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Casenotes: Constitutional Law — Criminal Procedure — Right to Counsel — Indigent Misdemeanor Defendant Not Entitled to Court-Appointed Attorney Unless Sentenced to Actual Confinement. Scott v. Illinois, 440 U.S. 367 (1979)

Michael E. Cross
University of Baltimore School of Law

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — RIGHT TO COUNSEL — INDIGENT MISDEMEANOR DEFENDANT NOT ENTITLED TO COURT-APPOINTED ATTORNEY UNLESS SENTENCED TO ACTUAL CONFINEMENT. *SCOTT v. ILLINOIS*, 440 U.S. 367 (1979).

I. INTRODUCTION

In *Scott v. Illinois*,[1] the United States Supreme Court held, in a five-to-four decision, that the sixth and fourteenth amendments do not require a state to appoint counsel for an indigent[2] defendant who is prosecuted for a misdemeanor if the defendant is not sentenced to actual confinement upon conviction.[3] The decision marks a halt of the gradual expansion of the right to court-appointed counsel begun by the Court in 1932, which by 1972 had resulted in the holding that the sixth and fourteenth amendments entitle an indigent misdemeanor defendant in a state criminal proceeding to court-appointed counsel if conviction results in actual confinement.[4] The *Scott* Court refused to extend that right to indigent misdemeanor defendants who are not sentenced to actual confinement following conviction, even when imprisonment is an authorized punishment for the offense. Thus, the actual sentence imposed, rather than the possibility of imprisonment, determines whether an indigent misdemeanor defendant possesses a constitutional right to be represented by counsel appointed by the court. This casenote examines the soundness of the *Scott* decision in light of prior right to counsel cases and discusses the practical effects of the decision as well as the questions remaining after *Scott*.

II. THE FACTS

The defendant, Aubrey Scott, was charged with shoplifting, punishable under the applicable Illinois theft statute by a five

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1. 440 U.S. 367 (1979).
2. Definitions of "indigent" are numerous. Maryland defines it to mean "any person taken into custody . . . who under oath or affirmation subscribes and states in writing that he is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of legal representation." MD. ANN. CODE art. 27A, § 2(f) (1976).
3. 440 U.S. 367, 369 (1979).
4. The expansion of the right to counsel began with Powell v. Alabama, 287 U.S. 45 (1932), in which the Supreme Court held that fundamental fairness required that indigent defendants charged with a capital offense be provided court-appointed counsel. Forty years later in Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court held that an indigent charged with a misdemeanor and sentenced to a 90-day jail sentence was entitled to be represented by counsel at state expense.

hundred dollar fine or one year in jail, or both.[5] Scott appeared in court without counsel and stated he was ready for trial, waived his right to a jury trial, and was subsequently found guilty by the Illinois court and fined fifty dollars.[6] Scott, an indigent,[7] was not advised of his right to counsel at any time during the proceeding. He appealed his conviction, contending that under the sixth and fourteenth amendments Illinois had been required to provide counsel for him at state expense. The Illinois appellate court upheld Scott's conviction.[8] That decision was affirmed by both the Supreme Court of Illinois[9] and the United States Supreme Court.[10]

III. THE RIGHT TO COURT-APPOINTED COUNSEL

The right to counsel in a criminal case is one of the many guarantees afforded by the sixth amendment to the United States Constitution.[11] The portion of the amendment pertaining to the right to counsel provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."[12] The amendment does not explicitly guarantee a right to *court-appointed* counsel to criminal defendants who are unable to afford the cost of legal representation. The Supreme Court, however, has recognized that such a right is implicitly guaranteed by the sixth amendment.

The line of cases establishing the right to appointed counsel began with *Powell v. Alabama*.[13] In that case, nine indigent black defendants were charged with rape, then a capital offense in Alabama.[14] The Court held that in a capital case in which a defendant is unable to employ counsel, and particularly when characteristics such as ignorance, feeblemindedness, or illiteracy

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5. ILL. REV. STAT. ch. 38, § 16–1 (1971). The penalty provision of the statute states in pertinent part: "A person first convicted of theft of property . . . not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution . . . not to exceed one year, or both . . . ."
6. 440 U.S. 367, 368 (1979).
7. The Supreme Court of Illinois assumed Scott was an indigent at the time of trial because he was an indigent at the time of his first appeal. There was nothing in the record to show he was an indigent at trial. People v. Scott, 68 Ill. 2d 269, 271, 369 N.E.2d 881, 882 (1977).
8. People v. Scott, 36 Ill. App. 3d 304, 343 N.E.2d 517 (1976).
9. People v. Scott, 68 Ill. 2d 269, 369 N.E.2d 881 (1977).
10. Scott v. Illinois, 440 U.S. 367 (1979).
11. The sixth amendment to the United States Constitution also affords the accused in a criminal prosecution the right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with opposing witnesses, and to have compulsory process for obtaining witnesses in his favor. U.S. CONST. amend. VI.
12. *Id.*
13. 287 U.S. 45 (1932).
14. These defendants are commonly referred to as the Scottsboro defendants. They were charged with the rape of two white girls during a train ride.

render the defendant helpless in defending himself, fundamental fairness requires that court-appointed counsel be provided.[15] Although the *Powell* decision was limited to indigent defendants in capital cases who were incapable of defending themselves,[16] portions of the opinion stated that an intelligent layman might nonetheless require the "guiding hand of counsel at every step in the proceedings against him."[17]

Six years later, in *Johnson v. Zerbst*,[18] the Court relied heavily on dictum in *Powell* to hold that the sixth amendment requires federal courts to appoint counsel in all felony cases.[19] Subsequently, in *Betts v. Brady*,[20] the Court refused to apply *Johnson* to state felony prosecutions, holding that the due process clause of the fourteenth amendment does not incorporate the sixth amendment right to counsel. The *Betts* majority held that the right to appointed counsel was not a fundamental right essential to a fair trial in every state felony prosecution.[21] The Court stated that it would apply instead a totality of the circumstances test on a case-by-case basis to determine whether special circumstances existed[22] which would indicate that the denial of counsel resulted in a fundamentally unfair trial.[23]

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15. 287 U.S. 45, 71 (1932). The *Powell* Court guaranteed the Scottsboro defendants the right to counsel on a fundamental fairness approach. In 1932, the prevailing view was that the first ten amendments to the Constitution (including the sixth amendment right to counsel) were only applicable to the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). The theory of "incorporation" whereby the Bill of Rights was said to apply to the states through the due process clause of the fourteenth amendment had not yet been accepted. Thus, violations of the Bill of Rights at the state level were grounds for reversal only if they resulted in a fundamentally unfair trial.
16. *Powell* involved other factors, such as public hostility toward the defendants and the defendants' inability to communicate with friends and family, which probably influenced the Court's decision. In addition, Alabama law required court-appointed counsel for indigent defendants in a capital case. Powell v. Alabama, 287 U.S. 45, 48 (1932). The defendants actually were "appointed all the members of the bar" just prior to trial, but this appointment could not be considered as satisfying the right to counsel in any substantial way because the opportunity for pretrial investigation and preparation is lost. *Id.* at 56–57.
17. *Id.* at 69.
18. 304 U.S. 458 (1938).
19. Because *Johnson* involved a federal prosecution, the sixth amendment directly applied, and there was no need for the Court to look for fundamentally unfair elements in the trial as the Court did in Powell v. Alabama, 287 U.S. 45 (1932).
20. 316 U.S. 455 (1942).
21. *Id.* at 471. The Court noted the informal nature of the non-jury trial, the fact that there was no question whether a robbery was committed, and the maturity and intelligence of the defendant as factors which suggested that the denial of counsel in this case was not fundamentally unfair. *Id.* at 472.
22. The age and intelligence of the defendant are not the only special circumstances examined. In Gibbs v. Burke, 337 U.S. 773 (1949), inadmissible hearsay and hostile, nonjudicial remarks from the bench were sufficient to render the trial fundamentally unfair.
23. 316 U.S. 455, 471–73 (1942).

In the years following the *Betts* decision, cases involving the special circumstances requisite to a finding that the right to court-appointed counsel exists were the rule rather than the exception.[24] Finally, in *Gideon v. Wainwright*,[25] the Court overruled *Betts*, admitting that it was "an abrupt break with its own well-considered precedents."[26] *Gideon* was significant not only because it abrogated case-by-case analysis, but more importantly it held that the denial of court-appointed counsel to indigent defendants in a state felony prosecution is a violation of the sixth amendment.[27] Further, the Court held the amendment applicable to the states through the due process clause of the fourteenth amendment.[28]

Although *Gideon* assured an indigent defendant the right to a court-appointed attorney in a state felony prosecution, confusion as to whether an indigent defendant would enjoy that right in a state misdemeanor prosecution continued. This confusion was caused not

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24. *See, e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962) (illiterate defendant); Chewning v. Cunningham, 368 U.S. 443 (1962) (complexity of issues); McNeal v. Culver, 365 U.S. 109 (1961) (ignorant and mentally ill defendant); Hudson v. North Carolina, 363 U.S. 697 (1960) (complexity of issues); Cash v. Culver, 358 U.S. 633 (1959) (uneducated defendant); Moore v. Michigan, 355 U.S. 155 (1957) (youthful and uneducated defendant); Palmer v. Ashe, 342 U.S. 134 (1951) (youth of defendant); Gibbs v. Burke, 337 U.S. 773 (1949) (gross prejudicial evidentiary errors); Uveges v. Pennsylvania, 335 U.S. 437 (1948) (youth of defendant); Townsend v. Burke, 334 U.S. 736 (1948) (submission of erroneous information concerning prior record); Wade v. Mayo, 334 U.S. 672 (1948) (youth of defendant); Williams v. Kaiser, 323 U.S. 471 (1945) (complexity of issues). *But see*, Gryger v. Burke, 334 U.S. 728 (1948) (experienced four-time offender); Bute v. Illinois, 333 U.S. 640 (1948) (simple language of indictment); Foster v. Illinois, 332 U.S. 134 (1947) (mature defendant).

25. 372 U.S. 335 (1963).

26. *Id.* at 344.

27. *Id.*

28. *Id.* at 342. While the *Gideon* decision applied only the sixth amendment right to counsel to the states, later decisions applied the other sixth amendment guarantees to the states. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront opposing witnesses); *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial); Cole v. Arkansas, 333 U.S. 196 (1948) (right to notice of charges). To date, all criminal rights in the first ten amendments of the United States Constitution apply to the states with the exception of the eighth amendment restraint on excessive bail, New York v. O'Neill, 359 U.S. 1 (1959) (question on bail raised but not decided), and the fifth amendment requirement for an indictment, Alexander v. Louisiana, 405 U.S. 625 (1972) (dicta citing Hurtado v. California, 110 U.S. 516 (1884), which held that there is no state requirement for indictment; *Hurtado* was decided before the trend toward incorporation of the Bill of Rights into the fourteenth amendment).

only by the factual setting of *Gideon*,[29] but also by the language in later cases that referred to *Gideon* as specifically conferring the right to counsel only in felony prosecutions.[30] This confusion was partially eliminated by the Supreme Court's decision in *Argersinger v. Hamlin*.[31] The defendant in *Argersinger* was charged with a misdemeanor punishable by imprisonment of up to six months, a thousand dollar fine, or both.[32] He was not represented by counsel and was ultimately convicted and sentenced to a ninety-day jail term.[33] The Supreme Court reversed the conviction, holding that when a defendant is actually deprived of his personal liberty, even upon misdemeanor conviction, denial of counsel is a violation of the sixth amendment as applied to the states through the fourteenth amendment.[34] *Argersinger* represents the high water mark in the trend expanding the application of the right to court-appointed counsel.

IV. *SCOTT v. ILLINOIS*

A. *The Majority Opinion*

The majority opinion in *Scott,* written by Justice Rehnquist, declined to take the next step suggested by the trend of prior right to counsel cases[35] and decided that Scott was not entitled to counsel.

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29. Gideon had broken into and entered a poolroom with the intent to commit a misdemeanor. This constituted a non-capital felony under Florida law. 372 U.S. 335, 336–37 (1963).
30. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Brady v. United States, 397 U.S. 742, 748 n.6 (1970); Mempha v. Rhay, 389 U.S. 128, 134 (1967).
31. 407 U.S. 25 (1972).
32. *Id.* at 26. Argersinger was charged with carrying a concealed weapon, a misdemeanor under Florida law.
33. *Id.*
34. *Id.* at 37. Specifically, the Court stated 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 trial." *Id.* In summarizing the decision, the Court noted, "[t]he run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the 'guiding hand of counsel'. . . ." *Id.* at 40. Despite the overall tone of the decision which indicated the substantial need for counsel in any criminal proceeding (whether imprisonment was actually imposed or only authorized), this summary of the opinion clearly indicates that the right to counsel would only be activated if actual confinement resulted upon conviction. Authorized or possible confinement upon conviction for a misdemeanor was not yet sufficient to guarantee the right to court-appointed counsel.
35. The line of cases begins with Powell v. Alabama, 287 U.S. 45 (1932), followed by Johnson v. Zerbst, 304 U.S. 458 (1938), Gideon v. Wainwright, 372 U.S. 335 (1963), and the most recent decision prior to *Scott*, Argersinger v. Hamlin, 407 U.S. 25 (1972). Prior to *Gideon*, the right to counsel was guaranteed to state indigent defendants on a fundamental fairness theory. After *Gideon,* the right was applied to the states through the fourteenth amendment. *See* note 15 *supra.*

The majority utilized language in *Argersinger*[36] to support its holding that an indigent misdemeanor defendant is entitled to court-appointed counsel only if actually confined upon conviction.[37] Thus, the Court concluded that the constitutional right to court-appointed counsel arises only when imprisonment is actually imposed and not when imprisonment is merely authorized.[38]

Under the actual imprisonment standard, an indigent is entitled to court-appointed counsel only if he is actually confined upon conviction. An authorized imprisonment standard, which was rejected by the Court, would have entitled an indigent to counsel whenever imprisonment was authorized as punishment, even if the defendant was not sentenced to confinement upon conviction. The Court rejected Scott's contention that the *Argersinger* decision had left open the question whether an indigent misdemeanor defendant has a right to counsel when imprisonment is authorized but not actually imposed.[39] The majority construed *Argersinger* to hold that the states are required to "go only so far in furnishing counsel to indigent defendants."[40] This decision to draw the line for the right to appointed counsel at the point of actual imprisonment was also motivated by the Court's undocumented fear that extending *Argersinger* to cases in which imprisonment was merely authorized and not imposed would create a substantial burden upon the states.[41]

B. The Dissenting Opinion

In a lengthy dissent, Justice Brennan, joined by Justices Marshall and Stevens, supported adoption of an authorized imprisonment standard as the constitutional guideline for the right to appointed counsel.[42] The dissent found this standard to be superior for three reasons. First, an authorized imprisonment standard would

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36. The language in *Argersinger* upon which the *Scott* majority relied stated that "[t]he run of misdemeanors will not be affected by today's ruling. But in those that end up in actual deprivation of a person's liberty, the accused will receive the benefit of counsel." 440 U.S. 367, 370 (1979).
37. *Id.* at 374.
38. *Id.*
39. To support this contention, Scott referred the Court to language in *Argersinger* which stated that the Court "need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . . for here petitioner was in fact sentenced to jail." *Id.* at 370.
40. *Id.* at 369. The majority stated that to accept the petitioner's interpretation of *Argersinger*, one would have to consider that decision as "a point in a moving line." *Id.*
41. The Court noted the lack of extensive empirical data on the impact of *Argersinger*, but after considering that some jurisdictions had difficulty implementing *Argersinger*, the Court declined to create a further burden. *Id.* at 373–74 n.5.
42. *Id.* at 382 (Brennan, J., dissenting). Mr. Justice Blackmun also wrote a brief dissenting opinion. See note 97 *infra*.

more faithfully implement the principles of the sixth amendment as expressed in *Gideon*.[43] Second, it would eliminate the time-consuming administrative procedure of predicting at the outset of the trial whether a defendant will be imprisoned upon conviction to determine if counsel is constitutionally required.[44] Finally, the dissent observed that the actual imprisonment standard would lead judges to nullify legislative judgment because only punishment short of actual confinement could be imposed if counsel had not been provided for the indigent defendant.[45] The dissent suggested that if an authorized imprisonment standard was adopted, a trial judge would have the option at the conclusion of trial to impose all possible punishments for a misdemeanor, including imprisonment.[46] In addition, the dissent noted that despite the majority's opinion, Scott would have been entitled to counsel in thirty-three states[47] and that speculative fears concerning burdens on local governments should be secondary to constitutional rights.[48]

V. ANALYSIS

During the forty-year period between *Powell* and *Argersinger*, the right to counsel underwent an evolutionary development that resulted in a gradual increase in both the number of indigents who were entitled to the assistance of counsel and the types of offenses to which that right applied.[49] This period of evolution existed because the Supreme Court did not allow the doctrine of stare decisis to prevent it from expanding application of the right to include less serious offenses when the appropriate situation was presented.[50]

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43. 440 U.S. 367, 382 (1979) (Brennan, J., dissenting). Justice Brennan believed that trials of offenses when imprisonment was a possibility possessed the same potential for stigma and collateral consequences that the *Gideon* Court contemplated when it extended the right to counsel to all state felony prosecutions. *Id.*
44. *Id.* at 383. Justice Brennan disliked this procedure not only because it was time consuming, but also because the system had problems of inaccurate predictions, unequal treatment, and bias. *Id. See* Argersinger v. Hamlin, 407 U.S. 25, 52–55 (1972) (Powell, J., concurring).
45. 440 U.S. 367, 383–84 (1979) (Brennan, J., dissenting).
46. *Id.* at 384 (Brennan, J., dissenting).
47. *Id.* at 388. If Scott had been a Maryland defendant, he would have been entitled to a court-appointed attorney. See text accompanying notes 99–104 *infra*.
48. 440 U.S. 367, 384 (1979) (Brennan, J., dissenting).
49. In 1932, the right to court-appointed counsel was limited to intellectually handicapped indigents in a capital case. Powell v. Alabama, 287 U.S. 45 (1932). By 1972, the right had been held to extend to every indigent who was sentenced to confinement upon a misdemeanor conviction. Argersinger v. Hamlin, 407 U.S. 25 (1972).
50. *See* Herman & Thompson, Scott v. Illinois *and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 77 (1979) [hereinafter cited as Herman & Thompson]. In setting the stage for *Scott*, the Herman and Thompson article notes that following *Argersinger*, some feared that the right

Thus, after *Argersinger*, commentators following the progression of the right to counsel since *Powell* did not anticipate that this constitutional evolution would cease, but rather, expected the right would soon be accorded to indigents who were subject to imprisonment but not actually confined upon conviction.[51] In *Scott*, however, the Court refused to expand the right to counsel to include misdemeanor charges not involving actual imprisonment and suggested that *Argersinger* may have been the final step in the growth of the sixth amendment right to counsel. This abrupt halt in the expansion of the right is troublesome not only because it is contrary to the theoretical development in previous right to counsel cases, but also because numerous practical problems could arise when the *Scott* standard is implemented by trial courts.

Except for the right to trial by jury, which has its own unique development,[52] the right to counsel is the only sixth amendment right which is not enjoyed by defendants in all criminal prosecutions,[53] as literal interpretation of the amendment would demand. The inability of all defendants in all types of criminal prosecutions to obtain court-appointed counsel is an unfortunate

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to counsel would not expand beyond situations in which an indigent misdemeanor defendant is sentenced to confinement upon conviction. As the article states, however, "nothing in the antecedent development of the right to counsel justified this fear. *Powell v. Alabama* did not result in limiting the right to counsel to capital cases; *Johnson v. Zerbst* did not confine the right to federal cases; and *Gideon v. Wainwright* did not restrict it to felony cases, as *Argersinger* itself demonstrated." *Id.*

51. *Id.* Even critics of the *Argersinger* opinion recognized that the decision was properly tailored to the facts of the case and that judicial restraint required such a holding. Thus, it was believed *Argersinger* had continued the evolution of the right to counsel and the question remaining after *Argersinger* "was not whether the right to counsel would continue to grow, but to what class of misdemeanor cases, not involving actual confinement, the Court would next extend the right." *Id.*

52. The sixth amendment right to trial by jury was held applicable to the states in Duncan v. Louisiana, 391 U.S. 145 (1968). The Court recognized in *Duncan*, however, and continues to recognize today, that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement . . . applied to the States." *Id.* at 159. Crimes which carry penalties of up to six months imprisonment do not require trial by jury. All offenses that carry a potential imprisonment in excess of six months, however, are not "petty" and require the guarantee of a jury trial. Baldwin v. New York, 399 U.S. 66 (1970). Thus, unlike the right to counsel, the right to trial by jury is activated by the authorized penalty.

53. The sixth amendment to the United States Constitution states that in "all criminal prosecutions, the accused shall enjoy the . . . Assistance of Counsel." The amendment also guarantees the accused the right to a speedy and public trial, the right to trial by jury, the right to notice of the charges, the right to confrontation, and the right to compulsory process for obtaining witnesses. U.S. CONST. amend. VI. Thus, if the right is guaranteed to the accused in a doctrinally pure sense, the type of criminal offense should not determine whether the right is granted to the defendant, be it a felony or a misdemeanor.

aspect of our criminal justice system and persists notwithstanding a general consensus that, in the absence of counsel, the ability to exercise other rights is seriously impaired.[54] Until *Scott,* the right to counsel had been gradually approaching a doctrinally pure interpretation of the sixth amendment, which would require that *all* defendants in *all* criminal prosecutions be entitled to court-appointed counsel. *Scott* thus portends an end of a period of what was already painfully slow evolutionary growth of a constitutional right.[55]

Notwithstanding foreshadowings of an imminent decision establishing a right to counsel in *all* criminal prosecutions as early as 1932 in *Powell v. Alabama,*[56] it was not until recently in *Gideon* and *Argersinger,* respectively, that the sixth amendment was held to afford a right to court-appointed counsel to all state felony defendants and those non-felony defendants who were sentenced to imprisonment.[57] Even these decisions, however, fell short of giving the sixth amendment a literal interpretation by applying it to all criminal prosecutions.

As the number and types of offenses to which the right to counsel was held applicable increased, it appeared that courts were moving toward acceptance of the doctrinally pure interpretation of the sixth amendment, thereby making the "guiding hand of counsel" available to every defendant in all criminal prosecutions. This decision appeared even more inevitable as courts began to take notice of the increasing number of lawyers available to represent

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54. The Supreme Court itself has referred to the assistance of counsel as the principal sixth amendment right which allows the defendant to assert other sixth amendment guarantees to the fullest. *See* Powell v. Alabama, 287 U.S. 45, 68–69 (1932). *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (the Court indicated that representation by counsel was a necessity, not a luxury). In 1956, a member of the Supreme Court of Illinois, the same court that affirmed Scott's denial of counsel, stated that "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Shaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956).

55. The sixth amendment was ratified in 1791, but it was not until 1963 that the right to counsel was held applicable to the states. Gideon v. Wainwright, 372 U.S. 335 (1963).

56. 287 U.S. 45 (1932). At one point in *Powell,* Justice Sutherland stated that "even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 69. As one commentator has noted, this sweeping language could have stood for the principle that "counsel must be appointed in virtually all criminal cases if indigents are to have a fair hearing." W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 155 (1955).

57. Although the right to counsel was recognized prior to *Gideon,* it was not until *Gideon* that the sixth amendment was recognized as the basis of the right. Prior to *Gideon,* the right to counsel was founded upon a fundamental fairness or due process approach. In *Argersinger,* the Court used the sixth amendment as the basis for its decision to expand the right to counsel to indigent misdemeanor defendants sentenced to imprisonment. 407 U.S. 25, 30, 37 (1972).

indigent defendants.[58] *Scott*, however, disregarded this trend by holding that a defendant in a misdemeanor prosecution is not entitled to court-appointed counsel unless he is sentenced to actual confinement. The *Scott* decision, in effect, conditions the fairness of a defendant's trial upon the type of punishment he is likely to receive. Previous cases suggest that such a distinction is unconstitutional.[59] In addition, use of an actual imprisonment standard not only disregards serious collateral consequences that arise from a misdemeanor conviction, but also creates substantial practical difficulties in implementation.

For example, for purposes of the initial decision as to whether a defendant is constitutionally entitled to appointed counsel, *Scott* places a trial judge in the awkward position of determining before trial begins whether imprisonment is likely upon conviction.[60] Ideally, if confinement is a strong possibility, counsel will be appointed. Conversely, if imprisonment appears unlikely, the trial judge is not required to appoint counsel. Making a decision as to punishment before the introduction of evidence, however, necessarily produces serious problems. One potential problem arises when a judge initially determines that imprisonment is a strong possibility, appoints counsel for an indigent defendant, and, subsequent to trial, sentences the defendant to actual confinement. Even if the evidence were to support the conviction and sentence imposed, the sentence could nonetheless be attacked on the ground that it resulted from

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58. As Justice Douglas noted in *Argersinger*, only 2,300 full-time counsel would be required to represent all misdemeanor defendants, while an estimated 355,200 attorneys were licensed in the United States. Additionally, the latter figure was expected to double by 1985. *Id.* at 37 n.7.

59. In Griffin v. Illinois, 351 U.S. 12 (1956), the Court held that it was a denial of equal protection to refuse to provide an imprisoned indigent with a transcript of his criminal trial for appeal purposes. In Mayer v. Chicago, 404 U.S. 189 (1972), the *Griffin* decision was the basis for providing a transcript to an indigent who only received a fine upon conviction. Thus, if the imprisonment-nonimprisonment line is invalid for purposes of obtaining a transcript, it is difficult to understand why the same distinction is valid when denying appointed counsel.

60. As noted by Justice Goldenhersh of the Illinois court:

> The majority quotes that portion of *Argersinger* which endows the courts with a degree of prescience which I doubt exists, that is, that a judge prior to hearing any evidence, "will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." I have searched *Argersinger* in vain for the source of this knowledge prior to the time when a judge has heard evidence in the case.

People v. Scott, 68 Ill. 2d 269, 275, 369 N.E.2d 881, 883 (1977) (Goldenhersh, J., dissenting).

prejudice formulated during the pretrial determination.[61] A sentence of confinement would be particularly vulnerable to attack following a non-jury trial because the same judge who is privy to information concerning the defendant's prior record and circumstances surrounding his trial must also make an unbiased determination of the facts of the case.[62] Although the ability of judges to determine fairly the outcome of a case under similar circumstances has not been questioned,[63] the possibility that such prejudicial information will actually taint the outcome of a trial should not be easily dismissed.[64]

Even when the evidence proves that a judge's predetermination of a defendant's candidacy for imprisonment was correct, such a procedure is subject to criticism because of the increased costs that a predetermination procedure is likely to require. In order to conduct a predetermination procedure in a manner that will avoid error, localities should develop a more formal approach than presently exists to ensure a correct pretrial punishment determination. This more formalistic approach will most likely require additional court personnel and an inevitable new economic burden upon the states.[65] Ironically, if such formal procedures were to develop, *Scott* will have resulted in imposing a new burden upon state court systems notwithstanding that avoidance of increased fiscal burdens upon state courts was one rationale relied upon by the Court to support

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61. *See* Duke, *The Right to Appointed Counsel:* Argersinger *and Beyond*, 12 AM. CRIM. L. REV. 601, 612 (1975). The author states:
> [I]f a judge determines that jail is a likelihood upon conviction and therefore appoints counsel, a subsequent jail sentence will appear to have been the product of a pre-trial determination and not the result of what the evidence, tested at trial, disclosed. This would cast doubt on the impartiality of the judge.

62. S. KRANTZ, RIGHT TO COUNSEL IN CRIMINAL CASES 87 (1976).
63. United States v. Bowles, 428 F.2d 592 (2d Cir. 1970). In *Bowles*, the defendant contended that it was prejudicial error for the judge, who heard and denied a pretrial motion to suppress evidence, to preside at his trial. The court of appeals rejected the defendant's contention and held that the trial judge is sufficiently disciplined to exclude hearsay evidence when making a final determination. *Id.* at 594. Similarly, in Webster v. United States, 330 F. Supp. 1080 (E.D. Va. 1971), the court noted that much information concerning the defendant and the facts of the case is ordinarily imparted to the judge in various pretrial proceedings, but this alone does not disqualify the judge from hearing the case. *Id.* at 1086.
64. *See* Argersinger v. Hamlin, 407 U.S. 25, 42–43 (1972) (Burger, C.J., concurring). The Federal Rules of Criminal Procedure recognize that pretrial information could prejudice the outcome of a trial. For example, Rule 32 (c)(1) states that a presentence report shall not be submitted to the court unless the defendant has pleaded guilty or has been found guilty. Commenting on the rule, the Supreme Court noted in Gregg v. United States, 394 U.S. 489 (1969), that permitting ex parte material of this nature to reach the judge would "seriously contravene the rule's purpose of preventing possible prejudice." *Id.* at 492.
65. *See generally* S. KRANTZ, RIGHT TO COUNSEL IN CRIMINAL CASES 83–86 (1976).

the decision not to extend the right to counsel to all misdemeanor defendants.[66]

An even more serious potential problem with pretrial sentencing determinations arises when a trial judge decides that imprisonment would be unlikely in a particular case and does not appoint counsel, but after hearing the evidence at trial, determines that incarceration would not only have been the preferable sanction, but is also seriously needed. To impose a sentence under such circumstances, however, would be constitutionally prohibited because the defendant was not represented by counsel, and any attempt to impose a sentence would certainly be reversed on appeal on the basis of *Scott*. Trial judges, in such situations, will be forced to seek alternative methods to achieve the desired result. For example, one possibility would be to declare a mistrial, and retry the defendant when counsel has been appointed. Constitutional case law, however, suggests that declaring a mistrial in order to enable the prosecution to try the defendant with the possibility of imposing a harsher sentence would violate the ban on double jeopardy.[67] Traditionally, a mistrial and subsequent retrial have been used sparingly,[68] and granting a mistrial solely to allow the state a second chance at prosecution, with an increased possibility of conviction, is improper.[69]

Notwithstanding the practical problems associated with a pretrial determination as to whether imprisonment is likely upon conviction, the *Scott* case also fails to explain what constitutes "actual imprisonment." The Supreme Court not only neglected to explain this ambiguous term, but it added to the confusion by using other language which suggests that *Scott* requires actual *sentencing* to

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66. Scott v. Illinois, 440 U.S. 367, 375 (1979). There is also the possibility that a lengthy pretrial determination for indigent defendants, but no such process for non-indigent defendants, could create an equal protection violation. To avoid the anomalous results of individual defendant predetermination, the *Scott* mandate could also be implemented by predicting punishment and thus providing counsel on a class of offense standard. S. KRANTZ, RIGHT TO COUNSEL IN CRIMINAL CASES 90 (1976). Under this process, indigents charged with misdemeanors that traditionally call for jail terms would be afforded counsel whereas those indigent misdemeanants charged with minor offenses that do not traditionally warrant a jail sentence would not be appointed counsel. Such a procedure, however, would wrongly allow the courts to disregard the punishment deemed appropriate for a misdemeanor. *Id.*

67. This scenario was contemplated by Justice Powell in his concurring opinion in *Argersinger*, 407 U.S. 25, 54 (1972), and similar concerns are expressed in S. KRANTZ, RIGHT TO COUNSEL IN CRIMINAL CASES 75 (1976).

68. The Supreme Court has held that a retrial is usually only allowed when the defendant is benefited. Gori v. United States, 367 U.S. 364 (1961). Although this "benefited" standard has been rejected, the Supreme Court still only allows mistrials and retrials if an impartial verdict could not be reached or a procedural error would result in reversal of a valid verdict. *See* Illinois v. Sommerville, 410 U.S. 458 (1973).

69. *Id.*

confinement as opposed to actual imprisonment.[70] As a result of this ambiguity, the question arises whether the right to counsel must be provided whenever the indigent misdemeanant is *sentenced* to confinement or if counsel is only required for those indigents who are *actually incarcerated* after sentencing.[71] For example, consider the indigent defendant who is sentenced to confinement but whose sentence is immediately suspended for a period of probation. Technically, the defendant was sentenced to imprisonment which would invoke the defendant's right to counsel if *Scott* means that counsel must be provided whenever an indigent is *actually sentenced* to confinement. If the Supreme Court intended, however, that counsel be provided only to indigents who are *actually incarcerated* after sentencing, the indigent who receives a suspended sentence and probation would not be entitled to counsel under *Scott*. Because most of the *Scott* opinion used the term "actual imprisonment," and the Court indicated that *Argersinger* — which held that counsel is required when conviction results in "actual deprivation of a person's liberty" — is the constitutional limit for the right to counsel,[72] the Supreme Court probably intended that counsel need be provided only when the defendant's conviction leads to his *actual incarceration*. When deciding a case concerning a right as fundamental as the right to counsel, the Supreme Court should carefully and clearly establish when legal representation is required so that states may implement these constitutional guidelines with the least possible confusion.

Even if one assumes that the Supreme Court intended that an indigent misdemeanant has the right to counsel only when actually incarcerated, a further question is raised regarding what constitutes incarceration. For example, suppose an indigent charged with a misdemeanor is unable to make bail and ultimately receives probation at trial. In this situation, his incarceration prior to trial could constitute the requisite actual confinement necessary to invoke the right to counsel or, more likely, the Supreme Court would assert that because there was no sentencing to confinement, no right to counsel arises. Suppose, however, that a defendant cannot make bail

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70. Throughout most of the opinion, the Court refers to the standard as actual imprisonment, but at the end of the opinion states, "[W]e therefore hold that the Sixth and 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." Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

71. Recently, the Court indicated that *Scott* "held that an uncounseled misdemeanor conviction is constitutionally valid *if the offender is not incarcerated.*" Baldasar v. Illinois, 48 U.S.L.W. 4481, 4481 (U.S. 1980) (per curiam) (emphasis added).

72. 440 U.S. 367, 369 (1979). Rather than view *Argersinger* as "a point in a moving line," the Court chose to view it as a "holding that the States are required to go only so far in furnishing counsel to indigent defendants." *Id.*

and is subsequently sentenced only to that time during which he was incarcerated prior to trial. In this situation, the defendant has been both actually sentenced and actually confined, and thus it would seem logical, even under *Scott*, that the court is required to provide counsel. Situations such as these demonstrate the lack of clarity and probable confusion that will result when the actual imprisonment standard of *Scott* is applied in the future by state courts.

The decision in *Scott* to draw the constitutional line for the right to counsel at misdemeanors resulting in actual confinement disregards the serious collateral consequences that can result from misdemeanor convictions.[73] Upon conviction, the misdemeanant may lose many privileges which will have a devastating effect upon his ability to return to society as a normal citizen. Aside from the stigma which inherently attaches upon conviction, the misdemeanant seeking employment in the private sector is automatically disqualified from many positions[74] and is confronted with widespread discrimination by employers for the openings that remain.[75] Employment possibilities for the ex-misdemeanant in the civil service field are also limited. Although certain government positions may be

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73. In Illinois, a theft conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. Recently, however, in Baldasar v. Illinois, 48 U.S.L.W. 4481 (U.S. 1980), the Supreme Court held that an uncounseled misdemeanor conviction could not be used by the state to support an enhanced penalty for a subsequent misdemeanor. Although *Baldasar* was a per curiam decision, there were four separate opinions. In the major concurring opinion, Justice Marshall concluded that imprisonment imposed as a result of the enhanced penalty statute arose from the first uncounseled misdemeanor conviction and thus violated the actual imprisonment standard of *Scott*. *Id.* at 4482. In dissent, Justice Powell believed that the sentence imposed under the enhanced penalty statute was "solely a penalty" for the second offense and thus that there was no violation of *Scott*. Powell also believed that the *Baldasar* decision would further confuse and burden local courts. *Id.* at 4483–84.

74. *See Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV 929, 1001 (1970). This special project investigating the lasting effects of a criminal conviction notes that most fidelity insurance companies refuse to bond individuals who have been convicted of a criminal offense and consequently the offender is automatically disqualified for employment in positions that require bonding. *Id.* Justice Brennan also notes in his dissent that Scott's conviction for theft would bar him from working in any capacity in a bank insured by FDIC or possibly in any public or private employment requiring a security clearance. Scott v. Illinois, 440 U.S. 367, 380–81 n.10 (Brennan, J., dissenting). In Maryland, while there is normally no duty on the part of the employer to inquire about an employee's possible criminal record, the employer could be liable for the employee's acts under a negligent hiring theory if he was aware of the employee's criminal record but decided to hire him for a position in which the employee would be in contact with the public. *See* Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978).

75. A private employer's refusal to hire a job applicant because of his arrest record has been held to be a violation of the Civil Rights Act of 1964. *See* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970). Nevertheless, private discrimination and prejudice remains.

available for those convicted of minor criminal offenses,[76] the decision to employ such an applicant is often within the discretion of the agency, and studies indicate that few ex-offenders are actually hired.[77] Particularly burdened by a misdemeanor conviction are those defendants whose present or intended occupation is licensed by a state or municipal agency.[78] Many licensed occupations list conviction of a crime as a ground for revocation of the license, and often the ultimate decision is made by administrative boards which do not afford the misdemeanant the pervasive rights he enjoyed at his criminal trial.[79]

In addition to these barriers affecting the defendant's immediate financial recovery, a criminal conviction may preclude the offender from participating in insurance, pension, and workmen's compensation programs.[80] A misdemeanor conviction could also involve the loss of certain judicial rights, such as the right to serve as a juror,[81] the capacity to testify as a witness at a trial,[82] and the ability to

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76. *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1014 (1970). For example, typical public employees include matrons, janitors, and park attendants. *Id.*
77. *Id.*
78. In Illinois, this included a large number of employment possibilities. A theft conviction in Illinois could result in disqualification for twelve occupations under state law and twenty-three occupations under Chicago ordinances which require "good moral character" or some similar background qualification. Scott v. Illinois, 440 U.S. 367, 380–81 n.10 (1979) (Brennan, J., dissenting). In Maryland, conviction for any crime involving moral turpitude can also lead to the revocation of occupational licenses, such as those for nursing. *See* MD. ANN. CODE art. 43, § 299(11) (1980).
79. *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1005 (1970). Although notice, hearing, and reason for revocation are usually required, licensing authority actions are exclusively administrative and review on the merits may be refused. *Id.*
80. *Id.* at 1109–40.
81. Illinois state law requires jurors to be of "fair character" and "approved integrity." ILL. REV. STAT. ch. 78, § 2 (1975). As a result, Scott may be excluded from jury duty because of his theft conviction. Scott v. Illinois, 440 U.S. 367, 380–81 n.10 (1979) (Brennan, J., dissenting). In Maryland, a person is disqualified to serve as a juror if he "[h]as a charge pending against him for a crime punishable by a fine of $500 or more, or by imprisonment for more than six months, or both, or has been convicted of such a crime and has received a sentence of a fine of $500 or more, or of imprisonment for more than six months, or both, and has not been pardoned." MD. CTS. & JUD. PROC. CODE ANN. § 8–207(6)(5) (1980).
82. People v. Stufflebean, 24 Ill. App. 3d 1065, 1068–69, 322 N.E.2d 488, 491–92 (1974), cited by Justice Brennan in his dissent. Note, however, that in Maryland only a person convicted of perjury may not testify. MD. CTS. & JUD. PROC. CODE ANN. § 9–104 (1980). As to other individuals, a prior conviction would affect merely the credibility, and not the admissibility of his testimony. *See generally* Taylor v. State, 278 Md. 150, 360 A.2d 430 (1976); Mason v. State, 242 Md. 707, 218 A.2d 682 (1966).

serve as a court-appointed fiduciary.[83] Upon conviction, misdemeanants may also lose the right to vote,[84] and alien defendants who are convicted may suffer special consequences.[85] The collateral effects of a misdemeanor conviction may also result in numerous problems in domestic situations, including disadvantages upon divorce and in custody battles.[86] At the very least, a misdemeanor conviction will almost always result in a fine, which usually will be devastating to the indigent defendant.[87] Thus, the *Scott* decision to limit the right to counsel to those indigent defendants actually imprisoned leaves many other indigents to face misdemeanor trials without counsel even though serious collateral consequences will almost surely occur upon conviction.

In light of the shortcomings of the actual imprisonment standard adopted in *Scott*, future Supreme Court decisions concerning the right to appointed counsel may seek an alternative standard. One such alternative would be to grant indigent defendants the right to counsel in all criminal prosecutions.[88] Under such a standard, an indigent would have the right to appointed counsel in any criminal prosecution, regardless of the seriousness of the offense. This alternative is appealing for two basic reasons. First, it would implement the exact mandate of the sixth amendment. Second, the "all prosecutions" standard would be the easiest to administer at the trial level.[89] While this alternative is appealing because of its doctrinal purity and simplicity, the likelihood that the Supreme Court will adopt such an approach in the near future is remote.

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83. *See Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1059–64 (1970). This would include the possible loss of capacity to serve as an executor, administrator, guardian, or trustee. *Id.*
84. *Id.* at 974.
85. *Id.* at 970. Persons who are not citizens of the United States may be ineligible to become naturalized citizens or subject to deportation if convicted.
86. *Id.* at 1064. Although restrictions and difficulties in the domestic area usually only arise in cases involving serious crimes, any criminal conviction may be determinative when custody is at issue.
87. *Cf.* Mayer v. Chicago, 404 U.S. 189 (1971) (a five hundred dollar fine imposed upon an indigent was held to be so burdensome that it was sufficient to entitle the defendant to the constitutional right to a free transcript for appeal purposes).
88. U.S. CONST. amend. VI. In pertinent part, the amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." Note that this alternative leaves open the difficult question of what constitues a "criminal prosecution." *See* Herman & Thompson, *supra* note 50, at 78.
89. In *Argersinger*, Justice Powell, while not advocating this standard, did admit that its simplicity was appealing. 407 U.S. 25, 50–51 (1972).

One reason for the slow expansion of the right to counsel was fear of the increased burdens state courts would suffer.[90] If the Supreme Court were to grant a sweeping extension of the sixth amendment right to counsel to all indigent defendants, the fear was that state courts could not readily absorb the increased burden. One possibility for alleviating such a potential burden might be to remove minor offenses such as drunkenness and vagrancy from the ambit of "criminal prosecutions."[91]

A second alternative is the authorized imprisonment standard suggested by Justice Brennan in his dissenting opinion in *Scott*.[92] Under this standard, counsel would be appointed for all indigent defendants charged with any felony or misdemeanor for which imprisonment is an authorized sentence.[93] Although this alternative is not doctrinally pure,[94] there are a number of features which make the authorized standard attractive as well as the most logical choice for the Supreme Court in future right to counsel cases.

One attractive feature of the authorized imprisonment standard is that it eliminates the problems inherent in prejudging a defendant's punishment upon conviction that arise under the actual imprisonment standard. As Justice Brennan noted in his dissent, the authorized imprisonment standard "avoids the necessity for time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate predictions, unequal treatment, and apparent and actual bias."[95] That the authorized imprisonment standard would also be a logical future choice by courts is evidenced by the fact that a number of states began to work under this standard in the wake of *Argersinger* and continue to do so today. Thus, the majority's decision to reject an authorized imprisonment standard in favor of an actual imprisonment standard ignored the successful operation in the thirty-three

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90. One study estimated that over 200,000 indigent defendants will require counsel for felony prosecutions alone. To include all misdemeanants (traffic offenses as well as normal misdemeanors) would involve another 13.5 million indigent offenders who would be eligible for state-appointed counsel. Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1263 (1970).

91. *See* Argersinger v. Hamlin, 407 U.S. 25, 38 n.9 (1972).

92. 440 U.S. 367, 382 (1979).

93. As one commentary stated:

> Under the authorized imprisonment alternative, the statutorily permissible sentence would control the right to appointed counsel, regardless of the sentence actually imposed. Thus, if the authorized punishment included confinement for any period, the indigent would be entitled to counsel.

Herman & Thompson, *supra* note 50, at 79.

94. The authorized imprisonment standard would entitle more indigent misdemeanants to appointed counsel, but it would nonetheless not provide this right to all defendants in all criminal prosecutions.

95. 440 U.S. 367, 383 (1979) (Brennan, J., dissenting).

states that provide legal assistance to all indigents who face criminal prosecutions for which imprisonment is an authorized punishment.[96]

It is difficult to predict with certainty which, if any, of these alternatives future Supreme Court right to appointed counsel cases will adopt.[97] It is interesting to note, however, that the *Scott* decision was decided by a mere five-to-four majority with Justice Powell providing the decisive vote in a concurring opinion based upon stare decisis.[98] In light of this delicate balance of opinion among members of the present Court, the prospect for change in subsequent decisions is a strong possibility.

VI. THE IMPACT OF *SCOTT* IN MARYLAND

Although the actual confinement standard of *Scott* may deny many indigents the right to counsel in jurisdictions which provide legal representation only when constitutionally required, few indigent misdemeanants facing trial in Maryland will be denied appointed counsel as a result of *Scott*. The Maryland Public Defender statute provides that indigent defendants must be provided legal representation in any criminal proceeding "constitutionally requiring the presence of counsel prior to presentment before a commissioner or judge."[99] In addition to providing legal representation when constitutionally required,[100] Maryland also requires that counsel be provided for any indigent who is charged with a misdemeanor

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96. *Id.* at 388. (Brennan, J., dissenting).

97. It should also be noted that in a separate dissenting opinion in *Scott*, Mr. Justice Blackmun suggested another alternative whereby an indigent "must be afforded appointed counsel whenever the defendant is prosecuted for a non-petty criminal offense, that is one punishable by more than six months' imprisonment, . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment." Scott v. Illinois, 440 U.S. 367, 389–90 (1979) (Blackmun, J., dissenting). Justice Blackmun has recently suggested this alternative again in Baldasar v. Illinois, 48 U.S.L.W. 4481 (U.S. 1980). Another alternative would be to provide counsel for all indigent defendants facing serious misdemeanors, but for defendants charged with petty offenses, the right to counsel would only attach if special circumstances warranted. Herman & Thompson, *supra* note 50, at 81–82. Such alternatives, however, not only suggest equal protection problems, but they also create the problem of defining "serious," "petty," and "special circumstances."

98. Scott v. Illinois, 440 U.S. 367, 374 (1979). Justice Powell reiterated his reservations about the *Argersinger* rule but believed that some guideline had to be given to lower courts across the nation. *Id.*

99. Md. Ann. Code art. 27A, § 4(b)(1) (Supp. 1979).

100. Following Argersinger v. Hamlin, 407 U.S. 25 (1972), the court of special appeals noted that the classification of an offense as a "felony" or a "serious crime," which had served as the criterion for the right to appointed counsel for the indigent, was unconstitutional. As a result of *Argersinger*, the indigent was now constitutionally required to have counsel whenever he was deprived of his liberty. Laquay v. State, 16 Md. App. 708, 716 n.3, 299 A.2d 527, 529 n.3 (1973).

punishable by more than three months confinement or a fine of more than five hundred dollars.[101]

Although Maryland does not provide counsel in all cases where *any* imprisonment is authorized, the statutory mandate to provide counsel when confinement for more than three months is authorized affords greater protection than constitutionally required by *Scott*. It should be noted, however, that while the Maryland standard assures the accused indigent legal representation for most misdemeanor offenses, there are some classes of misdemeanors for which legal representation is not required.[102] In these cases, the indigent would only be entitled to counsel under the less inclusive actual confinement standard of *Scott*. For example, an indigent charged with unlawful picketing in Maryland is subject to a one hundred dollar fine or imprisonment for not more than ninety days if convicted.[103] Assuming counsel is not provided under the discretionary power of the court,[104] the indigent is not eligible for legal representation under the authorized standard applied in Maryland because the term of possible confinement for unlawful picketing does not exceed three months. Consequently, counsel would only be provided for this indigent were he to be actually confined upon conviction. Thus, in the majority of misdemeanor cases, the Maryland indigent is afforded the right to counsel in more situations than is constitutionally required under *Scott*. In those cases in which the authorized punishment for a misdemeanor does not place it within the protection of the Maryland authorized standard, however, the *Scott* standard of actual confinement will determine whether the indigent is provided counsel.

VII. CONCLUSION

The *Scott* decision represents a halt to the gradual expansion of the right to appointed counsel. Future decisions will determine if *Scott* was a temporary delay or a permanent limitation on this sixth amendment right. Whatever later decisions hold, it is clear that, at

101. MD. ANN. CODE art. 27A, § 2(g)(2) (1976).

102. *See, e.g.*, MD. ANN. CODE art. 27, § 469 (1976 & Supp. 1979) (maintenance of junkyard or automobile graveyard in violation of natural resources laws); MD. ANN. CODE art. 27, § 556 (1976) (disclosure of private communication by person connected with telegraph or telephone company); MD. ANN. CODE art. 27, § 580 (1976) (trespass for purpose of invading privacy by looking into window or door).

103. MD. ANN. CODE art. 27, § 580A (1976). Portions of this statute were held unconstitutional in State v. Schuller, 280 Md. 305, 372 A.2d 1076 (1977).

104. In Maryland, an indigent charged with a misdemeanor may be provided counsel if, in the opinion of the court, either the complexity of the case or some characteristic of the individual, such as his youth, inexperience, or mental capacity, requires that counsel be appointed. MD. ANN. CODE art. 27A, § 2(h)(2) (1976). This section is similar to the special circumstances test of Betts v. Brady, 316 U.S. 455 (1942).

least for the present, the type of defense that some misdemeanor defendants will be able to produce unfortunately will depend upon their financial resources.

Michael E. Cross