# ARGERSINGER V. HAMLIN AND THE COLLATERAL USE OF PRIOR MISDEMEANOR CONVICTIONS OF INDIGENTS UNREPRESENTED BY COUNSEL AT TRIAL.

## I. INTRODUCTION

The United States Supreme Court recently formulated a new rule of criminal procedure regarding the constitutionality of uncounseled misdemeanor trials. In *Argersinger v. Hamlin*,[1] the Court examined the guarantees of the sixth amendment[2] respecting court-appointed counsel for indigent defendants charged with a misdemeanor.[3] It held that, "absent a knowing and intelligent waiver, no person may be *imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[4] This rule of criminal proce-

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[1] 407 U.S. 25 (1972), *rev'g* 236 So.2d 442 (Fla. 1970). Argersinger, an indigent, was convicted without counsel of carrying a concealed weapon and sentenced to serve ninety days in jail. He brought a habeas corpus action in the Florida Supreme Court alleging that denial of court-appointed counsel to an indigent like himself resulted in his inability to present an adequate defense to the charges. The Florida Supreme Court discharged the writ, holding that the right to court-appointed counsel extends only to offenses punishable by more than six months imprisonment.

[2] *Argersinger* technically involves the guarantees of the due process clause of the fourteenth amendment since the case concerns a state prosecution rather than a federal one. Nevertheless, Justice Douglas focuses on the sixth amendment, incorporating its requirements into the fourteenth amendment.

There is uncertainty regarding the scope of the sixth amendment right to counsel in federal cases. One analysis relies on Johnson v. Zerbst, 304 U.S. 458 (1938), to support the proposition that the sixth amendment guarantees the right to court appointed counsel in all federal trials, including misdemeanors. Although the Court's language supports this broad interpretation, the facts of *Johnson* involved a felony. Thus a second anaysis is possible, limiting the constitutional right to court appointed counsel to federal felonies. The issue has become dormant because FED. R. CRIM. P. 44(a) guarantees the right to counsel in *all* federal criminal cases tried in district courts, based on the analysis that the sixth amendment requires it. *See* 18 U.S.C.A. Rule 44 (1961), *Notes of Advisory Committee on Rules*, n.1; 18 U.S.C.A. Rule 44 (Supp. Pamph. 1961-1970), *Notes of Advisory Committee on Rules* (regarding 1966 amendments to Rule 44). However, the recent adoption of the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates reaffirms the unsettled scope of the right to counsel in federal cases; although mentioned, the right to counsel is not firmly guaranteed. *See* FED. R. P. for the TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES 2(b), 3.

[3] Prior development of the right to court-appointed counsel: Powell v. Alabama, 287 U.S. 45 (1932), held that an indigent person charged with a capital offense, who is unable to adequately make his own defense, has the right to court-appointed counsel; Gideon v. Wainwright, 372 U.S. 335 (1963), held that any indigent person charged with a felony has the right to a court-appointed counsel (overruling Betts v. Brady, 316 U.S. 455 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938), held that the sixth amendment required appointment of counsel in federal criminal cases where the defendant is unable to procure legal services on his own.

[4] 407 U.S. at 37 (emphasis added). Analyses of the background, majority and concurring opinions, possible expansion, and the effect of *Argersinger* may be found in the following: Note, *The Indigent's Expanding Right to Appointed Counsel*, 37 ALBANY L. REV. 383

dure has recently been applied retroactively in *Berry v. Cincinnati*.[5] Thus if an indigent[6] was convicted of a misdemeanor without counsel at trial and sentenced to imprisonment,[7] representation by counsel, unless waived,[8] is constitutionally required regardless of when the conviction occurred.

By framing the holding in this manner, the Court created a doctrine whose imperfections may return to haunt it. The holding is narrow; it creates only the negative right *not to go to jail* without counsel at trial, rather than the affirmative right to counsel. It fails to speak to the constitutionality of the underlying conviction. Relying on the type of sentence to determine the applicability of the rule, the Court abandoned

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(1973); 18 VILL. L. REV. 750 (1973); 41 FORDHAM L. REV. 722 (1973); 77 DICK. L. REV. 176 (1972); 47 TUL. L. REV. 446 (1973).

[5] 414 U.S. 29 (1973). The Court did not elaborate on the reason for applying *Argersinger* retroactively. In Linkletter v. Walker, 381 U.S. 618, 628-29 (1965), the Supreme Court concluded that new constitutional rules of criminal procedure are neither required to be made retroactive, nor prohibited from being so applied. The Court looks to each case and weighs the merits and demerits of retroactivity on the basis of these factors: "a) the purpose to be served by the new standards, b) the extent of reliance by law enforcement authorities on the old standards, and c) the effect on the administration of justice . . . ." Stovall v. Denno, 388 U.S. 293, 297 (1967). However, the Court has excluded any consideration of the second and third criteria if the major purpose of the new criminal rule is to enhance the reliability of the judgment at trial. Williams v. United States, 401 U.S. 646, 653 (1971). Neither good faith reliance nor dilatory effects on the administration of justice can suffice to deny retroactivity if the new constitutional standard creates serious doubts regarding the accuracy of guilty verdicts in previous trials without this new standard. Although recently re-affirming this single prong test in Adams v. Illinois, 405 U.S. 278 (1972), the Court has not strictly applied it to all new rules of criminal procedure whose aim was to enhance the accuracy of trial verdicts. *E.g.*, Stovall v. Denno, *supra* (denying retroactivity to the right to counsel at lineup in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S 263 (1967). The right to counsel at *trial*, however, has been cited as an example of the proper application of the single prong test. Adams v. Illinois, *supra* at 280-81.

Presumably, the unreliability of uncounseled misdemeanor trials which result in imprisonment necessitated retroactive application of *Argersinger*. *See* text accompanying notes 10-16 *infra*.

[6] No standard definition of an indigent exists. Justice Powell, concurring in the result of *Argersinger*, noted that some inequities may result due to differing criteria states use to judge indigency; a person may be deemed an indigent by one state and appointed counsel, although another under similar circumstances may not be deemed indigent by a different state, and therefore not constitutionally entitled to court-appointed counsel. 407 U.S. at 49-50 (Powell, J., concurring in the result). *Argersinger* does not speak directly to this problem.

[7] *Argersinger* requires actual imprisonment to invoke the right to counsel. For purposes of this note, it will be presumed that a person sentenced to imprisonment was actually imprisoned, though such is not always the case if, for example, probation or a suspended sentence was granted. *See* Cottle v. Wainwright, 477 F.2d 269, 275 (5th Cir. 1973), *vacated on other grounds*, 414 U.S. 895 (1973), in which *Argersinger* was held inapplicable to a misdemeanor conviction with a twenty day suspended sentence.

[8] An indigent defendant may "knowing[ly] and intelligent[ly]" waive his constitutional right to the provisions of the *Argersinger* ruling. 407 U.S. at 37. What elements comprise such a waiver may be the subject of dispute. For the purposes of this note, it shall be presumed that no valid waiver exists.

the reasoning which supposedly necessitated its decision. The dichotomy created between the Court's reasoning and its holding paved the way for some illogical consequences.

Among its other imperfections, *Argersinger* raises difficulties with respect to the use of uncounseled misdemeanor convictions in collateral criminal proceedings. This note will consider whether any restrictions should be imposed on the collateral use of such convictions. In this context, uncounseled convictions with imprisonment and without imprisonment will be analyzed separately. As will be discussed, the use of uncounseled misdemeanor convictions resulting in imprisonment, controlled by *Argersinger*, should be retroactively prohibited in collateral proceedings. Uncounseled convictions without imprisonment, though not invalidated by *Argersinger*, may also be restricted in their collateral use. Because the *Argersinger* Court neglected these issues, further review by the Court is necessary. An affirmative right to counsel would best resolve these questions.

## II. Analysis of Argersinger v. Hamlin

The Supreme Court's *Argersinger* opinion stops short of granting an affirmative right to counsel. The Court utilized the sentence to determine whether a misdemeanant had the right to court-appointed counsel at trial. When the sentence is imprisonment, the right to counsel vests and the misdemeanant may not be imprisoned unless he had counsel at trial. However, the Court failed to articulate whether or not the underlying *conviction* is constitutional when imprisonment is imposed. Thus the opinion is subject to two interpretations.

The first interpretation is that *Argersinger* applies only to sentencing and upholds the constitutionality of uncounseled misdemeanor convictions. This narrow view rests primarily on the language "no person may be imprisoned . . . unless . . . represented by counsel . . . ."[9] Thus, it can be argued, the Court merely restricted the sentencing options available if the trial was uncounseled; it did not mandate the appointment of counsel. This position leads to the paradoxical conclusion that a misdemeanor conviction obtained without counsel is constitutionally valid even though a sentence of imprisonment is not.

The better analysis is that *Argersinger* applies to both the misdemeanor conviction and the sentence of imprisonment, constitutionally invalidating both if the indigent defendant is unrepresented by counsel at trial. This view, which avoids an illogical application of the narrow holding, is supported by the Court's rationale.

[9] Argersinger v. Hamlin, 407 U.S. at 37.

Although the narrow *Argersinger* holding focuses on the sentence, the Court formulated this holding through an examination of the entire trial process. In the majority opinion, Justice Douglas concluded that, as in felony cases, "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."[10] The questions presented in a misdemeanor case are often too complicated and complex for even an educated lay person, much less one under-educated; guilty pleas often are entered in misdemeanor cases which require complete awareness by the defendant of all the ramifications of such a plea, and crowded court dockets add pressure for quick disposition of a case with the result that a fair trial often becomes a lost goal.

Moreover, the majority specifically recognized the unreliability of a trial conducted without counsel. Quoting from *Powell v. Alabama*,[11] it noted that the assistance of counsel is needed to insure a fair trial because "[w]ithout it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." The Court then quoted from the *American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970)* to show statistical support for the unreliability of a trial without counsel.[12] Thus the Court concluded that sentencing a misdemeanant to prison without representation at trial is unconstitutional because it stems from an unfair trial and therefore an unreliable conviction.

Chief Justice Burger and Justice Powell, each writing opinions concurring in the result, also viewed the inadequacies of an uncounseled trial as the rationale behind the *Argersinger* holding. Chief Justice Burger said: "The issues that must be dealt with in a trial for a petty offense or a misdemeanor may . . . be beyond the capability of a layman, especially when he is opposed by a law-trained prosecutor."[13] Justice Powell, while criticizing the majority for formulating an arbitrary and rigid rule,[14] also framed his discussion around the fairness of an uncoun-

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[10] *Id.* at 36-37.

[11] *Id.* at 31, quoting from Powell v. Alabama, 287 U.S. 45, 69 (1932).

[12] "[M]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." *Id.* at 36.

[13] *Id.* at 41 (Burger, C.J., concurring in the result).

[14] *Id.* at 47-52 (Powell, J., concurring in the result). Justice Powell proposed a case by case balancing approach:

> I would hold that the right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis. The determination should be made before the accused formally pleads; . . . If the trial court should conclude that the assistance of counsel is not

seled trial: "Many petty offenses will . . . present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel."[15]

Therefore, the analysis of the holding in *Argersinger* which finds most support in the language of the opinion is that counsel at trial must be provided to an indigent charged with a misdemeanor in order constitutionally to *convict and sentence* him if the sentence is imprisonment. *Argersinger* should apply not only to the sentence, but also to the underlying conviction if the sentence is imprisonment.

Most courts which have considered sentences potentially in violation of the *Argersinger* rule[16] have framed their discussions in terms of the validity of the conviction and the sentence without giving explicit consideration to the issue of restricting *Argersinger* to the sentence.[17] Two courts of appeal, however, have indicated adherence to the view that *Argersinger* applies only to the sentence. In *Marston v. Oliver*,[18] the Fourth Circuit reversed a district court ruling which invalidated an uncounseled misdemeanor conviction resulting in imprisonment: "In *Argersinger*, . . . the Court only invalidated any imprisonment flowing from the conviction; it left intact and outstanding the conviction itself."[19] The court allowed the conviction to be used collaterally to revoke the defendant's driver's license for ten years. Likewise, the Tenth Circuit, in *Sweeten v. Sneddon*,[20] reversed an injunction against a state misdemeanor prosecution in which the penalty could have been imprisonment and the state court had refused to appoint counsel. The court concluded that an injunction would go beyond the mandate of *Argersinger*. Since *Ar-*

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required in any case, it should state its reasons so that the issue could be preserved for review.

*Id.* at 63 (Powell, J., concurring in the result).

[15] *Id.* at 47 (Powell, J., concurring in the result).

[16] *See* Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973), *vacated on other grounds*, 414 U.S. 895 (1973); Wood v. Superintendent, 355 F. Supp. 338 (E.D. Va. 1973); Cordle v. Woody, 350 F. Supp. 479 (E.D. Va. 1972); United States v. Alderman, 22 U.S.C.M.A. 298 (1973); *Ex parte* Webster, 497 S.W.2d 305 (Tex. Crim. App. 1973); *cf.* Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972).

[17] In United States v. Alderman, 22 U.S.C.M.A. 298, 304-06 (1973), Judge Duncan, concurring in part and dissenting in part, recognized this narrow analysis of *Argersinger* and specifically rejected it. He observed that if only the sentence is to be invalid, then logically the sixth amendment right to be represented by counsel could be satisfied by representation during the sentencing procedure. To the contrary, he finds much support in *Argersinger* that the Court was looking at the effect of counsel on the fairness of the entire trial, not simply the sentencing process. Further, Judge Duncan cited Gideon v. Wainwright, 372 U.S. 335 (1963), and Powell v. Alabama, 287 U.S. 45 (1932), to support his rejection of this narrow analysis. *Contra, id.* at 309-10 (Darden, C.J., dissenting).

[18] 485 F.2d 705 (4th Cir. 1973).

[19] *Id.* at 707.

[20] 463 F.2d 713, 715-16 (10th Cir. 1972).

*gersinger* premised its ruling on a sentence of imprisonment, presumably the court thought it was premature to invoke *Argersinger* before the trial.[21] But the court went further: "*Argersinger* forbids imprisonment without representation. It does not forbid trial without representation."[22] Although on the facts of *Sweeten* the court was not concerned with an uncounseled conviction, the implication of its statement is that it perceived *Argersinger* to apply only to the sentencing process.

The immutable imperfection in *Argersinger* stems from the Court's use of the sentence to invoke the right to court-appointed counsel. The unfairness of a misdemeanor trial without counsel is the basic reason for the Court's holding. Yet it abandoned this reasoning when it attached the right to counsel to the type of sentence imposed. As a result, a basic dichotomy exists within *Argersinger* that forces an illogical and unsound situation. Two indigents, for example, might each be convicted at an uncounseled trial, before the same judge, for the same misdemeanor. At this point the constitutionality of each trial cannot be determined, even though the trials are over. Not until the sentence is pronounced may the trial—already completed—become unfair. If one misdemeanant is sentenced to imprisonment, then the nature of his trial is retroactively branded as unfair. If the other misdemeanant is only fined, however, then his trial is fair. The characteristics of two trials, though substantially the same, are both fair and unfair; the constitutionality of each depends on an event not even occurring at the trial. This result illustrates that the Court's reasoning behind *Argersinger* and its holding do not coalesce.

Aside from the possibility of this curious result, the Court's focus on the sentence creates serious problems of implementation.[23] The trial judge must assess the gravity and seriousness of the offense before commencing the trial to determine whether imprisonment should be retained as an available option for sentencing. In other words, the judge must *guess* whether he will impose imprisonment as a sentence if the defendant is convicted. Thus the decision whether to appoint counsel is neces-

[21] Mahler v. Birnbaum, 95 Idaho 14, 501 P.2d 282 (1972) (denying writ of mandate to compel appointment of counsel in state prosecution for misdemeanor), takes this approach.

[22] Sweeten v. Sneddon, 463 F.2d 713, 716 (10th Cir. 1972).

[23] The majority opinion devotes minimum attention to how the *Argersinger* holding will be implemented. 407 U.S. at 40. Justice Powell, however, discussed this topic in greater detail and pointed out several problems: once counsel is not appointed, even if facts appear to warrant it, no imprisonment may be imposed; possible equal protection problems may arise if a defendant charged with one offense has appointed counsel, although another defendant in the same court, charged with the same offense, does not have appointed counsel; if an indigent is convicted without counsel, and he could not afford to pay a fine, no meaningful sentence is left. 407 U.S. at 52-59 (Powell, J., concurring in the result). Chief Justice Burger discusses possible methods of implementing the predetermination required by the *Argersinger* ruling. 407 U.S. at 42-44 (Burger, C.J., concurring in the result). Articles previously listed in note 4 *supra*, also discuss this problem.

sarily made without knowledge of what sentence, if any, will eventually be imposed. Yet it is the sentence that determines whether counsel is constitutionally required. These problems could have been avoided, or at least diminished, by structuring some form of a positive right to counsel wherein determination of whether or not counsel is constitutionally required could be made before trial.[24] Yet the Court did not do so.

The Court's development of a doctrine which creates not only illogical consequences but also serious problems of implementation demands explanation. It cannot be defended by asserting that the Court was forced to focus on imprisonment because it had already concluded that uncounseled misdemeanor convictions involving *no* loss of liberty are constitutional.[25] Language in the opinion itself contradicts this theory: "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail."[26] Further, although the majority opinion acknowledged and refuted Justice Powell's criticism that there are too few attorneys to implement the *Argersinger* rule,[27] no similar refutation accompanied acknowledgement of Justice Powell's suggestion that counsel should be required in some non-imprisonment misdemeanor cases.[28] Thus the Court indicated a willingness to challenge criticism of the practicality of its holding, but an unwillingness to contradict Justice Powell's assessment of the constitutional requirement for counsel in some non-imprisonment misdemeanor trials.

In addition, the Court drew no distinction between the inherent nature of uncounseled misdemeanor trials resulting in loss of liberty and

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[24] The Court had other alternatives available, which apparently were rejected:

(1) absolute right to counsel for indigents charged with a misdemeanor wherein imprisonment is statutorily possible, regardless of the actual sentence. The states, then, could redraft their criminal statutes to eliminate imprisonment as a potential sentence for offenses for which imprisonment is seldom, if ever, imposed. *See* Oral Argument of *Argersinger v. Hamlin*, 10 CRIM. L. REP. 4098.

(2) absolute right to counsel for indigents charged with a misdemeanor offense for which imprisonment of six months or more is statutorily permissible, regardless of the actual sentence; no imprisonment, however, could be imposed unless counsel at trial was provided. This is the approach taken by the OHIO R. CRIM. P. 44.

[25] Wood v. Superintendent, 355 F. Supp. 338, 343 (E.D. Va. 1973), also rejected this theory, concluding that "[n]othing in the majority opinion of the Supreme Court suggests this result, this Court can but only conclude that the Supreme Court has chosen not to deal with this issue at the present time."

[26] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[27] *Id.* at 37 n.7.

[28] *Id.* at 37. Justice Powell concluded that complex legal and factual issues may be raised in these cases. He cited loss of one's driver's license in some situations (e.g., where needed for employment) and the stigma attached to some charges (e.g., drunken driving and hit-and-run) as examples of consequences as serious as imprisonment. *Id.* at 48 (Powell, J., concurring in the result).

those not resulting in loss of liberty. Certainly guilty pleas and crowded dockets, cited by the Court as reasons for its decision, affect *all* misdemeanor trials regardless of the sentence. Therefore, the Court's focus on sentencing cannot be explained by asserting the Court concluded that *only* uncounseled misdemeanor trials resulting in loss of liberty are inherently unconstitutional.

A tenable theory is that the Court focused on the sentencing process to balance the competing views that all indigents charged with a misdemeanor have a right to court-appointed counsel under the sixth amendment because uncounseled trials are unfair and unreliable,[29] and that the administration of justice would be adversely affected by such a broad extension of the right to counsel.[30] After weighing the competing views, the Court drew the line where actual imprisonment results.

This theory is supported by language in the last paragraph of the opinion: "The 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 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."[31] Moreover, the majority's distinction between actual and potential imprisonment also indicates the Court's balancing approach. If the Court decided that one should not go to jail based on an uncounseled misdemeanor conviction, but was also concerned about the potential detrimental effect of a broad extension of the right to court-appointed counsel, it would be logical to restrict the right to counsel to those cases involving *actual* imprisonment, rather than formulating a right to counsel whenever imprisonment is statutorily permissable. In this manner, the Court would be formulating a new rule of criminal procedure which would have the least impact on the administration of criminal justice.

Justice Powell's concurring opinion also indicates the Court's dual concern for the fairness of an individual trial and the timely administration of the criminal justice system: "[T]oday's decision could have a seriously adverse impact upon the day to day functioning of the criminal justice system. We should be slow to fashion a new constitutional rule with consequences of such unknown dimensions, especially since it is sup-

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[29] *Id.* at 29-38.

[30] *Id.* at 56-62 (Powell, J., concurring in the result). The primary fear of a broad extension of the right to counsel is the unavailability of attorneys to meet the need. If not enough attorneys were available for those indigents who desired one, trials would have to be postponed until counsel was available, thus slowing down the already creaky wheels of justice.

[31] *Id.* at 40.

ported neither by history nor precedent."[32] The *Argersinger* Court apparently heeded Justice Powell's advice.

## III. Restrictions on the Collateral Use of Uncounseled Misdemeanor Convictions

In *Argersinger* the Supreme Court did not consider the issue of collateral use of previous uncounseled misdemeanor convictions. Nevertheless, without the development of restrictions on such collateral use, *Argersinger* would be vitiated; such restrictions could indirectly affect *every* indigent convicted at an uncounseled trial in contrast to the direct impact of *Argersinger* only on those indigents still imprisoned as the result of an uncounseled misdemeanor trial. Because *Argersinger* was limited to sentences of imprisonment, a distinction must be made between convictions which result in imprisonment and those which do not. The previous analysis of *Argersinger* provides a basis for restricting the collateral use of convictions invalidated by it. However, the application of the *Argersinger* rationale to restrict the collateral use of convictions not resulting in loss of liberty is open to debate.

### A. *Convictions invalidated by Argersinger*

Because *Argersinger* invalidates both the *conviction and the sentence*, convictions in violation of its rule should *not* be subsequently used to enhance punishment for a different offense, to revoke probation, parole or a suspended sentence, or to impeach a defendant's testimony in a trial for a separate offense.

#### 1. Use of Invalid Convictions to Enhance Punishment

In most states, prior misdemeanor convictions may enhance the punishment of a subsequent offense in two ways:[33] (1) the statutory upgrading of the classification of an offense because of these prior misdemeanor convictions,[34] and (2) the discretionary consideration by the judge in de-

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[32] *Id.* at 52 (Powell, J., concurring in the result).

[33] Recidivist statutes typically prescribe an increased maximum penalty for certain grave offenses committed by "habitual criminals." The constitutionality of such statutes has been upheld in Spencer v. Texas, 385 U.S. 554, 559-60 (1967). *See, e.g.*, OHIO REV. CODE ANN. §§ 2961.11–.13 (Page, 1954) (repealed by H.B. 511, eff. 1-1-1974, which enacted the new Ohio Criminal Code). Typically, these types of statutes refer to offenses of a grave nature. But should a misdemeanor conviction be included in a recidivist statute, it would increase the penalty and therefore be subject to the same analysis as other methods of enhancing punishment relying upon previous misdemeanor convictions. *See generally* ILLINOIS LEGISLATIVE COUNCIL, HABITUAL CRIMINAL STATUTES (Publication #122, 1955); 53 CORNELL L. REV. 337 (1968).

[34] *See, e.g.*, ILL. ANN. STAT. Ch. 38 § 11-20(d) (Smith-Hurd Supp. 1973-1974) (making

termining the sentence.[35] The new Ohio Criminal Code,[36] for example, incorporates both of these methods. Statutes upgrading the crime classification prescribe one degree of offense for the first violation and another degree of offense if the defendant has previously been convicted of certain other offenses or types of offenses.[37] As a result, a more severe penalty is statutorily permissible,[38] though the judge still retains discretion in setting the actual sentence.

Regardless whether or not the classification of the offense has been upgraded, certain previous misdemeanor convictions are statutorily required to be considered by the judge under the new Ohio Criminal Code. In determining the sentence, a judge must consider whether a convicted defendant is a "repeat offender," defined as "a person who has a history of persistent criminal activity and whose character and condition reveal a substantial risk that he will commit another offense."[39] Prima facie evidence that a person is a repeat offender includes the previous conviction and imprisonment for certain misdemeanors.[40] If the convicted de-

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the offense of obscenity a class A misdemeanor on first offense, and a class 4 felony on second offense); N.Y. PENAL CODE § 265.05(3) (McKinney Supp. 1973-1974) (making the offense of illegal possession of weapons a class A misdemeanor, but a class D felony if previously convicted of any crime); CAL. PENAL CODE § 314 (West 1970) (making indecent exposure a misdemeanor on first offense and a felony on second or subsequent offenses). *See also* 24 OKLA. L. REV. 372, 376-80 (1971).

[35] *See, e.g.*, ILL. ANN. STAT. Ch. 38 § 1005-3-2 (Smith-Hurd 1973) (regarding pre-sentence report which includes information of prior record); N.Y. CRIM. PROC. LAW § 390.20 and § 390.30 (McKinney 1971) (regarding pre-sentence reports which include information of prior convictions); CAL. PENAL CODE § 1203 (West Supp. 1973) (regarding pre-sentence investigations in order to determine whether to grant probation); CAL. PENAL CODE § 13 (West 1970) (granting the sentencing judge wide discretion in determining the sentence within the limits set by statute).

[36] The new Ohio Criminal Code, H.B. 511, became effective on January 1, 1974.

[37] *E.g.*, violation of OHIO REV. CODE 2913.03(A) (H.B. 511, eff. 1-1-1974) is upgraded from a misdemeanor of the first degree to a felony of the fourth degree if "the offender has previously been convicted of a violation of this section or of any other theft offense . . . ." OHIO REV. CODE 2913.03(D) (H.B. 511, eff. 1-1-1974).

[38] *E.g.*, misdemeanors of the first degree carry a possible maximum penalty of six months imprisonment, or $1,000 fine, or both. Ohio REV. CODE § 2929.21(B)(1) and (C)(1) (H.B. 511, eff. 1-1-1974). But felonies of the fourth degree carry a minimum sentence of six months imprisonment, with a maximum of five years, or a possible maximum fine of $2,500, or both. OHIO REV. CODE § 2929.11(B)(4) and (C)(4) (H.B. 511, eff. 1-1-1974).

[39] OHIO REV. CODE § 2929.01(A) (H.B. 511, eff. 1-1-1974).

[40] OHIO REV. CODE § 2929.01(A)(2)(3) and (5) (H.B. 511, eff. 1-1-1974). If the present conviction is for a sex offense, as defined by OHIO REV. CODE § 2950.01(B)(1) (H.B. 511, eff. 1-1-1974), prima facie evidence of the status of a "repeat offender" includes conviction and imprisonment for one or more sex offenses, some of which are misdemeanors. *See, e.g.*, OHIO REV. CODE §§ 2907.08 to .09 (H.B. 511, eff. 1-1-1974). If the present conviction is for a theft offense, as defined by OHIO REV. CODE § 2913.01(K) (H.B. 511, eff. 1-1-1974), prima facie evidence of the status of a "repeat offender" includes convictions and imprisonment for one or more theft offenses, some of which are misdemeanors. *See, e.g.*, OHIO REV. CODE §§ 2913.02 to .04 (H.B. 511, eff. 1-1-1974). And, regardless of the present conviction, prima facie evidence of the status of a "repeat offender" includes

fendant is considered a repeat offender, imprisonment rather than a fine is favored[41] in misdemeanor cases. In felony cases, it may warrant a longer term.[42]

These collateral uses of previous convictions to enhance punishment should be disallowed if the previous conviction is constitutionally invalid under *Argersinger*. Two Supreme Court cases concerning an analogous situation support this conclusion. In *Burgett v. Texas*,[43] previous uncounseled felony convictions, invalid under *Gideon v. Wainwright*,[44] were introduced into evidence pursuant to a Texas recidivist statute. Although the previous convictions had no apparent effect on the length of the sentence,[45] the Supreme Court[46] stated in dictum its view that: "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person . . . to . . . enhance punishment for another offense . . . is to erode the principle of that case."[47] Five years later in *United States v. Tucker*,[48] previous uncounseled felony convictions were given weight by the trial judge in sentencing the defendant to the maximum term authorized by the statute.[49] The Supreme Court, in *Tucker*, reasoned that since *Townsend v. Burke*[50] prohibited sentencing based upon an erroneous record, consideration of previous convictions which were now invalid under *Gideon* was reversible error.[51] The Court emphasized that such convictions must have been relied upon by the judge in the determination of the present sentence before reconsideration of the sentence would be necessary.[52] The prohibition on the use of prior convictions, invalid under *Gideon*, to enhance the punishment of subsequent convictions[53] was based on the principle that felony convictions obtained

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conviction of three or more offenses (except traffic offenses, alcoholic intoxication offenses, or minor misdemeanors) and sentence to imprisonment for at least one of these offenses, which include many misdemeanors. *See, e.g.*, OHIO REV. CODE § 2917.03, § 2921.13, and § 2921.31 (H.B. 511, eff. 1-1-1974).

41 OHIO REV. CODE § 2929.22(B) (H.B. 511, eff. 1-1-1974).

42 OHIO REV. CODE § 2929.12(B) (H.B. 511, eff. 1-1-1974).

43 389 U.S. 109 (1967).

44 372 U.S. 335 (1963).

45 The actual sentence imposed was ten years and the recidivist statute would have required either a twenty five year sentence, or life imprisonment. Burgett v. Texas, 389 U.S. 109, 110 n.1, 111 n.3 (1967).

46 The crucial issue in *Burgett* was the prejudicial effect of the previous convictions on the jury's verdict. *See* text accompanying notes 65-70 *infra*.

47 Burgett v. Texas, 389 U.S. at 115.

48 404 U.S. 443 (1972).

49 Id. at 444.

50 334 U.S. 736 (1948).

51 United States v. Tucker, 404 U.S. at 447-48.

52 *Id.* at 448-49.

53 *See generally* 1 WASH. U.L.Q. 197, 197-203 (1973).

without counsel were an unreliable indication of guilt, and therefore constituted an erroneous record.[54]

A similar argument exists for restricting the collateral use of misdemeanor convictions, invalid under *Argersinger*, to enhance punishment. Like *Gideon*, the *Argersinger* holding was also based on a finding that uncounseled misdemeanor convictions which result in imprisonment are unreliable because they stem from an unfair trial. Thus any sentence which was influenced by an invalid misdemeanor conviction would also violate the *Townsend* prohibition on sentencing based on an erroneous record. In order to avoid such a result, resentencing should be constitutionally required if it can be shown that invalid misdemeanor convictions influenced the judge's determination of the type or length of sentence.

Although few courts have yet dealt with the admissibility of evidence of an invalid previous misdemeanor conviction, the United States Court of Military Appeals, in *United States v. Alderman*,[55] has applied the *Tucker* holding to military convictions held to be in violation of *Argersinger*. Concluding that the trial judge "gave effect to the previous convictions," the court held that "if either of the convictions is invalid because the accused was deprived of the right to counsel, the sentence must be reassessed."[56] Even though the *Burgett* and *Tucker* holdings would not prohibit the use of invalid convictions if they had no effect on the sentence, a logical policy for the future would prohibit *all* use of previous convictions constitutionally invalid under *Argersinger*.

2. Use of Invalid Convictions to Revoke Probation, Parole or a Suspended Sentence

A misdemeanor conviction may also be used collaterally to justify the revocation of probation, parole or a suspended sentence imposed as a result of a conviction on a separate offense. The previous analysis regarding enhanced punishment is equally applicable in these situations. *Burgett* and *Tucker* indicate that constitutionally invalid convictions constitute an erroneous record which may not be used collaterally. Since *Argersinger* held that an uncounseled misdemeanor conviction which results in imprisonment is an unreliable determination of guilt, and therefore constitutionally invalid, it follows that such convictions may not be used collaterally as the basis for the revocation of probation, parole, or

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[54] United States v. Tucker, 404 U.S. at 447-48; Burgett v. Texas, 389 U.S. at 114-16.

[55] 22 U.S.C.M.A. 298, 302-03 (1973). *Accord*, Maghe v. State, 507 P.2d 950 (Okla. Crim. 1973).

[56] *Id.* at 303.

a suspended sentence. The revocation should be vacated and reconsideration given without reference to any invalid convictions.

Following an approach similar to the previous analysis regarding enhanced punishment, the Fifth Circuit, in *Clay v. Wainwright*,[57] held that uncounseled misdemeanor convictions found to be in violation of *Argersinger* were insufficient to support revocation of *probation* which had been granted on a previous felony conviction. Upon concluding that the invalid convictions had some effect not only on the probation revocation, but also on the judgment and sentence following the revocation, the court ordered all revoked.[58] The court reasoned: "[I]f the sentencing judge had been aware of the constitutional infirmity of these convictions the circumstances of . . . the defendant's behavior on probation might 'have appeared in a dramatically different light at the sentencing proceeding.' "[59] The Fifth Circuit summarily extended this analysis to *parole* revocations in *Cottle v. Wainwright*,[60] citing *Clay* as support for their conclusion: "Perhaps needless to say, one's parole cannot be revoked on the basis of prior invalid convictions."[61] Although no court has directly dealt with the revocation of a *suspended sentence* based on invalid misdemeanor convictions, a similar result should follow since the circumstances are sufficiently analogous to probation and parole revocations.[62] Thus a misdemeanor conviction obtained in violation of the *Argersinger* rule should be restricted from indirectly resulting in loss of liberty.

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[57] 470 F.2d 478, 482-84 (5th Cir. 1972).

[58] *Id.* at 482, 484.

[59] *Id.* at 484.

[60] 477 F.2d 269, 274-75 (5th Cir. 1973), *vacated on other grounds*, 414 U.S. 895 (1973). The rejection of an application for parole based on consideration of previous invalid misdemeanor convictions should also be re-considered, following the same reasoning. Cordle v. Woody, 350 F. Supp. 479, 481 (E.D. Va. 1972). *See generally* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE, 263-73 (1969).

[61] Cottle v. Wainwright, 477 F.2d at 275.

[62] *But cf.* Cordle v. Woody, 350 F. Supp. 479 (E.D. Va. 1972). Plaintiff was convicted on January 26, 1971, of grand larceny and was given a suspended sentence of three years. On February 26, 1971, plaintiff was convicted without counsel of a misdemeanor and was sentenced to twelve months in jail and a $100 fine. On March 4, 1971, plaintiff's suspended sentence on the earlier charge was revoked. The court held that the misdemeanor conviction without counsel was invalid under *Argersinger*, even though the prison sentence for it had already been served. The court specifically noted the possible detrimental effect the invalid misdemeanor conviction might have on plaintiff's chances for parole on the grand larceny sentence. Thus it would appear that the court accepted the rationale of *Tucker* and *Burgett*. The court, however, made no mention of a re-consideration of the suspended sentence revocation, a procedure which would also conform with the rationale of *Tucker* and *Burgett*. Since the case arose on a habeas corpus proceeding challenging the validity of the misdemeanor conviction, perhaps the court simply addressed itself only to this.

3. Use of Invalid Convictions to Impeach the Credibility of the Defendant

In general, if the defendant in a criminal trial testifies on his own behalf, his prior criminal record may be used to impair his credibility as a witness,[63] subject to various limitations imposed in different jurisdictions.[64] But when misdemeanor convictions, invalid under *Argersinger*, are used for impeachment purposes, a new trial should be necessary. In *Burgett v. Texas*,[65] admission into evidence of previous felony convictions was held to be inherently prejudicial to the defendant. Otherwise, said the Court, indigents convicted of felonies without counsel would be subject to continued vulnerability flowing from an unreliable determination of guilt.[66] Since the previous convictions in *Burgett* were introduced to facilitate a one-stage trial for assault and enhanced punishment under the state recidivist statute,[67] the issue of impeachment was not directly faced until five years later in *Loper v. Beto*.[68] Reaffirming *Burgett*, the Court held that constitutionally invalid prior felony convictions may not be used to impeach the credibility of defendant's testimony.[69] But the error can be harmless if other evidence sufficient to support guilt is present.[70]

Although previous misdemeanor convictions may not be as influential as previous felony convictions in impeaching testimony at a subsequent trial, if the past misdemeanor convictions are for crimes similar to the

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[63] *See* MCCORMICK, EVIDENCE 443 (2d ed. 1972); 3A WIGMORE, EVIDENCE §§ 889-91 (Chadbourn rev. ed. 1970). *See generally* McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, LAW & SOC. ORDER 1 (1970); Cohen, *Impeachment of a Defendant-Witness By Prior Conviction*, 6 CRIM. L. BULL. 26 (1970).

[64] Some jurisdictions restrict admissibility of prior crimes to felonies. *See, e.g.*, CAL. EVID. CODE § 788 (West 1966). Others allow any felony or misdemeanor to be used. *See, e.g.*, Coslow v. State, 83 Okla. Crim. 378, 177 P.2d 518 (1947). Still others pose an additional requirement that the crime be one of "moral turpitude." *See, e.g.*, Tasker v. Commonwealth, 202 Va. 1019, 121 S.E. 2d 459 (1961). And others require that prior crimes must have some probative value to prove the issue involved. *See, e.g.*, OHIO REV. CODE ANN. § 2945.59 (Page 1954). Proposed Federal Rule of Evidence 6-09 would limit admissibility of prior crimes to those punishable by death or imprisonment in excess of one year, or those involving dishonesty. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 295 et seq. (1969). *See also* Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence of U.S. District Courts*, 6 CRIM. L. BULL. 330 (1970).

[65] 389 U.S. 109 (1967).

[66] "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person . . . to support guilt . . . is to erode the principle of that case." *Id.* at 115.

[67] *Id.* at 111.

[68] 405 U.S. 473 (1972).

[69] *Id.* at 483-84.

[70] *Id.* at 483 n.12; *See* Burgett v. Texas, 389 U.S. at 115; Hernandez v. Craven, 350 F. Supp. 929, 938-39 (C.D. Calif. 1972).

one on trial, they may be significant. Unless it could be shown that the error was not harmless, the use of an invalid misdemeanor conviction to impeach the credibility of the defendant at a subsequent trial should be prohibited. Although few courts have ruled on this issue,[71] the unconstitutionality found in *Argersinger* was based on the same principle as that found in *Gideon*—an unfair trial results in an unreliable determination of guilt. Therefore, the restrictions developed in *Burgett* and *Loper* are equally applicable to protect those unconstitutionally convicted of a misdemeanor from further pejorative effects.

B. *Convictions Not Invalidated by Argersinger*

Under *Argersinger* uncounseled misdemeanor convictions of indigents are still constitutionally valid if imprisonment is not imposed. Even though these convictions do not initially result in loss of liberty, however, they may affect future proceedings so as to have a delayed impact on liberty. Uncounseled misdemeanor convictions not invalidated by *Argersinger* may indirectly lead to loss of liberty in three ways. The first two involve the collateral use of the prior conviction at a trial for a subsequent charge. (The prior conviction may have been for an offense for which *only* fines were permissible, or for an offense for which imprisonment, though statutorily allowed, was rejected in favor of a fine.) In the first situation, the conviction may serve to statutorily upgrade the classification of the new offense from the lowest class, allowing only fines, to a higher level, allowing imprisonment.[72] Secondly, where the new offense permits imprisonment, this prior conviction may become a factor in the discretionary imposition of imprisonment by the trial judge.[73] Un-

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[71] Burford v. State, 515 P.2d 382 (Alaska 1973). In Commonwealth v. Boudreau, 285 N.E.2d 915 (1972), the Supreme Court of Massachusetts by implication supported this conclusion. After finding the misdemeanor conviction in question *not* to be invalidated by *Argersinger* as no imprisonment resulted, the court continued "even if such evidence were *erroneously* admitted." *Id.* at 918 (emphasis added).

[72] In Ohio, for example, the new Criminal Code provides that offenses classified as minor misdemeanors may be punishable only by fines up to $100. OHIO REV. CODE § 2929.21(D) (H.B. 511, eff. 1-1-1974). Some offenses, however, are classified as minor misdemeanors on the first offense, and statutorily upgraded, for example, to misdemeanors of the fourth degree upon second or subsequent offenses. *See, e.g.*, OHIO REV. CODE § 2917.11(E) (H.B. 511, eff. 1-1-1974). All types of misdemeanor offenses in Ohio, except minor misdemeanors, allow imprisonment as a penalty. *See* OHIO REV. CODE § 2929.21(A) (H.B. 511, eff. 1-1-1974). Therefore, one may be constitutionally convicted of a minor misdemeanor without counsel; however, upon a second offense, the first uncounseled conviction could mandate a statutory upgrading of the type of offense, thus allowing imprisonment as a potential sentence.

No similar classification exists in New York or California. *See* N.Y. PENAL CODE ANN. § 70.15 (McKinney 1967); CAL. PENAL CODE § 19 (West 1970).

[73] In Ohio, for example, a misdemeanor of any degree may be subject only to a fine rather than imprisonment. Although such convictions do not constitute prima facie evidence

less counsel is provided or waived at the trial for the subsequent charge, *Argersinger* prohibits imprisonment. But even assuming representation at the second trial, the issue here revolves around the fact that absent the prior uncounseled conviction, imprisonment could not or would not have been imposed.

The third possibility is the case where an indigent, already convicted of a prior offense, may be subject to the revocation of his probation, parole or suspended sentence because of an uncounseled misdemeanor conviction where only a fine was imposed. Again, loss of liberty would be effectuated by the collateral use of uncounseled misdemeanor convictions which in themselves involved no loss of liberty.

Such collateral use of constitutionally valid uncounseled misdemeanor convictions must be considered in light of *Argersinger*. The dichotomy between the focus on sentencing found in the holding of *Argersinger* and the sixth amendment right-to-counsel rationale underlying the holding permits no resolution of this issue. Two conflicting points of view may be argued. One approach would place no restriction on the use of convictions not invalidated by *Argersinger*. The argument may be framed in syllogistic fashion: Uncounseled misdemeanor convictions which do *not* result in imprisonment are constitutional. Constitutionally obtained convictions may be used collaterally. Therefore, collateral use of uncounseled misdemeanor convictions not resulting in imprisonment is proper. This argument is based on a rigid interpretation of the Court's holding in *Argersinger*. Although the major premise of this syllogism is presently accurate, no Supreme Court decision has specifically held that uncounseled misdemeanor convictions which do not result in imprisonment are constitutional. Instead, their constitutionality is upheld only by default—the *Argersinger* court having refused to consider the issue. Even so, this argument is not without merit, for it accurately, though narrowly, portrays the current status of the law.

A contrary approach would prohibit the collateral use of misdemeanor convictions of uncounseled indigents who were not imprisoned. The *Argersinger* Court's emphasis on loss of liberty supports this conclusion. The Court could have framed a right to counsel[74] but instead chose to create a right not to be imprisoned without representation at trial. It would subvert the Court's purpose to allow imprisonment to result indirectly from uncounseled misdemeanor trials, while at the same time dis-

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of the status of a "repeat offender," they may be considered as representing the history and character of the defendant in determining whether to impose imprisonment for the present offense. *See* OHIO REV. CODE 2929.01(A) and 2929.22(A) (H.B. 511, eff. 1-1-1974). Other states grant similar discretion. *See* note 35 *supra*.

[74] *See* note 24 *supra*.

allowing imprisonment as a direct result of uncounseled misdemeanor trials. Since the Court prohibited imprisonment based upon an unreliable conviction obtained at an unfair trial, the Court would probably not permit unreliable trials to have a delayed impact resulting in imprisonment. Therefore, following the *Burgett*, *Tucker* and *Loper* decisions, whenever it can be shown that an uncounseled misdemeanor conviction had a substantial effect on the loss of liberty, that is, imprisonment might not have been imposed absent this prior misdemeanor conviction, grounds for reconsideration of the sentence or revocation exist.

Support for this approach can be found in the paradox which results from rejection of any restrictions on the use of uncounseled misdemeanor convictions outside the scope of *Argersinger*. Conviction for lesser offenses would have an increased potential for a delayed impact on loss of liberty than would conviction for more serious offenses.[75] Persons committing lesser offenses, convicted without counsel and given non-imprisonment sentences, would be subject to the future detrimental use of such conviction which could ultimately result in imprisonment. Persons committing more serious offenses, however, convicted without counsel and sentenced to jail, would be immune from the future detrimental use of this conviction.

There is, however, the *Argersinger* Court's concern about the effect of its decision on the administration of justice. Requiring that any misdemeanor conviction must be counseled in order for it to result, directly or indirectly, in loss of liberty effectively extends the right to counsel in all misdemeanor cases. This is exactly what the Court refused to do in *Argersinger*. The pre-trial problems would be magnified; in each misdemeanor trial the decision whether to appoint counsel would have to be made not only on the basis of whether imprisonment would be an available sentencing alternative, but also on the basis of whether, if convicted and only fined, the conviction would have a potential collateral effect on liberty. Such a predetermination would be an administrative nightmare and would in effect stimulate a general appointment of counsel except for the most minor charges. Thus the apparent desire of the Court to avoid the burden of a broad extension of the right to court-appointed counsel would be severely compromised.

The resolution of these two conflicting points of view cannot come from an analysis of *Argersinger* alone. The Court's use of imprisonment to invoke the sixth amendment right to counsel created an imperfection within *Argersinger* which allows the constitutionality of two similar trials

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[75] *See* United States v. Alderman, 22 U.S.C.M.A. 298, 307-08 (1973) (Duncan, J., concurring in part and dissenting in part).

to be determined by the sentence imposed. Such a result illustrates that *Argersinger* is based on a compromise rather than on sound principle. Because it provides no basis upon which to resolve conflicting application, disparity among courts will be inevitable.

In *Marston v. Oliver*,[76] the Fourth Circuit emphasized the Supreme Court's concern that an uncounseled misdemeanor conviction should not result in imprisonment. The court stated, in dictum: "*Argersinger* purported to excise from the misdemeanor conviction only those consequences that related to loss of liberty and imprisonment. So far as its direct or *collateral* consequences are the loss of liberty on the part of the defendant, *Argersinger* applies . . . ."[77] Some other courts, however, are likely to take the opposite view when faced with this issue.

The best resolution of the conflict created by the Supreme Court's compromise between the necessity of counsel to insure a fair criminal trial and the need for an orderly functioning of the criminal justice system is the creation of an affirmative right to counsel for indigents charged with a misdemeanor—a step which the Supreme Court refused to take in *Argersinger*. The creation of such a right does present its own set of problems. The most basic of these is the scope to be given it; whether it should apply to *all* misdemeanor trials, or only to certain types. Some commentators have suggested that a full right to counsel is constitutionally required for all criminal prosecutions regardless of any readjustments which would be necessary to offset the additional burden on the criminal justice system.[78] Others fear the detrimental impact of implementing

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[76] 485 F.2d 705 (4th Cir. 1973).

[77] Id. at 707. The court only discussed uncounseled misdemeanor convictions which themselves resulted in imprisonment. Nevertheless, its reasoning implies application to uncounseled misdemeanor convictions involving no imprisonment since the Fourth Circuit perceived *Argersinger* to uphold the constitutionality of any uncounseled misdemeanor conviction. *See* text accompanying notes 18-19 *supra*.

[78] *See, e.g.*, L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT, Ch. 4 (to be published, 1974). Professor Herman persuasively argues that the right to appointed counsel is constitutionally guaranteed for all criminal prosecutions within the meaning of the sixth amendment and should not be compromised because of the fear of a resulting decrease in the quality of criminal justice. Although there will probably be some increase in the number of misdemeanor cases tried, and there undoubtedly will be an increase in lawyers needed, Professor Herman suggests that the extent of these burdens are not statistically forseeable based on present data. Nevertheless, he concludes that the ability of the courts to handle misdemeanor cases in a timely fashion can be maintained through better judicial administration, the diversion from the judicial process of cases which are punishable only by a small fine, e.g., most traffic offenses, and the decriminalization of victimless crimes. In addition, Professor Herman concludes that a structure is already available to provide appointed counsel since the majority of states have provision for appointment of counsel in at least certain types of misdemeanor cases and there are also legal aid and defender agencies throughout the country. For these reasons, the burden of implementing a delivery system for legal services is one of expansion, rather than creation, and therefore less severe. Thus the unknown burdens of creating a full right to appointed counsel could be minimized and are not a sufficient reason for denying constitutional rights. For further commentary

a full right and propose various compromises.[79] Insofar as *Argersinger* itself represents a compromise it illustrates the difficulties to be encountered in attempting to frame a doctrine which distinguishes among uncounseled misdemeanor trials in assessing their constitutionality. Thus a full right to counsel may be the lesson to be learned from *Argersinger*. Indeed, some courts have already begun to move in this direction. In *Wood v. Superintendent Caroline Correctional Unit*,[80] a federal district court applied the approach urged by Justice Powell in *Argersinger*: "[T]he right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis."[81] Thus at least an initial step toward creating an affirmative right to counsel in all misdemeanor cases was taken by the *Wood* court.

## IV. Retroactive Application of Restrictions on Collateral Use

This note has examined the extent to which the *Argersinger* decision requires certain restrictions on the collateral use of uncounseled misdemeanor convictions. Since *Argersinger* has been made retroactive, a corollary issue is whether this retroactivity extends so far as to affect collateral uses which occurred at trials held previous to the *Argersinger* decision—June 12, 1972.

In an analogous situation, the restrictions developed following *Gideon* have been applied retroactively. Although the trial in *Burgett v. Texas*[82] occurred after *Gideon*, the Supreme Court in *United States v. Tucker*[83] and *Loper v. Beto*[84] applied restrictions on its use of invalid felony convictions to trials occurring prior to *Gideon*.[85] The *Tucker* Court did not specifically discuss the issue of retroactivity of collateral use, but this sub-

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on the right to appointed counsel in misdemeanor cases see, *e.g.*, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968); Kamisar & Choper, The Right to Counsel in Minnesota: *Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1 (1963); Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1248 (1970).

[79] *See, e.g.*, Brief for the United States as Amicus Curiae, Argersinger v. Hamlin, 407 U.S. 25 (1972).

[80] 355 F. Supp. 338, 341-43 (E.D. Va. 1973). *Contra*, Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972).

[81] 355 F. Supp. at 342, quoting from Argersinger v. Hamlin, 407 U.S. at 63 (Powell, J., concurring in the result).

[82] 389 U.S. 109 (1967).

[83] 404 U.S. 443 (1972).

[84] 405 U.S. 473 (1972).

[85] *Id.* at 474. United States v. Tucker, 404 U.S. at 443-44.

ject generated divergent opinions in *Loper*.[86] The plurality opinion, by Justice Stewart, summarily rejected any proposal that the *Burgett* restrictions on collateral use should be applied *only* to trials occurring subsequent to *Gideon*;[87] it viewed proscriptions on the collateral use of convictions as developed in *Burgett* and *Tucker* to be constitutionally required by *Gideon*.[88] Chief Justice Burger, in his dissent, however, viewed the retroactive application of the *Burgett* restrictions on collateral use as an independent question.[89] He considered the detrimental effect of such retroactive application—that many convictions would become vulnerable to attack, and thus diminish the finality of judgments[90]—and concluded that: "Neither fundamental fairness nor any specific constitutional provision requires that a rule of evidence be made retroactive; consideration for the orderly administration of justice dictates the contrary."[91]

Because *Loper* was decided only two years ago, and because it was a plurality decision, it leaves unsettled the question of retroactivity of collateral use. The decision in *Loper* is authority favoring such retroactivity even for misdemeanor convictions. Applying the plurality's analysis, any collateral use which is constitutionally prohibited by the Court's holding in *Argersinger* was made retroactive when *Argersinger* itself was made retroactive in *Berry v. Cincinnati*.[92] Thus collateral use of uncounseled misdemeanor convictions which resulted in loss of liberty should be retroactively restricted. Further, uncounseled misdemeanor convictions, involving no loss of liberty in themselves, should be retroactively restricted, *if* they will indirectly result in loss of liberty.

This analysis gains support from language in *Berry*. After stating that, "[T]hose convicted prior to the decision in *Argersinger* are entitled to the constitutional rule enunciated in that case . . . ," the Court cited *Burgett*.[93] Since *Burgett* involved the collateral use of felony convictions invalidated by *Gideon* it might be concluded that restrictions similar to those applied in *Burgett* are part of the "constitutional rule" of *Argersinger*. If so, then such restrictions were made retroactive by *Berry*.

If the Court should refuse, however, to apply *Loper* to *Argersinger*, the decision to make *Argersinger* retroactive would have no bearing on the decision whether to make any restrictions on the collateral use of

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[86] *See generally* 1 WASH. U. L. Q. 197, 209-12 (1973).

[87] Loper v. Beto, 405 U.S. at 484 n.13.

[88] *Id.* at 483-84.

[89] *Id.* at 492 (Burger, C.J., dissenting).

[90] *Id.* at 491, 494 (Burger, C.J., dissenting).

[91] *Id.* at 493 (Burger, C.J., dissenting).

[92] 414 U.S. 29 (1973).

[93] *Id.*

uncounseled misdemeanor convictions also retroactive. A separate analysis would have to be made, as suggested by the dissent in *Loper*. Under such an analysis, it would probably be concluded that restrictions on collateral use to impeach a defendant's testimony should only be applied prospectively since retroactivity of a rule of evidence would require new trials which, for persons convicted many years ago, would be a practical impossibility. Thus there would be a detrimental effect on the administration of justice. Even under this analysis, however, it could be argued that other restrictions on collateral use of prior misdemeanor convictions —to enhance punishment or to revoke probation, parole, or a suspended sentence—shuld be made retroactive. In these cases only a resentencing would be required. Thus such retroactive application does not create the severe hardship on the administration of justice that the retroactive application of the proscription against use to impeach testimony does.[94]

## V. CONCLUSION

*Argersinger v. Hamlin* enunciated a new rule of criminal procedure: no indigent may be imprisoned without representation by counsel at trial. Although based on an analysis that uncounseled misdemeanor convictions are unreliable because they stem from unfair trials, the Court created sentencing restrictions rather than a right to counsel. As a result of this compromise, *Argersinger* contains some logical flaws, not all of which can be resolved. An attempt to determine whether *Argersinger* mandates any restrictions on the collateral use of uncounseled misdemeanor convictions emphasizes the unprincipled nature of the case.

Based on the analysis that *Argersinger* applies to both the conviction and the sentence, the collateral use of any misdemeanor conviction, invalid under *Argersinger*, should be restricted. Such restrictions are mandated by the premise of the *Argersinger* conclusion that an uncounseled misdemeanor conviction which results in imprisonment is an unreliable determination of guilt because it stems from an unfair trial. Thus collateral use of misdemeanor convictions invalidated by *Argersinger* should not be allowed to enhance punishment for a different offense, to justify revocation of parole, probation or a suspended sentence, or to impeach defendant's testimony in a trial for a different offense. Further, these restrictions should be applied retroactively since they are mandated by *Argersinger*, which itself has been retroactively applied in *Berry v. Cincinnati*.

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[94] Although Justice Burger, dissenting in *Loper*, criticized retroactively applying restrictions on collateral use to impeach testimony, he did not do so when used to enhance punishment.

A further issue, also not discussed by the Court, is whether uncounseled misdemeanor convictions involving no loss of liberty, and therefore not controlled by *Argersinger*, may be used collaterally to have the delayed effect of imprisonment. For example, the imposition of imprisonment at a counseled trial may be directly attributable to a previous uncounseled misdemeanor conviction. In this type of situation, arguments both for and against restrictions on collateral use find support in *Argersinger*. The Court's focus on loss of liberty to invoke the right to court-appointed counsel seems to favor restrictions. At the same time, however, the constitutionality of uncounseled misdemeanor convictions, along with the Court's apparent effort to reduce as much as possible any detrimental impact on the administration of justice, would support rejection of any restrictions. Thus the flaws within *Argersinger* become apparent and no resolution of this issue can be drawn from the case.

Creation of an affirmative right to court appointed counsel for indigents charged with a misdemeanor is the best solution to the imperfections of *Argersinger*. Although the Supreme Court refused to do so in *Argersinger*, its compromise has only created ambiguity and uncertainty. As a result, there will be increasing demand for some further explanation of *Argersinger*. The best explanation is to abandon its illogical doctrine and create a right to counsel which is not illusory.

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