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Constitutional Law-The Indigent Misdemeanant's Right to Counsel

Constitutional Law—THE INDIGENT MISDEMEANANT'S RIGHT TO COUNSEL— *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

In accordance with the provisions of the federal and most state constitutions,[1] a person accused of a crime has the right to be heard and to be assisted by counsel in his defense.[2] However, not until 1932 was the right to counsel for indigent criminal defendants recognized by the Supreme Court of the United States,[3] and the extent of this right has remained unclear for forty years.[4]

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[1] *See* Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932); *Re* Newbern, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80 (1959); Harrell v. Commonwealth, 328 S.W.2d 531 (Ky. 1959); People v. Thorn, 156 N.Y. 286, 50 N.E. 947 (1898); Thomas v. Mills, 117 Ohio St. 114, 157 N.E. 488 (1927); State *ex rel.* Tucker v. Davis, 9 Okla. Crim. 94, 130 P. 962 (1913); Turner v. State, 91 Tex. Crim. 627, 241 S.W. 162 (1922); Dietz v. State, 149 Wis. 462, 136 N.W. 166 (1912). *But see* People v. Robinson, 222 Cal. App. 2d 602, 35 Cal. Rptr. 344 (1963). The Court held that the right to be represented by an attorney of one's choice does not give a defendant the right to insist on a particular attorney where this would unnecessarily impede or obstruct the proceedings. *Id.* at —, 35 Cal. Rptr. at 346.

[2] Under these provisions a defendant is entitled to have an attorney appointed by the court to act in his behalf, or to be given a fair opportunity to secure counsel of his own choice. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958); Chandler v. Fretag, 348 U.S. 3 (1954); Powell v. Alabama, 287 U.S. 45 (1932). This right is of a substantial rather than a formal nature. The constitutional guarantees require the services of a licensed attorney, not an attorney in fact or a layman. *See, e.g.*, Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940).

[3] Powell v. Alabama, 287 U.S. 45 (1932). Mr. Justice Sutherland, writing for the majority of the court, clearly stated the importance of the defendant's right to counsel in a criminal proceeding:

> 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 has 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 danger of conviction because he does not know how to establish his innocence. *Id.* at 68.

[4] The right to counsel was a source of much controversy during those forty years, as is evidenced by the voluminous literature devoted to its discussion. *See, e.g.*, BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955); Fellman, *The Right to Counsel under State Law*, 30 WIS. L. REV. 281 (1955); Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15 (1951); Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559 (1951); Holtzoff, *The Right of Counsel under the Sixth Amendment*, 20 N.Y.U. L. REV. 1 (1944); Kamisal, *Betts v. Brady Twenty*

In the recent case of *Argersinger v. Hamlin*,[5] the indigent misdemeanant's right to appointed counsel has received explicit recognition as a constitutional right by the United States Supreme Court. Unrepresented by counsel, Jon Richard Argersinger, an indigent, was tried and convicted in a Florida court for carrying a concealed weapon,[6] an offense punishable by imprisonment up to six months and a one thousand dollar fine.[7] Habeas corpus proceedings were instituted in the Florida Supreme Court, but relief was denied on the ground that the federal constitutional right to counsel extended only to trials for non-petty offenses punishable by more than six months imprisonment.[8] The United States Supreme Court reversed this decision, holding that absent a knowing and intelligent waiver,[9] no person may be imprisoned for any offense, felony or misdemeanor, unless he has been represented by counsel at his trial.

The right of an indigent to court-appointed counsel, gradually extended by the Court,[10] was first extended only to those persons charged with capital offenses.[11] Subsequently, the Court established the "special circumstances rule," [12] extending the right to those charged with felonies only if the special circumstances of the case, such as the complexity of the defense, required that counsel be appointed to insure a fair trial.[13] Later, however, the Su-

Years Later: The Right to Counsel and Due Process Values, 61 MICH. L. REV. 219 (1962); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962); *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961).

For a discussion of the historical background of the right to counsel controversy *see* Heidelbaugh & Becker, *The Right to Counsel in Criminal Cases—an Inquiry into the History and Practice in England and America*, 28 NOTRE DAME L. REV. 351 (1953); Heidelbaugh & Becker, *Blackstone's Use of Medieval Law in Criminal Cases Involving Benefit of Counsel*, 7 MIAMI L. Q. 184 (1953).

[5] 407 U.S. 25 (1972).

[6] 236 So. 2d 442 (Fla. 1970).

[7] F.S.A. § 790.01 (1965).

[8] The Florida Supreme Court, in ruling on the right to counsel, followed the Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968).

[9] For a comprehensive examination of the requisites of an effective waiver of the right to counsel, see Annot., 71 A.L.R.2d 1160 (1960).

[10] Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1967).

[11] *See* Powell v. Alabama, 287 U.S. 45 (1932). The defendants were charged with rape. Although the trial judge appointed the entire Scottsboro bar to defend them, no attorney was specifically assigned to their defense, and this was held to be violative of the due process clause of the fourteenth amendment.

[12] *See* Betts v. Brady, 316 U.S. 455 (1942).

[13] The Court's reluctance to extend the right to counsel beyond certain felonies was apparent:

> [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and

preme Court, in the landmark case of *Gideon v. Wainwright*,[14] rejected the "special circumstances" standard and extended the right to court-appointed counsel to all indigent defendants charged with felonies.[15]

Strictly interpreted, *Gideon* applies only to those persons charged with a felony.[16] The possibility of its application to misdemeanor cases was left open by the general language in the opinion,[17] and as a result, many conflicting decisions arose in state courts as to whether *Gideon* should be so extended.[18] A minority of states refuse appointed counsel to any person charged with a misdemeanor;[19] others provide counsel in the more serious

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right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel. *Id.* at 473.

[14] 372 U.S. 335 (1963).

[15] The defendant, who refused appointed counsel, received a five year prison sentence for breaking and entering with intent to commit a misdemeanor, which is a felony in Florida. The Court held that the fourteenth amendment made binding on the states the sixth amendment's right to counsel, which is "fundamental and essential to a fair trial." *Id.* at 342.

[16] *See* note 15 *supra.*

[17] In a concurring opinion, Justice Harlan said:

> The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should be extended to all criminal cases need not now be decided.)

372 U.S. at 351.

[18] *Compare* Watkins v. Morris, 179 So. 2d 348 (Fla. 1965); State v. Brown, 250 La. 1023, 201 So. 2d 277 (1967); and Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967), *with* Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951) and State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967).

The Court has denied certiorari in three cases arising after *Gideon* but before *Argersinger*, which specifically raised the issue of the right to court-appointed counsel for one charged with a misdemeanor. Many courts have interpreted its refusal as a further indication that *Gideon* was intended to apply only to felony cases. *See* Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966); Hendrix v. Seattle, 76 Wash. 2d 142, 456 P.2d 696 (1969).

[19] Virginia is among the minority of states that restrict this right to felony cases. The legislature has extended the right to court-appointed counsel to persons questioned concerning a felony, to those being tried for a felony, to those effecting an appeal for a felony conviction, and to juveniles during confinement hearings in state juvenile courts. *See* VA. CODE ANN. § 19.1-241.1 (Cum. Supp. 1972). *See also* Dailey v. Commonwealth, 208 Va. 452, 158 S.E.2d 731 (1968); Durhan v. Commonwealth, 208 Va. 452, 158 S.E.2d 135 (1967); Thacker v. Peyton, 206 Va. 771, 146 S.E.2d 176 (1966); Cabaniss v. Cunningham, 206 Va. 330, 143 S.E.2d 911 (1965); Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953); Watkins v. Commonwealth, 174 Va. 518, 6 S.E.2d 670 (1940).

The issue of the right to court-appointed counsel for misdemeanants has not been

misdemeanor cases;[20] still other states have even extended the right to court-appointed counsel to persons charged with any crime that could possibly result in loss of liberty.[21]

The Supreme Court of Virginia has declared the right to counsel to be a fundamental right within the Virginia Bill of Rights.[22] Thus, if a person charged with a felony proceeds *in forma pauperis*, the court must appoint counsel to act in his defense.[23] By statute, the right to appointed counsel is specifically extended to those charged with a felony.[24] Adopted three years after *Gideon*, the statute indicates that the legislature interpreted *Gideon* as extending the right to court-appointed counsel only to those charged with felonies.[25]

A wide divergence exists in the practice of state and federal courts concerning the extent of the indigent's right to counsel.[26] Under existing statutes[27] and rules of procedure,[28] the federal courts guarantee the right to court-appointed counsel to any person charged with a crime, whether felony or misdemeanor. Thus, anyone facing a charge for which the punishment exceeds six months imprisonment and a five hundred dollar fine has

raised in any reported cases in Virginia. *See* Manson, *The Indigent in Virginia*, 51 VA. L. REV. 163 (1965).

[20] *See* People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965). In Maryland counsel must be appointed when the offense is one "for which the maximum punishment is . . . imprisonment for a period of six months or more," and *may* be assigned in cases involving lesser penalties. *See* Manning v. State, 237 Md. 349, 206 A.2d 563 (1965); MD. R. P. 719(b)(2) (Supp. 1967).

[21] CAL. CONST. art. I, § 13. *See, e.g., In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965). Resting its decision on the state constitutional guarantee of the right to counsel, the court found the right ". . . not limited to felony cases but . . . equally guaranteed to persons charged with misdemeanors in a municipal or other inferior court." *Id.* at —, 398 P.2d at 422, 42 Cal. Rptr. at 230.

For a survey of the right to court-appointed counsel as applied by each state, *see generally* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1967).

[22] In Barnes v. Commonwealth, 92 Va. 794, 23 S.E. 784 (1895), the Virginia Constitution was interpreted as guaranteeing the right to counsel in felony trials. VA. CONST. art. I, § 8 (1902). *See* note 19 *supra*.

[23] VA. CODE ANN. § 19.1-241.3 (Cum. Supp. 1972).

[24] *See* note 19 *supra*.

[25] Adopted in 1948, the statute was reworded by the Virginia Legislature in 1966 with no indication of extending the right to counsel to misdemeanor cases.

[26] *Compare* James v. Headley, 410 F.2d 325 (5th Cir. 1969); Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969); and Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965), *with* Watkins v. Morris, 179 So. 2d 348 (Fla. 1965).

[27] Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (1970).

[28] FED. R. CRIM. P. 44(a). Rule 44(a) provides that if the defendant appears in court without counsel, the court must advise him of his rights in this respect and assign coun-

the right to a court-appointed attorney.[29] However, as has been noted, many state courts, citing *Gideon*, extend this right only to persons charged with felonies.[30] Therefore, in many state courts an indigent charged with a misdemeanor is not guaranteed the same due process rights as an indigent charged with a misdemeanor in a federal court.

In *Argersinger v. Hamlin*[31] the Court has established the extent of the indigent's right to court-appointed counsel.[32] An indigent's right to counsel is no longer determined by the category in which the alleged criminal offense is placed.[33] The Court recognizes that the sixth amendment provides specified standards for all criminal prosecutions.[34] Since the right to a public trial and the right to confrontation have not been limited to felony cases, there is no reason why the right to counsel should be so limited. Thus, the right to counsel exists in every case in which an accused is deprived of his liberty upon conviction, and the denial of the assistance of counsel will preclude the imposition of a jail sentence by a state or federal court.

The term "imprisonment" is most often used to connote imprisonment in law. So used, the Court's decision would apparently suggest that if a law allows the imposition of a sentence of imprisonment on conviction of the offense charged, the indigent defendant may rightfully invoke his right to

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sel to represent him at every stage of the proceedings unless the defendant elects to proceed without counsel or is able to obtain counsel. *See also* Von Moltke v. Gillie, 332 U.S. 708 (1948) and Foster v. Illinois, 332 U.S. 134 (1947).

[29] *See* 18 U.S.C. § 1 (1970).

[30] Junker, *supra* note 21, at 722.

[31] 407 U.S. 25 (1972).

[32] The *Argersinger* Court quoted the Supreme Court of Oregon to express its view. *In re* Stevenson, 254 Or. 94, 458 P.2d 414 (1969):

> [N]o person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence. *Id.* at —, 458 P.2d at 418.

[33] Mr. Justice Douglas, writing for the majority of the Court, ended the confusion and controversy caused by the language in *Gideon*. *See* note 17 *supra*. He argued that *Gideon* was not meant to limit the right to counsel to felony trials only. "The case involved a felony but its rationale has relevance to any criminal trial where an accused is deprived of his liberty." 407 U.S. at 32.

[34] Although clarifying *Gideon*, the *Argersinger* Court liberally quoted from that decision:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. 372 U.S. at 344.

counsel.[35] However, the majority opinion discusses imprisonment in a factual rather than legal context.[36] As a practical matter, imprisonment is rarely if ever imposed for certain misdemeanors carrying such a punishment.[37] The Court is concerned with proceedings that, as a matter of fact, put the indigent defendant's liberty in jeopardy. *Argersinger* calls for the appointment of counsel in those classes of cases in which, in the event of conviction, there is some likelihood of imprisonment. The right to counsel extends to all offenses for which incarceration as a punishment is a practical possibility.[38] This is a narrower approach than the term "imprisonment" would at first suggest.[39]

The reasoning behind the majority opinion runs to the very heart of our system of criminal justice, *i.e.*, one's absolute and unquestioned right to a fair trial. The assistance of counsel is often a requisite to the existence of a fair trial.[40] In addition, the volume of misdemeanor cases often creates an obsession for speedy dispositions that results in assembly line justice where the accused is treated not as an individual but as a number on a docket.[41] Clearly, such treatment has a prejudicial effect on the defense. Difficult legal questions, taxing to a legally trained mind not to mention that of an indigent defendant, often arise in trials for petty offenses.[42] In such circumstances, the right to be heard would be of little avail if it did not include the right to be heard by counsel.[43]

A possible explanation for the hesitancy of the courts in finding a right to appointed counsel for indigent defendants in misdemeanor cases lies in

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[35] The California Supreme Court suggested this approach in *In re* Smiley, 66 Cal. 2d 634, 427 P.2d 179, 58 Cal. Rptr. 579 (1967): "[T]here can be no doubt that the fundamental right to the assistance of counsel (extends) to all persons charged with a misdemeanor in a justice or other inferior court." *Id.* at —, 427 P.2d at 184, 58 Cal. Rptr. at 584.

[36] 407 U.S. at 39. The Court quotes from the American Bar Association project on Standards for Criminal Justice.

[37] *Id.* at 38 n. 10.

[38] *Id.* at 39.

[39] *See* note 38 *supra.*

[40] *See* note 3 *supra.*

[41] 407 U.S. at 34 n. 4. *See also* 1 L. SILVERSTEIN, DEFENSES OF THE POOR IN THE CRIMINAL CASES IN AMERICAN STATE COURTS 123 (1965); *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389 (1966). In Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1967), the author referred to misdemeanor prosecutions as the "Appalachia" of the criminal justice system.

[42] *See In re* Gault, 387 U.S. 1 (1967).

[43] The *Argersinger* Court also framed the rationale for its decision within a social context. Imprisonment, however short, is seldom viewed by the accused as a trivial matter, and often results in the loss of employment and reputation. Such consequences demand the assistance of counsel as guaranteed by the sixth amendment. 407 U.S. at 37.

the fear that too great a burden will be placed on the effective administration of criminal proceedings.[44] A burden has no doubt been placed on the profession as a result of the *Argersinger* decision,[45] but in a balancing process this should not receive disproportionate weight. For, in a trial, the prosecution is able to marshal all the forces of the state against the defendant, who must overcome the prosecution's advantages of money, education, and experience. In such an uneven match, basic considerations of fairness require that the defendant in misdemeanor cases receive aid from one who has a working knowledge of the procedures and processes involved. In many classes of misdemeanors, non-indigent defendants refrain from securing counsel.[46] *Argersinger* gives the indigent defendant the right to make this choice when his freedom is in jeopardy.

Two of the justices believe that the right to counsel in misdemeanor cases should not be made absolute under all circumstances, but should be determined by the trial court's exercise of judicial discretion on a case-by-case basis.[47] The court's reasons for not requiring counsel would then be stated so that the issue could be pursued for review. However, this line of reasoning engenders the belief that, while other constitutional rights might be available to criminal defendants generally, the right to appointed counsel should be granted only sparingly in cases of unarguable necessity. However, the sixth amendment gives no basis for any distinction between the right to counsel and the other rights therein.

The rule adopted in *Argersinger* does not go as far as it might appear; it is limited to cases in which the sentence is imprisonment. Such an arbitrary guideline is more easily described than justified. The demand for reliability and fairness to which the right to counsel responds exists as well in cases that do not jeopardize the accused's liberty as in those that do.

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[44] Mr. Justice Powell gave voice to this fear in his separate opinion. *Id.* at 56-60. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 68 (1963).

[45] Mr. Chief Justice Burger believed that the legal profession is willing and capable of meeting this challenge of rising to the burdens placed upon it. 407 U.S. at 44.

Justice Brennen expressed the view that law students could be called upon to provide an additional source of legal representation for the indigent through clinical programs in which faculty supervised students aid clients in legal matters. *Id.* at 40.

The time has come for the enactment of a law that allows third-year law students, in clinical programs established by students and faculty, to represent indigent defendants in the community surrounding the school of law.

[46] In Seattle it was found that persons charged with speeding, and driving without a license hired counsel in only about 6.5 percent of the sample cases. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 713 (1967); Junker, *Report on the Need for Publicly Provided Counsel in King County*, Appendix D (1965) (unpublished, on file at the University of Washington and Harvard law libraries).

[47] 407 U.S. 25 (1972) (Powell & Rehnquist, JJ., concurring).

The direction in which the court has moved in *Argersinger* does not necessarily foreshadow the eventual adoption of such a rule. It seems impossible to ignore responsibly the extraordinary demands on the legal system that a wider application of the right to counsel than that declared in *Argersinger* would impose.[48] Justice is not advanced by promising more than it can deliver. The sixth and fourteenth amendments require the right to counsel for any person "charged with crime," and that the indigent defendant enjoy the same rights, as nearly as is practicable, as are enjoyed by persons who are able to afford the retention of counsel. In the past, this requirement has not been met. But the standards set forth in *Argersinger* more nearly and realistically meet these requirements than has any previous interpretation of the sixth amendment guarantee.

G. L. C.

[48] *See* 1 L. SILVERSTEIN, DEFENSES OF THE POOR in the CRIMINAL CASES IN AMERICAN STATE COURTS 123; *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389 (1966).