10-1978

# Scott v. Illinois

Lewis F. Powell Jr.

Dissent with Baldasar v. Ill.
77-6219 prosecuting similar
Q

Grant or Hold for; if we grant it (I don't think we did)

5/14/78
Response in. Adds nothing. Stay with Grant or Hold for Baldasar.
Bob

Petr., an indigent charged with shop-lifting - an offense that gave judge discretion to fine or sentence to jail - was not provided w/ counsel.

Altho he was fined $50 & not imprisoned, he argues that Argersinger should be extended to situations where a Δ may be sentenced to jail. A judge can not know in advance of trial whether a jail sentence will be appropriate

PRELIMINARY MEMORANDUM

May 25 ~~April 14~~, 1978 Conference
List 2, Sheet 2

No. 77-1177 CSY

SCOTT

V.

ILLINOIS

Cert to Illinois Sup. Ct.
(Moran for the court; Goldenhersh, dissenting)

State/Criminal

Timely

1. SUMMARY: This petn presents the issue left open in Argersinger v. Hamlin, 407 U.S. 25 (1972): is an indigent defendant entitled to the assistance of counsel in a criminal prosecution which, under the criminal statute, might result in actual imprisonment? Because Argersinger precludes imprisonment when counsel was not provided, it may be more accurate to cast the question in slightly different terms: does the right to

If Baldasar is granted, HOLD; if not, GRANT.

Bob

the assistance of counsel extend to prosecutions for crimes sufficiently serious that the legislature has made imprisonment a possible sentence?

2. FACTS: Petr was collared by a store security guard for shop-lifting. At the trial before a Chicago circuit court, the prosecutor presented only one witness, the guard, who testified that he stopped petr outside the store. Petr, to whom nothing had been said regarding the assistance of counsel, then told his story, which was that he was stopped while still inside the store and at a time when, with money in hand, he was looking for a sales person. The judge then stated to the prosecutor, "There's a lot of questions I want to know." The prosecutor responded, "Ask them." The Court: "Why don't you ask them? Are you going to leave it right there?" The prosecutor: "We feel we have made our case." The judge thereupon asked petr a series of questions regarding the incident in order to clarify petr's story. The judge then stated to petr, "I don't believe you, sir. Finding of guilt." Petr was sentenced to pay a $50 fine.

The Appellate Court rejected petr's right to counsel argument, which was made there on both federal constitutional and state statutory grounds. In doing so, it proceeded on the assumption that petr was indigent in fact at the time of the trial. Although the record did not show that defendant petitioned for an appointed trial counsel on the grounds of indigency, the State agreed with petr that he was an indigent person in the trial court and that he had not been advised of a right to the assistance of trial counsel. Further, he had established his right to

appointed appellate counsel because of indigency.

The Illinois Supreme Court affirmed, stating its disinclination to extend Argersinger "merely because a defendant is charged with a statutory offense which provides for various sentencing alternatives upon conviction [including imprisonment]." Petn, at 3a. Like the Appellate Court, it assumed that petr was indigent at the time of his trial.

Justice Goldenhersh dissented, arguing that the right to the assistance of counsel is so important that "judges should not engage in nice calculations about when that right should be enjoyed." Petn, at 5a. He also contended that judges do not have, prior to the trial, the kind of information necessary to an intelligent decision regarding sentencing, a decision required by the narrow reading of Argersinger.

3. CONTENTIONS: Petr relies heavily on Mr. Justice Powell's concurrence in Argersinger that "It would be illogical -- and without discernible support in the Constitution -- to hold that no discretion may ever be exercised where a nominal jail sentence is contemplated and at the same time endorse the legitimacy of discretion in 'non-jail' petty-offense cases which may result in far more serious consequences than a few hours or days of incarceration." 407 U.S., at 25. Petr also restates many of the arguments leveled by Mr. Justice Powell and others at the imprisonment-in-fact standard: the Fourteenth Amendment protects both property and liberty; non-jail penalties can be more serious, both directly and in their collateral con-

sequences, than jail sentences; the judge must determine without adequate information whether to impose a term of imprisonment before hearing the case, which frustrates legislative purposes, leads to arbitrary decisions, and denies defendants of equal protection. Petr also argues that he was deprived of a fair trial here because of the lack of legal assistance.

Petr also contends that there is a circuit split and a division among the state courts on the question presented here. He also notes the existence of a split on closely related questions: can counselless misdemeanor convictions be used either for impeachment purposes in subsequent trials of the defendant or for enhancing the defendant's sentence for subsequent convictions.

4. DISCUSSION: Most state and federal courts have not extended Argersinger to those instances where imprisonment does not in fact result. E.g., United States v. White, 529 F.2d 1390 (8th Cir. 1976). Petr cites a plethora of cases supposedly coming down the other way but all but two of them are opinions where the holding in Argersinger is casually misstated, or, more accuaretly, not stated with sufficient precision, and the misstatement is in no way material to the conclusion of the court. Two courts, however, CA 5 and the Wisconsin Supreme Court, have consciously examined the issue presented here and ruled that the possibility of imprisonment triggers a right to the assistance of counsel. Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976), cert denied, December 12, 1977 (No. 77-503); Thomas v. Savage, 513 F.2d 536 (5th Cir. 1975); State ex rel. Winnie v.

Harris, 249 N.W.2d 791 (Wis. 1977). CA 5 merely continued its pre-Argersinger position. The Wisconsin Supreme Court relied primarily on the argument that the trial judge, whether proceeding on an ad hoc basis or the basis of categories of crimes, cannot sensibly make the imprisonment decision before the case has been tried, as the narrow reading of Argersinger requires. It thus agreed with the conclusions in S. Krantz, et al, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin 69-117 (1976).

In December 1977, the Court denied cert in Potts, supra, where the admissibility of prior counselless misdemeanor convictions for impeachment purposes was raised. In Baldasar v. Illinois, April 14, 1978 Conference, List 2, Sheet 2 (No. 77-6219)(no response), petr asks whether a prior uncounseled misdemeanor conviction may be used to increase a sentence for a subsequent misdemeanor offense under an enhanced penalty statute.

I recommend a grant in Baldasar, which will permit the Court to answer the fundamental question raised here regarding the scope of the right to counsel plus the question of subsequent use of counselless convictions, and a hold for this case. (This is assuming that a response in Baldasar and this case will not demonstrate some independent reason for denying.) The Court was understandably concerned in Argersinger with the impact of the decision, and any wider decision, on the criminal justice system. But the courts have lived with Argersinger now for a sufficiently long time, and sufficient attention has been focused on the problem of impact, e.g., S. Krantz, supra, that

the Court can, with some surety, reenter the area to resolve the conflicts that have arisen.

There is no response.

4/3/78 Stewart ops in petn

May 25, 1978

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

*Argued* ....., 19... *Assigned* ....., 19... No. 77-1177

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

SCOTT

vs.

ILLINOIS

Response requested and received.

C & PS
think case is
correctly decided
- but we should
settle law. Bryan
agree but also
think we should
grant to resolve
conflict.
C & thinks
we could
affirm summarily.

Grant

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | |
| Burger, Ch. J. | | | ✓ | | | | | | | | | | |
| Brennan, J. | | ✓ | | | | | | | | | | | |
| Stewart, J. | | ✓ | | | | | | | | | | | |
| White, J. | | ✓ | | | | | | | | | | | |
| Marshall, J. | | ✓ | | | | | | | | | | | |
| Blackmun, J. | ✓ | | | for Baldasar v. Ill. | | | | | | | | | |
| Powell, J. | | ✓ | | | | | | | | | | | |
| Rehnquist, J. | | | ✓ | | | | | | | | | | |
| Stevens, J. | | ✓ | | | | | | | | | | | |
| | | | | | | | | | | | | | |

BB 11/28/78 Argersinger applies only when imprisonment is to be imposed. Judge must pre-determine.

Petr. urges extension of Argersinger to require ~~attorneys~~ counsel for indigents in (1) all petty criminal cases ~~actually~~ (i.e. all misdemeanor cases, or (2) all cases where — as here — the offense is punishable by jail as well as by a fine.

Not much practical difference between these two, as most misdemeanor statutes provide for "jail or fine".

I'll adhere to my Argersinger opinion. Due process requires a ~~fair~~ fair trial. No bright line rule in both fair to ~~accused~~ accused and feasible for application in the thousands of misdemeanor cases. Bright line rule ~~is~~ deprives judge of discretion, and would create the "chaos" described by SG in Argersinger

BENCH MEMORANDUM

To: Mr. Justice Powell

Re: Scott v. Illinois, No. 77-1177

Scott was arrested and charged with petty theft. The charge carried a possible punishment of a fine up to $150 or imprisonment up to one year, or both. Petr was indigent at the time of his trial, and was not advised of a right to the assistance of counsel; he did not request the appointment of counsel. After a bench trial at which Scott was not represented by counsel, he was convicted and fined $50.

The Illinois Supreme Court affirmed the conviction. It refused Scott's invitation to extend Argersinger v. Hamlin,

407 U.S. 25 (1972), to cases in which the defendant might be but is not sentenced to a term of imprisonment.

Petr's Arguments for Reversal

The petr begins with the observation that the Sixth Amendment applies the right to counsel "in all criminal prosecutions." He points out that the Sixth Amendment right to counsel has been regarded as an essential element of fundamental fairness, and has been incorporated into the due process standard of the Fourteenth Amendment. He contends that the States are bound to provide counsel to indigent defendants in all criminal prosecutions, or at least in every criminal prosecution where the law authorizes imprisonment.

Either of the rules contended for by petr entails an expansion of the right to counsel beyond the imprisonment-in-fact standard adopted by the Court in Argersinger. Petr contends that while the Court correctly decided there that the Sixth Amendment requires at least that counsel be provided in a trial resulting in imprisonment, it would be error to conclude that imprisonment-in-fact marks the limit of the Sixth Amendment requirement. Many cases which do not result in imprisonment nonetheless result in serious penalties for the convicted defendant. And other Sixth Amendment rights, enjoyed by a defendant not eligible for counsel under the imprisonment-in-fact standard, cannot be exercised effectively without assistance of counsel. Further, the imprisonment-in-fact

standard results in judicial creation of a class of "ultra-petty offenses" in which judges determine before trial that regardless of the penalties authorized by the legislature, no sentences of imprisonment will be imposed.

The petr also argues that due process of law, considered apart from the particular language of the Sixth Amendment, requires appointment of counsel in all criminal prosecutions, or at least in those in which imprisonment is authorized by law. Scott contends that without the assistance of counsel, many defendants will be unable to make skilled inquiry into the facts or to cope with questions of law that may arise.

In anticipation of the argument that society cannot afford to provide counsel to indigent defendants in all misdemeanor cases, or in all those with an authorized sentence of imprisonment, petr argues in effect that society cannot afford not to provide counsel in such cases. He bases this contention partly on the observation that "government has a paramount interest in assuring that criminal trials result in fair determinations of guilt or innocence," and that assistance of counsel is often necessary to accurate fact-finding. He also urges that maintenance of the imprisonment-in-fact standard, requiring a pre-trial judicial determination of whether or not a sentence of imprisonment will be imposed upon conviction, detracts from society's interest in a fair and

accurate criminal justice system.

With regard to the cost of providing the legal services for which he contends, petr cites two recent studies. He reports that both studies "concluded that reliable statistics to support an accurate estimate of this cost do not exist, that 'the question of calculating the cost of defense services remains largely an enigma.'" Br., at 38.

The petr also makes an equal protection argument in support of his position. Any rule that limits the right to counsel of indigent defendants in petty crimes, petr points out, depends on a classification on the basis of wealth. Since the right to counsel is of fundamental importance to a fair trial, petr concludes, a rule denying counsel to indigents violates the Equal Protection Clause.

In closing, petr points out several respects in which he contends that his trial was unfair. These are set forth at pp. 62-64 of Petr's Brief, and I will not repeat them here.

Resp's Arguments for Affirmance

The resp relies heavily on Argersinger, which it views as a decision balancing the interest of the defendant in representation by counsel against the burden on the State if it is required to provide counsel in all criminal prosecutions. "Faced with the alternatives of allowing an accused to be deprived of his liberty without counsel or requiring the States

to provide counsel for all indigents accused of any criminal offense, the Court imposed a standard accommodating both the rights of the accused and the needs of society." Throughout its Brief, the State stresses that although the scope of other Sixth Amendment rights (other than the right to trial by jury) have never been made to depend upon the seriousness of the offense charged, none of the other such rights implicate a "compelling pecuniary interest" of the State.

State argues cost

The State argues that the distinction between the sanction of imprisonment and all other direct or collateral consequences of conviction is sufficiently clear and significant to provide a reasonable boundary for the right to counsel. In support of this contention, resp cites Muniz v. Hoffman, 422 U.S. 454, 457 (1975), where the Court held that the imposition of a $10,000 fine did not require a jury trial. The Court said, "From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different."

The State also argues that indigent misdemeanor defendants would receive only small benefit from representation by counsel. The State argues that procedures in the misdemeanor courts are informal, that few defendants hire lawyers, and that often the state is represented not by an attorney but by the arresting police officer. It argues that

the right to a jury trial almost always is waived, as it was in this case, so that there is no need for counsel to direct the defense in the more complicated setting of a jury trial.

The small benefits to the defendants to be realized from expansion of the right to counsel, the State urges, cannot justify the high cost to the State of providing counsel. It cites the results of a survey that show tht since Argersinger, many local courts have stopped incarcerating misdemeanor defendants because of an inability to provide them with counsel.

With regard to the pre-trial determination of probable sentencing required by the Argersinger rule, the State contends that an experienced misdemeanor judge has no difficulty in making that judgment. It also argues that the defendant has no reason to complain of a pre-trial decision that forecloses the possibility of a sentence of imprisonment. If the State decides to tolerate this kind of sentencing decison rather than pay for counsel for all indigent misdemeanor defendants, then, according to the State, that decision is of no concern to either the defendant or this Court.

The State contends that petr's claims based on the Equal Protection Clause and on the Due Process Clause considered apart from the Sixth Amendment were not raised in the state courts or in the petition for certiorari. Question 2 in the Petition for Certiorari raised the question whether

petr's trial was so unfair as to constitute a violation of due process. This claim was not passed on by either of the state appellate courts.

Petr asserts that the other claims he raises in his Brief are comprised fairly within Question 1 of the Petition.

> "Whether the sixth and fourteenth amendments to the United States Constitution guarantee the right to counsel when a defendant is charged with an offense punishable under state law by imprisonment, regardless of whether the defendant is in fact imprisoned?"

The equal protection claim does rest on the Equal Protection Clause of the Fourteenth Amendment. But that claim is not mentioned in either of the state court opinions in this case or in the Petition for Certiorari. The same is true of petr's argument that even if the Sixth Amendment does not require counsel for all indigent misdemeanor defendants, the Due Process Clause of the Fourteenth Amendment does. My reading of the opinions below and the petition in this Court indicates to me that this case has been treated throughout as presenting the Sixth Amendment question left open in Argersinger, and I think it should continue to be treated on that narrow basis.

Discussion:

You set out your views in this area in your concurring opinion in Argersinger, a copy of which is attached to this memorandum.

Assuming that the Court will not now reexamine the Argersinger holding and adopt your suggested due process approach to the provision of counsel in all petty or misdemeanor cases, I expect that it will tend towards some bright-line boundary for the right to counsel in such cases. One possibility is to adopt (1) the imprisonment-in-fact standard of Argersinger as the limit of the due process right to counsel. Another is to adopt (2) a standard of possibility-of-imprisonment, and a third is to settle on (3) a rule requiring counsel for all misdemeanor defendants.

Possible holdings

About the same as most misdemeanor statutes provide for jail or fines or both

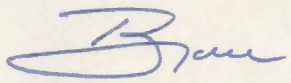
There is little practical difference between the second and third suggestions, since most petty or misdemeanor crimes carry the possibility of some imprisonment. This probably explains why the petr is never careful in his Brief to specify which of the two rules he prefers. (The "Question Presented" in the Petition for Certiorari does opt for the possibility-of-imprisonment standard; see p. 7 supra.) The difficulty with either of petr's suggestions is obvious -- the States must shoulder considerable additional burdens in order to enforce their laws, when in many cases the demands of fair and accurate fact-finding and application of the law may be satisfied without providing counsel. The difficulties with the first alternative, adopting the Argersinger rule as the limit of due process requirements, are stated in your concurring opinion in that case.

The Argersinger chickens have come home to roost. The majority opinion in that case refers to the Sixth Amendment standards for "all criminal prosecutions" in defining the requirements of due process under the Fourteenth Amendment. If the language of the Sixth Amendment, and its history, compel the conclusion that counsel is required at least in "all criminal prosecutions" resulting in imprisonment, it is difficult to see any reasoned distinction that will limit the requirement at the point of imprisonment. Only the right to jury trial has been limited in a similar way, and that limitation rests explicitly on the peculiar history of the jury trial right.

As a matter of practical statemanship, however, it would still be preferable to apply the due process rule of fairness that you suggested in Argersinger to misdemeanor or petty crime prosecutions not resulting in imprisonment. I think it would be worth swallowing the logical difficulty of distinguishing imprisonment from other consequences of such prosecutions in order to avoid further extension of the rule of mandatory provision of counsel.

In my view, the most difficult result to justify would be a holding that imprisonment-in-fact defines the limit of the due process right to counsel in criminal prosecutions. For all of the reasons stated in your concurring opinion in Argersinger, it seems clear that there will be at least some

misdemeanor cases in which no imprisonment results, but in which the interests at stake and the complexity of the issues create a need for assistance of counsel.



77-1177 SCOTT v. ILLINOIS Argued 12/4/78

Case from Ill. requesting us to expand Argersinger.

Elson (Petr)

So long as statute creating the offence authorizes jail sentence, there is a right to counsel.

[Potter observed that Petr. is asking us to re-examine Argersinger.

Petr was not advised of any of his rights.

Not all misdemeanors would require counsel – e.g. spitting on sidewalk. Only those that involve crimes (usually common law crimes) that carry serious consequences in addition to the jail sentence – e.g. criminal record, stigma, loss of vote. Here, there were all of the indicia of a criminal defendant.

Miss Papushkewych (Asst A.G. of Ill)

40 to 48% of misdemeanor case Δs are indigent.

State does not contest indigency of Petr. in this case

[John Stevens makes point that if it pursues at trial is objective it is immaterial whether Δ is sentenced to jail or merely fined. (I agree)

Papushkewych (cont.)

Δ in this case had a right to a transcript & judge so advised D. Also Δ was advised of right to appeal.

Survey found that judges in small towns & counties have difficulty in complying with Argersinger.

Affirm 5
Rev. Judy 2
Reverse 2

77-1177 Scott v. Illinois Conf. 12/6/78

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The Chief Justice Affirm

When 6th Amend. was drafted, only felonies were considered crimes. ~~Argersinger~~

Argersinger went beyond Framers' intent & held "no lawyer, no imprisonment".

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Mr. Justice Brennan Reverse

Counsel should be provided whenever a jail sentence may be imposed by statute.

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Mr. Justice Stewart Affirm

Stand on Argersinger. This set a bright line. If a D doesn't have a lawyer, he can't be sentenced to jail. Not theoretically flawless, but meets Const. standards.

Argersinger was fully considered ~~after~~ recently.

Mr. Justice Powell Concur in Judgment

No satisfactory ~~solution~~ resolution of issue as to when counsel must be provided. In theory, farmer would require aid of lawyer whenever ~~one~~ a penalty may be imposed. But that would overburden the system beyond its capacity to function.

If we reconsider Argersinger, I'll stand on my opinion in that case.

If Argersinger remains law, I'll probably join judgment.

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Mr. Justice Rehnquist Affirm

WHR joined my op. in Argersinger - but with new recognize it as precedent

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Mr. Justice Stevens Reverse

Agree with much of what LFP said in concurring in Argersinger, but we do need a bright line.

Would prefer to cut back the Argersinger line to require lawyer only when sentence may be 6 months or more. ~~But~~ Argersinger is law, but it need not be applied in this case

??

Mr. Justice White Affirm

On Argersinger.

No one now complains about the administration of our rule in that case.

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Mr. Justice Marshall ~~Reverse~~

Concur in Result

Argersinger has worked well.

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Mr. Justice Blackmun Affirm

Follow Argersinger — illogical as it may be. It creates problems — e.g. when fine is not paid. Is inconsistent with Baldwin as to jury trials. But we need a bright line — despite its illogic and in some cases unfairness.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 12 JAN 1979

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, v. State of Illinois. } On Writ of Certiorari to the Supreme Court of Illinois.

[January —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to resolve a conflict among state and lower federal courts regarding the proper application of our decision in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).[1] Petitioner Scott was convicted of theft and fined $50 after a bench trial in the Circuit Court of Cook County, Ill. His conviction was affirmed by the state intermediate appellate court and then by the Supreme Court of Illinois, over Scott's contention that the Sixth and Fourteenth Amendments to the United States Constitution required that Illinois provide trial counsel to him at its expense.

Petitioner Scott was convicted of shoplifting merchandise valued at less than $150. The applicable Illinois statute sets the maximum penalty for such an offense at a $500 fine or one year in jail, or both.[2] The petitioner argues that a line of

[1] Compare, *e. g.*, *Potts* v. *Estelle*, 529 F. 2d 450 (CA5 1976); *In re Di Bella*, 518 F. 2d 955 (CA2 1975); *State ex rel. Winnie* v. *Harris*, 75 Wis. 2d 547, 249 N. W. 2d 791 (1977), with *United States* v. *White*, 529 F. 2d 1390 (CA8 1976); *Sweeten* v. *Sneddon*, 463 F. 2d 713 (CA10 1972); *Rollins* v. *State*, 299 So. 2d 586 (Fla. 1974), cert. denied, 419 U. S. 1009 (1974).

[2] Ill. Rev. Stat. 1969, ch. 38, par. 16-1. The penalty provision of the statute provides in relevant part:

"A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned

this Court's cases culminating in *Argersinger* v. *Hamlin, supra,* require State provision of counsel whenever imprisonment is an authorized penalty.

The Supreme Court of Illinois rejected this contention, quoting the following language from *Argersinger:*

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U. S., at 37.
>
> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." *Id.*, at 40.

The Supreme Court of Illinois went on to state that it was "not inclined to extend *Argersinger*" to the case where a defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed upon the defendant. 68 Ill. 2d 269, 272, 369 N. E. 2d 881, 882 (1977). We agree with the Supreme Court of Illinois that the Federal Constitution does not require a trial court to appoint counsel for a criminal defendant such as petitioner, and we therefore affirm its judgment.

In his petition for certiorari, petitioner referred to the issue in this case as "the question left open in *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972)." Petition, at 5. Whether this question was indeed "left open" in *Argersinger* depends upon

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in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. . . ."

whether one considers that opinion to be a point in a moving line or a holding that the States are required to go only so far in furnishing counsel to indigent defendants. The Supreme Court of Illinois, in quoting the above language from *Argersinger*, clearly viewed the latter as *Argersinger*'s holding. Additional support for this proposition may be derived from the concluding paragraph of the opinion in that case:

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy." 407 U. S., at 40.

Petitioner, on the other hand, refers to language in the Court's opinion, responding to the opinion of MR. JUSTICE POWELL, which states that the Court "need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . . for here petitioner was in fact sentenced to jail." *Id.*, at 37.

There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution to employ a lawyer to assist in his defense. W. Beaney, The Right to Counsel in American Courts 27–30 (1955). In *Powell* v. *Alabama*, 287 U. S. 45 (1932), the Court held that Alabama was obligated to appoint counsel for the Scottsboro defendants, phrasing the inquiry as "whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the Due Process Clause of the Fourteenth Amendment." *Id.*, at 52. It concluded its opinion with the following language:

> "The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint

> counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right." 287 U. S., at 73.

*Betts* v. *Brady*, 316 U. S. 455 (1942), held that not every indigent defendant accused in a state criminal prosecution was entitled to appointment of counsel. A determination had to be made in each individual case whether failure to appoint counsel was a denial of fundamental fairness. *Betts* was in turn overruled in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). In *Gideon*, *Betts* was described as holding "that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment. . . ." *Id.*, at 339.

Several Terms later the Court held in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), that the right to jury trial in federal court guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth Amendment. The Court held, however, that "[i]t is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses . . . ." *Id.*, at 159 (footnote omitted). In *Baldwin* v. *New York*, 399 U. S. 66, 69 (1970), the controlling opinion of MR. JUSTICE WHITE concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."

In *Argersinger* the State of Florida urged that a similar dichotomy be employed in the right-to-counsel area: any offense punishable by less than six months in jail should not require appointment of counsel for an indigent defendant.[3] The *Argersinger* Court rejected this analogy, however, observing that "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone." 407 U. S., at 29.

The number of separate opinions in *Gideon, supra, Duncan, supra, Baldwin, supra,* and *Argersinger, supra,* suggests that constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another. The process of incorporation creates special difficulties, for the state and federal contexts are often different and application of the same principle may have ramifications distinct in degree and kind. The range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the "petty" offense part of the spectrum. As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. We have now in our decided cases forsaken the literal meaning of the Sixth Amendment. And we cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors. See *Powell* v. *Alabama, supra,* at 60.

In *Argersinger* the Court rejected arguments that social cost or a lack of available lawyers militated against its holding, in some part because it thought these arguments were factually incorrect. 407 U. S., at 37 n. 7. But they were

[3] Brief of Respondent, at 12, *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).

True
This is what I would avoid - holding that the Court draws these lines.

rejected in much larger part because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule. The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty," 407 U. S., at 32, and to "a case that actually leads to imprisonment even for a brief period," 407 U. S., at 33. THE CHIEF JUSTICE in his opinion concurring in the result also observed that "any deprivation of liberty is a serious matter." 407 U. S., at 41.

Of course — but not the only serious matter

Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the Sixth Amendment right to appointed counsel in state criminal proceedings.[4] Even were the matter *res nova,* we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.[5] We therefore hold that the Sixth

Holding

Who says so?

[4] We note that the line drawn in *Argersinger* was with full awareness of the various options. Both the petitioner in that case and the Legal Aid Society of New York, as *amicus curiae,* argued that the right to appointed counsel should pertain in any case in which imprisonment was an authorized penalty for the underlying offense. Brief for the Petitioner, at 4; Brief of the Legal Aid Society of New York as *Amicus Curiae,* at 5–11. Respondent Florida and the *amici* States urged that the line be drawn as it had been in *Baldwin* for purposes of the jury trial guarantee. See, *e. g.,* Brief of Respondent, at 12. The Solicitor General argued for the standard that was finally adopted—that of actual imprisonment. Brief for the United States as *Amicus Curiae,* at 22–24.

[5] Unfortunately, extensive empirical work has not been done. That which exists suggests that the requirements of *Argersinger* have not proved

and Fourteenth Amendments to the United States Constitution require only that any indigent criminal defendant who is sentenced to a term of imprisonment have been afforded the right to assistance of appointed counsel in his defense. The judgment of the Supreme Court of Illinois is accordingly

*Affirmed.*

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to be unduly burdensome. See, *e. g.*, Ingraham, The Impact of *Argersinger*—One Year Later, 8 Law & Society Rev. 615 (1974). That some jurisdictions have had difficulty implementing *Argersinger* is certainly not an argument for extending it. S. Krantz et al., Right to Counsel in Criminal Cases 1–18 (1976).

LFP/lab 1/15/79 77-1177 Scott v. Illinois

First Draft
file

MR. JUSTICE POWELL, concurring in the judgment.

I am not able to join the opinion of the Court for the reasons stated fully in my concurring opinion in Argersinger v. Hamlin, 407 U.S. 25, --- (1972). Petitioner here was convicted of shoplifting, and the only penalty imposed was a $50 fine. The applicable Illinois statute provided a maximum penalty of a $500 fine or one year in jail, or both. Petitioner argues that counsel must be provided an indigent defendant whenever imprisonment is an authorized penalty. The Court rejects that argument, holding that Argersinger requires counsel only when there is an actual deprivation of a person's liberty.

The Court's opinion, with commendable candor, recognizes that it is "line-drawing", that the line "already [is] extended", and that "our decided cases [have] forsaken the literal meaning of the Sixth Amendment". Ante at 5.

If the forsaking of the Sixth Amendment can be forgiven, I would have thought that recourse would have been to the Due Process Clause of the Fifth and Fourteenth Amendments and its concept of fundamental fairness. To be sure, a drawn line - if bright enough - is thought to have the merit of uniformity and ease of application. For the

reasons set forth in my opinion in Argersinger, its "line" results neither in uniformity nor is it invariably easy to apply. Most misdemeanor or petty crime statutes provide, as does the Illinois statute at issue here, for a jail sentence or a fine or both, the sentence to vary according to the severity and circumstances of the offense, including the record of the offender. The penalty provisions of such statutes are intended to afford flexibility in sentencing, according discretion in this respect to the sentencing authority.

The Argersinger line inevitably frustrates this salutory purpose in a high percentage of cases. It requires the presiding judge to determine in advance of hearing any evidence, or indeed in advance of knowing anything about the case or the defendant except the charge, to make one of the more critical decisions: whether he will forego the legislatively granted option to impose a jail sentence for even so much as a single day. Unless the presiding judge foregoes this option, he must appoint counsel if indigency is claimed - as it often is. The Court's opinion states, in the absence of "extensive empirical" documentation, that "Argersinger has proved reasonably workable". Ante at Perhaps this is true if the Court simply means that judges can follow the Argersinger rule. It is quite simple - invitingly simple - for a judge to forego the responsibility

imposed on him by the legislature to consider whether the evidence adduced at trial and the record of the defendant warrants a jail sentence. Moreover, the decision not to exercise the prescribed sentencing discretion often is forced upon the judge by circumstances. In the busy metropolitan misdemeanor court, where dockets are overcrowded and delay already is intolerable, the appointment of counsel is likely to exacerbate these problems. In counties and small towns, remote from metropolitan bars, counsel may be wholly unavailable. It is predictable in these situations that all too often the pressure to take the easy Argersinger course of deciding in advance the character of the punishment, will be too great to resist.

Quite apart from this de facto nullification of a large element of the sentencing discretion authorized by the legislature, the effect on the criminal justice system is unlikely to be in the public interest. It is not unreasonable to suppose that the deterrence factor of the criminal law is weakened. There will be fewer jail sentences imposed for petty crimes, and the imposition of a fine upon an indigent is likely to be no penalty at all.

The other side of the coin, addressed in my Argersinger concurring opinion, is that no counsel need be provided for petty offenses where conviction may be more

serious than a brief incarceration. The case that comes at once to mind is the revocation of one's driver's license where driving may be indispensable to livelihood. There may be many other situations where conviction of an offense, not carrying a jail sentence, is more a deprivation than a night in jail.

In sum, the Argersinger line-drawing often will lack the element of fairness when applied to defendants, and in other situations seems likely to disserve the public interest in the detering of petty crime. In a more fundamental sense, it is grounded in no constitutional provision. The Court concedes that the Sixth Amendment's literal meaning has been "foresaken". In my view, the very concept of fundamental fairness as a due process doctrine applicable to each trial is foresaken by inflexible line-drawing. In my Argersinger concurrence, supra, at , I outlined the principles that should guide a Court's decision in determining whether and when duep process requires the appointment of counsel. I adhere to the views there expressed.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 15, 1979

Re: 77-1177 - Scott v. Illinois

Dear Bill,

I agree.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1979

Re: No. 77-1177 - Scott v. Illinois

Dear Bill:

Subject to our telephone conversation, I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

January 16, 1979

77-1177 Scott v. Illinois

Dear Bill:

Although I probably will concur in the judgment, I will write something in this case.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1979

RE: No. 77-1177 Aubrey Scott v. Illinois

Dear Bill:

I'll circulate a dissent in this case in due course.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1979

Re: No. 77-1177 - Aubrey Scott v. Illinois

Dear Bill:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

January 18, 1979

Dear Bill:

Re: 77-1177 Scott v. Illinois

I join.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 30 JAN 1979

1st DRAFT

Recirculated: _____

# SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

The petitioner was tried for shoplifting under an Illinois statute providing for a maximum penalty of a $500 fine or one year in jail, or both. After waiving his right to a jury trial, the petitioner was convicted and fined $50. The Court rejects the petitioner's argument that as an indigent, he should have been provided with counsel because imprisonment was an authorized penalty for the crime with which he was charged. Relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court holds instead that the Sixth and Fourteenth Amendments require the States to provide counsel only to indigents who are sentenced to terms of imprisonment. Although I concur in the affirmance of the petitioner's conviction, I am unable to join the opinion of the Court. See *id.*, at 44 (POWELL, J., concurring).

The Court's opinion, with commendable candor, states that "our decided cases [have] forsaken the literal meaning of the Sixth Amendment." *Ante*, at 5. This acknowledgement is highlighted by the absence of historical or precedential justification for the line the Court draws to limit the "already extended" reach of the Sixth Amendment. *Ibid.* As the Sixth Amendment provides no guidance in this area, the Court should recur to the Due Process Clause, which in its basic concept of fairness gives full recognition to the constitutional interests of criminal defendants. Instead, the Court finds in the Sixth Amendment a categorical difference between indi-

gent state misdemeanor defendants who are sentenced to imprisonment and those who are not, and concludes that the Constitution guarantees only the former group the right to assistance of appointed counsel.

The rule adopted by the Court in this case and in *Argersinger* is easy to apply, in the sense that a state court can have to doubt as to this prerequisite for an imposition of a sentence of imprisonment. For the reasons set forth in my opinion in *Argersinger,* however, I adhere to my view that the Court's rule imposes burdens on both defendants and the public that are too severe to be justified by the apparent simplicity of the rule.

Some defendants may be affected more seriously by the payment of a fine, the loss of a driver's license, or the impact of the stigma attached to a conviction, than by a brief incarceration. Yet no matter how serious the nonimprisonment consequences of conviction, there is no right to counsel under the Court's rule unless a sentence of imprisonment also is imposed. Similarly, defendants who do not have a right to counsel under the Court's rule may be faced by legal or factual questions as complex as those raised by the charges against defendants who are sentenced to prison. The lack of counsel may be especially unfair where a defendant who is not afforded counsel under the Court's rule exercises a right to trial by jury, for "before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant." *Id.,* at 46 (POWELL, J., concurring).

The Court's rule, in addition to denying assistance of counsel unfairly in some cases, also impairs the functioning of the criminal justice system. Most misdemeanor and petty crime statutes provide for imprisonment, a fine, or both. The penalty provisions of such statutes are intended to afford the judge considerable flexibility in fitting the sentence to the circumstances and severity of the offense and to the record of

the offender. The "bright line" adopted by the Court in this case and *Argersinger* inevitably frustrates this important purpose. The trial judge, in advance of hearing any evidence, indeed, in advance of knowing anything about the case except the charge, must decide whether he will forego the legislatively granted authority to impose a sentence of imprisonment upon conviction. Unless the judge surrenders this option, he must appoint counsel to assist the indigent defendant. Thus, the Court's rule forces the trial judge to make an important preliminary sentencing decision without the knowledge on which such decisions should be based.

Moreover, given the practical realities of the misdemeanor and petty offense trial courts in the States, one can forsee readily the direction in which the *Argersinger* rule will distort the penalties imposed. In busy metropolitan courts, where dockets are overcrowded and delay already is intolerable, trial judges are likely to dispense with the option of imprisonment rather than further delay proceedings to secure counsel for an indigent defendant. In rural counties and small towns, remote from metropolitan bars and often strapped for funds, counsel may be wholly unavailable or else beyond the financial means of the local government. As a result, in many cases in which due process would not require assistance of counsel, the trial judge will be pressured nonetheless to foreclose the option of a sentence of imprisonment.*

Quite apart from the irrationalities and distortions introduced into the sentencing decisions of state trial judges, the Court's rule has a serious impact on another important public interest. It is not unreasonable to suppose that the deterrent effect of the misdemeanor and petty offense laws is weakened by a systematic reduction in the number of jail sentences imposed. The Court's rule will also make the en-

*See National Legal Aid and Defender Assn., The Other Face of Justice 38–40, 63–64 (1973); *Argersinger, supra,* at 55–61 (POWELL, J., concurring).

forcement of fines against recalcitrant defendants difficult, if not impossible, as it seems unlikely that the Court contemplates the circumvention of its rule by the jailing of uncounseled indigents for failure to pay such fines. *Id.*, at 55 (POWELL, J., concurring).

In sum, the *Argersinger* line often will result in unfairness to defendants, and in many other situations seems likely to disserve the public interest in a rational and effective system of criminal justice. These flaws are but indications of the lack of any constitutional basis for the Court's categorical rule. In my view, the very concept of fairness as a due process doctrine applicable to each trial precludes such inflexible line-drawing. Rather, in each case the trial judge should decide whether fairness requires appointment of counsel after considering the complexity of the offense charged, the severity of the sentence that might follow conviction, and other factors peculiar to each case. In my opinion in *Argersinger*, I reviewed this inquiry, and the demands that it would place on state trial judges. *Id.*, at 64–65 (POWELL, J., concurring).

Here, the petitioner waived a jury trial on a simple charge of shoplifting several items valued at $13.68. The prosecutor made no opening or closing statement, did not object to any testimony offered by the petitioner, declined the court's invitation to cross-examine the petitioner, and called no rebuttal witnesses. The trial court, in contrast, took an active role in questioning the petitioner about the facts surrounding his arrest. Since there was no unfairness in trying the petitioner without affording him the assistance of counsel, I join in the judgment affirming his conviction.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 7 FEB 1979

Recirculated: ✓

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

I've written separately. I don't agree with this

[February —, 1979]

MR. JUSTICE BRENNAN, dissenting.

The Sixth Amendment provides that "In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." (Emphasis supplied.) *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), extended the Sixth Amendment right to counsel to the States through the Fourteenth Amendment and held that the right includes the right of the indigent to have counsel provided. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), held that the right recognized in *Gideon* extends to the trial of any offense for which a convicted defendant is likely to be incarcerated.

This case presents the question whether the right to counsel extends to a person accused of an offense that, although punishable by incarceration, is actually punished only by a fine. Petitioner Aubrey Scott was charged with theft in violation of Ill. Rev. Stat. ch. 38, § 16-1 (A)(1) (1972), an offense punishable by imprisonment up to one year or by a fine up to $500, or by both. About four months before *Argersinger* was decided, Scott had a bench trial, without counsel, and without notice of entitlement to retain counsel or, if indigent,[1] to have counsel provided. He was found guilty as charged and sentenced to pay a $50 fine.

[1] Scott was found to be indigent at the time of his initial appeal, and an attorney was therefore appointed for him and he was provided a free transcript of his trial for use on the appeal. The Illinois courts and the parties have assumed his indigency at the time of trial for purposes of this case. See Appendix to Pet. for Cert., at 1a–2a, 10a–11a.

The Court, in an opinion that at best ignores the basic principles of prior decisions, affirms Scott's conviction without counsel because he was sentenced only to pay a fine. In my view, the plain wording of the Sixth Amendment and the Court's precedents compel the conclusion that Scott's uncounseled conviction violated the Sixth and Fourteenth Amendments and should be reversed.

I

Both the Court's opinion and the concurrence intimate a view that the Court's precedents ordaining the right to appointed counsel for indigent accuseds in state criminal proceedings fail to provide a principled basis for deciding this case. That is demonstrably not so. The principles developed in the relevant precedents are clear and sound. The Court simply chooses to ignore them.

*Gideon* v. *Wainwright* held that, because representation by counsel in a criminal proceeding is "a fundamental right, essential to a fair trial," 372 U. S., at 342, the Sixth Amendment right to counsel was applicable to the States through the Fourteenth Amendment:

> "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers

> in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.*, at 344.

Earlier precedents had recognized that the assistance of appointed counsel was critical, not only to equalize the sides in an adversary criminal process,[2] but also to give substance to other constitutional and procedural protections afforded criminal defendants.[3] *Gideon* established the right

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[2] "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is [re]presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938).

[3] "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much

to appointed counsel for indigent accuseds as a categorical requirement, making the Court's former case-by-case due-process analysis, cf. *Betts* v. *Brady*, 316 U. S. 455 (1942), unnecessary in cases covered by its holding. *Gideon* involved a felony prosecution, but that fact was not crucial to the decision; its reasoning extended, in the words of the Sixth Amendment, to "*all* criminal prosecutions." [4]

*Argersinger* v. *Hamlin* took a cautious approach toward implementing the logical consequences of *Gideon*'s rationale. The petitioner in *Argersinger* had been sentenced to jail for 90 days after conviction—at a trial without cousel—of carrying a concealed weapon, a Florida offense carrying an authorized penalty of imprisonment up to six months and a fine up to $1,000. The State, relying on *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Baldwin* v. *New York*, 399 U. S. 66 (1970), urged that the Sixth Amendment right to counsel, like the right to jury trial, should not apply to accuseds charged with "petty" offenses punishable by less than six months imprisonment. But *Argersinger* refused to extend the "petty" offense limitation to the right to counsel. The Court pointed out that the limitation was contrary to the express words of the Sixth Amendment, which guarantee its enumerated rights "[i]n all criminal prosecutions"; that the right to jury trial was the only Sixth Amendment right applicable to the States that had been held inapplicable to "petty offenses"; [5] that this

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more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932).

[4] See *Argersinger* v. *Hamlin*, 407 U. S. 25, 31 (1972).

[5] "It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf." *Argersinger* v. *Hamlin*, 407 U. S. 25, 28 (1972), quoting Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 705 (1968). Cf. *In re Oliver*, 333 U. S. 257 (1948) (right to a public trial); *Pointer* v. *Texas*, 380 U. S. 400 (1965) (right to confrontation);

limitation had been based on historical considerations peculiar to the right to jury trial; [6] and that the right to counsel was more fundamentally related to the fairness of criminal prosecutions than the right to jury trial and was in fact essential to the meaningful exercise of other Sixth Amendment protections.[7]

Although its analysis, like that in *Gideon* and other earlier cases, suggested that the Sixth Amendment right to counsel should apply to all state criminal prosecutions, *Argersinger* held only that an indigent defendant is entitled to appointed counsel, even in petty offenses punishable by six months of incarceration or less, if he is likely to be sentenced to incarceration for any time if convicted. The question of the right to counsel in cases in which incarceration was authorized but would not be imposed was expressly reserved.[8]

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*Washington* v. *Texas*, 388 U. S. 14 (1967) (right to compulsory process of witnesses); *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967) (right to a speedy trial); *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971) (right to an impartial jury); *Henderson* v. *Morgan*, 426 U. S. 637 (1976) (right to be informed of the nature and cause of the accusation).

[6] "While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel . . .

. . . . . .

"The Sixth Amendment . . . extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided." *Argersinger* v. *Hamlin*, 407 U. S., at 30 (footnote and citations omitted).

[7] *Id.*, at 31; see text and note, at n. 3, *supra*.

[8] "MR. JUSTICE POWELL suggests that these problems [requiring the presence of counsel to insure the accused a fair trial] are raised even in situations where there is no prospect of imprisonment. . . . We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." 407 U. S., at 37.

## II

In my view petitioner could prevail in this case without extending the right to counsel beyond what was assumed to exist in *Argersinger*. Neither party in that case questioned the existence of the right to counsel in trials involving "non-petty" offenses punishable by more than six months in jail.[9] The question the Court addressed was whether the right applied to some "petty" offenses to which the right to jury trial did not extend. The Court's reasoning in applying the right to counsel in the case before it—that the right to counsel is more fundamental to a fair proceeding than the right to jury trial and that the historical limitations on the jury-trial right are irrelevant to the right to counsel—certainly cannot support a standard for the right to counsel that is more restrictive than the standard for granting a right to jury trial. As my Brother POWELL commented in his concurring opinion in *Argersinger*, 407 U. S., at 45–46, "It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." *Argersinger* thus established a "two dimensional" test for the right to counsel: the right attaches to any "non-petty" offense punishable by more than six months in jail and in addition to any offense where actual incarceration is likely regardless of the maximum authorized penalty. See Duke, The Right to Appointed Counsel: Argersinger and Beyond, 12 Am. Crim. L. Rev. 601 (1975).

The offense of "theft" with which Scott was charged is certainly not a "petty" one. It is punishable by a sentence of up to one year in jail. Unlike many traffic or other "regulatory" offenses, it carries the moral stigma associated with common-law crimes traditionally recognized as indicative of moral

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[9] See, *e. g.*, *Argersinger* v. *Hamlin*, 407 U. S., at 27, 330–331, 36, and n. 5; *id.*, at 45, and n. 2, 63 (POWELL, J., concurring).

depravity.[10] The State indicated at oral argument that the services of a professional prosecutor were considered essential to the prosecution of this offense. Tr. of Oral Arg., at 39; cf. *Argersinger* v. *Hamlin, supra,* 407 U. S., at 49 (POWELL, J., concurring). Likewise, nonindigent defendants charged with this offense would be well advised to hire the "best lawyers they can get." [11] Scott's right to the assistance of appointed counsel is thus plainly mandated by the logic of the Court's prior cases, including *Argersinger* itself.[12]

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[10] Because a theft conviction implies dishonesty, it may be a basis for impeaching petitioner's testimony in a court proceeding. *People* v. *Stufflebean,* 24 Ill. App. 3d 1065, 1068–1169, 322 N. E. 2d 488, 491–492 (1974). Because jurors must be of "fair character" and "approved integrity," Ill. Rev. Stat. ch. 78 § 2 (1977), petitioner may be excluded from jury duty as a result of his theft conviction. Twelve occupations licensed under Illinois law and 23 occupations licensed under city of Chicago ordinances require the license applicant to have "good moral character" or some equivalent background qualification that could be found unsatisfied because of a theft conviction. See Chicago Council of Lawyers, Study of Licensing Restrictions on Ex-Offenders in the City of Chicago and the State of Illinois 8, A–17 (1975). Under federal law petitioner's theft conviction would bar him from working in any capacity in a bank insured by the F. D. I. C., 12 U. S. C. § 1829, or possibly in any public or private employment requiring a security clearance. 32 CFR § 155.5 (h) and (i), and § 156.7 (b)(1)(iii) (1977).

[11] *Gideon* v. *Wainwright,* 372 U. S. 335, 344 (1963); see Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 713–714 (1968).

[12] My Brother POWELL's concurrence in *Argersinger,* 407 U. S., at 44, joined by my Brother REHNQUIST, also supports petitioner's right to appointed counsel in this case. The concurrence explicitly stated that the right to counsel should extend at least as far as the right to jury trial, *id.,* at 45–46, and its preference for a case-by-case approach was repeatedly limited to "petty" offenses. See, *e. g., id.,* at 45, and n. 2, 47, 63. Even in petty offenses, the *Argersinger* concurrence would have mandated the following procedures:

"The determination [whether counsel must be appointed] should be made before the accused formally pleads; many petty cases are resolved by

## III

But rather than decide consonant with the assumption in regard to nonpetty offenses that was both implicit and explicit in *Argersinger,* the Court today retreats to the indefensible position that the *Argersinger* "actual imprisonment" standard is the *only* test for determining the boundary of the Sixth Amendment right to appointed counsel in state misdemeanor cases, thus necessarily deciding that in many cases (such as this one) a defendant will have no right to appointed counsel even when he has a constitutional right to a jury trial. This is simply an intolerable result. Not only is the "actual imprisonment" standard unprecedented as the exclusive test, but the problems inherent in its application demonstrate the superiority of an "authorized imprisonment" standard that would require the appointment of counsel for indigents accused of any offense for which imprisonment for any time is authorized.

First, the authorized imprisonment standard more faithfully implements the principles of the Sixth Amendment identified in *Gideon.* The procedural rules established by state statutes are geared to the nature of the potential penalty for an offense, not to the actual penalty imposed in particular cases. The authorized penalty is also a better predictor of the stigma and other collateral consequences that attach to

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guilty pleas in which the assistance of counsel may be required. If the trial court should conclude that the assistance of counsel is not required in any case, it should state its reasons so that the issue could be preserved for review." *Id.,* at 63.

My Brother POWELL nevertheless concurs in this case without confronting the apparent inconsistencies with his position in *Argersinger.* His concurrence is based in part on an ex post facto review of what occurred at trial:

"The prosecutor made no opening or closing statement, did not object to any testimony offered by petitioner, declined the court's invitation to

conviction of an offense.[13] With the exception of *Argersinger*, authorized penalties have been used consistently by this Court as the true measures of the seriousness of offenses. See, *e. g.*, *Baldwin* v. *New York*, 399 U. S. 66, 68–70 (1970); *Frank* v. *United States*, 395 U. S. 147, 149 (1969); *United States* v. *Moreland*, 258 U. S. 433 (1922). Imprisonment is a sanction particularly associated with criminal offenses; trials of offenses punishable by imprisonment accordingly possess the characteristics found by *Gideon* to require the appointment of counsel. By contrast, the actual imprisonment standard, as the Court's opinion in this case demonstrates, denies the right to counsel in criminal prosecutions to accuseds who suffer the severe consequences of prosecution other than imprisonment.

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cross-examine the petitioner, and called no rebuttal witnesses. The trial court, in contrast, took an active role in questioning the petitioner about the facts surrounding his arrest." *Ante*, at 4.

My Brother POWELL neglects to mention that without petitioner's own testimony the prosecution had not proved he did not pay for the item he allegedly stole, or that the judge's questions were apparently motivated by the prosecutor's refusal to develop the facts on his own adequately to satisfy the judge's reasonable doubts. See Appendix, at 9. The problems posed by such post-hoc analyses of the fairness of proceedings and of how proceedings might have been different if counsel had been appointed demonstrate the wisdom of the Court's position, most recently reaffirmed in *Holloway* v. *Arkansas*, 435 U. S. 475, 487–491 (1978), that prejudice is conclusively presumed when the right to assistance of counsel is denied: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.*, at 488 (quoting *Glasser* v. *United States*, 315 U. S. 60, 75–76 (1942). See *Chapman* v. *California*, 386 U. S. 13, 43 (STEWART, J., concurring).

[13] See n. 10, *supra*. The scope of collateral consequences that would be constitutionally permissible under the actual imprisonment standard remains unsettled, and this uncertainty is another source of confusion generated by this standard. See, *e. g.*, Tr. of Oral Arg., at 35–37; *United States* v. *White*, 529 F. 2d 1390 (CA8 1976); Note, Argersinger v. Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial, 35 Ohio St. L. J. 168 (1974).

Second, the "authorized imprisonment" test presents no problems of administration. It avoids the necessity for time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate predictions, unequal treatment, and apparent and actual bias. These problems with the actual imprisonment standard were suggested in my Brother POWELL's concurrence in *Argersinger*, 407 U. S., at 52–55, which was echoed in scholarly criticism of that decision.[14] Petitioner emphasizes these defects, arguing with considerable force that implementation of the actual imprisonment standard must assuredly lead to violations of both the Due Process and Equal Protection clauses of the Constitution. Brief for Petitioner, at 47–59.

Finally, the "authorized imprisonment" test ensures that courts will not abrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense. Under the actual imprisonment standard,

> "[t]he judge will . . . be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel."

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[14] See, *e. g.*, S. Krantz el al., Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin 69–117 (1976); Duke, The Right to Appointed Counsel: Argersinger and Beyond, 12 Am. Crim. L. Rev. 601 (1975).

The case-by-case approach advocated by my Brother POWELL in *Argersinger* has also been criticized as unworkable because of the administrative burden it would impose. See, *e. g.*, National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, Rule 321 (b), Comment, p. 69.

*Argersinger* v. *Hamlin,* 407 U. S., at 53 (POWELL, J., concurring).

The authorized imprisonment standard, on the other hand, respects the allocation of functions between legislatures and courts in the administration of the criminal justice system.

The apparent reason for the Court's adoption of the "actual imprisonment" standard for all misdemeanors is concern for the economic burden that an "authorized imprisonment" standard might place on the States. But, with all respect, that concern is both irrelevant and speculative.

This Court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments. A unanimous Court made that clear in *Mayer* v. *City of Chicago,* 404 U. S. 189, 196–197 (1971), in rejecting a proposed fiscal justification for providing free transcripts for appeals only when the appellant was subject to imprisonment:

> "This argument misconceives the principle of *Griffin* [v. *Illinois,* 351 U. S. 12 (1956)] . . . . *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant." [15]

In any event, the extent of the alleged burden on the States is, as the Court admits, *ante,* at 6–7, n. 5, speculative. Although more persons are charged with misdemeanors punishable by incarceration than are charged with felonies, a smaller percentage of persons charged with misdemeanors qualify as

[15] See also *Bounds* v. *Smith,* 430 U. S. 817, 825 (1977).

indigent, and misdemeanor cases as a rule require far less attorney time.[16]

Furthermore, public defender systems have proved economically feasible, and the establishment of such systems to replace appointment of private attorneys can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically.[17] The public defender system alternative also answers the argument that an authorized imprisonment standard would clog the courts with inexperienced appointed counsel.

Perhaps the strongest refutation of respondent's alarmist prophecies that an authorized imprisonment standard would wreak havoc on the States is that the standard has not produced that result in the substantial number of States that already provide counsel in all cases where imprisonment is authorized—States that include a large majority of the country's population and a great diversity of urban and rural

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[16] See National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, Rule 321 (b) Comment, p. 70 (1974) (estimates that only 10% of misdemeanor defendants, as opposed to 60–65% of felony defendants, meet the necessary indigency standard); National Legal Aid & Defender Ass'n, The Other Face of Justice, Note I, pp. 82–83 (1973) (survey indicates national average is 65% indigency in felony cases and only 47% in misdemeanor cases).

The National Advisory Commission on Criminal Justice Standards and Goals adopted a maximum caseload standard of 150 felony cases or 400 misdemeanor cases per attorney per year. National Advisory Commission on Criminal Justice Standards & Goals, Courts, Standard 13.12, pp. 276–277 (1973). See also The Other Face of Justice, *supra*, Table 109, at p. 73.

[17] A study conducted in the State of Wisconsin, which introduced a State Public Defender System after the Wisconsin Supreme Court in *State ex rel. Winnie* v. *Harris*, 75 Wis. 2d 547, 249 N. W. 2d 791 (1977), extended the right to counsel in the way urged by petitioner in this case, indicated that the average cost of providing counsel in a misdemeanor case was reduced from $150–200 to $90 by using a public defender rather than appointing private counsel. Brief for *Amicus Curiae* National Legal Aid & Defender Assn., at 10–12.

environments.[18] Moreover, of those States that do not yet provide counsel in all cases where *any* imprisonment is authorized, many provide counsel when periods of imprisonment

[18] See, *e. g.*, ALASKA: Alaska Const., Art. 1 § 11; Alaska Stat. § 18.85.100 (a) (1974) (any offense punishable by incarceration; or which may result in loss of valuable license or heavy fine); *Alexander* v. *City of Anchorage*, 490 P. 2d 910 (1971); ARIZONA: Ariz. Rule Crim. Proc., Rule 6.1 (b) (Supp. 1978) (any criminal proceedings which may result in punishment by loss of liberty; or where the court concludes that the interest of justice so requires); CALIFORNIA: Cal. Penal Code § 987 (West Supp. 1978) (all criminal cases); CONNECTICUT: 9 Conn. Gen. Stat. Ann. §§ 51–296 (a), 51–297 (f) (Supp. 1978) (all criminal actions); DELAWARE: Del. Code Ann., tit. 29, § 4602 (1974) (all indigents under arrest or charged with crime if defendant requests or court orders); HAWAII: Haw. Rev. Stat., tit. 37, § 802–1 (1976) (any offense punishable by confinement in jail); INDIANA: Ind. Const., Art. I, § 13 (all criminal prosecutions); *Bolkovac* v. *State of Indiana*, 229 Ind. 294, 98 N. E. 2d 250 (1951); KENTUCKY: 17 Ky. Rule Crim. Proc., Rule 8.04 (1978) (offenses punishable by a fine of more than $500 or by imprisonment); LOUISIANA: La. Stat. Ann., Code Crim. Proc., Art. 513 (Supp. 1978) (offenses punishable by imprisonment); MASSACHUSETTS: Mass. Supr. Jud. Ct. Gen. Rule 3.10 (any crime for which sentence of imprisonment may be imposed); MINNESOTA: Minn. Stat. Ann. §§ 609.02, 611.14 (Supp. 1979) (felonies and "gross misdemeanors"; statute defines "petty" misdemeanors as those not punishable by imprisonment or fine over $100); NEW HAMPSHIRE: N. H. Rev. Stat. Ann. §§ 604–A:2, 625:9 (1974) (offenses punishable by imprisonment); NEW MEXICO: N. Mex. Stat. Ann. § 41–22A–12 (Supp. 1975) (offense carrying a possible sentence of imprisonment); NEW YORK: C. P. L. § 170.10 (1971) (all misdemeanors except traffic violations); *People* v. *Weinstock*, 80 Misc. 2d 510, 511, 363 N. Y. S. 2d 878 (1974) (traffic violations subject to possible imprisonment); OKLAHOMA: Okla. Stat. Ann. 22–464, 1271 (1969) (all criminal cases); *Stewart* v. *State*, 495 P. 2d 834 (Okla. Crim. App. 1972); OREGON: *Brown* v. *Multnomah County Dist. Ct.*, 29 Ore. App. 917, 566 P. 2d 522 (1977) (all criminal cases); SOUTH DAKOTA: S. D. Comp. Laws Ann. § 23–2–1 (Supp. 1978) (any criminal action); TENNESSEE: Tenn. Code Ann. §§ 40–2002, 40–2003 (1975) (persons accused of any crime or misdemeanor whatsoever); TEXAS: Tex. Code Crim. Proc. Art. 26.04 (1965) (any felony or misdemeanor punishable by imprisonment); VIRGINIA: Va. Code Ann., §§ 19.2–157, 19.2–160 (Supp.

longer than 30 days,[19] 3 months,[20] or 6 months [21] are authorized. In fact, Scott would be entitled to appointed counsel under the current laws of at least 33 States.[22]

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1978) (misdemeanors the penalty for which may be confinement in jail); WASHINGTON: Wash. J. Crim. Rule 2.11 (a)(1) (1978) (all criminal offenses punishable by loss of liberty); WEST VIRGINIA: W. Va. Code Ann. § 62–3–1a (Supp. 1977) (persons under indictment for a crime); WISCONSIN: Wis. Const., Art. I, § 7, *State ex rel. Winnie Harris*, 75 Wis. 2d 547, 249 N. W. 2d 791 (1977) (all criminal prosecutions).

Respondent claims that the statutes and case law in some of these cases "need not be read as requiring appointment of counsel for all imprisonable cases." Respondent's Brief, at 33 n. 28. Although the law is not unambiguous in every case, ambiguities in the laws of other States suggest that the list is perhaps too short, or at least that other States provide counsel in all but the most trivial offenses. *E. g.*, COLORADO: Colo. Rev. Stat. Ann. § 21–1–103 (1974) (all misdemeanors and all municipal code violations at the discretion of the public defender); GEORGIA: Ga. Code Ann., § 27–3203 (1978) (any violation of a state law or local ordinance which may result in incarceration); MISSOURI: Attorney General Opinion No. 207, Young 6–21–63 (counsel should be appointed in misdemeanor cases of "more than minor significance" and "where prejudice might result"); MONTANA: Mont. Rev. Code Ann. § 95–1001 (1969) (court may assign counsel in misdemeanors "in the interest of justice"); NEVADA: Nev. Rev. Stat. § 171.397 (1973) (persons accused of "gross misdemeanors" or felonies); NEW JERSEY: N. J. Stat. Ann. § 2A:158 (A) (1973); N. J. Crim. Rules 3:27–1 (1973) (any offense which is indictable); PENNSYLVANIA: Pa. Rule Crim. Proc. 316 (a)–(c) (Supp. 1978) (in all but "summary cases"); WYOMING: Wyo. Sta. Ann. §§ 7–1–110 (a) (entitled to appointed counsel in "serious crimes"), 7–1–108 (v) (serious crimes are those for which incarceration is a "practical possibility"), 7–9–105 (all cases where accused shall or may be punished by imprisonment in penitentiary) (1977).

In addition, Alabama, Florida, Georgia, and Mississippi were until today covered by the Fifth Circuit's adoption of the "authorized imprisonment" standard. See *Potts* v. *Estelle*, 529 F. 2d 450 (CA5 1976); *Thomas* v. *Savage*, 513 F. 2d 536 (CA5 1975).

Several States that have not adopted the authorized imprisonment standard give courts discretionary authority to appoint counsel in cases where it is perceived to be necessary (*e. g.*, Maryland, Missouri, Montana, North Dakota, Ohio, and Pennsylvania).

[*Footnotes 19, 20, 21, and 22 are on p. 15*]

It may well be that adoption of an authorized imprisonment standard will lead states and local governments to re-examine their criminal statutes. A state legislature or local government may determine that it no longer desires to authorize

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[19] IOWA: Iowa Code Ann., § 813.2, Rule 2 § 3; § 813.3, Rule 42 § 3 (1978 Spec. Pamphlet).

[20] MARYLAND: Md. Ann. Code, Art. 27A, § 2 (h), 164 (1976); MISSISSIPPI: Miss. Code Ann. § 99–15–15 (1972).

[21] IDAHO: Idaho Code Ann. tit. 19, § 851 (1978); *Mahler* v. *Birnbaum*, 95 Idaho 14, 501 P. 2d 282 (1972); MAINE: *Newell* v. *State*, 277 A. 2d 731 (Maine, 1971); OHIO: Ohio Rule Crim. C. P., Rule 2, Rule 44 (A)(B) (1975); RHODE ISLAND: Supr. Rule Crim. Proc. 44; Rule Crim. Proc. 44 (1976); *State* v. *Halliday*, 280 A. 2d 333 (Supr. Ct. 1971); UTAH: Utah Code Ann., § 77–64–2 (Supp. 1977); *Salt Lake City Corp.* v. *Salt Lake County*, 520 P. 2d 2112 (Supr. Ct. 1974).

[22] See nn. 18–22, *supra*. The actual figure may be closer to 40 States. The following States appear to be governed only by the "likelihood of imprisonment" standard: ARKANSAS: Ark. Rule Crim. Proc., Rule 8.2 (b) (1977) (all criminal offenses except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment); FLORIDA: Fla. Rule Crim. Proc. 3.111 (b) (1975) (any misdemeanor or municipal ordinance violation unless prior written statement by judge that conviction will not result in imprisonment); NORTH CAROLINA: N. C. Gen. Stat., § 7A–451 (a) (Supp. 1977) (any case in which imprisonment or a fine of $500 or more is likely to be adjudged); NORTH DAKOTA: N. D. Cent. Code, Rule Crim. Proc., Rule 44 (1974) (all nonfelony cases unless magistrate determines that sentence upon conviction will not include imprisonment); VERMONT: Ver. Stat. Ann., § 13–5201–5231 (Supp. 1977) (any misdemeanor punishable by any period of imprisonment or fine over $1,000 unless prior determination that imprisonment or fine over $1,000 will not be imposed). Two States require appointment of counsel for indigents in cases where it is "constitutionally required": ALABAMA: Ala. Code, tit. 15, §§ 15–12–1, 15–12–20 (1975); SOUTH CAROLINA: S. C. Code § 17–3–10 (1977). Some States require counsel in misdemeanor cases only by virtue of judicial decisions reacting to *Argersinger:* KANSAS: *State* v. *Giddings*, 216 Kan. 14, 21–22, 531 P. 2d 445 (1975); MICHIGAN: *People* v. *Studebaker*, 387 Mich. 698, 199 N. W. 2d 177 (1972); *People* v. *Harris*, 45 Mich. App. 217, 206 N. W. 2d 478, 480 (1973); NEBRASKA: *Kovarik* v. *County of Banner*, 224 N. W. 2d 761 (Neb. 1975).

incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution. In my view this re-examination is long overdue.[23] In any event, the Court's actual imprisonment standard must inevitably lead the courts to make this re-examination, which plainly should more properly be a legislative responsibility.

## IV

The Court's opinion turns the reasoning of *Argersinger* on its head. It restricts the right to counsel, perhaps the most fundamental Sixth Amendment right,[24] more narrowly than the admittedly less fundamental right to jury trial.[25] The abstract pretext that "constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another," *ante,* at 5, cannot camouflage the anomalous result the Court reaches. The Court's opinion reminds one of Mr. Justice Black's description of *Betts* v. *Brady:* "an anachronism when handed down" that "ma[kes] an abrupt break with its own well-considered precedents." *Gideon* v. *Wainwright,* 372 U. S., at 345, 344.

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[23] See *e. g.,* S. Krantz et al., *supra,* n. 14, at 445–606.

[24] "In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." *Lakeside* v. *Oregon,* 435 U. S. 333, 341 (1978).

[25] "[T]he interest protected by the right to have guilt or innocence determined by a jury—tempering the possibly arbitrary and harsh exercise of prosecutorial and judicial power—while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel." *Argersinger* v. *Hamlin,* 407 U. S., at 46 (POWELL, J., concurring) (footnotes omitted).

the petr in the present case, for he had a right to a jury trial. See Brennan's opinion, at 6-7 & n. 12.

We have talked about this before. The sentence quoted by Justice Brennan is followed immediately by a discussion that clearly indicates that the relationship between the rights to counsel and jury trial is based on the need for the assistance of counsel before the jury. "An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to a jury trial becomes meaningless." Id., at 46. Where the defendant makes a valid waiver of his right to a jury trial, the need for assistance of counsel before a jury obviously cannot require or justify appointment of counsel.

We have already met Justice Brennan's criticism on this point to a significant extent. We mention the waiver of jury trial at pp. 1 and 4, and quote from your explanation of the need for counsel in jury trials at p. 2. I propose that we add the footnote indicated at p. 2, copy attached.

Justice Brennan's second criticism rests on the procedures you recommended for trial courts in your Argersinger opinion. There you indicated that in administering the due process standard of fairness, the trial judges should inquire, before the defendant enters his plea, into the need for counsel, and should place on the record the reasons supporting a conclusion that counsel is not required. Id., at 63. See Justice Brennan's opinion, at 7 n. 12. Since the trial judge did not conduct such an inquiry on the record in the present case, Justice Brennan seems to think that you are committed to concluding that the defendant was denied due process. I am sure that he draws support for his conclusion on this point from the final sentence of your Argersinger opinion: "As the proceedings in the courts below were not in accordance with the views expressed above, I concur in the result of the decision in this case." Id., at 66

I have always taken the view that the final sentence of your Argersinger opinion referred to the failure of the trial proceedings to conform with the requirements of due process as you had expounded them in the opinion. Thus, you indicated that should counsel not be appointed for

an indigent, "[t]he trial court would then become obligated to scrutinize carefully the subsequent proceedings for the protection of the defendant. If an unrepresented defendant sought to enter a plea of guilty, the Court shoid examine the case against him to insure that there is admissible evidence tending to support the elements of the offense. If a case went to trial without defense counsel, the court should intervene, when necessary, to insure that the defendant adequately brings out the facts in his favor and to prevent legal issues from being overlooked. Formal trial rules should not be applied strictly against unrepresented defendants. Finally, appellate courts should carefully scrutinize all decisions not to appoint counsel and the proceedings which follow." Id., at 63-64.

It is true that here, the trial court did not pursue on the record an inquiry into the need for assistance of counsel. Although that failure does make review of the fairness of the trial more difficult, I do not think that anything in your Argersinger opinion indicates that this failure is itself a due process violation. I suggest we add the sentence indicated at p. 4 of the concurring opinion to make clear the focus of appellate review under the Due Process Clause.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 12 FEB 1979

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

The petitioner was tried for shoplifting under an Illinois statute providing for a maximum penalty of a $500 fine or one year in jail, or both. After waiving his right to a jury trial, the petitioner was convicted and fined $50. The Court rejects the petitioner's argument that as an indigent, he should have been provided with counsel because imprisonment was an authorized penalty for the crime with which he was charged. Relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court holds instead that the Sixth and Fourteenth Amendments require the States to provide counsel only to indigents who are sentenced to terms of imprisonment. Although I concur in the affirmance of the petitioner's conviction, I am unable to join the opinion of the Court. See *id.*, at 44 (POWELL, J., concurring).

The Court's opinion, with commendable candor, states that "our decided cases [have] departed from the literal meaning of the Sixth Amendment." *Ante*, at 5. This acknowledgement is highlighted by the absence of historical or precedential justification for the line the Court draws to limit the "already extended" reach of the Sixth Amendment. *Ibid.* As the Sixth Amendment provides no guidance in this area, the Court should recur to the Due Process Clause, which in its basic concept of fairness gives full recognition to the constitutional interests of criminal defendants. Instead, the Court finds in the Sixth Amendment a categorical difference between indi-

gent state misdemeanor defendants who are sentenced to imprisonment and those who are not, and concludes that the Constitution guarantees only the former group the right to assistance of appointed counsel.

The rule adopted by the Court in this case and in *Argersinger* is easy to apply, in the sense that a state court can have to doubt as to this prerequisite for an imposition of a sentence of imprisonment. For the reasons set forth in my opinion in *Argersinger*, however, I adhere to my view that the Court's rule imposes burdens on both defendants and the public that are too severe to be justified by the apparent simplicity of the rule.

Some defendants may be affected more seriously by the payment of a fine, the loss of a driver's license, or the impact of the stigma attached to a conviction, than by a brief incarceration. Yet no matter how serious the nonimprisonment consequences of conviction, there is no right to counsel under the Court's rule unless a sentence of imprisonment also is imposed. Similarly, defendants who do not have a right to counsel under the Court's rule may be faced by legal or factual questions as complex as those raised by the charges against defendants who are sentenced to prison. The lack of counsel may be especially unfair where a defendant who is not afforded counsel under the Court's rule exercises a right to trial by jury, for "before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant." *Id.*, at 46 (POWELL, J., concurring).[1]

The Court's rule, in addition to denying assistance of counsel unfairly in some cases, also impairs the functioning of the criminal justice system. Most misdemeanor and petty crime statutes provide for imprisonment, a fine, or both. The

[1] When, on the other hand, the defendant waives his right to a jury trial, this particular reason for affording him the assistance of appointed counsel is not pertinent.

penalty provisions of such statutes are intended to afford the judge considerable flexibility in fitting the sentence to the circumstances and severity of the offense and to the record of the offender. The "bright line" adopted by the Court in this case and *Argersinger* inevitably frustrates this important purpose. The trial judge, in advance of hearing any evidence, indeed, in advance of knowing anything about the case except the charge, must decide whether he will forego the legislatively granted authority to impose a sentence of imprisonment upon conviction. Unless the judge surrenders this option, he must appoint counsel to assist the indigent defendant. Thus, the Court's rule forces the trial judge to make an important preliminary sentencing decision without the knowledge on which such decisions should be based.

Moreover, given the practical realities of the misdemeanor and petty offense trial courts in the States, one can forsee readily the direction in which the *Argersinger* rule will distort the penalties imposed. In busy metropolitan courts, where dockets are overcrowded and delay already is intolerable, trial judges are likely to dispense with the option of imprisonment rather than further delay proceedings to secure counsel for an indigent defendant. In rural counties and small towns, remote from metropolitan bars and often strapped for funds, counsel may be wholly unavailable or else beyond the financial means of the local government. As a result, in many cases in which due process would not require assistance of counsel, the trial judge will be pressured nonetheless to foreclose the option of a sentence of imprisonment.[2]

Quite apart from the irrationalities and distortions introduced into the sentencing decisions of state trial judges, the Court's rule has a serious impact on another important public interest. It is not unreasonable to suppose that the deter-

[2] See National Legal Aid and Defender Assn., The Other Face of Justice 38–40, 63–64 (1973); *Argersinger, supra,* at 55–61 (POWELL, J., concurring).

rent effect of the misdemeanor and petty offense laws is weakened by a systematic reduction in the number of jail sentences imposed. The Court's rule will also make the enforcement of fines against recalcitrant defendants difficult, if not impossible, as it seems unlikely that the Court contemplates the circumvention of its rule by the jailing of uncounseled indigents for failure to pay such fines. *Id.*, at 55 (POWELL, J., concurring).

In sum, the *Argersinger* line often will result in unfairness to defendants, and in many other situations seems likely to disserve the public interest in a rational and effective system of criminal justice. These flaws are but indications of the lack of any constitutional basis for the Court's categorical rule. In my view, the very concept of fairness as a due process doctrine applicable to each trial precludes such inflexible line-drawing. Rather, in each case the trial judge should decide whether fairness requires appointment of counsel after considering the complexity of the offense charged, the severity of the sentence that might follow conviction, and other factors peculiar to each case. In my opinion in *Argersinger,* I reviewed this inquiry, and the demands that it would place on state trial judges. *Id.*, at 64–65 (POWELL, J., concurring).

Whether or not the trial court pursued this inquiry on the record, the appellate courts reviewing the conviction of an uncounseled indigent must determine whether the failure to provide counsel denied the defendant a fair trial. Here, the petitioner waived a jury trial on a simple charge of shoplifting several items valued at $13.68. The prosecutor made no opening or closing statement, did not object to any testimony offered by the petitioner, declined the court's invitation to cross-examine the petitioner, and called no rebuttal witnesses. The trial court, in contrast, took an active role in questioning the petitioner about the facts surrounding his arrest. In sum, it does not appear that there was any unfairness in trying the petitioner without affording him the assistance of counsel. Accordingly, I join in the judgment affirming his conviction.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 12, 1979

Re: 77-1177 - Scott v. Illinois

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 12, 1979

Re: No. 77-1177 - Aubrey Scott v. Illinois

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 14 FEB 1979

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2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner,
*v.*
State of Illinois.

On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE BLACKMUN, dissenting.

For substantially the reasons stated by MR. JUSTICE BRENNAN in Parts I and II of his dissenting opinion, I would hold that the right to counsel secured by the Sixth and Fourteenth Amendments extends at least as far as the right to jury trial secured by those amendments. Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).

This resolution, I feel, would provide the "bright line" that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan, Baldwin,* and *Argersinger.*

On this approach, of course, the judgment of the Supreme Court of Illinois upholding petitioner Scott's conviction should be reversed, since he was convicted of an offense for which he was constitutionally entitled to a jury trial. I, therefore, dissent.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 15 FEB 1979

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

The petitioner was tried for shoplifting under an Illinois statute providing for a maximum penalty of a $500 fine or one year in jail, or both. After waiving his right to a jury trial, the petitioner was convicted and fined $50. The Court rejects the petitioner's argument that as an indigent, he should have been provided with counsel because imprisonment was an authorized penalty for the crime with which he was charged. Relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court holds instead that the Sixth and Fourteenth Amendments require the States to provide counsel only to indigents who are sentenced to terms of imprisonment. Although I concur in the affirmance of the petitioner's conviction, I am unable to join the opinion of the Court. See *id.*, at 44 (POWELL, J., concurring).

The Court's opinion, with commendable candor, states that "our decided cases [have] departed from the literal meaning of the Sixth Amendment." *Ante*, at 5. This acknowledgement is highlighted by the absence of historical or precedential justification for the line the Court draws to limit the "already extended" reach of the Sixth Amendment. *Ibid.* As the Sixth Amendment provides no guidance in this area, the Court should recur to the Due Process Clause, which in its basic concept of fairness gives full recognition to the constitutional interests of criminal defendants. Instead, the Court finds in the Sixth Amendment a categorical difference between indi-

gent state misdemeanor defendants who are sentenced to imprisonment and those who are not, and concludes that the Constitution guarantees only the former group the right to assistance of appointed counsel.

The rule adopted by the Court in this case and in *Argersinger* is easy to apply, in the sense that a state court can have no doubt as to this prerequisite for an imposition of a sentence of imprisonment. For the reasons set forth in my opinion in *Argersinger*, however, I adhere to my view that the Court's rule imposes burdens on both defendants and the public that are too severe to be justified by the apparent simplicity of the rule.

Some defendants may be affected more seriously by the payment of a fine, the loss of a driver's license, or the impact of the stigma attached to a conviction, than by a brief incarceration. Yet no matter how serious the nonimprisonment consequences of conviction, there is no right to counsel under the Court's rule unless a sentence of imprisonment also is imposed. Similarly, defendants who do not have a right to counsel under the Court's rule may be faced by legal or factual questions as complex as those raised by the charges against defendants who are sentenced to prison. The lack of counsel may be especially unfair where a defendant who is not afforded counsel under the Court's rule exercises a right to trial by jury, for "before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant." *Id.*, at 46 (POWELL, J., concurring).[1]

The Court's rule, in addition to denying assistance of counsel unfairly in some cases, also impairs the functioning of the criminal justice system. Most misdemeanor and petty crime statutes provide for imprisonment, a fine, or both. The

[1] When, on the other hand, the defendant waives his right to a jury trial, this particular reason for affording him the assistance of appointed counsel is not pertinent.

penalty provisions of such statutes are intended to afford the judge considerable flexibility in fitting the sentence to the circumstances and severity of the offense and to the record of the offender. The "bright line" adopted by the Court in this case and *Argersinger* inevitably frustrates this important purpose. The trial judge, in advance of hearing any evidence, indeed, in advance of knowing anything about the case except the charge, must decide whether he will forego the legislatively granted authority to impose a sentence of imprisonment upon conviction. Unless the judge surrenders this option, he must appoint counsel to assist the indigent defendant. Thus, the Court's rule forces the trial judge to make an important preliminary sentencing decision without the knowledge on which such decisions should be based.

Moreover, given the practical realities of the misdemeanor and petty offense trial courts in the States, one can forsee readily the direction in which the *Argersinger* rule will distort the penalties imposed. In busy metropolitan courts, where dockets are overcrowded and delay already is intolerable, trial judges are likely to dispense with the option of imprisonment rather than further delay proceedings to secure counsel for an indigent defendant. In rural counties and small towns, remote from metropolitan bars and often strapped for funds, counsel may be wholly unavailable or else beyond the financial means of the local government. As a result, in many cases in which due process would not require assistance of counsel, the trial judge will be pressured nonetheless to foreclose the option of a sentence of imprisonment.[2]

Quite apart from the irrationalities and distortions introduced into the sentencing decisions of state trial judges, the Court's rule has a serious impact on another important public interest. It is not unreasonable to suppose that the deter-

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[2] See National Legal Aid and Defender Assn., The Other Face of Justice 38–40, 63–64 (1973); *Argersinger, supra*, at 55–61 (POWELL, J., concurring).

rent effect of the misdemeanor and petty offense laws is weakened by a systematic reduction in the number of jail sentences imposed. The Court's rule will also make the enforcement of fines against recalcitrant defendants difficult, if not impossible, as it seems unlikely that the Court contemplates the circumvention of its rule by the jailing of uncounseled indigents for failure to pay such fines. *Id.*, at 55 (POWELL, J., concurring).

In sum, the *Argersinger* line often will result in unfairness to defendants, and in many other situations seems likely to disserve the public interest in a rational and effective system of criminal justice. These flaws are but indications of the lack of any constitutional basis for the Court's categorical rule. In my view, the very concept of fairness as a due process doctrine applicable to each trial precludes such inflexible line-drawing. Rather, in each case the trial judge should decide whether fairness requires appointment of counsel after considering the complexity of the offense charged, the severity of the sentence that might follow conviction, and other factors peculiar to each case. In my opinion in *Argersinger*, I reviewed this inquiry, and the demands that it would place on state trial judges. *Id.*, at 64–65 (POWELL, J., concurring).

Whether or not the trial court pursued this inquiry on the record, the appellate courts reviewing the conviction of an uncounseled indigent must determine whether the failure to provide counsel denied the defendant a fair trial. Here, the petitioner waived a jury trial on a simple charge of shoplifting several items valued at $13.68. The prosecutor made no opening or closing statement, did not object to any testimony offered by the petitioner, declined the court's invitation to cross-examine the petitioner, and called no rebuttal witnesses. The trial court, in contrast, took an active role in questioning the petitioner about the facts surrounding his arrest. In sum, it does not appear that there was any unfairness in trying the petitioner without affording him the assistance of counsel. Accordingly, I join in the judgment affirming his conviction.

Rewritten

To:
Mr. [illegible]
Mr. [illegible] White
Mr. [illegible] Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 26 FEB 1979

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77–1177

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|---|---|
| Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois. |

[February —, 1979]

MR. JUSTICE POWELL, concurring.

For the reasons stated in my opinion in *Argersinger* v. *Hamlin*, 407 U. S. 25, 44 (1972), I do not think the rule adopted by the Court in that case is required by the Constitution. Moreover, the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences. The *Argersinger* rule also tends to impair the proper functioning of the criminal justice system in that trial judges, in advance of hearing any evidence and before knowing anything about the case except the charge, all too often will be compelled to forego the legislatively granted option to impose a sentence of imprisonment upon conviction. Preserving this option by providing counsel often will be impossible or impracticable—particularly in congested urban courts where scores of cases are heard in a single sitting, and in small and rural communities where lawyers may not be available.

Despite my continuing reservations about the *Argersinger* rule, it was approved by the Court in the 1972 opinion and four Justices have reaffirmed it today. It is important that this Court provide clear guidance to the hundreds of courts across the country that confront this problem daily. Accordingly, and mindful of *stare decisis*, I join the opinion of the Court. I do so, however, with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice.

[c. FEB. 21, 1979]

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Re: No. 77-1177 - Scott v. Illinois

Dear Bill:

My short dissent in this case, I suspect, speaks for itself.

I dislike to do this to you and to deprive you of a "court." You have, however, five votes for the judgment. I found this case tantalizing. The solution I propose reconciles, I think, the respective conclusions that have been reached in the right to counsel and right to a jury trial cases. I must confess, of course, that neither side urged this middle ground. Each wanted his own way all the way.

Sincerely,

Harry

Where does this leave the law?? What will courts across the country do.

Mr. Justice Rehnquist

cc: The Conference

February 22, 1979

77-1177 Scott v. Illinois

Dear Potter:

In view of our discussions, and those that took place at last Friday's Conference, I am considering concurring in Bill Rehnquist's opinion for the purpose of making a Court.

I would accompany this with a brief concurring statement along the lines set forth in the enclosed draft.

What do you think?

Sincerely,

Mr. Justice Stewart

lfp/ss

| THE C. J. | W. J. B. | P. S. | B. R. W. | T. M. | H. A. B. | L. F. P. | W. H. R. | J. P. S. |
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| | | | | | | | 11/12/78 | |
| Join WHR. 1/18/79 | will dissent 1/16/79 | Join WHR 1/15/79 | Join WHR 1/15/79 | await dissent 1/17/79 | 1st draft 2/7/79 | will concur in the judgment & may write | 1st draft 1-12-79 2nd draft 1/29/79 | Join WJB 2/12/79 |
| | 2nd draft 2/28/79 | | | Join WJB 2/12/79 | 2nd draft 2/14/79 | something 1/16/79 2nd draft can wait 2/12/79 3rd draft 2/15/79 | | |
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77-1177 Scott v. Illinois