North Dakota Law Review

Volume 56 | Number 3 Article 8

1979

Constitutional Law Right to Counsel - No Indigent Criminal Defendant May Be Sentenced to a Term of Imprisonment Unless He Has Been Afforded Right to Appointed Counsel

Monty G. Mertz

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—NO INDIGENT CRIMINAL DEFENDANT MAY BE SENTENCED TO A TERM OF IMPRISONMENT UNLESS HE HAS BEEN AFFORDED RIGHT TO APPOINTED COUNSEL

Petitioner was convicted of theft[1] in an Illinois state court and fined $50.00, without being represented by defense counsel at his trial.[2] Petitioner appealed his conviction to the Illinois Supreme Court, contending that, because a term of imprisonment was an authorized penalty for the crime he had been charged with,[3] the sixth[4] and fourteenth[5] amendments to the United States

1. Scott v. Illinois, 440 U.S. 367, 368 (1979). Petitioner Aubrey Scott's conviction was based upon a violation of chapter 38, section 16-1(A) (1) of Illinois Revised Statutes. The penalty provision of the statute at the time in question provided:

> A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to five years. . . .

ILL. REV. STAT. ch. 38, § 16-1(A)(1) (1969).

2. 440 U.S. at 368. On January 19, 1972, petitioner was apprehended for shoplifting merchandise at the F. W. Woolworth store in Chicago, Illinois. He posted bond and was released pending a first court appearance in the Circuit Court of Cook County, Illinois, on January 31, 1972. The court advised him that he was charged with theft, and concluded that there was, in fact, probable cause for the charge. Petitioner subsequently indicated that he was ready for trial, the court ordered him arraigned, and he pleaded not guilty. Having waived a jury trial, his bench trial followed immediately, and resulted in conviction and a fine of $50. At no time during the entire proceeding was he ever advised of any right to be represented by counsel. People v. Scott, 68 Ill. 2d 269, 270, 369 N.E.2d 881, 882 (1977).

3. 68 Ill. 2d at 272, 369 N.E.2d at 882.

4. The sixth amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

5. Section one of the fourteenth amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. § 1

Constitution required that he be afforded the right to court-appointed defense counsel at his trial. The Supreme Court of Illinois affirmed the conviction, and held that an indigent criminal defendant is entitled to court-appointed defense counsel only if he is actually incarcerated upon conviction, even though imprisonment was an authorized penalty for the offense charged.[6] The United States Supreme Court affirmed, and *held* that the sixth and fourteenth amendments to the United States Constitution do not require that counsel be appointed for indigent criminal defendants in cases in which incarceration is an authorized penalty but is not actually imposed.[7] *Scott v. Illinois,* 440 U.S. 367 (1979).

The common-law rule in England denied the aid of counsel to a person accused of a felony.[8] Persons accused of misdemeanors, however, were entitled to the full assistance of counsel.[9] It was not until 1836, when an act of Parliament granted the full right to counsel in felony cases, that this rule was abandoned.[10] The rule denying persons accused of a felony the assistance of counsel had been highly criticized, and was rejected by all of the American colonies before the adoption of the United States Constitution.[11] The right to counsel was incorporated into the sixth amendment.[12] In early decisions, however, the courts had held that the sixth amendment right to counsel granted only the right to employ counsel in federal felony prosecutions.[13] It was not until 1972 that the United States Supreme Court, in *Argersinger v. Hamlin,*[14] expressly recognized the right to appointed counsel in all criminal

6. 68 Ill. 2d at 272, 369 N.E.2d at 882. The Supreme Court of Illinois noted in its opinion that Scott had conceded that the United States Supreme Court had not yet extended the right to counsel to prosecutions in which imprisonment is a potential penalty for the crime charged but the conviction results in only a fine. *Id.* The Illinois court based its holding upon Argersinger v. Hamlin, 407 U.S. 25 (1972), and stated that in *Argersinger* "the Supreme Court extended the right to counsel to all criminal prosecutions which resulted in actual imprisonment." 68 Ill. 2d at 272, 369 N.E.2d at 882.

7. 440 U.S. at 373-74.

8. *See* Powell v. Alabama, 287 U.S. 45, 60 (1932).

9. *Id.*

10. *Id.*

11. *Id.* at 61.

12. *Id.* at 61-66. At least twelve of the original thirteen colonies had adopted the right to employ counsel in all criminal prosecutions. *Id.* at 64.

13. For a discussion of the right to counsel in English and early American law, see W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955). *See also* 407 U.S. at 30. The Court in *Argersinger* recognized that the sixth amendment's right to counsel provision had been treated as a retraction of the common-law right to counsel in petty offenses, but expressed its skepticism of such a principle:

> The Sixth Amendment thus extended the right to counsel beyond its common law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided.

407 U.S. at 30.

14. 407 U.S. 25 (1972).

prosecutions which resulted in imprisonment, whether petty, misdemeanor, or felony.[15]

One landmark decision in the line of cases leading up to *Argersinger* was *Powell v. Alabama.*[16] *Powell* took a step toward expanding the constitutional right to counsel to the state by holding that in some circumstances an uncounseled criminal conviction in a state court may be so unfair that it violates a defendant's due process rights.[17] In *Powell,* the Court reversed the uncounseled death sentence convictions of six black youths who had been charged with raping two white girls.[18] Under the facts of the case, the Court found that the failure of the state trial court to afford the defendants reasonable time and opportunity to secure counsel was a denial of due process under the fourteenth amendment.[19] Furthermore, the Court held that, because the defendants were unable to secure counsel or make their own defense, the failure of the trial court to make an effective appointment of counsel was also a denial of due process.[20]

Another important predecessor to *Argersinger* was *Gideon v. Wainwright.*[21] The United States Supreme Court in *Gideon* adopted the reasoning in *Powell,*[22] concluding that the sixth amendment's right to counsel was one of the fundamental rights made obligatory upon the states by the fourteenth amendment.[23] *Gideon* firmly

---

15. *Id.* at 37. The Court in *Argersinger* held that no indigent criminal defendant may be imprisoned for any offense unless he was represented by counsel at his trial. *Id.*

16. 287 U.S. 45 (1932).

17. Powell v. Alabama, 287 U.S. 45, 68-71 (1932).

18. *Id.* at 50, 73.

19. *Id.* at 71. After reviewing the history of the right to counsel and the facts of the case, the Court stated:

> In the light of the facts outlined in the forepart of this opinion — the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by military forces, . . . and above all that they stood in deadly peril of their lives — 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.

Id.

20. *Id.* The Court stated that "under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." *Id.*

21. 372 U.S. 335 (1963).

22. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

23. *Id.* at 342. *Gideon* overruled the earlier case of Betts v. Brady, 316 U.S. 455 (1942). 372 U.S. at 345. The Court in *Betts* had formulated a case-by-case fundamental fairness analysis to determine whether the right to counsel was necessary for a fair trial. 316 U.S. at 473. The *Betts* Court declined to hold that the sixth amendment's right to counsel was one of the fundamental rights made obligatory on the states by the fourteenth amendment. *Id.* at 471. It was on this point that the Court in *Gideon* disagreed:

> We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court

established that the states must provide appointed counsel in felony trials to criminal defendants unable to employ counsel themselves.[24] It was not clear from the Court's decision in *Gideon,* however, whether the right to counsel attached to criminal proceedings other than felony prosecutions.[25] The United States Supreme Court answered this question in *Argersinger,*[26] holding that no person may be imprisoned for an offense, whether petty, misdemeanor, or felony, unless he was represented by counsel at trial.[27] The Court's rationale was that the legal and constitutional questions involved in any case that actually results in imprisonment may be complex.[28] The Court therefore found that, regardless of the crime charged or the potential sentence, the right to counsel should apply if the defendant is imprisoned upon conviction.[29]

In *Argersinger,* the Court was confronted with a conviction for which a sentence of imprisonment was actually imposed.[30] It was not clear from the opinion in *Argersinger* whether the right to counsel would apply if imprisonment was an authorized penalty for the crime charged but was not actually imposed.[31] The Court reached this issue in *Scott v. Illinois.*[32] Petitioner argued that the line of United States Supreme Court cases which culminated in *Argersinger* required that the states provide counsel whenever imprisonment is an authorized penalty for the crime charged, regardless of whether imprisonment is actually imposed.[33] The Court rejected

---

in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

372 U.S. at 342.

24. 372 U.S. at 342-45. Although it is not unmistakably clear from its language, *Gideon* was found by the United States Supreme Court, in Mempa v. Rhay, 389 U.S. 128 (1967), to have conferred an absolute right to court-appointed counsel in state felony prosecutions. *Id.* at 134. Prior to *Gideon,* the Court had recognized a sixth amendment right to court-appointed counsel in all federal felony cases. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

25. *See* 372 U.S. at 342-45.

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

27. *Id.* at 37. The Court in *Argersinger* reversed the conviction of an indigent who had been charged with an offense punishable by six months imprisonment, a $1,000 fine, or both. *Id.* at 26. The case was tried without a jury, and the accused, unrepresented by counsel, was sentenced to ninety days in jail. *Id.*

28. *Id.* at 33. The Court stated:

> The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.

Id.

29. *Id.* The Court further stated that "[t]he trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions. *See* Papachristou v. Jacksonville, 405 U.S. 156 [1972]." *Id.*

30. 407 U.S. at 37.

31. *Id.*

32. 440 U.S. at 368.

33. *Id.*

petitioner's argument, holding that the right to counsel attaches only in cases in which a criminal defendant is actually sentenced to a term of imprisonment, regardless of the authorized penalty.[34] Following the rule thus established, the Court in *Scott* affirmed petitioner's uncounseled conviction because he had not been incarcerated.[35]

The *Scott* Court approached the question of when the right to counsel should attach by attempting to determine the intent of the framers of the sixth amendment.[36] Finding that intent to be unclear, the Court concluded that its prior decisions had gone far beyond whatever the sixth amendment was originally intended to require.[37] The Court recognized that it could not return to the common-law rule, which unreasonably denied the right to counsel in felony cases, and appeared reluctant to retreat from its precedents which had expanded the right to counsel to its status under *Argersinger*.[38] The Court decided, however, not to extend these precedents any further.[39] In spite of suggested alternatives,[40] the

---

34. *Id.* at 369, 373-74.

35. *Id.*

36. *Id.* at 370. The *Scott* Court expressed doubt that the sixth amendment of the United States Constitution was originally contemplated to extend beyond the right to employ a lawyer in federal criminal prosecutions. *Id.* To support this statement, the Court cited W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955). This treatise states that the sixth amendment was intended by its framers only to give a defendant the right to employ counsel in a federal capital case, not to guarantee the appointment of counsel by the government for an indigent in every criminal case. Beany notes, however, that appointment of counsel was, nevertheless, a practice or custom among lower federal courts whenever dictated by the requirements of a fair trial. W. BEANY, *supra*, at 30.

37. 440 U.S. at 372. Referring to the line of cases leading up to *Argersinger*, the Court stated:

> As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. We have now in our decided cases departed from the literal meaning of the Sixth Amendment. And we cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors.

Id.

38. 440 U.S. at 372-73. The *Scott* Court was apparently reluctant to retreat from *Argersinger*, as it discussed its approval of the holding in *Argersinger* and noted that the standard set out therein had been workable. *Id.*

39. *Id.*

40. *See* 440 U.S. at 382-89 (Brennan, J., dissenting). The alternative urged upon the Court in *Scott* by Justice Brennan was the " 'authorized imprisonment' standard that would require the appointment of counsel for indigents accused of any offense for which imprisonment for any time was authorized." *Id.* at 382. Brennan's dissent points out what he terms the "indefensible position" of the Court in its conclusion that the *Argersinger* "actual imprisonment standard" is the only test for determining right to counsel in state misdemeanor cases. *Id.* Brennan proceeded to establish the superiority of an "authorized imprisonment standard" on several points: 1) this standard would more readily implement two principles of the sixth amendment — that the defendant has an interest in avoiding the stigma of a conviction to invoke due process protection under *In Re* Winship, 397 U.S. 358, 363, 364 (1970), and that the authorized penalty is the true measure of the seriousness of an offense under Frank v. United States, 395 U.S. 147, 149 (1969); 2) the standard would not be an administrative problem, because it avoids "the necessity of time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate

Court found that *Argersinger* drew the line for the right to appointed counsel at the point at which a term of imprisonment is actually imposed.[41] The Court also concluded that the central premise of *Argersinger* was that actual incarceration is a punishment different in kind and degree from fines or the mere threat of imprisonment,[42] stressing that *Argersinger* deemed any deprivation of liberty by incarceration a severe sanction.[43] Also, the Court found that *Argersinger* had proved workable in a practical sense.[44] In that light, the Court asserted that any extension of *Argersinger* would create confusion and impose unpredictable burdens upon the states.[45]

There are several questions left open by the *Scott* Court's specific holding that no indigent defendant may be sentenced to a term of imprisonment unless he was represented by counsel at his trial. The Court did not indicate under what circumstances an uncounseled conviction, valid under *Scott,* may be used collaterally against the convicted defendant.[46] One such

---

predictions, unequal treatment, and apparent and actual bias"; 3) the "'authorized imprisonment' test ensures that courts will not abrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense"; 4) problems with the "actual imprisonment standard" necessarily lead to violations of the due process and equal protection clauses; 5) the states' fiscal objections to the "authorized imprisonment standard" are irrelevant and speculative. 440 U.S. at 382-89 (Brennan, J., dissenting).

In a separate dissent, Justice Blackmun suggests a compromise, advocating that the right to counsel extend at least as far as the right to jury trial under Baldwin v. New York, 399 U.S. 66 (1970), which extended the right to jury trial to every case in which a penalty of greater than six months is authorized, or in which the defendant is convicted and actually imprisoned. 440 U.S. at 389-90 (Blackmun, J., dissenting).

41. 440 U.S. at 373-74.

42. *Id.* The Court stated:

> Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova,* we believe that the central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.

Id. (footnote omitted).

43. *Id.* at 372-73.

44. *Id.* at 373.

45. *Id.* In support of his belief that adopting the "authorized imprisonment standard" would not place an undue financial burden upon the states, Brennan's dissent cites extensively to state statutes and cases implementing some form of the standard. *Id.* at 385-86 n.18 (Brennan, J., dissenting). Some empirical work has been done on the impact of *Argersinger* which indicates that, although some states have had difficulty implementing its rule, its requirements have not proved unduly burdensome. *See, e.g.,* Ingraham, *The Impact of Argersinger — One Year Later,* 8 LAW & SOC'Y REV. 615 (1974); S. KRANTZ, RIGHT TO COUNSEL IN CRIMINAL CASES (1976).

46. *See* Giffin v. Blackburn, 594 F.2d 1044, 1046 (5th Cir. 1979). In *Giffin,* the court held that an uncounseled misdemeanor conviction which did not result in imprisonment was properly used to impeach the defendant in a subsequent armed robbery prosecution. *Id.* The court in *Giffin* characterized the holding in *Scott* as follows:

> The Court's opinion is short, broad, and grounded in basic principles. It displays no disposition to distinguish between possible effects, uses or consequences of such convictions. The authorities it cites as being in conflict are quite disparate, factually.

question presented by *Scott's* actual imprisonment test is whether a person who was not represented by counsel may be given a suspended sentence or probation which does not include incarceration, but which later may be revoked.[47] The holding in *Scott* stated that no indigent defendant may be "sentenced to a term of imprisonment" unless he has been provided with the right to appointed counsel.[48] A suspended sentence or term of probation is arguably not a sentence to an actual term of imprisonment.[49] It is possible, however, that the suspended sentence or probation may later be revoked and imprisonment imposed. It is unclear from the opinion in *Scott* whether such imprisonment following an uncounseled conviction would be violative of the sixth and fourteenth amendments.[50]

The holding in *Scott* also left open the question of whether an uncounseled conviction which does not result in incarceration may be used under an enhancement statute providing for more severe penalties for multiple offenders.[51] The original uncounseled con-

---

Logically, if a conviction is valid for purposes of imposing its own pains and penalties — the "worst" case — it is valid for all purposes.

Id.

47. *See, e.g.*, People v. Baldasar, 52 Ill. App. 3d 305, 367 N.E.2d 459 (1977), *rev'd on other grounds*, ___ U.S. ___, 100 S. Ct. 1585 (1980). In *Baldasar*, the Illinois Appellate Court found that an uncounseled conviction which resulted in a term of probation was not a conviction which resulted in a term of imprisonment, and was therefore valid under Argersinger v. Hamlin, 407 U.S. 25 (1972). 52 Ill. App. 3d at 307-10, 367 N.E.2d at 461-63. *See also* Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973). *Cottle* held that an uncounseled misdemeanor conviction which resulted in a twenty-day suspended sentence was not a conviction which resulted in actual imprisonment, and was valid. *Id.* at 275.

48. 440 U.S. at 374.

49. *See supra* note 47, and accompanying text.

50. The question is raised whether an uncounseled conviction which resulted in probation or a suspended sentence would be invalidated by a subsequent revocation and incarceration. The revocation could be treated similar to contempt for failure to pay a fine, *see infra* note 55, and the incarceration upon revocation would thereby arguably be imposed for a subsequent act, and not for the original uncounseled conviction. The uncounseled conviction would then not be rendered invalid, because it did not result in imprisonment. *See* 440 U.S. at 373-74.

51. The United States Supreme Court answered this question in Baldasar v. Illinois, ___ U.S. ___, 100 S. Ct. 1585 (1980) (per curiam). Petitioner had been convicted of misdemeanor theft, and was fined $159 and sentenced to one year's probation. He was not represented by counsel in the proceedings, and did not formally waive counsel. Petitioner was subsequently convicted again under the same misdemeanor theft statute, which provided for an enhanced penalty for multiple offenders. During the second trial, defense counsel argued that the first uncounseled misdemeanor conviction could not be used for enhancement of the second offense to a felony. Petitioner was ultimately convicted under the enhancement provision, and was sentenced to imprisonment for one to three years. *Id.* at ___, 100 S. Ct. at 1586. The Illinois Appellate Court affirmed petitioner's conviction, holding that he had been imprisoned for the second theft, not the first. The court further found that the first uncounseled conviction was valid because it did not result in incarceration, and was therefore properly used under the enhancement statute, citing Agersinger v. Hamlin, 407 U.S. 25 (1972). People v. Baldasar, 52 Ill. App. 3d 305, 307, 310, 367 N.E.2d 459, 462-63 (1977), *rev'd per curiam*, ___ U.S. ___, 100 S. Ct. 1585 (1980).

The United States Supreme Court reversed Baldasar's conviction, *per curiam*, for the reasons set forth in three concurring opinions. Baldasar v. Illinois, ___ U.S. ___, 100 S. Ct. 1585 (1980). Justice Stewart stated that Baldasar "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Id.* at ___, 100 S. Ct. at 1587 (Stewart, J., concurring) (emphasis in original). He therefore concluded that the prison term for the second conviction clearly violated the "constitutional rule" of *Scott*. *Id.*

viction would unquestionably be valid under *Scott* because it did not result in a sentence to a term of imprisonment.[52] Without using the first uncounseled conviction in conjunction with a second conviction, however, the greater penalty under the enhancement statute would not be available. Thus, as a direct or collateral result of the original uncounseled conviction, incarceration for an additional period may be possible.[53]

Another potential problem not addressed in *Scott* arises when a person is sentenced to pay a fine and is later jailed for failure to pay the fine.[54] Refusal to pay a fine arguably constitutes civil contempt, and incarceration on the contempt charge is therefore unrelated to the original conviction leading to the fine itself. Thus, the incarceration would be for contempt, not for the uncounseled conviction, and such incarceration would therefore not be constitutionally impermissible.[55]

One other question left open is whether *Scott's* holding can be applied to the right to counsel on appeal. The North Dakota Supreme Court recently confronted this problem in *State v. Mees*,[56]

In his concurring opinion in *Baldasar*, Justice Marshall's central theme was that petitioner had clearly been deprived of his liberty as a consequence of the first uncounseled conviction, stating that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." ___ U.S. at ___, 100 S. Ct. at 1588-89. (Marshall, J., concurring). Justice Marshall went on to state that "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases." *Id.* at ___, 100 S. Ct. at 1589 (footnote omitted).

Justice Blackmun adhered to the position, which he had espoused in his dissent in Scott v. Illinois, 440 U.S. 367, 389-90 (1979) (Blackmun, J., dissenting), that all ciminal defendants should be entitled to court-appointed counsel if charged with an offense punishable by more than six months' imprisonment. ___U.S. at ___, 100 S. Ct. at 1585 (Blackmun, J., concurring). Blackmun concluded that, beacause petitioner was prosecuted for an offense punishable by more than six months' imprisonment, he was entitled to counsel at the first misdemeanor proceeding. The first conviction was therefore invalid and could not be used under the enhancement provision. *Id.* at ___, 100 S. Ct. at 1589-90.

52. *See* 440 U.S. at 373-74.

53. The various opinions in *Baldasar* made it clear that an uncounseled conviction, valid under *Scott*, may not be used under an enhancement statute to impose a sentence of incarceration for a second offense. *See, e.g.*, ___ U.S. at ___, 100 S. Ct. at 1588-89 (Marshall, J., concurring). Relying on the holding in *Baldasar*, one might argue that an uncounseled conviction may never be used for any collateral purpose, such as impeachment of a defendant's testimony or consideration in subsequent sentencing determinations. *See* ___ U.S. at ___, 100 S. Ct. at 1592 (Powell, J., dissenting).

54. *See* Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975). The Supreme Court of Mississippi found that *Argersinger* did not prohibit a sentence of a fine to be converted later into imprisonment if the defendant failed to pay the fine after reasonable measures designed to aid payment of the fine proved unsuccessful. *Id.* at 546. The court in *Nelson* found that *Argersinger* did not direct that a defendant may never be imprisoned as a collateral consequence of an uncounseled conviction. *Id.*

55. *Id.* at 545. The rationale in *Nelson* was that the imprisonment was for failure to comply with the original sentence of a fine and was actually, therefore, imprisonment for civil contempt, not for the original uncounseled conviction. *Id.*

56. 272 N.W.2d 284 (N.D. 1978). The defendants' right to counsel in *Mees* was determined by rule 44 of the North Dakota Rules of Criminal Procedure, which incorporates the holding of Argersinger v. Hamlin, 407 U.S. 25 (1972). 272 N.W.2d at 290. *See* Travis, *An Introduction to the North Dakota Rules of Criminal Procedure*, 50 N.D.L. REV. 20 (1973) (commenting on the then newly adopted North Dakota Rules of Criminal Procedure). Rule 44 provides:

in which the court took note of the Illinois Supreme Court's holding in *Scott,* which was then on appeal to the United State Supreme Court.[57] The court in *Mees* affirmed the trial court's determination that the indigent defendants had no right to appointed counsel on appeal because they had not been sentenced to a term of imprisonment.[58] It is possible, however, that the application of the holding in *Scott* to the right to counsel on appeal was not contemplated by the United States Supreme Court.[59]

Although the opinion in *Scott v. Illinois* has left several issues unresolved, it did clarify that the actual imprisonment standard of *Argersinger* is the current test to be used to determine whether an indigent defendant is entitled to court-appointed counsel.

MONTY G. MERTZ

> Absent a knowing and intelligent waiver, every indigent defendant shall be entitled to have counsel appointed at public expense to represent him at every stage of the proceedings from his initial appearance before a magistrate through appeal in all felony cases. Absent a knowing and intelligent waiver, every indigent defendant shall be entitled to have counsel appointed at public expense to represent him at every stage of the proceedings from his initial appearance before a magistrate through appeal in all nonfelony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment. The court shall appoint counsel to represent a defendant at his expense if he is unable to secure the assistance of counsel and is not indigent.

N.D.R. CRIM. P. 44.

57. State v. Mees, 272 N.W.2d 284, 291 n.2. (N.D. 1978). *Mees* involved the arrest and conviction of two women for prostitution. Their conviction resulted in a fine. Because both women were indigent, they were represented by court-appointed counsel at trial. Both women made timely motions for court-appointed counsel to represent them on appeal. The trial court denied the motions pursuant to rule 44 of the North Dakota Rules of Criminal Procedure, reasoning that because there had been no imprisonment, there was no right to appointed counsel on appeal. The North Dakota Supreme Court affirmed this determination. *Id.* at 290-91. The women in *Mees* made largely the same arguments as petitioner in *Scott. Id.* The North Dakota Supreme Court rejected these arguments, citing Argersinger v. Hamlin, 407 U.S. 25 (1972), and taking note of People v. Scott, 68 Ill. 2d 269, 369 N.E.2d 881 (1977), then on appeal to the United States Supreme Court. 272 N.W.2d at 291 n.2.

58. 272 N.W.2d at 290-91.

59. There is some question whether the ultimate holding in *Scott,* as adopted in anticipation by the North Dakota Supreme Court in *Mees,* was properly applied to right to counsel on appeal. The United States Supreme Court held in Douglas v. California, 372 U.S. 353 (1963), that denial of appointed counsel for an indigent defendant on an initial appeal of right was a violation of equal protection. *Id.* at 357-58. There was no indication in *Douglas* that its holding was restricted only to cases in which the defendant was incarcerated. *See id.* at 353. The Court's opinion and holding in *Scott* made no mention of appointment of counsel to indigent defendants to make an appeal of right. *See* 440 U.S. at 368-74. It is therefore arguable that the Court in *Scott* did not intend to affect the holding in *Douglas.* Thus, it is possible that the North Dakota Supreme Court's application of *Scott* in *Mees* was improper. *See* 272 N.W.2d at 291 n.2.