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Alabama v. Shelton: One Small Step for Man, One Very Small Step for the Sixth Amendment's Right to Counsel

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Alabama v. Shelton: One Small Step for Man, One Very Small Step for the Sixth Amendment's Right to Counsel

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“To protect those who are not able to protect themselves is a duty which every one owes to society.”¹

“The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.”²

I. INTRODUCTION

Imagine you have been arrested. Your physical liberty is yanked away, your mental disposition uprooted. You have lost the freedom to move about freely; you have entered the dark barracks of the criminal justice system. After a quick release from the distressing confines of a jail cell, you proceed to trial. You have been told that you may lose your child and your job. More importantly, you fear losing your reputation and a lifetime of respect. Upon being ushered into the courtroom, you suddenly remember hearing from a distant relative (who had taken a course in constitutional law) about the right to have a lawyer fight on your behalf if you cannot afford one. You now confidently appear before the judge with this comforting and encouraging thought in mind. You tell the judge you cannot afford a lawyer, and you would like one appointed on your behalf. The judge bluntly denies this request. You plead with him, but he brashly explains that the Sixth Amendment does not require the state to appoint a lawyer to *you* . . . at least for *this* crime, and for *this* punishment. Severely disappointed by this response, you have no choice but to slouch away and fearfully anticipate your coming trial - a trial in which the state will have a competent lawyer on their side, and you will not.

It has been over 210 years since the Constitution first solemnly proclaimed that “[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel.”³ Despite this seemingly broad

1. *Jenoure v. Delmege*, 60 L.J. Rep. (N.S.) Q.B. 13 (1890). (quoting Edward Macnaghten, 1st baron and English jurist).

2. *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (quoting Jackson, J.).

3. U.S. CONST. amend. VI (emphasis added). The Amendment reads in full:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

and bold Sixth Amendment guarantee,⁴ its protection has not been realized for all underprivileged criminal defendants.⁵ It is evident that *some* criminal defendants enjoy the right to the assistance of counsel: the rich, the famous, and those convicted of felonies.⁶ The wide range of all criminal prosecutions, however, covers a much broader spectrum. What about those who cannot readily afford a lawyer? What about the thousands upon thousands of misdemeanor charges that indigent defendants face each year?

The right to have representative counsel at your expense in any criminal proceeding has scarcely been questioned.⁷ The constitutional right to have *appointed* counsel argue on your behalf has seen much more troubled times.⁸ Obviously, this predicament mostly affects poor criminal defendants who lack the resources to hire an effective advocate willing and able to meet the prosecution's case. The disparity between the representation afforded to affluent criminal defendants and the meager assistance of counsel granted to indigent defendants has produced "one of the most embarrassing legal quandaries in America."⁹ It can no longer be said that there is not a "direct proportional relationship between the quality of representation one receives and the size of their bank account."¹⁰

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id.

4. See Martin R. Gardner, *Criminal Law: The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 397 (2000) (reflecting that the right to counsel "has been described by leading commentators as the central feature of our adversarial system").

5. See *id.* (finding that "'scholars, lawyers, and judges have often lost their way' in their attempts to understand the Amendment's scope and underlying values") (quoting Akhil R. Amar, *Sixth Amendment First Principles*, 84 GEO. L. J. 641, 641 (1996)).

6. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

7. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

8. See discussion *infra* Part II.

9. Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 48-49 (1997) (concluding that "[t]he distance between the quality of representation that a wealthy person (or corporation) receives in a criminal case and that received by an indigent person is scandalous No wealthy defendant has ever been executed by governmental authorities in American history.").

10. Sonia Y. Lee, *OC's PD's Feeling the Squeeze - The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1896 (1996). Professor Clark explained the relationship between wealth and quality of representation:

It is not that wealthy people (especially mob figures) have not committed crimes that are indistinguishable from the crimes for which many poor or non-wealthy people have been executed. It is simply that the wealthy defendants had the financial resources to purchase the kind of defense that can blunt a prosecution for a capital crime or dissuade a prosecutor from even pursuing such a penalty. Lawyers versed in the defense of capital cases regularly report that poverty and the failure of adequate defense are the key variables that determine whether the death penalty is imposed or actually carried out.

This sobering portrait of representation for a criminally accused appears even more ominous keeping in mind the dearth of qualified attorneys willing to represent indigent criminal defendants.¹¹ Underlying the many difficulties accompanying this sorrowful situation is a fundamental question that must be asked before attempting to solve this dilemma: when is an indigent defendant *constitutionally* entitled to court appointed counsel? There are certainly many important and legitimate concerns that attend the problem of ineffective assistance of counsel for the poor once they are at trial,¹² but first these indigents must be granted the right to *merely have* a trial lawyer by their side. At what type of proceeding should indigent defendants be allowed to reap the benefits of court appointed counsel? What types of charges must be brought before they qualify for Sixth Amendment protection? Who is going to pay for these court appointed lawyers? More specifically, what type of criminal prosecution falls within the realm of “all criminal prosecutions” as stated by the Sixth Amendment, so that an indigent will be guaranteed a zealous advocate at the state’s expense?¹³ The importance of a fair trial is held in the highest regard in the American justice system,¹⁴ and the necessity of a learned advocate on both sides is essential to this process.¹⁵ Therefore, at what point does the difficulty in providing legal assistance to indigent defendants outweigh the fundamental right to receive a fair trial? In many jurisdictions, eighty to ninety percent of those citizens charged with crimes are unable to afford private counsel.¹⁶ Given such depressing figures, a sound determination of this issue is even more imperative.

These are the questions that will be investigated in this article. Part II will discuss the landmark Supreme Court cases dealing with the right to counsel that lead up to the decision in *Alabama v. Shelton*.¹⁷ Special attention will be paid to the rationale behind these decisions, and the reasons for recognizing the importance of the Sixth Amendment’s guarantees. Part III will discuss the *Shelton* decision itself and explore both the majority’s and the dissent’s detailed logic in drafting the opinions. Part IV will expand on the Court’s recent departure from their prior Sixth Amendment

Clark, *supra* note 9, at 49-50.

11. See Stephen J. Schulhofer and David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice For All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 93 (1993) (concerning the courts’ abilities to conscript unwilling defenders).

12. See discussion *infra* Part II.A. The most important of these concerns is the legal burden on the defendant to prove this ineffective assistance of counsel.

13. U.S. CONST. amend. VI.

14. See Daniel Givelber, *The Right to Counsel in Collateral Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1404 (1999) (“If exonerating the innocent represents a significant goal of our system of criminal procedure, this process must provide some means for evaluating whether the defendant was competently and adequately represented at trial, so that an adversarial determination of guilt indeed occurred”).

15. See *id.*

16. Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 211 (1993).

17. 535 U.S. 654 (2002).

jurisprudence and attempt to discover if the *Shelton* decision was enough to bring it back on track. Part V will focus on the current state of affairs in indigent criminal trials and the chorus of critical reviews accompanying it. This will include the contemporary effects of uncounseled misdemeanors and proposed solutions to the problem, as well as some criticisms of these recent proposals and evidence of their failure. Part VI will conclude with a difficult but “inescapable resolution,” explaining why the Supreme Court must continue to move forward and give full force to the language of the Sixth Amendment. There are countless warning signals foretelling the dangers of a restricted Sixth Amendment right to counsel.¹⁸ A failure to heed these warnings will result in a mockery of the profession, a breakdown of justice, and a complete loss of faith in American criminal proceedings.

II. SUPREME COURT HISTORY OF THE RIGHT TO COUNSEL

A. Scope of This Article

Before reviewing the relevant Supreme Court precedent leading up to *Alabama v. Shelton*, it must be noted that this article will not analyze other equally important right to counsel issues such as when the right attaches,¹⁹ and then once it is earned, what is the “effective assistance of counsel,”²⁰ “critical stages” of a trial for Sixth Amendment purposes (stages in which it is crucial that counsel be present),²¹ use of uncounseled misdemeanors to enhance sentences,²² the right to counsel in collateral post-conviction

18. See discussion *infra* Part V.A.

19. See *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (holding that the Sixth Amendment right to counsel is triggered when an adversarial judicial proceeding has commenced, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”).

20. The *Strickland* Court identified the standard for effective assistance of counsel:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland v. Washington, 466 U.S. 668, 690 (1984)

21. See *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (“Because of its limited function and its nonadversary character, [a] probable cause determination is not a “critical stage” in the prosecution that would require appointed counsel.”); *United States v. Ash*, 413 U.S. 300, 321 (1973) (holding that a photographic display, even if conducted post-indictment, is not a critical stage of the proceedings and therefore does not require the presence of counsel); *United States v. Wade*, 388 U.S. 218 (1967) (finding that a post-indictment lineup is a “critical stage” requiring the assistance of counsel).

22. See Kirsten M. Nelson, *Nichols v. United States and the Collateral use of Uncounseled Misdemeanors in Sentence Enhancement*, 37 B.C. L. Rev. 557, 574-81 (1996) (discussing the *Nichols* decision, which held that a court could properly use a prior uncounseled misdemeanor to enhance a subsequent sentence).

proceedings,²³ the appointment of counsel in quasi-criminal cases,²⁴ the appointment of counsel for juvenile defendants,²⁵ and court appointed counsel in landlord-tenant disputes.²⁶ Rather, it will focus exclusively on the first step of the Sixth Amendment process: the circumstances in which an indigent defendant should be entitled to appointed counsel when charged with a criminal offense. Setting aside for the moment any proposed professional standard this counsel should be held to, or at what stages in the process an appointed counsel should be dutifully standing by their client's side, the inquiry will be limited to the question of how many indigent criminal defendants can employ the constitutional right to have free legal representation, and what type of charges must they face in order to take advantage of this right.²⁷

B. Historical Rationale for the Right to Appointed Counsel

While some commentators claimed to have discovered the roots of the right to appointed counsel in Roman history,²⁸ for purposes of this article the modern right to counsel commences with English statutory and common law before the colonization of America.²⁹ As always, in searching for the historical underpinnings of an important legal concept, the legal historian "must have his eyes on the end of the story, and be able to pick out the

23. See William D. Adams, Note, *The Prosecutorial Appeal of Parole: The Indigent Prisoner's Right to Counsel*, 41 WAYNE L. REV. 177, 189-90 (1994) (discussing the Supreme Court's opinion in *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973), which found that the right to counsel at parole hearings "must be made on a case-by-case basis in the exercise of a sound discretion by the [parole board]").

24. See Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 399-400 (noting that "[c]ourts have used the due process clause to provide indigent litigants the right to appointed counsel in defense of their liberty interests in such 'quasi-criminal' matters as juvenile delinquency, civil commitment, civil contempt, termination of parental rights, divorce, paternity, and deportation") (citations omitted).

25. See Patricia Puritz & Wendy Shang, *Juvenile Indigent Defense: Crisis and Solutions*, 15 CRIM. JUST. 22, 23 (2000) ("[T]he idea that juvenile court is an informally run 'kiddie court' with no need for vigorous legal advocacy seems to rest comfortably beside the notion that juveniles should receive harsher and more punitive sentencing—even the death penalty.").

26. See Anne Stark Gallagher, *Civil Gideon? Poor Tenants Want N.Y. to Pay For Lawyers in Evictions*, 75 A.B.A. J., Sept. 1989, at 16, 16 (discussing a lawsuit which argued that the equal-protection and due-process provisions of the New York and U.S. constitutions entitled low-income tenants to counsel in eviction cases).

27. Moreover, the "right to counsel" as guaranteed by the Sixth Amendment and discussed in this article should not be confused with the slightly different and non-constitutional "right to counsel" derived from the Fifth Amendment. See *Miranda v. Arizona*, 384 U.S. 436 (1966); Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 181 n.2 (1998).

28. See Thomas F. Liotti, *Does Gideon Still Make a Difference?*, 2 N.Y. CITY L. REV. 105, 107 (1998) (citing John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 385 (1923) and David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 739-48 (1980)).

29. See generally Julius J. Marke, *How the Right to Counsel Developed*, N.Y. L. J., March 16, 1999, at 5.

beginnings of those principles and rules and institutions which have survived and are operative today.”³⁰

Much humor and criticism have accompanied the well known procedure and settled rule at English common law by which a prisoner was not allowed counsel in any capital offense or commission of a felony (except treason after 1688), unless a point of law arose which properly required review, and yet was permitted the use of such representation in petty trespasses and minor misdemeanors.³¹ Modern American criminal jurisprudence has considered this a perversion.³² Blackstone denounced the rule rhetorically: “For upon what face of reason . . . can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?”³³

30. *Id.* (quoting the 17th Century lawyer John Selden).

31. *See* Marke, *supra* note 29, at 7. Marke relates the anecdotal “‘Case of the Mad Peer,’ which took place in the House of Peers in Westminster Hall in 1760, and is subtitled ‘The Right to Have a Fool for a Client.’” *Id.* Marke states that “it reflects how historic events gradually developed the concept of the right to counsel as presently guaranteed by our law:”

Lawrence Shirely, fourth Earl Ferrers, despite his descent from a long line of noble blood, was an “ill-looking” man, “dangerous” in appearance and corresponded to his reputation of being a “horrid lunatic . . . wild beast, a mad assassin and a low wretch.” For all his noble titles, the Earl was obviously a homicidal maniac. Believing that the steward of his estate was involved in a conspiracy against him with the Earl’s wife, who had received a separation from him by an Act of Parliament, he brutally and ferociously battered and finally murdered him while in a state of intoxication. Being a peer of the realm, Lord Ferrers was required by law to be tried by his peers in the House of Lords. Although many peers were absent, at least 140 were present. The case for the Crown was ably presented by the Attorney General, Charles Pratt, afterward Lord Camden, Chief Justice of the Common Pleas and Lord Chancellor. When Lord Ferrers’ time came to present his defense, he pleaded for an adjournment till the next day “as there are some circumstances that I could wish to consult my counsel about.” After being directed to proceed with his defense, the Earl then startled the House by claiming: “My Lords, I can hardly express myself, the very circumstance shocks me so much, but I am informed, from several circumstances of an indisposition of mind The defense I mean is occasional insanity of mind and I am convinced from recollecting within myself, that, at the time of this action, I could not know what I was about!”

Id.

32. *Powell v. Alabama*, 287 U.S. 45, 60 (1932):

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers. . . . One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. . . . But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

Id. at 60-61.

33. *Id.* at 60-61 (citation omitted).

This paradoxical procedure was not altered until a broader understanding of the right to counsel “was ultimately accepted, especially in the colonies, as a response to political exigencies.”³⁴ It was not until 1836 that “Parliament passed a law granting all individuals accused of felonies the right to have counsel in the presentation of their defense.”³⁵ Some of this legal reform was also attributed to Jeremy Bentham, and his fight “against the inequities of the law.”³⁶

The English common law attitude disfavoring the assistance of counsel was ultimately not to be imitated by the colonies. Initially, the colonies adopted a distrust of lawyers in general, and the attorney became “a symbol of oppression in both England and the colonies.”³⁷ This distaste for the profession is evident in the West New Jersey Charter of Fundamental Laws of 1676, which freed litigants of the compulsion to hire counsel to defend their cases.³⁸ The reform movement in England that favored the freedom to enlist counsel, however, eventually took hold in the United States.³⁹ Many of the American colonies enacted the role of public prosecutor.⁴⁰ Due to the prosecutor’s knowledge of the system, familiarity with the “idiosyncrasies of juries,” and relationship with “the personnel of the court,” the assistance of counsel “became essential to counter the prosecutor’s advantage.”⁴¹

The right to counsel was enumerated in most state constitutions after the colonies declared their independence.⁴² The denial of this right formed part

34. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 40 (1991).

35. Nelson, *supra* note 22, at 557-58; *see also* Garcia, *supra* note 34, at 40.

36. Marke, *supra* note 29, at 7.

37. Garcia, *supra* note 34, at 40.

38. *Id.*

39. Marke, *supra* note 29, at 8.

40. Garcia, *supra* note 34, at 41.

41. *Id.*

42. *See id.* The Court in *Powell v. Alabama* explained this development:

The rule [that prevailed at English common law] was rejected by the colonies. Before the adoption of the federal Constitution, the Constitution of Maryland had declared “That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel.” (Art. 19, Constitution of 1776). The Constitution of Massachusetts, adopted in 1780 (Part First, Art. XII), the Constitution of New Hampshire, adopted in 1784 (Part I, Art. XV), the Constitution of New York of 1777 (Article XXXIV), and the Constitution of Pennsylvania of 1776 (Art. IX), had also declared to the same effect. And in the case of Pennsylvania, as early as 1701, the Penn Charter (Art. X) declared that “all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors;” and there was also a provision in the Pennsylvania statute of May 31, 1718 (Dallas, *Laws of Pennsylvania, 1700—1781*, Vol. 1, p. 134), that in capital cases learned counsel should be assigned to the prisoners. In Delaware, the Constitution of 1776 (Art. XXV) adopted the common law of England, but expressly excepted such parts as were repugnant to the rights and privileges contained in the Declaration of Rights; and the Declaration of Rights, which was adopted on September 11, 1776, provided (Art. XIV) “That in all Prosecutions for criminal Offences, every Man hath a Right . . . to be allowed Counsel, . . .” In addition, Penn’s Charter, already referred to, was applicable in Delaware. The original Constitution of New Jersey of 1776 (Art. XVI) contained a provision like that of the Penn Charter, to the effect that all criminals should be admitted to the same privileges of counsel as their prosecutors. The original Constitution of North Carolina (1776) did not contain the guarantee, but c. 115, § 85, Sess. Laws, N. Car., 1777

of the grievances listed in the Declaration of Independence, and opposition to the Federal Constitution arose in part “because the procedural protections accorded the accused in state constitutions, with the exception of the jury trial, were conspicuously missing from the new document.”⁴³ This opposition subsided, of course, with the adoption of the Bill of Rights and the Sixth Amendment, which demanded that the Constitution “[reflect] the American public’s insistence on ‘the maintenance of a fair balance in criminal trials, and to that end the protection of the rights of the accused.’”⁴⁴ Part of the Sixth Amendment’s recognition of a balance in criminal trials was the natural rejection of the English rule denying counsel when faced with a more serious offense.⁴⁵ The ubiquitous right to counsel of one’s choice and at one’s expense, therefore, was enacted in large part to “redress the imbalance of power that existed in English procedure” and was secured with the interests of the defendant in mind.⁴⁶

When the Sixth Amendment was introduced and later adopted on the House and Senate floors during the First Congress, “hardly a protest was heard and the debate on the right of an accused in all criminal prosecutions to have the assistance of counsel for his defense, was so limited and uncontroversial, that problems later arose as to its actual meaning.”⁴⁷ One of these problems was the interpretation of the Amendment that included the right to appointed counsel if a defendant could not afford one. This problem was not solved until the United States Supreme Court decided the line of cases that began with *Powell v. Alabama*.⁴⁸

(N. Car. Rev. Laws, 1715—1796, Vol. I, 316), provided “. . . That every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defence, as well to facts as to law; . . .” Similarly, in South Carolina the original Constitution of 1776 did not contain the provision as to counsel, but it was provided as early as 1731 (Act of August 20, 1731, § XLIII, Grimke, S. Car. Pub. Laws, 1682—1790, p. 130) that every person charged with treason, murder, felony, or other capital offense, should be admitted to make full defense by counsel learned in the law. In Virginia there was no constitutional provision on the subject, but as early as August, 1734 (c. VII, § III, Laws of Va., 8th Geo. II, Hening’s Stat. at Large, Vol. 4, p. 404), there was an act declaring that in all trials for capital offenses the prisoner, upon his petition to the court, should be allowed counsel. The original Constitution of Connecticut (Art. I, § 9) contained a provision that “in all criminal prosecutions, the accused shall have the right to be heard by himself and by counsel;” but this constitution was not adopted until 1818. However, it appears that the English common law rule had been rejected in practice long prior to 1796. See Zephaniah Swift’s “A System of the Laws of the State of Connecticut,” printed at Windham by John Byrne, 1795—1796, Vol. II, Bk. 5, “Of Crimes and Punishments,” c. XXIV, “Of Trials,” pp. 398—399.

Powell v. Alabama, 287 U.S. 45, 61-63 (1932).

43. Garcia, *supra* note 34, at 41.

44. *Id.* (quoting F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 10, 27 (1951)).

45. *Id.* at 40-41.

46. *Id.*

47. Marke, *supra* note 29, at 8.

48. 287 U.S. 45 (1932).

C. Powell v. Alabama

The *Powell* decision in 1932 stands as the prominent forefather to all other Supreme Court decisions outlining the indigent criminal defendant's right to counsel.⁴⁹ In *Powell*, a group of young African-American defendants, later known as the "Scottsboro boys," were charged with the rape of two white girls.⁵⁰ Under Alabama statute, this crime was punishable by death.⁵¹ The record was disturbingly vague, but it was certain that the trial court had not appointed counsel to the young defendants until the very morning of trial, at which point a lawyer was largely meaningless.⁵² The defendants "were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with."⁵³ After three separate trials, each lasting only one day, all of the defendants were convicted and sentenced to death.⁵⁴

The Court in *Powell*, instead of focusing on the guarantees in the Sixth Amendment, ruled that the trials in Scottsboro, Alabama were fundamentally unfair under the Due Process Clause of the Fourteenth Amendment.⁵⁵ Carefully limiting its holding to the facts of the case, the Court stated:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.⁵⁶

Instead of imposing the Sixth Amendment right to counsel upon the states, it found the right to have the assistance of appointed counsel in such a setting a fundamental right under the Due Process Clause.⁵⁷ If the right to counsel would serve as a fundamental necessity for a wealthy defendant in this

49. See Nelson, *supra* note 22, at 559 ("It was not until 1932, in the landmark case of *Powell v. Alabama*, that the right to counsel began to evolve into a significant constitutional doctrine.") (citing Laurie S. Fulton, Note, *The Right to Counsel Clause of the Sixth Amendment*, 26 AM. CRIM. L. REV. 1599, 1605 (1989)).

50. *Powell*, 287 U.S. at 49.

51. *Id.* at 50.

52. *Id.* at 56. The Court extrapolated on the useless nature of this "counsel" that might have been appointed to the defendants:

Prior to [the morning of trial], the trial judge had appointed all the members of the bar "for the limited purpose of arraigning the defendants. Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel.

Id.

53. *Id.* at 52.

54. *Id.* at 50.

55. *Id.* at 71.

56. *Id.* at 71.

57. *Id.* at 67-68; see also Catz & Firak, *supra* note 24, at 401.

circumstance, then certainly the same protection must apply to the poor African-American defendants in Alabama.

The Court, speaking through Justice Sutherland, utilized powerful language in the *Powell* opinion.⁵⁸ Most important was the recognition that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁵⁹ The underlying rationale was that the Constitution requires a fair trial, and a fair trial requires a lawyer on both sides of the adversarial process, regardless of the defendant’s ability to pay for one.⁶⁰ Sentencing an uncounseled defendant to death, the Court surmised, would amount to “judicial murder.”⁶¹

Despite this extension of the Due Process Clause, “the invocation of a long list of circumstances demanding the defendants’ representation ended up restricting the scope of the Court’s ‘right to counsel.’”⁶² Even after the *Powell* decision, therefore, the states were still free to deny an indigent defendant the right to counsel in any non-capital felony case as long as the proceeding did not rise to the level of fundamental unfairness so prevalent in the Scottsboro trials.⁶³

58. See *Powell*, 287 U.S. at 68-69. An oft-quoted phrase bears repeating:

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 more true is it of the ignorant and illiterate, or those of feeble intellect.

Id.

59. *Id.*

60. See *id.*

61. *Id.* at 72.

62. Victoria Nourse, *Gideon’s Muted Trumpet*, 58 MD. L. REV. 1417, 1422 (1999).

63. See *Powell*, 287 U.S. at 71-73. Despite this limitation on the Court’s holding, Justice Butler’s dissenting opinion still expressed regret at the court’s extension of the Fourteenth Amendment:

If correct, the ruling that the failure of the trial court to give petitioners time and opportunity to secure counsel was denial of due process is enough, and with this the opinion should end. But the Court goes on to declare that “the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.”

Id. at 76 (Butler, J., dissenting).

D. Johnson v. Zerbst⁶⁴

Six years later in *Zerbst*, the Court ruled that *Powell* should have a more definitive reach in federal courts.⁶⁵ The defendant in *Zerbst* was convicted in federal court of “possessing and uttering” counterfeit money without the assistance of counsel.⁶⁶ He filed a petition for habeas corpus that eventually reached the Supreme Court.⁶⁷ The Court overturned his conviction, this time basing its decision on the Sixth Amendment’s guarantee of counsel “in all criminal prosecutions.”⁶⁸ Justice Black, writing for the majority, thought that absent a knowing and intelligent waiver, the Sixth Amendment “withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty” unless he was represented by counsel at trial.⁶⁹

The Court’s reasoning in *Zerbst* relied on the forceful language and apparently just conclusion of *Powell*, but it reached that same conclusion through a different vehicle.⁷⁰ The Court emphasized *Powell*’s notion that an indigent and uncounseled defendant suffers a marked disadvantage against the government, and could therefore suffer a denial of due process, but their holding ultimately rested on Sixth Amendment grounds.⁷¹ The opinion also viewed the right to counsel “as a constitutionally defined element of a criminal trial,” and it was therefore “the trial court’s affirmative obligation to see that the accused was given this right.”⁷² The Court invoked 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 presented by experienced and learned counsel.”⁷³

The Court in *Zerbst* ultimately found relief for federal indigent defendants by way of the Sixth Amendment instead of the Due Process Clause.⁷⁴ However, by merely interpreting the Sixth Amendment’s mandates on the federal government, *Zerbst* left *Powell*’s demands on the states undisturbed.⁷⁵ States were still only required to offer court appointed counsel to indigent defendants in capital cases or in particular situations where an uncounseled trial would offend all notions of due process.⁷⁶

64. 304 U.S. 458 (1938).

65. *Id.* at 463.

66. *Id.* at 459.

67. *Id.*

68. *Id.* at 463 (quoting U.S. CONST. amend. VI).

69. *Id.*

70. *Id.* at 462-63.

71. *See id.*

72. Liotti, *supra* note 28, at 119 (citing *Zerbst*, 304 U.S. at 467-68).

73. *Zerbst*, 304 U.S. at 462-63.

74. *Id.* at 467-69.

75. *See* Liotti, *supra* note 28, at 119.

76. *See Zerbst*, 304 U.S. at 467-69.

E. *Betts v. Brady*⁷⁷

The Court refused to extend either Fourteenth Amendment or Sixth Amendment protection to indigent defendants in state courts four years later in a 1942 decision that has been labeled “counterintuitive.”⁷⁸ In *Betts*, the defendant was charged with robbery, demanded appointed counsel, and was refused.⁷⁹ He was subsequently convicted, and the Supreme Court upheld that conviction by holding that the Fourteenth Amendment’s Due Process Clause did not mandate counsel for an indigent defendant charged with a felony offense in state court.⁸⁰ Just as they had done in *Powell*, the Court focused on the specific facts of the case: the defendant was forty-three, he was familiar with the criminal process, and he was “of ordinary intelligence.”⁸¹ In this setting, however, these specific factual findings led the Court to believe that the defendant had the ability to defend himself adequately, and he was therefore not denied any constitutional protection.⁸²

In addition, the Court explicitly refused to incorporate the fundamental Sixth Amendment right to counsel, as applied to federal indigent defendants in *Johnson*, into the Fourteenth Amendment’s due process requirements on the states.⁸³ The Court troubled itself with a review of every state constitution in order to find the will of the people in appointing indigent defendants counsel at the expense of the state.⁸⁴ Their conclusion was firm:

77. 316 U.S. 455 (1942).

78. Garcia, *supra* note 34, at 47.

79. *Betts*, 316 U.S. at 456-57.

80. *Id.* at 472-73.

81. *Id.* at 472.

82. *Id.* at 472-73.

83. *Id.* at 464-66. The Court stated:

In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be “allowed” counsel or should have a right “to be heard by himself and his counsel,” or that he might be heard by “either or both,” at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the State to provide counsel for a defendant.

Id.

84. *Betts*, 316 U.S. at 467-68 nn.21-22:

The constitutions of all the States, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine States may be said to embody a guarantee textually the same as that of the Sixth Amendment or of like import. In the fundamental law of most States, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice. Georgia (Art. I, Par. V); Iowa (Art. I, § 10); Louisiana (Art. I, § 9); Michigan (Dec. of Rights, Art. II, § 19); Minnesota (Art. I, § 6); New Jersey (Art. I, § 8); North Carolina (Art. I, § 11); Rhode Island (Art. I, § 10); West Virginia (Art. III, § 14). Some assert the right of a defendant “to appear and defend in person and by counsel.” Arizona (Art. II, § 24); Colorado (Art. II, § 16); Illinois (Art. II, § 9); Missouri (Art. II, § 22); Montana (Art. III, § 16); New Mexico (Art. II, § 14); South Dakota (Art. VI, § 7); Utah (Art. I, § 12); Wyoming (Art. I, § 10). Others phrase the right as that “to be heard by himself and (his) counsel”: Arkansas (Art. II, § 10); Delaware

This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case.⁸⁵

In dissent, Justice Black found the Court's ruling contrary to its prior holdings in *Powell* and *Johnson*.⁸⁶ He reiterated the logic underlying those decisions and concluded that depriving a defendant of counsel because of his indigent status is at odds with "common and fundamental ideas of fairness and right."⁸⁷ He expressed the view that the Sixth Amendment should be applicable to the states, but even if it is not, the Court should have rested its decision on narrower grounds, namely that the petitioner was denied due process under the Federal Constitution.⁸⁸ Nevertheless, the majority found that the "denial of [appointed] counsel in *Betts* was not so offensive to [this] . . . fundamental . . . fairness as to constitute a violation of due process."⁸⁹

Justice Black espoused disdain for the Court's decision for two additional reasons. The first was practical: "[a] practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty."⁹⁰ The second was statistical: unlike the majority, Justice Black had a different interpretation of the states' statutes and provisions allowing for a right to appointed counsel.⁹¹ Although the states

(Art. I, § 7); *Indiana* (Art. I, § 13); *Kentucky* (Bill of Rights, § 11); *Pennsylvania* (Art. I, § 9); *Tennessee* (Art. I, § 9); *Vermont* (Ch. I, Art. 10th); or "by himself and by counsel": *Connecticut* (Art. I, § 9) or "by himself, and counsel": *New Hampshire* (Bill of Rights, 15th); *Oklahoma* (Art. II, § 20); *Oregon* (Art. I, § 11); *Wisconsin* (Art. I, § 7); or "by himself and counsel or either": *Alabama* (Art. I, § 6); "by himself or counsel or (by) both": *Florida* (Dec. of Rights, § 11); *Mississippi* (Art. III, § 26); *South Carolina* (Art. I, § 18); *Texas* (Art. I, § 10). The verbiage sometimes employed is: "to appear and defend in person and with counsel"; *California* (Art. I, § 13); *Idaho*, (Art. I, § 13); *North Dakota* (Art. I, § 13); *Ohio* (Art. I, § 10); or "in person, or by counsel"; *Kansas* (Bill of Rights, § 10); *Nebraska* (Art. I, § 11); *Washington* (Art. I, § 22). *Nevada* (Art. I, § 8) and *New York* (Art. I, § 6) add: "as in civil actions." Some constitutions formulate the right as one "to be heard by himself and his counsel at his election" or "himself and his counsel or either at his election": *Massachusetts* (Part I, § 12), *Maine* (Art. I, § 6). *Maryland* (Dec. of Rights, Art. 21) states the right as that "to be allowed counsel."

85. *Id.* at 471.

86. *Id.* at 475-76 (Black, J., dissenting).

87. *Id.* (Black, J., dissenting) ("Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude . . . that the defendant's case was adequately presented.").

88. *Id.* at 474-75 (Black, J., dissenting).

89. *Id.* at 472; see also Nelson, *supra* note 22, at 561.

90. *Betts*, 316 U.S. at 476 (Black, J., dissenting).

91. *Id.* at 477 n.2 (Black, J., dissenting).

may not have perceived the right to counsel as a *fundamental right*, he pointed out that “[i]n thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases . . . be provided with counsel on request.”⁹² Despite Justice Black’s reservations, *Betts* went to jail without the assistance of counsel,⁹³ and it required the loud burst of a trumpet call twenty-one years later to revive his spirit.

F. *Gideon v. Wainwright*⁹⁴

The societal import of the 1963 *Gideon* decision is nearly impossible to overstate. “Few decisions have evoked as much popular support.”⁹⁵ Clarence Earl Gideon was convicted in Florida of “having broken and entered a pool [hall] with the intent to commit a misdemeanor,” which was a felony under Florida law.⁹⁶ Gideon was denied the right to appointed counsel by the trial court, and the Court ultimately found that this was in contravention of the Sixth Amendment.⁹⁷ They explicitly overruled the *Betts* decision, and solidified what they had been hinting at for decades: the right to be heard by counsel was *essential* to a fair trial.⁹⁸

Justice Black, now joined by a majority of justices, demonstrated that even at the time *Betts* was decided, the Court “had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty . . . are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”⁹⁹ In fact, “the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents.”¹⁰⁰ Justice Black also made known that “[t]wenty-two States, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled.”¹⁰¹

The Court’s legal legwork took little effort and few pages to describe.¹⁰² They first determined that a criminal defendant’s Sixth Amendment right to counsel is fundamental and essential to a fair trial.¹⁰³ Consequently, and like

92. *Id.*

93. *Id.* at 457.

94. 372 U.S. 335 (1963).

95. See Garcia, *supra* note 34, at 49.

96. *Gideon*, 372 U.S. at 336-37.

97. *Id.* at 343-44.

98. *Id.* at 344.

99. *Id.* at 341.

100. *Id.* at 344.

101. *Id.* at 345.

102. *Id.* at 343-44.

103. *Id.* (“Not only these precedents but also reason 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.”).

other fundamental rights essential to a fair trial, this right was incorporated into the Fourteenth Amendment's guarantee of due process of law and binding on the states.¹⁰⁴ Therefore, the Sixth Amendment right to counsel applied to those indigent defendants charged with crimes in state courts.¹⁰⁵ This would ensure equal protection to indigent defendants, and instill the maxim in our system that "lawyers in criminal courts are necessities, not luxuries."¹⁰⁶ In order to fairly and justly counter the states' "vast sums of money [establishing] machinery to try defendants accused of crime," the indigent defendant was at least entitled to show up in court with an advocate by his side.¹⁰⁷ The Court noted that American constitutions, both federal and state, have always placed great emphasis on "procedural and substantive safeguards designed to assure fair trials before impartial tribunals."¹⁰⁸ This noble ideal could not be realized "if the poor man charged with crime has to face his accusers without a lawyer to assist him."¹⁰⁹

To what degree the Sixth Amendment was applicable to the states was the focus of the discussion of the concurring opinions in *Gideon*.¹¹⁰ *Gideon* had been convicted of a felony, and so the immediate impact of the majority decision was to require states to supply counsel to poor defendants who were at least accused of a felony.¹¹¹ This holding differed from the *Zerbst* decision, which interpreted the Sixth Amendment's applicability solely in federal courts and held that a lawyer must be appointed in any case in which "life or liberty" was at stake.¹¹² Justice Douglas was of the view that the guarantees in the Bill of Rights, made applicable to the states by way of the Fourteenth Amendment, were not "watered-down" versions of those guarantees.¹¹³ This philosophy holds that the states should be forced to provide counsel to *all* defendants whose life or liberty is at stake, as the federal courts had been required to do since *Johnson*.¹¹⁴ Justice Clark made a similar argument and said that there should be no distinction between

104. The Court explained:

We accept *Betts v. Brady's* assumption based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

Gideon, 372 U.S. at 342.

105. *Id.* at 343-44.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* at 345-47 (Douglas, J., concurring); *id.* at 347-49 (Clark, J., concurring); *id.* at 349-52 (Harlan, J., concurring).

111. *Id.* at 336-37.

112. *Zerbst*, 304 U.S. at 467-68.

113. *Gideon*, 372 U.S. at 346-47 (Douglas, J., concurring) (asserting confidently that the contrary view has not prevailed in the Court's history).

114. *See id.*; *Zerbst*, 304 U.S. at 467 ("The Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.").

capital and noncapital cases.¹¹⁵ He felt that the Fourteenth Amendment required due process of law “for the deprivation of ‘liberty’ just as for the deprivation of ‘life,’ and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved.”¹¹⁶ Because the decision applied to at least some noncapital cases, namely any offense that qualified as a felony under the states’ penal codes, the majority decision fulfilled only some of his expectations.¹¹⁷

Justice Harlan took a somewhat different stance. He suggested that *Betts* be accorded “a more respectful burial.”¹¹⁸ Instead of incorporating the Sixth Amendment in its entirety, he reasoned, the Court’s prior precedent did not justify carrying over “an entire body of federal law and [applying] it in full sweep to the States.”¹¹⁹ He parenthetically hinted that the issue of whether the rule requiring appointed counsel to indigent defendants should extend to all criminal cases “need not now be decided.”¹²⁰

Justice Harlan’s doubts about the pervasiveness of the right to counsel, and the Court’s decision, which was, of course, limited to the facts of the case, left open the question of how far the Sixth Amendment, as made applicable to the states through the Fourteenth Amendment, would extend.¹²¹ It was clear that after *Gideon*, any indigent defendant charged with a felony was entitled to court appointed counsel.¹²² What about those charged with misdemeanors? Nine years later, the Court would provide an inventive answer.

G. *Argersinger v. Hamlin*¹²³

Jon Argersinger was charged in Florida with carrying a concealed weapon, a crime punishable by imprisonment of up to six months, a \$1,000 fine, or both.¹²⁴ He was tried before a judge without the benefit of counsel and sentenced to 90 days in jail.¹²⁵ He brought a habeas corpus action, alleging that he was unable as an indigent person to effectively raise and

115. *Gideon*, 372 U.S. at 348 (Clark, J., concurring).

116. *Id.* at 349 (Clark, J., concurring).

117. *Id.* at 336-37 (noting the offense in *Gideon* was a felony under Florida law).

118. *Id.* at 349 (Harlan, J., concurring).

119. *Id.* at 352 (Harlan, J., concurring).

120. *Id.* at 351 (Harlan, J., concurring).

121. *Id.*

122. *Id.* at 339, 345.

123. 407 U.S. 25 (1972).

124. *Id.* at 26.

125. *Id.*

present to the trial court a viable defense to the charge for which he was convicted.¹²⁶

The Court, in reflecting on whether or not to extend the right to court appointed counsel to misdemeanor cases, looked to historical understandings of a complimentary Sixth Amendment right: the right to a trial by jury.¹²⁷ The state argued that since the right to a jury trial had only been mandatory for those crimes punishable by more than six months in prison, the same rule should apply to the Sixth Amendment right to counsel.¹²⁸ The Court disagreed, reiterating what it had said in *Powell* and *Gideon*, that “[t]he assistance of counsel is often a requisite to the very existence of a fair trial.”¹²⁹ Moreover, the Court recalled that in England, the right to counsel was inexplicably denied in the most heinous crimes, but provided for more petty offenses.¹³⁰ It was clear that by inserting in the Bill of Rights a guarantee that an accused be entitled to counsel “in all criminal prosecutions,” our nation’s founders meant to do away with this awkward procedure in felony prosecutions.¹³¹ However, this certainly did not mean that they also intended to “embody a retraction of the right in petty offenses wherein the common law previously *did require* that counsel be provided.”¹³²

The Court then spouted its numerous reasons for extending the right to counsel to some misdemeanors.¹³³ First, even though *Powell* and *Gideon* involved felonies, “their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.”¹³⁴ Second, it was ignorant to suppose that the legal and constitutional questions involved in a misdemeanor case “are any less complex” than those in felony prosecutions.¹³⁵ Third, the existence of guilty pleas, just as prevalent in misdemeanor cases as in felony prosecutions, called for the guiding hand of counsel so that “the accused may know precisely what he is doing.”¹³⁶ Finally, the sheer volume of misdemeanor cases, far more in number than felonies, created “an obsession for speedy dispositions, regardless of the fairness of the result.”¹³⁷ This

126. *Id.*

127. *Id.* at 29 (“The right to trial by jury, also guaranteed by the Sixth Amendment . . . was limited by *Duncan v. Louisiana* But . . . the right to trial by jury has a different genealogy.”).

128. *Id.* at 30 (“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.”).

129. *Id.* at 31 (“We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer.”).

130. *Id.* at 30 (quoting *Powell v. Alabama*, 287 U.S. 45, 60, 64-65 (1932)); see also discussion *infra* Part V.A.

131. *Argersinger*, 407 U.S. at 30.

132. *Id.* at 30 (emphasis added).

133. *Id.* at 32-37.

134. *Id.* at 32.

135. *Id.* at 33; see also Nelson, *supra* note 22, at 563 (“The Court reasoned that the complexities and implications associated with misdemeanor convictions often equally require effective counsel.”).

136. *Argersinger*, 407 U.S. at 34.

137. *Id.* at 34. The Court quoted statistics in the 1960’s and 1970’s involving felony and

reality weighed heavily in favor of granting appointed counsel to those charged with misdemeanors.¹³⁸

The final holding of *Argersinger* requires the most attention to detail. The Court explicitly stated that they need not consider the requirements of the Sixth Amendment in regard to the right to counsel “where loss of liberty is not involved.”¹³⁹ Presumably, this loss of liberty referred only to actual time served in jail. This limited the holding to only some misdemeanors, namely those where the prosecutors know they are seeking a sentence of imprisonment:

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 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.¹⁴⁰

With this waive of its judicial hand, the Court generously extended the right to counsel to any case in which the accused was sentenced to a term of imprisonment.¹⁴¹ Two questions remained. The first was a forward-looking critique: Why not extend the right to appointed counsel to all misdemeanors or all criminal charges where there is a *possibility* of imprisonment or another bright line rule? The second was a backward-looking concern: The states have already had difficulties funding the expanded right to counsel, so how are they going to fund this new explosion of court appointed lawyers?

Chief Justice Burger discussed the first inquiry in his concurrence.¹⁴² While agreeing that the Court was headed in the proper direction, he voiced concern that their rule might be difficult to apply in court.¹⁴³ He implied that the burden placed on the trial judge in making “a predictive evaluation of each case” to determine whether a jail sentence will be imposed would place “a new load on courts already overburdened and already compelled to deal with far more cases in one day than is reasonable and proper.”¹⁴⁴ He was

misdemeanor cases and cited numerous commentators who have painted a bleak picture of a misdemeanor conviction. *Id.* at 34-35. “The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.” *Id.* at 35-36 (quoting William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 THE LEGAL AID BRIEF CASE 151, 152 (1970)).

138. *Argersinger*, 704 U.S. at 36-37.

139. *Id.* at 37.

140. *Id.* at 37, 40.

141. *See id.*

142. *Id.* at 41-42 (Burger, C.J., concurring).

143. *Id.* at 42 (Burger, C.J., concurring).

144. *Id.*

more inclined to draw the line at penalties in excess of six months imprisonment.¹⁴⁵ After these concerns surfaced, however, Chief Justice Burger expressed his full fledged confidence in the ability of the system to meet its new demands.¹⁴⁶ “The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.”¹⁴⁷

In his concurrence, Justice Brennan gave a brief answer to the second remaining question: How can the states manage to provide counsel to any indigent defendant they wish to send to prison?¹⁴⁸ He proposed that law students as well as private practicing attorneys might provide an important source of legal representation for the indigent.¹⁴⁹

Justice Powell was not so optimistic. After expressing his disapproval of the line drawn by the court,¹⁵⁰ he went on to assert his position that the right to counsel should only be required in petty cases “whenever the assistance of counsel is necessary to assure a fair trial.”¹⁵¹ Although he concurred in the result, he displayed some distaste with the Court’s rigid application of the Sixth Amendment guarantee and mentioned that “[s]ome petty offense cases are complex; others are exceedingly simple.”¹⁵² The result would be that in some cases, “the costs of assistance of counsel may exceed the benefits.”¹⁵³ He predicted a “seriously adverse impact upon the day-to-day functioning of the criminal justice system,” consisting of “delay and congestion” in the courts and inadequate resources to provide counsel to every indigent defendant that fell within the majority’s protected group.¹⁵⁴ Justice Powell thought a further problem with the majority rule was its insensitivity to deprivations of *property* as well as liberty.¹⁵⁵ He listed

145. *Id.* at 41 (Burger, C.J., concurring).

146. *Id.* at 44 (Burger, C.J., concurring); *see also* Nelson, *supra* note 22, at 563-64.

147. *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring); *see also* Nelson, *supra* note 22, at 563-64.

148. *Argersinger*, 407 U.S. at 40-41 (Brennan, J., concurring).

149. *Id.* Justice Brennan surveyed programs that had already explored the option of using law students in the country’s accredited law schools in clinical programs in which faculty supervised students aid clients in a variety of civil and criminal matters. *Id.* He cited statistics from The Council on Legal Education for Professional Responsibility (CLEPR) which showed that more than 125 of the country’s 147 accredited law schools had established clinical programs in which faculty supervised students aided clients. *Id.* “These programs supplement practice rules enacted in 38 States authorizing students to practice law under prescribed conditions. Like the American Bar Association’s Model Student Practice Rule (1969), most of these regulations permit students to make supervised court appearances as defense counsel in criminal cases.” *Id.* at 40-41; *see also* CLEPR, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS 13 (1971).

150. Justice Powell envisioned a more lenient standard in which the right to counsel was judged on a case by case analysis based on judicial discretion. *See* Nelson, *supra* note 22, at 564. More specifically, he wanted the line to 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*, 407 U.S. at 45-46 (Powell, J., concurring).

151. *Argersinger*, 407 U.S. at 47 (Powell, J., concurring).

152. *Id.* at 49 (Powell, J., concurring).

153. *Id.*

154. *Id.* at 52, 59 (Powell, J., concurring).

155. *Id.* at 51-52 (Powell, J., concurring).

several consequences more damaging than a brief period of incarceration, and reminded the Court that these restrictions might be suffered by an indigent who was uncounseled at trial.¹⁵⁶ This seemed to be an unfair result: the more sensible solution in his mind was the adjudication of the indigent's need for counsel on a case by case basis, keeping under consideration the complexity of the offense, the probable sentence that would follow, and the individual factors peculiar to each case.¹⁵⁷ The majority ultimately did not heed Justice Powell's advice, and the Court drew the line for an indigent's right to appointed counsel at "actual imprisonment."¹⁵⁸ This standard was to be challenged seven years later in *Scott v. Illinois*.¹⁵⁹

H. *Scott v. Illinois*¹⁶⁰

Aubrey Scott was convicted of shoplifting in Illinois, and the maximum penalty for such an offense [was] a \$500 fine or one year in jail, or both.¹⁶¹ He was only fined for the conviction.¹⁶² He appealed his conviction all the way to the United States Supreme Court, and he based his appeal on one premise: the logical culmination of the line of cases leading up to *Argersinger* required that counsel be appointed to all indigents whenever imprisonment is an *authorized* penalty.¹⁶³ The Court found no merit in his plea.¹⁶⁴ Just as *Betts* had halted the constitutional progression of *Powell* and *Johnson*, so too did *Scott* put an end to the blossoming right to counsel favored by the *Gideon* and *Argersinger* decisions.¹⁶⁵

The Court's language in a plurality decision consisted mostly of practical considerations:

[Our numerous opinions in precedent cases suggest] that constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to

156. *Id.* Justice Powell surmised:

The logic [the Court] advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. Nor does the majority deny that some "non-jail" penalties are more serious than brief jail sentences.

Id. at 52; see also Garcia, *supra* note 34, at 53 ("It is anomalous, [Justice Powell] argued, to deny counsel in some circumstances wherein the penalty, though not involving prison, is harsher than brief imprisonment.").

157. *Argersinger*, 407 U.S. at 63 (Powell, J., concurring).

158. *Id.* at 40.

159. *Scott v. Illinois*, 440 U.S. 367 (1979).

160. 440 U.S. 367 (1979).

161. *Id.* at 368.

162. *See id.*

163. *See id.* at 368-70.

164. *Id.* at 369.

165. *Id.* at 369-74.

transpose lines from one area of Sixth Amendment jurisprudence to another. . . . Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. 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.¹⁶⁶

Aside from insisting that the line drawn in *Argersinger* was the most reasonable, the plurality showed a certain amount of hesitancy to extend the right to counsel given the costs to the states.¹⁶⁷ They assumed that “any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.”¹⁶⁸

Their simple rationale did not rest well with all of the justices, and the Court was heavily divided.¹⁶⁹ Justice Powell, whose concurrence gave stronger authority to the four member plurality, reaffirmed his position that a more flexible rule was needed to be consistent with due process and to “better serve the cause of justice.”¹⁷⁰ Justice Brennan, joined by Justices Marshall and Stevens, found it appropriate to memorialize the text of the Sixth Amendment once again, and found that “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.”¹⁷¹ Justice Brennan’s dissent quoted *Powell, Johnson,*

166. *Id.* at 372-73. The Court would further detail this standard in *Glover v. United States*, 531 U.S. 198, 203 (2001) (recognizing that “any amount of actual jail time has Sixth Amendment significance”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) (ruling that the “right [to appointed counsel] does not extend to nonfelony trials if no term of imprisonment is actually imposed”); and *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26 (1981) (refusing to extend the right of appointed counsel to include “prosecutions which, though criminal, do not result in the defendant’s loss of personal liberty”).

167. *Scott*, 440 U.S. at 373.

168. *Id.* The Court supported this conclusion with the acknowledgement that the line in *Argersinger* was drawn “with full awareness of the various options.” *Id.* at 373 n.4. The author of this article must humbly suggest that “full awareness” in hindsight seldom turns out to be precisely that.

169. *See id.* at 374-90.

170. *Id.* at 375 (Powell, J., concurring). Justice Powell delineated:

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.

Id. at 374-75.

171. *Id.* at 376 (Brennan, J., dissenting).

and *Gideon*, and came to the conclusion that those decisions demanded the extension of the right to counsel to a defendant such as Scott.¹⁷²

Justice Brennan refuted the plurality's vision of budgetary disaster among the states in three ways.¹⁷³ First, those fears were, as the Court admitted, speculative.¹⁷⁴ Second, he proffered that "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."¹⁷⁵ The third, and in Justice Brennan's view the strongest argument in refutation of the plurality's anticipated financial stress on the states, was the empirical evidence in the states' penal codes, which showed that a majority of states, at the time of the decision, had implemented an "authorized imprisonment" standard for the right to counsel without detrimental results.¹⁷⁶ In fact, Scott would be entitled to appointed counsel under the current systems of at least thirty-three states at the time of the Court's decision.¹⁷⁷ This meant that the plurality's "alarmist prophesy" that an authorized imprisonment standard would "wreak havoc on the states" was unfounded.¹⁷⁸ Finally, Justice Brennan accused the Court of turning *Argersinger* "on its head."¹⁷⁹ This was because its opinion restricted the right to counsel, "perhaps the most fundamental Sixth Amendment right, more narrowly than the admittedly less fundamental right to jury trial."¹⁸⁰

172. *Id.* at 376-78 (Brennan, J., dissenting).

173. *Id.* at 384-89.

174. *Id.* at 384-85 (Brennan, J., dissenting) ("[A]lthough more persons are charged with misdemeanors punishable by incarceration than are charged with felonies, a smaller percentage of persons charged with misdemeanors qualify as indigent, and misdemeanor cases as a rule require far less attorney time.") *Id.* at 384-85.

175. *Id.* at 385 (Brennan, J., dissenting) ("[T]he public defender system alternative also answers the argument that an 'authorized imprisonment' standard would clog the courts with inexperienced appointed counsel.").

176. *Id.* at 386-88 nn.18-21 (Brennan, J., dissenting) (listing all of the states' penal codes and where they draw the line for the right to appointed counsel).

177. These statistics were piled on top of the plurality's own admission that the empirical work done in order to discover the effect of *Argersinger* on the states had shown "that the requirements of *Argersinger* have not proved to be unduly burdensome." *Id.* at 373 n.5.

178. *Scott*, 440 U.S. at 374 n.5. Professor Garcia expanded on this idea:

Furthermore, it is ironic that *Scott's* practical implications would pose more serious systemic problems than the alternative "authorized imprisonment" standard it rejected. As Justice Powell pointed out in *Argersinger*, and Justice Brennan reiterated in his *Scott* dissent, the "actual imprisonment" test presents numerous administrative difficulties, which include: timeconsuming decisions before trial of the likely sentence, inaccurate predictions, discretionary abuse, "unequal treatment," and "apparent and actual" bias.

Garcia, *supra* note 34, at 25.

179. *Scott*, 440 U.S. at 389 (Brennan, J., dissenting).

180. *Id.* (citing *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) and *Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972)).

Justice Blackmun's short dissent proposed that the line be drawn at any offense which is punishable by more than six months' imprisonment (correlating with the right to a jury trial), or in any case where the defendant is convicted and actually sentenced to a term of imprisonment.¹⁸¹

The decision in *Scott* cloaked the stage with new scenery. It prepared the Court for the coming of an even more rigorous analysis under the Sixth Amendment: what constitutes "actual imprisonment?"

III. ALABAMA V. SHELTON¹⁸²

A. Factual History

The Court's fragmented opinions in *Argersinger* and *Scott* anticipated the coming of a case that would draw the line for the right to counsel even more particularly. In *Scott*, the Court had narrowly confined "loss of liberty" to mean only "actual imprisonment."¹⁸³ The question now to be presented before the court was the precise definition of "actual imprisonment." That question was answered in June of 2002.¹⁸⁴

LeReed Shelton was charged with third-degree assault, an offense which carried the maximum punishment of one year imprisonment and a \$2,000 fine.¹⁸⁵ He represented himself at a bench trial and was convicted.¹⁸⁶ Shelton then invoked his right to a new trial by a jury and represented himself at that trial as well.¹⁸⁷ The court repeatedly warned Shelton about the dangers of self-representation, but it did not offer him assistance of counsel at the state's expense.¹⁸⁸ He was convicted again, and was sentenced to thirty days in the county prison.¹⁸⁹ . . . [T]he court suspended [this jail] sentence and placed Shelton on probation for two years, . . . conditioned on his payment of court costs, a \$500 fine, reparations of \$25, and restitution in the amount of \$516.69."¹⁹⁰

B. Procedural History

Shelton appealed his conviction on Sixth Amendment grounds, but the Alabama Court of Criminal Appeals affirmed.¹⁹¹ The state court of appeals "initially held that an indigent defendant who receives a suspended prison sentence has a constitutional right to state-appointed counsel and remanded

181. *Scott*, 440 U.S. at 390 (Blackmun, J., dissenting).

182. 535 U.S. 654 (2002).

183. *Scott*, 440 U.S. at 373-74.

184. *Shelton*, 535 U.S. 654 (2002).

185. *Id.* at 658.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 658-59.

for a determination whether Shelton had ‘made a knowing, intelligent, and voluntary waiver of his right.’¹⁹² “When the case returned on remand, however, the appeals court reversed course: A suspended sentence does not trigger the Sixth Amendment right to appointed counsel unless there is ‘evidence in the record that the [defendant] has actually been deprived of liberty.’”¹⁹³ The court held that Shelton had not been denied any Sixth Amendment right at trial because he remained on probation.¹⁹⁴

Shelton appealed from this change of heart, and the Supreme Court of Alabama reversed the Court of Criminal Appeals in relevant part.¹⁹⁵ The Alabama Supreme Court, referring to the United States Supreme Court’s decisions in *Argersinger* and *Scott*, held that a defendant may not be “sentenced to a term of imprisonment” without representation.¹⁹⁶ The Alabama Supreme Court reasoned that “a suspended sentence constitutes a ‘term of imprisonment’ within the meaning of *Argersinger* and *Scott* even though incarceration is not immediate or inevitable.”¹⁹⁷ Furthermore, since the state was constitutionally barred from activating the conditional sentence, the Alabama court concluded that “‘the threat itself is hollow and should be considered a nullity.’”¹⁹⁸ Therefore, “the court affirmed Shelton’s conviction and the monetary portion of his punishment, but invalidated that aspect of his sentence imposing 30 days of suspended jail time.”¹⁹⁹

The State of Alabama appealed to the United States Supreme Court, and the Court granted certiorari because lower courts were divided on the question of whether “appointment of counsel is a constitutional prerequisite to imposition of a conditional or suspended prison sentence.”²⁰⁰

Three different positions on the issue had been presented to the Court. Shelton argued “that an indigent defendant may not receive a suspended sentence unless he is offered or waives the assistance of state appointed counsel.”²⁰¹ Alabama now conceded that the Sixth Amendment barred activation of a suspended sentence for a conviction without representation,

192. *Id.* at 659.

193. *Id.*

194. *Id.*

195. *Ex parte Shelton*, No. 1990031, 2000 WL 1603806, at *5 (Ala. May 19, 2000).

196. *Id.* at *4.

197. *Shelton*, 535 U.S. at 659.

198. *Ex parte Shelton*, 2000 WL 1603806, at *4.

199. *Shelton*, 535 U.S. at 659-60.

200. *Id.* at 660. The Court cited three decisions that found the imposition of a suspended sentence upon an uncounseled defendant unconstitutional and three decisions that found otherwise. *Id.* The three cases cited by the Court that equated “actual imprisonment” with a suspended sentence were: *United States v. Reilly*, 948 F.2d 648, 654 (10th Cir. 1991); *United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990); and *United States v. White*, 529 F.2d 1390, 1394 (8th Cir. 1976). *Id.* The three cases rejecting that proposition were: *Griswold v. Commonwealth*, 472 S.E.2d 789, 791 (Va. 1996); *State v. Hansen*, 903 P.2d 194, 197 (Mont. 1995); and *Cottle v. Wainwright*, 477 F.2d 269, 274 (5th Cir. 1973), *vacated on other grounds*, 414 U.S. 895 (1973). *Id.*

201. *Shelton*, 535 U.S. at 660.

but it did “not prohibit *imposition* of such a sentence as a method of effectuating probationary punishment.”²⁰² A third position, argued by *amicus curiae*, stated that the Sixth Amendment “does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked.”²⁰³

C. Majority Opinion

Justice Ginsburg authored the majority opinion.²⁰⁴ In responding to these positions, the majority first reviewed the holdings of *Gideon*, *Argersinger*, and *Scott*.²⁰⁵ They found that “[s]ubsequent decisions have reiterated the *Argersinger-Scott* “actual imprisonment” standard.”²⁰⁶ The Court then rejected the *amicus* position and stated the following:

A suspended sentence is a prison term imposed for the offense of conviction. [Therefore], once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point result[s] in imprisonment.²⁰⁷

The *amicus* argument rested on two grounds.²⁰⁸ First, sequential proceedings must be analyzed separately for Sixth Amendment purposes, and only those proceedings “result[ing] in *immediate* actual imprisonment” require state-appointed counsel.²⁰⁹ This reasoning was borrowed from two prior cases before the Court.²¹⁰ *Nichols v. United States* held it proper to use an uncounseled misdemeanor conviction to enhance a sentence in a subsequent felony offense.²¹¹ *Gagnon v. Scarpelli* denied an indigent defendant the right to appointed counsel at a probation revocation hearing.²¹² The Court disagreed with the *amicus* argument:

Gagnon and *Nichols* do not stand for the broad proposition *amicus* would extract from them. The dispositive factor in those cases was

202. *Id.* at 661.

203. *Id.* The Court assigned this task to Charles Fried, a member of the Bar of the Supreme Court. *Id.* at 661 n.4.

204. *Id.* at 657.

205. *Id.* at 661.

206. *Id.* at 662. The Court cited *Glover v. United States*, 531 U.S. 198 (2001) (conceding that “any amount of actual jail time has Sixth Amendment significance”) as well as *Nichols v. United States*, 511 U.S. 738 (1994) (holding the “constitutional line is ‘between criminal proceedings that resulted in imprisonment, and those that did not’”). *Id.*

207. *Shelton*, 535 U.S. at 662.

208. *Id.*

209. *Id.* at 663 (quoting the *amicus* brief) (emphasis in original).

210. See *Nichols v. United States*, 511 U.S. 738, 746 (1994); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

211. 511 U.S. 738, 746 (1994).

212. 411 U.S. 778, 791 (1973).

not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned Unlike this case, in which revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel, the sentences imposed in *Nichols* and *Gagnon* were for felony convictions.²¹³

The Court, therefore, rejected the notion that *Nichols* or *Gagnon* “altered or diminished *Argersinger’s* command that ‘no person may be imprisoned for any offense unless he was represented by counsel at his trial.’”²¹⁴ The Sixth Amendment is implicated at “the stage of the proceedings . . . where . . . guilt is adjudicated, eligibility for imprisonment established, and prison sentence determined.”²¹⁵ For Shelton, this was at the circuit court trial where he was found guilty without the aid of counsel.²¹⁶

The second prong of the *amicus* argument was that the practical considerations weighed against the extension of the Sixth Amendment’s right to appointed counsel to a defendant in Shelton’s situation.²¹⁷ *Amicus* cited figures in its brief which suggested that “‘hundreds of thousands’ of uncounseled defendants receive suspended sentences, but only ‘thousands’ of that [group] are incarcerated upon violating . . . their probation.”²¹⁸ These statistics made it difficult to imagine requiring each one of those defendants to be represented at the state’s expense.²¹⁹ Also, “probation is ‘now a critical tool of law enforcement’”, and requiring state appointed counsel in these situations would “unduly hamper the States’ attempts to impose effective probationary punishment.”²²⁰ The *Amicus* brief proposed a solution in which a state could “impos[e] a suspended sentence on an uncounseled defendant and require appointment of counsel, if at all, only at the probation revocation hearing, when incarceration is imminent.”²²¹

The Court stated that the importance of probationary punishment did not warrant “the reduction of the Sixth Amendment’s domain that would result from the regime *amicus* hypothesizes.”²²² Furthermore, the Court was

213. *Shelton*, 535 U.S. at 664.

214. *Id.* (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)).

215. *Id.* at 664-666.

216. *Id.* at 658.

217. *Id.* at 665.

218. *Id.*

219. *See id.* at 666.

220. *Id.*

221. *Id.*

222. *Id.*

concerned with the nature of such probation revocation proceedings.²²³ It highlighted that in Alabama:

The proceeding is an “informal” one . . . at which . . . the court [is under] no obligation to observe customary rules of evidence [In addition to its informal nature,] the sole issue at the hearing . . . is whether the defendant breached the terms of probation, . . . and the validity or reliability of the underlying conviction is beyond attack.²²⁴

This means that the defendant would still be denied the guiding hand of counsel when it is needed most.²²⁵ Ultimately, the Court found that the assistance of counsel at probation revocation hearings did not sufficiently cure the ill of having been convicted and sentenced to a term in prison without the aid of counsel.²²⁶

In response to the dissent’s proposal, which would allow imposition of a suspended sentence on an uncounseled defendant but not activation of that sentence, the Court declared:

Severing the analysis in this manner makes little sense. One cannot assess the constitutionality of imposing a suspended sentence while simultaneously walling off the procedures that will precede its activation The dissent [offered a number] of safeguards that Alabama might provide at the probation revocation stage sufficient to cure its failure to appoint counsel prior to sentencing, . . . [but the Court countered that] . . . there is no cause for speculation about Alabama’s procedures; they are established by Alabama statute and decisional law . . . and they bear no resemblance to those the dissent invents in its effort to sanction the prospect of Shelton’s imprisonment on an uncounseled conviction [I]n light of Alabama’s actual circumstances, we do not comprehend . . . Alabama[’s] . . . probation revocation [procedures] . . . bring[ing] Shelton’s sentence within constitutional bounds.²²⁷

223. *Id.*

224. *Id.*

225. *See generally id.* at 666-67.

226. *Id.* The court stated:

We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration. Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton’s circumstances faces incarceration on a conviction that has never been subjected to “the crucible of meaningful adversarial testing.”

Id. at 667 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

227. *Id.* at 667-68.

In response to predictions that requiring appointed counsel in situations similar to Shelton's would impose devastating financial burdens on the states, the Court pointed to the current statutory mandates of the states:

All but 16 States . . . would provide counsel to a defendant in Shelton's circumstances, either because he received a substantial fine or because state law authorized incarceration for the charged offense or provided for a maximum prison term of one year There is thus scant reason to believe that a rule conditioning imposition of a suspended sentence on provision of appointed counsel would affect existing practice in the large majority of States.²²⁸

Even if some states could not bear the costs of appointing counsel to defendants in Shelton's position, the Court continued, they had the option of employing "pretrial probation," which was already in use in at least twenty-three states.²²⁹ "Under [this system], the prosecutor and defendant agree to defendant's participation in a pretrial rehabilitation program The adjudication of guilt and imposition of a sentence for the underlying offense

228. *Id.* at 669-70. The Court listed these state laws:

See N.J. STAT. ANN. § 2A:158A-5.2 (1985); *State v. Hermanns*, 278 N.J. Super. 19, 29, 650 A.2d 360, 366 (1994); N.C. GEN. STAT. § 7A-451(a)(1) (1999); VT. STAT. ANN., TIT. 13, § 5201 (1998); *Alexander v. Anchorage*, 490 P.2d 910, 913 (Alaska 1971) (interpreting Alaska CONST., Art. I, § 11, to provide counsel when punishment may involve incarceration); *Tracy v. Municipal Court for Glendale Judicial Dist.*, 22 Cal.3d 760, 766, 150 Cal. Rptr. 785, 587 P.2d 227, 230 (1978) (CAL.PENAL CODE ANN. § 686 (West 1985) affords counsel to misdemeanor defendants); DEL. CODE ANN., Tit. 29, § 4602 (1997); D.C. CODE ANN. § 11-2602 (2001); HAW. REV. STAT. § 802-1 (1999); ILL. COMP. STAT., ch. 725, § 113-3 (1992); *Brunson v. State*, 182 Ind. App. 146, 149, 394 N.E.2d 229, 231 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, § 13); KY. REV. STAT. ANN. §§ 31.100(4)(b), 31.110(1) (1999); LA. CONST., Art. I, § 13; MASS. RULE CRIM. PROC. 8 (2001); MINN. RULE CRIM. PROC. 5.02(1) (2001); NEB. REV. STAT. § 29-3902 (1995); N.Y. CRIM. PROC. LAW § 170.10(3)(c) (1993); OKLA. STAT., Tit. 22, § 1355.6.A (Supp. 2002); ORE. REV. STAT. ANN. § 135.050(4) (Supp. 1998); TENN. SUP. CT. RULE 13(d)(1) (2001); TEX. CRIM. PROC. CODE ANN. § 26.04(b)(3) (Supp.2002); VA. CODE ANN. §§ 19.2-159, 19.2-160 (2000); WASH. SUPER. CT. CRIM. RULE 3.1(a) (2002); W. VA. CODE § 50-4-3 (2000); WIS. STAT. § 967.06 (1998); WYO. STAT. ANN. § 7-6-102 (2001); IDAHO CODE §§ 19-851(d)(2), § 19-852(a)(1) (1997); IOWA RULE CRIM. PROC. 26 (2002); *Wright v. Denato*, 178 N.W.2d 339, 341-342 (Iowa 1970); MD. ANN. CODE, Art. 27A, §§ 2(h)(2), 4(b)(2) (1997 and Supp.2000); NEV. REV. STAT. §§ 178.397, 193.120 (2001); N.H. REV. STAT. ANN. §§ 604-A:2(I), 625:9(IV)(a)(1) (Supp.2001); N.M. STAT. ANN. §§ 31-16-2(D), § 31-16-3(A) (2000); OHIO RULES CRIM. PROC. 2(C), 44(A) (2002); PA. RULE CRIM. PROC. 122(A) (2002); 18 PA. CONS. STAT. § 106(c)(2) (1998); S.D. CODIFIED LAWS §§ 23A-40-6, 23-40-6.1, 22-6-2(1) (1998); see also CONN. GEN. STAT. § 51-296(a) (Supp.2001) (imposition of a "suspended sentence of incarceration with a period of probation" necessitates appointment of counsel).

Id. at 1773-74 nn.7-9.

229. *Shelton*, 535 U.S. at 671.

then occur only if and when the defendant breaches those conditions.”²³⁰ Like the *amicus* proposal, pretrial probation reserves the appointed counsel requirement to the small number of cases in which jail time proves necessary.²³¹ Contrary to the *amicus*’ position, however, “pretrial probation also respects the constitutional imperative“ set out in *Argersinger*.²³²

Alabama, which maintained that there was no constitutional bar to imposing a suspended sentence, invited the court to regard the two years probation as a separate and independent sentence that the state could enforce as it would be a judgment or a fine.²³³ The state argued that a freestanding probation sentence “could be enforced as a criminal fine or restitution order could, in a contempt proceeding.”²³⁴ Furthermore, the contempt proceeding would include the assistance of counsel.²³⁵ The Court did not even consider this position because there was no indication that the probation sentence was indeed separable from the suspended prison term.²³⁶

The Alabama Attorney General had been forced to acknowledge “at oral argument that he did not know of any State that imposes, post conviction, . . . a term of probation unattached to a suspended sentence.”²³⁷ Even in their opening brief, Alabama admitted that, “by reversing Shelton’s suspended sentence, the [Supreme Court of Alabama] correspondingly vacated the two-year probationary term.”²³⁸ Therefore, the Court concluded that Alabama has developed its position “late in [the] litigation and before the wrong forum.”²³⁹

Finally, the majority opinion specifically affirmed the Alabama Supreme Court’s ruling that “[a] defendant who receives a suspended or probated sentence *to imprisonment* has a constitutional right to counsel.”²⁴⁰

230. *Id.* “Because this device is conditioned on the defendant’s consent, it does not raise the question whether imposition of probation alone so restrains a defendant’s liberty as to require provision of appointed counsel.” *Id.* at 671, n.11.

231. *Id.* at 671-71.

232. *Id.* at 672. The Court went on to state:

There is thus only one significant difference between pretrial probation and the ‘sensible option’ urged by the dissent, . . . [that] pretrial probation is substantially less expensive. It permits incarceration after a single trial, whereas the dissent’s regime requires two—one (without counsel) to place the defendant on probation, and a second (with counsel) to trigger imprisonment.

Id. at 672 n.12.

233. *Id.* at 672.

234. *Id.*

235. *Id.* at 672-73.

236. *Id.* at 673.

237. *Id.*

238. *Id.* (citing Brief for Petitioner at 6).

239. *Id.* at 674. It was “[n]ot until its Reply Brief [that] the State [held this position and realized] that Shelton’s suspended sentence will be activated if he violates the terms of his probation.” *Id.* at 673 n.13.

240. *Id.* at 674. (quoting *Ex parte Shelton*, No. 1990031, 2000 WL 1603806, at *5 (Ala. May 19, 2000)). The Court further stated:

Satisfied that Shelton is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined, we affirm the judgment of the Supreme Court of

The Court essentially ruled that a suspended sentence constituted “actual imprisonment” under *Argersinger*, even though the defendant might never spend a day in prison.²⁴¹

D. Dissenting Opinion

The dissent, led by Justice Scalia, began its opinion with a different outlook on the direction that the Sixth Amendment was heading. The dissent stated that the Court had “repeatedly emphasized actual imprisonment as the touchstone of entitlement to appointed counsel.”²⁴² They also made clear that, at least in their minds, the majority position was an aberration: “Today’s decision ignores this long and consistent jurisprudence, extending the misdemeanor right to counsel to cases bearing the mere threat of imprisonment.”²⁴³ Their attack on the majority position began with a list of contingencies:

The Court holds that the suspended sentence violates respondent’s Sixth Amendment right to counsel because it “*may* ‘end up in the actual deprivation of [respondent’s] liberty,’” . . . *if* he someday violates the terms of probation, *if* a court determines that the violation merits revocation of probation . . . and *if* the court determines that no other punishment will “adequately protect the community from further criminal activity” or “avoid depreciating the seriousness of the violation.”²⁴⁴

If all these contingencies occurred, the dissent continued, “the Alabama Supreme Court would mechanically apply its decisional law applicable to routine probation revocation . . . rather than adopt special procedures for situations that raise constitutional questions.”²⁴⁵

Alabama.

Id. This holding was based on the obvious conclusion, stated in Respondent’s Brief, that: A probationer who is revoked and incarcerated suffers actual imprisonment. If an uncounseled misdemeanant can be sentenced to a suspended sentence and probation, and then revoked and incarcerated, the result is no different from that of an uncounseled misdemeanant who is convicted and immediately incarcerated. Both suffer actual imprisonment from an uncounseled conviction.

Respondent’s Opening Brief at 2, *Shelton*, (No. 00-1214).

241. *See Shelton*, 535 U.S. at 673-74.

242. *Shelton*, 535 U.S. at 675 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas.

243. *Id.*

244. *Id.* (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1932); ALA. CODE § 15-22-54(d)(1), (4) (1995)).

245. *Id.* at 676 (Scalia, J., dissenting).

According to Justice Scalia, the question of how an Alabama probation revocation proceeding after an uncounseled conviction might rise to a Sixth Amendment challenge should not have been discussed.²⁴⁶ Rather, the only question was whether “imposition of a suspended or conditional sentence in a misdemeanor case invokes a defendant’s Sixth Amendment right to counsel.”²⁴⁷ The dissent offered an answer that mimicked the logic of the state of Alabama’s argument:

Since *imposition* of a suspended sentence does not deprive a defendant of his personal liberty, the answer to *that* question is plainly no. In the future, *if and when* the State of Alabama seeks to imprison respondent on the previously suspended sentence, we can ask whether the procedural safeguards attending the imposition of that sentence comply with the Constitution. But that question is *not* before us now.²⁴⁸

The dissent essentially saw the majority decision as an advisory opinion, and it chastised the Court for venturing into the mind of the Alabama state courts.²⁴⁹ However, the dissent could not resist the opportunity to respond to the Court’s speculation of how Alabama might deny counsel to indigent misdemeanants and still impose suspended sentences.²⁵⁰ “Surely the procedures attending reimposition of a suspended sentence would be adequate if they required, upon the defendant’s request, complete retrial of the misdemeanor violation with assistance of counsel. By what right does the Court deprive the State of that option?”²⁵¹ In a footnote, the dissent criticizes the majority’s recommendation of pretrial probation simply because it forces the state to implement one “functional equivalent” rather than the other.²⁵² If pretrial probation was so effective, the dissent chided, “we would expect to see pretrial probation used for both major and minor crimes and to see it used in place of, not in addition to, post-trial probation.”²⁵³ After expressing its disappointment with the majority’s

246. *Id.* at 676 (Scalia, J., dissenting) (arguing that the question of Alabama’s procedures in probation revocation proceedings “is not the one before us, and the Court has no business offering an advisory opinion on its answer”).

247. *Id.*

248. *Id.* (emphasis in original).

249. *See id.*

250. *See id.* at 677 (Scalia, J., dissenting).

251. *Id.* The dissent provided its reasoning for allowing the states to utilize this option:

It may well be a sensible option, since most defendants will be induced to comply with the terms of their probation by the mere threat of a retrial that could send them to jail, and since the expense of those rare, counseled retrials may be much less than the expense of providing counsel initially in all misdemeanor cases that bear a possible sentence of imprisonment. And it may well be that, in some cases, even procedures short of complete retrial will suffice.

Id. at 677-78 (Scalia, J., dissenting).

252. *Id.* at 677 n.2 (Scalia, J., dissenting).

253. *Id.*

refusal to entertain different options available to Alabama, they returned to the catchall Sixth Amendment repudiation: “the practical consequences of expanding the right to appointed counsel.”²⁵⁴ Although the majority had predicted that thirty-four states would have already provided appointed counsel to a defendant in Shelton’s position, the dissent shed some more light on this abstract number.²⁵⁵ They found this statistic to be “irrelevant” because the Court’s holding was “not confined to *defendants like respondent*.”²⁵⁶ Under the Court’s ruling, “appointed counsel must henceforth be offered before *any* defendant can be awarded a suspended sentence, no matter how short.”²⁵⁷ Ten of the thirty-four States mentioned by the majority only offered counsel in cases where the suspended sentence either exceeded three months, was likely to be imposed, or “when the court *knows* that the punishment it will assess includes imprisonment.”²⁵⁸ All ten

254. *Id.* at 679 (Scalia, J., dissenting) (“Our prior opinions placed considerable weight on the practical consequences of expanding the right to appointed counsel beyond cases of actual imprisonment.”).

255. *See id.* at 679.

256. *Id.*

257. *Id.*

258. *See id.* at 681 n.4. This footnote reads in full:

Ten of the thirty-four States cited by the Court do not offer appointed counsel in all cases where a misdemeanor defendant might suffer a suspended sentence. Six States guarantee counsel only when the authorized penalty is *at least* three or six months’ imprisonment. See Idaho Code §§ 19-851(d)(2), 19-852(a) (1948-1997); *State v. Hardman*, 120 Idaho 667, 669-670, 818 P.2d 782, 784-785 (App.1991); Md. Ann. Code, Art. 27A, §§ 2(h)(2), 4(b)(2) (1957-1997); Nev. Rev. Stat. §§ 178.397, 193.120 (1996); N.M. Stat. Ann. §§ 31-16-2, 31-16-3 (2000); *State v. Woodruff*, 124 N.M. 388, 396, n. 3, 951 P.2d 605, 613, n. 3 (1997); Ohio Rules Crim. Proc. 2(C), 44(A) (2002); 18 Pa. Cons. Stat. § 106(c) (1998); Pa. Rules Crim. Proc. 122(A), (B) (2002); *Commonwealth v. Thomas*, 510 Pa. 106, 111, n. 7, 507 A.2d 57, 59, n. 7 (1986). South Dakota does not provide counsel where the maximum permissible sentence is 30 days’ imprisonment, S.D. Codified Laws § 22-6-2 (1998), if “the court has concluded that [the defendant] will not be deprived of his liberty if he is convicted,” §§ 23A-40-6, 23A-40-6.1. Texas’s statute declares that appointed counsel should be offered to any defendant “charged with a misdemeanor punishable by confinement,” Tex. Code Crim. Proc. Ann., Art. 26.04(b)(3) (Vernon Supp.2002), but the state courts have construed this provision to require appointment only “when the court *knows* that the punishment it will assess includes imprisonment or when the trial is before the jury and the possible punishment includes imprisonment.” *Fortner v. State*, 764 S.W.2d 934, 935 (Tex.App.1989) (emphasis added). Thus, nothing in Texas law assures counsel in a misdemeanor bench trial resulting in a suspended sentence. Finally, in two of the States that appoint counsel when imprisonment is “likely” to be imposed, the courts have not yet decided whether the likelihood of a *suspended* sentence qualifies, but the answer—as has been held with respect to the similarly phrased Michigan and Pennsylvania statutes cited *supra*—is probably no. N.J. Stat. Ann. § 2A:158A-5.2 (1985); *Rodriguez v. Rosenblatt*, 58 N.J. 281, 295, 277 A.2d 216, 223 (1971); N.C. Gen. Stat. § 7A-451(a)(1) (1999); *State v. McCoy*, 304 N.C. 363, 370, 283 S.E.2d 788, 791-792 (1981).

The District of Columbia must also be numbered among the jurisdictions whose law is altered by today’s decision. D.C. Code Ann. § 11-2602 (2001) guarantees counsel in “all cases where a person faces a loss of liberty *and* the Constitution or any other law requires the appointment of counsel.” (Emphasis added.) Today’s decision, discarding the rule of

of these statutory schemes allowed for the possibility of a defendant like Shelton to be convicted at an uncounseled trial.²⁵⁹ This actually meant that a majority of states would now have to be burdened with a change in their procedures.²⁶⁰

The dissent was not prepared to impose this burden which included not only “the cost of providing state-paid counsel in cases of such insignificance that even financially prosperous defendants sometimes forgo the expense of hired counsel; but also the cost of enabling courts and prosecutors to respond to the ‘over-lawyering’ of minor cases.”²⁶¹ They also expressed sympathy for the minority of states who would have appointed counsel to a defendant in Shelton’s position, but who, because of the court’s ruling, must “keep their current disposition forever in place, however imprudent experience proves it to be.”²⁶² While the majority had suggested that the burdens were small because the circumstances in which any of these states denied appointed counsel to misdemeanants were quite narrow, the dissent reasoned that “the narrowness of the range of circumstances covered says nothing about the number of suspended-sentence cases covered.”²⁶³ Even though the range of cases may be small, the number of cases in which a suspended sentence is imposed might well be vast “precisely *because* of the minor nature of the offense.”²⁶⁴

Justice Scalia finished his short dissent with a brief conclusion: “Today’s imposition upon the States finds justification neither in the text of

Argersinger, brings suspended sentences within this prescription. The Court asserts that the burden of today’s decision on these jurisdictions is small because the “circumstances in which [they] currently allow prosecution of misdemeanors without appointed counsel are quite *narrow*.” *Ante*, at 1774, n. 10 (emphasis added). But the narrowness of the range of circumstances covered says nothing about the number of suspended-sentence cases covered. Misdemeanors punishable by less than six months’ imprisonment may be a narrow category, but it may well include the vast majority of cases in which (precisely *because* of the minor nature of the offense) a suspended sentence is imposed. There is simply nothing to support the Court’s belief that few offenders are prosecuted for crimes in which counsel is not already provided. The Court minimizes the burden on Pennsylvania by observing that the “summary offenses” for which it permits uncounseled suspended sentences include such rarely prosecuted crimes as failing to return a library book within 30 days and fishing on Sunday. *Ante*, at 1774, n. 10. But they also include first-offense minor retail theft, driving with a suspended license, and harassment (which includes minor assault). See *Thomas, supra*, at 109, 507 A.2d, at 58; 75 Pa. Cons. Stat. § 1543(b)(1) (Supp.2002); 18 Pa. Cons. Stat. §§ 2709(a), (c)(1) (2000). Over against the Court’s uninformed intuition, there is an *amicus* brief filed by States that include 2 of the 10 with exceptions that the Court calls “narrow,” affirming that the rule the Court has adopted today will impose “significant burdens on States.” Brief for Texas, Ohio, Montana, Nebraska, Delaware, Louisiana, and Virginia as *Amici Curiae* 22.

Id. at 681 n4.

259. See *Shelton*, 535 U.S. at 679 n.4 (Scalia, J., dissenting).

260. See *supra* note 258.

261. *Id.* at 681 (Scalia, J., dissenting).

262. *Id.*

263. *Id.* at 679 n.4 (Scalia, J., dissenting).

264. *Id.*

the Constitution, nor in the settled practices of our people, nor in the prior jurisprudence of this Court. I respectfully dissent.”²⁶⁵

IV. THE EFFECT AND IMPACT OF THE *SHELTON* DECISION

Shelton’s war had been waged, and Shelton himself, assuming the role of the indigent defendant who might lose his liberty, had been victorious.²⁶⁶ In a smaller sense, the decision deciding his fate had been a confident step forward for those committed to constitutional safeguards for indigent criminal defendants.²⁶⁷ In a larger sense, *Shelton* was simply an irresolute but sufficient response to a very particular question: Did “actual imprisonment” include a suspended sentence that may never result in actual jail time?²⁶⁸ The Court had responded in the affirmative.²⁶⁹ Few cases have arisen that actively put *Shelton* into action,²⁷⁰ but one particular decision has shed some light on the question of a freestanding probation sentence.²⁷¹

In *United States v. Perez-Macias*, the defendant was convicted of a misdemeanor in 2002 for illegal entry into the United States.²⁷² He was arrested less than two weeks later and convicted again for illegal entry into the United States, as well as “two counts of transporting illegal aliens” into the country.²⁷³ He was not represented by counsel for the first misdemeanor conviction, and he received a stand-alone sentence of probation.²⁷⁴ When he

265. *Id.* at 681 (Scalia, J., dissenting).

266. *See Shelton*, 535 U.S. 654 (2003).

267. *See id.*

268. *See id.*

269. *Id.*

270. One decision provided a straight forward application of *Shelton*. *See Barnes v. State*, 570 S.E.2d 277, 278 (Ga. 2002). The defendant had been sentenced to a suspended term in prison, and the trial court failed to discern whether he had made a knowing and intelligent waiver of his right to counsel. *Id.* at 278. Another case seems to apply *Shelton* retroactively to a delinquency proceeding and holds that if “proceedings to revoke [the defendant’s] probation ever be initiated, *Shelton* provides that punishment resulting in the loss of liberty cannot be imposed because [the defendant] was not provided counsel at the delinquency hearing.” *C.M. v. State*, 2002 WL 31151366 at *2 (Sept. 27, 2002, Ala. Crim. App.). A third discusses a sentence that was enhanced because of a prior uncounseled misdemeanor conviction that resulted in a suspended sentence. *United States v. Black*, 37 Fed. Appx. 654, (4th Cir. 2002) (per curiam). The court vacated the sentence, and held that prior uncounseled suspended sentences, invalid under *Shelton*, are also invalid for any other reason. *Id.* Another case cites the holding in *Shelton* but denies an indigent defendant the right to appointed counsel in a civil contempt proceeding. *Krieger v. Virginia*, 567 S.E.2d 557, 564 n.7 (2002). The Supreme Court has had to grant certiorari, vacate the judgment, and remand one particular case to the Fifth Circuit Court of Appeals in light of the ruling in *Shelton*. *Torres-Soria v. United States*, 537 U.S. 1041 (2002) (mem.); *see also United States v. Martinez-Gonzalez*, 69 Fed. Appx. 832 (9th Cir. 2003) (mem.) (holding a conviction predicated upon a prior uncounseled removal proceeding does not violate defendant’s Sixth Amendment rights).

271. *United States v. Perez-Macias*, 335 F.3d 421 (5th Cir. 2003).

272. *Id.* at 422-23.

273. *Id.* at 423.

274. *Id.*

was sentenced for the second offense, the United States argued that he should receive an enhanced sentence under the sentencing guidelines because of this previous conviction.²⁷⁵ The defendant claimed that they could not use the first uncounseled misdemeanor because under *Shelton* an indigent defendant was entitled to appointed counsel even for a free-standing probation sentence.²⁷⁶ The Fifth Circuit distinguished the *Shelton* case and drew even more detailed lines around the Sixth Amendment right to counsel.²⁷⁷ The court first considered the decision in *Shelton*:

Shelton did not address the sentence of probation at issue in this case because a suspended sentence is not the same as a stand-alone sentence of probation. The sentence under consideration in *Shelton* was a suspended sentence coupled with probation, while in this case, [the defendant] received probation without a suspended sentence . . . [I]n the federal system, probation is available as a stand-alone sentence and suspended sentences are not used.²⁷⁸

The court then specifically distinguished a suspended jail sentence from a stand-alone probation sentence:

If a defendant receives only a sentence of probation, he is sentenced to community release with conditions; he does not receive a sentence of imprisonment . . . [Furthermore,] [i]f a defendant serving a stand-alone probation sentence violates a condition of probation, his probation may be revoked after a hearing and he may be sentenced to any punishment that was originally available at sentencing.²⁷⁹

Even though this hearing would “not retry issues of guilt or innocence,” would not employ a standard of reasonable doubt, and would not use the Federal Rules of Evidence, the court found that this difference warranted using an uncounseled misdemeanor probation sentence to enhance a subsequent crime.²⁸⁰ The court noted that “[t]he *Shelton* Court expressly refused to address whether its holding applies to a sentence of probation uncoupled with a suspended sentence.”²⁸¹ Analyzing the matter de novo, the Fifth Circuit did “not believe that the logic of *Shelton* compels extension of the right to counsel to cases where the defendant receives a sentence of probation uncoupled with a suspended sentence.”²⁸² They thought the Supreme Court jurisprudence focused exclusively on whether the defendant

275. *Id.*

276. *Id.*

277. *Id.* at 426-27.

278. *Id.* at 426.

279. *Id.* at 426-27.

280. *Id.* at 427.

281. *Id.*

282. *Id.*

received a sentence of imprisonment.²⁸³ Because the defendant in this case was not sentenced to imprisonment for his uncounseled misdemeanor, his conviction could be used to enhance a subsequent sentence.²⁸⁴ However, the court conceded that it was possible that “a misdemeanor defendant who was convicted without counsel may not be sentenced to prison upon revocation of his probation.”²⁸⁵ Because the defendant before the court never went to prison for his first offense, they did not address that particular issue.²⁸⁶ This was one of the first cases attempting to answer one of the questions that *Shelton* left open.²⁸⁷

Other questions still linger. Was physical imprisonment the only “loss of liberty” that demanded an opportunity for appointed counsel under the Sixth Amendment? Could the states ever implement some type of post conviction probation revocation proceeding that would fulfill Sixth Amendment requirements? The decision seemed to reject this proposition,²⁸⁸ but the question nonetheless remains. Would states begin to impose freestanding probation sentences, upheld only by court contempt proceedings or other civil penalties?²⁸⁹

Finally, how exactly would the states be affected by this ruling? At the time of this article, twenty-three states have made a change in their legal schemes to reflect the ruling in *Shelton*. These changes have come by way of actual legislative revisions to the statute, additions to annotated case notes in a statute, or additions to the annotations in state constitutions.²⁹⁰ The

283. *Id.*

284. *Id.* at 428.

285. *Id.*

286. *Id.* at 429. Interestingly, another indigent defendant tried to appeal his conviction on the same grounds before the Fifth Circuit two months later. See *United States v. Martinez-Carrillo*, 2003 WL 21997488 (Aug. 20, 2003, 5th Cir.). The defendant argued that his prior uncounseled stand-alone probation sentences were invalid for any purpose. *Id.* at *1. He acknowledged that his “argument is foreclosed by [*Perez-Macias*], . . . [but] [h]e raise[d] the argument only to preserve it for possible further review.” *Id.*

287. *Perez-Macias*, 335 F.3d at 426.

288. *Shelton*, 535 U.S. at 667. “We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration.”)

289. For an affirmative answer, see *Leading Cases, I. Constitutional Law, C. Criminal Law and Procedure, 4. Sixth Amendment*, 116 HARV. L. REV. 200, 259 (2002) (“Because *Shelton* does not preclude the imposition of a probation-only sentence in the absence of counsel, states can tailor their penalty schemes to avoid appointing counsel for every defendant who faces probation.”). This supposition, however, seems highly unlikely considering the *Shelton* Court’s lack of faith in any probation revocation proceeding that would meet constitutional safeguards. See *Shelton*, 535 U.S. at 667.

290. See ALA. CODE § 15-22-50 (2002); ARIZ. REV. STAT. ANN. § 13-901 (West Supp. 2002); CAL. CONST. art. I § 15 (West Supp. 2002); CONN. GEN. STAT. ANN. § 51-297 (West Supp. 2003); D.C. CODE ANN. § 23-110 (2002); 2002 FLORIDA COURT ORDER 28 (C.O. 28) (amending FL. ST. RCRP 3.111) IND. CODE ANN. § 35-33-7-6 (Michie 2002); IOWA CONST. art. 1, § 10 (West 2002); KY. REV. STAT. ANN. § 202B.210 (Banks-Baldwin 2002); LA. CODE CRIM. PROC. ANN. art. 513 (West

retroactive application of *Shelton* will be determined by the states or by the Supreme Court in an appropriate subsequent case pursuant to their jurisprudence regarding retroactivity.²⁹¹ This jurisprudence is based largely on whether the Court would consider this to be a “new rule,” and at what procedural stage a defendant seeking retroactive relief has advanced.²⁹²

If one takes the *Shelton* dissent statistics at face value, the majority of states will have to change their criminal procedure systems so as to appoint counsel to every uncounseled misdemeanant who receives a suspended sentence.²⁹³ Unfortunately, the nationwide empirical data is much too young and far from adequate in painting a coherent picture of the effects of the ruling. However, one must put some faith in Chief Justice Burger’s concurrence in *Argersinger* which intimated that “the dynamics of the [legal] profession have a way of rising to the burdens placed on it.”²⁹⁴ One should also consider the majority opinion in *Scott*, which had to admit that *Argersinger* had proved “reasonably workable.”²⁹⁵

V. DID *SHELTON* EXTEND THE RIGHT TO APPOINTED COUNSEL FAR ENOUGH?

Despite *Shelton*’s progression in favor of an expanded right to appointed counsel, one must look deep into the history of the right to counsel to decide whether the opinion has given full respect to the guarantees outlined in the Sixth Amendment. The line of cases starting with *Powell* and culminating in *Shelton* must be analyzed in a broader sense to determine if the legal distinctions and constitutional standards propounded in those cases have

2003); ME. REV. STAT. ANN. Tit. 15, § 810 (West 2003); MASS. CONST. pt. 1, art. XII (West 2002); MINN. CONST. art. I, § 6 (West 2002); MISS. CODE ANN. § 25-32-9 (2002); N.H. REV. STAT. ANN. §§ 604-A1-10 (2003); N.Y. CONST. art. I, § 6 (McKinney 2002); N.C. GEN. STAT. ANN. art. I, § 23 (2002); OHIO CONST. art. I, § 10 (Anderson 2002); OKLA. STAT. ANN. tit. 22, § 991b (West 2002); PA. CONST. art. I, § 9 (2002); TENN. CODE ANN. § 40-35-310 (2002); TEX. CONST. art. I, § 10 (Vernon 2002); VA. CODE ANN. § 19.2-306 (Michie 2002).

291. See *Teague v. Lane*, 489 U.S. 288 (1989).

292. See *id.* at 300-11. (“It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what or may not constitute a new rule for retroactivity purposes.”).

293. *Alabama v. Shelton*, 535 U.S. 654, 674-81 (2002). (Scalia, J., dissenting) (showing that the “Court’s decision imposes a large, new burden on a majority of the States, including some of the poorest”).

294. *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).

295. *Scott v. Illinois*, 440 U.S. 367, 373 (1979). Surprisingly enough, there have already been a few positive responses to *Shelton* ruling, even from the Alabama State Bar Association itself. See Jenny B. Davis, *Staying Upbeat in an Uphill Battle*, 1 No. 47 A.B.A. J. E-REPORT 7 (2002). Davis quoted a public defender in McAllen, Texas, who was glad the Supreme Court decided as it did in *Shelton*. *Id.* The public defender said that “[i]t’s a daunting task, but it’s the right thing to do Everyone in the court system has to strive to do the right thing and treat each client fairly.” *Id.* See also Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases After Alabama v. Shelton*, 63 ALA. LAW. 370, 373 (2002) (pointing out that even though the “lawyers who represent indigent defendants in criminal cases throughout Alabama do so at a great discount from what they would otherwise receive as either retained criminal defense lawyers or even as an hourly rate in most civil defense matters . . . the persons they represent are without question entitled to effective assistance of counsel”).

accorded full weight to the guarantee envisioned by America's constitutional authors. In order to gain a more accurate perspective of what the right to counsel and appointed counsel has meant in American history, the vocabulary and exclamations in those decisions must be revisited.

A. Powell's and Gideon's Holdings

Early interpretations of the Sixth Amendment showed that "[t]here [was] considerable doubt that [it], 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 in a federal court to employ a lawyer to assist in his defense."²⁹⁶ This view of the Sixth Amendment was proposed in the first case addressing the scope of the right to counsel.²⁹⁷ It is also true, however, that in subsequent cases the Supreme Court elicited a broader interpretation of the Sixth Amendment.

The *Powell* Court, in making a due process determination, quoted extensively from the state constitutions written after the colonies gained independence as well as court precedents leading up to the 1930s.²⁹⁸ It concluded that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of [a] fundamental character."²⁹⁹ The question specifically answered by the Court was whether the right to counsel, and by extension, the right to appointed counsel, was among rights enumerated in the Bill of Rights that are of such a fundamental nature that they are binding upon the states through the Fourteenth Amendment.³⁰⁰ While limiting their holding to the facts of the case, they nevertheless found that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."³⁰¹

The *Gideon* decision emphasized this idea once again.³⁰² The Court there labeled *Powell's* "conclusions about the fundamental nature of the right to counsel [as] unmistakable."³⁰³ The *Gideon* Court did not waver in

296. *Scott v. Illinois*, 440 U.S. 367, 370 (1979) (citing W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURT* 27-30 (1955)).

297. *See United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (holding that "[t]here is . . . no general obligation on the part of the government . . . to . . . retain counsel for defendants"); *see also* Laurie S. Fulton, Note, *The Right to Counsel Clause of the Sixth Amendment*, 26 AM. CRIM. L. REV. 1599, 1604-05 (1989).

298. *Powell v. Alabama*, 287 U.S. 45 at 61-62 (1932).

299. *Id.* at 68.

300. *Id.* at 67.

301. *Id.* at 71.

302. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

303. *Id.* at 343. This language was repeated in 1936, four years after the *Powell* decision, in *Grosjean v. American Press Co.*: "We concluded that certain fundamental rights, safeguarded . . .

its holding, and it explicitly stated that “reason 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.”³⁰⁴ Again, the Court made haste in steadfastly declaring that “[t]he 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.”³⁰⁵

The overriding theme and simple equation is difficult to miss: not having representative counsel equals an unfair trial.³⁰⁶ It is this new and expansive constitutional rendering of the right to counsel that must become the backdrop for any further inquiries into the scope of the Sixth Amendment. The decisions in *Powell* and *Gideon* became the dominating precedent with which the Court molded a new constitutional structure: a new jurisprudence which views the right to appointed counsel as fundamental to a fair trial and necessary to ensure a reliable outcome. Unfortunately, the Court has decided not to continue traveling on this straight and narrow path.

B. Where Did *Powell* and *Gideon* Go Wrong?

The failure to adhere to the language in *Powell* and *Gideon* has manifested itself in three ways. First, the Court failed to incorporate the full range of Sixth Amendment protection into the Fourteenth Amendment’s mandate on the states in the *Gideon* decision.³⁰⁷ Second, after *Gideon*, the Court began to focus not on the unreliability or fundamental unfairness of an uncounseled trial, but instead on the type of sanction imposed to determine whether appointed counsel was necessary.³⁰⁸ Finally, the Court has misinterpreted and misapplied the *Argersinger* and *Scott* decisions which speak to any “loss of liberty” as constitutionally forbidden without representative counsel by one’s side.³⁰⁹

Addressing the first digression from the clear holdings in *Powell* and *Gideon*, Justice Douglas’ concurrence in *Gideon* examined the history of the incorporation doctrine of the Bill of Rights and found that “rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights

against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.” 297 U.S. 233, 243-44 (1936).

304. *Gideon*, 372 U.S. at 344.

305. *Id.*

306. See B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 423 (2000).

307. It was only Justice Douglas’ concurrence that had assumed the Sixth Amendment would be applied in full to the states. *Gideon v. Wainwright*, 372 U.S. 335, 347 (1963) (Douglas, J., concurring). The majority, however, narrowed its holding to the facts, which had the impact of providing counsel to indigents only charged with felonies. *Id.* at 341-45.

308. Simpson, *supra* note 306, at 422-23.

309. See *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972); *Scott v. Illinois*, 440 U.S. 367, 370 (1979).

guarantees.”³¹⁰ Presumably, this meant that the *Johnson v. Zerbst* standard for the right to counsel in federal courts (that appointed counsel is constitutionally required in any case where the sentence deprives the defendant “of his life or his liberty,”)³¹¹ should have immediately been applied to the states. This standard was not adopted, which meant that subsequent to *Gideon* only those indigents charged with felonies were entitled to court appointed counsel.³¹² Given the Court’s language in *Gideon*, and despite concerns about decisions which probe into questions not presented, there was scant reason to limit “the fundamental nature of the right to counsel” to felony trials.³¹³

Secondly, after *Gideon*, the Court abandoned its vocabulary that had pinpointed the right to counsel as a “fundamental right” and instead chose to make this “fundamental right” dependent upon the type of sanction that was imposed at trial.³¹⁴ In a decision following *Gideon*, the justices found “that the absence of counsel at trial ‘infects the integrity of the truth determining process,’ and thus undermines the reliability of a conviction.”³¹⁵ Of course, the same reliability concerns are present in every criminal trial, regardless of the sentence imposed, and regardless of whether it is a felony, misdemeanor, or petty crime.³¹⁶ In *Powell*, the Court said that the right to counsel “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our

310. *Gideon*, 372 U.S. at 347 (Douglas, J., concurring).

311. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

312. *Gideon*, 372 U.S. at 341-45. This limitation is even more surprising when one considers the plain language of *Argersinger* nine years later: “Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to *any criminal trial*, where an accused is deprived of his liberty.” *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972) (emphasis added).

313. *Gideon*, 372 U.S. at 343. The anomalous nature of the Court’s holding becomes even more apparent when flanked by its own words at the end of the decision:

Not only these precedents but also reason 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*.

Id. at 344 (emphasis added).

314. *Argersinger*, 407 U.S. at 37. This holding is seemingly inexplicable given the language only a few pages earlier: “The Sixth Amendment thus 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.” *Id.* at 30.

315. Paul D. Leake, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense: Extending Burgett v. Texas and United States v. Tucker*, 19 COLUM. HUM. RTS. L. REV. 123, 150 (1987) (quoting *Lewis v. United States*, 445 U.S. 55, 72 (1980) (Brennan, J., dissenting)).

316. See Michael J. Stacchini, *Nichols v. United States: Narrowing the Sixth Amendment Guarantee to Counsel*, 75 B.U. L. REV. 1233, 1245-46 (1995) (“Misdemeanor cases are often highly complex and fraught with constitutional issues. Due to the high volume of misdemeanor cases, many courts obsess over procuring speedy dispositions, giving inadequate attention to individual defendants.”).

civil and political institutions.”³¹⁷ The Supreme Court “focused on the conduct of the hearing in making its determination of due process and not on the sentence.”³¹⁸ A peculiar shift in Sixth Amendment jurisprudence came when *Argersinger* held that “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”³¹⁹ One commentator exposed the Court’s legal misstep:

Tying *Argersinger*’s right to counsel to his sentence was not necessary to reverse his conviction. The Supreme Court could simply have said, in effect, that a fair trial, even for a misdemeanor, requires the assistance of counsel, unless there is an intelligent and knowing waiver. This holding has blurred the clear purpose of the Sixth Amendment right to counsel: to insure a fair trial for the accused, *regardless of the nature of the offense charged and its penalty*. Instead, and unfortunately, the Supreme Court focused on the result of the trial and the sentence imposed.³²⁰

The Court did not heed this criticism before its ruling in *Scott*, however, and it once again focused on the penalty imposed rather than on the fairness of the trial.³²¹ This has caused a majority of states to condition the appointment of counsel on the imposition of the punishment, rather than the necessity of due process for indigent criminals.³²² *Powell* and *Gideon* do not countenance such a result.³²³

The third departure from the rationale in *Powell* and *Gideon* concerns the interpretation of a “loss of liberty.”³²⁴ Although *Argersinger* hinted that “[t]he requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution,” the Court curtailed the line at actual imprisonment.³²⁵ This reasoning contradicts the Court’s own philosophy that “liberty interests extend beyond mere freedom from physical

317. *Powell*, 287 U.S. at 67 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

318. Simpson, *supra* note 306, at 422.

319. *Argersinger*, 407 U.S. at 37.

320. Simpson, *supra* note 306, at 424 (emphasis added).

321. *Id.* (criticizing the Court for turning “the Sixth Amendment right to counsel on its head”). Simpson went on to say that the “essence of due process is judicial fairness. The right to counsel was enshrined in the Bill of Rights and in state constitutions to insure that defendants were, in fact, accorded a fair trial.” *Id.* at 437.

322. *Id.* at 428.

323. See Adams, *supra* note 23, at 197 (“[I]f the risk of an erroneous decision is sufficiently grave and such erroneous decision would result in the unjustifiable loss of or damage to the interests involved, a court must allow representation by appointed counsel even when incarceration is not the possible end result of the proceeding.”); see also Givelber, *supra* note 14, at 1397 (“Attempting to limit the right to counsel only to those who are facing particularly severe penalties would reintroduce the difficulties that characterized *Betts v. Brady*.”).

324. *Argersinger*, 407 U.S. at 37.

325. *Id.*

restraint.”³²⁶ Indeed, the *Argersinger* and *Scott* decisions themselves “make it clear that the basic function of the Sixth Amendment’s right to counsel is to guarantee a fair trial in criminal prosecutions in order to protect the constitutional right of every person to *liberty*.”³²⁷ Discarding other losses of liberty as unimportant enough to require the assistance of appointed counsel undermines the foundational reasoning of *Powell* and *Gideon*.³²⁸ The right to counsel has been expanded to include some of these deprivations of liberty in civil contexts, and there is simply no reason to exclude other criminal deprivations of liberty when examining the necessity for appointed counsel in any particular case.³²⁹ Drawing the line at “physical restraint” or “actual imprisonment” is simply an arbitrary standard that must be modified if the spirit of *Powell* and *Gideon* is to survive.³³⁰ This is especially true when the Court has long recognized that one’s liberty interests under the due process clause encompasses more than simply freedom from physical restraint.³³¹

VI. IS THERE HOPE FOR INDIGENT CRIMINAL DEFENDANTS IN THE FUTURE?

To suggest that the current state of criminal justice for indigent defendants is in a state of disrepair would be a gross understatement.³³² This predicament has not been benefited by a presumption within the system that

326. See Catz & Firak, *supra* note 24, at 408. These losses of liberty include “the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience.” *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

327. Respondent’s Brief at 9, *Alabama v. Shelton*, 535 U.S. 654 (2002) (No. 00-1214) (emphasis added).

328. See *Powell*, 287 U.S. 45 (1932); *Gideon*, 372 U.S. 335 (1963).

329. See Catz & Firak, *supra* note 24, at 415 (“Under the preference currently accorded physical liberty interests, a drunk driver merits the aid of counsel in a trial that may incarcerate him for a few days while an indigent parent may be deprived of her child permanently without the assistance of an attorney.”); see also Garcia, *supra* note 34, at 54 (“The negative consequences stemming from a conviction may preclude the defendant from performing civic duties, such as serving on a jury, and may prevent her from obtaining licenses required for certain occupations, not to mention the stigma which results from a conviction.”).

330. See Nelson, *supra* note 22, at 566 (showing that Justice Brennan, dissenting in the *Argersinger* decision, thought its restrictions upon the Sixth Amendment resembled the anachronistic *Betts v. Brady* decision).

331. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (defining due process liberty as “not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children”); see also Adam D. Young, *An Analysis of the Sixth Amendment Right to Counsel as it Applies to Suspended Sentences and Probation: Do Argersinger and Scott Blow a Flat Note on Gideon’s Trumpet?*, 107 DICK. L. REV. 699, 713 (2003) (“The concept of liberty in the American criminal justice system far exceeds the single notion of actual imprisonment.”).

332. See Lee, *supra* note 10, at 1918 (1996) (urging that “a presumption of ineffective assistance of counsel be attached to the legal assistance rendered by the Office of the Public Defender without inquiry into the actual conduct of the trial”).

too many guilty criminals go free.³³³ The Court has “shifted its focus from the erroneous convictions that might occur due to lack of funds to the erroneous acquittals that may be procured by criminals deploying vast resources.”³³⁴ There is a prevailing view that “those who are arrested and charged with a crime must be guilty—if not of the crime for which they are charged, then of some other crime,” and this makes it “unfair . . . to ask law abiding citizens to carry the financial burdens of the lawless.”³³⁵ Some have proposed that cases such as *Betts* and *Scott* reflect such a concern.³³⁶ Most likely, the Supreme Court has treaded lightly on Sixth Amendment ground in these decisions because they are weary of giving too much power to indigent defendants, thereby exacerbating this problem. Furthermore, some recent cases have hinted that “the right to appointed counsel will expand much more slowly in the future than it has in the past. The ‘cutting edge’ of the field has shifted to the enforcement of the existing expanded right.”³³⁷ The *Shelton* decision ran contrary to this position.³³⁸ It actually enlarged an indigent defendant’s right to appointed counsel.³³⁹ Is this single opinion enough to revive the lagging right to court appointed counsel? Some brief considerations are in order.

A. Risks of Uncounseled Convictions on Both the System and the Defendant

The dangers of leaving a number of uncounseled misdemeanor convictions intact threaten both the individual defendant and the system.³⁴⁰ After *Shelton*, not all indigent misdemeanor defendants are entitled to court appointed counsel, and “the consequences of a misdemeanor conviction, regardless of the sentence imposed, can be far-reaching and devastating for some people.”³⁴¹ In addition to the current penalties, an increasingly complex and regulated society will continue to produce added and even unintended consequences for misdemeanor convictions.³⁴²

The failure to provide an adequate defense for the nation’s indigent misdemeanants can have a severe impact on society at large.³⁴³ “Any

333. See Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 723 (1992) (discussing a recent trend in the courts that views defense lawyers as scheming advocates instead of a “shield of weak and possibly innocent individuals”).

334. *Id.* at 671.

335. Lee, *supra* note 10, at 1925-26.

336. Karlan, *supra* note 333, at 672.

337. See Catz & Firak, *supra* note 24, at 438.

338. See *Alabama v. Shelton*, 535 U.S. 654 (2002).

339. See *id.*

340. See generally Cait Clarke, *The Right to Counsel: Gideon v. Wainwright at 40: Contemporary Issues: Taking Alabama v. Shelton to Heart*, 27 *Champion* 25 (2003)

341. Catz & Firak, *supra* note 24, at 437.

342. *Id.* at 438.

343. One commentator has suggested that these misdemeanor convictions “often reflect social problems inside specific geographic communities or demographic groups. Large numbers of minor cases can be a source of important data and insight into the health of a community. Problems, such as addiction, could be addressed early, before these problems become intractable.” Clarke, *supra*

diminution in the rights of the indigent results in a proportional diminution and erosion of the rights of all persons. No one benefits if one side has more resources than the other.”³⁴⁴ This failure to promote equality in the courts also encourages the public perception that “the rich go free and the poor go to jail.”³⁴⁵ Simply stated, the situation in public defenders’ offices across the country is one “ripe for abuse, and it is folly to think that those abuses and consequences do not extend beyond the lives of those many unfortunate defendants who sorely need but who are denied the appointment of counsel.”³⁴⁶

These damaging effects of uncounseled indigent convictions on the public at large are joined by harrowing truths about the effects on individual criminals:

While . . . severe penalties have been injected into our criminal justice system, we provide only the most cursory defense services to the poor. Public defender budgets are routinely slashed to the bare bone. Lawyers who serve the poor zealously strive to provide effective legal representation, yet they are overrun by the superior resources of law enforcement and the Government. The lack of funding for defense services for the poor makes a mockery of justice.³⁴⁷

In certain jurisdictions the courts are unable to provide counsel even when it is constitutionally required.³⁴⁸ States are often unable to provide adequate funding to assure effective representation, and public defender systems are often underfunded while at the same time handling caseloads that exceed the maximum limits set by national guidelines.³⁴⁹ “In the

note 340, at 27. In addition, “[m]isdemeanor cases often present the best opportunity to engage restorative justice initiatives. Rehabilitation and restitution can be most acceptable and effective for minor offenses.” *Id.*

344. Lee, *supra* note 10, at 1926.

345. *See id.* at 1896.

346. Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 NEW ENG. L. REV. 495, 513 (1997); *see also* Clarke, *supra* note 340, at 27. (“Defenders should ‘sweat the small stuff’ because it is the most fertile area for defenders and community leaders to collaborate on problem-solving justice initiatives.”).

347. Liotti, *supra* note 28, at 105-06.

348. Richard Klein, *The Emperor Gideon has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 657-63 (1986) (citing several nationwide studies showing that “[t]he scope of representation provided for indigent defendants in many jurisdictions does not meet specific constitutional directives of the Supreme Court”); *see also* Judith Kapuscinski, *Beyond ‘Gideon’: 25 Years Later, the Right to Counsel is Not Always Assured*, L.A. DAILY J., April 1, 1988, at 4 (observing national studies indicating that this constitutional violation occurs especially with misdemeanor offenses).

349. Stacchini, *supra* note 316, at 1248-49 nn.111-17; *see also* James Kura, *Prove You Need the Money, Public Defenders Should Use Caseload Data to Raise Funds and Influence People*, 4 SPG

misdeemeanor courtrooms, lawyers may be responsible for 25 to 35 clients a day.³⁵⁰ Since the *Gideon* decision, “a major independent report has been issued at least every five years documenting the severe deficiencies in indigent defense services.”³⁵¹ Some states allocate significantly more funding to the prosecution offices than to the indigent defense offices.³⁵² The meager funds received by public defenders are sometimes reduced by judges “who seem to retaliate against them for being strong advocates.”³⁵³

Furthermore, “every state and the federal government has enacted a statutory recovery system designed to recoup all or some of the costs associated with the government’s constitutional obligation to provide counsel to indigent criminal defendants.”³⁵⁴ Under this system, indigent defendants, who do not have any discretion in choosing their own counsel, must “repay all or a portion of the costs of their legal defense when they subsequently obtain the means to do so.”³⁵⁵ The effect of this process is to require “the indigent to pay the piper without extending any real authority to call the tune.”³⁵⁶

Under the current system, “a drunk driver merits the aid of counsel in a trial that may incarcerate him for a few days while an indigent parent may be deprived of her child permanently without the assistance of an attorney.”³⁵⁷ While this loss of a child may take place in the context of a civil trial, the underlying concern is still the same. The statistics cited above demonstrate

CRIM. JUST. 20, 21 (1989) (stating that in some jurisdictions, public defenders are now appointed to eighty percent of all criminal cases).

350. Stone, *supra* note 16, at 215. Further statistics from the Cook County Public Defender’s Office in Chicago are not heartwarming: a single attorney may be required to handle over four hundred pending clients in the juvenile division, over one hundred pending cases in the felony division, and “over 20 pending murder cases at any given time.” *See id.*

351. Harvard Law Review, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064 (2000) (recalling stories of “intoxicated, sleeping, and otherwise incompetent public defenders”).

352. Stacchini, *supra* note 316, at 1252. In 1999, prosecutors’ offices nationwide had total budgets of over \$4.6 billion for prosecutorial functions. Half of the offices reported an annual budget of \$318,000 or more. The average budget was \$2 million. This can be contrasted with the twenty-one states whose state government funds virtually all indigent defense services. These twenty-one states account for 27% of the U.S. population in 1999. They spent a total of \$662 million on indigent defense. In 1999, an estimated \$1.2 billion was spent to provide indigent defense services to the nation’s 100 most populous counties. These statistics can be found at www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf and www.ojp.usdof.gov/bjs/id.htm#counties.

353. Liotti, *supra* note 28, at 106. The current pay rate for these overworked defenders is just as disappointing. In New York State, hourly fees for those willing to represent indigent defendants has “increased only twice since 1965.” *Id.* at 124. It has not been increased since 1986. *Id.* The current rate is “forty dollars per hour for in-court time and twenty-five dollars per hour for out-of-court time.” *Id.* The statutory cap is \$1,200 for felony cases and \$800 for misdemeanor cases. *Id.* Some solutions to these problems have popped up occasionally. *See* Clarke, *supra* note 340, at 26 (“Defenders can get local governments to think about diversion and alternatives to incarceration or to decriminalize certain conduct. Enforcing *Shelton* does not necessarily have to result in increased costs and burdens on the criminal justice system or county budgets.”) (quoting Robert C. Boruchowitz, the Executive Director of the King County Public Defender Association in Seattle).

354. Holly, *supra* note 27, at 218 (citing *State v. Albert*, 899 P.2d 103, 104 (Alaska 1995)).

355. *Id.*

356. *Id.* at 230.

357. Catz & Firak, *supra* note 24, at 415.

that the indigent criminal defendant is victimized by a system that fails to meet constitutional standards, cares nothing for the level of representation they receive, subjects them to fees for this empty advocacy, and altogether ignores the guarantees that all criminal defendants are afforded under the Due Process Clause. There is certainly room for improvement.³⁵⁸

B. Proposed Solutions and Their Risks

There have been three main types of programs evolving throughout the country that attempt to provide legal services to the indigent accused:

(1) assigned counsel programs where lawyers who are members of the private bar are appointed on a case-by-case basis; (2) contract attorney programs where the local government contracts with individual private attorneys, law firms, or bar associations to provide representation to certain categories of defendants over a specific period of time; and (3) public defender programs where a salaried staff of full-time or part-time attorneys provide defense services.³⁵⁹

Each system has its share of risks and benefits. While the contract system may attract very capable attorneys from the private bar, usually the government funds “the lowest bidder to provide representation to a . . . number . . . of indigent defendants for a certain period The economic incentive is for that lawyer or . . . lawyers to dispose of as many cases as quickly as possible to maximize profit.”³⁶⁰

The federal government has relied almost exclusively on the assigned counsel program, but this has brought problems of “fixing appropriate levels of compensation, inadequate training and supervision, [and the] absence of

358. Interestingly enough, public confidence in the American criminal justice system appears to have remained steady since the mid-1990s. According to the Department of Justice, the percentage of Americans who have “a great deal” or “quite a lot” of confidence in the criminal justice system has ranged between 17-24% from 1993-2000. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 106 (2000).

359. See Stone, *supra* note 16, at 209-10. Of the twenty-one states that depend solely on the state government to provide all of their indigent defense services, nineteen provide indigent defense services through assigned counsel. Ten had a roster of private attorneys who could be appointed to represent indigent criminal defendants. Five of those ten had formal procedures for removing attorneys from the roster. Eleven states had funded contract attorney programs administered to Public Defender offices, law firm, solo practitioners, non-profit organizations, or groups of private attorneys or law firms. Five states reported competitive bidding for indigent criminal defense services. Indigent defense service programs in the largest 100 counties received an estimated 4.2 million cases in 1999. Of these cases, 82% were handled by court appointed private attorneys, 15% by private attorneys, and 3% by contract attorneys. These statistics can be found at www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf and www.ojp.usdoj.gov/bjs/id.htm#counties.

360. Stone, *supra* note 16, at 210.

minimum standards of performance.”³⁶¹ In addition, there has been some criticism that the assigned counsel system constitutes a taking under the Fifth Amendment.³⁶²

Public defender systems featuring a full-time staff of attorneys working with a fixed salary tend to offer the best hope of unreserved representation, but in practice insufficient funding and excessive caseloads can seriously diminish the quality of services.³⁶³

Another rather extreme proposal is that state and federal governments adopt legislation that requires all criminal defendants, underprivileged and over-privileged, to be represented by counsel that is appointed by the court.³⁶⁴ This would ensure the actuality and appearance of equal justice.³⁶⁵ Defendants would no longer be able to “buy their way out.”³⁶⁶ The public would be more amenable to funding for criminal defendants because of their confidence in the system.³⁶⁷ Middle-class defendants who do not meet the stringent standards for indigency but don’t have the resources for a proper defense could acquire decent representation “without having to jeopardize essential family resources.”³⁶⁸

It is clear that the legal profession will need help from a wide range of attorneys, both public and private, to enact a system that will truly benefit indigent defendants.³⁶⁹ The sacrifices that individual attorneys will be compelled to make have everlasting nobility when seen in context. The decision to take a pay cut in order to keep constitutional freedoms alive is never a regrettable one. With the implementation of one or a combination of these proposals, the wasteland of indigent criminal defense might be transformed into an effective pool of capable advocates ready and willing to work towards a system worthy of being a productive part of the American criminal justice system. By carefully reviewing a number of these solutions, or by diligently laboring to find a better one, our nation’s governmental agencies might be able to provide indigent criminal defendants with the

361. *Id.*

362. See Stafford Henderson Byers, *Article: Delivering Indigents’ Right to Counsel While Respecting Lawyers’ Right to Their Profession: A System “Between a Rock and a Hard Place”*, 13 ST. JOHN’S J. LEGAL COMMENT. 491, 513-15 (1999); see also George A. Riemer, *Can Oregon Lawyers be Compelled to Represent Indigents for Free?*, 63 OR. ST. B. BULL. 21, 21 (2002) (warning that “[l]awyers and judges need to start thinking about the legal, ethical and practical implications of trying to force bar members to represent indigents when the state says it no longer has any money to pay for such representation”).

363. See Stone, *supra* note 16, at 210-11.

364. See Clark, *supra* note 9, at 52.

365. *Id.*

366. *Id.*

367. *Id.* at 53.

368. *Id.*

369. Some have suggested that simply “[e]nforcing Shelton will be a long uphill battle. Litigation will likely be necessary in some states and counties, but lawsuits should not be initiated by public defense organizations. Challenges to systemic inequities and constitutional violations should be left to organizations like the ACLU.” Clarke, *supra* note 340, at 27. Aside from litigation, Clarke recommends that defenders themselves take an active role in “educating all players about the Shelton decision.” *Id.* at 28. “In their meetings with local officials and community leaders, defenders should raise the issue with everyone and anyone who will listen.” *Id.*

representation they are constitutionally entitled to. The first step, however, is to grant each accused, regardless of their bank account, the simple opportunity to appear in court with an attorney by their side. This result cannot be waitlisted any longer.

VII. THE VERDICT ON THE CURRENT STATE OF THE INDIGENT DEFENDANT'S RIGHT TO COUNSEL

Despite the Sixth Amendment's explicit language, the United States Supreme Court has been reluctant, decade after decade, to incorporate the full guarantees of the Sixth Amendment into the Fourteenth Amendment's protections on the states.³⁷⁰ The evolving standards that outline precisely what Due Process requires on behalf of the states in providing indigent defendants with appointed counsel have developed with the speed of a tired tortoise.³⁷¹ The proudly pronounced *Powell v. Alabama*³⁷² and *Gideon v. Wainwright*³⁷³ decisions, extending the right to appointed counsel, have retained only a glimpse of their potency.³⁷⁴ The powerful due process

370. The Court in *Scott v. Illinois* stated:

[W]e conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. 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.

440 U.S. 367, 373 (1979); *see also* *Betts v. Brady*, 316 U.S. 455, 461-62 (1942) (“The Due Process Clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment.”). The Court was at least a little more willing to extend Sixth Amendment protection to indigent defendants in criminal cases, as the *Johnson v. Zerbst* decision makes clear. 304 U.S. 458, 463 (1938) (“The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”).

371. *Powell v. Alabama*, the first case requiring the states to appoint a lawyer to an indigent defendant in accordance with the Due Process Clause, was decided in 1932. 287 U.S. 45 (1932). Ten years later, the Court determined that the Due Process Clause did not require an appointment of a lawyer to an indigent criminal defendant in state court unless “want of counsel in a particular case may result in a conviction lacking in such fundamental fairness.” *Betts v. Brady*, 316 U.S. 455, 473 (1942). It was another twenty years until the Court recognized the right of appointed counsel to all indigent defendants in felony cases. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963). Nine years later, this was extended to convictions which resulted in a defendant's loss of liberty. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). This was limited in scope by *Scott v. Illinois* seven years later. 440 U.S. 367, 373 (1979). Twenty-two years later, *Alabama v. Shelton* provided a very small extension by holding that even suspended prison sentences could not be imposed at an uncounseled trial. 535 U.S. 654, 674 (2002). Thus, it has taken the Supreme Court *seventy years* to adjudicate the “fundamental fairness” mandated under the Due Process Clause includes the provision of the guiding hand of counsel before an indigent defendant can be sentenced to a suspended prison term.

372. 287 U.S. 45 (1932).

373. 372 U.S. 335 (1963).

374. *See Garcia, supra* note 34, at 57 (lamenting that “the course charted by the Court in the mid-1970s and the 1980s differed from that followed by *Gideon*, *Douglas*, and *Argersinger*. ‘Practical’

language in those opinions, suggesting that the right to appointed counsel is a fundamental right necessary to ensure a fair trial, as well as the importance given to this right by this country's founders, has given way to judicial haste and budgetary concerns.³⁷⁵

Despite the Supreme Court's lack of eagerness to extend the indigent criminal defendant's right to assistance of counsel, diamonds in the rough appear every so often. *Alabama v. Shelton* is one of these diamonds. The *Shelton* decision extended the right to counsel in a way that was entirely consistent with the Court's prior case precedent. It pushed the threshold constitutional requirements on the states' appointment of counsel to indigent defendants just a little bit further. But it was far from adequate. Although *Shelton* was a step in the right direction, the great liberties of the Sixth Amendment, applied to the states through the Fourteenth Amendment, remain stifled because of the Supreme Court's hesitancy to allow the Sixth Amendment to mean what it says: the right to the assistance of counsel in *all* criminal prosecutions. This would include prosecutions against the educated and uneducated, the rich and the poor, those charged with felonies *and* misdemeanors.

VIII. CONCLUSION

The logic of *Powell* and *Gideon* remains unrealized at best, and flat out ignored at the worst. The Court has extended the right to appointed counsel only in situations where the defendant may lose his or her liberty. This has been interpreted to include only loss of "physical liberty," but loss of one's liberty no longer merely refers to jail sentences. The wide array of criminal penalties in contemporary penal codes can ruin a career, destroy a family, label one a "sexual predator," take away the opportunity to vote, take away a driver's license, and attach social stigmas that can never be erased.³⁷⁶ These harsh consequences can no longer be justified when imposed after an unreliable and uncounseled conviction in criminal court. To do so offends all notions of due process and contradicts the rationale behind *Powell* and *Gideon*.

Instead of an inch-by-inch approach to this fundamental constitutional right, the Court must forge ahead. Both reason and precedent point to a

concerns suddenly loomed large against the ideal of fairness *Gideon* and its progeny sought to promote."). More than one commentator has noticed that, although "professing fidelity for the 'fundamental right' to counsel, the Court's recent jurisprudence reflects a different understanding of the function of counsel in the criminal process . . . one which construed the right of the defendant to counsel as a revocable privilege rather than a fundamental right." *Id.* at 103; *see also* Simpson, *supra* note 306, at 424 (explaining that the *Argersinger* decision, which limited the right to appointed counsel only in cases where the defendant is sentenced to jail, "blurred the clear purpose of the Sixth Amendment right to counsel: to insure a fair trial for the accused, regardless of the nature of the offense charged and its penalty").

375. *See* Garcia, *supra* note 34, at 105 ("It appears that the United States Supreme Court has lost sight of [James] Madison's goal in securing the enactment of the Bill of Rights. In particular, the right to counsel has foundered on the shoals of political expediency.").

376. *See* Garcia, *supra* note 34, at 54.

more liberal understanding of the indigent's right to appointed counsel. There are many proposals, but only one solid solution: give the Sixth Amendment the reverence it deserves. The language of the amendment is clear, and political or financial concerns cannot impede the necessary development of constitutional guarantees. The Court itself has said that a "State's fiscal interest is . . . irrelevant" where the denial of the constitutional rights of due process and equal protection is concerned.³⁷⁷ Every financially secure criminal defendant enjoys the assistance of counsel; those less fortunate must not settle for anything less.

Joshua S. Stambaugh³⁷⁸

377. *Mayer v. City of Chicago*, 404 U.S. 189, 197-98 (1971).

378. Student, Pepperdine University School of Law (J.D. candidate, Spring 2004). I would like to thank Jesus Christ, my Lord and Savior, to whom I am indebted for all of my abilities, and express my gratitude to the members of my family who lent their editorial talents, especially Therese Marie. This article is dedicated to my loving wife, Anne Marie.

