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Criminal Procedure: The Outer Limits of the Indegent's Right to Appointed Counsel

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NOTES

CRIMINAL PROCEDURE: THE OUTER LIMITS OF THE INDIGENT'S RIGHT TO APPOINTED COUNSEL—*Scott v. Illinois,* 440 U.S. 367 (1979).

Over the past forty-seven years, the sixth amendment[1] right to counsel, as applied to the states through the fourteenth amendment,[2] has undergone almost constant expansion. In 1932 the evolution began in *Powell v. Alabama,*[3] when the Supreme Court held that, in capital cases: (a) the sixth amendment right to counsel is of a fundamental nature, and applicable to the states through the due process clause of the fourteenth amendment; and (b) the state must provide counsel for indigent defendants. Ten years later, in *Betts v. Brady,*[4] the Court refused to extend the right to counsel further, holding that indigents were not entitled to appointed counsel in most noncapital state cases. But the Court soon recognized that under some circumstances counsel must be appointed even in noncapital cases.[5]

Although *Betts* nominally remained the general rule, the majority of the cases that followed were found to fall under a "special circumstances" exception.[6] Finally, in 1963, the Court specifically overruled *Betts* in *Gideon v. Wainwright,*[7] holding that fundamental fairness required that counsel be appointed in all felony cases. The *Gideon* holding was further broadened in *Argersinger v. Hamlin,*[8] when the Supreme Court unanimously extended the right to have counsel appointed in all cases which result in the actual deprivation of liberty.

Subsequent state and lower federal court decisions differed in their application of *Argersinger.* Some courts adhered strictly to a narrow

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1. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

2. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

3. 287 U.S. 45 (1932).

4. 316 U.S. 455 (1942).

5. *See* Rice v. Olson, 324 U.S. 786 (1945).

6. The "special circumstances" class of exceptions, originally labeled such in Bute v. Illinois, 333 U.S. 640 (1948), became the common mode of expanding the right to counsel. In eleven of thirteen cases decided between *Bute* and Gideon v. Wainwright, 372 U.S. 335 (1963), the Court found that special circumstances existed, and thus the appointment of counsel was necessary. *See* Annot., 93 A.L.R.2d 747 (1964).

7. 372 U.S. 335 (1963).

8. 407 U.S. 25 (1972).

"actual imprisonment," or "imprisonment in fact" standard.[9] Others interpreted *Argersinger* to require counsel whenever there was a possibility of imprisonment, and so applied the "imprisonment in law" standard.[10] Still others, while recognizing that *Argersinger* went no further than the "actual imprisonment" standard, held that the broader "imprisonment in law" standard was a logical extension of *Argersinger*.[11]

This dispute was resolved by the Supreme Court in the case of *Scott v. Illinois*.[12]

FACTS

Aubrey Scott, an indigent, was accused of shoplifting $13.68 worth of merchandise from an F.W. Woolworth store.[13] The offense was punishable by imprisonment up to one year or a fine up to five hundred dollars, or both.[14] Scott was neither offered nor provided counsel. At a bench trial, Scott was found guilty and fined fifty dollars. Scott appealed, claiming that he had been deprived of due process of law because he was not given the benefit of counsel at trial. Both the appellate court[15] and the Illinois Supreme Court[16] affirmed, finding that *Argersinger's* counsel requirement did not extend to cases where there has been no actual imprisonment. The courts saw no reason to go beyond the bounds of *Argersinger* merely because imprisonment was one of the sentencing alternatives authorized by the legislature.[17] The United States Supreme Court granted certiorari to resolve the dispute among jurisdictions.[18]

DECISION

In a 5-4 decision,[19] the Court affirmed, holding that "the Sixth and

9. *See* Sweeten v. Sneddon, 463 F.2d 713 (10th Cir. 1972); Barr v. United States, 415 F. Supp. 990 (W.D. Okla. 1976); Rollins v. State, 299 So. 2d 586 (Fla.), *cert. denied*, 419 U.S. 1009 (1974).

10. *See* Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978); Tate v. Kassulke, 409 F. Supp. 651 (W.D. Ky. 1976).

11. *See* Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976); Winnie v. Harris, 75 Wis.2d 547, 249 N.W.2d 791 (1977).

12. 440 U.S. 367 (1979).

13. *See* People v. Scott, 36 Ill. App. 3d 304, 305, 343 N.E.2d 517, 518 (1976), *aff'd*, 68 Ill. 2d 269, 369 N.E.2d 881 (1977), *aff'd*, 440 U.S. 367 (1979).

14. ILL. ANN. STAT. ch. 38, § 16-1(e) (Smith-Hurd 1977).

15. 36 Ill. App. 3d 304, 343 N.E.2d 517 (1976), *aff'd*, 68 Ill. 2d 269, 369 N.E.2d 881 (1977), *aff'd*, 440 U.S. 367 (1979).

16. 68 Ill. 2d 269, 369 N.E.2d 881 (1977), *aff'd*, 440 U.S. 367 (1979).

17. 68 Ill. 2d at 272, 369 N.E.2d at 882.

18. 440 U.S. at 368. *See* cases cited in notes 9-11 *supra*.

19. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White, and Powell joined. Justices Brennan, Marshall, Stevens, and Blackmun dissented. This was substantially the same Court which seven

Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[20] The Court refused to extend the right further because it found that the actual imprisonment standard as laid down in *Argersinger* was a logical cut off point. The Court maintained that incarceration is "so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense."[21] Other sanctions, however, were found to be of a different, less severe nature.[22] The *Scott* majority found this distinction to have been "the central premise of *Argersinger*,"[23] and adopted it as the foundation for its own decision.[24]

ANALYSIS

The majority position, while susceptible to criticism, is not without merit. First, because the basic proposition that imprisonment is inherently different from other penalties is well supported by authority,[25] the foundation of the decision is strong.[26] Justice Rehnquist further strengthened his position by looking at what was actually decided in *Argersinger*, and suggesting that the question raised by *Scott* was implicitly decided in the *Argersinger* decision.[27] In support of this proposition, Justice Rehnquist pointed out that the *Argersinger* Court made it clear that its decision would affect only those cases which end up in actual imprisonment, and not "the run of misdemeanors."[28] The majority in *Scott* also suggested that because the "imprisonment in law" standard was brought before the *Argersinger* Court, but not adopted, *Argersinger*, by negative implication, showed a preference for the "actual imprisonment" standard.[29] Thus, the *Scott* majority established its decision as consistent with *Argersinger*.

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years earlier rendered the decision in Argersinger v. Hamlin, 407 U.S. 25 (1972). The only change in the Court's composition was the replacement of Justice Douglas, who wrote for the majority in *Argersinger*, with Justice Stevens, who dissented in *Scott*.

20. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).
21. *Id.* at 372-73.
22. *Id.* at 373.
23. *Id.*
24. *Id.*
25. *See* Muniz v. Hoffman, 422 U.S. 454, 477 (1975) ("imprisonment and fines are intrinsically different"). *See also* Williams v. Illinois, 399 U.S. 235, 263 (1970). *Contra*, Argersinger v. Hamlin, 407 U.S. at 48 n.11 (Powell, J., concurring).
26. *See* note 23 and accompanying text *supra*.
27. 440 U.S. at 369-70, 373.
28. *Id.* at 370 (quoting Argersinger v. Hamlin, 407 U.S. at 40).
29. 440 U.S. at 373 n.4.

Justice Rehnquist also pointed out that, although on its face the sixth amendment applies to "all criminal prosecutions,"[30] it is not as broad as it may appear.[31] First, it is improbable that the sixth amendment was intended to comprehend the provision of counsel at the government's expense.[32] Second, the sixth amendment originally had no application to state criminal proceedings.[33] This is significant in that state criminal laws cover a broader spectrum of activities, especially in the petty offense and misdemeanor categories.[34] Because of this distinction, any strict analogy drawn between the state and federal proceedings involves an inherent flaw. Because the federal government does not regulate, and was not structured to regulate such crimes as shoplifting, the words "all criminal prosecutions" cannot be construed to reflect an intent by the framers to protect individuals accused of this or other petty state crimes.[35] If the words of the sixth amendment were interpreted to be so inclusive, it could create great burdens on the states due to the voluminous number of lesser offenses which are tried every year.[36] Because of the relatively low volume of such cases in federal courts, the national government does not bear a similar burden.

At the same time, because the penalties for these offenses are significantly lower, there is less benefit to be derived from providing counsel. Indeed, the cost of providing counsel would often exceed any fine upon a finding of guilt.[37] Thus, the cost of providing counsel in such cases may exceed the benefit.[38] This may be best evidenced by the fact that most nonindigents do not employ counsel in such cases.[39] To appoint counsel for an indigent when most nonindigents would not hire counsel would be affording the indigent a luxury rather than just protecting his right to due process.[40]

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30. U.S. CONST. amend. VI.
31. 440 U.S. at 370.
32. *Id.* (citing W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955)).
33. *See* Betts v. Brady, 316 U.S. 455, 461 (1942).
34. 440 U.S. at 372.
35. *See Betts*, 316 U.S. at 473.
36. There are between 1,250,000 and 2,710,820 indigent non-traffic misdemeanor offenders arrested annually. *See* Brief of Respondent at 28, Scott v. Illinois, 440 U.S. 367 (1979) (citing NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, L. BENNER & B. LYNCH-NEARY, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 72 (1973); Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601 (1975)).
37. *See* Argersinger v. Hamlin, 407 U.S. 25, 49 (Powell, J., concurring).
38. *Id.*
39. *Id.*
40. *Id.*

Justice Rehnquist in part relied on a similar economic argument as a justification for his holding in *Scott*, finding that a requirement for appointment of counsel in every case where imprisonment is a possibility would be an "unpredictable, but necessarily substantial" burden on the state.[41] Although some states have implemented the "imprisonment in law" standard with little difficulty,[42] other states could be greatly burdened if this standard were mandated.[43] Indeed, some states have even had difficulties implementing the requirements of *Argersinger*.[44] There is evidence that to require the broader "imprisonment in law" standard, as urged by petitioner Scott, would create insurmountable problems in some jurisdictions.[45]

In response to this economic argument, Justice Brennan, in his dissenting opinion,[46] contended that this argument is irrelevant because it in effect prices indigents out of having representation at trial.[47] Prior equal protection decisions, such as *Griffin v. Illinois*[48] and *Mayer v. City of Chicago*,[49] represent a "flat prohibition" against pricing indigents out of an effective appeal, even when imprisonment is not imposed at trial.[50] Justice Brennan suggested that this prohibition is equally applicable to other "constitutional guarantees for criminal defendants."[51] Indeed, even the *Scott* majority recognized that *Argersinger* upheld the right to counsel whenever incarceration results, "regardless of the cost to the States implicit in such a rule."[52]

If Justice Rehnquist did in fact deny Scott the right to counsel because of the burden on the state, his approach is contrary to past decisions such as *Griffin*.[53] But, even though the majority expressed concern about the burden on the state, its decision primarily rested on the premise that penalties other than imprisonment are of a different,

41. 440 U.S. at 373.

42. *See* McInturf v. Horton, 85 Wash. 2d 704, 538 P.2d 499 (1975); Winnie v. Harris, 75 Wis. 2d 547, 249 N.W.2d 791 (1977). *See also* S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD, & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES 71 (1976) [hereinafter cited as KRANTZ].

43. *See* Brief of Respondent at 26-27, Scott v. Illinois, 440 U.S. 367 (1979).

44. *Id.*

45. *See* Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249 (1970).

46. 440 U.S. at 375.

47. *Id.* at 384.

48. 351 U.S. 12 (1956).

49. 404 U.S. 189 (1971).

50. 440 U.S. at 384 (quoting Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971)).

51. 440 U.S. at 384.

52. *Id.* at 373.

53. *See* notes 47-51 and accompanying text *supra*.

less severe kind.[54] Because of this, the Court found that the due process clause of the fourteenth amendment does not require appointment of counsel where imprisonment is not the sanction imposed.[55] This involved an implicit finding by the Court that Scott's right to counsel under the circumstances was not fundamental.[56] This is the essential difference between the majority and the minority, in that Justice Brennan viewed Scott's right to counsel as fundamental.[57] Because the issue has never specifically been decided,[58] either view as to the fundamental character of Scott's right to counsel is tenable. Because the majority took the view that the right to counsel was not fundamental, the economic interest of the state was a relevant concern.[59]

If the burden to the state is considered, as was done by the majority, the high cost to the state may serve as a justification for refusing to further extend the right to counsel. But this argument is somewhat weakened by the existence of an alternative which could allow the states to cope with the burden. As suggested by Justice Brennan, the states might minimize the impact by decriminalizing certain offenses.[60] The Court in *Argersinger* indicated that this type of action is particularly within the domain of the state legislatures.[61] But because this represents an alternative approach which would both minimize the burden to the state and permit counsel to be provided for substantially all criminal defendants, it is an appropriate consideration in such an economic analysis.[62]

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54. *See* notes 21-24 and accompanying text *supra*.

55. *Id.*

56. *See* Palko v. Connecticut, 302 U.S. 319 (1937), which established that the fourteenth amendment incorporates the rights in the bill of rights which are deemed fundamental. (*Palko* was overruled in Benton v. Maryland, 395 U.S. 784 (1969), but only with respect to the status of the fifth amendment protection against double jeopardy as a fundamental right).

57. Justice Brennan viewed precedents more broadly than did Justice Rehnquist, finding that the reasoning of *Gideon* extended to "all criminal prosecutions." 440 U.S. at 378. In Justice Brennan's opinion, precedents answered the question raised in *Scott*, and dictated that the petitioner was entitled to appointed counsel. *Id.* at 378-80. Not only did he see Scott's right to counsel as fundamental, he viewed it as "perhaps the most fundamental Sixth Amendment right." *Id.* at 389.

58. The *Argersinger* Court specifically declined to resolve the question. 407 U.S. 25, 37.

59. *Cf.* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (the Court considered the economic burden in finding that there is no *per se* right to counsel in probation revocation hearings).

60. 440 U.S. at 388.

61. 407 U.S. at 38.

62. *See generally* KRANTZ, *supra* note 42, at 141-45. This alternative could be viewed as analogous to the "lesser restrictive alternatives" test which the Court has employed of other areas. *See, e.g.*, Shelton v. Tucker, 364 U.S. 470 (1970) (fundamental first amendment rights cannot be stifled if the government may achieve its ends in a

The *Scott* decision can also be questioned on a number of other bases. One concern, which was also expressed by Justice Brennan in his dissent, is that through this decision the Court has restricted the right to counsel to a greater degree than the right to trial by jury.[63] Under *Baldwin v. New York*[64] a defendant enjoys the right to a jury trial whenever there is a potential imprisonment of six months or more. Under the *Scott* decision, even if there is a potential imprisonment of over six months, there is no right to counsel unless imprisonment is actually imposed. Thus the restriction on the right to counsel may, in some instances, be greater than the restriction on the right to a jury trial.

The Supreme Court has recognized that the right to counsel is at least as important as other sixth amendment rights.[65] The *Argersinger* Court refused to limit the right to counsel to the same degree as the right to a jury trial because: (a) there is no historical support for such limitation; and (b) the right to counsel "is often requisite to the very existence of a fair trial."[66] Indeed, even Justice Powell, while expressing concern about *Argersinger's*[67] far-reaching implications, recognized that "wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases where there is a due process right to a jury trial."[68] Thus, to limit the right to counsel to a greater extent than the right to a jury trial, as *Scott* does, is inconsistent with the view, expressed in *Argersinger* and other cases, that the right to counsel is at least entitled to the same degree of protection.

The "actual imprisonment" standard utilized in *Scott* is also inconsistent with other decisions which indicate that the authorized penalty is the correct measure of the seriousness of the offense for constitutional purposes. In fact, in *Duncan v. Louisiana*,[69] the Court specifically rejected the use of the "actual imprisonment" standard as the relevant criterion for determining the seriousness of the offense.[70]

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less restrictive manner); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (interstate commerce cannot be discriminated against when there are lesser restrictive means available).

63. *See* 440 U.S. at 389 (Brennan, J., dissenting).

64. 399 U.S. 66 (1970).

65. Lakeside v. Oregon, 435 U.S. 333, 341 (1978).

66. 407 U.S. at 30-31.

67. 407 U.S. at 44 (Powell, J., concurring).

68. *Id.* at 45-46. Justice Powell joined the majority opinion in *Scott*. His concurrence in *Argersinger* was joined in by Justice Rehnquist.

69. 391 U.S. 145 (1968).

70. *Id.* at 159-62. The Court saw the penalty authorized "as a guage of . . . social and ethical judgments" of the seriousness of the crime. *Id.* at 160 (quoting District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)). The *Duncan* Court rejected any

The Court has also employed the authorized penalty as the correct measure of the seriousness of the offense in regard to a juvenile's right to counsel.[71] There is no apparent reason why the authorized penalty should be the correct measure in these instances but not in *Scott*.[72]

Another valid criticism of *Scott* is that it authorizes courts to abrogate the intent of state legislatures.[73] It is, of course, a judge's place to determine which of the authorized penalties is to be imposed. Most state statutes provide that the decision be made after trial and not before.[74] But if counsel is to be provided for an indigent, it must be before trial and, under *Scott*, the decision whether to provide counsel will be preceded by a determination of the likelihood that a penalty of incarceration will finally be imposed. By considering before trial what penalties might finally be imposed, the court is contravening the language of such statutes. Furthermore, if the judge fails to provide counsel at that point he is, contrary to legislative intent, eliminating a sentencing alternative which the legislature chose to leave open to him until after all the facts are in.[75] By deciding what penalty an offender may receive before he is ever brought to trial, the judge is embarking on a traditional legislative function.

Not only does this predetermination possibly infringe on a legislative function, it may also be a source of inaccurate predictions and judicial bias. That there will be at least some inaccuracies inherent in individual predictions is obvious. If it were not so, and judges were consistently capable of making such predictions with accuracy, then the trial itself would be little more than a procedural formality.[76] It is contrary to basic concepts of justice to suggest that a judge can accurately decide whether the defendant is likely to be found guilty and what the sentence will be,[77] without benefit of a trial.

Judicial bias is an equally valid concern. As inaccurate as the judge's prediction may tend to be, it would be little more than

analogy to Cheff v. Schnackenberg, 384 U.S. 373 (1966), where the actual punishment was used to guage the seriousness of the offense. *Cheff* was found to be distinguishable because the statute involved, a contempt statute, was silent as to possible punishments. In *Duncan*, as in *Scott*, the statute did prescribe penalties. *Duncan* viewed such a provision as a "legislative judgment as to the seriousness of the crime . . . in the form of an express authorization to impose a heavy penalty." 391 U.S. at 162 n.35.

71. *In re* Gault, 387 U.S. 1 (1967).

72. *See also* United States v. Moreland, 258 U.S. 433 (1922) (requirements of indictment by a grand jury).

73. *See* 440 U.S. at 383-84 (Brennan, J., dissenting).

74. Such a provision exists in Illinois, where Scott was convicted. ILL. ANN. STAT. ch. 38, § 1005-4-1 (Smith-Hurd Supp. 1979).

75. 440 U.S. at 383 (Brennan, J., dissenting).

76. KRANTZ, *supra* note 42, at 70.

77. *Id.*

guesswork without allowing that judge access to the defendant's past record and other information which might be inadmissible at trial. But to allow a judge to consider these factors before trial would be to invite judicial bias. Although the judge is presumed not to consider such information, he is, after all, human and capable of being influenced.[78] Thus, the better practice is thought to be to withhold such information from the judge to avoid prejudice.[79] The *Scott* decision is contrary to this view, in that it requires that the judge look at inadmissible information, in order to make a reasonably accurate prediction.

The *Scott* decision also may be criticized as representing "an abrupt break with its own well-considered precedents."[80] While *Scott* is at least consistent with the letter of *Argersinger*, the *Scott* decision does break with the trend over the last half-century of recognizing the right to counsel as a fundamental right.

Although the *Powell-Gideon-Argersinger* line of cases did not answer the specific question raised in *Scott*, some broad language in these decisions suggest that the right to counsel is entitled to great protection.[81] This is particularly true in *Gideon*, where the Court recognized that "any person haled into court, who is too poor to have a lawyer, cannot be assured a fair trial unless counsel is provided for him."[82] Not only does *Gideon* contain such broad language, it is also significant that the *Gideon* Court never expressly limited its holding to felony prosecutions. *Gideon* states unconditionally that the right to counsel is of a fundamental nature, and thus obligatory on the states through the fourteenth amendment.[83]

Because the *Scott* decision is contrary to such broad language, the decision appears contrary to its precedents. If these precedents do not mandate the wholesale incorporation of the right to counsel,[84] they at

78. *Id.* at 87-90. *Cf.* North Carolina v. Pearce 395 U.S. 711 (1969) (to avoid judicial vindictiveness, a judge must affirmatively show his reasons for imposing a more severe sentence after a retrial).

79. Gregg v. United States, 394 U.S. 489 (1969). *Cf.* FED. R. CRIM. P. 32(c)(1) (recognizing potential prejudice by not allowing the judge to see the presentence report before a plea or a finding of guilt).

80. 440 U.S. at 389 (Brennan, J., dissenting) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

81. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25, 37-40 (1972); Powell v. Alabama, 287 U.S. 45, 68-70 (1932). *See also* notes 82-83 *infra*.

82. 372 U.S. at 344.

83. *Id.* at 342-44.

84. There was some disagreement between the concurring judges in *Gideon* as to whether its decision operated as a total incorporation of the sixth amendment right to counsel. Justice Douglas in his concurrence indicated that the incorporation is total. *Id.* at 346-47. But Justice Harlan, also concurring, maintained that the incorporation is less than total. *Id.* at 352. The *Scott* decision apparently establishes that Justice Harlan's view is correct.

least reflect a spirit which indicates that the right is an important one and should not be too readily restricted.

Perhaps, from a practical point of view, a line must be drawn somewhere.[85] But it is questionable whether the *Scott* Court, in drawing that line, restricted the right to counsel to a greater degree than its precedents would seem to warrant.

In addition to being susceptible to criticism as being contrary to past decisions, *Scott* can also be criticized for opening the door to future difficulties. The first of these difficulties is one of enforcement. This problem may arise when a judge predetermines that an indigent is not going to be imprisoned, and is therefore not entitled to appointed counsel. After trial, and a finding of guilt, a fine is imposed. If the indigent for some reason fails to pay the fine, which is not altogether unlikely in view of his indigency, the court has limited means of compelling him to pay. A conventional remedy would be to bring a contempt proceeding against him. But, even if counsel is provided in this contempt proceeding, it is at least doubtful, under *Argersinger*, that the court could imprison the indigent.[86] The imprisonment, as a practical matter, would still be a result of the first proceeding. Furthermore, if imprisonment were allowed at this point, *Argersinger* would have little meaning for those judges wishing to circumvent its requirements. A judge could refuse to appoint an attorney, impose the maximum fine on a penniless indigent, and then imprison him for contempt upon failure to pay. Such circumvention is unlikely to be countenanced.[87] As a result, once the fine is imposed, the trial court will have few, if any, tools of enforcement.[88]

Another concern which may spark reconsideration of the *Scott* decision is the prohibition against double jeopardy.[89] This may come into play when the judge's pretrial prediction of the likelihood of incarceration proves inaccurate.[90] If the judge does not appoint counsel initially, the *Argersinger* requirements will not be met by appointing

85. *See* 440 U.S. at 372.

86. *See* KRANTZ, *supra* note 42, at 38-43.

87. *Id. See also* Argersinger v. Hamlin, 407 U.S. 25, 55 (1972) (Powell, J., concurring).

88. This is but one of the situations where indirect imprisonment can result. A similar problem may arise where a repeat offender is involved, or where an offender is put on probation or given a suspended sentence conditioned on good behavior. *See generally* KRANTZ, *supra* note 42, at 33-44; Note, *Argersinger v. Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 OHIO ST. L.J. 168 (1974).

89. U.S. CONST. amend. V. This provision was held applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969).

90. *See* notes 76-77 and accompanying text *supra*.

counsel later in the trial.[91] To declare a mistrial and hold a new trial solely to allow a harsher sentence would arguably be a violation of the guarantee against double jeopardy.[92] Although the Court has stated that a mistrial does not necessarily violate the double jeopardy clause in all instances,[93] it has held that granting a mistrial for the sole purpose of giving a prosecutor a better chance at a conviction does run afoul of the clause.[94] A situation where the sole purpose of the new trial is to increase the penalty is analogous.

Scott may also be challenged on the basis of the equal protection guarantee.[95] One problem here is whether the indigent is deprived of equal protection because he is denied the benefit of counsel available to a nonindigent. Because misdemeanants have a five times better chance of being acquitted if they are respresented by counsel, this claim should not be casually dismissed as artificial.[96] The indigent would receive a different kind of trial solely because he could not afford to have counsel appointed. The Court has recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[97] Because *Scott* authorizes such disparate treatment, it runs contrary to past equal protection decisions.[98] But, because the *Scott* Court explicitly rejected a due process contention similar to this argument, it is doubtful that the Court will overrule its decision on the basis of this equal protection claim.[99]

A totally different equal protection claim may be raised by the nonindigent accused of the same offense as an indigent. If the judge predetermines that the indigent is not entitled to counsel, he cannot be imprisoned. But under the same circumstances the nonindigent may be

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91. KRANTZ, *supra* note 42, at 74.

92. Justice Powell recognized this problem in his concurring opinion in *Argersinger*, 407 U.S. 25, 54 (citing Callan v. Wilson, 127 U.S. 540 (1888) and North Carolina v. Pearce, 395 U.S. 711 (1969)).

93. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

94. *See* Illinois v. Somerville, 410 U.S. 458 (1973).

95. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

96. *See* 407 U.S. 25, 36.

97. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (where the Court held that to deny an indigent an appeal solely because he could not afford to pay for the court transcript was a denial of equal protection).

98. *Id.*

99. The *Scott* Court seemed to indicate that Scott's right to counsel in this instance was not fundamental. In James v. Valtierra, 402 U.S. 137 (1971), the Court indicated that wealth is not in itself a suspect class. Therefore, the Court is unlikely to find an equal protection challenge such as this one an occasion to invoke strict scrutiny.

imprisoned,[100] and, if in fact he is imprisoned, he would appear to have a valid equal protection claim.[101] To allow the penalty to vary solely on the basis of wealth, as here, has been held to be a violation of the equal protection guarantee.[102] This anomaly could be corrected by requiring a predetermination of the likelihood of incarceration for both indigents and nonindigents. When the relative costs are weighed, it would appear preferable to spend the money employing counsel for all indigents.[103]

IMPLICATIONS

Scott is significant in that it sets the outer limits of the constitutional right of an indigent to have counsel provided for him. Indigents in state court trials will not be entitled to appointed counsel under the Constitution, unless that trial ends up in the actual deprivation of liberty.[104]

Although the Supreme Court has never specifically recognized a broader interpretation of the right to counsel, many subordinate courts have employed a broader standard, viewing it as a constitutional requirement.[105] *Scott* establishes that this broader interpretation is incorrect, and in this sense effectively overrules these decisions. These courts may no longer employ the broader standard as a requirement of the Constitution.[106]

Because of the availability of independent grounds on which the right to counsel may be extended, however, the implications of *Scott* may not sweep so wide as may initially appear. First, a judge will still be free to implicitly use the broader "imprisonment in law" standard by automatically appointing counsel any time imprisonment is a possibility. It is certainly within the judge's discretion to keep the option of imprisonment open until all the evidence is in. Second, state

100. *See* KRANTZ, *supra* note 42, at 84-85. The authors also suggests that an equal protection claim arises merely because the nonindigent is not given the benefit of knowing before trial that he cannot be imprisoned.

101. *Id.*

102. *See* Williams v. Illinois, 399 U.S. 235 (1970). To illustrate, suppose A (an indigent) and B (a nonindigent) are caught smoking marijuana, a misdemeanor in some jurisdictions. The judge predetermines that A, who has a clean record, need not have an attorney appointed in his behalf. B is tried and imprisoned. At A's trial it is proven that he was actually the instigator. Although his culpability is greater, he cannot be imprisoned because of his indigency. This runs contrary to *Williams*. It should make no difference that the discrimination is of an inverse nature. *See, e.g.*, Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

103. *See* KRANTZ, *supra* note 42, at 84.

104. 440 U.S. at 373-74.

105. *See* notes 9-11 and accompanying text *supra*.

106. Oregon v. Hass, 420 U.S. 714, 719 (1975).

legislatures are free to require by law that counsel be provided whenever imprisonment is a possibility, or even in all criminal prosecutions. State constitutions can also be amended or interpreted to provide for a broader right to counsel. Some states have already taken these routes.[107] Others are free to follow, although *Scott* is authority that this broader approach is not mandated by due process.

In practice, *Scott* may do little or nothing to change the right to counsel as it existed under *Argersinger*. Those states which desire an expanded right to counsel can readily find some avenue to reach this goal, although they may not rely on the United States Constitution. Those states which wish to restrict counsel will still be bound by the minimum requirement of *Argersinger*. The real effect of *Scott* is that it does not require more of these states, and thus legitimizes any restrictions which do not violate *Argersinger*.[108]

CONCLUSION

Scott v. Illinois will undoubtedly prove to be a controversial decision. Although it can be defended as a necessary restriction of the right to counsel, it also can be criticized on many bases. Because it is controversial, it is likely that many states will take other avenues to expand the right to counsel. For those that do not, it is likely that their decisions and the rationale of *Scott* will be vigorously challenged both in and out of court. These challenges will sooner or later find their way into the Supreme Court. But, until then, *Scott* represents the outer limits to the sixth amendment right to counsel, as applied to indigents in state courts.

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107. *See* 440 U.S. at 386-87 n.18 (Brennan, J., dissenting).

108. It should be noted that *Scott* will have no application in federal prosecutions. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).