In the

Supreme Court of the United States

JON RICHARD ARGERSINGER,

Petitioner,

vs. 70-5015

RAYMOND HAMLIN,

Respondent.

Washington, D. C.
December 6, 1971

Pages 1 thru 34

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

EM

IN THE SUPREME COURT OF THE UNITED STATES

JON RICHARD ARGERSINGER,

Petitioner,

v. No. 70-5015

RAYMOND HAMLIN,

Respondent.

Washington, D. C.,

Monday, December 6, 1971.

The above-entitled matter came on for argument at 10:58 o'clock, a.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

APPEARANCES:

J. MICHAEL SHEA, ESQ., P. O. Box 2742, Kennedy at Franklin, Tampa, Florida 33601, for the Petitioner.

GEORGE R. GEORGIEFF, ESQ., Assistant Attorney General of Florida, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

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

Mr. Shea, you may proceed whenever you're ready.

ORAL ARGUMENT OF J. MICHAEL SHEA, ESQ.,

ON BEHALF OF THE PETITIONER

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

The petitioner in this case was arrested in January of 1970 in Leon County, Florida, for the crime of carrying a concealed weapon, punishable in Florida by imprisonment for six months or a fine of $1,000.

He was arraigned and plead guilty the next day, and was sentenced to ninety days or $500 fine.

An original petition was filed in the Supreme Court of Florida the same month, and that court rendered its decision in June of the same year.

The court, although establishing a new rule for Florida, denied the petitioner's right to counsel.

Cert has been granted by this Court, and it is our contention that a person charged with any crime should be given the right to counsel, even in a situation where he is indigent.

Q I didn't get, Mr. Shea, clearly, just what was it you said about the change in the handling of these cases in Florida. It was --?

MR. SHEA: Yes, sir.

Originally, before the Argersinger case, the rule was Fish vs. State, which was decided in Florida in 1964, and in that case the Florida Supreme Court ruled that the right to counsel, as decided in this case, only applied to felonies. Now, since then, they have upheld that several times, but then changed their mind in a 4-3 decision of this case, in the lower -- in the June decision. And now we have a more-than-six-month rule in Florida.

And this defendant, then, lost by one day.

Q That is, no matter what the label may be on the offense, if it carries six months or more --

MR. SHEA: No, Your Honor --

Q No?

MR. SHEA: If it carries more than six months. No matter what the length.

Q That's what I say, if it carries more than six months, --

MR. SHEA: Yes, sir.

Q -- then under Florida law now counsel must be provided; is that it?

MR. SHEA: Yes, sir.

Q And before that, in the law -- the rule of the Fish case in Florida was that counsel may not be provided except in felony cases. Is that it?

MR. SHEA: That's correct, Your Honor.

Q In Florida. And how are felonies defined in Florida?

MR. SHEA: Incarceration for more than one year.

Q A year.

MR. SHEA: Yes, sir.

Q Or more than one year.

MR. SHEA: Incarceration in the State --

Q -- penitentiary?

MR. SHEA: Yes, sir.

Q Rather than in jail.

MR. SHEA: We have some misdemeanors in Florida where a person can be incarcerated for more than a year, but that would be in a situation where they would be kept in a county facility. So it's possible in Florida to be incarcerated for a misdemeanor for more than a year.

Q But, I gather, if the offense is limited to more than six months but less than a year, is it still labeled a misdemeanor, or do you have other labels?

MR. SHEA: No, sir; it's labeled a misdemeanor. Although, if it's a municipal violation, then it would be a municipal violation.

Q And then suppose it carried over six months?

MR. SHEA: I assume, from reading the Argersinger decision from Florida, that the rule would apply.

Q How about traffic offenses, do you have any of them that carry between six and twelve months?

MR. SHEA: Yes, sir. The more serious --

Q And what are they called?

MR. SHEA: They're called city ordinances or -- ordinances if it's a city violation. And the same ordinance would be a traffic violation in the State court.

Q Under State law?

MR. SHEA: Yes, sir.

Q So now you understand this recent decision as meaning in all those instances counsel would have to be provided?

MR. SHEA: Yes, sir. And I think that the question of the difference between the terminologies has probably been laid to rest with this Court's decision of Wall.

Q Has there been any effort to provide figures as to what this would mean in terms of the number of assignments that will have to be made?

MR. SHEA: That, of course, is only speculation on our part. However, I would refer the Court to our footnote 218 or 219, which we state that in the City of New York there was 1,800,000 misdemeanants convicted in 1969; of those only 40 went, or were actually incarcerated. So, although --

Q Well, is that the test under Florida law, for example? Is the test whether or not the offense may carry

over six months, or is the test whether in fact the punishment imposed is more than six months?

MR. SHEA: The test is may.

Q Is may?

MR. SHEA: Yes, sir.

Q I don't see how it otherwise could operate.

MR. SHEA: No, sir.

Q Well, in the figures you gave for New York, do you show how many of them could have been sentenced for over the six-month period?

MR. SHEA: No, sir. But I think in this we have to look to the practicality of it. Actually we're only talking about 40 people; 40 people out of 1,800,000.

Q How do we know that?

MR. SHEA: Well, that's what the actual figures show. If I may continue, the --

Q Well, just before you get started again, the situation still isn't clear, I gather, in Florida. If the -- Justice Boyd's separate opinion in this case accurately describes the decisions of the Court of Appeals for the Fifth Circuit, which hold that, which he says extend the right to counsel of persons facing possible imprisonment, regardless of the degree of their offenses or length of possible incarceration.

Are there decisions in the Fifth Circuit to that

effect?

MR. SHEA: Yes, sir; there are. And this has led to a great deal of confusion in our State, and some of the other States in our Circuit. Presently there are quite a number of habeas corpuses in Federal Courts which are pending the decision of this Court in this case. There has been a Federal Judge in Jacksonville, which has ordered one of our counties in that area to have their J.P.'s inform all defendants that they have right to counsel. This was in the form of an injunction.

In my hometown, in the City of Tampa, our Federal Judge has reserved ruling on a case before him requiring the municipal court judges to inform defendants of their right to counsel. We have a situation where we --

Q Is that right to counsel whenever imprisonment is a possible --

MR. SHEA: Yes, sir.

Q -- punishment. Is that it?

MR. SHEA: Well, their right to counsel in a situation where the person is indigent.

Q Well, even for a parking ticket?

MR. SHEA: I suggest, Your Honor, that there has been a long time since --

Q No, I'm just wondering -- I'm asking about a fact, not about what you think the law ought to be.

MR. SHEA: Yes, sir.

Q They have been directed to inform indigent defendants of their right to counsel in what kind of cases?

MR. SHEA: No, that's what the suit's about. The judge has respectively reserved ruling on it until such time. We do have three judges, I was about to say, and one of them informs of the right and the other two do not.

Q Informs of the right in what kind of cases?

MR. SHEA: In all cases.

Q Even in parking ticket cases?

MR. SHEA: Yes, sir. If a parking ticket case would come before the court. However, they don't come before our courts, so I suggest that it's impossible for a person to go to prison in Florida for a parking ticket. Now, he may --

Q I assumed it was, that's the --

MR. SHEA: Yes, sir.

Q -- reason I asked you what kind of cases this judge informs indigent defendants that they have the right to counsel. Is it only in cases where imprisonment is a possible punishment?

MR. SHEA: Yes, sir. Yes, sir. The parking ticket situation, I'm not saying a person couldn't go to prison for a parking ticket violation, but not the violation itself. If he is found to be --

Q A park law or something.

MR. SHEA: Yes. Right.

Q A hundred parking tickets or so.

Q Well, one last question.

MR. SHEA: Yes, sir.

Q Is your submission to us, then, that the Constitution requires provision for counsel in every case where the crime charged may carry a prison sentence, however long or however short?

MR. SHEA: Yes, sir; that's our position. I have a closing statement that we'll make specifically to that point. I think the Constitution is clear on that. It says, in Article VI that in all criminal prosecutions, where a person may have the right to the assistance of counsel for the defense. I think that's absolutely clear.

And it makes no limitation on the person's income.

Q Well, of course, that's the Sixth Amendment.

MR. SHEA: Yes, sir.

Q You're talking about the Fourteenth Amendment.

MR. SHEA: Yes, sir.

And I think we have to assume that the Fourteenth Amendment applies to the State of Florida and the districts --

Q Well, it certainly does.

MR. SHEA: Yes, sir.

Q We can all agree on that.

MR. SHEA: I'm glad -- sometimes I wonder if some of

our judges realize that.

(Laughter.)

If I may continue on --

Q But the Sixth Amendment to which you refer also provides for an impartial jury; and have we held that an impartial jury is essential for any case in which imprisonment is a possible punishment?

MR. SHEA: No, sir. I think the distinction between the Sixth Amendment rights are quite different, though, in the mere fact that this Court has chosen to treat jury trials differently is of no bearing on the right to counsel. I think that we can say that a fair trial can be had in this country without a jury. We've been doing it for quite some time, and I don't feel that it's an essential element to a trial.

But in an adversary system, where the State is providing a prosecutor, it's completely unthinkable to expect a defendant to get up and defend himself and then say that the trial is fair.

And I would also add that the other rights, as outlined in the Sixth Amendment, are not restricted as is the jury trial. I think this was adequately even pointed out in the decision that Your Honor is speaking of. I think Justice White, when he wrote Baldwin, said that indeed the prospect of imprisonment, for however short a time, will seldom be viewed by the accused as a trivial or petty matter, and may well result in quite

serious defects to the defendant.

If we look to the various States, we find that the question is, as was in Gideon, quite unclear. We would offer, though, that the -- our position is not one that's impossible. There are two States at present that are currently holding our suggested point of view: The State of Minnesota, and the State of New Jersey.

I would also like to point out to the Court that in the lower court decision of our case, we had a 4-3 decision, and in the dissenting opinion was the Chief Justice then of the State of Florida, Richard Ervin, who may be familiar to the Court. He was the Attorney General of the State of Florida in the Gideon case, and presented that brief.

So I think it's safe to assume that our Chief Justice has now taken a 180-degree turn, or the then Chief Justice.

Q I hope you'll permit me a reservation about what you say about New Jersey.

MR. SHEA: I beg your pardon, sir?

Q I say, I hope you'll permit me a reservation about what you say about New Jersey.

MR. SHEA: Yes, sir.

There have been several arguments raised against our position. The jury trial, as I've commented on, is just one of such. The State has also pointed out in their brief that there's a possibility of Boykin error. We don't feel that there's

a Boykin error. There cannot be a Boykin error unless there's an intelligent waiver. There cannot be an intelligent waiver unless the person is afforded the right to counsel.

This is an elementary thing, and must come before we can even consider those.

There has been a suggestion that the Criminal Justice Act has limited the right to counsel. It's our position that that Act does not limit the right to counsel. It speaks more specifically, if one takes a closer reading, to compensation for counsel. And the fact that Congress has chosen to compensate attorneys who handle more lengthy cases and involved cases, and not those of some of the lesser offenses, I think should have no bearing on a constitutional right.

Q Mr. Shea, let me be sure I understand you. Did you say that there cannot be an intelligent waiver of the right to counsel without counsel; is this what you're saying?

MR. SHEA: Yes, sir.

Q No matter how intelligent a person is, he cannot waive counsel?

MR. SHEA: No, sir, I don't think he can. I think he has to be informed of all the problems, the ramifications of what he's charged with, his possible defenses, and what the possible sentence is and everything else. And that only after he's been completely advised of his present situation and the possibilities that he has can he then make a decision.

Q You've never been confronted with a situation where the client knows more than the attorney?

MR. SHEA: Yes, sir. I've had a few of those.

(Laughter.)

I still advise that.

The only problem that I really see is the rules of procedure for the trial of minor offenses before magistrates. If we assume that those rules were, as the negative predicate suggests, then our petitioner here today has lost and we candidly suggest that.

However, it is our position that if we are to interpret that rule that way, that it is an unconstitutional rule and in violation of the Sixth and Fourteenth.

I would hope that this Court would not put this question to rest with the negative predicate.

We would like to offer what we feel is a completely workable rule as a test for the right to counsel. In the case of James v. Headley, Judge Wisdom handed down a rule which has been most successfully used: A defendant must be given counsel where there is a practical possibility that he might be sent to jail.

Now, in that we mean that in those situations, such as have been raised by the State of a person spitting on a sidewalk, of parking tickets, of jaywalking, and all the other minor offenses, we suggest that these are not practical

possibilities of a person going to prison.

Q Even though the ordinance or the statute, as the case may be, may say for that kind of offense a criminal -- rather, a prison term may be imposed, 30 days, 60 days, as the case may be?

MR. SHEA: Yes.

Q Even though the statute says that?

MR. SHEA: Yes, sir. And I would ask them to offer to us some statistics where someone did go to prison for that.

Q Well, then you'd have to come around to the test that has been suggested as one possibility in various reports, that counsel is required only if, generally or usually, a prison sentence is imposed. Is that the test you advocate?

MR. SHEA: If you're speaking of the ABA minimum standards --

Q That's one of them. That's one of them.

MR. SHEA: Yes, sir. -- I think that we would go along with that, and say that our position is in line with that suggested minimum standard.

Q Well, I thought you'd responded to a question of Mr. Justice Stewart that in every case, if the penalty was possible, counsel had to be provided.

MR. SHEA: Yes, Your Honor, I have. And I suggest that it is impossible for a person to go -- practically impossible for a person to go to prison for spitting on a side-

walk. The statistics just don't bear out.

As a second part of our suggested test, we would like to say that it should be added then --

Q Well, what happens if it never happened before, but this man gets two years? What happens to him?

MR. SHEA: I beg your pardon, sir?

Q You say the statistics determine whether a man is entitled to a lawyer. I'm saying the statistics show that for this crime, nobody in the United States has ever gone to jail for any time, they've all been fined; but Mr. A is given two years. Would that be a legal conviction? Without counsel.

MR. SHEA: No, sir, because the second part --

Q Why not?

MR. SHEA: The second part of our suggestion would cover that.

Q Well, how do you separate those two cases?

MR. SHEA: Well, if I may continue --

Q I mean this --

MR. SHEA: I'm addressing myself to that.

Q I get worried with this legality by statistics, or constitutionality by statistics.

MR. SHEA: Yes, sir.

Q I get very troubled.

MR. SHEA: The second phase of this would be that no person could then in fact be sent to a jail unless he had

been given right to counsel, and I think this would take care of that. For many, many years we have had justices and judges in our court system that have taken it upon themselves to appoint counsel in situations where they felt either the magnitude of the charge or the case itself warranted such a thing. And we're suggesting that this be done. That, in those situations where it appears that there's a possibility of sentence, that the right to counsel be afforded.

Q Well, it might not appear so at the beginning of the trial, before the triers of the fact have heard all the evidence, and it might turn out to be a much more aggravated and serious situation than had appeared before the trial began. I take it your position would be, then, that if a conviction was followed by a sentence to prison, and no lawyer had been provided, then that conviction would have to be set aside and a new trial ordered; is that it?

MR. SHEA: Yes, sir. We would suggest that it would be better to set a rule of this nature, saying that if there is a possibility of a sentence, that he must be given the right to counsel from the outset. If that decision is made, one way or the other, and he is not given that attorney, then he may not be sent to prison even though the facts may develop, as you have suggested, --

Q Well, or if he is sent to prison, then, and maybe it turns out that there was a very good reason why he

would be sent to prison, from the point of view of the gravity or seriousness or outrageousness of the conduct. But that then a new trial should be ordered, and at this time he gets a lawyer; is that it?

MR. SHEA: Yes, sir.

Q Would that pose any double jeopardy problems if he didn't consent to the new trial?

MR. SHEA: I would have to admit there is a possibility.

Q I suppose a new trial wouldn't be ordered unless he appealed. I'd assume that he would have appealed.

MR. SHEA: Yes, sir, I would, too.

And I think that in actual practice of it, in speaking of that particular circumstance, that it's better to let a few of these people maybe not go to prison and have a stiffer fine or some other type of penalty --

Q Well, maybe he'd go to prison. But in my brother Marshall's hypothetical case, where you had an offense where never, in the particular jurisdiction, had anybody been sentenced to prison for the commission of this offense, and so at the outset of the trial it could be fairly confidently assumed that this defendant was not going to prison. And then, -- and then it developed, during the course of the trial, that for one reason or another this was a singularly, egregiously outrageous example of this particular violation.

And, for good and sufficient reasons, after the defendant was convicted, he was sentenced to prison, and for the first time in the history of that jurisdiction. Then, would it be your position that the convicted defendant could then appeal and have a new trial, this time with a lawyer.

MR. SHEA: Yes, sir.

In addition to the fact that we're offering this test, I also point out, as the Chief Justice has, that the test is also one recommended by the ABA minimum standards. We suggest that there is another possibility for a test, and that would be a stricter application, a looking directly at the statute, and if the statute has a possibility at all of imprisonment, that then counsel must be provided if the person is indigent.

If that were the rule to be handed down by this case, by this Court, I would hope that the American jurisprudence system would take heed of President Nixon's latest comments on legal reform, and that we proceed to eliminate from the possibility of incarceration many of these minor crimes where there is no victim.

I think that I will save the remainder of my time for rebuttal to the State.

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

Mr. Georgieff.

ORAL ARGUMENT OF GEORGE R. GEORGIEFF, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I guess this is as fitting an occasion as any to take off on the down side of Gideon, since Florida opened the door for Gideon itself. I suspect Florida is the proper State to decide whether Gideon should be extended downward.

Hopefully, the result won't be the same as it was in Gideon, although I think it was a sound one.

I think I'd like to put something to rest before we get too far into it. Felonies and misdemeanors, as defined in Florida, as of today:

Felonies are those offenses punishable by imprisonment in the State penitentiary. Now, it doesn't mean that they must be so incarcerated, since we do have provisions for alternative confinement in county jails for offenses five years or less in term.

Now, misdemeanors are all offenses otherwise punishable by confinement in the county jail.

Everything else is something less than a crime in Florida. It's neither a misdemeanor nor a felony. Municipal violation, if you take up the situation in Dade County you have metro violations, which don't fit either bracket.

Q What kind of violation? Metro?

MR. GEORGIEFF: Metro. It's called Metropolitan Government. It's a combination of those cities which decided to go together with the county.

Q Yes.

MR. GEORGIEFF: Now, there are some 23, as I understand, which are not a part of it, and they remain isolated municipalities with their own unit of government.

Q So a municipal offense or a metro violation is something less, even, than a misdemeanor?

MR. GEORGIEFF: Oh, yes. There are -- as to metro, they are sui generis in terms of Miami being the leader -- Dade County being the leader in that situation.

Q The city and county, in a consolidated government.

MR. GEORGIEFF: But they are all less than misdemeanors.

Q And in terms of punishment, what's the maximum that they carry?

MR. GEORGIEFF: I would hazard on the outside now -- perhaps Mr. Shea can correct me; but I would hazard that it cannot exceed 90 days. And that's true with all municipal violations. I've not known of any that go in excess of that.

Now, conceivably, you can have some of them back to back, which would result in a longer period of confinement, but the maximum, on the outside, is 90 days.

Q And where is the confinement served in those cases?

MR. GEORGIEFF: City jail, city compounds, something on that order. Now, I don't have a title for all the places --

Q But not in the county jail for some?

MR. GEORGIEFF: No, sir.

Now, as a matter of fact, there are many times in the rural counties where they don't have county compounds. They often, by arrangement, have them served in the one city that may exist. For instance, in a place like Liberty County, which has only 2800 people in it, they do not have a compound -- they interchange their facility.

But if we're going to deal with labels, I wanted to straighten that much out first.

But we intend to throw labels out the window, because they really don't mean anything at all. You said so in Gault, and that's a fact.

Under the Criminal Justice Act, it is broken by Congress at six months on the petty offense doctrine. Now, after the decision in Gideon, and I think,Mr. Justice Stewart, after the several times when you suggested that perhaps the matter of misdemeanors ought to be treated, and had not been, the Supreme Court of Florida decided in Fish vs. State that if you had meant that Gideon should apply across the board as to crimes which includes both misdemeanors and felonies, that you would have said so.

And therefore they held that counsel was not an

organic right in misdemeanor situations, no matter what.

Now, on another occasion before you, I advised you that indeed there were some misdemeanors in Florida, though there have been no prosecutions under them, that carried a maximum penalty, would you believe, of eight years. And in which case, I think by an inquiry from Mr. Justice Brennan, I replied that if you had a situation like that, it would be absurd to suggest that you don't appoint counsel for him, because of the term of confinement.

Now, as of January the 1st of 1972, all that will be wiped out by the passage of 71-136, which is a general revisor bill; and that's known as the Florida Session Law Service, it's a post binder, covered in pages 381 to 711, or some 380-odd pages of a general revision of the Criminal Code of Florida.

They break down felonies into four degrees: capital, and three degrees of felonies.

They break misdemeanors down to two degrees. And misdemeanors are broken down very simply. In terms of time, and/or money fines, for a misdemeanor of the first degree by a definite term of imprisonment in the county jail, not exceeding one year.

We understand that under the decisions of the Fifth Circuit, in Harvey and the others, and, indeed, under Judge Mehrtens' decision in Brinson, where he breaks it at six months based upon the Criminal Justice Act, and expecting a similar

treatment as to Federal and State prisoners, it's certainly everybody in Florida, as of January the 1st, who is under a misdemeanor in the first degree, is going to get counsel as a matter of course.

Now, for a misdemeanor of a second degree, by a definite term of imprisonment in the county jail, not exceeding 60 days.

Now, there is also a fine provision which sets the fine at $500, but obviously after you reached the decision that you did in Tate, that's meaningless; since, if he's indigent and can't pay the fine, he can't be made to serve more than 60 days, no matter how you cut it.

So we are now in the posture of going down 30 days below what the Fifth Circuit Court of Appeals has said was their acceptable petty offense line. If it was all misdemeanors before, if it was reduced to six months by the Criminal Justice Act, and by the State of Florida Supreme Court in Argersinger, and even if the Federal District Court in Jacksonville under Wooley -- and, by the way, the only reason they are not advising everybody as to everything is they are awaiting the outcome of your decision here in this case today.

Now, we say the breaking point with the Fifth Circuit was set at 90 days. We set it ourselves by the Florida Supreme Court, relying on Judge Mehrtens' decision in Brinson, at six months. Which coincides with what you said in Baldwin as to

juries, and with the Criminal Justice Act as to petty offenses.

Now, the question becomes: Is it awesome to the man who faces some kind of imprisonment no matter what? Well, somewhere you must break the line.

There was no command at the time that Argersinger was argued there, except that that is urged here.

Now, I don't know how far we can break it. All I do know is, as of January the 1st, there are only going to be a handful of people who are ever processed on misdemeanor charges, who won't, based upon the imprisonment possible, be provided counsel.

Q Well, let's see, Mr. Georgieff, I gather your provision doesn't reach, though, the metro offenses or the other type offenses?

MR. GEORGIEFF: No, Your Honor, it does not.

Q Just State offenses.

MR. GEORGIEFF: That's right.

Now, if you recall, under Waller, of course metropolitan communities and/or cities, or whatever you may call them, exist at the sufferance of the Legislature. No laws that they adopt are criminal in nature, and they adopt whatever they like, either by individual charter provisions or that they adopt the violations of State law as city ordinances. But they must set independent punishment.

In other words, the revisors bill does not reach them

in any degree. I tell you as a matter of pure fact, though, it isn't in the record here, that no city has violations, to my knowledge, that have ever come to my attention, that exceed 90 days for a violation of what would be a criminal law had it been processed in the State or by the county.

So in the last analysis we're told that you allow power to come into court with a lawyer in situations, of their own hiring, so why shouldn't you do it here no matter what the penalty is?

Well, if you do, and if we use the statistics that they've given us on the New York report of the 1,800,000, with only 40 processed to the degree where they were put in confinement, if anything ever sounded like de minimis to me, that certainly does.

Now, if it is the awesome prospect that they tell us that it is, how come so few ever wound up in jail as a result of it?

Now, I think Mr. Justice Marshall's question about what do you do when somebody winds up on the short end of a theretofore vacant threat, well, obviously, as you posed, Mr. Justice Stewart, is: If you wind up with a situation like that, that's easily correctable. We grant them a new trial. If what happened to him so far outstripped what anybody expected, certainly they're going to grant him a new trial. Now, there isn't any question about it.

Now, I don't know how often that's going to occur, if at all. They are now under -- the Legislature is in special session this very day, and they will meet in general session in February to take up, of all things, another revisors bill, which, it is hoped, will do away with most if not all of the victimless crimes.

Now, that won't do away with the DWI's or anything like that, assuming anybody is injured or there's a substantial amount of property damage.

Q What's DWI?

MR. GEORGIEFF: Driving while intoxicated, or under the influence.

Q Yes.

MR. GEORGIEFF: Now, many of the minor violations, such as drunkenness, loitering, and I don't know what-all, will, if this goes through, be wiped out. Now, what that will do statistically to the problem posed, as suggested by petitioners, I do not know. But if we do away with victimless crimes, we're going to do away, for the most part, with what was the object of your concern in Tate and other cases similar to it.

I submit that it's not anywhere near the problem suggested. I submit that the Congress didn't think that it was. I submit that not even the Fifth Circuit thinks that it should be extended below the 90-day breaking line that they adopted.

But even if it is, Florida has broken it at 60 days,

as of January the 1st, 1972; and, for all the world, nothing I have heard here today gives me any reson to suspect that what was done with regard to Mr. Argersinger in the Florida Supreme Court should even be modified by any decision that you render here today.

I know that somebody says by one day he lost the benefit of counsel. Well, wherever you draw the line, assuming that it's not all the way down in the basement, somebody is going to lose by one day. Presumably, if you set the limit at 58 days, surely an artful legislator would say, Well, let's make it 57. And it would be a never-ending battle.

So I don't know that one day makes the difference. I know that the doctrine of petty offense has to mean something. Certainly the Congress was not stupid when they adopted it, nor was the Fifth Circuit stupid when they said that we think 90 days is a good place at which to break it.

I think Judge Mehrtens was amply justified in breaking it at the six months suggested by the Criminal Justice Act of '64. Since it does coincide, and since that is what the Florida Supreme Court relied on, and there's really no predicate for deciding that there ought to be a departure, below the six-month petty offense rule, and, in the last analysis, since Florida is not going to be imposing these awesome burdens at any time after January 1, I think the action of the Supreme Court of Florida should be affirmed in this case.

Thank you.

Q How about the rules for the -- approved by this Court for the magistrates? Has that got anything to do with it, do you think?

MR. GEORGIEFF: Well, I don't know that an individual stands in any different posture when he's before a U. S. Magistrate than he does when he's before a county judge, let's say; or, for the matter of that, wherever he may be, where a confinement is going to run no more than six months.

If it's satisfactory for an individual before a U. S. Magistrate, I should imagine that it's meaningless to an individual anywhere else to tell him: Don't worry about the rope burning, it's made out of linen instead of hemp.

That's just another reason, I think, Mr. Justice Stewart, why to make a false distinction, simply because this had its genesis in a State proceeding would be untoward. There's no reason to tell an individual being processed in a criminal system that it's different in one area, and he's entitled to counsel there, than it is in another where he's not, simply by rules adopted either by this Court or by the counties. I think the posture is the same.

A jail cell is a jail cell is a jail cell.

Now, I don't stand ready, willing, or able to tell you that an individual ought to like it for one day. I'm sure none of them do. But if we're going to live in a world with people

who served, and if there are going to be enough of them to go around, then I think an intelligent break is made at the six-month petty offense situation, and, hopefully, by the time we're finished, you will agree with that and affirm the action below.

I hope that's answered your question, sir.

Q Yes.

MR. GEORGIEFF: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Georgieff.

Mr. Shea, do you have anything further?

REBUTTAL ARGUMENT OF J. MICHAEL SHEA, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SHEA: I find it very difficult to understand how we can pick anything less than one day. How can we arbitrarily say one day, 30 days, or 60 days? To the man that's sitting in jail, that decision is completely arbitrary.

Now, I also would offer that there's no logical reason for picking 60 days or 90 days or six months.

As to some of the points Mr. Georgieff raised, I believe there's now a Florida statute that was recently passed in the last session that makes county ordinances the same as misdemeanors, and that's Session Law 70-453, subsection something-or-other.

I also want to try to make it clear that our position is that we do not feel that it's necessary to make counsel

appointment, that it will not result in counsel being appointed in all misdemeanor cases, only those where it's a practical possibility that the person may receive some incarceration.

I think that the position of the Fifth Circuit was a bit misleading, as far as the State presented. They said that the Fifth Circuit has a 90-day rule. I don't think that's quite the case. The Fifth Circuit has ruled on a case in which they said a person charged with an offense that received 90 days should be given the right to counsel, but I think they left the bottom end of that open.

And they have only ruled in the other cases on similar special circumstances.

In conclusion, I think that it's evident that our position and that of the States is not that far apart. They haven't come before you this morning and suggested that a man not be given the right to counsel on misdemeanors. They have only suggested that it should be either six months, and now they've come with another possibility of 60 days.

We feel that the only real test is to go completely as the Constitution says. A person who is in the position of a possible incarceration must be given the right to counsel, and if he is not given that right, he cannot be sent to prison. It's that simple. That's our test.

The only --

Q That means that you're not concerned with a fine,

no matter how large?

MR. SHEA: Correct, sir.

Q Next week, will you be back here with a fine case?

MR. SHEA: No, sir; I think that that's another situation, that we get into contempts and things of that nature, and if a person didn't pay the fine then he would, I assume, be charged with a contempt violation and in fact would be afforded an attorney.

So I think that the possibility of a person getting up here with that argument is much more remote.

I suggest that you boil it down in its simplest form, which is: no attorney, no jail.

I think the greatest freedom that we have in this country is our liberty. And when a man is afforded counsel, it's the only method he has of protecting that liberty when he stands in our courts.

If we take that right away, we also take his liberty away. To say less is to compromise the freedoms of our Constitution.

Thank you, sir.

Q Mr. Shea, on January 27th of this year, this Court, as you know, promulgated rules of procedure for the trial of minor offenses before magistrates, which, by subsequent inaction of the Congress of the United States, I understand,

have now become effective rules. And you are familiar with those rules --

MR. SHEA: Yes, sir, I am.

Q -- because I notice you make reference to them in your brief.

MR. SHEA: Yes, sir.

Q What bearing, if any, do you think they have on your argument, on your position in this case?

MR. SHEA: I think they're unconstitutional, as they apply to the right to counsel. They are in strict violation of the Sixth and Fourteenth. And if -- and I don't feel that they specifically go to the question. I think there's only a reference in the form of a negative predicate, and I hope --

Q Well, now, which? Now, you've made -- you've now given two quite different answers.

MR. SHEA: No, sir; I think that was my original answer, when I was asked the question before.

Q Well, are they unconstitutional, or don't they bear on your question?

MR. SHEA: I think they're unconstitutional.

Q Why?

MR. SHEA: Because they are in violation of the Constitution.

Q Why?

MR. SHEA: Because the Constitution says that a person

shall have the right to counsel in all criminal prosecutions.

Q But your second answer was that these rules don't say that persons shall not have the right to counsel.

MR. SHEA: Well, I think that the only way that it can be construed that they do say that is through that negative predicate, and I would suggest that that's a poor way of putting this question to bed.

I don't read it that way myself.

Q You don't read it which way?

MR. SHEA: As affecting the right to counsel. But if it does --

Q In that case, if your reading is correct, then they're not unconstitutional.

MR. SHEA: That's right, sir, if it is read that way. And, in the alternative, if it is -- I would suggest that it's possible that the other construction could be read, and if that be the case, then it is our position that they're unconstitutional.

Any further questions, sir?

MR. CHIEF JUSTICE BURGER: No. No, apparently not, --

MR. SHEA: Thank you, sir.

MR. CHIEF JUSTICE BURGER: -- Mr. Shea.

Thank you, gentlemen; the case is submitted.

(Whereupon, at 11:42 a.m., the case was submitted.)