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Argersinger v. Hamlin: The Gideon of Misdemeanors?

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"manufacturer's" liability to distributors and retailers without the requirement of any actions other than those taken in the course of their regular distribution of products.

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ARGERSINGER V. HAMLIN: THE GIDEON OF MISDEMEANORS?

Petitioner, an indigent unrepresented by counsel, was sentenced to 90 days in jail for carrying a concealed weapon. In a habeas corpus action, the Florida supreme court held that petitioner had no right to court-appointed counsel, reasoning that such right extends only to "trials for non-petty offenses punishable by more than six months' imprisonment."[1] The United States Supreme Court reversed,[2] holding no person may be imprisoned for any offense, in a criminal case, unless he was represented by counsel at his trial or waived his right to counsel. *Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972).

The landmark case of *Gideon v. Wainwright*[3] held the right to counsel for indigents, guaranteed by the sixth amendment, is a fundamental right and therefore applicable to the states through the due process clause of the fourteenth amendment. Although *Gideon* involved a felony trial, the opinion repeatedly referred to the rights of persons "charged with crime."[4] In a *per curiam* decision[5] rendered shortly after *Gideon*, the Court applied the Gideon rule to a "misdemeanor" offense punishable by two years in prison although certiorari was subsequently denied in two cases involving a state court's refusal to appoint counsel in misdemeanor prosecutions.[6]

1. 236 So.2d 442, 443 (Fla. 1970).

2. An 8-0 decision, Justice Douglas writing the opinion, Chief Justice Burger, and Justices Powell and Rehnquist concurring in result.

3. 372 U.S. 335 (1963).

4. *Id.* at 344: "The right of one charged with crime to counsel may not be fundamental and essential to fair trials in some countries, but it is in ours."

5. Patterson v. Warden, 372 U.S. 776 (1963). The offenses involved carried maximum terms of two years imprisonment, although labelled "misdemeanors" under Maryland law. *Patterson* was remanded for further consideration in light of *Gideon* and, on remand, the Maryland supreme court reversed and remanded for trial with appointed counsel. Patterson v. State, 231 Md. 509, 191 A.2d 237 (1963).

6. Winters v. Beck, 385 U.S. 907 (1966); and DeJoseph v. Connecticut, 385 U.S. 982 (1966). Justice Stewart, dissenting from the denial of certiorari in *Winters*, wrote: "I think this Court has a duty to resolve the conflict and clarify the scope of *Gideon v. Wainwright*." 385 U.S. at 908. One year later,

The right to jury trial, also protected by the sixth and fourteenth amendments, was explicitly limited to "serious" offenses in *Duncan v. Louisiana*.[7] Where the potential punishment was six months or less, the offense was classified as petty and no jury trial was required.[8] Some suggested that because a six-month rule was drawn to limit the jury trial right, a similar line would be drawn with respect to right to counsel.[9]

In *Mayer v. City of Chicago*,[10] a state statute which provided a free transcript of proceedings only in felony cases was struck down because it denied equal protection to those convicted of non-felony offenses. The defendant in *Mayer* was convicted of disorderly conduct and interference with a police officer, each offense carrying a maximum penalty of $500. In reversing the conviction, the Court not only prohibited the distinction drawn between felony and non-felony offenses, but also held invidiously discriminatory the proffered distinction between sentences imposing imprisonment and those imposing only fines.[11]

In the instant case, the Supreme Court expressly declined to extend to right to counsel cases the six-month standard applied in jury trial cases. Citing the different genealogies of the two sixth amendment rights, the Court found historical support for limiting jury trials to serious criminal cases, while finding no such historical justification for so limiting the right to counsel.[12] Instead, the Court offered the deprivation of liberty as the current standard for measuring the guarantee of counsel. "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial."[13] In so holding, the question of whether counsel would be required where loss of liberty was not involved was specifically left open.[14]

Justice Marshall characterized the holding of *Gideon* as follows: "this Court held . . . there was an absolute right to appointment of counsel in felony cases." Mempa v. Rhay, 389 U.S. 128, 134 (1967).

7. 391 U.S. 145 (1968).

8. Baldwin v. New York, 399 U.S. 66 (1970).

9. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings & Legal Policy Observations*, 48 MINN. L. REV. 1, 71 (1963).

10. 404 U.S. 189 (1971).

11. *Id.* at 196-97.

12. Argersinger v. Hamlin, 92 S. Ct. 2006, 2009 (1971).

13. *Id.* at 2012.

14. *Id.* "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail."

Just six months prior to *Argersinger*, the Court in *Mayer* said: "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any difference in the sentences that may be imposed."[15] Since indigents have the right to counsel on direct appeal from criminal convictions,[16] it is unlikely that the unanimous Court in *Mayer* would have refused petitioner's request had it been for counsel on appeal rather than for a free transcript. Yet, as if to soften the impact of a ruling which would extend the right to appointed counsel to all criminal prosecutions, the Court stopped short of that mark. Justices Powell and Rehnquist, in a concurring opinion, view *Argersinger* as foreshadowing a broad rule that would require the appointment of counsel to indigents in all criminal cases.[17] Perhaps, then, it is best to treat *Argersinger* as a temporary policy decision.

Regardless of the Court's ultimate action, implementation of the decision may prove troublesome. Since it is only upon pronouncement of an imprisoning sentence that it can be said the accused must have been represented by counsel, a misdemeanant's eligibility for appointed counsel can only be definitely ascertained by hindsight. Chief Justice Burger suggests a process of "predictive evaluation"[18] whereby the trial judge, aided by the prosecuting officer, reviews the prior record of the accused as well as other relevant criteria to determine whether there is a significant likelihood that, if convicted, the defendant will be sentenced to a jail term. As the Chief Justice points out in a footnote,[19] this procedure is inappropriate in states like Louisiana, where most misdemeanor cases will be tried without a jury. The trial judge, as the sole trier of fact, should be precluded from a prejudicial examination of the prior record of the accused.[20]

15. 404 U.S. at 197.
16. Douglas v. California, 372 U.S. 353 (1963).
17. 92 S. Ct. at 2019 (1971).
18. *Id.* at 2014.
19. *Id.* at 2015.
20. In *State v. Coody*, 275 So.2d 773 (La. 1973), the Louisiana supreme court reversed a conviction, obtained without representation by counsel or effective waiver, for driving while intoxicated. The majority, considering the impact of *Argersinger* wrote: "[W]e must change our practice in respect to misdemeanors which may carry a prison sentence and must afford an accused charged with such a misdemeanor the same rights in regard to counsel afforded a defendant on trial for a felony." *Id.* at 775. As pointed out by Justice Sanders, in dissent, this goes beyond the strict requirements

What, then, is the effect of a violation of *Argersinger*? Under prior holdings it appears that *Argersinger* will be given retroactive application, as was *Gideon*.[21] But what of future convictions? Suppose Smith, an indigent unrepresented by counsel without effective waiver, is convicted of aggravated assault (a misdemeanor under Louisiana law punishable by a fine of not more than $300, or imprisonment for not more than two years).[22] Clearly, Smith cannot be imprisoned presumably because the fact-finding determination which resulted in his conviction lacks reliability to support it.[23] Can it be properly argued that while Smith's sentence is void, his conviction nonetheless is valid, and hence that it can be used against him to justify imposition of a fine; or be used in the future for impeachment; or to provide the basis, under applicable recidivist statutes, for increased punishment for subsequent offenses? It is submitted that the inherent unreliability of convictions obtained in violation of the *Argersinger* standard should preclude their use either for impeachment purposes[24] or to enhance punishment for another offense.[25]

It is further submitted that an uncounseled conviction should not be used to justify imposition of a fine. The infirmity of a conviction obtained against a defendant unrepresented by counsel is not cured by any variation in the sentence imposed. However, even if the Supreme Court, as a matter of policy and practicality, allows an indigent unrepresented by counsel at his trial to be fined, the use of the resulting conviction should be limited to that purpose alone.

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laid down by the U.S. Supreme Court. In light of the problems implicit in *Argersinger* as written, this writer believes that a procedure whereby counsel is appointed whenever a potential for imprisonment exists, would be the most desirable solution.

21. Kitchens v. Smith, 401 U.S. 847 (1971); Pickelsimer v. Wainwright, 375 U.S. 2 (1963). *See also* Linkletter v. Walker, 381 U.S. 618 (1965).

22. LA. R.S. 14:37 (1950).

23. Loper v. Beto, 92 S. Ct. 1014, 1019 (1972).

24. *Id.*

25. Burgett v. Texas, 389 U.S. 109 (1967). Thus it is questionable whether counsel can ever be validly denied in cases where an habitual offender statute is applicable (*e.g.*, LA. R.S. 15:529 (1) (1950)). Conviction for a first offense, where no imprisonment is possible but where it is mandatory on a second on third conviction, certainly contributes to the offender's ultimate imprisonment. Arguably, under *Argersinger* a conviction obtained without the presence of counsel can never provide the basis for imprisonment. It seems proper then, that the accused be furnished counsel at the trial for his first offense, lest imprisonment for subsequent convictions be precluded altogether.