In the

Supreme Court of the United States

JOHN RICHARD ARGERSINGER,

Petitioner,

vs.

RAYMOND HAMLIN, Sherriff of Leon County, Florida,

Respondent.

No. 70-5015

Washington, D. C.
February 28, 1972

Pages 1 thru 59

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JOHN RICHARD ARGERSINGER,

Petitioner,

v. No. 70-5015

RAYMOND HAMLIN, Sheriff of Leon County, Florida,

Respondent.

Washington, D. C.
Monday, February 28, 1972

The above-entitled matter came on for argument at 1:31 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BRUCE S. ROGOW, ESQ., For the Petitioner
622 N. W. 62nd Street
Miami, Florida 33150.

ERWIN N. GRISWOLD, ESQ., For the United States
as amicus curiae,
Solicitor General of the United States
Department of Justice, Washington, D.C. 20530.

GEORGE R. GEORGIEFF, ESQ., For the Respondent
Assistant Attorney General
The Capitol
Tallahassee, Florida

CONTENTS

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-5015, Argersinger against Hamlin.

Mr. Rogow, you may proceed whenever you are ready.

ORAL ARGUMENT OF BRUCE S. ROGOW, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROGOW: Mr. Chief Justice and may it please the Court:

Certiorari was granted in this case to review the decision of the Florida Supreme Court which held four to three that the right to counsel extends only to those cases which carry a maximum punishment in excess of six months.

The petitioner in this case, Jon Richard Argersinger, was convicted in Leon County Court, Tallahassee, Florida, on a charge of carrying a concealed weapon. The maximum punishment disposable on that charge was six months in prison or a fine of $1000. Because the maximum punishment was only six months, the Florida Supreme Court held that Argersinger was not entitled to have been advised of his right to counsel.

Three dissenters in the Florida Supreme Court would have held that the right to counsel extends to any offense in which a man may lose his liberty. Our position

is essentially that. Our position is that wherever the actual threat of incarceration exists, a man must be advised of his right to counsel and counsel must be appointed for him if he cannot afford counsel, unless the defendant knowingly and intelligently waives that right.

Q Suppose the judge at the outset under the rule such as you suggest concluded in his own mind that he was not going to impose any sentence, even though it was permitted and then went ahead with the trial? That would be all right under your theory, would it?

MR. ROGOW: If he went ahead with the trial and did not impose incarceration--

Q Imposed only a fine.

MR. ROGOW: Yes, sir.

Q Now, then, if he imposed at the conclusion of the trial--he concluded that he changed his mind, that either the offense was much more serious than he had first thought or perhaps a probation report or some information about a prior record came to his notice and he concluded to impose a sentence; then the suggestion of offering him a new trial comes up. What is your response to that?

MR. ROGOW: Our position is that he would have to be offered a new trial with the benefit of counsel. No double jeopardy problem would be raised because this would be in effect an appeal, a voluntary act by the defendant

in accepting a new trial.

Q What if he said, "No thank you, Your Honor, I want to stand on the trial I've had"?

MR. ROGOW: I think that he could waive counsel even at that point only if he was clearly advised of the consequences of his act, he was clearly advised that this judge was considering putting him in jail or he was going to put him in jail.

Q Let's assume he is a little more sophisticated than some defendants and he answers the judge's suggestion by saying, "No thank you, Your Honor. I've tried my case as well as I think it can be tried by anyone. And the case is closed and it's your decision." Except he makes the point, "You can't send me into any confinement and I will not accept a new trial."

MR. ROGOW: I don't think that he would really have that option. I think that he has the option to waive the right to counsel at that point if the court has explained to him the circumstances that exist, the real threat that he may go to jail. I don't think he can, in effect, have his cake and eat it too and say, "Now you've tried me and now I'm going to take this trial because I know you can't incarcerate me."

I think that he has to make a decision between one or the other. And I think if he failed to make that

decision and if he stood on that first trial, I don't think the decision would be able to be reversed.

Q You don't see any double jeopardy problems even if at the outset of the trial he had asked for counsel and been denied it and at the end of the trial said that he wanted to stand on that trial and would oppose, object to, a new trial on any terms.

MR. ROGOW: If he had been advised at the outset that there was an actual threat of incarceration and that he may very well go to jail and that he had a right to counsel and counsel would be appointed and he waived his right--

Q My assumption is that at the outset he asked for counsel and the judge said, "No, I am not going to appoint counsel," and the judge then thinking he was not going to impose any confinement. Now, in my hypothesis the judge has changed his mind because of some factor intervening.

MR. ROGOW: In that rare instance I think the judge might be left with the fact that he will not be able to impose incarceration if there has been a clear situation originally where the man did request counsel and the judge had made up his mind there would be no imprisonment. I think that is a rare case though. I think that what happens in most of these cases--

Q Would it be rare if this rule were structured as suggested?

MR. ROGOW: I do not think it would be rare, Your Honor, because I think that in very few of these relatively minor offenses--and I mean very minor offenses, for instance violations in the City of New York which carry a maximum penalty of 15 days--very few people actually go to jail in those cases. A statistic contained in our brief at page 40 shows that over 1,800,000 people were tried in New York on these minor violations and only 40 were actually incarcerated.

So, I think there really is some practical recognition made every day in every court in the country that some offenses, although they carry the possibility because the ordinance says 15 days, there is no real actual possibility of incarceration.

Our position is essentially drawn from a long line of cases beginning with Powell v. Alabama through Johnson v. Zerbst, Gideon v. Wainwright, In re Gault, and Coleman v. Alabama. In this long line of cases, the Court has consistently held that the right to counsel is fundamental. It is essential to the fact-finding process, and a fair trial cannot be held without the guiding hand of counsel at every point.

As the Court said in Gideon, "In our adversary

system of criminal justice, any person hailed into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." We submit that those words from Gideon are equally applicable to a case where a man may lose his liberty for even one day.

Several courts have held that there is no distinction to be drawn by the Constitution between loss of liberty for a long period of time and a loss of liberty for a short period. Nearly 30 years ago in Evans v. Rives the Court of Appeals of the District of Columbia said just that, that the Constitution draws no distinction between loss of liberty for a long time and a short time.

The United States Court of Appeals for the Fifth Circuit has held in every case that has come before it that the right to counsel extended to the indigent misdemeanant or traffic violator who was faced with, as in each case that was presented to the Fifth Circuit, 90 days, that in each of those cases the right to counsel extended.

There is no real hard and fast rule, though, in the Fifth Circuit because the Fifth Circuit decisions have been on a case-by-case basis. In one case, James v. Headley, Judge Wisdom writing for himself alone urged the position that we urge here today, that any time there is an actual threat of incarceration, a person should be provided counsel. That position is supported by the ABA Committee

on Minimum Standards for Criminal Justice, which urges a very similar position almost exactly like ours.

The President's Commission on Crime and Law Enforcement has urged a similar position. So, the position that we submit to the Court today is not one that has not been recognized either judicially or by established committees of the Bar.

Q Does that mean where a statute carries a possible jail sentence, less than six months, that if the actual penalty imposed doesn't include a jail sentence, the defendant needn't have counsel?

MR. ROGOW: He need not be advised of his right to counsel.

Q So, when you say actual threat, what you're really saying is that if a judge is going to try a person without counsel, he cannot impose a jail sentence.

MR. ROGOW: Exactly, Your Honor.

Q But if he doesn't and if the possible penalty is less than six months--if he doesn't impose a jail sentence on him, he doesn't need to have counsel in any case.

MR. ROGOW: If the judge does not impose a jail sentence and there is no actual threat of a jail sentence, then on the theory we advance there would be no need to appoint--

Q It depends on when you judge that actual threat.

MR. ROGOW: I understand; the difficulty is that it has to be sort of a pre-judgment, and this Court has acknowledged that kind of judgment in the criminal contempt cases dealing with right to a jury trial where if a decision is made by the presiding judge that this defendant may get more than six months, there has to be a jury trial provided.

There are faults in this position. I would prefer, I think, a flat-out rule that any time a person faces even the remotest possibility of incarceration, he should be provided counsel. But the rule we advance and the rule that is supported by the Solicitor General takes into consideration the practical aspects of what goes on every day in the low visibility of the criminal justice system, and that is that many minor offenders, sidewalk spitters, jaywalkers--these are always the kinds of offenses that are raised in the decisions which seek to limit the right to counsel--those people do not actually face the threat of incarceration.

Of course, under the ordinance they may. But it is such a remote possibility that we submit that the real threat of incarceration does not exist.

Only ten states still adhere to a firm and inflexible rule that the right to counsel extends only to

felonies. The other states have all moved beyond the Gideon v. Wainwright decision in one form or another. Not all of them do. What Minnesota has done in State v. Borst is say that if imprisonment is likely to be imposed, then the Court must appoint counsel. Several other states have adopted the same position, not always on constitutional grounds. The Minnesota decision was based upon the rule-making power of that court. New Jersey in Rodriguez v. Rosenblatt arrived at the same conclusion based upon its own laws.

But what is important in looking at the states is that they have moved into the field of providing counsel for misdemeanors, and there is no great fear on the part of the states that providing such counsel will cause them any great harm.

The arguments that have been advanced in limiting the right to counsel to an excess of six months cases are based upon one or several of the following theories. First, that because the right to counsel and the right to jury trial both reside in the Sixth Amendment, the right to counsel must be governed by this Court's decision in the jury trial case Baldwin v. New York. We submit that that argument is just not valid.

There is a great difference between counsel and a jury trial. As the Court recognized in Baldwin, a fair

trial can be had without a jury. And, in fact, every day fair trials are had without a jury by a judge alone. But a lawyer is essential to the fact-finding process and a lawyer must be there to hammer out the facts which the decider will have to consider. Therefore, the analogy between jury trial and counsel is not valid.

And one other reason; I think this Court has recognized that the analogy isn't valid in holding the right to counsel retroactive but in refusing to hold the right to a jury trial retroactive.

Another argument advanced in the cases which seek to limit the right to counsel is that because the right to counsel and a jury trial both reside in the Sixth Amendment, Baldwin v. New York must govern. But there are other rights in the Sixth Amendment. There is the right to a public trial, the right to a speedy trial, the right to confront the witnesses against you, the right to compulsory process. No court has ever held to my knowledge that those rights are contingent upon a sentence which exceeds six months. So, any argument that because all these rights reside in the same amendment, they are governed by Baldwin v. New York, just does not hold.

Another argument advanced by people seeking to limit the right to counsel is that the Criminal Justice Act, Title 18, U. S. Code, Section 3006A, which is

the federal standard for appointed counsel for appointed counsel limits appointed counsel only to cases which exceed six months. But that law relates only to the payment of counsel. It does not set a firm rule that counsel shall not be provided in so-called petty offenses. In fact, to the contrary, the framers of the law in legislative history support the conclusion that they believe that the right to counsel did exist to petty offenses, and they left the criminal justice act open-ended so that counsel will be able to be paid if this Court holds that the right to counsel does extend beyond or in cases that carry less than a six months penalty.

Q Earlier in your argument, Mr. Rogow, you said that you were supported by the government, and I know that's true basically. However, the constitutional rule that they submit is not identical to the one you submit; is that correct?

MR. ROGOW: As I read it, it is identical.

Q A little more finely spun out perhaps.

MR. ROGOW: A matter of semantics, I think, becomes involved, yes, sir.

Q But you would be happy and content with the government's submission, would you?

MR. ROGOW: Not altogether, Your Honor. There are points in the government's submission that I would not

agree with in every facet. But in terms of this rule itself we do agree. There is no disagreement. The government has excluded a great many other cases which we think do not need to be decided today but may in the future be presented. But for the purpose of this case, there is no disagreement between the government and ourselves.

Another argument raised--

Q What about pleas of guilty, same rule?

MR. ROGOW: Yes; there has to be advice of counsel acceptance of a plea. The plea is a crucial time.

Q Not if he is only going to be fined.

MR. ROGOW: I'm sorry, if there is only going to be a fine, there would be no need to advise a man of his right to counsel.

What we are really asking is judicial recognition of the practical procedure that takes place every day. We are saying there are millions of cases tried in this country, first offense speeding, things like that where no one goes to jail although the ordinance says perhaps a ten-day penalty would be imposed. But no one does go to jail. And we are saying that the judiciary does in fact every day make these determinations.

Q Does anyone have any statistics at all on what kind of extra burden this would be on the legal system or on the attorneys of the country? How many under six

months cases acts result in jail sentences?

MR. ROGOW: The figures on that are not reliable and really do not exist.

Q Are we talking of a million, a hundred thousand or ten thousand or what?

MR. ROGOW: The statistics that I--for instance, in New York where there are 1,800,000 persons charged with violations, only 40 actually went to jail. I can really speak only in terms of some practical experience in Dade County. About 400,000 people are faced with traffic offenses in cases tried in the Metro Court. But only about 5000 of those people ever actually face incarceration.

Q What do you mean, actually face--are 5000 people actually sent to jail?

MR. ROGOW: Yes, sir, incarcerated.

Q Per year?

MR. ROGOW: Per year.

Q 5000 additional trials a year in which there would have to be counsel.

MR. ROGOW: Yes, sir.

Q Does that include things like drunken driving, manslaughter, and so on?

MR. ROGOW: Yes, sir.

Q That includes a lot of cases then where they would have to have counsel anyway.

MR. ROGOW: Exactly. In fact, our position is that--

Q How about under six months cases?

MR. ROGOW: Those are under six months cases. The maximum penalty imposable in Dade County is only 60 days, Your Honor.

Q Let me be sure I've got your figure clear. There are 5000 people a year in Dade County who go to some kind of confinement for up to six months?

MR. ROGOW: No, sir, for up to 60 days only. The maximum penalty imposable in Dade County Metropolitan Court is 60 days or $500 fine. The offenses include everything from loitering and vagrancy to drunk-driving--

Q There's 5000 of them?

MR. ROGOW: 5000 people.

Q In one city?

MR. ROGOW: In Dade County.

Q If all those were indigent, which they probably aren't but a lot of them are, I suppose.

MR. ROGOW: Yes, I would say that a lot of them are.

Q Say half of them are; that's 2500 appointments in Dade County that would have to be made.

MR. ROGOW: The estimates are that about 25 percent of the total so-called misdemeanants, these kind

of offenses, are indigent. But accepting your figures or 25 percent, 1250 or 2500 appointments would have to be made. But the statistics--

Q If there wasn't a valid waiver.

MR. ROGOW: Yes, if there wasn't a valid waiver. But the statistics also show that a public defender who can handle 150 felonies a year can handle a thousand of these cases a year, because these cases are not as complex. These cases--first of all, there will be no jury trial in these cases either. The case will proceed much more rapidly.

So, if we're talking about public defenders being able to handle a thousand cases and we are talking about 2500 cases, we're talking about only two and a half public defenders.

Q You have an assumption there that goes a little too speedily for me. That is, the lawyer can try that many. When a lawyer gets into a case, the pace of the litigation tends to change very often. I assume you accept that as a realistic fact.

MR. ROGOW: Yes, Your Honor, but it may change in two ways. It may result in guilty pleas where there would not be a guilty plea without counsel. In other words, if a defendant confers with counsel and learns exactly what the nature of the offense is and what his defenses are and that maybe he has no defense, he might be guilty--

Q Are there any available reasonably reliable figures on these propositions?

MR. ROGOW: Your Honor, I'm afraid there are not. The only places where any statistics at all exist, in the National Legal Aid and Defender Association amicus brief, which was filed in this Court, and 55 Iowa Law Review and in 13 William and Mary Law Review there are some attempts made to provide statistics. The William and Mary article echoes really the National Legal Aid and Defender Association brief. The statistics are sketchy. In fact, only this morning I was in contact with the National Legal Aid and Defender Association in an effort to get some additional statistics which they said were not available.

They have recently received a grant of $100,000 to find out exactly how much is spent.

Q How many states did you say offer counsel for all petty offenses?

MR. ROGOW: For all offenses which might result in a loss of liberty, except for minor traffic where there is no real threat of incarceration, my statistics show 12. Minnesota--these are the states which provide counsel in all cases in which there is no possibility--except those--in which there is no possibility in which incarceration will be imposed.

Q How many provide counsel, 12?

MR. ROGOW: Twelve.

Q Or all but 12?

MR. ROGOW: Twelve provide counsel.

Q In all cases where there is any provision for a jail sentence?

MR. ROGOW: Not provision under the ordinance, no, sir. Those states provide counsel in accordance with the rule we advocate today.

Q The probability of confinement.

MR. ROGOW: Yes.

Q Twelve states.

MR. ROGOW: Yes, sir.

Q And Minnesota, you say, is one of them?

MR. ROGOW: Minnesota is one of them.

Q Where are they listed?

MR. ROGOW: They are listed in our brief. There is a compilation of states. There are some recent decisions; for instance, Alaska only two months ago in Anchorage v. City of Alaska arrived at the same conclusion; wherever there is a possibility of incarceration counsel will be provided.

We submit that there is not a great problem, a great economic problem involved here because, as we have argued before, most of these public defender situations already do provide some counsel in misdemeanor cases. And, more than that, when Gideon was decided, it caused the

creation of public defender systems nationwide. What we are seeking here will not cause such a creation. What it will do, perhaps, will be to enlarge the already existing public defender system. But Gideon required a whole new creation. This does not. This builds only upon the prior decisions of the Court.

Q Your observations certainly have a relevance to metropolitan centers. What about isolated rural areas where they are either not covered by any legal aid or defender system at all or one that's on a regional basis where the legal aid office may be a hundred miles away from the particular small town court?

MR. ROGOW: In those cases, for instance, Mississippi comes to mind where they have rural areas, they have a circuit court which travels. And at a certain time during the year that circuit court sits, and there are defense counsel available. We would submit that in that kind of a situation when the trial court which tries felonies comes to town--

Q The mobile court is not a common phenomenon in the country anymore, is it?

MR. ROGOW: No, sir.

Q You don't have many states functioning as Mississippi does.

MR. ROGOW: In terms of circuit courts that move, I

think there are several rural states which do have them, where there is not enough court business to maintain a sitting in court throughout the year.

Q Several, but there are a great many states with large rural areas where the court does not move in just the way you are talking about. I'm sure you know that.

MR. ROGOW: Yes, sir, but even in those cases the defendant must move to the court in a felony case and there must be counsel provided. All we are saying would be necessary would be for this misdemeanant to move to that same court.

Q In many states again the defendant is not to be tried in the same court, in a felony court. He's off in a local police court of some kind more often than not, I would think.

MR. ROGOW: In a municipal court of some kind.

Q Yes.

MR. ROGOW: And if there is no counsel available, is that the Court's question? The only thing that we suggest that can be done would be to have some kind of legislation passed in that kind of a state where the trial court of criminal cases, of felony cases, would have jurisdiction to try--

Q Then your suggestion about this having no

significant impact has to be diluted a little bit, doesn't it?

MR. ROGOW: Obviously there will be a significant impact, but the people that have refused to extend the right to counsel have raised the spectre of counsel for sidewalk spitters and jaywalkers, and they have exaggerated the need for counsel because they do not take into consideration the practical, day-to-day situations in these courts.

Q Mr. Rogow, let me ask you along the line of the Chief Justice's questions, the situation in my home state of Arizona where Coconino County has an area of 20,000 square miles and has one county seat where the Superior Court sits; but justice courts that are spread out over an area that is larger than that of many of the states where ordinarily there simply are not lawyers in residence, wouldn't the application of your rule virtually require the abolition of justice court jurisdiction in an area of that size?

MR. ROGOW: Not necessarily. It might require that the penalty imposed by the justice court would have to be less than incarceration but not necessarily do away with the jurisdiction of the justice court in any way.

Of course, I am not aware of how many people actually face incarceration in those cases. They may be

relatively few. They may try minor offenses which do not actually carry the threat of incarceration.

Q What would you do with the average county like in upstate New York where all the lawyers are either one or two lawyer practitioners and after they get in they've got all these appointments and they came to the judge and said, "If we keep going this way, you're going to be appointing indigent lawyers to defend indigent clients." The whole point is there is a problem in areas like that.

MR. ROGOW: Yes, there is a problem, Your Honor; there is no doubt. This is not going to be something that will just be taken overnight and implemented without any discomfort at all to the state.

Recently in Mayer v. City of Chicago this Court has held that when a fundamental right is involved, the expense is not something to be considered in terms of guaranteeing that fundamental right. We're not saying there will be no expense here. We're not saying there will be no changes. There obviously will be. We're saying those changes are nowhere near as great as some people would have us believe.

One of the other arguments that is raised in opposition to any attempt to extend the right to counsel is the rules for the trial of minor offenses before magistrates. Our position on that is that those rules in

Rule Three allow trial in the district courts; and Rule 44 of the Federal Rules of Criminal Procedure provides that counsel in the district court should be appointed, even the trial of petty offenses. Therefore, there is a right to counsel still in those cases.

Q How many--in terms of comparative analysis--how many truly minor, trivial crimes are covered by the federal code?

MR. ROGOW: I believe the Solicitor General's brief used a figure of 150,000 or 200,000, I am not sure exactly. But in his brief his submission is that the federal system could incorporate the rule that we advocate without any great difficulty.

Q For the magistrates.

MR. ROGOW: Yes, for the magistrates. I'm sorry.

An equal protection argument exists also in this case, and that is where we have a classification made by the State of Florida denying counsel to some and guaranteeing counsel to others, we submit the equal protection clause would equally guarantee counsel in this case and that that and the due process clause of the 14th Amendment would apply.

I would like to reserve five minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rogow.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

FOR THE UNITED STATES, AS AMICUS CURIAE

MR. GRISWOLD: May it please the Court:

Perhaps I am too unreconstructed, but I find it easier to think of the legal problem in this case in terms of the 5th and 14th Amendments rather than in terms of the right-to-counsel provision in the 6th Amendment. This is a state case, and if the 6th Amendment is applicable, it is through the 14th Amendment.

As far as the 6th Amendment alone is concerned, there are in some minds at least some verbal or doctrinal difficulties. By its language the 6th Amendment guarantees only the right to have counsel and not the right to have counsel supplied. I know that the contrary was decided in the Gideon case and that this was said to rest on the 6th Amendment. For some, though, this has a more understandable foundation than the 14th Amendment.

Then there is the fact that the 6th Amendment by its terms is applicable in all criminal prosecution, and the Court has decided in Duncan and Baldwin that the right to a jury trial, also provided by the 6th Amendment, is applicable where the penalty is more than six months. On this basis it is contended as it was decided below that the right-to-counsel provision can be applicable only where more than six months imprisonment is involved.

Of course, there are authorities for saying that the same words in a statute or constitution may have different meanings in different applications. This involves some intellectual strain. But, as I have said, it is easier for me to deal with the problem in terms of the 14th Amendment. After all, it is a case of procedural due process which lies at the heart of the 14th Amendment. And, too, we are more accustomed to think of due process as a developing idea than we are to find such flexibility in some of the earlier amendments.

On this basis, I look at the Gideon case which, with respect, seems to me to have a thoroughly sound due process foundation; in considering the right to counsel, I cannot find any basis, any logical ground to stand on, for saying that the right to counsel exists for imprisonment of six months or more but does not apply for imprisonment for less than six months.

I recognize that lines have to be drawn in the law like the age of majority and that cases close to the line on each side will not be very different from each other. However, with respect to imprisonment, I find it hard to draw the line any place. Five months imprisonment seems to me to be substantial. I do not find much help when the time is reduced to ten days or five days. There seems to me to be a difference in kind between imprisonment

of any duration and merely monetary sanctions or other sanctions which may be imposed by judicial decision. These other sanctions may be a serious burden, but they do not involve depriving a person of his liberty, and this is something fundamental in our society. And thus I have found myself forced to the conclusion that there should be a due process right to counsel and that this right should be applicable before any term of imprisonment can be imposed.

Q On that line drawing, Mr. Solicitor General, that means one day or one hour as well as six months?

MR. GRISWOLD: Any imprisonment at all is the only place where I can find a satisfactory place to draw the line, drawing a distinction between imprisonment and monetary penalties of one kind or another.

Obviously there are problems at the borderline, as the cases mentioned by my associate here where a statute authorizes imprisonment but it's rarely imposed. I should think that in such cases the prosecutor or judge should make the determination in advance; or if something develops at the trial which makes imprisonment seem appropriate and the defendant has not had counsel, whether he had waived it or not before that without a clear understanding that imprisonment was a likely consequence, there should at the defendant's request be a new trial

where counsel will be provided and very likely before a different judge. If in answer to the Chief Justice's question he says, "Well, I stand on that trial," I take that to be a waiver of his right to counsel. But he should have a right to have counsel at a new trial. If he doesn't want it, it shouldn't be forced on him.

This conclusion that counsel should be made available for an indigent defendant before any term of imprisonment is imposed is essentially the conclusion which has been reached by two eminent bodies which have considered this problem, not as judges but as persons vitally interested in developing proper standards for the administration of criminal justice. These are the American Bar Association in its minimum standards for criminal justice and the President's Commission on Law Enforcement and Administration of Justice. Both are cited on page 17 of our brief.

The Bar Association recommendation on this matter has in substance been approved at least three times by the House of Delegates of the Association, which is a large and representative group of the profession.

Because of these reports and actions, I have more confidence in the conclusion to which I have felt myself impelled as an intellectual matter, namely, that counsel must be made available to an indigent before any sentence

of imprisonment can be imposed. I am also confirmed by the excellent opinion of Justice Jacobs of the Supreme Court of New Jersey for a unanimous court in Rodriguez v. Rosenblatt, decided last May.

At this point, though, another extremely difficult problem arises. What are the practical consequences of such a conclusion? What will be required in the way of manpower? Can the legal personnel be made available?

Q Just before you move on, Mr. Solicitor General, is Rodriguez v. Rosenblatt cited in your brief?

MR. GRISWOLD: No, I am sorry, Mr. Chief Justice, it is not cited in our brief. It is 58 New Jersey 281 and 277 Atlantic Second 216.

Although our information about the manpower situation is sketchy, what we have is encouraging. As far as the federal courts are concerned, counsel is now required in all cases unless it is waived. That's Rule 44-A of the Federal Rules of Civil Procedure, and I say the same is applicable with respect to trials in the magistrates courts because any defendant there may elect to have a trial in the district court where he can have counsel assigned to him if he chooses in order to save time and to get it over with, which I think is often the situation in these cases, to go ahead in the magistrates court. He has had a right to go to the district court and have counsel,

and I find it not too difficult. Moreover, it seems to me not unlikely that counsel can be provided in the magistrates courts.

The latest amendment to the Criminal Justice Act provides for compensation for counsel in these cases because it has now been amended to say wherever it's required by the Constitution and if this Court so decides, then it will be covered. All cases involving any imprisonment have long been covered in the District of Columbia where there are, of course, many petty offenses, and this has not proved to be unbearable.

As far as the situation in the states is concerned, there is more room for concern. However, the problems will probably not be as serious in actuality as the statistics on the number of cases would indicate. In the first place, it appears that nearly half of the states now cover all or nearly all of these cases. To that extent--to the extent that increases in services are required, the raw figures need to be adjusted because it undoubtedly is true that it takes less time to try most misdemeanors than it does the more serious cases.

Moreover, it is likely that counsel will be waived more often in cases of petty offenses. And it seems to me that waivers might well be more readily accepted in cases of this sort than where the charge is of a serious

felony. If the defendant in response to inquiry from the court says that he does not want counsel, it should not be forced on him when the right to counsel and the usefulness of counsel are somewhat attenuated as they are here.

We have considerable light on all of these questions in the two briefs amicus curiae which have been filed in this case, on behalf of the Legal Aid Society of New York which sets out actual experience in a situation where counsel are required in cases of this sort in our most congested metropolitan area, and the National League of Lay Defender Association, and as has been said much the same information is contained in an article of a recent issue of the William and Mary Law Review.

New York has for some time provided for representation in cases where imprisonment may be imposed, and the New York Legal Aid Society shows that the load can be handled. Similarly the other brief and the article summarize experience in other places which indicates that the load, though substantial, is not unmanageable. On the basis of this information and experience I find myself led to the conclusion that the chances are that the adoption by this Court of a rule that counsel must be furnished before any imprisonment may be imposed would result in increasing the man hours required of defense counsel by 50 or 60 percent. This is a serious matter, but

I do not think that it is insuperable. I have tried to put together some figures, but they are much too uncertain. On the basis of those figures I estimated that perhaps as many as 3000 additional lawyers would be required. At $10,000 a year, that would be a cost of $30 million. If you add half of that for secretarial and other personnel, it might get up to as much as $50 million. Whatever the financial load, this should be manageable when allocated to the 50 states even though some of the larger states would have to carry a considerable part of the load.

But California and Illinois and New York now provide for counsel in these cases. Thus a considerable part of the additional load is already undertaken. Other states should now be guided to do likewise, just as was the situation when the Gideon case itself was decided.

In this connection with respect to the availability of lawyers to carry the task, I am encouraged by the presently existing fact that there are now twice as many students in the nation's law schools as there were ten years ago, that young lawyers are starting their practice in unprecedented numbers, and that it is estimated that the number of lawyers in the country will double within the next 12 or 13 years.

Already concern is being expressed about the openings which will be available for these new lawyers. It

may be that the recognition of the need and the availability of the means to answer it are about to coincide.

Q Do you have in your brief the information conerning the number of states? I know Oregon as a matter of state law has adopted--

MR. GRISWOLD: It is not in our brief, Mr. Justice; what information there is is included in the petitioner's brief here and in the two briefs amicus which have been filed. Inasfar as I know, there is no other information.

Q Eight or nine states?

MR. GRISWOLD: How many states?

Q Eight or nine; do eight or nine states now have the rule that you propose?

MR. GRISWOLD: One of the briefs says 30. I said close to half. Counsel for the petitioner said ten, I believe. It really boils down to a question how you define certain borderline matters. Frankly I was not trying to resolve all those borderline matters. Traffic offenses--well, they vary all the way from automobile manslaughter, on the one hand, to failing to stop at an intersection when there was no other car nearby or overtime parking.

The only formula I have been able to come up with is before any imprisonment is in fact imposed.

Q How many states, Mr. Solicitor General, if you know, or about how many, now permit appearance in court on

behalf of indigent by law students or people who are not yet admitted to the bar?

MR. GRISWOLD: I don't know how many, Mr. Justice.

Q There are some.

MR. GRISWOLD: There are now a great many. There used to be only one, and I was quite instrumental in helping to bring that about. But this is one of the points that I wanted to bring out.

Q There are several states now though, are there not?

MR. GRISWOLD: There are a great many states. There has been a movement in recent years in that direction.

I am concerned about the quality of the service that will be performed by practicing members of the bar. It can be rather stultifying to be assigned to go to courtroom 14 and represent a hundred people this morning. Even that might be better than no representation. But it seems to me that what we have to do is set up a standard and then rely on local courts, bar associations, legal aid agencies and so on, to try to find ways to see that the representation is appropriately provided, consistent with the efficiency of the courts.

This also is a matter of legitimate concern. The introduction of counsel into more cases will require more pre-trial time of prosecutors, more courtroom time, and

this will lead to bigger backlogs with present personnel. Court reporters will be needed as well as counsel, and they are one of our worst bottlenecks. It seems equally clear that we need more courtroom personnel and that the only way we will get it is by building up the pressure which will make it clear that such personnel must be provided.

Q I'm not sure I follow your suggestions about court reporters. Do you link court reporter as an imperative in every case where there is a lawyer just automatically?

MR. GRISWOLD: This Court has more or less intimated as much in some cases. It is rather difficult to carry out an appeal without a transcript, and I would suspect as a practical matter that it would be found that court reporters were necessary where counsel were provided.

Q Would you agree that that's probably a greater problem than the problem of counsel?

MR. GRISWOLD: No, but I think it's a serious problem not only in these cases but in all criminal cases that we ought to find ways to improve, perhaps by putting court reporters on salaries rather than having them paid by piecework as we now do.

Q That's a federal court situation, but the states are not generally in that posture, are they?

MR. GRISWOLD: The federal courts are very much in that--

Q We're talking here in large part about state problems, aren't we?

MR. GRISWOLD: I suspect the state courts have more trouble than the federal courts do on this. I am not really familiar nationwide with the state court situation with respect to reporters.

Q But wouldn't the great number of the cases you're talking about in the traffic courts and in the JP courts, et cetera, wouldn't the appeal in the first instance be a trial de novo in many, many cases?

MR. GRISWOLD: Wherever it was, Mr. Justice, it would--of course, there would be no need for a reporter.

I have a final word. If this step is taken, I have a feeling that it should be expressly made non-retroactive. Presumably that's not very important since relatively short sentences are involved. However, I would go even further and respectfully suggest that the Court's decision should expressly provide that it would not become fully effective for some period in the future, say for a year or until January 1, 1974. This will give the states an opportunity to adjust to the new requirement. Without something like this--if, for example, even without retroactivity, this Court's decision should become fully

applicable on the day it is announced, there could be a massive pileup in the state courts which do not now meet this standard. This would involve delays and frustrations which would not be a real contribution to the administration of justice.

I recognize that such a provision--may I have three minutes more, Mr. Chief Justice? Thank you.

I recognize that such a provision would be unusual, but it would not be unlike the powers exercised by courts of equity in abating a nuisance, for example, which allow time for the parties to take the steps which are necessary to effectuate the Court's decision.

Q Have we ever done that at a constitutional decision, made it applicable say a year--

MR. GRISWOLD: I don't know, Mr. Justice. I think that this is getting out to a place where things are very attenuated, and I find it easier to accept that recognition of not fully complying with what the Court now regards the constitutional requirement to be than it is to say, "Well, you must comply" and everything is in chaos.

Q The Court was asked to do something like that among various alternative requests in the case of Brown v. Board of Education.

MR. GRISWOLD: Yes.

Q The effectuation case. Was that true? I

wasn't here, but I read the opinion and it indicated to me that the Court was asked alternatively to do a variety of things, one of which was to give a time in the future.

MR. GRISWOLD: With all deliberate speed.

Q You are not going to ask for all deliberate speed here, are you?

MR. GRISWOLD: No, Mr. Justice. I am simply speaking historically.

Q All deliberate speed, but it was asked to do something else and that was to give a certain time when it should be effective; is that not correct?

MR. GRISWOLD: Yes, Mr. Justice.

Q Are you sub silentio suggesting that this Court has some supervisory power over state courts?

MR. GRISWOLD: With respect to the Constitution, that doesn't shock me, with respect to constitutional requirements. I wouldn't have put it that way myself. I would simply have said that in the process of effectuating a change, it is not inappropriate to allow the time which is in fact required to carry out the change.

Q What about relief in this case?

MR. GRISWOLD: In this case, I would grant relief and hold that this petitioner is entitled to counsel at a new trial.

Q And you couldn't postpone the application of

the rule in his case?

MR. GRISWOLD: No, I wouldn't in his case. I would try to hold it down as little as possible, but I don't see how you can say, if this Court decides this case on May 10th, that on May 11th there shall be counsel in every court or else the trials shall all be invalid even for short terms in the work house.

Many of these petty offenses will really be quite petty. It seems to me that it would be very helpful if this Court's decision could make it plain that under appropriate circumstances the right to counsel does not require the presence of a fully qualified member of the bar. For example, many of these cases might be handled very effectively by law students under proper supervision, and it would be helpful if this Court's decision could recognize that possibility.

I have been familiar with the activities of law students in court, and I would say from experience that they provide excellent service. Usually they have much more time available than practicing lawyers, and they work on our cases with great energy and enthusiasm. It might also be that other persons could serve as counsel in certain types of cases involving relatively small sentences. These might include clergymen, social workers, probation officers, and other persons of that type.

And finally I have great concern about the more rural areas in the country, Wyoming or Idaho or North Dakota or upstate New York. There may well be cases of family assaults where a short jail sentence is appropriate and where there is no lawyer within a hundred miles. In such cases it seems to me that the real need might be met by the appearance on behalf of the defendant of the minister or a parent or a probation officer or some other local citizen. Often what is needed in cases of this sort is not legal expertise but simply an assurance that there is not overreaching of some sort.

I would hope that this Court's decision might leave some flexibility so that cases in remote areas involving relatively minor penalties might be handled with some sort of appropriate representation other than that of fully qualified legal counsel. This seems to me to be adequately consistent with the due process concept in cases where the requirement of counsel is clearly stretched close to its limit. On this basis, I submit the decision below should be reversed with an appropriately flexible opinion of this Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Georgieff, if you need some additional time, we'll indulge that. But you have been here before on this

subject and perhaps you won't need it.

MR. GEORGIEFF: I don't think I'll need it. If I can't make it in the time allotted, I guess I had better give it up, Mr. Chief Justice.

ORAL ARGUMENT OF GEORGE R. GEORGIEFF, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GEORGIEFF: I'd like us to remember what happened here before. The Court had cast upon it the question of whether you should consider this matter in light of the 6th Amendment. Now they have abandoned that and we have come to the 14th Amendment.

Q I don't know that counsel for the party has abandoned it, Mr. Georgieff.

MR. GEORGIEFF: No, but I'll get to that part.

Q The Court has done so.

MR. GEORGIEFF: Let me assume for the moment that if I can get to that and demonstrate to you why the 6th Amendment doesn't cover the situation, we'll be left with the 14th and then hopefully I can dissect it as the Solicitor's office has done the 14th Amendment in setting out the reasons why you should adopt it as the predicate for the action brought here.

As to the 6th Amendment, Mr. Rogow has told you that the reason that you needn't separate the two is because after all you have said that a jury trial is really

not quite as necessary to a fair trial as is a lawyer. And yet we find that you waive both rights, and we hear from the Solicitor's office that what you really ought to have to serve these people, if you find that by a parade of the horribles you're going to have a horrendous situation, is to give them not lawyers but paralegals or preachers or social workers or somebody like that. Now, you're either going to give them lawyers or you're not going to give them lawyers.

I understand that deans and former deans are very proud of law students. And I understand that sometimes judges are. Working lawyers for the states know that the greatest number of complaints about inefficient counsel come in those areas. Our complaints in that regard, and we handle them all in our office for the State of Florida, have increased 1400 percent since there have been that kind of supervisory service rendered by supervised law students.

What an appellate court does with them is meaningless. I am telling you about the complaints that come. They come with lawyers just as well as they do with them.

Q What are you going to compare that with, no lawyer or a competent lawyer?

MR. GEORGIEFF: You'd have to compare it in terms

of a competent lawyer, I'm sure. What other basis do you have, sir?

Q In these cases that we're talking about they have no lawyer, right?

MR. GEORGIEFF: Yes, sir.

Q So, wouldn't a law school student be better than no lawyer?

MR. GEORGIEFF: Well, to the man who winds up in jail as the result of bad service, I don't guess it makes any difference what you give him.

Q I guess we've all seen cases where the 16 greatest lawyers that ever lived wouldn't have saved them.

MR. GEORGIEFF: No, I'm satisfied. I don't mean to split hairs. What I'm saying is if we make it turn on the awesome spectre of having to go to jail for even one day, it's meaningless to tell me that in an isolated area where actually no real harm is going to be done the individual because he batted somebody around, what you really need to get is somebody less than a lawyer because after all he really only going to get three or four days. That's meaningless to him if you're asked to believe the other part.

If we are going to believe one part of it, we ought to take it all or none at all. If it's so awesome a prospect that it didn't keep you from deciding that in your

practice before magistrates you ought to break it off at six months, then I submit that you ought to give them counsel who are tried and true and have passed the bar somewhere and allowed and able to practice. Then if they complain we'll have to measure them as against all other lawyers in the general community.

But if we go to the 14th, how do we carve out the property and what do with it when we foreclose against somebody who now loses a house? His kids have got nowhere to stay, nowhere to go. You don't give him counsel under due process. On the fines, what do we do about the fines? What do we do with Tate? You can't fine an indigent and then if he doesn't pay it stick him in jail for not paying.

Q I would submit that we might get to those when we get there. We're not there yet, are we?

MR. GEORGIEFF: No, I understand that, but to say that we say that the reason you ought to give them lawyers is because imprisonment is the prospect belies what you said in Tate. That is to say, you cannot fine a man who is an indigent and then because he can't pay it stick him in jail as penalty therefor.

Now, that's here and it has already been ruled on. If you cannot put him in jail for non-payment of the fine and if you can't fine him because you know he can't pay it, then truly you've got a super class.

Q Are we talking about a man who has got three months? This is what we're talking about, aren't we?

MR. GEORGIEFF: Six months, in this case.

Q Six months, yes.

MR. GEORGIEFF: Yes, sir.

Q That's what we're talking about. We're not talking about his property or anything. We're talking about six months in jail.

MR. GEORGIEFF: No, but the argument--no, I understand. But the argument advanced here today by both parties, by counsel for the party and by amicus, is that you break it at a fine. The only time the problem ever comes up is when you have imprisonment as a prospect.

Q Six months and one day, he gets it.

MR. GEORGIEFF: That's right.

Q It's an arbitrary line, isn't it?

MR. GEORGIEFF: All lines are arbitrary.

Q Is there anything in the Constitution in your mind that limits the word "liberty"?

MR. GEORGIEFF: No, not in my mind.

Q That's what I thought the argument was.

MR. GEORGIEFF: I don't think you can draw a line about liberty, if it's curtailed, is curtailed. No quarrel about that.

Q Your point is that it also says property.

MR. GEORGIEFF: That's right. It says life, liberty and property. If you are going to give them counsel in one, you have got to give it to them in all, unless you can take as sharp a scalpel as they seem to use and carve it out and say why you get it in one and not in the other.

I submit that confinement for one day for a man who commits a running violation in a vehicle is far less meaningful in terms of harm to him--far less meaningful--than is the loss of one's house on a foreclosure when he can't get enough money together to rub a lawyer around and get him to come in and do something about it if he can. That's an awesome prospect to him.

But they say, "We don't care about money fines and we don't care about this. All we care about is slamming a door on him for one day" or perhaps for one hour, for all we know. So, I don't know how they have managed to cut it out. As far as I'm concerned--

Q No one suggests you can't waive.

MR. GEORGIEFF: I beg your pardon, sir?

Q No one suggests you can't waive a lawyer.

MR. GEORGIEFF: Oh, no, I would hope you can, certainly. You can waive juries. You can waive everything. You can waive a speedy trial.

Q You can't waive a prosecutor though, can you?

MR. GEORGIEFF: I beg your pardon?

Q You can't waive a prosecutor.

MR. GEORGIEFF: Not in any way that I know of, no.

Dade County was mentioned in the figure 400,000 that was used. The last time we argued this case, I told you that in terms of what it would mean to Florida, we had dropped cown to, well, 60 percent below what would be the rule if we adopted as the basis for your future decision what you did in adopting the rules for your practice before magistrates. We're down to 60 days on our split misdemeanors, if you recall.

On the 14th of March in Florida, along with a number of people who think they are going to find out who is going to be the presidential nominee for either the Democrats or the Republicans, we're going to vote on Article V, which is a revamping of the court structure of the State of Florida. One of the provisions that will be voted on is the total abolition of all municipal courts in the state. Now, you don't have long to wait once you get to the 14th; one day beyond that and the canvassing board will certify the results. We won't even have any municipal courts.

So, remembering what it was, down to 60 days in Florida by our own legislature, we're down even below what was done in Wooley in the Jacksonville District Court. We're certainly down below what was done in MacDonnel and

Harvey, and we're certainly down below what would be the basis if we used your procedure before magistrates. We get away with the municipal courts and we're down to what? We're down to county courts, which will be the second strata of what we get if Article V is adopted and I'm sure that it will be. But who knows what the voters will do?

But let's assume for the moment that that's so. What do we do now about speedy trials? 400,000 in Dade County. That's only in Metro. That doesn't take into account the 23 cities which, if this article doesn't pass will still function. So, we're talking about better than 600,000. But in the rural communities--we don't have to go to North Dakota. Bristol is the county seat of Liberty County, Florida. There are 2800 people in the whole county. There hasn't been a lawyer there for over 30 years. I'll admit they have a circuit that sits occasionally when they have litigation. But as to those individuals who violate the ordinances of the city, there is no one to whom they can go, and there is no one in the court to whom they can turn for an appointment because there is nobody around. There simply aren't any lawyers and there is no reason for them to be there.

What do we do for them? Do we say, "Now, you're going to have to wait until the circuit court gets here so that he can appoint somebody to represent you"? And

represent you where? In a municipal court? In a county court? How long will it be before you get to hearing? It got so bad in Liberty County that Governor Collins many years ago had to order them to hold a term of court because they solved their business without even going to court. They decided who would do what, and nobody seemed any the worse off for it.

I don't advocate that as a good notion. All I am telling you is that these are things that do occur. After the Dickey decision, the Florida Supreme Court decided to adopt a rule regarding speedy trials, which they did. They broke it into 180 days cold or on demand 60 days. It got so bad in Dade County, which is the source of the 400,000 figure Mr. Rogow gave you, that the state attorney's office had to make a special plea to the Florida Supreme Court to extend the deadline on it because otherwise 690 men would get a walkout because they couldn't meet the deadline, which they did, by the way.

So, piecemeal they have to make an adjustment. How much time do you give a man for a speedy trial who faces the prospect of three days, five days, ten days? I don't know. You certainly can't make it much longer than the time he'd spend in jail, if he ever got there. Or it would be meaningless to him. And if you do mean to make it a speedy situation, where do you get the help?

The court reporters--you give a man a lawyer free and I'll guarantee you he'll not only take him but he'll demand an appeal if he loses. And in order to have an appeal or a trial de novo, it don't matter which, you're going to have to have a court reporter.

Q Aren't most misdemeanors automatically bailable in Florida?

MR. GEORGIEFF: Oh, certainly.

Q So, the pressure for a speedy trial from the defendant will presumably be a little bit less than if they were being held in jail pending trial.

MR. GEORGIEFF: Well, Mr. Justice Rehnquist, all felonies, with the exception of capital and just recently those punishable by life imprisonment have always been bailable as a matter of right. But that didn't stop the speedy trial demand.

Q Isn't there a higher percentage of persons awaiting felony trials being held for want of bail or a decision of the court that the person should not in fact be bailed but it is a case of misdemeanors.

MR. GEORGIEFF: That's possibly so, but it's only because of the amount of bail, you see. My heavenly days, we are far from a severe state in terms of bail. If you wind up with anything over $7500 bail and it's a miracle. It just doesn't happen because they are not

attuned to high bail in Florida.

There is a host of problems no one of which can be answered now. The Solicitor comes before you and talks in terms of 150,000 cases. That may be, and it may be that for the federal system it would be virtually a piece of cake. But in terms of just those half a handful of states, you have been told the figure is 12; that leaves 38 if 12 is accurate. But I think Mr. Rogow will have to tell you that of those 12 it's doubtful that there is even one that says if an individual faces the possible prospect of one day's confinement we will provide him free counsel if he's indigent. And I'll bet you he'll tell you no.

Q What about Minnesota?

MR. GEORGIEFF: I don't think even in Minnesota. It's just a guess. I wouldn't want to be hung by it, but it occurs to me--

Q We wouldn't without giving you counsel.

MR. GEORGIEFF: If we're talking about 38 states; let's assume that 12 is the correct figure. If we're talking about 38 states, I submit that they ought to have a better spokesman than me, considering my history before this Court. They may want to rely on the Solicitor, but they ought to have a better spokesman than me and they ought to be given an opportunity to come to you and tell you what it is they have in terms of a peculiar problem.

And many inquiries have been made about statistics that would support this, that or the other. But it does seem to me that it's not an easy question, no matter which course you follow. But certainly if it didn't disturb you in drafting the procedure to be followed before magistrates to break the line at six months on the petty offense and if the Brinson decision relying on that and other positions is accurate, if a jury breakdown is accurate at this, then it occurs to me that if our own Fifth Circuit and if our own federal district court, by the way, breaks it at 90 days and if we have broken it at 60 and we'll probably reduce it even further, then it seems to me that we're all talkking about something that really is far less in terms of a horrible prospect than we've made it out to be.

Talking about the ABA, it's a very compelling organization and much of what they've done has proved to be sound law in the future. Mr. Chief Justice, you may not remember out at Jackson Hole, Wyoming when we were out there with the Tenth Circuit some time ago shortly after you took your Chair. But the Minimum Standards Committee serving Florida has just now submitted its matter to the Florida bar for inclusion in the journal and will be presented to the Florida Supreme Court. Nowhere does it include anything about providing counsel for indigents at this level. Nowhere.

I served on that committee as its vice chairman.

It may be that soembody will initiate something like that in Florida--and, remember, I am speaking for Florida, not for any of the other 38 or magically the 12 that make up the total of 50. But I'll tell you that if it is a recommendation, it still has not reached Florida's level. Somevody else may put it out in that fashion. But it seems to me that if we are going to provide people with lawyers, it had better be lawyers and not ministers or anything like that. And if we are going to provide lawyers, which we are assured will be here in the next 12 or 13 years, maybe we ought to wait 12 or 13 years to find out not only if they are there but if the problem that is posed is really the problem that's urged, and if there is such a problem whether it can be solved in a fashion that we can even accommodate. We don't have the physical room for these people.

We're told that we created a defender system right after Gideon. That's true. We had one seven days after your decision, statewide. We were the first ones to respond in that fashion, and fittingly since Gideon came from Florida. You're told now that the defenders can pick up ten times as many misdemeanor prosecutions and handle them with relative ease. Now, is that because those cases are ten times easier or because they'll give them only one-tenth the time necessary? If they are all as horrible as they

say, nobody sitting in this room today ought to be able to convince you that they're only worth one-tenth of the time simply because the sentence involved may be minimal.

To the individual going to jail, I say before in response to your question, I can't break the line at liberty, and it's meaningful to him if he decides that he has been done in by law enforcement and somebody has been trying to do him in. He wants representation and if he's innocent, by golly any time he spends in jail was terrible to him. And to somebody who can say, "Well, look, a felony is important; you know, they caught him coming out of the window. This is going to take a day and a half. I'll have to pick a jury." The truth of the matter is we're assured that there aren't going to be any juries. Don't you believe that. We wind up without any municipal courts and they're tried in the county courts, you're going to see jury trials and you're going to see them in alarming frequency. There is no question about it.

As a matter of fact, right now in Florida on traffic violations in municipal courts you have an option at which you can request a trial in a county court with a jury. Now, that isn't exercised too often because it involves money and lawyers. But the moment they find that they can have them, they're going to exercise it just as rapidly and quickly as they can.

Q Do you want to convince me that the average person charged with a traffic offense wants a jury of his fellow drivers to try him?

MR. GEORGIEFF: If he can have them, oh, sure.

Q You think so?

MR. GEORGIEFF: Oh, sure. I'm certain of it.

Q I wouldn't.

Q So far as the federal Constitution is concerned, they're not entitled to a jury trial unless the punishment is going to be more than six months in prison.

MR. GEORGIEFF: If we arrived at the jury trial at six months or greater, that should be the same predicate for the counsel--

Q That's something else again. This parade of horribles of yours may be--I don't know what your laws in Florida are about jury trials, but so far as the federal Constitution goes--

MR. GEORGIEFF: No, Your Honor, I don't mean to suggest that it will ultimately find its way to you and you're going to have to slap us down because we don't give it to them; that's not what I mean.

Q We've already done that. We have already held that there is no constitutional right to a jury trial unless the imprisonment is going to be longer than six months.

MR. GEORGIEFF: That's correct. All I'm saying

is that we'll be confronted with a problem. And since I say I do only speak for Florida, then it recurs to us for more than several reasons, not only those that I've advanced here. But it does seem to me that there has been less of a reason advanced here on this occasion, more people talking, saying more things, but not as much reason as was advanced the first time and accordingly whatever you do as to Mr. Argersinger, certainly if he is retried, he'll be given counsel, but that's under our own statute right now and under our own Florida Supreme Court ruling in this very case. So that if he were retried, he'd have his lawyer. It isn't a question of what happens to Argersinger; it's a question of what happens to all the others that are sure to follow.

And, I might add, he could have had the new trial because there was an admitted Boykin violation in the processing of his own case, which was stipulated to by the state in the Florida Supreme Court, and we said so in our brief. So, it isn't a problem of whether he gets his relief. That's not really what they're here for so much as it is the overall question. Thank you.

Q Are you suggesting we decide the case on some other ground then?

MR. GEORGIEFF: Oh, of course. You mean on the Boykin violation? No question about it. I'd be delighted.

I'd like to let somebody else have a chance to extend Gideon downward rather than Florida.

Q I don't think we spent much time in the original argument on that subject.

MR. GEORGIEFF: No, not at all, not as I recall.

Q And we have not spent any time in this argument.

MR. GEORGIEFF: No.

Q You say that the problem has not disappeared in Florida because you lost your vagrancy statutes?

MR. GEORGIEFF: I don't know quite how to answer that. I'd rather not avoid it and yet I don't really know how to answer that.

Q That was not an unkind--that was supposed to be a humorous remark.

MR. GEORGIEFF: No, I quite understand. But would you believe that the day after the opinion came out, they descended on our office and wanted to know what it was we could do to draft one that would be found acceptable. So far I told them I had to go to Washington and I couldn't spend any time on it and I hoped somebody else could.

Q Maybe you could find out what to do up here.

MR. GEORGIEFF: Hopefully. Thank you.

MR. CHIEF JUSTICE BURGER: You have four minutes left, Mr. Rogow.

MR. ROGOW: Thank you, Mr. Chief Justice.

There really is not much disagreement between my brother Mr. Georgieff and myself. As he said in his argument, there is no real horrible prospect here. He mentioned several matters that he thought might have posed problems. In fact, in his brief on page 17, the Attorney General of the State of Florida is suggesting a Betts v. Brady rule. They are not saying in any way that there should be no right to counsel in these de minimis offenses. They have suggested Betts v. Brady on page 17, and we submit that Betts v. Brady was long ago rejected in Gideon v. Wainwright.

One problem that does concern me in this case, and that is in seeking to assure that a decision be reached which will limit future litigation in terms of on a case-by-case basis trying to decide where there was a violation or where there wasn't, I think that the waiver of counsel must be set forth clearly in any decision that the Court reaches, set forth in such a way so that it is clear that the trial court will advise a defendant, not just that he has a right to counsel and a right to appoint a counsel but advise a defendant that that trial judge has concluded that there is a real, actual threat of incarceration and only in that kind of a situation could defendant make a knowing and intelligent waiver under Johnson v. Zerbst of

his right to counsel.

Q I suppose equal protection would require that the judge inform a non-indigent defendant the same way.

MR. ROGOW: Yes, sir, exactly. It would be reverse discrimination, I think, if he didn't. I think it would have to be clear.

Our position is that the Supreme Court of Florida should be reversed, the case should be remanded. Argersinger and all other persons who face actual threat of incarceration should be advised and provided counsel unless they knowingly and intelligently waive that right.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rogow. Thank you, Mr. Solicitor General. Thank you, Mr. Georgieff.

The case is submitted.

[Whereupon, at 2:48 o'clock p.m. the case was submitted.]

- - -