counsel. As the case involved a felony, the decision was accordingly limited to defendants charged with felonies. Therefore, the question of whether the right to court appointed counsel existed in cases where lesser offenses were charged, while alluded to, was not answered.⁸ The court did later hold that *Gideon* was to be applied in cases in which the possible imprisonment was greater than one year (and thus within the usual definition of a felony) even if the particular state labeled the

¹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972)

² *Id.* at 37 (Footnote of the Court omitted).

³ 1 *Student Lawyer* 5, 31 (Jan. 1973).

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ *Id.*

⁶ U.S. CONST. amend. VI, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense."

⁷ U.S. CONST. amend. XIV, §1, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

⁸ *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963).

offense a "misdemeanor."⁹ But it then consistently denied certiorari in cases in which the question would have had to have been decided.¹⁰

A possible explanation is that the Court knew that while most states were prepared to supply counsel to indigent defendants charged with felonies, almost no states were prepared to do so for the more numerous indigent defendants charged with lesser offenses, and therefore, felt some time should be allowed the states. In 1963 when *Gideon* was decided there were only five states that provided counsel in anything less than felony cases.¹¹ By 1970 thirty-one states, in at least some cases, appointed counsel in cases involving crimes less than felonies.¹² Clearly the climate was more favorable for a further delineation of how far the constitutional right to counsel did extend. In the *Argersinger* case the Court did make such a delineation.

The *Argersinger* case arose in the state of Florida where the petitioner-defendant was charged with carrying a concealed weapon,¹³ an offense with a maximum penalty of six months imprisonment and a \$1,000 fine.¹⁴ At his trial, petitioner, unrepresented by counsel, received a ninety day sentence. He then filed for a writ of habeas corpus in the Florida Supreme Court alleging that without court appointed counsel he, an indigent, had been unable to properly present his defense.¹⁵

The decision of the Florida Supreme Court was that an indigent defendant has a right to court appointed counsel only in trials ". . . for non-petty offenses punishable by more than six months imprisonment."¹⁶ It buttressed its decision on the United States Supreme Court decision in *Duncan v. Louisiana* which had indicated that the Sixth Amendment right to a jury trial would not extend to cases in state courts in which the defendant was subject to a maximum incarceration of six months or less.¹⁷ In this, the Florida court erred, for as Mr. Justice Powell points out in a concurring opinion:

⁹ *Patterson v. Warden*, 372 U.S. 776 (1963).

¹⁰ See, *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364 (1966), *cert. denied*, 385 U.S. 907 (1966); *DeJoseph v. Connecticut*, 3 Conn. Cir. 624, 222 A.2d 752 (1966), *cert. denied*, 385 U.S. 982 (1966); *Heller v. Connecticut*, 154 Conn. Rptr. 743, 226 A.2d 521 (1967), *cert. denied*, 389 U.S. 902 (1967).

¹¹ Comments, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 Creighton L.Rev. 103, 133 (1970).

¹² *Id.* at 133.

¹³ 236 So.2d 442 (1970).

¹⁴ F.S.A. §790.01 (1970).

¹⁵ 407 U.S. 25, 26 (1972).

¹⁶ 236 So.2d 442, 443 (1970).

¹⁷ *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

Limiting the right to jury-trial . . . does not compel the conclusion that the indigent's right to appointed counsel must be similarly restricted. The Court's opinions . . . reveal that the jury trial limitation has historic origins at common law. No such history exists to support a similar limitation of the right to counsel . . ."¹⁸

Thus the Supreme Court distinguishes *Duncan*. It then relies on history cited in *Powell v. Alabama*,¹⁹ and *James v. Headly*,²⁰ to state:

. . . there is nothing in the language of the (Sixth) Amendment, its history, or in the decisions of this court to indicate that it was intended to embody a retraction of the right [to counsel] in petty offenses wherein the common law previously did require that counsel be provided.²¹

The court then quotes from *Powell*, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel;"²² and notes that, while the *Gideon* decision involved a felony trial, the Court had stated:

. . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.²³

The Court next correctly explained, that there is no basis for assuming that the legal or constitutional questions that arise in the course of a trial for a petty offense are any less complicated than those that arise during the trial of a felony.²⁴

Next, facts, figures, and quotations were presented indicating that misdemeanor defendants are sometimes processed in a manner similar to fish on a tuna boat and thus fairness is not always guaranteed.²⁵ The Court concludes ". . . that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."²⁶ The holding then follows:

¹⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972).

¹⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁰ *James v. Headly*, 410 F.2d 325 (5th Cir. 1969).

²¹ *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972).

²² *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

²³ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1967).

²⁴ *Argersinger v. Hamlin*, 407 U.S. 25, 29-30 (1972).

²⁵ *Id.* at 33-37.

²⁶ *Id.* at 36-37.

We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.²⁷

In addition to the opinion of the Court written by Mr. Justice Douglas, there were three concurring opinions. In a concurring opinion by Mr. Justice Powell joined by Mr. Justice Rehnquist, these two members of the Court, express their dissatisfaction with the broadness of the rule held by the majority. They state that:

The simplicity of such a rule is appealing because it could be applied automatically in every case, but the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of fifty states.²⁸

They would rather have the court hold that "the right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis."²⁹ Such a holding would be analogous to the *Betts* rule which, in regard to felony cases, limited the right to court appointed counsel to those cases where a trial without counsel would be offensive to the fundamental ideas of fairness and right.³⁰ But the *Betts* rule proved unworkable when the state courts consistently failed to see reason to appoint counsel and the Supreme Court consistently was forced to overrule.³¹ Although Justice Powell states, ". . . this Court should not assume that the past insensitivity of some state courts to the rights of defendants will continue,"³² he fails to present any evidence or argument for assuming that it will not continue. Therefore, the "simple" rule also appears to be the sounder rule and, as the experience with administering *Betts* has shown, it also appears to be less of an interference (in the long run) with state court procedures than the constant supervision which would be required by the case-by-case rule.³³

The ramifications of the Court's decision will be many. While the "chaos predicted by the Solicitor General"³⁴ has not and will not occur, the implementation of the decision will not be as easy as

²⁷ *Id.* at 37 (Footnote at the Court omitted).

²⁸ *Id.* at 50-51.

²⁹ *Id.* at 63.

³⁰ *Betts v. Brady*, 316 U.S. 455 (1942), *ovrld.*, *Gideon v. Wainwright*, 372, U.S. 335 (1963).

³¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³² *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972).

³³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁴ *Argersinger v. Hamlin*, 407 U.S. 25, 66 (1972).

Justices Brennan, Douglas and Stewart seem to believe.³⁵ As pointed out by Justice Powell, there are many small towns, villages and even counties in the United States which have no practicing lawyers or the tax funds to hire them.³⁶ In such areas following this decision will be very difficult. Perhaps, "circuit public defenders" or "clinical practice field trips" from the law schools will be partial solutions. In his concurring opinion Chief Justice Burger stated it most realistically saying:

The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.³⁷

Providing counsel for all indigent defendants in cases where the defendant may be sentenced to imprisonment is clearly not beyond America's capabilities. Indeed, since 1966 the Federal Rules of Criminal Procedure have provided that:

Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment.³⁸

Also, even before this decision, there were nineteen states with "provisions for appointment of counsel in most misdemeanor cases."³⁹ In nine of these states the Court's decision will create few problems at all because state statutes or state court decisions already require that "virtually all misdemeanants have the right to appointed counsel. . . ."⁴⁰

If California, as it does, can require counsel to be appointed indigent defendants charged only with a minor traffic violation⁴¹ then there is strong reason to believe that all of the states can meet the lesser requirement mandated by the Supreme Court.

³⁵ See, *Id.* at 37 n. 7.

³⁶ *Id.* at 60.

³⁷ *Id.* at 44.

³⁸ F.R.C.P. 44 (a) 1966.

³⁹ Comments, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 Creighton L.Rev. 103, 133 (1970).

⁴⁰ *Id.* at 124.

⁴¹ *Blake v. Municipal Court*, 242 Cal. App. 2d 857, 51 Cal. Rptr. 771 (1966).

As the Court refused to consider the constitutional right to counsel where loss of liberty is not involved,⁴² a further delineation of the right may be forthcoming. It will probably not be soon. As Justice Douglas pointed out in the dissenting opinion of *Bute v. Illinois*:

It might not be nonsense to draw the *Betts v. Brady* line somewhere between that case (referring to a hypothetical twenty year sentence) and the case of one charged with violation of a parking ordinance, and to say the accused is entitled to counsel in the former but not in the latter.⁴³

As that is exactly what the court has done, the rule is likely to remain the same for some time.

So it can be seen that the decision of the Supreme Court will not place intolerable burdens on any state. In *Toledo v. Frazier* the Ohio Supreme Court stated:

It is our considered judgment that the law of Ohio be followed in this state until a mandate comes from the Supreme Court of the United States that the concept of the right to counsel at public expense under the Sixth Amendment should be embraced within the due process clause of the Fourteenth Amendment, which applies to criminal procedure in the states in misdemeanor cases, thereby coercing the Legislature of Ohio to implement such change in accordance with the decision of such court.⁴⁴

The result of *Argersinger v. Hamlin* is that the Supreme Court has now given that mandate and the states will have to abide by it.

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⁴² *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

⁴³ *Bute v. Illinois*, 333 U.S. 640, 682 (1948).

⁴⁴ *City of Toledo v. Frazier*, 10 Ohio App. 2d 51, 60, 61, 226 N.E.2d 777, 783 (1967).

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