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Constitutional Law - Fourteenth Amendment Due Process - Representation by Counsel at Trial Is a Prerequisite to the Imposition of Any Sentence of Imprisonment Absent Valid Waiver

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT DUE PROCESS — REPRESENTATION BY COUNSEL AT TRIAL IS A PREREQUISITE TO THE IMPOSITION OF ANY SENTENCE OF IMPRISONMENT ABSENT VALID WAIVER.

Argersinger v. Hamlin (U.S. 1972)

Petitioner was arrested for carrying a concealed weapon¹ in violation of a Florida criminal statute.² He pleaded guilty and was ordered to pay a fine and, upon default of such payment, to be imprisoned at hard labor in the county jail for three months.³ Through an attorney, petitioner filed an application for a writ of habeas corpus in the Florida Supreme Court, alleging that at the time of his conviction: (1) he was an indigent unrepresented by counsel; (2) he had not waived the assistance of counsel; and (3) he had a defense to the charge which he, as a layman, could not properly raise and present.⁴ The Florida Supreme Court, in a four-to-three decision, discharged the application, holding that the right to appointed counsel, by analogy to the right to demand a jury trial, was limited to situations in which the offense charged carried a possible sentence of more than six months imprisonment.⁵ The United States Supreme Court reversed, *holding* that the due process clause of the fourteenth amendment requires that a defendant be represented at trial, regardless of the offense charged, and that absent a proper waiver, such representation is a prerequisite to the imposition of imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The sixth amendment to the Constitution, which directly governs *federal* criminal proceedings, provides, *inter alia*, that "in all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his Defence."⁶ In *Johnson v. Zerbst*,⁷ the Court held that the sixth amendment gave an indigent tried in federal court the right to be provided with counsel at government expense. While *Johnson* involved

1. Brief for the United States as Amicus Curiae at 1, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

2. FLA. STAT. ANN. § 790.01(1) (1965). The statute authorizes either imprisonment for three to six months, or a fine of \$500 to \$1000, or both.

3. Brief for the United States as Amicus Curiae at 2, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

4. *Id.*

5. State *ex rel.* *Argersinger v. Hamlin*, 236 So. 2d 442 (Fla. 1970). See notes 34-36 and accompanying text *infra*. Under this ruling petitioner had no right to appointed counsel since the maximum sentence was not more than six months. See note 2 *supra*.

6. U.S. CONST. amend. VI.

7. 304 U.S. 458, 468 (1938).

a felony conviction, at least one federal court applied the same principle to misdemeanors, finding no constitutional significance in the length of the sentence imposed.⁸

With respect to appointed counsel in state court proceedings, the issue was more complex, since the sixth amendment did not apply *prima facie* to the states. In *Powell v. Alabama*,⁹ the Court held that an indigent¹⁰ defendant in a state prosecution had such a right based on the due process clause of the fourteenth amendment.¹¹ However, while the Court spoke eloquently and expansively of the need for counsel in any criminal case,¹² the decision, on its own terms, was limited to capital cases in which the defendant is incapable of defending himself due to illiteracy or deficient mental capacity.¹³ Some later cases contained language asserting an absolute right to appointed counsel in state capital cases,¹⁴ and, finally, such a rule was established by implication¹⁵ in *Hamilton v. Alabama*.¹⁶

When dealing with a state noncapital felony case, the Court in *Betts v. Brady*¹⁷ noted that a review of the historical data revealed only that the Constitution *allowed* a defendant to appear by counsel, not that it mandated appointment of counsel for indigents. Moreover, the positions of the various states on the question demonstrated that the appointment of counsel was not essential for the maintenance of a fair trial.¹⁸ For these

8. *Evans v. Rives*, 126 F.2d 633, 638 (D.C. Cir. 1942).

9. 287 U.S. 45, 71 (1932).

10. Although the term "indigent" in this context refers to someone who is financially unable to afford counsel, both the agency responsible for determining indigency and the standards for making that determination vary from state to state and even from county to county within a state. See L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 103-18 (1965). In the federal system, the court is required to conduct "appropriate inquiry" to determine whether the defendant is financially unable to obtain counsel. 18 U.S.C. § 3006A (b) (1970). However, no standards for such determination are included in the statute.

11. The existence of a right to counsel provision was of no direct aid to the *Powell* Court in reaching this conclusion. It was, in fact, somewhat of a hindrance because of the language in *Hurtado v. California*, 110 U.S. 516, 534-35 (1884), to the effect that any provision of the Bill of Rights which was not included in the fourteenth amendment was specifically excluded from that amendment. The Court in *Powell*, however, concluded that *Hurtado* provided only an aid to construction and that its reasoning must yield when the right involved is so fundamental in character that denial would violate basic concepts of liberty and justice. 287 U.S. at 67-68.

12. The Court noted that:

The right to be heard would be, in many cases, of little avail if it did not include the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have 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 the danger of conviction because he does not know how to establish his innocence.

287 U.S. at 68-69.

13. *Id.* at 71.

14. *Gideon v. Wainwright*, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring), citing *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948); *Bute v. Illinois*, 333 U.S. 640, 674 (1948); *Avery v. Alabama*, 308 U.S. 444, 445 (1940).

15. *Gideon v. Wainwright*, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring).

16. 368 U.S. 52 (1961).

17. 316 U.S. 455, 466 (1942). The historical data consisted of the constitutions of the thirteen original states, read in light of the English common law tradition. *Id.*

18. *Id.* at 469-71.

reasons, the Court held that the fourteenth amendment guarantee of due process of law did not require appointment of counsel in all noncapital felony cases.¹⁹ The rule articulated in *Betts*, known as the "special circumstances" rule,²⁰ soon evaporated as the courts began to "find" such "special circumstances" in every case in which the question arose, notwithstanding the differing factual situations.²¹

In 1963, on facts quite similar to those in *Betts*, the Court in *Gideon v. Wainwright*²² specifically overruled *Betts*, holding that the sixth amendment guarantee of assistance of counsel applied to the states through the fourteenth amendment, and, therefore the appointment of counsel for indigents was required. Although the Court's opinion made no reference to the offense charged and spoke of all persons who are too poor to hire a lawyer,²³ the case involved a felony conviction and, arguably, could be read narrowly as not being applicable to misdemeanor cases.²⁴ Such a narrow construction seemed to be favored when, in *Mempa v. Rhay*,²⁵ the Court referred to *Gideon* as establishing an absolute right to counsel in *felony* cases.

In the aftermath of *Gideon*, the law concerning an indigent's right to appointed counsel in a state misdemeanor prosecution has been in a confused state.²⁶ In interpreting *Gideon*, some state courts, focusing on the fact that the case involved a felony conviction, held that there was no constitutional right to appointed counsel for indigent misdemeanants.²⁷ Other courts, finding significance in the broad language of the *Gideon* opinion, held that all indigent misdemeanants must be afforded appointed counsel.²⁸ Still other courts adopted a "middle of the road position," namely, that counsel need be appointed only in felony and "serious" mis-

19. *Id.* at 473.

20. *Gideon v. Wainwright*, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring). It should be noted that the *Betts* opinion did not use the term "special circumstances." However, later cases referred to the *Betts* rule as the "special circumstances" rule. *Id.*

21. *Id.* It should be noted that the *Betts* Court was silent on exactly what type of case required appointment of counsel. The Court merely noted that it was not required in all noncapital felony cases. 316 U.S. at 473.

22. 372 U.S. 335, 345 (1963).

23. *Id.* at 344.

24. *See, e.g., Cortinez v. Flournoy*, 249 La. 741, 190 So. 2d 909, *cert. denied*, 385 U.S. 925 (1966). In the same year as *Gideon*, the Supreme Court vacated and remanded a misdemeanor conviction for further consideration in light of *Gideon*. *Patterson v. Maryland*, 372 U.S. 776 (1963). However, the sentence imposed was two years, and the lower court decision was based on whether that sentence made the case sufficiently "serious" to require appointment of counsel. *Patterson v. State*, 227 Md. 194, 196, 175 A.2d 746, 748 (1961). This led at least one court to conclude that *Gideon* required appointment of counsel in felony and "serious" misdemeanor cases. *State v. Anderson*, 96 Ariz. 123, 392 P.2d 284 (1964).

25. 389 U.S. 128, 134 (1967).

26. *See Junker, The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968). *See also Comment, Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

27. *See, e.g., City of Toledo v. Frazier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).

28. *See, e.g., Tacoma v. Heater*, 67 Wash. 2d 786, 409 P.2d 867 (1966).

demeanor cases.²⁹ Despite these conflicting views, the Supreme Court denied certiorari in three cases which presented the issue of constitutionally required counsel for indigent misdemeanants.³⁰ The constitutional mandate of due process of law had not only come to mean "one thing in Arkansas and something else in Mississippi,"³¹ but it also had come to mean different things to different courts within the same state.³²

Against this background of confusion, the *Argersinger* Court's holding is commendably clear:

We hold . . . that 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.³³

In arriving at this rule, the *Argersinger* Court rejected the Florida Supreme Court's holding³⁴ that, if the right to appointed counsel was to apply to any crimes other than felonies, it should extend only to crimes which carry a maximum sentence of more than six months imprisonment.³⁵ The Florida court had reasoned that since both the right to counsel and the right to demand a jury trial are enumerated in the sixth amendment, the six month sentence limitation which applies to the right to demand a jury trial should also apply to the right to appointed counsel.³⁶ The *Argersinger* Court rejected this interpretation by noting that other rights enumerated in that amendment, such as the right to have a public trial,³⁷ to confront the state's witnesses,³⁸ and to have compulsory process for defense witnesses,³⁹ are not subject to any limitation based on the offense charged.⁴⁰ The Court then stressed that the six month sentence limitation was appropriate for the right to demand a jury trial since historically that

29. See, e.g., *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964). See note 24 *supra*.

30. *DeJoseph v. Connecticut*, 385 U.S. 982 (1966); *Cortinez v. Flournoy*, 385 U.S. 925 (1966); *Winters v. Beck*, 385 U.S. 907 (1966).

31. *Winters v. Beck*, 385 U.S. 907, 908 (1966) (Stewart, J., dissenting).

32. Compare *Arbo v. Hegstrom*, 261 F. Supp. 397 (D. Conn. 1966), where the court held that an indigent charged with the misdemeanor of nonsupport had a constitutional right to appointed counsel, with *State v. DeJoseph*, 3 Conn. Cir. 624, 222 A.2d 752 (Cir. Ct. 1966), where the court approved a state statute giving the trial court discretionary power to determine in which cases counsel should be appointed. The *DeJoseph* case involved a conviction for nonsupport and was disposed of on the ground that the defendant had not established his indigency. *Id.* at 636-37, 222 A.2d at 759-60.

33. 407 U.S. at 37.

34. *Id.* at 30-31.

35. The Florida Supreme Court felt it was being "coerced" into some type of extension of the right to counsel beyond felony cases by the federal courts of the Fifth Circuit. *State ex rel. Argersinger v. Hamlin*, 236 So. 2d 442, 443 (Fla. 1970).

36. *Id.*, citing *Duncan v. Louisiana*, 391 U.S. 145 (1966). *Duncan* limited the right to demand a jury trial to non-petty offenses. *Id.* at 159. In *Baldwin v. New York*, 399 U.S. 66, 69 (1970), a plurality of the Court expressed the opinion that no crime which carried a sentence of more than six-months imprisonment could be termed "petty" for purposes of determining whether there was a right to demand a jury trial.

37. 407 U.S. at 28, citing *In re Oliver*, 333 U.S. 257 (1948).

38. 407 U.S. at 28, citing *Pointer v. Texas*, 380 U.S. 400 (1965).

39. 407 U.S. at 28, citing *Washington v. Texas*, 388 U.S. 14 (1967).

40. 407 U.S. at 28.

right had been a limited one,⁴¹ and, more importantly, since the absence of a jury is not constitutionally defective because there is an alternative — trial to a judge alone — which could also provide the defendant with a fair trial.⁴² Neither of these considerations, however, were found applicable to the right to appointed counsel. The Court noted that the right to retain counsel for less than felony offenses was not circumscribed by any historical limitations.⁴³ Further, the Court found that the rationale of appointed counsel cases, such as *Powell* and *Gideon*, showed that the absence of counsel will often preclude the possibility of a fair trial⁴⁴ and that this fact is not altered when the crime carries a potential sentence of less than six months imprisonment.⁴⁵ In support of this proposition the Court noted that the issues in a misdemeanor case can be complex,⁴⁶ that the advice of counsel is necessary for a knowledgeable plea,⁴⁷ and that the very large number of misdemeanor cases creates a tendency to sacrifice fairness for rapid disposition of cases.⁴⁸ For these reasons the Court determined that the presence of counsel is a necessary ingredient of the fair trial guaranteed by the due process clause of the fourteenth amendment.⁴⁹

Although the Court was unanimous in reversing the conviction and thus disavowing the rule established by the Florida Supreme Court, Justice Powell, in an opinion joined by Justice Rehnquist, concurred only in the result.⁵⁰ Justice Powell disagreed with the majority's belief that the Constitution required a rigid rule on the appointment of counsel.⁵¹ He suggested, instead, that the need for counsel be determined on a case-by-case basis.⁵² Since these two rules — one rigid, the other flexible — represent the basic choices open to the Court in any extension of the right to

41. *Id.* at 29, *citing* *Baldwin v. New York*, 399 U.S. 66 (1970).

42. 407 U.S. at 29.

43. *Id.* at 30, *citing* *Powell v. Alabama*, 287 U.S. 45, 60, 64-65 (1932).

44. 407 U.S. at 31.

45. *Id.* at 33.

46. *Id.*, *citing* *Powell v. Texas*, 392 U.S. 514 (1967); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); *Thompson v. Louisville*, 362 U.S. 199 (1960).

47. 407 U.S. at 34.

48. *Id.* at 34-36.

49. *Id.* at 36-37. The Court's opinion is unclear as to the actual constitutional basis of the holding. On the one hand, the Syllabus of the Court and other language in the opinion reflect the theory that the sixth amendment right to counsel provision is applicable to the states by "incorporation" into the fourteenth amendment. *Id.* at 25, 37. However, the analysis of the Court focuses on the unfairness of trial without counsel, and therefore, the rationale would seem to be based on the due process clause of the fourteenth amendment. For a full discussion of the "incorporation" theory, *see* Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 *CORNELL L.Q.* 467 (1966).

50. 407 U.S. at 44. There were two other opinions filed. Chief Justice Burger, concurring in the result, outlined what he believed to be the proper approach for trial judges in implementing the new rule and noted that, despite the many problems which could arise under the rule, the legal profession had a history of meeting new burdens. *Id.* at 41-44. Mr. Justice Brennan, joined by Justices Douglas and Stewart, wrote a concurring opinion stressing that law students under faculty guidance could provide a source of legal manpower to aid in fulfilling the rule's requirements. *Id.* at 40-41.

51. *Id.* at 49.

52. *Id.* at 63.

appointed counsel, a comparison and contrast of the two is most helpful in analyzing the validity of the majority rule.

Since the purpose of each rule is to assure that no defendant in need of an attorney will be without one, it is appropriate to determine which rule better serves this goal. In this regard, it is submitted that the majority rule is clearly superior to Justice Powell's suggestion. The majority rule is basically rigid but simple — no defendant may be imprisoned unless he was represented by counsel at his trial. Therefore, at least with respect to convictions which result in imprisonment, *all* defendants will be afforded protection. In fact, the majority rule will afford representation in cases where the presence of an attorney is not essential to the maintenance of a fair trial.⁵³ However, where the very fairness of the adjudication of guilt or innocence is concerned, rigid rules applying to all cases are most desirable, even if the result is an overextension of the right involved.⁵⁴

In contrast, Justice Powell attacked the rigidity of the majority rule.⁵⁵ It was his position that the trial judge should make the initial determination

53. One example of such a case would be where an indigent defendant, apprehended by the police *in flagrante delicto*, wishes to plead guilty immediately. Even in such a case, imprisonment could not be imposed unless the defendant was afforded representation.

54. Other rights which pertain to the fairness of the trial are rigid in structure. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial on demand in non-petty cases); *Washington v. Texas*, 388 U.S. 14 (1967) (right to have compulsory process for defense witnesses); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (right to an open trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront prosecution witnesses); *In re Oliver*, 333 U.S. 257 (1948) (right to a speedy trial).

55. 407 U.S. at 49. The sufficiency of legal manpower to discharge the duties imposed by the *Argersinger* rule was another area of sharp disagreement between the majority and Justice Powell. The majority pointed out that there are currently over 355,000 attorneys in the country. *Id.* at 37 n.7, citing BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 153 (1971). By contrasting this figure with the estimated 1,575 to 2,300 full-time attorneys needed to represent all indigent misdemeanants, excluding traffic offenders, the majority found no paucity of manpower to meet the requirements of its rule. 407 U.S. at 37 n.7, citing Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1260-61 (1970). Justice Powell disputed the majority figures on two grounds: (1) aggregate figures do not accurately reflect the number of attorneys who are both capable and willing to represent criminal defendants; and (2) aggregate figures ignore the real problem — attorneys are not evenly distributed across the country and, therefore, many small governmental units will contain an insufficient number of attorneys to effectuate the *Argersinger* rule. 407 U.S. at 56-58, 59-61.

Any discussion of the practical implications of the *Argersinger* rule is speculative. It has been estimated that there are between four and five million misdemeanor court cases each year (exclusive of traffic offenses). PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 55 (1967). However, there is simply no way of knowing how many of these involve indigents. No reliable extrapolation from the known number of indigent felons can be made since misdemeanor cases are usually less expensive to defend and, thus, a smaller percentage of those involved will be unable to hire attorneys. L. SILVERSTEIN, *supra* note 10, at 125. Furthermore, any estimate based on the number of indigent felons would be on the unproven assumption that the economic status of felons and misdemeanants is the same. Note, *supra*, at 1260 n.74. The estimate of 1,575 to 2,300 attorneys necessary to represent indigent misdemeanants is based on what is apparently a "guess" that there are 1 million to 1.25 million indigent misdemeanants annually. *Id.* at 1260.

of the need for counsel in each case,⁵⁶ with the appellate courts reviewing closely any decision not to provide counsel.⁵⁷ If Justice Powell's rule were a workable one, it would not only provide the requisite fair trial, but also prevent any problems with overextension. However, it is submitted that in actual practice his rule would not effectively guarantee representation for all those who need it.

The first problem with Justice Powell's suggested rule is its similarity to the "special circumstances" rule of *Betts*,⁵⁸ which rule had to be abandoned when it failed to protect adequately the rights of indigent defendants.⁵⁹ Justice Powell admitted the similarity but argued that the reason for the failure of *Betts* — the insensitivity of state courts to the rights of criminal defendants — can not still be presumed to exist.⁶⁰ Whether or not such insensitivity still exists is, of course, a matter for speculation, but it is significant that the only previous attempt at a case-by-case determination of the need for appointed counsel was a failure and had to be replaced with a rigid standard.

Secondly, appellate review is not an adequate remedy when counsel has been denied. This is due not to the possible insensitivity of the appellate courts, but rather to the extremely important role that the attorney plays in making appellate review a workable remedy for any error at trial.⁶¹

Finally, even if the defendant could be retried with counsel and without prejudice from the former trial, there is a valid policy reason for avoiding such a procedure. Although not constitutionally objectionable, this type of legal "runaround" — trial without counsel, appeal, reversal, trial with counsel — hardly seems calculated to instill in the accused misdemeanant a sense of confidence in the criminal justice system.⁶²

56. 407 U.S. at 63.

57. *Id.* at 63-64.

58. See notes 17-21 and accompanying text *supra*.

59. *Gideon v. Wainwright*, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring).

60. 407 U.S. at 65.

61. Chief Justice Burger has stated:

Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record.

Id. at 41. The "die is cast" for several reasons. First, the uncounseled defendant may never come to know of any right to appeal or of the necessary procedures for perfecting an appeal. Second, unless Justice Powell is suggesting that all aspects of all uncounseled trials would necessarily be reviewed, there is little likelihood that the unrepresented defendant would know what questions to raise on appeal or how to preserve those questions for appeal. Finally, any appeal would have to be based on the trial record, but there is a strong probability that courtroom errors which would not escape zealous counsel for the defense would not be ascertainable from the bare record.

62. In assessing the importance of appointed counsel in misdemeanor cases, the ABA has stated:

Minor offenses may have major significance in terms of the interests to be served by providing defense services. It is at this level that the largest number of people confront the administration of criminal justice. If they are to develop respect for its processes it must treat them fairly; and providing counsel to those unable to retain their own is essential to the development of that respect. Moreover, those who are charged with major offenses often have a record of prior convic-

In sum, Justice Powell's rule is unworkable because the legal system functions properly — both at trial and on appeal — only when both sides are competently represented. The majority rule, on the other hand, provides for automatic appointment of counsel and, therefore, remains within the parameters of the adversary process.

This is not to suggest, however, that the majority rule is flawless, but merely that it will function better than any case-by-case method in assuring fair trials. In fact, there are two major problems with the *Argersinger* ruling. First, the Court specifically left open the question of the constitutionality of uncounseled trials which do not result in imprisonment.⁶³ Therefore, defendants who are sentenced to pay a fine or to surrender some validly bestowed privilege, such as a motor vehicle operator's license,⁶⁴ are still subject to trial without appointed counsel. This situation is disturbing since the *Argersinger* opinion indicated that all uncounseled trials run grave risks of being violative of due process.⁶⁵ However, unless due process requirements vary according to the type of punishment imposed — and there is nothing in the fourteenth amendment which suggests this — the rule of *Argersinger* seems ripe for extension on this point when a proper case is presented.

The second problem is with the practical administration of the rule. Under the explicit holding of the Court, there is a right to representation only if the defendant is actually given a jail sentence. Sentencing, however, comes only after trial. Therefore, unless the jurisdiction is willing to appoint counsel for all indigent misdemeanants, some pretrial predictive analysis will be necessary to determine the likelihood of imprisonment upon conviction.⁶⁶ As a practical matter, the application of a pretrial predictive procedure would be difficult because of the large number of misdemeanor cases⁶⁷ and the customarily brief period between a misdemeanor arrest and trial. Consequently, the court will have little opportunity to evaluate the likelihood of imprisonment in each case involving an indigent misdemean-

tions for minor ones. This suggests the importance of using the processes of the law at the level of minor offenses to try to prevent recidivism and reverse the tendency of petty criminality to lead to aggravated forms of antisocial conduct. Providing counsel at the lower levels may counter to some degree the pressure to mass-produce justice and in this and other ways serve the ends of rehabilitation.

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 39 (1968) [hereinafter cited as ABA PROJECT].

63. 407 U.S. at 37.

64. Revocation of a driver's license is subject to the requirements of procedural due process. *Bell v. Burson*, 402 U.S. 535, 539 (1970).

65. See notes 44-49 and accompanying text *supra*.

66. The ABA suggested that appointment of counsel be based on a pretrial determination as to the likelihood of imprisonment on conviction. ABA PROJECT, *supra* note 62, at 38. The *Argersinger* rule is superior to that suggested by the ABA because it protects defendants who are "unexpectedly" sentenced to imprisonment. Brief for the United States as Amicus Curiae at 24, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

67. See note 55 *supra*.

ant.⁶⁸ However, no matter how hasty the evaluation, if counsel is not appointed, imprisonment is foreclosed as a possible punishment. Moreover, retrial with an attorney solely for the purpose of allowing a sentence of imprisonment would arguably, as Justice Powell suggested, be violative of the prohibition against double jeopardy.⁶⁹

In making an evaluation as to the impact of the *Argersinger* rule, perhaps the only certainty is that the various governmental units will be forced to allocate additional funds to finance their criminal justice systems. One possible consequence of this increased cost could be an acceleration of the trend to remove certain types of conduct, such as drunkenness, from the criminal area entirely.⁷⁰ Another possible result could be that some court systems which presently meet their indigent representation requirements by appointment of private attorneys will adopt a public defender system, which is generally less expensive and more efficient when a large caseload is involved.⁷¹

Whether there will be a further extension of the right to counsel is, of course, a matter of speculation. However, it should be noted that *Argersinger* is merely the latest in a series of cases which have extended that right.⁷² Moreover, while the opinions in *Argersinger* obviously reflect a difference in viewpoint on the extent to which the Constitution requires appointment of counsel, there seems to be basic agreement with Justice Powell's statement that:

The goal should be . . . to expand as rapidly as practicable the availability of counsel so that no person accused of crime must stand alone if counsel is needed.⁷³

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68. In attempting to avoid such problems, some courts may choose to set up two "classes" of misdemeanors — "imprisonable" and "nonimprisonable." Representation will be afforded only to those indigents accused of "imprisonable" offenses and those found guilty of any other misdemeanors will not be imprisoned even though that punishment would be proper in the particular case. While this approach obviously comports with the rule in *Argersinger*, it would represent a judicial nullification of the legislative power to prescribe the range of punishment for a given misdemeanor. See 407 U.S. at 53.

69. *Id.* at 54, citing *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Callan v. Wilson*, 127 U.S. 540 (1885).

70. 407 U.S. at 38 n.9. See generally R. NIMMER, *TWO MILLION UNNECESSARY ARRESTS* (1971).

71. For an analysis of each system and a comparison of the two, see L. SILVERSTEIN, *supra* note 10, at 15-74.

72. See notes 7-32 and accompanying text *supra*.

73. 407 U.S. at 66.