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Right to Counsel: A New Standard

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to interpretation of that Constitution."⁶⁶ State legislatures and school systems should take to heart this subtle admonition to consider the obvious wisdom of adoption of such procedural safeguards. Although application of the fourteenth amendment is limited to cases in which interests of life, liberty, or property are involved, we have progressed beyond an era in which such interests can be narrowly construed to exclude a person's interest in his means of livelihood just because it is not a precisely defined constitutional right. Rather than distort the meaning of fourteenth amendment concepts, states should act to provide suitable protections for the people they employ. A statement of reasons for dismissal and an opportunity to rebut them at an open hearing constitutes no grievous burden on state schools. Indeed, providing such procedural safeguards accords with the very spirit of our law.⁶⁷

Nathan L. Hecht

Right to Counsel: A New Standard

The indigent petitioner was charged in Florida with carrying a concealed weapon, a misdemeanor offense punishable by a fine not exceeding \$500 or imprisonment for not more than six months.¹ The petitioner was not represented by counsel. He was found guilty and sentenced to pay a \$500 fine or serve ninety days in jail. While imprisoned, he sought a writ of habeas corpus, asserting that he was unable to defend himself properly at trial since he was deprived of his right to court-appointed counsel. The Florida Supreme Court denied the writ,² and the Supreme Court of the United States granted certiorari.³ *Held, reversed*: Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as a petty crime, a misdemeanor, or a felony, unless he was represented by counsel at his trial. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

I. DEVELOPMENT OF THE RIGHT TO COUNSEL

Although Parliament gave a defendant accused of treason the right to court-appointed counsel in 1695,⁴ it was not until 1903 that this same right was provided in all felony cases involving an indigent defendant.⁵ In the United States, the right to appointed counsel was first established in *Powell v. Alabama*,⁶ in which the Supreme Court of the United States held that the right existed

⁶⁶ 408 U.S. at 578-79.

⁶⁷ "Doth our law judge any man before it hear him, and know what he doeth?" *John* 7:51.

¹ FLA. STAT. ANN. § 790.01 (1965).

² State *ex rel.* *Argersinger v. Hamlin*, 236 So. 2d 442 (Fla. 1970). The court stated that an indigent's right to court-appointed counsel extended only to trials "for non-petty offenses punishable by more than six months imprisonment." *Id.* at 443.

³ 401 U.S. 908 (1971).

⁴ 7 & 8 Will. 3, c. 3, § 1 (1695).

⁵ 3 Edw. 7, c. 38, § 1 (1903).

⁶ 287 U.S. 45 (1932).

for indigents accused in federal courts of capital offenses.⁷ The right was later extended to all indigent defendants in felony cases tried in federal courts.⁸ Subsequently, the Supreme Court in *Betts v. Brady*⁹ held that the failure to appoint counsel in a non-capital state felony trial was not a denial of due process. In 1963, however, the Supreme Court, in *Gideon v. Wainwright*,¹⁰ held that the sixth amendment right to counsel was incorporated in the fourteenth amendment due process clause. Although the petitioner in *Gideon* was accused of a felony, the opinion was devoid of any specific limitation to felony defendants, and was framed consistently in terms of the rights of persons "charged with crime."¹¹ It was not until 1967 that the Court specifically limited its holding in *Gideon* to indigents accused of felonies.¹²

A sharp division existed among the courts¹³ as to whether *Gideon* should be interpreted narrowly,¹⁴ or whether the broad language of the opinion was an invitation to extend the right to court-appointed counsel to indigent defendants in virtually all prosecutions.¹⁵ Most courts, however, occupied positions between these two extremes,¹⁶ and extended the right to counsel to the extent allowed by various standards which had developed in their respective jurisdictions.¹⁷ *Gideon* did not provide a unifying rule of law among the juris-

⁷ The Court acknowledged the fact that its limitation of the right to appointed counsel to capital offenses was much more narrow than the treatment of the right in most states at the time, but declined to extend its holding beyond the facts of the case. *Id.* at 73.

⁸ *Johnson v. Zerbst*, 304 U.S. 458 (1938). Justice Black did not specifically limit the holding to felony cases, but wrote in terms of the sixth amendment withholding from federal courts "in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at 463.

⁹ 316 U.S. 455 (1942). The decision has generally been considered to have been a regression in the Court's gradual extension of the right to court-appointed counsel. See, e.g., Allison & Phelps, *Can We Afford To Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 76 (1971).

¹⁰ 372 U.S. 335 (1963).

¹¹ *Id.* at 344. Justice Black, writing for the Court, referred to the importance of counsel in the American criminal justice system, without referring only to those accused of a felony. See also *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932):

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.

In *Powell*, however, the Court did go on to limit its decision specifically to the existence of the right to counsel in capital cases.

¹² "In *Gideon v. Wainwright* . . . this Court held . . . that there was an absolute right to the appointment of counsel in felony cases." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

¹³ For definitive treatment of the development of the expanded right to court-appointed counsel for misdemeanants in state and lower federal courts, see Allison & Phelps, *supra* note 9; Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

¹⁴ See, e.g., *Cortinez v. Flournoy*, 249 La. 741, 190 So. 2d 909 (1966); *City of Toledo v. Frazier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).

¹⁵ Courts which extended the right to court-appointed counsel to its full dimension have relied on language in *Gideon* which refers to "crime" and to "any person hauled into court who is too poor to hire a lawyer" to support their conclusion that the right should be extended to all defendants in any criminal proceeding. See, e.g., *City of Tacoma v. Heater*, 67 Wash. 2d 736, 409 P.2d 867 (1966); *People v. Letterio*, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965).

¹⁶ Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 719 (1968).

¹⁷ Basically, there appear to be two general standards which have found application in these jurisdictions: the serious offense standard and the petty offense standard. The serious offense standard was employed in one of two general forms. Some courts merely defined the

dictions, and without any authoritative statement of the post-*Gideon* standard from the Supreme Court,¹⁸ the courts were relatively free to develop their own standards. The resulting confusion often made the indigent misdemeanant's right to counsel dependent on the forum of the trial.

II. ARGERSINGER V. HAMLIN

In *Argersinger v. Hamlin* the United States Supreme Court clarified the constitutional limitation on the right to court-appointed counsel, and eliminated to a great degree the diverse practices in the lower courts. The Court specifically rejected the petty offense standard which had been applied by the Florida Supreme Court, and applied instead an adaptation of the serious offense standard.¹⁹ The only consideration to be employed in determining the seriousness of the offense was held to be the likelihood of imprisonment upon conviction. As if in answer to the confusion prompted by *Gideon*, the Court was careful to limit its holding specifically to situations involving the loss of liberty.²⁰

The Court pointed out that the reasoning of cases such as *Duncan v. Louisiana*,²¹ limiting the right to trial by jury to non-petty offenses, was inapplicable in ascertaining the extent of the right to court-appointed counsel. The two rights, said the Court, are of different genealogy: the limitation of the right to jury trial to more serious criminal cases is supported in the history of criminal law,²² while there is no historical support for such a limitation on the right to counsel. Referring to the fact that the right to retain counsel was extended to misdemeanants and not to felons under the rule of the English common law,²³ the Court reasoned that the sixth amendment had the effect of

offense in terms of maximum possible punishment. See, e.g., *Harvey v. State*, 340 F.2d 263, 270-71 (5th Cir. 1965); *Marston v. Oliver*, 324 F. Supp. 691 (E.D. Va. 1971); *Brinson v. Florida*, 273 F. Supp. 840 (S.D. Fla. 1967). Other courts examined several factors, in addition to maximum possible punishment, in order to determine whether the seriousness of the crime demanded a right to counsel. See, e.g., *Alvis v. Kimbrough*, 446 F.2d 548 (5th Cir. 1971); *Brinson v. State*, 273 F. Supp. 840, 843 (S.D. Fla. 1967); *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784, 790 (1964); *People v. Dupree*, 42 Ill. 2d 249, 246 N.E.2d 281, 285 (1969).

Those jurisdictions employing the petty offense standard generally followed the federal definition of petty offense contained in the Criminal Justice Act of 1964, 18 U.S.C. § 1(3) (1970): "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both." These jurisdictions justified the application of the petty offense standard to the right to counsel because this was the standard set forth by the Court in determining the extent of the right to trial by jury in *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). See, e.g., *Beck v. Winters*, 407 F.2d 125, 128-29 (8th Cir.), cert. denied, 395 U.S. 963 (1969); *Roberts v. Janco*, 335 F. Supp. 942, 945-46 (N.D.W. Va. 1971).

¹⁸ After the *Gideon* decision, the Supreme Court denied certiorari in at least three cases involving a denial of counsel to indigents in misdemeanor cases. *Heller v. Connecticut*, 389 U.S. 902 (1967); *DeJoseph v. Connecticut*, 385 U.S. 982 (1966); *Winters v. Beck*, 385 U.S. 907 (1966). Justice Stewart dissented in both the *DeJoseph* and *Winters* cases. In *DeJoseph* he made reference to those jurisdictions which allowed court-appointed counsel for indigent misdemeanants, and stated: "When the meaning of a fundamental constitutional right depends on which court . . . a person turns to for redress, I believe it is time for this Court to intervene." 385 U.S. at 983.

¹⁹ See note 17 *supra*.

²⁰ 407 U.S. at 37.

²¹ 391 U.S. 145 (1968).

²² See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 980-82 (1926).

²³ 1 J. STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND 341 (1883). A defendant charged with a felony was not permitted to retain counsel until 1836. W. BEANEY, THE

extending the right to counsel beyond its common-law dimensions, and that there was nothing in the Constitution to indicate that the right did not extend to petty offenses.

Support for the extension of the right to court-appointed counsel was found in the assertion that the presence of counsel is a necessary element in a fair trial.²⁴ The Court reasoned that the legal and constitutional issues involved in any case that results in imprisonment are just as complex, regardless of the term of imprisonment. Further, the Court based its decision on the volume of misdemeanor cases in the criminal courts.²⁵ Because of the vast quantity, there may be a desire for speedy dispositions, often at the expense of fundamental fairness.²⁶ Denouncing such "assembly-line justice," and the problems of potential prejudice resulting to misdemeanor and petty offenders, the Court concluded that the presence of counsel should be required to insure the accused a fair trial; but the Court limited that requirement, not to situations in which it is legally possible to imprison a defendant, but to situations in which the defendant would actually suffer imprisonment if convicted. The Court did not attempt to instruct the states on how to implement the directives of *Argersinger*; it did, however, indicate that to alleviate potential problems, some minor offenses could be removed from the court system and handled administratively.²⁷

III. THE ARGERSINGER STANDARD—WILL IT WORK?

Under the new standard, the right to appointed counsel exists in all cases in which the judge intends to imprison the defendant if convicted.²⁸ There are two methods available to courts for implementing this standard; both, however, are subject to valid criticisms²⁹ which indicate that implementation could

RIGHT TO COUNSEL IN AMERICAN COURTS 9 (1955); 2 L. PIKE, A HISTORY OF CRIME IN ENGLAND 444 (1968).

²⁴ 407 U.S. at 33-34.

²⁵ Some courts have used the existence of a great number of cases coming before the courts as a reason for denying the extension of the right to counsel and other rights. See, e.g., *Bentley v. United States*, 431 F.2d 250 (6th Cir. 1970); *Hendrix v. Seattle*, 456 P.2d 696 (Wash. 1969).

²⁶ 407 U.S. at 34-37. The Court cited a study which concluded that "[M]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." A.C.L.U., LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970).

²⁷ 407 U.S. at 38 n.9. The Court stressed that this solution is peculiarly within the province of legislative bodies.

²⁸ "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. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." *Id.* at 40.

²⁹ One method is judicial determination of the likelihood of imprisonment before trial. Although this is the more narrow formula, how could such a judicial determination be made? Unless the judge examines evidentiary material before trial, he cannot always be certain that he would or would not impose imprisonment. But if he does examine evidentiary material prior to trial, he runs the risk of prejudicing the case. Junker, *supra* note 16, at 710. In his concurring opinion in *Argersinger*, Mr. Justice Powell pointed out that there are equal protection problems raised by the use of this method. It would result in some courts allowing counsel for a particular offense, while in other courts, an indigent could be denied the right for the same type of offense. Also, if punishment in the alternative is provided legislatively, and the judge predetermined that he will not impose imprisonment, the

better be effected legislatively. Quite apart from the question of whether implementation of the *Argersinger* standard should be accomplished judicially or legislatively, cost and manpower implications arise from the standard itself. There are three fundamental questions posed by the adoption and effective implementation of the new standard.³⁰ First, how many lawyers will be required? Second, is the supply of lawyers adequate to meet the increased demand for legal services? And third, how much will it cost?

It is estimated that in order to defend adequately all indigent persons who will qualify for appointed counsel under *Argersinger* the full-time services of 2,300 to 5,600 lawyers will be required.³¹ This represents an increase of 1,250 to 4,200 full-time lawyers over those required for indigent felony defense under the *Gideon* standard.

Mr. Justice Douglas, in writing the opinion of the Court, did not deal extensively with the problem of whether there will be a sufficient number of lawyers to meet this increased demand, although he did assert that the legal community is sufficiently large to meet the demand.³² In terms of numbers alone, Douglas is correct in this assertion.³³ However, as Mr. Justice Powell pointed out, many of the potentially available lawyers have not practiced criminal law, and are not dispersed in the hundreds of places in which counsel may be required.³⁴ There are, however, several ways in which the supply of lawyers can be made more available.³⁵

indigent would probably be unable to pay any fine imposed, yet the non-indigent defendant, tried for the same offense, would be forced to pay. 407 U.S. at 55.

The second method, judicial determination of imprisonable classes, does not require case-by-case predetermination; nevertheless, it may be criticized on the ground that the determination of what is criminal and what standards of punishment should apply is a legislative task. Mr. Justice Powell pointed out that "[i]n creating categories of offenses which by law are imprisonable, but for which [the judge] would not impose jail sentences, a judge will be overruling *de facto* the legislative determination as to the appropriate range of punishment for the particular offense." 407 U.S. at 53.

³⁰ See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 55 (1967) [hereinafter referred to as THE COURTS].

³¹ In 1971, 350,000 persons were charged with felonies. An estimated 60% of these persons, or 210,000, were indigent. See 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 8-9, 125 (1965); Wall Street Journal, June 26, 1972, at 1, col. 1. Estimates of the number of non-traffic misdemeanor cases yearly range from 4 to 5 million. 1965 F.B.I. UNIFORM CRIME REPORTS, tables 18, 21, at 108-09, 112 (1965); 1 L. SILVERSTEIN, *supra*, at 123. Of these offenders, it is estimated that 1.25 million are indigent. *Id.* at 125. A full-time lawyer with the support of adequate investigative services could effectively represent between 150 and 200 felony defendants yearly, and between 300 and 1,000 misdemeanor defendants, depending on the complexity of the cases. THE COURTS 56; LEGAL AID AGENCY OF THE DISTRICT OF COLUMBIA, ANNUAL REPORT 28-31 (1965). The number of lawyers estimated to be required and the cost of implementing *Argersinger* are somewhat inflated, since a considerable number of jurisdictions had extended the right to court-appointed counsel to the extent provided by *Argersinger* before the decision was rendered.

³² 407 U.S. at 37 n.7.

³³ In 1970, there were 335,242 lawyers in the United States, 236,085 of whom were in private practice. Between 2,500 and 5,000 of these lawyers accepted criminal defense "more than occasionally." THE COURTS 57. See also U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, table 236, at 148 (92d ed. 1971).

³⁴ 407 U.S. at 56-60.

³⁵ One method which could be employed to increase the availability of counsel for indigent defense would be to improve the assigned counsel system, which is presently used exclusively in about 2,750 of the 3,100 counties in the U.S. THE COURTS 59. The states could make more extensive use of law students in the indigent defense system, as suggested by Mr. Justice Brennan in his concurring opinion in *Argersinger*. 407 U.S. at 40-41. The public defense system could be expanded into jurisdictions in which its use would be most effective.

The basic problem raised by *Argersinger* is not the number of lawyers required or their availability for indigent defense, but rather the cost of creating and implementing indigent defense systems.³⁶ The total cost of defending, by an appointed counsel system, all indigent felony and non-traffic misdemeanor defendants would be from \$94 million to \$104.5 million annually.³⁷ With a public defender system, the annual cost would be between \$52.5 million and \$67 million.³⁸ Although the public defender system would cost less to administer nation-wide, in jurisdictions where the number of indigent cases is small, court-appointed counsel may prove less costly. In jurisdictions where the number of indigent defendants is relatively large, the public defender system would be less expensive to operate, since it could be used at near maximum efficiency. But even if the optimum combination of public defender and court-appointed systems is reached, there will be a considerable increase in the cost of indigent defense, by virtue of the increase in the number of persons who will now qualify under *Argersinger*.³⁹

In light of the problems inherent in exclusive judicial implementation of the new standard,⁴⁰ states which have not already extended the right to counsel to the extent provided by *Argersinger* can accomplish the Court's dictates by one of two main alternatives. One alternative would be to switch to a state-wide system of public defense, perhaps retaining some degree of appointed counsel in areas where indigent defense arises only occasionally. The states could also try to reduce the number of eligible indigent defendants by eliminating the possibility of imprisonment for certain misdemeanor and petty offenses. Many states are beginning to do both.⁴¹

IV. CONCLUSION

Gideon had little practical impact, since counsel was already provided to indigents in felony prosecutions in most states. In the same vein, the impact of *Argersinger* may not be as great as expected, since a considerable number of states had already extended the right to counsel to the extent provided by the new standard.

See text accompanying note 38 *infra*. The scope of legal services provided by the Office of Economic Opportunity could also be expanded. Comment, *Unavailability of Lawyer's Services for Low Income Persons*, 4 VALPARAISO L. REV. 308 (1970).

³⁶ See, e.g., *New Counsel Needed*, 58 A.B.A.J. 942, 943 (1972).

³⁷ The average compensation for the defender of indigents under the appointed counsel system is \$150 to \$200 per case for felonies and \$50 per case for misdemeanors. THE COURTS 56; I L. SILVERSTEIN, *supra* note 31, at 125. The Criminal Justice Act of 1964 permits appointed counsel in federal courts to be compensated at an hourly rate not to exceed \$15 for in-court time and \$10 for out-of-court time. Except in extraordinary circumstances, the maximum amount payable is \$500 for defense in felony cases and \$300 for defense of misdemeanants. 18 U.S.C. § 3006A(d) (1970).

³⁸ It would require from 2,625 to 3,350 public defenders to provide defense for indigent felony and non-traffic misdemeanor defendants. At an average salary of \$20,000 each year per defender, the cost would range between \$52 million and \$67 million annually. THE COURTS 57; D. OAKES, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 12 (1968); see Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1248, 1263 (1970).

³⁹ In 1969, the total expenditure by state and federal governments on indigent defense was \$78 million. STATISTICAL ABSTRACT, *supra* note 33, table 236, at 148.

⁴⁰ See note 29 *supra*.

⁴¹ Wall Street Journal, June 26, 1972, at 1, col. 1.

The question remains whether the new standard established in *Argersinger* is the logical and proper place to stop. In limiting the right to counsel to instances in which the defendant would be imprisoned, the Court relied heavily on the fact that imprisonment invariably has such a great effect on the reputation and career of the defendant that the loss of liberty without having had the assistance of counsel is not reflective of a fair trial. But the same type of consequences may follow from penalties other than imprisonment.⁴² Whether the Court will extend the right to counsel beyond the *Argersinger* standard cannot, of course, be determined at this point. Mr. Justice Powell, however, stated that "[t]he thrust of the Court's position indicates . . . that when the decision must be made, the rule will be extended to all petty offense cases except perhaps the most minor traffic violations."⁴³ Should the Court consider expanding the right to appointed counsel beyond *Argersinger*, consideration should be given to the fact that the criminal justice system will accomplish very little by promising more than it can provide.

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⁴² See, e.g., *James v. Headley*, 410 F.2d 325, 334-35 (5th Cir. 1969). The court suggested that counsel should be appointed whenever moral turpitude attaches to the offense, whether imprisonment is possible or not, because of the frequent non-legal consequences. The court even suggested that losing a driver's license may be more serious to the offender than a brief period of imprisonment.

⁴³ 407 U.S. at 51.