10-1971

Argersinger v. Hamlin

Lewis F. Powell Jr.

Conf. 2/18/72

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 70-5015

Submitted ....., *19*... *Announced* ....., *19*...

ARGERSINGER

vs.

HAMLIN

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Good memo

2/24/72

Q - Right of indigents to counsel in misdemeanor (petty) offenses involving possibility of ~~good~~ jail sentences.

Plur commends ~~rule~~ striking balance as recommended by SG - which suggests affirmative answer.

BENCH MEMO

No. 70-5015

Argersinger v. Hamlin

Cert to Fla SC: Roberts, Drew, Thornal, Carlton; dissenting: Boyd, Ervin, Adkins

Petr was arrested and charged with a misdemeanor punishable under Fla law by not less than three and not more than 6 months or by a fine not less than $500 and not more than $1000. Petr pled guilty and was sentenced to pay a fine of $500, and in default of payment to be imprisoned for 3 months. He was indigent, and therefore was ordered to prison.

With the assistance of an attorney, he filed for state habeas corpus the day after his sentence began. He was released on bail, where he remains. His claim was that when he pled guilty he was unrepresented but that he had not waived his right to assistance of counsel. He also claimed that he had

CONTROLLING CASES: GIDeon v. Wainwright, 372 U.S. 335 (1963).

a defense to the charges against him. The Fla SC, by a 4-3 vote, discharged the writ. It ruled that an indigent offender accused of a misdemeanor is entitled to court-appointed counsel only where the offense with which he has been charged carries a possible penalty of more than 6 months imprisonment. Since petr was charged with a misdemanor which was not punishable by more than 6 months, he was not entitled to relief. Petr sought cert to this Court, and the Court granted.

This is going to be, hopefully, a brief memo, because I do not think I can say anything here that will improve on the amicus brief filed by the SG in this case. I recommend that you read that brief and rely on it rather than the petr's brief as your source for that side of the case.

The right of indigents to have appointed counsle was recognized by this Court in Gideon v. Wainwright. Although neither the reasoning nor the precise holding of the case is limited to felonies, Gideon had been convicted of a felony, It is therefore argued that the Court has not held that indigents are entitled to appointed counsel in misdemeanor cases. The Fla SC and most of the persons supporting the state's position, do not argue that in all misdemeanor cases, there is no right to counsel. They instead, relying on the line drawn in Duncan v. Lousiana, 391 U.S. 145 (1968), and Baldwin v. New York, 399 U.S. 66 (1970), argue that there is no such right in non-serious cases, i.e., cases in which the maximum imprisonment that can be imposed does not exceed 6 months.

In the right-to-counsel precedents, there is little comfort for [the line resp would draw.] ~~pe roop's line.~~ In the right-to-counsel area the Court has never taken an historical approach of trying to determine in what kinds of cases counsel was afforded at the time the Constitution was written. It's approach has been fundamental fairness. Very simply put, it has held that the right to counsel goes to the integrety of the fact-finding function, and that a trial is unfair. It has never limited this reasoning according to whether the offense charged is serious or not. Indeed, there is substantial evidence for the proposition that the fact-finding process in non-serious cases requires the assistance of counsel to the same extent as does the fact-finding process in serious cases. There are some interesting figures cited in the amicus brief of the Legal Aid Society of New York, at 16-18, which show that in non-serious cases in which the society represents indigents in New York, it obtains either an acquital or dismissal of charges 45% of the time, whereas in felonies, it is successful only 9% of the time. This suggests that the occurance of errors is far more frequent in the non-serious cases, and it is not ~~straining~~ straining judicial notice too far, I think, to conclude that substantially less of these errors would have come to light had there been no assistance of counsel. Other studies could be, and indeed are, cited for the proposition that the quality of justice handed out by the lower criminal courts of this country benefits when

the accused is represented. Over-burdened courts, often presided over by judges who are poorly trained, do not aid a def who is ~~xxx~~ without assistance. Therefore, I think it is difficult to quarrel with the proposition that the system works better if the accused is represented in non-serious cases.

In addition to this due process reason in ~~xxxxx~~ support of the indigent's right to ~~xxxxx~~ counsel, there is a quasi-equal protection ~~arguemtn~~ argument. (Resp argues that this argument was not advanced in the court below and cannot therefore be raised here. In support of this claim, ~~he~~ it cites the petr's "candid acknowledgement" at p 36 of petr's brief. I see no such acknowledgement on that page. Moreover, due process was clearly raised below, ~~and~~ 3 I think that if this arguemtn is properly classified as an equal protection argument rather than a due process argument, that it is certainly on the hazy borderline between those two doctrines. The Court has acknowledge that the concept of equal protection is inherent in the fundamental fairness ~~xxx~~ concept of due process.) The arguemtn is simply that it is fundamentally ~~xxxxxxxxx~~ unfair to permit persons who can afford attorneys to be represented while persons who cannot afford them are not. In support of this argument, petr cites the Griffin v. Illinois, 351 U.S. 12 (1956), line of cases.

Thus, petr is able to marshal two powerful constitutional policies in favor of the right of indigents to have appointed counsel in non-serious cases. There are, however, counter

policies.

The strongest of these is the argument that to appoint counsel in every misdemaenor case in which an indigent is unrepresented would be to place an insurmountable burden on the judicial systems. Resp cites the number of traffic offenses, or charges of jaywalking or spiiting on the sidewalk, in which counsel would have to be afforded. The state asserts that it would be impossible for all these persons to be represented. Since due process often acquires a delicate balance between the rights of the accused and the interest of the state, it is not inappropriate to consider these logistical problems. Moreover, the logistical argument also serves to refute the quasi-equal protection argument advanced by petr. In most non-serious cases, the potential liability is only a fine. It is often not worth while for persons who can afford one, to hire a lawyer; legal fees are likely to be higher than the potential fine. But if an indigent has a right to appointed counsel, we would face the anomolous situation in which all indigents would be represented because they could have free assistance while most non-indigents would be unrepresented because it would not be economically intelligent to hire an attorney. Furthermore, resp argues, if indigents have a right to appointed counsel in all misdemeanor cases, why would they not also have the same right in civil cases. The potential liability in a civil case will often exceed the maximum fine imposable in a misdemanor case. If assistance is provided in the latter to protect the indigent's interests, logic

dictates that assistance be provided in the former where the same or even greater interests are involved. But here the logistical problem would truly prove insurmountable.

There is no denying the force to resp's logistical arguments, but much of that force is dissipated by the rule suggested by the SG in his brief. He suggests that the right to counsel exist only in cases in which a sentence is imposed. If at the outset of the process, the judge believes that a conviction will likely bring a jail sentence, he must advise the def of his right to appointed counsel. This is essentially the rule proposed by the ABA, except that this one has an additional wrinkle. The SG says that if the offense is one which would not normally bring a sentence and if a judge, accordingly, does not offer an indigent appointed counsel, he cannot then later change his mind and sentence the man after all. Instead some other, as yet unspecified, procedure, would have to be devised.

The SG's proposed rule would substantially reduce the logistical problem by eliminating crimes like jaywalking from those in which indigents must be furnished counsel. There is considerable reason to believe that the remaining logistical problem would not be unmanagable. Several states have comparable rules at the present, including New York and California. While New York is not the best example one could cite for efficiency, there is no reason to think that the appointment of counsel in non-serious misdemeanor

cases contributes substantially to the problem. If New York can handle the problem, it is reasonable to assume that other states could. Indeed, Alaska in its amicus brief, endorses the SG's rule. Second, the SG says that his rule would present no insurmountable problem for the federal system. Third, while the SG cannot speak for the states, he points out that the recent cases that have expanded the right to counsel ~~so that it applies~~ to apply in many other stages of the criminal process have not presented any insurmountable logistical barrier. Finally, the ABA and a federal study have concluded that similar rules are feasible. It is reasonable to assume that the ABA in particular was not unaware of the magnitude of resulting logistical problems.

The SG's rule is also the answer to the argument of resp that if indigents have a right to counsel in all misdemeanor cases, they must have such a right in all civil cases. The SG's rule distinguishes a situation where there is a possibility of imprisonment from those in which the only penalty is financial. This distinguishes the civil cases. While it, like all rules, is not perfect--there may be some cases in which the financial interest at stake is of higher importance than the possibility of a few days in jail, although it is difficult to think of such a case involving indigents--it does seem both workable and effective in removing the inequities. As a general rule, the thing we think unfair

is the possibility of going to jail without having been represented. The magnitude of the unfairness is diminished where the only penalty is monetary.

There is one solid workability argument advance against the SG's position by the state of Virginia in its amicus brief. It says that in cases where indigents are fined and cannot or will not pay the fine, they are sent to jail. Therefore it argues that there is a possibilty of jail in almost every case. That is not an easy objection to answer. It is, of course, not before the Court in this case. (It is true that petr was sentenced to jail because he could not pay a fine, but the charge involved in this case, carrying a concealed weapon, is one that would often, I assume, result in a sentence, so under the SG's rule, petr would have ~~had a~~ been advised of his right to appointed counsel.) Moreover, when such a case presents itself, I think there is a possible avenue of distinction. It may be that jail sentences imposed in lieu of fines could be analagized to contempt or something like it. Then you might say that he was sent to jail not because he violated the criminal statute, but because he failed to pay his fine and was therefore in contempt. But even if there is no distinction, I do not think that the problem is insurmountable. In reality there are going to be very few cases in which the fine is so large and the defendant so poor that he cannot pay it. Most of the kinds of misdemeanors we are talking about--jaywalking or traffic violations--do not involve fines of $500 such as was imposed in this case. Moreover, in its opinion of last term,

Tate v. Short, 401 U.S. 395 (1971), the Court ruled that it was illegal to automatically send a man to jail because he was too poor to pay his fine. It said that alternatives, such as installment payments, had to be tried first. Only then if the man still could not or would not pay, could he be sent to jail. Thus, in the future there should be fewer of these cases. So even if the rule must be that if the fine cannot be paid and the def is then sent to jail, he had a right to counsel, the rule will still clear away a lot of the minor cases in which jail sentences, as a practical matter, are not a realistic possibility.

One benefit that might result from such a rule, incidentally, is the elimination of a lot of criminal statutes that are not properly criminal matters. I do not know what one could call them, if not crimes, but a lot of traffic offensese could be better handled by a process that did not invoke all the cumbersome mechanisms of the criminal law. A rule such as that suggested by the SG, might encourage states to redefine a lot of "crimes."

Thus, I would conclude that striking the ~~logistical~~ balance, between the state's logistical problems and under the ~~SG's~~ suggested rule, ~~with~~ the interest of indigents in obtaining a fair trial, would result in a holding that indigents have a right to counsel in all cases in which they are sent to jail. That is really the guts of this case, but there ~~are a few~~ is one incidental issues that need to be treated.

~~First,~~ Resp argues that the line for right to appointed

counsel should be drawn at offenses punishable by not more than 6 months because that is the line drawn in the jury cases. The right to counsel like the right to a jury trial is a part of the 6th Amenment. If the 6th Amendment does not require a right to a jury in a case, it ought not require the appointment of counsel. This argument assumes that the Court adopted Mr. Justice Black's position of total incorporation of the Bill of Rights into the 14 th Amenment. But the Court did not adopt that position. It selectively incorporated according to what it felt were the dictates of fundamental fairness. And it turns out that the reasons for incorporating some part of the 6th Amenment do not apply to others. For example, the right to a jury trial does not, at least to the same extent, reflect the policy behind the right to counsel which is that without the assistance of counsel, the integrety of the fact-finding process is weakened. This is why the right to a jury trial was not made retroactice, while the right to counsel was. Thus, all the parts of the 6th amendment do not have the same force, so the fact that a jury may not be required in non-serious misdemeanor trials does not necessarily mean that counsel is not required. It is very doubtful that the Court would tolerate limiting the other rights guaranteed by the 6th Amendment--right to speedy trial, right to public trial, right to know nature and cause of accusation, right to confront witnesses, right to compel favorable witnesses--to serious offenses. For one thing, the logistical problems that are claimed to exist in

this case, and which certainly would exist if juries were required in non-serious offenses, do not exist if the right to confront witnesses, for example, is guaranteed in non-serious cases. Thus, in the case of each right, a balance must be struck. In this case, as I have already argued, the balance should be struck in favor of the right.

~~(Although I promised, in the paragraph before last, that there were a "few" incidental issues that needed treating, I reverse myself and limit the discussion to the one in the last paragraph.)~~

In conclusion, let me reiterate that ~~kxx~~ this is really a balancing case--the interest of the accused in counsel vs. the interest of the state in efficieny. I think that the SG's rule offers a proper method of striking that balance.

REVERSE Fox

Conf. 2/25/72

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 70-5015

ARGERSINGER

vs.

HAMLIN

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Rogow (for Petitioner)

Supports rule proposed by SG.

There must be a threat to liberty.

All but 10 states have moved somewhat - more or less - away from rule felony/misd.

Fair ~~trials~~ trials can be held without jury - but not without counsel.

Most of rights in 6th amend - confrontation, process, etc - apply to misdemeanors as well as felonys.

→ Admits his position is substantially same as SG's. For purpose of this case, Rogow accepts rule proposed by SG

Rogow (cont.)

About 25% of Δ's are indigents
Public defender could be used.

What about small towns & cities where no legal aid or defender system exists? No satisfactory answer.

Gravel

Relies on "due process" – 14th Amend.
Doesn't believe 6th is necessarily controlling. 6th is applicable by its terms to all criminal prosecutions & Duncan held that jury trial is required ~~only~~ only for cases where penalty is 6 mo. or more.
Gideon has both a 6th & 14th Amend. basis.
See no different bet. 6 mo. & less. Any imprisonment – or contempt with fines – requires counsel.
~~Due process~~

Griswold (cont.)

ABA position approved 3 times by H/Del.

Read ⇒ Relies heavily on N.J. Case 277 Atl. 2nd 216

Experience elsewhere suggests problems not as severe as may appear:

about half of States now have rules substantially like that proposed by SG.

Recommends Brief Amicus by N.Y. Legal Aid Society & NLADA

Estimates that this rule would increase need for counsel by about 3000 lawyers. Cost — $60 million

Calif., N.Y. & Ill already provide such counsel

Twice as many students in law schools.

Griswold

Record would have to be made
— transcripts

The decision should be non-retroactive
— indeed should not become fully
applicable for a year or two. This
would be like a court degree
in equity as to abatement of nuisance.

A minister, & social worker might
appear where counsel not available.

Georgia

14th Amend. includes "property"
as well as "liberty"

Conf. 2/28/72

Court .....
Argued ..2/28/72....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 70-5015

ARGERSINGER

vs.

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Majority for Reversal
– but several votes
not firm.

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DOUGLAS, J. ~~Reverse~~ Affirm
Principles clear. Practical results may be difficult
Draw same line as with respect to jury.

MARSHALL, J. Reverse
No lawyer / no jail

BRENNAN, J. Reverse (tentative)
Not an hour without a lawyer.

BLACKMUN, J. Reverse (tentative)
not necessary to equate to jury trial.
But could go along with with Douglas & no. rule.

STEWART, J. Reverse
No lawyer/no jail

POWELL, J. Reserved judgment
Return the 6 mo. rule &
~~Both Sides~~
formulate a fair trial doctrine (see Betts v Brady).
I reserved judgment but am inclined to Douglas' views -

WHITE, J. Reverse (tentative)

REHNQUIST, J. Affirm
Follows Bill Douglas

MEMO: Chief:
Not prepared to decide this marginal issue. We need more information as to consequences.
Set for reargument next term & ask Nat. Center for State Courts to make study prior thereto

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 2, 1972

Re: No. 70-5015 - Argersinger v. Hamlin

Dear Chief:

I have devoted further attention to this case. I write this note merely to let you know that my vote, this time around, remains just as tentative and just as unsure as it was in December. I am particularly concerned, of course, because mine seems to be the swing vote, and at the moment I feel I could draw the line either at imprisonment or at the six-month mark. The latter has the obvious advantage of relating to Baldwin. It is possible that I shall come to rest only after something is written out.

Facetiously, one might conclude to send this case back because of the Boykin error and let it go at that.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 27, 1972

Re: No. 70-5015 Argersinger v. Hamlin

Dear Bill:

Although your draft opinion is persuasive, I am not yet persuaded to change my vote. Accordingly, I now plan to write something.

Sincerely,

Lewis

Mr. Justice Douglas

lfp/ss

cc: The Conference

lfp/ss 4/3/72 1cc

MEMORANDUM

TO: Mr. Hamilton Fox DATE: April 3, 1972

FROM: Lewis F. Powell, Jr.

No. 70-5015 Argersinger v. Hamlin

Your draft opinion of 4/1/72 is great - well written and well reasoned.

I will, of course, do some revisions because lawyers are incapable of accepting something another lawyer writes without changing it. The result in this case will probably not be as good.

I would appreciate your seeing whether additional facts are available as follows:

The majority relies on a single study (as I understand it) to the effect that fewer than 2300 lawyers will be needed to accommodate all indigent petty crime cases. You translate this into $23,000,000 assuming $10,000 per year. The minimum charge per hour - prescribed by any state law with which I am familiar or in any law office - is $15.00. If you assume 30 hours per week - which is certainly a minimum in litigation - my arithmetic results in $22,500 per lawyer. If public defenders were used, perhaps you would not have to pay this much on the average. The starting minimum wage for lawyers in government and law firms is about $14,000 per year.

But I question the basis assumption that 2300 lawyers would be adequate or that the cost would be as low as even my figures would project.

You might do the following: (i) read, if you have not done so, the article relied upon by the majority and see how solid it looks; (ii) obtain the actual figures appropriated by the Congress for the OEO Legal Services Program, going back to the first year 1965 and record the steady increase in the requests and the appropriations - which all of us who worked with that program considered inadequate; (iii) see if there are studies by NLADA as to the increase in cost on a national basis of legal aid - both private and state provided - prior to and since Gideon; and (iv) take a look at the briefs in No. 71-11 (James v. Strange). My recollection is that these briefs will reveal - perhaps the record does too - that Kansas spent about $600,000 a year providing indigent services in felony cases, an amount which has been increasing annually. The FBI shows the number of felonies in each state in its annual reports. It may show the number of misdemeanors, although I doubt this. If one compared the number of felonies committed in Kansas, and the cost per felony for this legal service, you might come up with a figure to be applied nationally. This would be way on the low side, as obviously Kansas - with few urbanized areas - is

not a high crime state as compared with many others. Whether this sort of analysis is worth the trouble is a debatable question. I certainly would not spend any large amount of time on it. The cost problem is not what concerns me most, but I am convinced that reliance upon the single study - cited in the majority opinion - presents an unrealistic assessment of costs.

The consequences of the majority's position which concern me the most are (a) the impact on the smaller communities, with all of their diversity across the county; and (b) the impact on the criminal justice system primarily in terms of aggravating the already acute problem of "delayed justice" and intolerable congestion in court dockets at all levels. On this latter point - which is the single most important one in my thinking - I hope you can find some statistics which reflect the impact of Gideon in these respects. I realize that statistics do not measure any single cause of the present overburdened condition of the system. Decisions of this Court have certainly contributed singificantly. But I suspect that the real "watershed" was Gideon (which I firmly support), but which has created problems which the system has not yet managed to master. As you and I have discussed

young lawyers recieve most of the appointments (except where public defenders are provided); they are fresh out of law school, full of the latest constitutional "wisdom"; they are eager to make a reputation; they often have plenty of time; and, when paid on a hourly basis by the state, this is lucrative and attractive work. The result is that the simplest felony case, often without a truly substantive issue, may be litigated all the way to the United States Supreme Court - not just once but 10 or 20 times through state and federal habeas corpus.

I am sure studies are available somewhere, possibly through the Administrative Office of the Federal Court. I have seen references to studies on the escalating flood of habeas corpus petitions, but this is only a part of the story.

While the experience in felony cases is not completely analagous, it is the best indication of what is likely to be the overburdening of the system - in terms of delay frivolous defenses, petitions and appeals.

I have one or two other ideas but we can talk about these.

L. F. P., Jr.

lfp/ss 1cc 4/7/72

MEMORANDUM

TO: Mr. Hamilton Fox DATE: April 7, 1972

FROM: Lewis F. Powell, Jr.

Re: Argersinger v. Hamlin No. 70-5015

Here is your first draft, with a certain number of suggested changes and with a couple of fairly verbose riders.

I would appreciate your developing a second draft, which tries to blend together - both in substance and style - our respective contributions. Feel free, as always, to change my verbiage and challenge my reasoning.

Specific points - some quite minor - which have occurred to me include the following:

1. My terminology is not always consistent. I think you used the term "petty" offenses, and I sometimes used both petty and misdemeanor offenses. Perhaps it would be well - near the outset - to define petty offenses a little more specifically than you have at present. This might be done in a footnote, which might also refer to 18 U. S. C. § 1 defining petty offenses under federal law.

Another example of inconsistent terminology is my use of "the majority", the "majority opinion", and the "Court's opinion".

If there are any ground rules here as to how one should refer to the prevailing opinion, feel free to make the necessary changes.

2. The Douglas draft makes some use of lower federal and state court decisions. I am aware of a conflict (see ABA Standards on "providing defense services" pp. 38 and 39), and wonder whether we have anything to gain by citing any of these cases.

3. Should we not make some reference to the fact that a number of states, by statute, have extended the right to counsel into the misdemeanor categories? I have not looked at any of these statutes. I wonder whether we could derive support from any of them for our view that it is unnecessary to create a new, arbitrary constitutional line. Perhaps, as a minimum, we might refer to state sthtutes as an example of one way to deal with this problem without imposing on all 50 states a new hard and fast rule?

4. In discussing cost, would it not be well to note - without emphasis - that paying for counsel at the first trial stage is only one element. Counsel will be required in all subsequent stages. In addition a transcript of the evidence will have to be made, preserved and made available to the accused. This would be quite impossible in many misdemeanor courts in the smaller communities across the country, where neither recording facilities nor stenographers are available.

5. I am still tempted to include, at least in a footnote, the SG's suggestion that - in view of the obvious burden even his rule would impose on the legal profession - the requirement could be met by using social workers and clergymen. If you have the time, take a look at the transcript of the SG's argument. It seems to me that this suggestion contradicts the basic premise that lawyers are needed. I think the average defendant would be better off with no lawyer than with the average social worker or clergyman - at least that would be my own decision.

6. We have discussed Section II of your draft, and how you will restructure it.

L. F. P., Jr.