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B. Mitchell Simpson III
Roger Williams University School of Law

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A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?

B. Mitchell Simpson, III*

It is Monday morning in District Court. The docket is crowded with a wide variety of matters—civil motions, citations, evictions, civil trials and even small claims.¹ After calling the calendar, the sitting judge will do the arraignments, no matter how pressing any civil matter may be. Those persons being arraigned will include lockups (that is, anyone arrested by the police and held in custody) and anyone else released from custody pending arraignment.

At an arraignment, the accused will be asked to enter a plea if the offense is within the jurisdiction of the court (pleas for felonies will be taken in the superior court).² At this point, the judge has the constitutional duty to explain to the accused the full panoply of his rights under the law, particularly if the accused wishes to dispose of the matter by pleading guilty or *nolo contendere*.³ In addition to a presumption of innocence, the accused has the right to a speedy and public trial by an impartial jury, to confront witnesses, to cross-examine them, to remain silent and to have the assistance

* Professor of Law, Roger Williams University School of Law. I am grateful to the Office of the Rhode Island Public Defender, and especially to Professor Andrew Horwitz of the Roger Williams University School of Law, who made available the numerous briefs, including those of *amici curiae*, submitted in this matter to the Rhode Island Supreme Court. See *In re Advisory Opinion to the Governor (Appointed Counsel)*, 666 A.2d 813 (R.I. 1995).

1. The description of matters before the District Court is based on Rhode Island procedure. Other states may differ in some respects, but the point is illustrative rather than analytical.

2. This is the practice in Rhode Island; other states may differ.

3. In Rhode Island, *nolo contendere* is a statutory plea by which the accused does not admit guilt. He or she only admits that the state has sufficient evidence to convict him. See R.I. Dist. Ct. R. Crim. P. 11.

of counsel.⁴ All of these rights are necessary to ensure that the accused has a fair trial, which is at the heart of our jurisprudence.

The right to counsel is central to a fair trial. So long as an accused has the means to hire a lawyer, there is no constitutional problem. However, when the accused is an indigent and the offense charged is a misdemeanor, a fair trial still requires that he be represented by counsel. The United States Supreme Court set the minimum standard for the Sixth Amendment right to counsel, applicable to the states by way of the Fourteenth Amendment, when it held in *Scott v. Illinois*⁵ that no indigent criminal defendant may be sentenced to jail without the assistance of appointed counsel.⁶ Or, put another way, if an indigent charged with a misdemeanor is not sentenced to jail, he has no Sixth Amendment right to counsel. Thirteen states have followed the holding of *Scott*.⁷

However, the vast majority of states (thirty-five and the District of Columbia) have left behind the minimal standards of *Scott* and require the appointment of counsel for indigents charged with misdemeanors punishable by incarceration, minimum jail sentences or substantial fines. The breakdown is as follows: twenty states and the District of Columbia have recognized that a fair trial requires that indigents charged with any criminal offense punishable by incarceration are entitled to appointed counsel, regardless of whether a jail sentence follows conviction.⁸ Ten states (and the federal courts) have adopted a compromise position by requiring the appointment of counsel for indigents charged with mis-

4. See U.S. Const. amend. VI. Additionally, the Fourteenth Amendment prohibits the states from depriving "any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV. The development of constitutional law in this area is an enormous and important topic, much of which is beyond the scope of this article.

5. 440 U.S. 367 (1979).

6. See *id.* at 373.

7. These states include: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Mississippi, Montana, North Dakota, South Carolina and Texas. Citations to cases and references to statutory and constitutional provisions, as appropriate, are given respectively in a later portion of this article. See *infra* notes 115-127.

8. These include: Alaska, California, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Tennessee, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Case citations, statutory and constitutional references, respectively, are given in a later portion of this article. See *infra* notes 78-98.

demeanors, only if the sentence involves a minimum confinement, usually six months or more.⁹ Three states require the appointment of counsel for indigents facing a substantial fine.¹⁰ Two states require the appointment of counsel where there is a "likelihood of jail."¹¹ The rules for the appointment of counsel in the remaining two states are unclear.¹²

This seeming discrepancy between the requirements of the federal constitution, as pronounced by the United States Supreme Court, and the more liberal and expansive view of most of the states, has caused confusion, most recently in Rhode Island.¹³ It can be explained by a careful reading of the major decisions of the United States Supreme Court on the subject and the case law and statutes of the states.

I. UNITED STATES SUPREME COURT DECISIONS

The seminal United States Supreme Court decision is *Powell v. Alabama*.¹⁴ Nine black men—all of whom were young, illiterate, ignorant and strangers to the county—were accused of raping two white women on March 25, 1931.¹⁵ A sheriff's posse arrested them the same day amidst great publicity and hostility.¹⁶ The sheriff was so concerned with the safeguarding of the prisoners that he asked the state militia for assistance, which was provided until after the trial was concluded.¹⁷ Indictments were returned on March

9. These states are: Idaho, Iowa, Maine, Maryland, Michigan, New Mexico, Ohio, Pennsylvania, Rhode Island and South Dakota. Citations to cases and statutory and constitutional references, as appropriate, are listed in a later portion of this article. See *infra* notes 99-108.

10. New Jersey, North Carolina and Vermont have such a rule. Citations to cases and statutory and constitutional references, as appropriate, are listed in a later portion of this article. See *infra* notes 110-12.

11. Kansas and Missouri have adopted this rule. Citations to cases and statutory and constitutional references, as appropriate, are listed in a later portion of this article. See *infra* notes 113-14.

12. Nevada and Utah do not appear to have explicitly adopted any of the positions discussed. Appropriate case, statutory and constitutional references appear in a later portion of this article. See *infra* notes 128-29.

13. See *In re Advisory Opinion to the Governor (Appointed Counsel)*, 666 A.2d 813 (R.I. 1995).

14. 287 U.S. 45 (1932).

15. See *id.* at 49.

16. See *id.* at 51.

17. See *id.*

31; the accused were then promptly arraigned.¹⁸ The penalty under the Alabama statute ranged from ten years imprisonment to death.¹⁹

At the arraignment on March 31, they plead not guilty.²⁰ However, the trial judge did not ask whether they had or were able to employ counsel, whether they wished to have counsel appointed, or whether they had friends or relatives who could assist them in obtaining counsel.²¹ Also, at the arraignment, the trial judge "appointed all the members of the bar for the purpose of arraigning the defendants" with the expectation that they would continue "if no counsel appear[ed]."²² None appeared.

On the very morning of the trial, no lawyer had been designated to represent the defendants.²³ During the important period between the arraignment and the start of the trial, when there should have been thorough investigation, consultation and preparation, the defendants did not have the aid of counsel, although they were entitled to it at that time as much as at the trial itself.²⁴ This fact led the Supreme Court to hold that the "defendants were not accorded the right of counsel in any substantial sense."²⁵

The Supreme Court captured the atmosphere of the trial and the casual nature of the appointment, or at least the entry of appearance of defense counsel, in these graphic terms:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.²⁶

The court then turned to the question whether the denial of assistance of counsel was a denial of due process in contravention of the

18. *See id.* at 49.

19. *See id.* at 50.

20. *See id.* at 49-50.

21. *See id.* at 52.

22. *Id.* at 53.

23. *See id.*

24. *See id.* at 57.

25. *Id.* at 58.

26. *Id.* at 57-58.

Fourteenth Amendment to the United States Constitution.²⁷ It concluded that the aid of counsel is included in the concept of due process, saying, "we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."²⁸

The court reasoned that due process requires a hearing and that fundamental to a hearing is the right to assistance of counsel.²⁹ Justice Sutherland's eloquent comment on this point has been frequently quoted and bears repeating once again:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If, in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.³⁰

The reasoning of the court is clear and uncomplicated: due process requires a hearing. At a hearing, a defendant is entitled to the assistance of counsel. The right to due process, which includes the right to counsel, "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institu-

27. *See id.* at 60.

28. *Id.* at 71.

29. *See id.* at 68.

30. *Id.* at 68-69.

tions.”³¹ The court focused on the conduct of the hearing in making its determination of due process and not on the sentence. The fact that the defendants had been sentenced to death made the stakes higher, but did not intrude upon the necessity of a hearing and the defendants’ constitutional right to assistance of counsel under the due process clause of the Fourteenth Amendment.

Construed narrowly, *Powell* stands for the proposition that, in capital cases, an indigent defendant has a constitutional right to counsel, which the state must provide. What about an indigent charged with a non-capital felony? Clarence Gideon was charged in a Florida state court with breaking and entering a poolroom with intent to commit a misdemeanor, a felony under Florida law.³² At his trial, he requested the court to appoint defense counsel.³³ The court refused on grounds that Florida law authorized the appointment of counsel only in capital cases.³⁴ Gideon undertook his own defense and was convicted anyway.³⁵ He was sentenced to five years imprisonment.³⁶ He filed a *habeas corpus* petition attacking his conviction on grounds that he had been denied his constitutional right to assistance of counsel.³⁷

Justice Black, writing for seven members of the Supreme Court, reaffirmed the principal that “those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”³⁸ He concluded, “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”³⁹ The Supreme Court reversed the conviction and remanded the case to the Florida courts.⁴⁰

Following *Powell* by a generation, *Gideon* is not only a reaffirmation of the holding of *Powell*, but it also follows the same line of

31. *Id.* at 67 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

32. *See Gideon v. Wainwright*, 372 U.S. 335, 336-37 (1963).

33. *See id.* at 337.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *Id.* at 341.

39. *Id.* at 344.

40. *See id.* at 345.

reasoning by addressing the question of what is essential to a fair trial. Both cases are well-reasoned. Both cases make it abundantly clear that assistance of counsel is fundamental to a fair trial. Both cases have settled the question that indigents charged with capital or non-capital felonies are entitled to the assistance of counsel.

What about misdemeanors? Jon Argersinger was charged in a Florida state court with carrying a concealed deadly weapon, an offense punishable by imprisonment up to six months and a fine of \$1,000.⁴¹ He was not represented by counsel at his trial.⁴² He was convicted and sentenced to serve ninety days in jail.⁴³ He instituted *habeas corpus* proceedings, but the Florida Supreme Court denied relief on grounds that the right to counsel extended only to trials for non-petty offenses which were punishable by more than six months imprisonment.⁴⁴ He prevailed in the Supreme Court in 1972, where it was held that no person may be imprisoned for any offense unless he was represented by counsel at trial.⁴⁵

The *Argersinger* court followed the same rationale of the *Powell* and *Gideon* courts by concentrating on the question: what is necessary for a fair trial? Justice Douglas pointed out that both *Powell* and *Gideon* were charged with felonies, but *Argersinger* had been charged with a misdemeanor.⁴⁶ The common rationale of the *Powell* and *Gideon* cases is equally relevant "to any criminal trial, where an accused is deprived of his liberty."⁴⁷ The court concluded that "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."⁴⁸

Rather than simply reaffirming the principal that assistance of counsel is a prerequisite of a fair trial, the court's holding muddied the waters: "[w]e hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was

41. See *Argersinger v. Hamlin*, 407 U.S. 25, 26 (1972).

42. See *id.*

43. See *id.*

44. See *id.* at 26-27.

45. See *id.* at 40.

46. See *id.* at 32.

47. *Id.*

48. *Id.* at 36-37 (footnote omitted).

represented by counsel at his trial."⁴⁹ Tying Argersinger's right to counsel to his sentence was not necessary to reverse his conviction. The Supreme Court could simply have said, in effect, that a fair trial, even for a misdemeanor, requires the assistance of counsel, unless there is an intelligent and knowing waiver. This holding has blurred the clear purpose of the Sixth Amendment right to counsel: to insure a fair trial for the accused, regardless of the nature of the offense charged and its penalty. Instead, and unfortunately, the Supreme Court focused on the result of the trial and the sentence imposed.

Seven years after *Argersinger*, the Supreme Court again took up the question of an indigent defendant's right to counsel in *Scott v. Illinois*.⁵⁰ Aubrey Scott, an indigent, was convicted of shoplifting and was fined \$50—but not sentenced to jail—after a bench trial in an Illinois state court.⁵¹ Under the applicable Illinois statute, the maximum sentence was a \$500 fine and one year in jail, or both.⁵² The Supreme Court held that the Sixth and Fourteenth Amendments do not require a state to appoint counsel for an indigent who is charged with a statutory offense for which jail is authorized but not imposed.⁵³ In other words, the *Scott* court held, regardless of the authorized punishment, no indigent may be sentenced to jail if he has not been represented by counsel.⁵⁴

Once again, and more forcefully this time, the Supreme Court emphasized the penalty imposed rather than the fairness of the trial preceding imposition of the penalty. In so doing, it turned the Sixth Amendment right to counsel on its head. *Powell* may have involved a capital offense, but the underlying theory of Justice Sutherland's opinion was the absolute necessity of ensuring a fair trial for indigents. The *Scott* court turned its back on this enlightened approach.

The reasoning of Justice Rehnquist is often overlooked in the justified criticisms of his opinion.⁵⁵ He noted the difficulty of constitutional line drawing, "as the reach of the Constitution is ex-

49. *Id.* at 37.

50. 440 U.S. 367 (1979).

51. *See id.* at 368.

52. *See id.* (footnote omitted).

53. *See id.* at 373-74.

54. *See id.* at 374.

55. For an excellent commentary on *Scott*, see *The Supreme Court, 1978 Term*, 93 Harv. L. Rev. 62, 82-88 (1979).

tended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another."⁵⁶ He further commented that "[t]he range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the 'petty' offense part of the spectrum."⁵⁷ The clear inference is that federal jurisprudence should not intrude unnecessarily into the areas of human conduct more properly regulated by the states. The logical conclusion is that it is the responsibility of the states to ensure that indigents charged with misdemeanors receive a fair trial, regardless of what penalties may be authorized or actually imposed.

II. THE STATES AND THE RIGHT TO COUNSEL

The right to counsel is firmly embedded in American jurisprudence. How the states have provided—or failed to provide—counsel for indigents charged with misdemeanors is a legal patchwork. No state denies the right to counsel for people accused of crimes. Generally speaking, the states have included the right to counsel in their constitutions and most states make some provision for it by statute or by court rule as well.

The reason for the inclusion of a right to counsel in the Bill of Rights and in state constitutions lies in the English common law. Originally, under the common law, a person accused of treason or a felony was not entitled to counsel (procured and paid by the accused), except for the determination of legal questions which the accused might raise. "The rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers," among them Blackstone in his *Commentaries*.⁵⁸ By the time of the adoption of the Constitution in 1787, twelve of the thirteen colonies had definitely rejected the English rule and instead, had recognized the right to counsel "in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes. . . ."⁵⁹

The intent of the framers of the Bill of Rights in 1795 was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right

56. *Scott*, 440 U.S. at 372.

57. *Id.*

58. *Powell v. Alabama*, 287 U.S. 45, 60-61 (1932).

59. *Id.* at 64-65.

to be represented by counsel, presumably of his own choice and at his own expense. The states followed suit with similar constitutional guarantees of counsel in "criminal prosecutions" and even in "all criminal prosecutions."⁶⁰

Nevertheless, there is a wide disparity among the states as to whether indigents charged with misdemeanors are entitled to appointed counsel. The range is extreme. South Carolina has a constitutional provision guaranteeing right to counsel,⁶¹ but limits it by statute to those instances required by the United States Constitution,⁶² which means South Carolina adheres to *Scott* and *Argersinger*. This view is shared by only twelve other states.⁶³

The majority of the states—36 in all—have expanded the right to counsel for indigents charged with misdemeanors.⁶⁴ These states have clearly reserved the power to develop additional constitutional or statutory rights. Although most states have not said as much through their supreme courts, a few states, such as Alaska, not only reserve, but also proclaim the right to develop additional constitutional rights and privileges under their respective constitutions "if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."⁶⁵

The readiness of the state courts to expand rights beyond the minimal limits established by *Scott*, is best expressed by the Vermont Supreme Court's metaphor that the Vermont constitution is "freestanding," and may require a closer examination of the issues than is required under the Fourteenth Amendment.⁶⁶

60. *Id.* at 61-64.

61. *See* S.C. Const. art. I, § 14.

62. *See* S.C. Code Ann. § 17-3-10 (Law. Co-op. 1976).

63. *See supra* note 7 for a list of states adhering to the minority view.

64. *See supra* notes 8-12 for a list of states that have expanded the right to counsel for indigents charged with misdemeanors.

65. *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970). *See also* Alaska Const. art. I, § 11 (guaranteeing right of accused to counsel); *Resek v. State*, 706 P.2d 288, 291 n.11 (Alaska 1985) (holding that "[t]he right to counsel under the Alaska Constitution is more expansive than the corresponding right under the Sixth Amendment to the United States Constitution").

66. *Hodgeman v. Jard Co.*, 599 A.2d 1371, 1372-73 (Vt. 1991). Although this case dealt with issues relating to workers' compensation, the willingness of the Vermont Supreme Court to act independently and according to its own notions of the law is important.

Several states have made it abundantly clear that their citizens enjoy broader rights under their respective state constitutions than they do under the United States Constitution. Minnesota has established "a broad-based right to counsel which goes beyond the dictates of *Scott v. Illinois*. . . ."⁶⁷ The Indiana Supreme Court reversed a misdemeanor conviction after the trial court failed to inform the accused of his right to counsel pursuant to the Indiana state constitution.⁶⁸

Washington,⁶⁹ Oregon,⁷⁰ Illinois⁷¹ and New Hampshire⁷² have also taken stands based explicitly on the rights guaranteed by their respective state constitutions, which are significantly broader than the holdings of *Scott* and *Argersinger*.

It is ironic that while the United States Supreme Court in *Argersinger* and *Scott* has limited the Sixth Amendment right to counsel to those instances where a jail sentence is actually imposed, the right to counsel has been expanded in the District of Columbia to apply in all cases where an accused faces a loss of liberty upon conviction.⁷³ In construing the Criminal Justice Act, the District of Columbia Court of Appeals concluded that Congress did not intend that "the right to counsel should depend on the sentence eventually imposed by the trial judge, or that the judge

67. *State v. Nordstrom*, 331 N.W.2d 901, 904 (Minn. 1983). The Minnesota Constitution provides: "[i]n all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of counsel in his defense." Minn. Const. art I, § 6.

68. *See Brunson v. State*, 394 N.E.2d 229, 231 (Ind. Ct. App. 1979). The Indiana Constitution provides: "[i]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel. . . ." Ind. Const. art. I, § 13. After conviction of a misdemeanor, Brunson was sentenced to pay a fine and to a jail term. *See Brunson*, 394 N.E.2d at 230. This case was decided seven years after *Argersinger* (1972) and six months after *Scott* (1979). The point still remains that the Indiana Supreme Court looked to the state constitution to ascertain Brunson's rights.

69. *See* Wash. Const. art. I, § 22; Wash. Ct. R. Crim. P. 3.1(a), (d); *State v. Fitzsimmons*, 620 P.2d 999 (Wash. 1980).

70. *See* Or. Const. art. I, § 11; *Gaffey v. State*, 637 P.2d 634, 636-37 (Or. Ct. App. 1981) (holding that Oregon law is broader than *Argersinger* and that the right to counsel attaches in all criminal prosecutions).

71. *See* Ill. Const. art. I, § 2; *People v. Dass*, 589 N.E.2d 1065, 1067 (Ill. App. Ct. 1992) (specifically holding that the right to counsel in Illinois "is broader than the constitutional right as defined by *Scott* and *Argersinger*"). The right to counsel is guaranteed under the theory of due process. *See People v. McCauley*, 645 N.E.2d 923, 937 (Ill. 1994).

72. *See* N.H. Const. part I, art. XV; *State v. Scarborough*, 470 A.2d 909 (N.H. 1983).

73. *See* D.C. Code Ann. § 11-2602 (1981).

should be permitted to dispense with providing legal representation for a poor defendant after the fact, by not sentencing him to prison."⁷⁴

The North Dakota Supreme Court recognized that the underlying purpose of the right to counsel under the state constitution is to enable "*an accused to procure a fair trial.*"⁷⁵ The North Dakota court also repudiated an explanatory note to the state rules of criminal procedure, which indicated the rules expressly followed *Argersinger*, by saying, "in North Dakota the right to counsel . . . is [not] to be limited by or to the holdings of the United States Supreme Court."⁷⁶

III. THE MAJORITY VIEW

The majority of American jurisdictions—thirty-five states and the District of Columbia—have rejected the minimal standards established by the Supreme Court in *Argersinger* and *Scott* and have expanded the right to counsel for indigents charged with misdemeanors. This expansion has not been uniform and varies substantially from one jurisdiction to another. Unfortunately, the criteria for appointment of counsel in the majority of jurisdictions relate to the imposition of punishment, rather than to the guarantee of a fair trial. The purpose for appointing counsel is to ensure a fair trial and, for this reason, the right to counsel is fundamental to the concept of due process.

The various criteria used by the majority of jurisdictions falls into four main categories.

1. *When the Offense is Punishable by a Jail Sentence*

Twenty states and the District of Columbia will appoint counsel for indigents charged with misdemeanors, if a jail sentence is authorized upon conviction. Generally speaking, the underlying notion is a literal interpretation of a constitutional or statutory right of counsel in "all criminal prosecutions."⁷⁷ Those that follow

74. *Olevsky v. District of Columbia*, 548 A.2d 78, 85 (D.C. 1988) (footnote omitted).

75. *State v. Orr*, 375 N.W.2d 171, 178 (N.D. 1985) (citation omitted) (emphasis added).

76. *Id.* at 178 n.6.

77. *Supra* note 60 and accompanying text.

the aforementioned procedure include: Alaska,⁷⁸ California,⁷⁹ Delaware,⁸⁰ District of Columbia,⁸¹ Illinois,⁸² Indiana,⁸³ Kentucky,⁸⁴ Louisiana,⁸⁵ Massachusetts,⁸⁶ Minnesota,⁸⁷ Nebraska,⁸⁸ New

78. See Alaska Const. art. I, § 11; *Gregory v. State*, 550 P.2d 374, 378 (Alaska 1976) (holding that the Alaska Constitution guarantees the right to appointed counsel, even when the charge is a misdemeanor); *Alexander v. City of Anchorage*, 490 P.2d 910, 915-16 (Alaska 1971) (holding that an indigent defendant is entitled to representation by counsel when prosecuted for an offense in which the penalty may be incarceration, loss of a valuable license or a fine that indicates criminality); *Pananen v. State*, 711 P.2d 528, 531-32 (Alaska Ct. App. 1985) (emphasizing the overriding importance of fairness in appointing counsel for an indigent charged with a misdemeanor).

79. See Cal. Const. art. I, § 15; Cal. Penal Code § 686 (West 1985); *Tracy v. Municipal Ct.*, 587 P.2d 227 (Cal. 1978) (stating that indigent defendants charged with possession of less than an ounce of marijuana were entitled to assistance of appointed counsel); *Mills v. Municipal Ct.*, 515 P.2d 273, 282 (Cal. 1973) (explaining why the right to appointed counsel for indigent clients who have been charged with a misdemeanor should not be limited to those cases where there is the possibility of jail time).

80. See Del. Const. art. I, § 7; Del. Code Ann. tit. 29, § 4602 (1997); Del. Super. Ct. R. Crim. P. 44; Del. Common Pleas R. Crim. P. 44(a); Del. Justice of the Peace R. Crim. P. 44.

81. See D.C. Code Ann. § 11-2602 (1981); *Olevsky v. District of Columbia*, 548 A.2d 78 (D.C. 1988).

82. See Ill. Const. art. I, § 2; *People v. McCauley*, 645 N.E.2d 923 (Ill. 1994); *People v. Dass*, 589 N.E.2d 1065, 1067-68 (Ill. App. Ct. 1992) (holding that a defendant sentenced to "supervision" is entitled to appointed counsel); *People v. Morgese*, 418 N.E.2d 1124, 1128 (Ill. App. Ct. 1981) (holding that a defendant sentenced to probation is entitled to counsel).

83. See Ind. Const. art. I, § 13; *Brunson v. State*, 394 N.E.2d 229 (Ind. Ct. App. 1979).

84. See Ky. Const. art. I, § 11; Ky. Rev. Stat. Ann. §§ 31.100(1), (4)(b) (Michie 1998).

85. See La. Const. art. I, § 13; *State v. Peart*, 621 So.2d 780 (La. 1993); *State v. Fraychineaud*, 620 So.2d 338 (La. App. Ct. 1993).

86. See Mass. Const. part I, art. XII; Mass. Sup. Jud. Ct. R. 3:10 (proscribing the terms and conditions required in the process of assigning counsel to indigents); *MacDonnel v. Commonwealth*, 230 N.E.2d 821 (Mass. 1967) (holding the right to appointed counsel for indigents in Massachusetts stems from the court rule and not the Massachusetts Constitution).

87. See Minn. Const. art. I, § 6; Minn. R. Crim. P. 5.01(b), 5.02(2) (defining the terms and conditions required in the process of assigning counsel to indigents); *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983) (indicating that the Minnesota Constitution and the Minnesota Rules of Criminal Procedure require a defendant, if indigent, be informed of his right to counsel and his right to have counsel appointed); *State v. Ferris*, 540 N.W.2d 891 (Minn. Ct. App. 1995) (holding that, although not indigent under the standards of the Minnesota Rules of Criminal Procedure, a defendant may obtain court appointed counsel if retaining private counsel would create substantial hardship).

Hampshire,⁸⁹ New York,⁹⁰ Oklahoma,⁹¹ Oregon,⁹² Tennessee,⁹³ Virginia,⁹⁴ Washington,⁹⁵ West Virginia,⁹⁶ Wisconsin⁹⁷ and Wyo-

88. See Neb. Const. art. I, § 11; Neb. Rev. Stat. § 29-3902 (1995) (proscribing rules and procedures for determining necessity of court appointed counsel); *State v. Green*, 471 N.W.2d 402 (Neb. 1991) (holding that defendant knowingly, intelligently and voluntarily waived the right to counsel); *State v. Sondag*, 335 N.W.2d 306 (Neb. 1983) (holding that, without a knowing and intelligent waiver, a defendant cannot be imprisoned if he was not represented at trial, without a determination of his ability or desire to retain counsel).

89. See N.H. Const. part I, art. XV; N.H. Rev. Stat. Ann. § 604-A:2 (Supp. 1999) (explaining the qualifications for adequate representation of counsel for indigent defendants in criminal cases); *State v. Scarborough*, 470 A.2d 909 (N.H. 1983) (holding that a defendant's right to counsel under the New Hampshire Constitution covers a broader range of criminal defendants than such right granted by the 6th and 14th Amendments to the United States Constitution).

90. See N.Y. Crim. Proc. Law § 170.10(3)(c) (McKinney 1993); *People v. Ross*, 493 N.E.2d (N.Y. 1986) (holding that a defendant who expressed reservations regarding continuing *pro se*, and was not subject to imprisonment for a misdemeanor conviction, was entitled to affirmative action by the court to effectuate his right to counsel).

91. See Okla. Const. art. II, § 20; Okla. Stat. Ann. tit. 22, § 1358 (West Supp. 2000) (dictating the process for appointing counsel to all indigents); *Stewart v. State*, 495 P.2d 834 (Okla. Crim. App. 1972) (holding that defendant knowingly and voluntarily waived his right to counsel and, therefore, defendant's prior conviction was not unconstitutional); *Hunter v. State*, 288 P.2d 425 (Okla. Crim. App. 1955) (upholding prior conviction where the defendant knowingly and intelligently waived his right to counsel).

92. See Or. Const. art. I, § 11; Or. Rev. Stat. § 135.050(4) (Supp. III 1998) (indicating the criteria needing to be successfully met in order to obtain court appointed counsel); *Gaffey v. State*, 637 P.2d 634 (Or. Ct. App. 1981) (holding that traffic crimes were not an exception to the Oregon constitutional provision that all indigents were entitled to counsel for criminal prosecutions).

93. See Tenn. Const. art. I, § 9; *Allen v. McWilliams*, 715 S.W.2d 28 (Tenn. 1986) (striking in its entirety Rule 13 of the Supreme Court of Tennessee and revising it to include compensation for court appointed counsel).

94. The Virginia Constitution is silent on the right to counsel. Prior to *Argersinger*, indigents had no right to appointed counsel. See Andrew P. Miller & Vann H. Lefroe, *Gideon's Encore: The Argersinger Decision in Virginia*, 30 Wash. & Lee L. Rev. 431, 443 (1973). However, the Code of Virginia now provides that if a charge "involves incarceration," the trial judge must ascertain if the accused wishes to waive counsel and, if not, the judge will make a determination of indigence. See Va. Code Ann. § 19.2-160 (Michie 1995); *Harris v. Commonwealth*, 455 S.E.2d 759 (Va. Ct. App. 1995) (holding that absent a knowing waiver, an unconstitutional conviction may not stand); *Griswold v. Commonwealth*, 453 S.E.2d 287 (Va. Ct. App. 1995) (same).

95. See Wash. Const. art. I, § 22; Wash. Super. Ct. R. Crim. P. 3.1(a), (d); *State v. Fitzsimmons*, 620 P.2d 999 (Wash. 1980). *But see State v. Lang*, 705 P.2d 245 (Wash. 1985) (holding that no constitutional or statutory provision exists requiring a defendant charged only with negligent driving be provided court appointed counsel).

ming.⁹⁸ With the exception of Illinois, the other state constitutions provide for a right to counsel in criminal prosecutions, which has been implemented either by statute, rule of court or case law.

2. *When the Offense is Punishable by a Jail Sentence Above a Specified Minimum Term*

Ten states have taken a slightly more restrictive approach by requiring appointment of counsel for indigents charged with misdemeanors only if a jail sentence exceeds a certain minimum. The underlying rationale in most of these jurisdictions is based on the distinction between misdemeanors and petty offenses, and historic reluctance to appoint counsel to defend indigents when charged with petty offenses. These jurisdictions are: Idaho,⁹⁹ Iowa,¹⁰⁰ Maine,¹⁰¹ Maryland,¹⁰² Michigan,¹⁰³ New Mexico,¹⁰⁴ Ohio,¹⁰⁵

96. See W. Va. Const. art. III, § 14; W. Va. Code § 50-4-3 (1994); *Bullett v. Staggs*, 250 S.E.2d 38 (W. Va. 1978).

97. See Wis. Const. art. I, § 7; *Wisconsin ex rel. Winnie v. Harris*, 249 N.W.2d 791 (Wis. 1977).

98. See Wyo. Const. art. I, § 10; Wyo. Stat. Ann. § 7-6-104 (Michie 1999).

99. See Idaho Const. art. I, § 13; Idaho Code §§ 19-851(d)(2), 19-852(a)(1) (1997); *State v. Hardman*, 818 P.2d 782 (Idaho Ct. App. 1991) (indicating indigent defendant entitled to appointed counsel for any misdemeanor which includes the possibility of imprisonment for more than six months).

100. See Iowa Const. art. I, § 10; Iowa R. Crim. P. 26; *State v. Watts*, 186 N.W.2d 611 (Iowa 1971) (citing *Wright v. Denato*, 178 N.W.2d 339 (Iowa 1970)) (stating indigent defendant is entitled to appointed counsel when indicted for a misdemeanor carrying a potential sentence of more than thirty days imprisonment).

101. See Me. Const. art. I, § 6; *State v. Dowd*, 478 A.2d 671 (Me. 1984) (discussing the holding of *Newell v. State*, 277 A.2d 731 (Me. 1971), that an indigent defendant is not entitled to appointed counsel for "petty offenses," but is entitled to appointed counsel for "serious misdemeanors," i.e., offenses with a potential of six months or more of jail time).

102. See Md. Declaration of Rights, art. XXI; Md. Ann. Code art. 27A, § 4(b) (1997); *State v. Bryan*, 395 A.2d 475 (Md. 1978) (holding that a defendant must have the assistance of counsel unless waived by him).

103. See Mich. Const. art. I, § 20; Mich. Comp. Laws Ann. § 763.1 (West 1982); *People v. Harris*, 206 N.W.2d 478 (Mich. 1973). See also Mich. Ct. R. 6.610(D) (indicating an indigent defendant entitled to appointed counsel if conviction of charged misdemeanor is punishable by more than ninety-two days imprisonment).

104. See N.M. Const. art. II, § 14; N.M. Stat. Ann. § 31-16-3 (Michie 1984) (articulating that an indigent defendant is entitled to appointed counsel, if conviction of a misdemeanor carries a possible sentence of six months confinement or more); 43 Op. Att'y Gen. 1, 2 (1987). ("requiring that no indigent criminal, whether accused of a felony or a misdemeanor, may be sentenced to a term of imprisonment unless the state has afforded the accused the right to assistance of appointed counsel").

Pennsylvania,¹⁰⁶ Rhode Island,¹⁰⁷ South Dakota¹⁰⁸ and the federal courts.¹⁰⁹

3. *When the Offense is Punishable by a Substantial Fine*

Three states require the appointment of counsel for indigents when, in addition to imprisonment, a substantial fine or "consequences of magnitude" could result. They are: New Jersey,¹¹⁰ North Carolina¹¹¹ and Vermont.¹¹²

105. See Ohio Const. art. I, § 10; Ohio R. Crim. P. 44(A) (requiring assignment of counsel to defendant charged with "serious offenses," i.e., punishable by more than six months jail time); Ohio R. Crim. P. 44(B) (prohibiting sentencing to jail of defendants convicted of petty offenses without representation of counsel or a knowing waiver).

106. See Pa. Const. art. I, § 9; 18 Pa. Cons. Stat. Ann. § 106(c)(2) (West 1992) (defining a summary offense as one with a maximum of ninety days jail time); Pa. R. Crim. P. 316(a) (requiring assignment of counsel for indigents in all summary cases without any of the qualifications in *Scott*). The comment to Rule 316 explains that it is intended to implement the *Argersinger* decision, but the language of the rule is much broader. See Pa. R. Crim. P. 316 cmt.

107. See R.I. Const. art. I, § 10; *State v. Moretti*, 521 A.2d 1003 (R.I. 1987) (discussing that an indigent defendant is entitled to appointed counsel if the charge is punishable by more than six months jail time); *State v. Holliday*, 280 A.2d 333 (R.I. 1971). *But see In re Advisory Opinion to the Governor*, 666 A.2d 813, 817 (R.I. 1995) (indicating that the *Holliday* holding should be revisited and the state constitution should be interpreted "in a manner consistent with the United States Supreme Court's interpretation of the Sixth Amendment in *Scott*"). Although an advisory opinion is not precedential, it does give an indication of the thinking of the individual justices of the Rhode Island Supreme Court, and may presage Rhode Island's departure from the majority view in a future case.

108. See S.D. Const. art. VI, § 7; S.D. Codified Laws §§ 22-6-2, 23A-40-61, 23A-40-6.1 (Michie 1998). (If the defendant requests, the court shall appoint counsel for any offense carrying a penalty of more than thirty days imprisonment. However, if the judge states on the record that jail time will not be imposed, the defendant has no right to appointed counsel.)

109. See 18 U.S.C. §§ 3006A(a), (b), 3559(a)(6) (West 1999) (describing that an indigent defendant is entitled to appointed counsel for any offense with a penalty of more than six months imprisonment).

110. See N.J. Const. art. I, § 10; *Rodriguez v. Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971) (holding that counsel must be appointed for indigents when conviction "entail[s] imprisonment in fact or other consequence of magnitude"); *State v. Hermanns*, 650 A.2d 360 (N.J. Super. 1994) (overturning a municipal court conviction of numerous ordinance violations and a fine totalling \$1,800 because an indigent defendant was denied counsel).

111. See N.C. Const. art. I, § 23; N.C. Gen. Stat. § 7A-451(a)(1) (1999) (holding that, among other things, an indigent is entitled to counsel if conviction carries a penalty or imprisonment with a fine of \$500 or more); *State v. Speights*, 182 S.E.2d 204 (N.C. Ct. App. 1971) (holding that there is no right to appointed counsel for petty offenses).

4. *When There is a Likelihood of Jail*

In Kansas¹¹³ and Missouri,¹¹⁴ an indigent charged with a misdemeanor is entitled to appointed counsel if there is a likelihood of a jail sentence upon conviction.

IV. THE MINORITY: *ARGERSINGER* AND *SCOTT* JURISDICTIONS

The states that so far have failed to expand the right to counsel for indigents charged with misdemeanors beyond the admitted minimum standards established in *Scott* and *Argersinger* are: Alabama,¹¹⁵ Arizona,¹¹⁶ Arkansas,¹¹⁷ Colorado,¹¹⁸ Connecticut,¹¹⁹

112. See Vt. Const. art. I, § 10; Vt. Stat. Ann. tit. 13, § 5201 (1998) (requiring the appointment of counsel for an indigent charged with a misdemeanor carrying a penalty involving a fine of more than \$1,000 "or any period of imprisonment" unless the judge states he will not impose jail time).

113. See Kan. Const. Bill of Rights § 9; Kan. Stat. Ann. §12-4405 (1991) (requiring municipal court judges to appoint counsel for indigents charged with ordinance violations when the municipal judge "has reason to believe that if found guilty, the accused person might be deprived of his or her liberty"; Kan. Stat. Ann. § 22-4503 (1995) (requiring appointment of counsel for indigents charged with felonies); Kansas *ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987) (dictating that the state must provide counsel for indigents charged with misdemeanors "when imprisonment is a real possibility").

114. See Mo. Const. art. I, § 18(a); Mo. Ann. Stat. § 600.042 (West 1999) (requiring appointment of counsel for indigents charged with a misdemeanor "which will probably result in confinement in the county jail upon conviction").

115. See Ala. Const. art. I, § 6; Ala. R. Crim. P. 6.1(a) (stating that an indigent is entitled to appointment of attorney "in all criminal proceedings in which representation by counsel is constitutionally required"); *Reese v. State*, 620 So.2d 579, 580 (Ala. 1993) (holding that the right to counsel in misdemeanor cases applies "only when the defendant is actually sentenced to jail") (citations omitted).

116. See Ariz. Const. art. II, § 24; Ariz. R. Crim. P. 6.1(b) (stating that "[a]n indigent defendant shall be entitled to have an attorney appointed . . . in any criminal proceeding which may result in punishment by loss of liberty. . ."); *Campa v. Fleming*, 656 P.2d 619 (Ariz. Ct. App. 1982) (following *Scott* on grounds that there is no authority holding that Arizona standards are more strict than those required by the U.S. Constitution).

117. See Ark. Const. art. II, § 10; Ark. R. Crim. P. 8.2(b).

118. See Colo. Const. art. II, § 16; Colo. Rev. Stat. Ann. § 21-1-103 (West 1999) (requiring the public defender to represent indigents, unless the prosecutor states in writing that he will not seek jail time upon conviction).

119. See Conn. Const. art. I, § 8; Conn. Gen. Stat. Ann. §§ 51-296, 54-1b (West Supp. 1999); *State v. Florence*, 178 A.2d 862, 863 (Conn. 1961) (holding that a defendant charged with a misdemeanor is not entitled to be advised of the right to counsel, or even entitled to have counsel, at arraignment). *Florence* seems to be good law. No later decisions have explained or expanded the right to counsel.

Florida,¹²⁰ Georgia,¹²¹ Hawaii,¹²² Mississippi,¹²³ Montana,¹²⁴ North Dakota,¹²⁵ South Carolina¹²⁶ and Texas.¹²⁷ The constitutions of these states contain provisions guaranteeing the right to counsel in criminal prosecutions. Despite these constitutional provisions, these few states have simply failed to expand the right to counsel. This failure is not the result of an arbitrary or authoritarian bent of their supreme courts or legislatures. It rests, for better or for worse, on a reliance on the United States Supreme Court to pronounce the extent of constitutional rights and nothing more.

120. See Fla. Const. art. I, § 16; Fla. R. Crim. P. 3.111(b)(1) (stating that appointment of counsel for an indigent charged with a misdemeanor is not required if the judge states in writing that he will not award jail time upon conviction).

121. See Ga. Const. art. I, § 1, ¶ xiv; *Brawner v. State*, 296 S.E.2d 551, 552 (Ga. 1982) (citing *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)); *Peters v. State*, 435 S.E.2d 731 (Ga. Ct. App. 1993) (specifically adopting the *Scott* rule).

122. See Haw. Const. art. I, § 14; *State v. Apuna*, 657 P.2d 1062, 1064 (Haw. Ct. App. 1983) (specifically adopting the *Scott* rule).

123. See Miss. Const. art. III, § 26; Miss. Code Ann. § 25-32-9 (1999) (prohibiting the imprisonment of an indigent "unless he was represented by the public defender or waived the right to counsel").

124. See Mont. Const. art. II, § 24; *City of Billings v. Layzell*, 789 P.2d 221, 225 (Mont. 1990) (citing *Scott* as controlling authority).

125. See N.D. Const. art. I, § 12; N.D. R. Crim. P. 44 (requiring appointment of counsel for indigents charged with misdemeanors, unless "the magistrate has determined that sentence upon conviction will not include imprisonment"). But, *State v. Orr*, 375 N.W.2d 171 (N.D. 1985), held that a court must appoint counsel for an indigent charged with DUI "if enhancement punishment for a subsequent conviction is not to be precluded." *Id.* at 179. The court in *Orr* also stated that the explanatory note to Rule 44, which states that counsel will be appointed "only when required under the holding . . . in *Argersinger* . . . [does not] indicate any intention that in North Dakota the right to counsel guaranteed by [the North Dakota Constitution] is to be limited by holdings of the United States Supreme Court." *Id.* at 178 n.6.

126. See S.C. Const. art. I, § 14; S.C. Code Ann. § 17-3-10 (Law. Co-op. 1976) (noting that indigent defendants will be provided with counsel when required by the U.S. Constitution).

127. See Tex. Const. art. I, § 10; Tex. Code Crim. P. Ann. art. 26.04 (West 1989) (requiring the court to appoint defense counsel when it "determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent"); *Fortner v. State*, 764 S.W.2d 934 (Tex. Crim. App. 1989) (The prosecutor stated he would not seek jail time. The defendant's request for counsel was thereafter denied; he appeared *pro se* and was convicted. The appellate court upheld the conviction on grounds that there was no requirement under *Scott* and *Argersinger* to appoint counsel.) (citing *Scott*, 440 U.S. 367; *Argersinger*, 407 U.S. 25); *Empy v. State*, 571 S.W.2d 526 (Tex. Crim. App. 1978) (noting that only a fine was actually imposed, although the statute authorized imprisonment; nevertheless, the court held the defendant was not entitled to counsel).

V. THE UNDECIDEDS

Nevada¹²⁸ and Utah¹²⁹ do not have clearly established positions.

VI. PROBLEMS WITH *SCOTT*

The problems with *Scott* are both practical and analytical. The chief practical problem with the application of the *Scott* rule (that an indigent charged with a misdemeanor may not be sentenced to jail without representation by counsel) is that it requires the trial judge to determine in advance of trial what the sentence will be in the event of conviction. The practical problems in making this determination are enormous. How does the trial judge make such a determination: by a hearing in open court, in the presence of the defendant, at which, the prosecutor, or even a representative of the police department, recites the evidence that will be introduced and possibly makes a recommendation? By an *in camera* conference with the prosecutor and the police? At arraignment, for the purpose of encouraging a guilty or *nolo contendere* plea, so as to dispose of another matter on an already over-crowded calendar?

The *Scott* rule binds a judge before all of the evidence has been presented. A trial judge who had previously determined that the sentence upon conviction would not include jail time, may not change his mind and sentence an uncounseled defendant to jail, no matter how much the evidence warrants it. The determination of a sentence should follow a trial, not precede it.

Scott also creates other practical problems. For example, at arraignment, the judge may determine under *Scott* that it is a "non-jail" case. If the defendant cannot make bail, he will be held in custody until his trial a few days or even weeks later. After

128. See Nev. Const. art. I, § 8; Nev. Rev. Stat. § 171.188 (1997) (providing that any defendant charged with an offense, including a misdemeanor, may request counsel and that the court shall appoint counsel if it "[o]therwise determines that representation is required"). Case law does not clarify Nevada's statutory requirement.

129. See Utah Const. art. I, § 12; Utah R. Crim. P. 7(d)(3) (requiring the magistrate to inform the defendant of the right to counsel). See also Utah R. Crim. P. 8 (providing that an indigent defendant "has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty"); *Webster v. Jones*, 587 P.2d 528, 530 (Utah 1978) (holding that where a person is charged with an offense which may be punished by imprisonment, he is entitled to the assistance of counsel) (citing U.S. Const. amend. VI; *Argersinger*, 407 U.S. at 25).

trial, the judge may sentence him to time served as a common-sense disposition, particularly because the defendant lacks the means to pay a fine. But the retrospective nature of "time served," makes the failure to appoint counsel unlawful under *Scott*, and hence a violation of the defendant's Sixth Amendment right to counsel.¹³⁰ *Scott*, in effect, vitiates "time served" sentences, unless the trial court at arraignment and in an abundance of caution appoints counsel for indigents when bail is set. If so, there is very little left to *Scott* in the practical judicial world of the district court, because counsel will be appointed for indigents when bail is set and the trial judge will have flexibility in sentencing.

When the issue was raised before the Rhode Island Supreme Court in 1995, the Office of the Public Defender pointed out that *Scott* creates "a labyrinthine prospect of a defendant going in and out of the right to counsel." A defendant is arrested on a misdemeanor charge of possession of marijuana. Suspected of being part of a drug ring, he or she is questioned, and invokes a Fifth Amendment right to counsel pursuant to *Miranda v. Arizona*.¹³¹ The right to counsel has attached.

The defendant is then charged with misdemeanor possession and the judge, at arraignment, predetermines that the case is "non-jail." The right to counsel vanishes. Three days later, a BCI (Background Criminal Investigation) check reveals an apparent earlier offense and the charge is amended to second-degree possession. The judge then determines that jail *may* be appropriate and the right to counsel re-attaches. At pretrial, where the defendant is represented by counsel, it is revealed that the earlier possession charge was filed on a not guilty plea and the charge is dropped back to simple possession. When the likelihood of jail vanishes, counsel does too.¹³²

As difficult as these practical problems may be, perhaps some *modus vivendi* could be devised to get around them, no matter how cumbersome and how difficult for the practitioner in court and for the trial judge. Nevertheless, using the "authorized penalty" test

130. See "Brief in Chief of the Office of Public Defender as Amicus Curiae," Rhode Island Supreme Court, *In re: Advisory Opinion to the Governor*, No. 95-265 MP, at 39.

131. 384 U.S. 436 (1966).

132. See *supra* note 130, at 43-44.

would eliminate these practical difficulties and broaden a fundamental constitutional right as well.

The chief problem with *Scott*, and its fatal flaw, is that it places emphasis on the sentence eventually imposed, rather than on the conduct of the trial. The essence of due process is judicial fairness. The right to counsel was enshrined in the Bill of Rights and in state constitutions to insure that defendants were, in fact, accorded a fair trial.

A misdemeanor trial is no less important than a trial for a felony. In both trials the prosecution bears the burden of proof beyond a reasonable doubt; the defendant enjoys a presumption of innocence; evidence must be in accord with the rules of evidence; proper procedure must be followed; the findings of the court must constitute an offense; and, if there is a finding of guilty, the sentence must be lawful.

Trial of a misdemeanor is not necessarily a simple matter. It can involve serious First Amendment questions in disorderly conduct, obstruction, trespass and disturbing the peace charges. Driving while intoxicated necessarily involves expert testimony about breathalyzers and calibration of equipment. Simple assault may raise questions of self-defense. Possession of marijuana frequently raises Fourth Amendment questions. The list goes on.¹³³

The main difference between a felony and a misdemeanor is the severity of the sentence the court may impose. Even so, the consequences of a misdemeanor conviction, regardless of the sentence imposed, can be far-reaching and devastating for some people. Justice Powell in his concurring opinion in *Argersinger* observed that "[t]he consequences of a misdemeanor conviction . . . or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'"¹³⁴ A few examples illustrate the point: loss of a driver's license may be more serious than a "brief stay in jail,"¹³⁵ so too may be forfeiture of public office, disqualification from a profession or loss of pension rights.

Conviction of even a misdemeanor can carry enormous and severe consequences, particularly for a low-income or indigent de-

133. *See id.* at 40.

134. 407 U.S. 25, 47-48 (Powell, J., concurring) (footnote omitted).

135. *Id.* at 48. An excellent review of the consequences of a conviction is found in *Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970).

fendant in an increasingly complex and regulated society. Loss of eligibility for federally subsidized housing is one such consequence. Federal regulations permit the manager or landlord to reject an applicant with a history of criminal activity¹³⁶ or for failure to meet financial obligations stemming from a bad check or shoplifting conviction.¹³⁷

These consequences, beyond the sentence of the court for misdemeanor violations, demonstrate the absolute necessity of ensuring that misdemeanor trials, particularly for indigents, are fair and that all of the rights of defendants at trial are preserved. An increasingly complex and regulated society will continue to produce added and even unintended consequences for misdemeanor convictions. It would not be far-fetched to conclude that due process and judicial fairness require the appointment of counsel for indigents even when imprisonment is neither a possibility, nor is it imposed.

VII. CONCLUSION

The problems with *Scott* are inherent in its reliance on the sentence imposed as the touchstone for the right of counsel for indigents. *Scott* loses sight of the purpose of counsel in the first place, which is to ensure that the defendant has a fair trial. The colonies' rejection of the harsh English rule in favor of granting defendants the right to counsel in felonies was the first step in the development of the law to keep pace with changes in society. *Powell* and *Gideon* are significant milestones in the journey towards the goal of equal justice for all.

The overwhelming majority of American jurisdictions have rejected *Scott*. They use the standard of authorized or potential punishment, not punishment actually imposed, to determine when indigents are entitled to appointed counsel. As society changes, other standards will be necessary to ensure that all persons are afforded their constitutional rights. The New Jersey Supreme Court may be leading the way with its holding that "simple justice" requires that "no indigent defendant should be subjected to a conviction entailing imprisonment in fact or *other consequence of mag-*

136. See 24 C.F.R. § 960.205(b)(3) (1999).

137. See *id.* § 960.205(b)(1).

nitude without first having had due and fair opportunity to have counsel assigned without cost.”¹³⁸

138. *Rodriguez v. Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971) (emphasis added).

