

COURT OF APPEALS OF WISCONSIN

DISTRICT I

Manuel Garcia, Jr.,

Petitioner-Appellee,

v.

Pearl Garcia,

Respondent-Appellant.

**MEMORANDUM IN SUPPORT OF PETITION
FOR PERMISSION TO APPEAL AND FOR A
WRIT OF PROHIBITION**

**I. ARTICLE I, SECTION 21(2) OF THE WISCONSIN
CONSTITUTION GUARANTEES THE FUNDAMENTAL
RIGHT TO AN ATTORNEY IN CIVIL ACTIONS TO ANY
SUITOR; THIS INCLUDES IMPOVERISHED SUITORS.**

**A. The Right to Counsel in the Wisconsin Constitution is a
Fundamental Right.**

Article I, Section 21(2) provides:

- (2) *In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice.*

The Wisconsin Constitution provides the right to an attorney in civil matters. This right is fundamental. It is fundamental because it is expressly set forth in the Constitution itself, and because, in 1977, it was deliberately transferred into the Declaration of Rights through a constitutional amendment. As Judge Gartzke has written, the heading "Declaration of Rights":

. . . is not something which may be ignored as may, for example, a statute's. [Footnote omitted.] The heading is as much a part of the constitution as sec. 3 itself.

* * *

A declaration or bill of rights is, at its very least, a solemn statement of those powers, privileges and liberties considered basic and most important.

Jacobs v. Major, 132 Wis.2d 82, 127, 390 N.W.2d 86, 103 (Wis. App. 1986)(Gartzke, J., concurring).

The Section 21(2) right to counsel is also fundamental because counsel is an essential element of meaningful access to the courts. Access to the courts is itself a fundamental right. *Tennessee*

v. Lane, 541 U.S. 509, 124 S. Ct. 1978 (2004); *State v. Martin*, 191 Wis. 2d 647, 652, 530 N.W. 2d 420, 423 (Wis. App. 1995).

Because of the explicit and specific language of Section 21(2), and the fact that Section 21(2) has been placed in the Declaration of Rights, in Wisconsin the right to counsel is a fundamental right, both in and of itself and because it is essential to meaningful access to the courts.

B. Construction of a Constitutional Provision

When construing a constitutional provision, the Wisconsin Supreme Court examines three sources: 1) the plain meaning of the words in the context used; 2) the constitutional debates and the practices in existence at the time of the writing of the Constitution; and 3) the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption. *Wagner v. Milwaukee County Election Commission*, 2003 WI 103 ¶18, 263 Wis.2d 709, 723, 666 N.W.2d 816, 824 (2003).

- 1. The plain meaning of Section 21(2) guarantees the fundamental right to be represented by an attorney to impoverished suitors.**

Section 21(2) guarantees the fundamental right to be represented by an attorney to *any* suitor, not just to suitors with sufficient wealth to hire their own attorneys.

The key word in Section 21 is “any”. “Any” means just that: “any” as in “each and every.” “Any” has an expansive meaning, that is, “one or some indiscriminately of whatever kind.” *Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131, 122 S.Ct. 1230 (2002).

The common and approved usage of words can also be established by the definition of a recognized dictionary. *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, ¶¶16 and 69, 245 Wis.2d 396, 629 N.W.2d 662, 669, 686 (2001). Webster’s definition of “any” includes: “1b: one, *no matter what one*: EVERY . . . Webster’s Third New International Dictionary (Unabridged), p. 97. (Emphasis through italics is ours; “every” is capitalized in Webster’s.) Thus, when Section 21(2) is applied, the selection of “suitors” who will be entitled to counsel cannot be restricted, or the choice limited, to affluent suitors.

C. The constitutional history shows that Section 21(2) guarantees the fundamental right to an attorney to impoverished suitors.

The constitutional history of Section 21(2) does not support the conclusion that “any suitor” may be read to exclude poor people.

Section 21(2) is now in Article I of the Constitution, the “Declaration of Rights.” While it did not begin there, it has, since November 30, 1846, been a provision which establishes the fundamental right to be represented by an attorney. As such, Section 21(2) should be construed in a manner which confers its right in the broadest possible fashion.

The history of Section 21(2) is, as constitutional provisions go, somewhat dramatic. It began life as Section 22 of the Judiciary Article in the first Constitutional Convention, that of 1846. On October 27, 1846, the Convention’s Judiciary Committee established criteria for the practice of law in Wisconsin:

Section 22. Any male citizen residing in this state, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of

*this state.*¹

Section 22 remained in this form for nearly a month. When a Judiciary Committee amendment to Section 22 arose before the Convention on November 30, Delegate William A. Dennis, of Dodge County, immediately moved to amend that committee amendment by adding:

*“Any suitor in any court of this state shall have the right to prosecute and [or] defend his suit either in his own proper person or by an attorney or agent of his own choice.”*²

This amendment was a complete and total change in the language and in the purpose of Section 22, from regulating a profession to establishing a broad right of representation in favor of suitors. The amendment passed, 44 to 14.³

This was the way Section 22 appeared in the final version of the Constitution of 1846, which was defeated by the people of Wisconsin over other issues, such as banking. When Wisconsin

¹ Milo M. Quaife, *The Constitution of 1846*, p. 295 (hereafter “Quaife 1846.”)

² *Id.*

³ *Id.*

tried again in the Constitutional Convention of 1847-1848, the language of Section 22 did not change.

The 1977 “Court Reorganization” constitutional amendments moved the suitors’ rights provision from Article VII, Section 20 to Article I, Section 21(2), where it currently resides in the Declaration of Rights.⁴

D. The Wisconsin Supreme Court’s precedents show that Section 21(2) guarantees the fundamental right to be represented by an attorney to impoverished suitors.

A recent case in which the Court construed Section 21(2) is *In Matter of Condition of S. Y.*, 162 Wis.2d 320, 469 N.W.2d 836 (1991). The Court in that case broadly construed four elements of Section 21(2): 1) the meaning of “suitor”; 2) the meaning of “own proper person”; 3) the right to represent oneself; and 4) the right to be represented by an attorney. Important to the instant case, the Court in *Matter of S. Y.* held that Section 21(2) affords the right of *any*

⁴ Legislative Reference Bureau Informational Bulletin 76-IB-9, “Constitutional Amendments Given ‘First Consideration’ Approval by the 1975 Wisconsin Legislature” (December 1976), pp. 1-7 (hereafter “LRB-76-IB-9”).

person to be represented by an attorney:

Article I, sec. 21(2), Wis. Const. affords the right of any person to self-representation, as well as the right to be represented by an attorney.

Id.

In *Piper v. Popp*, 167 Wis.2d 633, 482 N.W.2d 353 (1992), the

Wisconsin Supreme Court held:

. . . that, when a prisoner is a defendant in a civil tort action, due process requires that the state grant the prisoner a meaningful opportunity to be heard. The circuit court must determine, subject to appellate review, how a meaningful opportunity to be heard is to be achieved in the particular case. We conclude that the defendant in this case does not have a constitutional right to appointed counsel, given that he had no liberty interest at stake, appeared personally in circuit court to defend himself, and had a meaningful opportunity to defend himself pro se.

Id. at 658-59. The “constitutional right” which the Court interpreted in this case was that provided by the United States Constitution, not the Wisconsin Constitution. The Court’s discussion focussed exclusively on the United States Supreme Court’s construction of the 6th and 14th Amendments to the United States Constitution. It referred only obliquely, in a footnote, to Art. I, Sec. 21(2) of the Wisconsin

Constitution, and did not purport to consider Section 21(2) to undergird the Court's holding.⁵

In the instant case, where the movant does not invoke the federal Due Process Clause, this court need not, and should not, rely on *Piper v. Popp* or *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153 (1981).

The trial in *Piper v. Popp* is exemplary of the difficulty of the *Lassiter* analysis. There the trial judge, *after* the trial, not prior thereto, attempted to justify his pretrial decision to deny Popp an attorney by stating for the record that Popp did an “amazingly good job,” and that there was nothing a lawyer could have done for Popp that he didn't do himself.⁶ In fact, there were many things that a lawyer could have done for Popp that Popp failed to do for himself, such as conducting a *voir dire* and exercising his three peremptory juror strikes.⁷ A lawyer could have prevented Popp from telling the

⁵ It also did not consider the equal protection guarantee of Article I, Section 1.

⁶ Transcript of Proceedings, *Piper v. Popp*, Case File 85-CV-454 (March 28, 1989), pp. 86-87.

⁷ *Id.* at 5.

jury that he had been sentenced to 40 years in Waupun.⁸ The damning medical evidence was introduced by Piper's lawyer through his reading of the deposition of a doctor. Popp was not even present at that deposition, and at trial failed to object to any part of it.⁹ Perhaps Popp should have testified on his own behalf; the jury may have held against him his failure to testify. Piper's attorney was permitted to ask all manner of leading questions. Popp had no physician expert to minimize Piper's damages. At one point, the judge even prompted Piper's attorney to pursue a line of questions which would enhance damages.¹⁰

Popp's "amazing effectiveness" can be seen from the jury's award of \$486,311.67, including \$200,000 in punitives, to Popp's opponent. The jury deliberated for all of an hour.¹¹

The court should not rely on *Piper v. Popp* or on *Lassiter* in the

⁸ *Id.* at 37, 56.

⁹ *Id.* at 50-54; Transcript of Deposition of Henry W. Aufderhaar, M.D., July 14, 1988, p. 2.

¹⁰ Transcript, p. 28.

¹¹ Transcript, pp. 74, 99.

case at bar.

E. Article I, Section 21(2) does not require an impoverished suitor to represent herself.

For the indigent, the right to “hire an attorney at their own expense is a cruel sham; the protection it confers is a fiction.”¹² The words of Justice Frankfurter, concurring in *Griffin v. Illinois, supra*, are applicable here:

To sanction such a ruthless consequence, inevitably resulting from a money hurdle, erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the “majestic equality” of the law. “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” John Cournos, A Modern Plutarch, p. 27.

351 U.S. at 23. Are we to say that §21(2), in its majestic equality, permits the poor as well as the rich to come into court with their hired attorneys?

The purpose of Section 21(2)'s right to self-representation is to

¹² Robert Catz & John T. Kuelbs, *The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 *J. Fam. L.* 223, 233 (1974).

grant that right to those who don't *want* an attorney. "Art. 1, s. 21(2) affords the right of any person to self-representation, as well as the right to be represented by an attorney." *In the Matter of Condition of S.Y., supra* at 330. This is, however, far different than a constitutional *obligation* to represent himself.

If, by the words of Section 21(2), every natural person has an absolute right to appear *pro se*, *Jadair, Inc. V. U.S. Fire Ins. Co.*, 209 Wis.2d 187, 205, 562 N.W.2d 401 (1997), *cert. denied* 522 U.S. 998, 118 S.Ct. 565, 139 L. Ed.2d 405, then, by those very same words, there is a companion "absolute right" to appear by an attorney. If one has an absolute right to the least adequate representation, that of oneself, then certainly one has a right to competent representation through an attorney. The United States Supreme Court cited *Carpenter v. County of Dane*, 9 Wis. 249 (1859), in recognizing this logic:

. . . the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.

Powell v. Alabama, 287 U.S. at 72.

Why would an impoverished suitor have an "absolute right" to

the lesser right of self-representation, and no right at all to the greater right of attorney representation? This an absurd result. The purpose of Section 21(2)'s right to prosecute or defend in the suitor's "own proper person" is *not* to *require* a litigant to represent himself simply because he is too poor to purchase a lawyer's services. If, because you are poor, you are forced to appear by yourself, and cannot appear by an attorney, then for you the right to have an attorney of one's choice means nothing, and that phrase in Section 21(2) is useless surplusage.

Following Section 21(2)'s amendment in 1977, representation by non-attorney agents is prohibited. *Baker v. County Court*, 29 Wis. 2d 1, 138 N.W. 2d 162 (1965), had held that executors as agents are not competent to represent beneficiaries in probate adjudications, and that this is unauthorized practice, stating:

Nevertheless, the need for protection of beneficiaries in general from practice by unlicensed persons justifies the existence of a general rule and its application to this instance.

Id. at 9. If this is so, then how is it that agents, no matter how sophisticated they might be in court proceedings, are so incompetent

as to endanger their litigant “clients”, yet all litigants who can’t afford counsel, no matter how uneducated, disabled, non-English-speaking or mentally ill, are so competent that they don’t endanger themselves? Indeed, if even for attorneys, “. . . unfamiliarity with the rules of procedure amounts to incompetence . . .”, *Filppula McArthur v. Halloin*, 2001 WI 8 ¶42, 241 Wis.2d 110, 132-133, 622 N.W.2d 436 (2001), how can *pro se* litigants be competent? The courts rigidly protect the public and parties from non-attorneys who could theoretically harm them, yet are satisfied to force suitors themselves to proceed *pro se*, with no representation at all, even if they are *less* competent than the unlicensed executor or other non-attorney. This state of affairs makes absolutely no sense.

II. ARTICLE I, SECTION 1 OF THE WISCONSIN CONSTITUTION REQUIRING EQUAL PROTECTION OF THE LAW IS VIOLATED WHEN INDIGENT LITIGANTS ARE DENIED THEIR FUNDAMENTAL RIGHT TO COUNSEL.

Article I, Section 1 provides:

All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the

pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

This is Wisconsin's equal protection clause. Numerous Wisconsin decisions have established the principle that, in equal protection analysis under Section 1, strict scrutiny is to be applied to a classification when the classification interferes with a fundamental right or is created on the basis of a suspect criterion. *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, 237 Wis. 2d 99, 128, 613 N.W. 2d 849, 865-66 (2000); *Tomczak v. Bailey*, 218 Wis.2d 245, 261-62, 578 N.W. 2d 166 (1998).

Under strict scrutiny, a classification will be upheld only if the classification promotes compelling governmental interests and is narrowly tailored to promote only such interests. *Treiber v. Knoll*, *supra*; 135 Wis. 2d at 70-71; *Gard v. State Elections Bd.*, 156 Wis. 2d 28, 44, 46, 69-70, 456 N.W. 2d 809, (1990). A classification is not narrowly tailored if it is overbroad or underinclusive in substantial respects. *Matter of Ruth E.J.*, 196 Wis. 2d 794, 803, 540 N.W. 2d 213, 216 (Wis. App. 1995).

Fundamental rights are based on the Constitution, either explicitly or implicitly, and they include access to the courts. *State v. Martin*, 191 Wis.2d 647, 652, 530 N.W.2d 422-423 (Wis. App. 1995). Where a right is specifically mentioned in the state constitution, it is entitled to more protection than those rights found only by implication, and warrants strict scrutiny. See *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

A right secured by the Wisconsin Constitution, but not the federal Constitution, is nevertheless considered "fundamental" and warrants strict scrutiny. *Matter of Eisenberg's Estate*, 90 Wis. 2d 620, 280 N.W. 2d 359 (Wis. App. 1979). In *Treiber v. Knoll*, 135 Wis.2d 58, 70-72, 398 N.W.2d 756 (1987), the Wisconsin Supreme Court, while not citing *Matter of Eisenberg's Estate*, nevertheless applied strict scrutiny to an impingement on the right to dispose of property by will. *Matter of Eisenberg's Estate* has been cited in law review commentaries for the principle that, unlike most states, Wisconsin views the right to make a will as an inherent right protected by the Wisconsin Constitution. Wisconsin is similarly unique in its constitutional guarantee of the right to counsel in civil cases.

In applying strict scrutiny to the case at bar, it must be determined whether there is a compelling state interest to support the denial of counsel to the movant, who cannot afford an attorney. While the avoidance of wasteful or needless public expenditures may be one claimed state interest, it certainly cannot be claimed that avoidance of a *justified* public expenditure which protects a constitutional right is a compelling state interest. Pecuniary interests have been found not to be compelling when balanced against fundamental interests:

Further, the Court in *Lassiter* found that although the State's pecuniary interest (in striving to economize proceeding expenses by not appointing counsel) was legitimate, "it is hardly significant enough to overcome private interests as important as those here." [citation to *Lassiter* at 28].

Joni B. v. State, 202 Wis. 2d at 15. As the United States Supreme Court stated in *Tennessee v. Lane*:

Each of these cases [*Boddie, M.L.B., Smith, Burns, Griffin, Gideon, Douglas*] makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts.

124 S. Ct. at 1994. The state's legitimate interest in saving money

provides no justification for its decision to discriminate among equally eligible citizens. *Saenz v. Roe*, 526 U.S. 489, 507, 119 S.Ct. 1518, 1528 (1999).

A second possible interest which may be claimed by the state is the desire to keep frivolous claims out of the judicial system. Whether or not this interest is compelling, the classification drawn – all poor suitors – is not narrowly tailored to achieve that interest. Indigent respondents such as the movant are not making *any* claims; they are responding to the claims of suitors who have lawyers. Even with regard only to claimants, the classification is overinclusive: Not all indigent plaintiffs or claimants will make claims which are frivolous; many will be valid. There is “. . . no necessary connection between a litigant’s assets and the seriousness of his motives in bringing suit.” *Boddie v. Connecticut*, 401 U.S. 371, 381, 91 S.Ct. 780, 788 (1971). Thus the class of all poor suitors is not narrowly tailored, but rather is extremely overinclusive.

Moreover, this state interest in minimizing frivolous claims is more likely to be served by providing counsel to indigents than by denying that right. *Pro se* litigants have no professional ethical

obligation not to pursue frivolous claims or defenses. Attorneys do. See SCR 20:3.1. Although there may be sanctions which can be imposed on *pro se* litigants for pursuing frivolous claims, those litigants are probably not aware that those sanctions exist, or even that their cases lack merit. As the Public Defender does in criminal cases, attorneys will serve a screening function, and will thus reduce the number of cases of dubious merit with which the courts must grapple. Denial of attorneys to impoverished suitors will not keep frivolous cases out of the justice system. To the contrary, this purpose is achieved in the criminal justice system by *providing* attorneys to litigants, and the “no merit” practice is constitutional. *Schmelzer v. Murphy*, 201 Wis. 2d 246, 251, 252, 548 N.W. 2d 45, 47 (1996).

Therefore, there are no compelling state interests which justify the denial of the fundamental right of counsel to impoverished suitors. In fact, the compelling state interest is in *providing* counsel, and thus eliminating the tremendous problems caused by *pro se* litigants. The denial of counsel to *all* impoverished suitors is a denial of equal protection, and it violates Article I, Section 1 of the Wisconsin

Constitution.

In interpreting equal protection under Article I, Section 1, Wisconsin looks to the United States Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Aicher v. Wisconsin Patients Compensation Fund, supra* at 128. Read together, the United States Supreme Court cases hold the following: A right to meaningful access to the courts which a state chooses to create, such as a right to appeal, or a right to appellate counsel, constitutes a fundamental right which cannot be denied without a compelling state interest and a class narrowly tailored to serve that interest. It is not a compelling interest of the state to deny this fundamental right to all poor people simply because they are poor; nor is a class of all poor people sufficiently narrowly-tailored to achieve whatever the state interests may be, such as not wasting money or avoiding frivolous appeals. The principle of equal justice that emerges is that, if the state makes a court-access remedy available, it cannot deny that remedy to indigents solely because they are poor.

In the foundation case, *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct.

585 (1956), the United States Supreme Court held that, where a state grants the right to appellate review of a criminal conviction, it may not discriminate against some convicted defendants solely on account of their poverty by denying an appeal to those unable to afford a transcript:

But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.

Id. at 18. Justice Black framed the issue as:

Whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others.

Id. at 13. The issue in the instant case may be similarly put: Whether the Wisconsin courts may, consistent with Article I, Section 1, Wisconsin's Equal Protection Clause, administer Section 21(2) so as to deny the right to appear by counsel to the poor while granting that right to all others.

The Court in *Griffin* rebutted the contention in the dissenting opinions that the Illinois law should be upheld because, by its terms, it

applied to rich and poor alike. Justice Black wrote that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Id.* at 17, n. 11. Section 21(2) can be described in precisely the same words.

Justice Frankfurter concurred in Justice Black's opinion that, if a state makes a remedy available, it cannot deny that remedy to indigents because of their lack of means. He stated:

The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.

Id. at 24.

The *Griffin* Court also recognized that the right it was declaring could be delimited, stating that it was not holding that Illinois must purchase a transcript in every case where a defendant could not buy it. Justice Frankfurter, too, indicated that there need not be concern that the right recognized by the Court would be taken to an extreme degree:

But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and

public moneys not needlessly spent . . . to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.

Id.

Through this reasoning and this language, the Court in *Griffin* fashioned a “principle of equal justice.” In 1983, the Court expressly recognized this principle in *Bearden v. Georgia*:

Griffin’s principle of “equal justice,” which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963) (indigent entitled to counsel on first direct appeal) . . .

461 U.S. 664.

In 1996, the United States Supreme Court in *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555 (1996), observed that “*Griffin’s* principle has not been confined to cases in which imprisonment is at stake,” 519 U.S. at 111, and was “of prime relevance” to the purely civil appeal which it was considering. The *M.L.B.* case is of critical significance because it applied *Griffin* to a civil, not a criminal, action. In thus extending the *Griffin* principle of equal justice, the Court noted

that, in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967), it had resisted the “feeble enticement of the ‘civil’ label-of-convenience.” 519 U.S. at 119.

While the Court acknowledged that the State’s interest in offsetting the costs of its court system was “legitimate” and satisfied the “rationality requirement,” *id.* at 122, 123, it also noted that *Mayer v. Chicago*, 404 U.S. 189, had concluded that the State’s pocketbook interest in advance payment for a transcript was “unimpressive” when measured against the stakes for the defendant, which in *Mayer* were not imprisonment, but merely an adverse effect on Mayer’s professional prospects as a medical student. Thus, this State financial interest is legitimate but not compelling. The Court found this State pocketbook interest insufficient to require M.L.B. to pay Mississippi’s document preparation fees as a condition of appeal.

The Court rebutted the argument that a law does not violate the Equal Protection Clause if it is neutral on its face and merely, in its operation, affects one class more than another. The Court looked to *Griffin* and to its opinion in *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018 (1970), in reaffirming the principle that a law nondiscriminatory

on its face may be grossly discriminatory in its operation, and is particularly offensive when it affects *only* indigents. 519 U.S. at 126-127. The Court then cited *Bearden v. Georgia*, 461 U.S. 660, 664-665, 103 S.Ct. 2064, 2068-2069 (1983), for *Griffin's* "principle of equal justice." 519 U.S. at 127.

Like *M.L.B.*, our case involves access to judicial processes. In our case, the fundamental right is the Wisconsin Constitutional right to prosecute or defend one's suit by an attorney, and the State may not "bolt the door to equal justice" by forcing impoverished suitors to appear *pro se*.

As in *M.L.B.*, in the instant case, the State's pocketbook interest in saving money is insufficient to justify denying the fundamental right to counsel. Whereas the medical student Mayer's interest in his professional prospects was not a right set forth expressly in the United States Constitution, petitioner's right to the aid of counsel is spelled out in the Wisconsin Constitution.

Although Section 21(2) is nondiscriminatory on its face, it is grossly discriminatory in its operation if suitors of means can appear by counsel and indigent suitors cannot. In this operation, the

prohibition affects *only* indigents, and thus is particularly offensive. The right to counsel is “wholly contingent on one’s ability to pay,” *M.L.B.*, *supra* at 127, and the operation of Section 21(2) visits “different consequences on two categories of persons,” *id.*; the denial of counsel applies to all indigents, and does not reach anyone outside that class. *Id.*

In *M.L.B.*, under such circumstances, the *Griffin* principle of equal justice required that Mississippi could not withhold from M.L.B., simply because she could not pay the \$2,352.36 cost, “. . . a record of sufficient completeness to permit proper appellate consideration of her claims.” *Id.* at 128. In the instant case, the *Griffin* principle of equal justice requires that Wisconsin not withhold from petitioner, simply because she is too impoverished to retain an attorney, the aid of counsel in her case.

In examining the relevance of federal right-to-counsel cases to the case at bar, it should be remembered that the United States Constitution does not contain a suitors’ rights provision which contains the right to counsel. *Wisconsin’s Constitution does.*

The case of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792

(1963) is, of course, very well-known. Employing a Due Process analysis, the United States Supreme Court held that a State must provide trial counsel for indigent defendants charged with felonies. Relying heavily on *Powell v. Alabama*, 287 U.S. 45 (1932), and its declaration that the right to the aid of counsel is of a fundamental character, 372 U.S. at 342-343, the *Gideon* Court rejected the case-by-case analysis of *Betts v. Brady*, 316 U.S. 455 (1942), decided 20 years earlier. (The *Betts* approach is similar to that adopted in *Lassiter*.) It stated that *Betts* had “departed from the sound wisdom” of *Powell*. 372 U.S. at 345. Justice Black wrote the majority opinion in *Gideon*. He also wrote the dissent in *Betts*, and in it quoted extensively from the 1859 Wisconsin case of *Carpenter v. Dane County*. 316 U.S. at 476. The *Gideon* Court did *not* rely on *Griffin* as authority, or use an Equal Protection analysis, except to state that every defendant should stand “equal before the law.” 372 U.S. at 344. In his *Betts v. Brady* dissent, however, Justice Black concluded with the statement that any practice other than assuring that no man shall be deprived of counsel merely because of his poverty would “. . . defeat the promise of our democratic society to provide equal justice

under the law.” 316 U.S. at 477.

By contrast, *Griffin* and its Equal Protection reasoning was the explicit foundation for the Court’s decision in *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), decided the same day as *Gideon*. The Court in *Douglas* did not employ a Due Process analysis, or rely on *Powell v. Alabama*. In a unanimous opinion, the *Griffin* principle of equal justice was applied to grant the right to counsel to indigent criminal defendants in an appeal of right. The *Douglas* Court described the issue before it as whether or not an indigent shall be denied the assistance of counsel on appeal, and then said:

In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has,’

citing *Griffin*.

In the next major right-to-counsel case, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153 (1981), both the majority and the dissent employed a strictly Due Process analysis. *Lassiter* is significant in that it allows for counsel to indigents in appropriate cases which are *civil*, not criminal. It is also significant

that in *M.L.B.*, *supra*, the Supreme Court stressed the counsel-affording, rather than the counsel-denying, aspects of *Lassiter*, and looked to Justice Blackmun's powerful dissent in grounding the decision.

To summarize these decisions: *M.L.B.* ignored the criminal-civil distinction and extended the right of indigents to appeal without paying costs from criminal petty offenders to civil respondents in private termination of parental rights actions. In this, the fundamental nature of the right was critical. *Lassiter* extended the right of indigents to counsel from criminal misdemeanor defendants to civil respondents in termination of parental rights actions, but on a case-by-case basis. In this, again, the fundamental nature of the right was critical. *Douglas*, on an Equal Protection analysis, and relying on *Griffin*, extended the right of indigent criminal defendants to counsel from trials to appeals.

In light of this federal jurisprudence, it is appropriate to construe Article I, Section 1 of the Wisconsin Constitution to accord the Section 21(2) right to counsel to impoverished civil suitors. There is a fundamental Constitutional right at stake – the express right to

counsel in Section 21(2). This right has been created by the state and placed in the Declaration of Rights article of its founding document, and given to affluent suitors. The criminal-civil distinction is no longer a constitutionally-permitted barrier to treating impoverished civil suitors equally with affluent civil suitors under the *Griffin-Douglas* Equal Protection rationale – *Griffin's* “principle of equal justice.” Equal treatment under this principle means that indigent suitors must be accorded the aid of counsel through court-provided counsel.

Although the Court in *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974), declined to apply *Douglas* to discretionary appeals, it nonetheless acknowledged that, while the Fourteenth Amendment does not require the state to equalize economic conditions, it does require that “. . . indigents have an adequate opportunity to present their claims fairly within the adversary system,” and that the state cannot adopt procedures which extend to indigent defendants “. . . merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" *Id.* at 612.

The Court has struck down fees which act as barriers to

indigent litigants in civil cases as well as criminal. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Little v. Streater*, 452 U.S. 1 (1981).

Thus, in federal jurisprudence, in civil cases as well as criminal cases, meaningful access to the courts cannot be denied solely because of indigency, especially where the court is the only forum in which the parties' rights can be resolved.

Wisconsin is the same. In *Treiber v. Knoll*, 135 Wis. 2d 58, 76, 398 N.W. 2d 756, 763 (1987), the Wisconsin Supreme Court, after discussing *Boddie*, held:

We conclude that the right to court access, where a fundamental interest is involved, is not a guarantee of free access for all but instead is a right not to be denied court access because of indigency.

The Wisconsin Court has long held that the state cannot discriminate between classes of suitors or parties to the same suit, giving one an unjust pecuniary advantage over the other. *Durkee v. City of Janesville*, 28 Wis. 464, 471 (1871). Moving forward 115 years, Presiding Judge Gartzke, in his concurrence in *Jacobs v. Major*, 132 Wis.2d 82, 133-134, 390 N.W.2d 86 (1986), cited *Durkee* with

approval.

When *Jacobs v. Major* went to the Wisconsin Supreme Court in 1987, the majority relied heavily on Judge Gartzke's analysis and embraced *Durkee*, paraphrasing Judge Gartzke only slightly. *Jacobs v. Major*, 139 Wis.2d 492, 508, 407 N.W.2d 832, 838 (1987).

If it is unconstitutional for the legislature to discriminate between classes of suitors or parties to the same suit, "giving one most unjust pecuniary advantage over the other," is it not just as unconstitutional for the courts to permit one suitor to appear by counsel and force the other suitor, in the same suit, to appear without counsel because the latter can't afford one?

Like the United States Supreme Court, the supreme courts of other states have recognized the *Griffin* principle of equal justice: If the state makes a remedy, such as the right to appear by counsel, available to the affluent suitor, equality demands that it be made available to the impoverished suitor. See, e.g., *Matter of Ella B.*, 30 N.Y. 2d 352, 285 N.E. 2d 288 (N.Y. 1972).

III. SECTION 22 OF ARTICLE I OF THE WISCONSIN CONSTITUTION, READ IN PARI MATERIA WITH SECTIONS 21(2) AND 1, PROVIDES TO IMPOVERISHED SUITORS THE RIGHT TO COURT-PROVIDED ATTORNEYS.

A third section of the Wisconsin Constitution which was enacted together with Sections 21(2) and 1 and concerns the same subject matter -- justice -- is Article I, Section 22. Section 21(2) and Section 1 should be construed harmoniously with Section 22, which provides:

The blessings of free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Equal justice under law is a fundamental principle. The right to counsel is a fundamental principle. Both constitute “justice.” A “firm adherence to justice” and “frequent recurrence to [the] fundamental principles” of equal justice and the right to counsel would not produce a construction of Section 21(2) which reads poor people out of “any suitor” and “any court.” Quite the contrary: a firm adherence to justice and the fundamental principle of equal justice require that Section 21(2) and Section 1 be read to guarantee poor people a right to

representation by an attorney.

Respectfully submitted,

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