Gideon's Encore

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an equal chance to defend his property interest. The deterrent effect on those creditors who in the past initiated unjust claims may also be of substantial value to the buyer's interest.

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GIDEON'S ENCORE

Petitioner, an indigent, was tried without benefit of representation by counsel on the charge of carrying a concealed weapon. The offense was punishable by imprisonment for up to six months and/or a one thousand dollar fine. The petitioner was sentenced to serve ninety days. He thereafter filed an original writ of habeas corpus in the Supreme Court of Florida alleging that, as an indigent, he was deprived of his right to counsel and that he was therefore unable to properly raise and present to the trial court good and sufficient defenses to the charges for which he was convicted. The Florida court discharged the writ, holding that indigent defendants were entitled to counsel only when the offense involved a possible imprisonment of more than six months. On certiorari, the United States Supreme Court held, reversed: Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless represented by counsel at trial. *Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972).

The right to counsel has slowly but steadily evolved for forty years and was extended to state felony defendants in the landmark case of *Gideon v. Wainwright*. The sweeping language of *Gideon* met mixed reactions in the state courts and legislatures. In a large minority of them the case was limited on its facts to felonies. However, thirty-one states extended the *Gideon* rule to crimes less serious than

3. 372 U.S. 335 (1963) [hereinafter cited as *Gideon*]. An interesting account of the preparation of a series of right to counsel cases including *Gideon* is found in A. LEWIS, *GIDEON'S TRUMPET* (1964); and J. MEADOR, *PRELUDES TO GIDEON* (1967).
4. The Court stated:
   
   [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental . . . in some countries, but it is in ours.

   *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The applicable language of the sixth amendment is equally broad, providing that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.
5. E.g., State *ex rel. Taylor v. Warden*, 193 So.2d 606 (Fla. 1967); *Watkins v. Morris*, 179 So.2d 348 (Fla. 1965); *Fish v. State*, 159 So.2d 866 (Fla. 1964).
felonies.9 Just prior to Argersinger, the jurisdictions providing counsel to indigents, either by statute or decision, fell into roughly four categories.7 Twelve states adopted a "serious offense" standard.8 Others established a six month incarceration rule, generally adopting the reasoning of Duncan v. Louisiana.9 A third view, the ninety day rule, found a very active proponent in the federal Fifth Circuit.10 The final approach was the "any incarceration rule."11

The Supreme Court added to the confusion surrounding the extent of the Gideon holding by denying certiorari in a series of cases presenting the question of right to counsel in misdemeanor trials.12 However, the historic evolution of the indigent's right to counsel13 made a further extension probable. When the Court granted certiorari in Argersinger14 the only question remaining was which view would the court adopt?

Mr. Justice Douglas delivered the opinion of the Court, indicating several due process bases for the extension of the right to counsel to all indigents facing imprisonment. Pointing out that there is no historical basis for limiting the right to counsel as there is for the right to trial by jury,15 he stressed that serious legal and constitutional problems present in even "petty offense" prosecutions which lead to imprisonment,16 often make the assistance of counsel a requisite to the existence of a fair trial. The problem of uninformed guilty pleas,17 the

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10. The Right of the Indigent Misdemeanant, supra note 7, at 402-05; see Comment, Will the Trumpet of Gideon Be Heard in All the Halls of Justice?, 25 U. MIAmI L. Rev. 450, 458-61 (1971).
17. Counsel is needed so that the accused may know precisely what he is doing,
high volume of misdemeanor cases which leads to prejudicial "assembly-line" justice,\(^8\) and the serious repercussions of any imprisonment\(^9\) were instrumental in forcing the conclusion that the indigent facing imprisonment requires the aid of counsel to obtain a fair trial.

The only objections raised to the Argersinger extension of \textit{Gideon} have centered around the practical problems of cost and implementation. Reflecting this very real apprehension of a heavy new burden upon the profession and the taxpayers were the concurring opinions.\(^{20}\) However, Mr. Justice Powell, joined by Mr. Justice Rehnquist, disagreed in a concurring opinion with the establishment of any rigid requirement for right to counsel. While agreeing that the right to counsel is more fundamental than the right to trial by jury, they preferred to follow a flexible due process approach which would require counsel to be appointed whenever "fundamental fairness" so required.\(^{21}\) They also objected to the imprisonment standard as, \textit{inter alia}, creating equal protection problems within a single jurisdiction where a judge may decide to open or foreclose the possibility of imprisonment in advance of trial.\(^{22}\) The Court's approach, while the most far-reaching of those previously mentioned, should prove to be the easiest to administer, avoiding the problems of calculating maximum sentences\(^{23}\) and the series of "special circumstances" exceptions, inherent in Mr. Justice Powell's approach, which led to the demise of Betts v. Brady.\(^{24}\)

The actual fiscal impact of \textit{Argersinger} is unclear due to a lack of

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\(^8\) While accurate statistics are unavailable, there are four to five million misdemeanor and perhaps 50 million traffic violation cases annually. Note, \textit{Dollars and Sense of an Expanded Right to Counsel}, 55 Iowa L. Rev. 1249, 1260-61 (1970). There are over 1,100 non-felony cases per week in the Municipal Court of Jacksonville, Florida, which has less than 600 active members in its bar. McDonald v. Moore, 353 F.2d 106, 109 n.3 (1965).


\(^{10}\) The Chief Justice observed that "the dynamics of the profession have a way of rising to the burdens placed on it." 92 S. Ct. at 2015. Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Stewart, suggests that "law students can be looked to to make a significant contribution, quantitatively and qualitatively, to the representation of the poor. . . ." \textit{Id.} at 2016. Unfortunately, the number of communities with law schools and the number of students interested are limited. \textit{Id.} at 2022 n.21 (Mr. Justice Powell concurring in the result).

\(^{21}\) The necessity of counsel to assure a fair trial would be determined by examining the complexity of the charged offense, the severity of the probable sentence, and individual factors such as the defendant's competency. \textit{Id.} at 2026 (Mr. Justice Powell concurring in the result).

\(^{22}\) \textit{Id.} at 2021.

\(^{23}\) See \textit{Shepard v. Jordan}, 425 F.2d 1174 (5th Cir. 1970); \textit{Matthews v. Florida}, 422 F.2d 1046 (5th Cir. 1970).

accurate statistics. Assuming that there are 1.25 million indigent misdemeanants (not just those facing imprisonment) annually, one study places the costs at between $62.5 million (assigned counsel at $50 per case) and $46 million (public defenders at $20,000 per defender) per year.\textsuperscript{25} Another study indicates that the additional annual public cost of providing adequate legal defense for all criminal offenders could be as high as $180 million annually.\textsuperscript{26} Allowing for inflation from the date of these studies, but eliminating indigents not facing imprisonment, the costs of \textit{Arger singer} may exceed $100 million annually, indicating a need for federal funding.\textsuperscript{27} The distribution and qualifications of counsel willing to defend indigent misdemeanants at low compensation will similarly create difficulties in implementing \textit{Arger singer}.\textsuperscript{28} The burden will obviously be heaviest on the 19 states, including Florida, not currently providing counsel to misdemeanants.

\textit{Arger singer} may exacerbate another problem facing the indigent defendant and the legal profession—ineffective compensation\textsuperscript{29} of assigned counsel who bear the burden of indigent defense in twenty-nine hundred counties in the United States.\textsuperscript{30} Court appointment with no compensation, or inadequate compensation, may constitute involuntary servitude and deprive the attorney of property without due process and equal protection of the law.\textsuperscript{31} Such arguments, however, have met with little success, because courts often find a duty of gratuitous service as a condition of the license to practice, or as a correlative of the rights and privileges of the attorney as an officer of the court.\textsuperscript{32} However, many commentators argue that the increased burdens of indigent defense

\begin{itemize}
\item \textsuperscript{25} Note, \textit{Dollars and Sense of an Expanded Right to Counsel}, 55 Iowa L. Rev. 1249, 1263 (1970).
\item \textsuperscript{26} Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389, 416 (1966). The estimated expenditure for indigent defense in 1966 was $20 million. \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} The plight of Wood, South Dakota, in a recent case is described in 92 S. Ct. at 2024.
\item \textsuperscript{29} Adequate compensation has been suggested to be \textquotedblleft... 60\% of the fee a client of ordinary means would pay an attorney of modest financial success." \textit{State v. Rush}, 46 N.J. 399, 413, 217 A.2d 441, 448 (1966). An attorney's overhead may run as much as twenty dollars per working hour, so that even the relatively liberal thirty dollars per in-court hour of the federal Criminal Justice Act of 1964, which establishes a maximum of $400 compensation for misdemeanor cases, 18 U.S.C. § 3006A(d) (1970), may make indigent defense a losing proposition for most attorneys. \textit{Williams and Bost, The Assigned Counsel System: An Exercise of Servitude?}, 42 Miss. L.J. 32, 36 (1971).
\item \textsuperscript{30} L. Silverstein, \textit{Defense of the Poor in Criminal Cases in American State Courts} 15 (1965).
\item \textsuperscript{31} These were the unsuccessful arguments in \textit{State v. Rush}, 46 N.J. 399, 217 A.2d 441 (1966). \textit{See generally Annot., 21 A.L.R.3d 819 (1968).
\item \textsuperscript{32} Annot., 21 A.L.R.3d 819, 825-28 (1968). But see \textit{Schware v. Board of Bar Exam'rs}, 353 U.S. 232, 239 (1957), where the Court wrote: \textquotedblleft[\textit{A}ny qualification [for admission to the bar] must have a rational connection with the applicant's fitness or capacity to practice law."
\end{itemize}
nullify this duty. While the suggestion of an attorney's constitutional right to compensation for assigned defense has met strong resistance, there is evidence that defendants with uncompensated counsel receive less effective protection of their rights. Occasionally they are represented in form only. The equal protection path may well be followed to further protect the indigent by insuring properly compensated appointed counsel.

The Supreme Court of Florida has, in Gideon and now in Arger-singer, twice been reversed by the United States Supreme Court in landmark right-to-counsel cases. The two courts often seem to consider the same factors and use the same language, but reach opposite conclusions. Yet perhaps the bulk of responsibility for Florida's lag in this area lies upon the legislature. In contrast, the majority of states had followed the requirements of Gideon and Argersinger before those decisions. The time interval between major right to counsel cases has clearly been sufficient to allow gradual statutory extension by the other states, eliminating the haste, confusion, and sudden massive expenditures involved in complying with the decisions.

Few affluent laymen would undertake the trial of a just cause, civil or criminal, without the aid of counsel; and few attorneys can disagree with Mr. Justice Black's observation that: "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." This suggests that the imprisonment standard of Argersinger is inadequate, as there are often serious repercussions from any conviction, not just those


34. Note, Indigent Criminal Defendant's Constitutional Right to Compensated Counsel, 52 Cornell L.Q. 433, 439 (1967). Appellate relief is available for incompetency or inadequacy of counsel only in extreme cases. See Note, Effectiveness of Appointed Counsel, 29 Ohio St. L.J. 512 (1968); Comment, Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings, 20 Sw. L.J. 136 (1966).


37. In Fish v. State, 159 So.2d 866 (Fla. 1964), the court stated:

By limiting the scope of the [public defender] Act to felonies, the Legislature has, in effect, declared the public policy of this state to be that persons accused of misdemeanors only do not necessarily require the appointment of counsel to assist in their defense.

Id. at 868, referring to what is now Fla. Stat. § 27.50 (1971).


39. See note 2 supra.

resulting in imprisonment;\textsuperscript{41} nor is there such distinction drawn in the sixth amendment.

In the writer's opinion, Argersinger is only another way station on the path of eventual extension of the right to counsel to cover many civil\textsuperscript{42} and all criminal cases, including traffic violations.\textsuperscript{43} Hopefully, Florida's Legislature and Supreme Court will, of their own accord, see the writing on the wall and not again be forced to meet their responsibilities.

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**THE RIGHTS OF PRIVATE CLUBS TO DISCRIMINATE AGAINST BLACK GUESTS DESPITE A STATE-ISSUED LIQUOR LICENSE**

Plaintiff, the black guest of a member of a private club which restricted membership to Caucasians, was refused service of food and beverage solely because of his race. The complaint, brought in the federal district court under United States Code, title 42, section 1983 (1970)\textsuperscript{1} for injunctive relief, alleged that since the Pennsylvania Liquor Control Board had issued defendant a private club license, the discrimination was state action, and thus a violation of the equal protection clause of the fourteenth amendment.\textsuperscript{2} A three-judge district court, convened at plaintiff's request,\textsuperscript{3} entered a decree declaring invalid the liquor license issued to the club.\textsuperscript{4} On direct appeal to the United States Supreme

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\textsuperscript{4} 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

\textsuperscript{1} 2. U.S. Const. amend. XIV, § 1.

\textsuperscript{2} The three-judge court was convened pursuant to 28 U.S.C. § 2281 (1970).