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Constitutional Law - Right of Indigents to Counsel to Misdemeanor Cases - Argersinger v. Hamlin

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CONSTITUTIONAL LAW—Right of Indigents to Counsel in Misdemeanor Cases. Argersinger v. Hamlin, 92 S. Ct. 2006 (1972).

Argersinger, an indigent, was charged with an offense punishable by imprisonment up to six month and a $1,000 fine. At trial he was not represented by counsel, and was sentenced to serve 90 days in jail. He brought an action of habeas corpus in the Florida Supreme Court, claiming he could not adequately defend himself at trial because he was deprived of his right to counsel. The Florida Supreme Court found that there was no right to court-appointed counsel where the offense charged was punishable by less than six months imprisonment.[1] The United States Supreme Court granted certiorari.[2] In a unanimous decision as to result, the Court held, "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[3]

The *American Bar Association Journal* called *Argersinger,* "[T]he one decision of the last term of the Supreme Court that has the most significance for the legal profession itself. . . ."[4] The purpose of this case note is to study the history of the right-to-counsel principle culminating in *Argersinger,* and to offer suggestions as to how that principle should be implemented in Wyoming.

In the United States, the doctrine of right to counsel stems from the sixth amendment to the Constitution, proclaiming, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[5] It was left to the courts to construe the exact meaning of the sixth amendment, and to determine just how far it was to be extended.

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1. Argersinger v. Hamlin, ____ U.S. ____, 92 S. Ct. 2006, 2007 (1972).
2. *Id.* at 2008.
3. *Id.* at 2012.
4. 58 A.B.A.J. 942 (1972).
5. U.S. CONST. amend. VI.

The first landmark decision was *Powell v. Alabama,*[6] in which the Court held the sixth amendment was made binding on the states in capital offense cases by reason of the due process clause of the fourteenth amendment, noting it is the duty of the court to assign counsel to an indigent defendant accused of a capital crime, in order to assure a fair trial.

Johnson v. Zerbst extended the meaning of the sixth amendment in Federal courts beyond the earlier capital offense standard: "The Sixth Amendment withholds 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."[7] (Emphasis added).

A major set-back blocked the advancement of the right-to-counsel principle in 1942, however, when the Court found in *Betts v. Brady*[8] that "appointment of counsel is not a fundamental right," and that due process did not require the state courts to appoint counsel to indigent defendants. The *Betts* Court distinguished the *Powell* case on its facts, and observed that the *Johnson* decision applied only to federal courts.

For twenty years the United States Supreme Court was saddled with Betts. In its attempts to expand the right-to-counsel doctrine, the Court was forced to find "special circumsances" in each case in which it wanted to hold that a constitutional right to counsel existed. *In Re Oliver*[9] was a case in which the defendant had been convicted after a secret one-man grand jury investigation. Under these facts, Justice Black, for the majority said, "[A]n opportunity to be heard in his defense—a right to his day in court—[including the right to be represented by counsel]—are basic in our system of jurisprudence. . . ."[10] In *Cash v. Culver* the Court set out the "special circumstances" under which it would apply the sixth amendment to the states: where there are "factors which may

6. 287 U.S. 45 (1932).
7. 304 U.S. 458, 463 (1938).
8. 316 U.S. 455, 471 (1942).
9. 333 U.S. 257 (1948).
10. *Id.* at 273.

render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment."[11]

In 1963, the Court rendered its second landmark decision in *Gideon v. Wainwright,*[12] and finally freed itself from the restrictions of *Betts.* The *Gideon* Court made the sixth amendment binding on the states in all *serious* offenses, in holding that an indigent defendant has a fundamental right to the assistance of counsel in a criminal trial, and that conviction without the assistance of counsel *is* a violation of the fourteenth amendment due process. In a concurring opinion, Justice Douglas, (who was to write for the majority in *Argersinger*), stated his belief that there is *no* constitutional distinction between capital and non-capital cases, and that the fourteenth amendment requires due process for deprival of liberty as well as of life.[13] The *Gideon* case involved a felony. But seeing *Gideon* in the larger context of "crime" instead of "felony" and considering the broad language adopted by the Court, "it would not . . . have been an indefensible position to suggest that any indigent person charged with a crime was, by virtue of *Gideon,* entitled to appointed counsel."[14] Yet the Court consistently denied certiorari in cases where state courts had refused to apply *Gideon* to misdemeanor prosecutions, and it became "abundantly clear that the Court believes that *Gideon* does not, of its own force, include misdemeanor offenses."[15]

Five years later, in *Duncan v. Louisiana,*[16] the Court imposed upon the states the duty to recognize the right to jury trial in misdemeanor cases punishable by over six months in prison, where the crime charged was not a petty offense. Many assumed that this would also be the standard for application of the right to counsel, and indeed Florida applied the *Duncan* test in denying Argersinger's right to counsel.[17]

11. 358 U.S. 633, 636 (1959).
12. 372 U.S. 335 (1963).
13. *Id.* at 349.
14. Junker, *The Right to Counsel in Misdemeanor Cases,* 43 WASH. L. REV. 685, 688 (1968).
15. *Id.* at 690.
16. 391 U.S. 145 (1968).
17. Argersinger, *supra* note 1, at 2007.

Some courts, however, were more creative. In 1969 the Fifth Circuit, in *James v. Headley*, said, "Because a charge is petty enough to lie outside the jury-trial requirement does not mean that it is also petty enough to allow suspension of the right to counsel."[18] The court noted important distinctions between the right to counsel and the right to jury trial, finding the right to counsel more fundamental, as it alone can protect the defendant from such defense problems as introduction of improper evidence, self-incrimination, and the many procedural pitfalls.[19] In dicta, the court also observed that there is "no constitutional distinction between felonies and misdemeanors, between gross and petty offenses, between the loss of liberty for 181 days and the loss of liberty for 180 or fewer days."[20]

Shortly after the *James* decision, the Supreme Court of Oregon, in *Stevenson v. Holzman,*[21] held that no one who has been denied the assistance of counsel can be deprived of liberty as a result of *any* criminal prosecution, including one for violation of a municipal ordinance. Citing *James,* the Oregon court said:

> We agree, however, with those courts that have held that the right to counsel is more essential to a fair trial than the right to a jury. . . .
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> . . . .
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> Since the Supreme Court has not decided the question, we must ourselves decide whether the Sixth Amendment right to counsel extends to prosecutions for misdemeanors, ... We hold that it does . . . .[22]

The court based its holding on the belief that to avoid conviction of the innocent is the controlling objective in *all* courts, and that if indigent misdemeanants in federal courts have the right to assigned counsel, failure to grant the corresponding right in state courts would "result in unequal justice before the law."[23]

18. 410 F.2d 325, 331-32 (1969).
19. *Id.* at 332-33.
20. *Id.* at 333.
21. 458 P.2d 414 (1969).
22. *Id.* at 417.
23. *Id.* at 418.

It is within this framework that the United States Supreme Court held last year, in *Tate v. Short,*[24] that the states are prohibited by the equal protection clause from imprisonment of indigents for failure to pay fines. And then last term the Court, in *Argersinger,* finally reached the logical conclusion to what it began 40 years ago in *Powell v. Alabama:* the extension of right to counsel to misdemeanor, petty offense, and municipal ordinance crimes in state courts.[25]

Argersinger v. Hamlin goes far beyond the serious offense standard of *Gideon* and the six-month imprisonment standard of *Duncan.* Under the *Argersinger* ruling "no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."[26] All the Justices concurred in the result, but Chief Justice Burger and Justice Powell (joined by Justice Rehnquist) expressed serious concerns about how the new rule would be put into action by the states, from a purely practical standpoint. Undoubtedly, *Argersinger* does present new problems for the entire legal system, problems which must be satisfactorily resolved if the doctrine of right to counsel for *all* people is to survive. Chief Justice Burger states that *Argersinger,* "[M]ay well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it."[27]

An immediate problem is whether *Argersinger,* in conjunction with *Tate v. Short,* creates the "inverse discrimination" spoken of by the *Tate* Court.[28] In *Tate,* the Court held that the poor can not be imprisoned for failure to pay fines. The *Tate* holding apparently eliminated, for poor persons, the fine part of "imprisonment-and/or-fine" penalties, unless the states were willing to impose fines payable in small installments.[29] The *Argersinger* holding eliminates the imprisonment part of such penalties, unless counsel was appointed before trial. It would thus appear that the courts are

24. 401 U.S. 395 (1971).
25. Argersinger, *supra* note 1, at 2013.
26. *Id.* at 2014.
27. *Id.* at 2015.
28. Tate, *supra* note 24, at 399.
29. *Id.* at 399-400.

left with only two alternatives in indigent cases: (1) if they choose not to appoint counsel in advance, the *only* penalty they can impose is a fine payable in small installments; (2) if they choose to appoint counsel in advance, they can only impose a jail sentence or a fine as limited by *Tate*. The *Tate* holding, however, is restricted in application to "poor persons." Thus, for example, a member of the lower middle class, unrepresented by counsel at trial, might have to pay a $1,000 fine or be jailed, whereas the indigent without counsel at trial would be allowed to pay off his fine at something like $2 per week.

Something *must* be done to avoid such blatant "inverse discrimination." One suggestion would be to establish a statewide ability-to-pay schedule for the computation of amounts owed on installments, for the payment of *all* fines. Ability-to-pay schedules work quite well for such socially-oriented programs as Mental Health Centers, and there seems to be no reason why they could not work equally well for the courts. Such a plan would have several assets. It would greatly simplify the assessment of fines. It would mean that fewer contempt proceedings would be necessary (because more defendants would be able to pay their fines). It would be more fair than drawing arbitrary poverty lines and would help to prevent middle-class resentments of the rights of the poor. It might also relieve the courts of some of the pressure to appoint counsel arising from the fear that the penalty imposed must be imprisonment or the defendant will go unpunished.

Even if ability-to-pay legislation could be enacted, the states are still left with severe problems of financing, manpower shortage and other much-needed legislative changes, if right to counsel is to be a truly successful legal precept. As one commentator said, "[I]t seems impossible responsibly to ignore the financial and manpower demands on the legal system that strict equality might impose. The administration of justice is not advanced by promising more than it can deliver."[30]

30. Junker, *supra* note 14, at 715.

An examination of the situation in Wyoming should illustrate some of the post-*Argersinger* problems faced by the states. A study made after the *Gideon* decision revealed that it was not the practice of the Wyoming courts to assign counsel to indigents in misdemeanor cases.[31] Only in Albany County was there any assignment of counsel to indigent misdemeants, and then only in extraordinary or high misdemeanor cases.[32] A survey taken by the author of the study, John O. Rames, showed that the great majority of Wyoming judges, prosecuting attorneys, and defense attorneys were against providing counsel in misdemeanor cases, because they felt that the financial and management problems would outweigh any benefit to the poor.[33] Yet now, by virtue of *Argersinger,* these are burdens which must be met by the Wyoming legal structure. There is no doubt that they will be met with as much dignity as is possible under the circumstances. The Rules of the Wyoming Bar state, "The bench and bar are primarily responsible for providing competent legal services for all persons, including those unable to pay . . . ."[34] This was written long before *Argersinger,* and even before *Gideon.* It is a strong indication that the Wyoming Bar is as aware as the United States Supreme Court of the importance of equality of justice, and the need to allow the poor, as well as the rich, the opportunity to appear in court without losing their sense of self-worth, to have an attorney as a buffer between them and the feelings of hopelessness and frustration that come with being confronted by a legal system incomprehensible to the average layman.

Nevertheless, despite the Bar's early recognition of its responsibilities for providing counsel to the poor, Wyoming does not have the suitable framework for immediate instigation of a total right-to-counsel program. Wyoming has no public defender system and most Wyoming communities have no legal aid society. The maximum fee allowed for a court-appointed lawyer in a misdemeanor case in Wyoming is

31. Rames, *Wyoming* in 3 DEFENSE OF THE POOR IN AMERICAN COURTS, 813, 818 (Silverstein ed. 1965).
32. *Id.*
33. *Id.* at 820-26.
34. 2A WYO. STAT. Rules for Bar Association, rule 18 (1971 Supp.).

$100.[35] No allowance is made for the attorney's expenses for investigation, trial preparation, or travel.[36] There is no standard system for appointment of counsel. Generally, the courts follow a loose alphabetical rotation pattern,[37] not conducive to achieving optimum defense attorney enthusiasm.

The Rules of the Wyoming Bar allow and encourage the appearance of eligible law students on behalf of defendants in criminal cases,[38] a solution suggested by Justice Brennan in *Argersinger*.[39] However, in any criminal case in which the accused has the constitutional right to court-appointed counsel, a supervising lawyer must be personally present with the student throughout the trial.[40] The geographical location of the University of Wyoming College of Law, the relatively small number of eligible law students, and the lack of available funds make it impractical, if not impossible, for law students and supervising lawyers to make a significant contribution to defense of the poor in more than a limited area within the state.

OEO Legal Aid programs would probably not be the answer, even if they were universally accessible in Wyoming. The Office of Economic Opportunity will not provide funds to meet the responsibility to furnish counsel for indigent defendants in criminal prosecutions which the Constitution imposes on the states except in certain unusual circumstances.[41]

The Wyoming Rules of Criminal Procedure make no suggestion as to how assignment of counsel is to be accomplished. To compound the problem, Rule 51(a)[42] is now clearly in need of amendment, to assure that the right of counsel granted by Rule 6(a)[43] is also applied to misdemeanant pro-

35. WYO. STAT. § 7-9 (Supp. 1971).
36. Rames, *supra* note 31, at 819.
37. *Id.* at 819.
38. 2A WYO. STAT. Rules for Bar Association, rule 18 (1971 Supp.).
39. Argersinger, *supra* note 1, at 2015.
40. 2A WYO. STAT. Rules for Bar Association, rule 18 (1971 Supp.).
41. 2 CCH POVERTY LAW REP., Guidelines for Legal Services Programs, ¶ 8700.36 (1972).
42. WYO. R. CRIM. P. 51(a). Rule 51(a) provides, *inter alia*, that the Rules of Criminal Procedure do not apply to misdemeanor proceedings in justice of the peace courts.
43. *Id.* at 6(a).

ceedings in justice of the peace courts. It is obvious that the Legislature, as well as the Bar, must rise to the occasion. It should repeal statutes rendered unconstitutional by *Argersinger,* and pass new legislation, such as the ability-to-pay scheduling for assessment of all fines, to aid the courts in meeting their new responsibilities. Above all, the legislature should authorize the establishment of a public defender system in Wyoming, equivalent in funding and manpower to the corresponding prosecuting attorneys offices, for only such a public defender system can adequately handle the counseling burden created by *Argersinger.*

In an article cited by the Court in *Argersinger,* Professor John M. Junker observed:

> [I]n every relevant sense, the indigent misdemeanant is indistinguishable from the indigent . . . [felon]. Neither is capable, unaided, of providing the kind of challenge that has traditionally been considered essential to assure both the reliability of the criminal process and the containment of governmental power.[44]

Now the United States Supreme Court has recognized this fact, and made it the law of the land. But the law, to have efficacy, awaits proper implementation by the states. It is a noble law, worthy of all the great sacrifice it may demand. Whether it will ever be a really workable law depends upon the concerted and cooperative efforts of judges, lawyers, and legislatures.

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44. Junker, *supra* note 14, at 686.