ORIGINAL

In the

Supreme Court of the United States

AUBREY SCOTT, PETITIONER,	)	
V.	)	No. 77-1177
PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.	)	

Washington, D. C.
December 4, 1978

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v.	:	No. 77-1177
PEOPLE OF THE STATE OF ILLINOIS, Respondent.	:	

Washington, D.C.

Monday, December 4, 1978

The above-entitled matter came on for argument at 11:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN S. ELSON, ESQ., Northwestern University Legal Clinic, 360 East Superior Street, Chicago, Illinois 60611; on behalf of the Petitioner.

GERRI PAPUSHKEWYCH, ESQ., Assistant Attorney General of Illinois, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1177, Scott against the State of Illinois.

Mr. Elson, I think you may proceed now whenever you're ready.

ORAL ARGUMENT OF JOHN S. ELSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ELSON: Mr. Chief Justice and may it please the Court:

On January 31st, 1972, in the circuit court of Cook County, Petitioner Aubrey Scott was convicted of misdemeanor theft, for which he was fined $50.

In Illinois the maximum penalty authorized for this crime is one year in prison and/or a $500 fine.

On direct appeal of this conviction, the Illinois appellate and Supreme Courts held that under Illinois law and the United States constitution Scott had no right to counsel, appointed counsel at trial, since he was fined and not imprisoned.

The Court -- this Court -- accepted certiorari on two questions: whether the Sixth and Fourteenth Amendments guarantee the right to counsel to a defendant charged with an offense punishable in law by imprisonment, regardless of whether the defendant is imprisoned. And second, whether petitioner's trial was so unfair as to deny due process.

Now the trial in this case was not quite what Mr. Justice Rehnquist alluded to just now, summary hanging for shoplifting; but it wasn't that far, either.

With the exception of the right to jury trial, Scott was not advised by the trial court of any of the constitutional safeguards that this Court has found fundamental to fairness in a criminal trial.

QUESTION: Your position would apply equally to a $1 fine, would it not?

MR. ELSON: In this case, it would, yes sir.

QUESTION: And so long as the judge was empowered under the statute to impose a sentence of imprisonment?

MR. ELSON: Of up to one year.

QUESTION: Well, so long -- as I understand your position would be the same, after the question of the Chief Justice, if punishment actually imposed were a one dollar fine, so long as the statute creating the criminal offense had authorized the trial judge to impose a sentence of confinement, even of one day.

MR. ELSON: Well, we don't necessarily go that far in our brief. And the facts of this case don't require that.

Supposedly, the Court, if it should deem it appropriation, could make a six-month rule, as it did in the jury trial. But --

QUESTION: But what if the particular provision, penalty provision, was a fine not exceeding $100? Nothing else, no imprisonment at all. Then would your position be the same as you're asserting in your briefs and here today?

MR. ELSON: Well, our case certainly wouldn't be the same, but our position would be that the crime of misdemeanor theft is sufficiently established at common law and in the minds of the community as a criminal offense that it would invoke the Sixth Amendment safeguards.

QUESTION: Now, the Court could make a six month rule, as you said. But in Argersinger it didn't.

So you're asking us to wholly review Argersinger, everything about it. Is that it?

MR. ELSON: No. Argersinger, of course, explicitly refused to decide the question in this case.

QUESTION: But it did hold that if there's to be a sentence of confinement, there has to have been counsel at the criminal trials.

MR. ELSON: Yes, sir.

QUESTION: And you abandon that argument.

MR. ELSON: Certainly we abandon -- we oppose --

QUESTION: You totally disregard Argersinger in every respect; that's what it comes down to, isn't it?

MR. ELSON: Well, not the rationale of Argersinger, but we certainly oppose a ruling that you're not entitled to

counsel if a penalty is imprisonment; regardless of whether you're imprisoned.

QUESTION: You say that Argersinger expressly refrained from deciding this case. I'm not sure I agree with you.

I mean, presumptively, all state action including this one, is constitutional unless it's found to violate the federal constitution.

And the fact that Argersinger didn't expressly say this state action is all right doesn't mean it's an open question.

MR. ELSON: Except that the opinion expressly stated -- I think it was Mr. Justice Powell in his conurring opinion -- raised the question, well, what about cases where the imprisonment is authorized and no jail is ever imposed.

And Mr. Justice Douglas explicitly stated, we are not deciding that. And I think that's in line with the tradition of Powell v. Alabama and Gideon v. Wainwright.

QUESTION: Well, did we need to decide it? Was there any occasion to decide it?

MR. ELSON: No. My understanding is that, frankly, the petitioners inthat case actually did not ask for such a broad rule; they just said, imprisonment only.

So it wasn't put before the Court, is my understanding

of it.

In -- I'd just like to briefly refer to the facts because I think they do make a telling point as to the importance of right to counsel. Scott in this case was not advised of and did not exercise the right to cross-examination, the right to compulsory process of witnesses, the right to make a closing summation, the right to be informed of the elements of the charge against him, and of course the right of counsel, either at his own expense, or at the state expense, if he could not afford counsel.

Now, the -- he was allowed to tell his side of the story, but he was not told that he did not have to tell his side of the story.

The trial itself was a paradigm of the prejudice which results when a defendant is without counsel in a criminal trial.

The clearest example of this prejudice is that a directed verdict motion should have been made and granted after the state had rested; because the state had failed to prove a necessary element of its shoplifting prosecution; that Scott, in fact, had not paid for the item he allegedly stole.

And Scott as a layman had no reason to know that a directed verdict motion could even be made.

And I think further prejudice is evident from the fact that after both the state and Scott had rested, the judge admitted that he still had several doubts about the case.

QUESTION: What if the -- what if the state, instead of having this in the criminal system, had called it a civil fine situation, and put a maximum of $500 civil fine; said, we're just going to take shoplifting out of the criminal area.

And the judge had imposed precisely the same fine at the close of this hearing under a system like that. Would you say he's entitled to counsel?

MR. ELSON: Well, of course, that'd be a closer case. But I still think that the crime of theft is so associated in our history and in the popular mind with the criminal element of -- of criminal prosecution, that I think counsel would probably be required.

QUESTION: So that a suggestion in one of the briefs -- I don't remember whether it's yours or not -- that states can deal with this problem by simply taking certain offenses out of the criminal system entirely wouldn't apply in your case?

MR. ELSON: I don't believe so. I think it would apply to, say, jaywalking, and that type of thing. But --

QUESTION: Mr. Elson, you keep talking about

robbery. This is shoplifting, wasn't it?

MR. ELSON: Well, it's defined as theft, under Illinois law. Under $150.

QUESTION: Yes. It's shoplifting.

MR. ELSON: It was shoplifting in this case.

QUESTION: But you keep saying how horrible a crime it is.

I mean, I don't think any adjectives are going to help this case.

MR. ELSON: Except that Illinois classifies it as theft. And they deem it sufficiently serious to impose -- to authorize a year's imprisonment.

QUESTION: But you indicated your argument would be the same even if it provided for no imprisonment, but only a fine.

MR. ELSON: The -- the -- I think the balancing in that case, it still would be criminal.

QUESTION: Well, is the answer to my question yes or no.

MR. ELSON: That I -- in that case, I think you'd be entitled to the right to counsel. But that's certainly not our case.

QUESTION: Would you be entitled to right to counsel on spitting on the sidewalk ordinance?

MR. ELSON: Well, if the state authorized a year's

imprisonment, I think that's the prime determinant of what's a criminal offense, and yes.

QUESTION: So it's the -- if you had a fine of up to $500 for spitting on the sidewalk --

MR. ELSON: I don't think the right to counsel would probably be appropriate in that case.

QUESTION: And the difference is?

MR. ELSON: That in that case, it would not have the element of the indicia of what is a criminal offense, within the meaning of the Sixth Amendment.

QUESTION: Which is?

MR. ELSON: Which are -- well, the Court has identified seven or eight factors in various cases.

QUESTION: Well, which one are you relying on?

MR. ELSON: We rely really on all of them. Because with misdemeanor theft, they all come together to show that it's criminal. They -- this had the year's imprisonment; it has the requirement of scienter; it was considered malum in se; it was indictable at common law; this Court in Middendorf said larceny, which is basically the same thing, carries the stamp of bad character. It has every criteria.

QUESTION: Is arson the same as robbery? Is shoplifting?

MR. ELSON: Well, it shows intent to steal, I think.

QUESTION: Larceny.

MR. ELSON: I'm sorry, I said larceny.

QUESTION: I thought you said arson.

MR. ELSON: Oh, I'm sorry. I'm sorry.

QUESTION: Mr. Elson, just so that I have your position in mind.

Of course, as in Argersinger -- I never know how to pronounce that case -- holds if there's in fact imprisonment, there must be counsel; we don't have that case.

You -- as I understand, you make alternative arguments. One, that if the statute authorized imprisonment for up to a year or more, then the crime would be sufficiently serious that there ought to be counsel.

Or alternatively, I understand you to say, that even if the statute does not authorize imprisonment, but the statute has all the other indicia of a common law crime, then there should be right to counsel.

But that case isn't before us.

MR. ELSON: Right. I don't think I have to make that case for this.

QUESTION: It's only the first one we're dealing with today, is when the statute in fact authorizes a year imprisonment, and it is also a traditional common law crime, is there a right to counsel there.

That's what we're dealing with today.

MR. ELSON: That's correct. That's the only issue

I see in this case.

QUESTION: I see.

QUESTION: Yet your theory is such that -- in conjunction with the question by Mr. Justice Stewart a moment ago -- your theory is that this is just kind of an unrolling thing. And it's unrolled from Powell to Gideon to Argersinger; these are just way-stations, and presumably this is another way-station. And a year from now, we'll be asked to expand it further.

MR. ELSON: Well, the Sixth Amendment right to counsel has been termed an evolving concept.

QUESTION: You think that's the way the framers intended it?

MR. ELSON: It's hard to say.

QUESTION: Do you really think it's hard to say?

MR. ELSON: What the framers intended?

QUESTION: Yes.

MR. ELSON: Well, there's certain things about the Sixth Amendment right to counsel application now they clearly had no idea of.

QUESTION: Well, my question is, do you think it's difficult to say what the framers of the Sixth Amendment right to counsel thought about it?

MR. ELSON: Oh, no, not in this case.

QUESTION: I didn't mean this case. I meant

generally.

MR. ELSON: Yes, of course.

QUESTION: You think it is difficult?

MR. ELSON: Yes.

QUESTION: But isn't it really quite clear that as far as the framers' intent went, it wouldn't have applied at all to a state trial All it did was guarantee in the Sixth Amendment a defendant in a federal trial, not a state trial --a federal trial -- should have the right to the assistance of counsel if he wanted to bring a lawyer along at his own expense to assist him; that's what it meant. Every historian knows that. Every school boy should know that.

MR. ELSON: Right.

QUESTION: Isn't that correct?

MR. ELSON: I believe so.

QUESTION: We've come a long way from there, haven't we?

MR. ELSON: Yes, indeed. And I think the framers -- it is clear that the framers intended that the right to counsel was essential in all criminal prosecutions at that time.

QUESTION: Well, but the right to counsel defined by my brother Stewart. If you could afford a lawyer and pay for him and bring him along --

MR. ELSON: Right.

QUESTION: -- and you were being tried in a federal court, you could do it.

MR. ELSON: Yes, sir.

QUESTION: Your position -- let me make sure I understand it -- is that shoplifting from a store, for all purposes of the stigma, all the consequences -- shoplifting from a store is no different from shoplifting from a bank?

MR. ELSON: In Illinois, if it were charged as theft under $150, it is not different; that's correct.

His record says, theft.

Of the five grounds for reversal set forth in petitioner's brief, petitioner relies most strongly, as I indicated, on the Sixth Amendment grounds.

And there are two alternative rationales for applying the Sixth Amendment right to counsel in this case.

The first and simplest is that the right to counsel applies as the terms of the Sixth Amendment specified, in all criminal prosecutions. And the Court has never limited the application of any Sixth Amendment right that has been applied to the state through the Fourteenth Amendment on the basis of the gravity of the crime; except, of course, for the right to jury trial.

But in Argersinger, the Court pointed out that the historical reasons for limiting the right to jury to serious offenses, do not exist with respect to the right to counsel.

And the Court specifically rejected the premise that crimes punishable by less than six months imprisonment may be tried without a lawyer, simply because they may be tried without a jury.

And the right to counsel also requires wider application than the right to jury, because the nature of the criminal trial process. And the Court has repeatedly pointed out that the right to counsel, and not the right to jury, is essential to a fair trial, to the integrity of the fact-finding process.

And as the Court pointed out in Fuller v. Oregon, the right to counsel is necessary so the defendants may recognize and take advantage of the Sixth Amendment's other fair trial safeguards.

Since the right to counsel is therefore the Sixth Amendment right that is most important to the actual achievement of a fair trial, it would contradict the Sixth Amendment's essential purpose of assuring fair trials to apply the right to counsel more narrowly than the other Sixth Amendment rights.

Moreover, respondents' argument that the right to counsel does not apply to petitioner's prosecution renders petitioner's right to a jury trial meaningless. For notwithstanding respondent's assertions to the contrary, a lawymen simply cannot adequately present a case to a jury, under any circumstances.

The right to counsel, therefore, must at a minimum apply where the crime is punishable in law by over six months in prison; otherwise the right to jury would simply be a null.

The --

QUESTION: I don't happen to agree with your assertion that a layman can't possibly present a case -- a defense to a jury if he wants to. If it's a justice of the peace misdemeanor type of jury.

In my own practice, I have seen that done.

MR. ELSON: I've never seen it done. It's hard for me, as a trial lawyer, to envision it. I --

QUESTION: Have you never seen juries -- have you never seen juries acquit defendants who have not chosen to retain counsel on relatively low-grade misdemeanors?

MR. ELSON: I have never seen it. There aren't that many misdemeanor jury trialsin the area where I practice. But --

Now, if the Sixth Amendment right to counsel is to be applied according to its terms in all criminal prosecution, then there is only one issue in this case, and that is whether a prosuection for misdemeanor theft not resulting in imprisonment is a criminal prosecution within the meaning of the Sixth Amendment.

And as I have previously stated, in this case it

has all the indicia of what is a criminal prosecution.

I don't think respondents really contest that this is not in fact a criminal prosecution.

But regardless of whether the Sixth Amendment right to counsel is to be applied according to its terms, the right applies in this case under the test used for applying any Sixth Amendment rights to the states, and that is, whether or not it is necessary for fundamental fairness.

Now, counsel is fundamental to fairness in a trial of a misdemeanor that does not result in imprisonment, as it was in Gideon in the trial of a felony, and as it was in Argersinger in the trial ofa misdemeanor resulting in imprisonment.

There is no functional difference between the trial of a felony and a misdemeanor that would make a layman a more competent advocate in the one than in the other.

Moreover, I think respondent's distinctions between misdemeanors that do and do not result in imprisonment for the right to counsel purposes is in total contradiction to the rationale of Argersinger; for if an unconstitutional misdemeanor trial and conviction that results in imprisonment does not comport with fundamental fairness, as Argersinger held, then fundamental fairness also must be denied by an unconstitutional misdemeanor trial and conviction that does

not result in imprisonment.

Because a trial cannot simply be transformed into a fair fact-finding process because after the trial the judge decides not to sentence the defendant to jail.

QUESTION: Yet that was the hypothesis of Argersinger, was it?

MR. ELSON: I contend that it wasn't, that Argersinger stated that a misdemeanor trial cannot be a fair fact-finding process without counsel; it's as essential as it was in Gideon.

QUESTION: But it went on to say that we don't have -- as you say, putting it I think most favorably to your case, we don't have to decide whether this opinion or reasoning applies where there's no threat of imprisonment.

MR. ELSON: Right.

QUESTION: And you say it's just unconceivable that that sort of rationale makes any sense, that you could draw the line between threat of imprisonment and no threat of imprisonment.

MR. ELSON: Yes. I find that logically it's very difficult to follow. If Argersinger was premised on the needs for counsel for a fair trial, as the opinion indicates that it was.

QUESTION: Do you think that it was irrational when the courts made the distinctions between felonies and other

types of crimes?

MR. ELSON: Well, I think -- no. I think that's a legislative task, and I think it valid --

QUESTION: Well, how about when courts did it?

MR. ELSON: I'm sorry.

QUESTION: When courts distinguished the rights to counsel, Sixth Amendment rights, between felonies and other types of cases.

MR. ELSON: Well, I think the Court since then has gotten rid of that distinction in many cases. I think --

QUESTION: But made a distinction between potential imprisonment and no potential imprisonment.

MR. ELSON: Well, Argersinger was the first case that could be interpreted is that beside the contempt --

QUESTION: But you think the rationale was not, as Mr. Justice Rehnquist just stated it, of Argersinger?

MR. ELSON: Do I think --

QUESTION: You think that was not the basis of decision in that case?

MR. ELSON: No, the rationale from the opinion is clear that counsel is necessary for a fair trial.

QUESTION: If the man may go to jail. And is it not clear that if the judge trying such a case must decide in advance if I find this man guilty, am I likely to send him to prison, to jail, and then if he decides that, he better

furnish him counsel. If he decides that he isn't going to send him to prison, but only fine him, then he goes ahead without counsel.

MR. ELSON: Well, that's how the holding of Argersinger has been interpreted, and that's the narrowest possible reading.

But, as I say, if Argersinger held as it did that there's no difference for fairness purposes in the trial of a felony and a misdemeanor, then it just has to follow that there's no difference for fairness purposes between the trial of a misdemeanor that results in imprisonment and one that doesn't.

They're equal --

QUESTION: Or the trial of one that has only a fine in it.

MR. ELSON: Yes, certainly.

QUESTION: I mean your argument certainly would invalidate any trial where the only punishment authorized is a fine unless he has counsel.

MR. ELSON: If it were a criminal prosecution within the meaning of the Sixth Amendment.

QUESTION: Yes, exactly.

MR. ELSON: Right. And that's the issue in this case, is misdemeanor theft.

QUESTION: Mr. Elson, the whole proceeding is what's

in here?

MR. ELSON: Yes, it's very short.

QUESTION: And you need a lawyer. This is practically a plea of guilty.

MR. ELSON: Well, I think he maintained his innocence.

QUESTION: The man --

MR. ELSON: He didn't think he was pleading guilty.

QUESTION: Well, he said that he went in and picked up andhad them unlock the case and take out the briefcase. And he walked around with the briefcase and then started out the door with it.

MR. ELSON: No. He maintained he was still looking for the sales girl. And he was stopped inside.

QUESTION: At the door going out into State Street.

MR. ELSON: Well , he doesn't say whether he was at the door, does he?

QUESTION: Yes, he said he was at the door at State Street.

MR. ELSON: Well, the other door. But he's maintained that he wasn't going out. He was still looking --

QUESTION: Well, what was he going to State Street for? She was in the store?

MR. ELSON: Well, he was still in the store.

QUESTION: Yeah.

MR. ELSON: But he was looking for the sales girl.

QUESTION: Mr. Elson --

MR. ELSON: Yes.

QUESTION: Wait a second.

QUESTION: You say in one of your questions presented the first one, whether the Sixth and Fourteenth Amendments of the United States constitution guarantees the right to counsel when a defendant is charged with an offense punishable under state law by imprisonment.

Now I would gather from your answer to Mr. Justice White's question that although that may be theoretically presented by the facts in this case, you regard it as being utterly immaterial whether or not the statute authorizes imprisonment or not, so long as it's a criminal prosecution.

MR. ELSON: No, certainly not utterly immaterial. I think imprisonment is one of the -- authorized imprisonment is one of the essential, the most important indicia --

QUESTION: Well, that isn't the way you answered my question.

QUESTION: No, you answered his --

QUESTION: You were arguing that Argersinger said that without counsel you can't have a fair trial.

MR. ELSON: That's right.

QUESTION: And I said therefore, if the statute only authorizes a fine, and it's a criminal prosecution, would

your theory apply, and you said yes.

MR. ELSON: Oh, yes.

But my answer to Mr. Justice Rehnquist was that imprisonment is not irrelevant, immaterial, because that is an indicia --

QUESTION: But your theory wouldn't -- but your submission is that it would be just as unfair a trial if only a fine was --

MR. ELSON: That's right. But I'm not saying that unfairness itself invokes the Sixth Amendment. I'm saying it has to be criminal and authorized imprisonment is the essential indicia of criminality.

QUESTION: You've answered at least three of us in exactly the contrary way in earlier arguments.

QUESTION: Well, you're saying that unless imprisonment is authorized, you would not think the case could be deemed a criminal case.

MR. ELSON: No, The point I'm trying to make is that in a variety of cases the Court has pointed to six or seven different factors to determine whether an offense is criminal or civil.

And you can't -- I don't think there's a general rule that will take care of all cases. I think the Court has to look --

QUESTION: Well, I know, that's -- so you can

imagine a lot of cases where the only punishment authorized is a fine that you would agree are criminal cases?

MR. ELSON: I would think so. I would think that if the --

QUESTION: Well, in those cases at least, you would say that whether or not imprisonment is authorized --

MR. ELSON: I would say kidnapping, murder, certainly.

QUESTION: -- that he must have counsel.

MR. ELSON: Yes.

QUESTION: Even though -- let's assume that there are some cases where only a fine is authorized. And you can imagine some that you would agree are criminal cases?

MR. ELSON: I can imagine -- I can't imagine the state necessarily removing imprisonment, say for something like murder.

QUESTION: No, no, no --

MR. ELSON: But if that happened, I would say that is sufficiently identified as --

QUESTION: What about theft, the case we've got before us, if they removed the possibility of confinement, would you still say that's such an unfairness that there must be counsel because it is in the criminal framework?

MR. ELSON: I would think so, because I think the Sixth Amendment by its terms demands that.

Respondent's argument rests primarily on the proposition that it is too expensive for the state to provide the right to counsel to indigent misdemeanants who are not imprisoned.

But there's no legal authority, however, for the proposition that under the Sixth Amendment or due process the state can convict a defendant through fundamentally unfair fact-finding procedures because of the cost of providing fair procedures.

In Gideon, in Argersinger, and in in re Galt, the cost of extending the right to counsel were substantial. But in not one of those cases did the Court weigh the costs of counsel against the need for counsel for fairness.

QUESTION: Well, how can you say the cost in Argersinger was expensive when the -- the holding of Argersinger did not bring about any expense where no confinement was involved?

MR. ELSON: Well, although there are not accurate, reliable statistics on this point, I think the greatest expense in terms of providing right to counsel in misdemeanor cases was -- happened already as a result of Argersinger, where the states had developed, for the first time, systems for supplying counsel to misdemeanants.

And those systems in practically all the states are not in place.

QUESTION: You mean the Court -- you mean the Court couldn't take judicial notice of the reality within the overwhelming majority of these minor misdemeanor cases there is no confinement?

You say there are no statistics --

MR. ELSON: Right. But I don't think the Court can take judicial notice that the right to counsel is not available in those cases, and is not made available in those cases.

I would think the assumption in the absence of such statistics has to be that most judges are supplying -- affording the right to counsel in order to comply with rational principles of sentencing and with legislative intent in authorizing something as a possible sentence.

I think that was Mr. Justice Powell's statement, what would happen, in his concurring opinion in Argersinger; and I think that's what in fact has happened.

Moreover, respondent's cost argument is based on the false assumption that the state's only duty is to finance the prosecution. But the state also has a duty to assure that the criminal trial process is a fair one.

The adversary process is really no more than an empty phrase if the state can fund the full apparatus of effective prosecution, including judges, court reporters, state's attorneys, bailiffs, et cetera, and then just refuse

to pay the fraction of that cost that would go for defense costs.

QUESTION: What if a state would set up a system whereby the state is not represented by an attorney at each trial; just a typical British police officer comes into the British magistrate's court?

MR. ELSON: Well, of course, again, there was a prosecutor here. But I think the fairness argument might be a little different, but that doesn't affect our Sixth Amendment argument.

And the fact is that a layman has so much at stake here that I would think that counsel would be his right.

QUESTION: So your funding argument is really a make-weight, because even if the state were to fund neither side, you would say you still ought to have counsel?

MR. ELSON: Well, no. Yes, you still should have counsel. But I don't see that it's a make-weight.

QUESTION: Well, you were saying that a state has a duty to equalize and make an adversary system a reality.

MR. ELSON: Right.

QUESTION: Now, one way it could do it is by upgrading it so both sides have counsel. Another way is to downgrade it so neither side has counsel.

MR. ELSON: That would reduce the unfairness in the adversary process of not having one side represented by

counsel.

I don't think that would affect the Sixth Amendment. Certainly in all the courts that I'm familiar with in my jurisdiction, the prosecutors are always there.

I would point out that one statistic that is very reliable is that at least 16 states, including both urban and rural states, do provide the right to counsel for cases that have authorized imprisonment. And there have been no showing -- there is no showing that those states have suffered by that.

I'd like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Miss Papushkewych.

ORAL ARGUMENT OF MISS GERRI PAPUSHKEWYCH,

ON BEHALF OF THE RESPONDENT.

MISS PAPUSHKEWYCH: Thank you.

Mr. Chief Justice, and may it please the Court:

The question before this Court is whether or not the right to counsel which was articulated in Gideon v. Wainwright, and extended in Argersinger v. Hamlin, should be extended.

Now, the actual question before this Court is where to draw the line. Counsel argues that imprisonment should be -- or counsel argues in his brief that imprisonment should

be the focus -- imprisonment or non-imprisonment -- as an authorized penalty, should be the focus of any actual right to counsel.

However, before this Court he now states that the criminal -- it doesn't matter whether or not there is authorized imprisonment or not. He states that regardless of what the actual penalty is, if there are other indicia of criminality, right to counsel would be extended.

And I would imagine that in future cases, he would come before this Court and say: As long as there are other indicia of criminality, don't consider what those consequences actually entail to the defendant; don't consider what the actual cost is to a state; don't consider whether or not the defendant is capable of defending himself of those charges.

Once you -- his position is that once you decide something is a criminal prosecution because some of the indicia of criminality exist, after that you can't ask any further questions.

It's our position that this Court must ask some further questions. And we submit that the right to counsel in this case should be based, after looking -- based on -- should be decided after looking and balancing two factors.

First of all, considering the results to the defendant, based on the consequences which a defendant may

face, and also his ability to defend himself in a court; and secondly, considering the burden on the state courts and state criminal justice system.

I would first like to focus my argument -- and although I will not cite statistics -- I would first like to focus my argument on a concern which this Court has indicated great concern about: it's the efficacy of the criminal justice system.

Now counsel in his brief argues that there are no reliable statistics for indigency, and we really -- we really can't gauge what kind of effect this kind of an extension of the type that he talks about will cost the state. He says after all that some predictions have percentages as low as 10 percent in indigency rates.

And I would submit to the court that that's not the kind of figures that we are looking at. The burden that will be imposed on the states is tremendous.

Reliable figures show there is between a 40 and a 47 percent indigency rate in misdemeanor cases. Those kind of figures, when applied to the approximately 5-1/2 million misdemeanors which are non-traffic offenses which are prosecuted a year indicate that the burden on the court system will be tremendous.

And that's not --

QUESTION: Miss Papushkewych, can we assume in this

case that the petitioner was an indigent at the time of the trial?

MISS PAPUSHKEWYCH: Your Honor, although that was not established before the actual trial, subsequently to that and before the appellate court argument and the Illinois Supreme Court argument, there were -- petitioner filed an affidavit of indigency showing his assets and liability. And for purposes of the Illinois hearing, there was an assumption that --

QUESTION: Assumption that he was an indigent.

MISS PAPUSHKEWYCH: Yes, that he was an indigent.

Well, part of his defense was that he had $300 or $400 in his pocket at the time -- at the time of that shoplifting, alleged shoplifting.

MISS PAPUSHKEWYCH: Yes, Your Honor, that was part of the defense. We have not sought -- because we had conceded that issue both in the appellate court --

QUESTION: You proceed on the premise that he was an indignent.

MISS PAPUSHKEWYCH: That's right. We had to proceed on that premise, because we proceeded on that premise in the lower courts.

The burden which the states will face can be viewed in two different situations. First of all, if we look on the burden it places, like, in large counties, the effect

of this rule will be to increase the backlog, increase the workload, and it most importantly I think, in terms of the criminal justice system, it'll decrease the representation which we provide for defendants, defendants who are actually entitled presently under the Gideon and Argersinger to receive representation will be represented by the same people who know represent -- who will be then representing persons who have very little need for counsel.

Now it is our position in this Court that because of the character and the nature of the misdemeanor court and the charges involved, there is no right to counsel; that a defendant can, in fact, defend himself adequately and receive a fair trial in a misdemeanor court without having the assistance of counsel.

Now --

QUESTION: Does that include if he's given a year?

MISS PAPUSHKEWYCH: No, Your Honor. Under Argersinger, he can't be given any imprisonment.

QUESTION: Well, I mean -- your language was so broad, there. I just --

MISS PAPUSHKEWYCH: I'm sorry, Your Honor.

No, we would agree that under the Argersinger v. Hamlin, he cannot be given one year in prison. If the authority is in the statute for one year in prison, then counsel is not appointed.

It's very clear what the rule is: that imprisonment may not be imposed, although the alternative sentences may be.

But counsel's argument is based on an argument that there is no way that a misdemeanor defendant can adequately defend himself. And yet, the ability to defend himself is adequately demonstrated by this particular record.

QUESTION: May I just interrupt there?

There is really kind of a logical dilemma here. If he were to be sentenced for a year, he could still defend himself adequately if it's the same charge, and all the rest.

Why does the sentence have anything to do with whether he needs a lawyer or not in order to adequately defend himself?

MISS PAPUSHKEWYCH: Because, Your Honor, I believe that we've got to look at this case in terms of line drawing.

QUESTION: Well, that's a tenable argument. And I understand it. And maybe for all these practical reasons, we should leave the line right where it draws it there.

But in terms of fairness -- I mean, the need for a lawyer, to be sure the issues are fairly presented in an adversary way at a trial, I don't understand why it makes any difference whether he's going to be given the year's sentence, or the judge says in advance, I won't give you the year's sentence.

Isn't it precisely the same trial problem of getting

the evidence out in a fair way?

MISS PAPUSHKEWYCH: I think the problem becomes -- the actual problem is the same. What you have to do is defend yourself in a fair trial.

What we have decided -- and my argument is this -- that we have to draw the line at some point. And this is the reasonable line drawn because we've removed the worst possible criminal sanction. We can no longer imprison him.

QUESTION: But that's unrelated to the question of whether he'll be able to get the facts out in a fair way. I mean, just as a practical matter, we've got to draw the line somewhere.

MISS PAPUSHKEWYCH: Well, I think that he would be able to get the facts out in a fair way. I think the question is more precisely answered if you consider what we want to consider as fair when we impose imprisonment and when we don't.

And I think that what we've provided by providing counsel is not -- goes beyond fairness. I think what we've provided in our assistance to counsel cases is very extreme detailed -- I don't mean extreme -- detailed probing any possibilities that may exist for a reasonable doubt. And that is the standard that we wish to use where imprisonment is possible.

But that doesn't mean that anything less is not a fair trial, and that you cannot actually bring out the facts fairly without counsel there to bring them out.

QUESTION: Let me ask two brief, related, questions.

Under your view, could the trial judge impose probation?

MISS PAPUSHKEWYCH: Yes, Your Honor. The trial court could impose probation in our view.

QUESTION: Without a lawyer.

MISS PAPUSHKEWYCH: Without a lawyer.

QUESTION: What if the man violates the terms of probation? Can he be put in prison?

MISS PAPUSHKEWYCH: Under our position, Your Honor, we would argue: Yes, he could be put in prison. The relationship is too indirect, and it requires additional acts before he is put in prison.

QUESTION: And supposing he doesn't pay the fine. He's fined. He says, well, I've decided not to pay it.

Could he be put in prison then?

MISS PAPUSHKEWYCH: If the frame of your question is that if he decides to pay -- not to pay the fine, and it's deliberate action --

QUESTION: He had no lawyers at the trial.

MISS PAPUSHKEWYCH: -- I would say -- yes, I would say he could be imprisoned.

However, I would point out that --

QUESTION: So that every case really carries a potential of imprisonment, doesn't it?

MISS PAPUSHKEWYCH: Many cases, I would argue, would carry a potential of imprisonment.

I would point out as far as your fine question is concerned that if he -- the reason he doesn't pay the fine is because he's indigent, we're of course prohibited from going -- from imprisonment because --

QUESTION: Well, of course, by hypothesis, we're only dealing with cases of people who are indigent. We're not talking about those who can hire their own lawyers.

MISS PAPUSHKEWYCH: That's true.

QUESTION: So that by hypothesis, the category, they're going to have some difficulty paying their fines.

MISS PAPUSHKEWYCH: And I think the Court has before it presently in Hunter v. Dean --

QUESTION: Right.

MISS PAPUSHKEWYCH: -- the varieties of ways in which states can permit -- or are required to permit -- indigents to pay fines.

QUESTION: Right. But your interpretation of our -- I just want to be sure -- your interpretation is that either probation is possible, which could be revoked, or alternatively, an indigent could be assessed a fine of up to $500 which he might be unable to pay, and then he could go to jail.

MISS PAPUSHKEWYCH: Yes, Your Honor; that would be

our position.

But additionally I would point out that should further decision -- and this question has been under review in many of the state courts that have been faced with the Argersinger decision -- should the consensus of opinio. or eventually a decision of this Court decide, that it's too direct a relationship, the state is prepared to live with those kind of consequences because I think that comes within the bounds of prosecutorial discretion.

What would then happen would be, you would have fines -- you would have penalties that are somewhat less -- don't carry all of the stigma that you would get if you were -- if you actually had counsel.

QUESTION: Was this man entitled to a transcript of his trial?

MISS PAPUSHKEWYCH: Yes, he was, Your Honor.

QUESTION: And he had a right to appeal?

MISS PAPUSHKEWYCH: Yes, he did, Your Honor.

QUESTION: But he didn't have a right to a lawyer?

MISS PAPUSHKEWYCH: He did not have a right to a lawyer at the trial level.

QUESTION: How does he know he has a right to a transcript in Illinois? Did the judge tell him?

MISS PAPUSHKEWYCH: Yes, Your Honor. He is notified of his right to a transcript and of his right to appeal.

QUESTION: Before the trial starts?

MISS PAPUSHKEWYCH: I'm not sure, Your Honor. I believe that's done after trial. But I'm not exactly sure at this point.

QUESTION: Is it standard practice to have a court reporter in the courtroom in all misdemeanor proceedings?

MISS PAPUSHKEWYCH: Yes, Your Honor, it is.

QUESTION: Aren't there many -- how many states have complied with Argersinger by saying, we'll give it in all misdemeanor cases?

MISS PAPUSHKEWYCH: It's approximately 16, Your Honor.

QUESTION: That's in all misdemeanors, regardless?

MISS PAPUSHKEWYCH: That's in all misdemeanors, regardless; at least in all misdemeanors that are punishable by imprisonment, where it's an authorized penalty.

There's some dispute between respondent -- petitioner and myself as to the exact number, but it's approximately 16 to 20.

QUESTION: Yeah, that's what I thought.

QUESTION: Wouldn't it be possible to meet your cost argument by instead of giving counsel to the defendant having no prosecuting attorney and simply having a policeman and the defendant come in, if that were the way this Court were to go?

Your opponent says that would not be sufficient.

MISS PAPUSHKEWYCH: Yes. If there is -- if there is a cost -- if there is a cost argument.

I don't --

QUESTION: Well, you -- I thought you were arguing that if we followed petitioner's -- adopted petitioner's reasoning, the state would be less able to provide counsel for those who needed it.

MISS PAPUSHKEWYCH: Yes, Your Honor, I was arguing that. And I -- you could have -- it would seem to me that if you had -- to the extent that the Court is worried about the unequal ability of the parties to present their respective sides, I believe that you could diminish that particular worry, in addition to diminishing the worry of the cost, by providing policemen versus a defendant.

QUESTION: You might have to pay your magistrates more, because they would be presumably the only ones that knew anything about the law.

MISS PAPUSHKEWYCH: That's true. And additionally I think that one problem with that that I would point out at this point would be that the burden in these cases is, beyond a reasonable doubt on the state. And you would have to by putting police officers in, I think you would make it much more difficult for the state to meet the burden and, you know, cause various problems to the state in meeting that burden.

If you have an untrained person with that kind of a burden, instead of the burden of presenting your case and

presenting facts to the evidence.

Now, in addition to the cost argument in legal -- in large communities, I would also point out to this Court that the effect on rural communities is -- has been shown since the decision in Argersinger to be exactly what Mr. Justice Powell -- or -- had predicted that it could be.

In a study, "The Other Face of Justice," which was conducted in approximately 1974, the courts held -- the study found that 71 percent -- or 61 percent of the judges interviewed in rural counties -- this was where -- in approximately over 2,000 counties in the United States -- have assigned public defenders systems.

And in interviewing these particular judges, 61 percent of those judges indicated that they had tremendous difficulties meeting the Argersinger standards.

Now, if they had tremendous difficulties in those communities meeting the Argersinger standard, then further -- then they would have even more difficulty meeting a broader standard.

Now there was further indication in that study that the response of many judges in these communities -- and they indicated that there was a twofold problem. That the twofold problem consisted of the cost and in addition a scarcity of lawyers in these areas.

And they indicated their response to the Argersinger

decision was simply not to incarcerate defendants, because they could not incarcerate them if they found them guilty, they simply did not appoint counsel -- unless they appointed counsel, they simply did not appoint counsel and did not incarcerate.

Now, if you extend that position -- the petitioner takes in this case, the conclusion is inescapable that what will happen is that municipalities and other counties and localities will not be able to enforce their own laws.

They will not be able to prosecute at all because of their inability to appoint a counsel.

QUESTION: Miss Counsel, is that a valid argument? Do they have enough money to hire prosecutors in those small communities?

MISS PAPUSHKEWYCH: What they do in --

QUESTION: Do they have enough money to pay for transcripts, to authorize appeals, and all that?

MISS PAPUSHKEWYCH: Well --

QUESTION: If they don't, what do they have to do? They have to appropriate more money.

MISS PAPUSHKEWYCH: Yes, they do, Your Honor.

QUESTION: That's the only way to guarantee a defendant a constitutional -- a constitutional right to a fair trial. Isn't the burden on the legislature to put up the money that's necessary to accomplish it?

MISS PAPUSHKEWYCH: Yes, Your Honor, I would agree

with that if --

QUESTION: Then how does this argument go to the question of whether it's fair or unfair at all? It's just a question of what -- some states have not found it appropriate to spend the money that's required in certain -- in certain parts of the criminal process.

MISS PAPUSHKEWYCH: Or simply don't have the money.

QUESTION: Is this how we test fairness of the constitution: what a state legislature is willing to appropriate?

MISS PAPUSHKEWYCH: No, Your HOnor. What my argument is, that in misdemeanor cases --

QUESTION: It's not worth the money?

MISS PAPUSHKEWYCH: No, no, no. In misdemeanor cases, fairness can be assured by less than what is being asked here. And what is being asked --

QUESTION: Well, then we don't even have to look at these 16 states. That's true in Chicago and New York as well.

I suggest to you that the question of whether these 16 rural areas, whatever they are, whether they can afford it or not really is not relevant to the question of whether it's required by fundamental fairness or not.

Maybe you're right. Maybe it's not required. But then it's not required in Chicago and New York, either.

MISS PAPUSHKEWYCH: The right to counsel for -- in

terms of --

QUESTION: Yes.

MISS PAPUSHKEWYCH: No, Your Honor. I'm arguing that the right to counsel is not required in any jurisdiction.

QUESTION: I understand that. I just don't understand how this question about whether some small communities have enough money to pay the public defender goes to the question -- goes to the constitutional question at all.

Is that a valid argument?

MISS PAPUSHKEWYCH: Well, I would say that it's a valid argument to be considered in defining the scope of the right to counsel.

At sometime, this Court is going to have to -- when presented with further arguments, if not in this case, then in some of the further cases, you're going to have to draw a line.

And the question is: What consideration will you put in? Will you -- what factors will you consider?

And I suggest the cost and the ability of communities to enforce the kind of rule that you're drawing should be taken into the practical consideration.

Although petitioner does not urge the point here before the Court today, I would -- oh, additionally, before I go on to my next point, I would point out to the Court that under petitoiner's hypothesis, the right to counsel

should extend not only to misdemeanor cases, but to the vast majority of traffic cases. And statistics are self-explanatory within the brief.

This would impose even a much heavier burden than the right to counsel in misdemeanor cases. It's such a heavy burden, in fact, that I would submit that this Court cannot adopt an imprisonment in loss -- an authorized imprisonment standard as being urged by petitioner.

Now in his brief, petitioner argues that the predicted evaluation, which is a part of the Argersinger standard, is unconstitutional, and violates due process.

Now it's inconceivable to me, and I'm sure would be inconceivable to many of the court's -- system in the United States. This Court, in 1972, would have told the entire nation, all the judges in the country, would have fixed a procedure whereby they could go -- they could determine whether or not to appoint counsel, and ask -- and propose an unconstitutional method.

Now, we would submit that this decision -- that the decision as to whether or not to predict counsel is exactly what this Court says it -- the kind of procedure that this Court said it would be. Definitely within the capabilities of an experienced judge aided by prosecutor.

Now I think this situation clearly indicates the predictive evaluation technique is a valid one for the Court

to proceed with, and is not in any manner unconstitutional.

It would seem to be no difficulty in this situation, had Argersinger been in effect when this case was tried and decided, for the court to take a look at the particular offense before it and see thatit was a misdemeanor theft; that the value of the property was very low; that it was not charged under enhancement theory.

The only other conceivable question that it could have asked would have been -- to the prosecutor -- do you intend to ask for jail time.

Given that kind of a situation, we would submit, that the Court could make a very reasoned decision that in this case it would be so highly unlikely that I would impose jail time that there's no need for me to appoint counsel.

We would submit that that is an entirely logical and constitutional kind of procedure.

Secondly --

QUESTION: Let me ask one other question about this particular case.

Is there in Illinois a lesser included offense which could have applied to the facts here that would have not carried the jail sentence? Something like shoplifting or other petty theft type crime?

MISS PAPUSHKEWYCH: Your Honor, just a -- no, I don't believe that there would be.

QUESTION: So that under Illinois law, if he was to be prosecuted, it had to be with a crime that provided for a jail sentence?

MISS PAPUSHKEWYCH: Yes, Your Honor, I think that's true.

Secondly, I would point out regarding the predictive evaluation standard, that they provide -- they do not abrogate in any fashion the intent of state legislatures that there be a broad scope of sentencing alternatives.

The broad scope of sentencing alternatives exists at any rate, and all the judge does, by discarding one, is to preserve the options which are contained in the statutes in all the other -- all the other sentencing alternatives.

Now unless the Court has any further questions, the respondent will respectfully request that this Court affirm the judgment of the Illinois courts below.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Elson?

MR. ELSON: Yes.

MR. CHIEF JUSTICE BURGER: You have two minutes left.

REBUTTAL ARGUMENT OF JOHN S. ELSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ELSON: I would just like to address the equal

protection argument which I believe is compelling in this case, and made more compelling in light of Mayer v. City of Chicago and Ross v. Moffitt.

Mayer makes clear that the lack of imprisonment, that the penalty cannot justify withholding any criminal procedural safeguards on the basis of defendant's ability to pay.

And then Ross makes clear that the equal protection rationale of Douglas v. California, which required appointment of counsel on initial appeal, applies with far more force to the appointment of counsel at trial, where the defendant is fighting to maintain his presumption of innocence, and where tactically and strategically, counsel can do the most good.

It's really too late, usually, to appoint a counsel on appeal when the pro se defendant has not put in the record the facts that he needs for his case.

I'd just like to point out that in our brief as now we do not maintain that the authorized imprisonment is in itself necessarily the only criterion of criminality in this case; that there are other criteria as well that add up to this being a criminal prosecution.

Unless there are any further questions, thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you counsel.

The case is submitted.

[Whereupon, at 11:58 p.m., the case in the above-entitled matter was submitted.]

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