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Constitutional Law - Criminal Law - Absent a Knowing and Intelligent Waiver, No Person May Be Imprisoned for Any Offense Unless Represented by Counsel at Trial

Richard E. Weicher

CONSTITUTIONAL LAW—CRIMINAL LAW—Absent a Knowing and Intelligent Waiver, No Person May Be Imprisoned for Any Offense Unless Represented by Counsel at Trial.

Jon Richard Argersinger was arrested in Leon County, Florida and charged with carrying a concealed weapon. This offense, under Florida law, is a misdemeanor punishable by up to six months imprisonment and a $1,000 fine. Argersinger, an indigent, was tried before a judge without the assistance of counsel. Sentenced to 90 days in jail, he brought a habeas corpus petition before the Florida Supreme Court.

Argersinger alleged that as an indigent layman he had been unable to present to the trial court good and sufficient defenses without the assistance of counsel. The Florida Supreme Court[1] faced the issue of the applicability of *Gideon v. Wainwright*[2] to a state trial of a misdemeanor offense. *Gideon* had held that an indigent defendant in a *felony* prosecution has a fundamental due process right under the fourteenth amendment to the assistance of appointed counsel at trial.[3]

The Florida court reasoned that assuming *Gideon* were eventually to be extended by the United States Supreme Court, such extension would be in accord with the more recent decisions on the right to trial by jury announced in *Duncan v. Louisiana*[4] and *Baldwin v. New York*.[5] These decisions had limited the federal constitutional right to trial by jury to offenses punishable by a sentence of over six months imprisonment. Since Argersinger had not been charged with such an offense, the court decided that he was not entitled to appointed counsel at trial and, therefore, discharged the writ. The United States Supreme Court granted certiorari[6] and reversed.[7]

The issue before the Court was whether the protection of *Gideon* was to be extended, and if so, to what kinds of offenses. Reasoning that counsel is essential whenever a defendant's liberty is at stake, the Court held that "absent a knowing and intelligent waiver, no person

1. Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970).
2. 372 U.S. 335 (1963).
3. *Id.* at 345.
4. 391 U.S. 145 (1968).
5. 399 U.S. 66 (1970).
6. 401 U.S. 908 (1971).
7. Argersinger v. Hamlin, 407 U.S. 25 (1972).

may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."[8]

BACKGROUND

The right to appointed counsel in a state *capital* case was established in *Powell v. Alabama.*[9] There the Court explored the practical and theoretical bases for this right. Counsel was adjudged a necessary requisite of due process in capital cases and thus was made applicable to the states through the fourteenth amendment.[10]

Although the *Powell* case involved a defendant charged with a capital offense, its broad language, quoted with approval in *Argersinger*, laid a theoretical base for the right to counsel in all criminal cases.

> 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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefor, of due process in the constitutional sense.[11]

In 1942, the Supreme Court in *Betts v. Brady*[12] dealt with the issue of a right to appointed counsel in a state *felony* case. There the Court denied there was an unconditional right to appointed counsel, but left the door open in cases of "special circumstances." The Court in *Betts* stated:

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8. *Id.* at 37.
9. 287 U.S. 45 (1932).
10. U.S. CONST. AMEND. XIV, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
11. 287 U.S. at 68-69.
12. 316 U.S. 455 (1942).

> The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.[13]

Betts left it to the discretion of the trial judge to appoint counsel when such appointment seemed "to be required in the interest of fairness."[14]

Twenty-one years later in 1963, the United States Supreme Court decided *Gideon v. Wainwright*.[15] Gideon had been charged with breaking and entering a poolroom with the intent to commit a misdemeanor, a felony under Florida law. At his trial, Gideon requested the court to appoint counsel and was refused. He conducted his own defense, was convicted and was sentenced to five years in the state prison. Gideon brought a habeas corpus petition to the Florida Supreme Court claiming a denial of his sixth amendment right to counsel. After the Florida court denied all relief, the United States Supreme Court reviewed the question and reversed. Overruling *Betts v. Brady*, the Court held that due to the refusal to appoint counsel, Gideon had been denied a right which is fundamental and essential to a fair trial.[16]

Mr. Justice Harlan, in his concurring opinion to *Gideon*, contended that the rule of *Betts* had continued to exist in form[17] while its substance had been substantially and steadily eroded. This was due to the Court's increasing willingness to find these "special circumstances"[18] —it found them without exception in all cases since 1950. Justice Harlan characterized the *Gideon* Court as having come to recognize "that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial."[19]

Gideon settled the issue of the right to appointed counsel in *felony* trials; the decision, however, went no further. Mr. Justice Harlan commented parenthetically: "Whether the rule should be extended to all criminal cases need not now be decided."[20]

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13. *Id.* at 461-62.
14. *Id.* at 472.
15. 372 U.S. 335 (1963).
16. *Id.* at 345.
17. Two cases which denied that there were special circumstances sufficient to appoint counsel were Bute v. Illinois, 333 U.S. 640 (1948); Gryger v. Burke, 334 U.S. 728 (1948).
18. *E.g.*, Hudson v. North Carolina, 363 U.S. 697 (1960); Chewning v. Cunningham, 368 U.S. 443 (1962).
19. 372 U.S. at 351 (Harlan, J., concurring).
20. *Id.* at 351.

The Court denied certiorari in instances subsequent to *Gideon* and prior to *Argersinger* where the issue of right to counsel in less than felony length sentences had arisen.[21] (Traditionally, a felony has been defined as any offense which carries a potential punishment of more than one year.)[22] In a per curiam decision in *Patterson v. Warden,*[23] the Court vacated and remanded to the Maryland Supreme Court for further consideration in light of *Gideon.* In *Patterson* the accused was convicted of a *misdemeanor* after being refused appointed counsel. However, the defendant was sentenced to two years imprisonment, a length beyond the standard one year felony definition.[24] Thus, since *Gideon* and until *Argersinger,* the Supreme Court had shed no light on the question in cases involving less than felony length sentences, whatever the crime be named.

Since 1963, there have been several Federal Circuit Court decisions dealing with the right to appointed counsel in certain *misdemeanor* situations. In *Harvey v. Mississippi,*[25] the defendant was arrested for possession of whiskey, a misdemeanor under state law. Harvey pleaded guilty, expecting only a fine. On his court day, without the assistance of counsel, he was sentenced to 90 days imprisonment and fined $500.

The Fifth Circuit, hearing Harvey's habeas corpus appeal, held that the failure to inform the defendant of his right to counsel "invalidated his guilty plea and rendered his conviction and incarceration constitutionally improper."[26] In reaching its decision, the court dealt with the distinction between felony and misdemeanor. The court pointed out that: "It is true that the cases which support appellant's argument all involved felony convictions, but their rationale does not seem to depend on the often purely formal distinction between felonies and misdemeanors."[27] The court quoted with approval from *Evans v. Rives,*[28] which had extended the right to appointed counsel to federal misdemeanor cases:

> It is . . . suggested . . . that the constitutional guaranty of the right to the assistance of counsel in a criminal case does not apply except in the event of 'serious offenses.' No such differentiation is

21. *E.g.,* De Joseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied,* 385 U.S. 982 (1966); Hendrix v. Seattle, 76 Wash. 2d 142, 456 P.2d 696 (1969), *cert. denied,* 397 U.S. 948 (1970).
22. *See, e.g.,* the federal definition of a felony at 18 U.S.C. § 1.
23. 372 U.S. 776 (1963).
24. Patterson v. Maryland, 227 Md. 194, 175 A.2d 746 (1961).
25. 340 F.2d 263 (5th Cir. 1965).
26. *Id.* at 271.
27. *Id.* at 269.
28. 126 F.2d 633 (D.C. Cir. 1942).

> made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[29]

Thus, in a guilty plea proceeding, the right to appointed counsel was established without regard to the designation of the charge—felony or misdemeanor.

In 1968, the Fifth Circuit decided *Goslin v. Thomas*,[30] which held that the right to counsel in that jurisdiction extended to all state misdemeanor cases. This case again involved a guilty plea. The court followed *Harvey v. Mississippi*[31] and *McDonald v. Moore*[32] and referred to the then recent *Duncan v. Louisiana*[33] decision on the right to jury trial. The court in *Goslin* felt that *Duncan* supported the Fifth Circuit rule since they viewed *Duncan* as establishing that a misdemeanor defendant was entitled to a jury. The court repeated the *Gideon* emphasis on the need for a lawyer in any criminal prosecution and stressed the artificiality of the felony-misdemeanor distinction.[34]

Other federal appeals courts also dealt with the right to counsel for misdemeanants. In *Winters v. Beck*,[35] an indigent defendant was tried and convicted without counsel for obscene and lascivious conduct. He received a 30-day jail sentence and a $250 fine plus costs. Because he was unable to pay the fine, he was sentenced to 284 days on a penal farm. The Arkansas Supreme Court denied there was any

29. *Id.* at 638. Johnson v. Zerbst, 304 U.S. 458 (1938) had previously established the right to counsel in federal prosecutions in a felony case. These decisions were codified in 18 U.S.C.A. § 3006A(b): "*Appointment of counsel.*—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him."

30. 400 F.2d 594 (5th Cir. 1968).

31. 340 F.2d 263 (5th Cir. 1965).

32. 353 F.2d 106 (5th Cir. 1965). This case was factually similar to *Harvey* and followed its reasoning.

33. 391 U.S. 145 (1968).

34. The Fifth Circuit later held that the right to appointed counsel also applied in a situation where the defendant did not plead guilty. James v. Headley, 410 F.2d 325 (5th Cir. 1969).

35. 239 Ark. 1151, 397 S.W.2d 364 (1965).

requirement to appoint counsel in a misdemeanor case. The Supreme Court denied certiorari;[36] Mr. Justice Stewart, in dissent, pointed out the conflict *Winters* presented with the Fifth Circuit decisions of *Harvey v. Mississipi* and *McDonald v. Moore.*

The Eighth Circuit Court of Appeals dealt with Winters' request for habeas corpus relief and concluded that "the right to counsel cannot be dependent upon the mere arbitrary label that a state legislature attaches to an offense."[37] Winters had been sentenced to jail for approximately nine and one half months which the court found to be of sufficient gravity to entitle the defendant to appointed counsel. *Winters* does *not* hold that there is a right to counsel for all misdemeanors, nor does it interpret the Fifth Circuit as having established that proposition. The Eighth Circuit accepted the *Harvey* rationale and stated that " . . . the right to counsel must be recognized regardless of the label of the offense if, as here, the accused may be or is subjected to deprivation of his liberty for a substantial period of time."[38] Thus, the line was drawn at confinement for a substantial period rather than the felony-misdemeanor distinction which had gained emphasis as a result of *Gideon.*

Since the Supreme Court decision in *Gideon,* these lower federal courts wrestled with the problem of the appointment of counsel in minor offense prosecutions. These decisions, which laid the groundwork for *Argersinger,* demonstrated the erosion of two concepts. The validity of the felony-misdemeanor distinction was discredited. Such a distinction—merely the designation of an offense—was abandoned as the criterion for affording a constitutional protection. A criterion based on a specific length of imprisonment was also questioned. Even a short period of confinement was recognized as a serious consequence. However, it remained for the Supreme Court in *Argersinger* to take the step not taken by any of the lower federal courts and hold that before *any* deprivation of liberty may be imposed, counsel must be appointed.

THE DECISION

Argersinger v. Hamlin was handed down on June 12, 1972.[39] Mr.

36. 385 U.S. 907 (1966).
37. Beck v. Winters, 407 F.2d 125, 130 (8th Cir.), *cert. denied,* 395 U.S. 963 (1969).
38. 407 F.2d at 128.
39. Mr. Justice Douglas delivered the opinion of the Court, joined by Justices Brennan, Stewart, White, Marshall, and Blackmun. Mr. Chief Justice Burger concurred in the result. Mr. Justice Brennan filed a concurring opinion in which Justices Douglas and Stewart joined. Mr. Justice Powell concurred in the result and filed an opinion in which Mr. Justice Rehnquist joined.

Justice Douglas, speaking for the majority, first reviewed the sixth amendment[40] protections made applicable to the states by the fourteenth amendment. He stated that the rights to public trial, to be informed of the nature and cause of the accusation, and to confront witnesses have not been limited to felonies, nor to lesser but serious offenses. These were contrasted with the right to trial by jury which, according to Justice Douglas, arose from a different "genealogy."[41]

This different genealogy has been used to justify the limitation on the right to trial by jury which developed from *Duncan v. Louisiana*.[42] In *Baldwin v. New York*[43] a defendant was held to be entitled to a jury trial where the potential punishment was confinement for six months or more. The Court in *Argersinger* distinguished the right to counsel from the right to jury trial and refused to apply the six month limitation to the right to counsel. The Court emphasized the importance of counsel in misdemeanor and petty offense prosecutions which may involve issues no less complex than when a long prison penalty is possible. In the misdemeanor trial, counsel is needed to deal with the problems involved in pleading, and to counterbalance the unfairness which results from the obsession for speed due to the great volume of misdemeanor cases. Without counsel, prejudice may result to misdemeanor defendants from such "assembly line" justice. Considering these factors, the Court held that unless represented by counsel at his trial, or unless knowingly and intelligently waiving counsel, no person may be imprisoned for any offense, regardless of whether classified as petty, misdemeanor or felony.

Mr. Chief Justice Burger in his concurring opinion agreed with the Court on the importance of counsel in any trial where imprisonment can result. His primary focus was on the procedure to be followed in deciding on the appointment of counsel. The prosecutor and trial judge must "engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term."[44]

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40. U.S. CONST. AMEND. VI:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
41. 407 U.S. at 29.
42. 391 U.S. 145 (1968).
43. 399 U.S. 66 (1970).
44. 407 U.S. at 42 (Burger, C. J., concurring).

Mr. Justice Powell wrote a lengthy opinion dealing primarily with the complications and practical difficulties he envisioned as a result of the decision. Although concurring in the result, Justice Powell would have preferred a less mechanistic application than the rigid rule adopted by the Court. He suggested his own rule in which each case would be decided on its own facts, thereby maintaining greater judicial discretion. He also pointed out that the majority made no distinction between deprivations of liberty and deprivations of property. Thus, the logic of the decision is equally applicable to cases involving other penalties which lack confinement.

Justice Powell foresaw two kinds of equal protection problems which could result from *Argersinger*. The first would occur in a petty offense judgment involving fine *or* imprisonment.[45] If no imprisonment is likely to be imposed with respect to certain offenses, an indigent defendant will be receiving a different treatment from a defendant who can pay. Due to his indigency, no effective penalty whatsoever is likely to be imposed. The other difficulty would be the possibility of individual defendants in different courts of the same jurisdiction receiving different treatment. This could result from the differing practices of judges in leaving open the imprisonment option by appointing counsel. However, this fear seems exaggerated since, as is discussed later, it is likely that there will be an eventual standardization of treatment according to the policies of the local jurisdiction. Justice Powell expressed great apprehension about the ability of the legal profession to cope with the added demands for legal counsel *Argersinger* would create. His principal concern was with the uneven distribution of legal resources which has its most negative effect in small rural communities.

The Right to Counsel and the Right to Jury Trial

The majority contrasted the different "genealogy" of the right to jury trial with that of the right to counsel in order to justify not limiting the two rights in the same manner. This distinction appears to be primarily historical, rather than theoretical. *Baldwin v. New York*[46] and *Duncan v. Louisiana*[47] discussed the history of jury trials in England

45. 407 U.S. at 55, n.17 (Powell, J., concurring): "The type of penalty discussed above (involving the discretionary alternative of 'jail or fine') presents serious problems of fairness—both to indigents and nonindigents and to the administration of justice. *Cf.* Tate v. Short, 401 U.S. 395 (1971). No adequate resolution of these inherently difficult problems has yet been found. The rule adopted by the Court today, depriving the lower courts of all discretion in such cases unless counsel is available and is appointed, could aggravate the problem."

46. 399 U.S. 66 (1970).

47. 391 U.S. 145 (1968).

and the American colonies. The Court in *Baldwin* stated " . . . with a few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six month prison term."[48]

This historical six month limitation on the right to jury trial was contrasted to the colonial practice concerning the right to counsel. The colonies had expanded the common law right to counsel by permitting it in all criminal cases.[49] The Court thus viewed the sixth amendment as extending the right to counsel beyond its common law dimensions, without retracting the right from lesser offenses for which it had originally been provided. Using this historical base, and seemingly concluding that the right to counsel is a "more fundamental" right than trial by jury, the Court rejected the "premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."[50]

The historical differences between the right to counsel and the right to jury trial may be a valid basis for distinguishing the extent to which each will be applied. However, perhaps the actual basis, although unstated, is that the right to counsel is in itself of a more fundamental nature than the right to jury trial. For example, when the Fifth Circuit in *Goslin v. Thomas*[51] held there was a right to appointed counsel in all state misdemeanor cases, the court speculated: "Indeed, the right to counsel may be more important than the right to a jury trial if the two are to be compared. It often happens that the only effective means of securing other valuable constitutional rights is through competent counsel."[52]

In any event, *Argersinger* indicates that at least in the trial of a minor offense, a lawyer is more essential and a greater safeguard than a jury. One inference that can be drawn from this is that the right to counsel outweighs practical considerations any time that confinement will occur; whereas, the right to a jury outweighs practical considera-

48. 399 U.S. at 71.
49. "Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. . . . [It] appears that in at least twelve of the thirteen colonies, the rule of the English common law, in the respect now under consideration, had been definitively rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes . . . ." Powell v. Alabama, 287 U.S. 45, 60 and 64-65 (1932).
50. 407 U.S. at 30-31.
51. 400 F.2d 594 (5th Cir. 1968).
52. *Id.* at 598.

tions only when six months imprisonment is possible. The practical costs of a jury in any prosecution will be greater than that of counsel, not only in terms of money but in terms of its effect on the efficient administration of justice.

The limitation on the right to trial by jury could have been used as support for the *Argersinger* limitation. The Court, however, used the different genealogy approach to justify not accepting the same limit as has been accepted with respect to the right to jury trial. The sixth amendment refers to *all criminal prosecutions.* Of the protections enunciated therein, only the rights to counsel and trial by jury have not been literally interpreted as applying to all criminal prosecutions. By distinguishing the right to counsel from the right to trial by jury, the *Argersinger* Court implied that the right to counsel is more akin to the all-inclusive protections.[53] However, in *Argersinger* the Court is setting a new limit on how far the constitutional protection of a sixth amendment right will be extended. The right to appointed counsel is made "fundamental" only where imprisonment is likely; the right to trial by jury only when that imprisonment is six months or longer. Thus, in fact, in the case of both these rights, a limit still exists; a constitutional protection is again not being interpreted as extending to all crimes. The Court could have concluded that the two rights were both of a "fundamental" character, and that both could be constitutionally limited due to historical and practical reasons. Even though a different line is being drawn, in both instances the full exercise of constitutional rights is being restricted by the nature of the penalty.

The Possibility of the Future Extension of the Right to Appointed Counsel

In *Gideon v. Wainwright,*[54] the Supreme Court held that, in a felony trial, an indigent defendant has a right to appointed counsel. In *Argersinger v. Hamlin,* the Supreme Court held that, whenever any imprisonment is to be imposed, an indigent defendant has the same right to appointed counsel. Mr. Justice Douglas, in *Argersinger,* stated that although the offense in *Gideon* was a felony, the rationale in that case did not limit the need of counsel to felonies only.[55] In *Argersinger* the defendant was sentenced to jail, yet the rationale of this decision need not be limited to jail sentences only. Because *Argersinger* involved imprisonment, Justice Douglas believed that it was not necessary for

53. *See* note 40 *supra* and discussion at p. 279 herein.
54. 372 U.S. 335 (1963).
55. 407 U.S. at 31.

the Court to consider the requirements of the sixth amendment where loss of liberty is not involved.

The rationale of *Argersinger* does not come to a natural end only where imprisonment is imposed; the Court has placed an arbitrary limit on its arguments and logic. The ground for the decision appears to be the fundamental nature of the right to counsel. This fundamental nature requires the appointment of an attorney for any indigent before imprisonment can result. However, there is no apparent reason why counsel becomes any less useful or essential to the layman where imprisonment is *not* involved. The due process clause of the fourteenth amendment protects a person against deprivations of *both* liberty and property. If the right to appointed counsel is required where liberty is at stake, a literal reading of the Constitution would lead to the same requirement where property is at stake.

Mr. Justice Powell, concurring in *Argersinger*, stated: "The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction."[56] He viewed the present decision as foreshadowing a broad prophylactic rule applicable to all petty offenses.

The due process protection of property has been dealt with in terms of eminent domain,[57] the taking of private property for state use,[58] or in terms of the vast field of economic regulation.[59] However, the subject of due process as applied to the taking of property in the form of a fine in a criminal prosecution has not been developed or explained by the courts.

If sometime in the future, the Supreme Court should specifically hold that the right to counsel does not extend to non-imprisonment cases, this would imply that property was being considered inferior to liberty. Such a distinction would be difficult to constitutionally justify. Considering the social stigma which attaches to any criminal conviction, deprivation of property should be entitled to as great a protection as deprivation of liberty. The community is saying in both instances: "We are punishing you because you are a criminal, a wrongdoer." For example, if Jon Argersinger had been punished by only a

56. *Id.* at 51-52 (Powell, J., concurring).
57. *E.g.*, Berman v. Parker, 348 U.S. 26 (1954).
58. *E.g.*, Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
59. *E.g.*, Nebbia v. New York, 291 U.S. 502 (1934).

$500 fine with no imprisonment, he still would have been convicted of a crime and still would have acquired the social stigma of a criminal.

There is another viewpoint from which it can be argued that the right to counsel should extend to cases involving fines as well as those involving imprisonment. This argument stems from the equal protection clause. One basis for making the *Argersinger* decision could have been that the equal protection clause demands that an indigent be provided with a lawyer in a situation where a man of means would have employed one. The Respondent's brief points out that this question was not raised before the Florida Supreme Court and therefore could not be raised before the United States Supreme Court.[60] The previous decisions in the right to counsel area have rested on the fundamental nature of the right, not on an equal protection basis. Of probable significance to the question of a right to counsel where the defendant faces only a fine is the decision of *Mayer v. Chicago*.[61] There, the indigent defendant was convicted of the nonfelony charges of disorderly conduct and interference with police officers in violation of city ordinances. His penalty was a fine only. He petitioned the Circuit Court for the transcript of the proceeding for an appeal. His request was refused on the basis of a state supreme court rule which denied a free transcript in the appeal of a nonfelony case. The United States Supreme Court held that the limitation on providing free trial transcripts in felony trials only was an " 'unreasoned distinction' proscribed by the Fourteenth Amendment."[62]

In reaching its decision, the Court rejected the city's argument that the case could be distinguished from *Griffin v. Illinois*[63] because in all previous transcript cases the defendants were sentenced to some term of confinement, whereas Mayer was merely fined. The Court stated:

> The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. . . . The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The

60. Brief for the Respondent at 19-22, Argersinger v. Hamlin, 407 U.S. 25 (1972).
61. 404 U.S. 189 (1971).
62. *Id.* at 196.
63. 351 U.S. 12 (1956). In *Griffin*, the Court held that an indigent must be provided with a free transcript of the trial when such a transcript is necessary for appellate review. In Douglas v. California, 372 U.S. 353 (1963) the Court held that an indigent had a right to the assistance of appointed counsel on appeal. The equal protection rationale in these cases is basically that the justice of a man's trial must not depend on how much money he has.

> collateral consequences of conviction may be even more serious. . . .[64]

Thus, the Court declared that the fine-imprisonment distinction was not an adequate basis on which to limit a procedural protection. Arguably, neither should such a distinction be used as the basis to limit the constitutional protection of the right to counsel to imprisonment cases.

THE IMPLEMENTATION OF ARGERSINGER

The Views of the Justices

A general picture of where the various states stood on the issue of appointed counsel prior to *Argersinger* can be obtained from an examination of recent studies.[65] In fifteen states this decision will have no direct effect,[66] since these states had previously recognized the right to appointed counsel for any offense in which imprisonment may result.[67] Of the remaining thirty-five states in which this decision will have an impact, sixteen[68] had extended the right to counsel to offenses less than felony level, and nineteen[69] still adhered to the felony only standard. These divisions reflected the individual state's definitions of felony, serious crime and misdemeanor. This lack of uniformity obscures comparisons of state procedure.[70] *Gideon* itself was of no effect

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64. 404 U.S. at 197.

65. *See, e.g.*, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968). Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1969). Comment, *Will the Trumpet of Gideon Be Heard in All the Halls of Justice?*, 25 U. MIAMI L. REV. 450 (1971).

66. California, Colorado, Illinois, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Texas, Washington, West Virginia, Wyoming.

67. Some states go beyond *Argersinger*. "California's requirement extends to traffic violations. *Blake v. Municipal Court*, 242 Cal. App. 2d 731, 51 Cal. Reptr. 771." 407 U.S. at 27, n.1.

68. Alabama, Alaska, Arizona, Connecticut, Delaware, Idaho, Iowa, Kentucky, Maryland, Michigan, Nevada, New Mexico, North Carolina, Utah, Vermont, Wisconsin.

69. Arkansas, Florida, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia.

70. *See generally* Comment, *Continuing Echoes of Gideon's Trumpet—The Indigent Defendant and the Misdemeanor*, 10 S. TEX. L.J. 222, 223 & n.3 (1968):

> A definitional problem exists from one state to another as regards the labeling of the same offenses. Whereas Texas considers 'offense' and 'crime' to be synonymous, thereby including misdemeanors, felonies, and capital felonies, New York deems an 'offense' and an 'infraction' to be a breach of the law lower in magnitude than a misdemeanor and calls such junctures 'petty' violations; and New Jersey calls these petty violations 'quasi-crimes.' In some states such as Florida and Arizona, adultery is classed as a felony, but as a misdemeanor in other states such as Kansas. Further illustrating the problem created by an arbitrary felony-misdemeanor classification is that even though a crime be classed as a felony or as a misdemeanor in all states, the possible punishment varies greatly from state to state. New Jersey designates most crimes as misdemeanors or high misdemeanors.

in the many states which had already extended the right to appointed counsel for felony trials.[71] *Argersinger* now removes this problem of definitions for purposes of the right to appointed counsel. No longer can the right to counsel vary according to a given state's arbitrary definitions of felony and misdemeanor. Now a lawyer must be appointed anytime imprisonment is to be imposed.

Mr. Justice Powell expressed great concern with the capacity of the legal profession to cope with the potential added strain. He feared grave effects to an already overburdened criminal justice system. Mr. Justice Brennan in his concurring opinion, minimized these factors, pointing to the availability of law students to augment the nation's legal resources. Chief Justice Burger was confident that the "dynamics of the profession have a way of rising to the burdens placed on it."[72] In any event, as the Chief Justice noted, the burden that the states will have to bear in providing counsel cannot be allowed to control the application of a fundamental constitutional right, once a right be recognized as such.

In the majority opinion, Justice Douglas stated that the Court does not sit as an "ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement."[73] Yet the practical result of the decision is clear: "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed even though local law permits it, unless the accused is represented by counsel."[74] However, as Justice Powell pointed out, "The opinion is disquietingly barren of details as to how this rule will be implemented."[75]

Chief Justice Burger offered his appraisal of the pretrial consultation between prosecutor and trial judge that he envisioned must take place in deciding on the matter of counsel. Prior to trial, the judge is to be given information about the accused and the offense charged in order to aid him in deciding if a jail sentence is likely. The Chief Justice minimized any impairment of judicial impartiality this may cause. This potential difficulty could be eliminated if a judge other than the trial judge makes the preliminary decision on counsel. If this bifurcated procedure is not adopted the "predictive evaluation"[76] prior to

71. According to one commentator, Gideon would have been provided with counsel in forty-five states. Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 104 (1969).
72. 407 U.S. 25, 44 (Burger, C.J., concurring).
73. *Id.* at 38.
74. *Id.* at 40.
75. *Id.* at 52 (Powell, J., concurring).
76. *Id.* at 42 (Burger, C.J., concurring).

the determination of guilt or innocence certainly would not benefit a defendant with a dubious past.

Justice Powell would have preferred to 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."[77] He viewed the new rule as too rigid, disliking the loss of judicial discretion. Now the judge *must* appoint counsel whenever imprisonment is to be imposed. Justice Powell would have employed a less mechanistic application that would follow a principle of "fundamental fairness." The process he outlined would have considered the complexity of the offense involved, the probable sentence in case of a conviction and the individual factors peculiar to each defendant. This he saw as similar to the former rule of *Betts v. Brady*[78] which held that there was no automatic right to counsel in felony cases except in "special circumstances." Justice Powell felt one reason why that rule was rejected in *Gideon* was its misapplication in state courts, rather than any constitutional infirmity.

It is interesting to speculate what Justice Powell's guidelines, if adopted, would mean. He appeared to be saying that the majority opinion was going too far. However, one of his criteria for appointing counsel was the probable sentence. He stated that "imprisonment is not the only serious consequence the court should consider."[79] He also would have weighed other consequences such as social stigma or loss of a driver's license which could be as serious as confinement in a given situation. However, if imprisonment were to be considered at all, it would be difficult to see where once it had been considered, counsel would be denied. By the Powell procedure, other punishment consequences would be included, along with the complexity of the case, *and* any special circumstances. The weighing of all these elements could lead to extending the right to appointed counsel to situations beyond those included in the majority coverage.

In cases involving a small term of imprisonment and where there are no other contravening factors, Justice Powell would not appoint counsel. However, in these clear-cut situations, the defendant himself is in the best position to decide if he desires to waive counsel. The majority left the decision on counsel to the defendant; Justice Powell would have preferred it rested with the judge. Justice Powell may also have been

77. *Id.* at 63 (Powell, J., concurring).
78. 316 U.S. 455 (1942). As discussed, the *Betts* rule is known as the "special circumstances" rule. The rule emphasized judicial discretion in the individual case. *E.g.*, Bute v. Illinois, 333 U.S. 640 (1948).
79. 407 U.S. at 64 (Powell, J., concurring).

in disagreement with the majority in their failure to make clear that the judge retains discretion to appoint counsel in situations which *do not* involve imprisonment but *do* involve the other factors. In the future, it is likely that the explicit holding of *Argersinger* will discourage judges from appointing counsel in non-imprisonment cases regardless of the complexity of the legal issues. Thus, the *Argersinger* decision could serve as a brake to the exercise of judicial discretion in situations where the Supreme Court has not yet said appointed counsel is constitutionally required.

Who Decides and With What Standards?

Argersinger leaves undetermined the question of who will ultimately make the decision on the appointment of counsel. The choice may actually be made by the prosecutor in determining the manner in which he will handle the case and what penalty he will seek. At least, his will be the first choice. He must first decide if he will seek imprisonment. If he does not, that would apparently settle the question. It seems unlikely that the trial judge, in consulting with the prosecutor, would decide he might impose imprisonment, thus necessitating appointing counsel in a situation where the prosecutor does not even seek it.

When the prosecutor does seek imprisonment, the next step is the pretrial consultation Chief Justice Burger foresaw between prosecutor and trial judge. However, one might speculate that in reality in the harried press of the legal process, the trial judge will automatically appoint counsel in situations where imprisonment is being sought. The judge would realize that if he denies counsel he has limited the scope of the penalty he can impose. In any case, he would probably also seek to minimize the otherwise searching pretrial inquiry necessary to decide the counsel issue. Rather, in order to insure fairness, he would simply follow the prosecutor's lead and appoint counsel.

Whether prosecutor, judge or both decide on the appointment of counsel, there is also the matter of what standards will be employed. When the Supreme Court held that no one may be imprisoned without counsel, it was dealing with imprisonment in-fact, as distinguished from imprisonment in-law.[80] Imprisonment in-law refers to any situation where imprisonment could potentially be imposed as punishment for an offense. Imprisonment in-fact refers to the situation where a person convicted of a given offense is actually imprisoned. The deci-

80. For a thorough examination of this distinction, see Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968).

sion on appointment of counsel can be made by either the case-by-case method focusing on whether this particular defendant is likely to be in fact imprisoned or it can be made by using a fixed standard.

The fixed standard approach would appoint or deny counsel depending upon the specific charge. For example, if 95% of the defendants convicted of a given misdemeanor have not been sent to jail, then counsel would not be appointed. How about 85%? 50%? If, on the other hand, a certain percentage of those convicted of a specific charge are actually imprisoned, then *all* those charged with that offense would be provided with counsel. Again, what percentage will fix the standard?

In the case-by-case method, the punishment to be imposed would be determined with respect to the individual defendant. This approach, involving a greater amount of judicial discretion, would be more efficient in terms of the cost of appointed counsel since fewer appointments would probably be made. The fixed standard would be more expensive in terms of the number of lawyers appointed in cases where an individualized determination would have shown no imprisonment likely. This cost, however, might be offset in time saved by minimizing the pretrial conference. A fixed standard also eliminates any problems of impartiality which the pre-trial predictive evaluation associated with the case-by-case method might create.

The initial implementation of *Argersinger* is likely to involve a combination of both methods. The decision as to whether counsel is to be appointed would be made on a case-by-case basis until an imprisonment/offense pattern could be adequately determined in a given jurisdiction. Later the decision would be made according to a fixed standard developed from these patterns. Thus, the determination concerning appointed counsel would be based on the offense charged. This would result in the right to appointed counsel, once again, being made dependent upon the name of the offense, albeit on a differnet level.

Prosecute or Not?

The majority opinion presents prosecutors and judges with a choice as the trial of an indigent misdemeanant approaches. This choice would be between appointing counsel for the indigent and thereby enabling the prosecutor to seek a punishment of imprisonment or proceeding without counsel with the realization that only a fine may be imposed.

However, when dealing with an indigent, there arises the question of the applicability and enforceability of a fine. This question may necessitate a close examination of just who is indigent. The man may be too poor to hire an attorney but not too poor to pay a small fine—which for him might still have a punitive effect and still be a deterrent. However, if *any* fine were too much of a burden, what could the court do? The judge could not impose a fine and then imprison the indigent when he was unable to pay.

In *Tate v. Short*[81] the defendant was convicted of traffic offenses in the Corporation Court of Houston, Texas. This court could impose only fines. After failing to pay his $425 fine, the indigent defendant was committed to the municipal prison farm. The United States Supreme Court found that his imprisonment was unconstitutional as a denial of equal protection since punishment was limited to a fine for those who could pay it, but converted to imprisonment for those who could not.[82]

Thus, *Argersinger* may leave prosecutors and trial courts with but two choices when dealing with indigents. The first choice would be to appoint counsel for the accused and thus keep all options open—imprisonment or fine. The other would be simply not to prosecute at all. Prosecutors might interpret these as being the real alternatives, lest they see the efficacy of the criminal justice system weakened by the imposition of unenforceable penalties, and their own time wasted in the process.[83]

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81. 401 U.S. 395 (1971). This decision built on the earlier Williams v. Illinois, 399 U.S. 235 (1970), which had held that a combination sentence of fine and imprisonment could not be extended in the case of an indigent to a sentence of solely imprisonment extending beyond the maximum term prescribed for the charge. As to the question of an eighth amendment problem regarding excessive fine for an indigent, examine People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686 (Ct. App. 1966). There the defendant had pleaded guilty to the misdemeanor of assault. The court found it illegal to imprison the defendant for his prison term of one year (eight months for good behavior) and an additional five hundred days when the indigent could not pay the $500 fine. The court reasoned that if excessive fine had a meaning, it related to what was reasonable, usual, proper, or just. In the case of this defendant, his was necessarily excessive.

82. In this opinion the Court emphasized that it was not unconstitutional to imprison a defendant who has the means to pay but refuses. The Court also referred to alternative methods of collecting fines, such as installment plans. 401 U.S. at 399-401. *Argersinger* will give the states new impetus to explore these approaches.

83. Another query is at what stage this new right to counsel is to become available. The majority and concurring opinions referred to *the trial.* Justice Douglas stated what every judge must know, and Chief Justice Burger described the *pre-trial* decision. However, if counsel is not appointed until the time of trial, it may already be too late to preserve due process. This question is beyond the scope of this comment and involves the matter of the "critical stage." *E.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967).

CONCLUSION

In states where the right to counsel had not previously been so extensive, *Argersinger* may force a revision of the public defender system. After a period of experimentation, classifications may solidify. As a result, for offenses for which imprisonment has in fact seldom been imposed, counsel will not be appointed. Likewise, where imprisonment is customarily imposed, counsel will be appointed. A more individualized treatment appears unrealistic.

The majority opinion concerned itself with imprisonment in-fact, rather than imprisonment in-law. That is, the important factor is not whether an offense can, by statute, be punished by confinement, but rather if it will be. This may foreshadow a realignment of the criminal process whereby certain types of offenses punished by minor fines only might be entirely separated from the criminal justice system. Offenses punishable by fine only could come to be considered as quasi-criminal.[84] If they can in some way be taken out of the sixth amendment's coverage of "all criminal prosecutions," then the same substantive protections are not necessary. Such infractions might be dealt with in an administrative fashion rather than as crimes. Then, while certain safeguards might be necessary, the full range of constitutional protections might not be applicable. One result of *Argersinger* may be a new need to examine and define exactly what is a crime.[85]

This possible separation from the criminal justice system is distinct from the question of an eventual further expansion of the right to counsel. If, however, these minor offenses remain within the existing system, several arguments can be advanced in favor of making the right more inclusive. First, the due process rationale of *Argersinger* is equally applicable to non-imprisonment prosecutions. The right to counsel is now considered fundamental whenever imprisonment is to be im-

84. One court which has dealt with the concept of a quasi-crime stated: "The word 'crime' does not include 'certain *quasi*-criminal acts or "offenses" ' such as e.g., the violation of municipal ordinances 'where the act is not made a crime by the general law of the state or by virtue of authority delegated by the state to the municipal corporation'; at common law, independent of statute, 'punishments for the violation of municipal ordinances are treated as civil actions'; the imprisonment is not deemed to be punishment but rather the means of coercing the payment of the fine. 14 Am. Jur. Criminal Law, sections 2, 9; Annotation, 33 L.R.A. 33; 48 L.R.A., N.S., 156." State v. Laird, 25 N.J. 298, 135 A.2d 859, 861-62 (1957). However, the court stated that in an offense, quasi-criminal in nature, the same regard exists as in strictly criminal cases for essential civil liberties designed to secure the individual against arbitrary action.

85. For discussion concerning the meaning of crimes and criminal prosecutions in a right-to-jury context, *see* Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917 (1926); Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959).

posed. The right could come to be considered equally fundamental when only a fine is imposed. Additionally, in reaching this due process result, emphasis could be placed on the fact that the fourteenth amendment specifically includes deprivation of property as well as deprivation of liberty.

Although it has never been relied upon in the right to appointed counsel decisions, another argument for expansion utilizes the equal protection clause. If a rich man, faced with a fine, would normally employ a lawyer, a poor man should be provided with one.

The arguments for maintaining the *Argersinger* limitation emphasize the practical rather than the theoretical. The right to counsel could continue to be interpreted as not applying to "all criminal prosecutions" due to historical and policy reasons. Similar factors have been used to support the limitation that the courts have placed on the right to trial by jury.

Weighing all these arguments, the language of the constitution must be added. The sixth amendment does say "all criminal prosecutions." On balance, the case for expansion is the more persuasive. Barring a change in the nature of the criminal process, the *Argersinger* decision permits an eventual expansion of the right to counsel to any situation in which a person is arrested by a policeman, taken before a judge in a courtroom, fined, and most of all, branded and considered criminal by society.

RICHARD E. WEICHER