SUPREME COURT OF THE UNITED STATES

No. 00–1214

ALABAMA, PETITIONER *v.* LEREED SHELTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[May 20, 2002]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In *Argersinger* v. *Hamlin,* 407 U. S. 25, 37 (1972), we held that "absent a knowing and intelligent waiver, *no person may be imprisoned* for any offense . . . unless he was represented by counsel at his trial." (Emphasis added.) Although, we said, the "run of misdemeanors will not be affected" by this rule, "in those *that end up in the actual deprivation of a person's liberty*, the accused will receive the benefit" of appointed counsel. *Id.*, at 40 (emphasis added). We affirmed this rule in *Scott* v. *Illinois,* 440 U. S. 367 (1979), drawing a bright line between imprisonment and the mere threat of imprisonment: "[T]he 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.*, at 373 (emphasis added). We have repeatedly emphasized actual imprisonment as the touchstone of entitlement to appointed counsel. See, *e.g.*, *Glover* v. *United States,* 531 U. S. 198, 203 (2001) ("any amount of *actual jail time* has Sixth Amendment significance" (emphasis added)); *M. L. B.* v. *S. L. J.,* 519 U. S. 102, 113 (1996) ("right [to appointed counsel] does not extend to nonfelony trials if no term of imprisonment is *actually imposed*" (emphasis

added)); *Lassiter* v. *Department of Social Servs. of Durham Cty.,* 452 U. S. 18, 26 (1981) (the Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, *do not result in* the defendant's *loss of personal liberty*" (emphasis added)).

Today's decision ignores this long and consistent jurisprudence, extending the misdemeanor right to counsel to cases bearing the mere threat of imprisonment. Respondent's 30-day suspended sentence, and the accompanying 2-year term of probation, are invalidated for lack of appointed counsel even though respondent has not suffered, and may never suffer, a deprivation of liberty. The Court holds that the suspended sentence violates respondent's Sixth Amendment right to counsel because it "*may* 'end up in the actual deprivation of [respondent's] liberty,'" *ante*, at 1–2 (emphasis added), *if* he someday violates the terms of probation, *if* a court determines that the violation merits revocation of probation, Ala. Code §15–22–54(d)(1) (1995), and *if* the court determines that no other punishment will "adequately protect the community from further criminal activity" or "avoid depreciating the seriousness of the violation," §15–22–54(d)(4). And to all of these contingencies there must yet be added, before the Court's decision makes sense, an element of rank speculation. Should all these contingencies occur, the Court speculates, the Alabama Supreme Court would mechanically apply its decisional law applicable to routine probation revocation (which establishes procedures that the Court finds inadequate) rather than adopt special procedures for situations that raise constitutional questions in light of *Argersinger* and *Scott*. *Ante*, at 10–11. The Court has miraculously divined how the Alabama justices would resolve a constitutional question.[1]

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[1]The Court says that the Alabama Supreme Court has already re-

But that question is not the one before us, and the Court has no business offering an advisory opinion on its answer. We are asked to decide whether "imposition of a suspended or conditional sentence in a misdemeanor case invoke[s] a defendant's Sixth Amendment right to counsel." Pet. for Cert. i. Since *imposition* of a suspended sentence does not deprive a defendant of his personal liberty, the answer to *that* question is plainly no. In the future, *if and when* the State of Alabama seeks to imprison respondent on the previously suspended sentence, we can ask whether the procedural safeguards attending the imposition of that sentence comply with the Constitution. But that question is *not* before us now. Given our longstanding refusal to issue advisory opinions, *Hayburn's Case,* 2 Dall. 409 (1792), particularly with respect to constitutional questions (as to which we seek to avoid even *non*-advisory opinions, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), I am amazed by the Court's conclusion that it "makes little sense" to limit today's decision to the question presented (the constitutionality of imposing a suspended sentence on uncounseled misdemeanants) and to avoid a question *not* presented (the constitutionality of the "procedures that will precede its activation"). *Ante*, at 12.

Although the Court at one point purports to limit its decision to suspended sentences imposed on uncounseled misdemeanants in States, like Alabama, that offer only "minimal procedures" during probation revocation hear-

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solved this question, since, in finding that respondent's sentence violated the Sixth Amendment, it "expressed not the slightest hint that revocation-stage procedures . . . would affect the constitutional calculus." *Ante*, at 13, n. 6. Indeed it did not, and that was precisely its error. It did not answer (because it did not consider) the question whether procedures attending the probation revocation proceeding could cure the absence of counsel at trial.

ings, see *ante*, at 12, n. 5, the text of today's opinion repudiates that limitation. In answering the question we asked *amicus* to address—whether "the Sixth Amendment permit[s] activation of a suspended sentence upon the defendant's violation of the terms of probation"—the Court states without qualification that "it does not." *Ante*, at 6. Thus, when the Court says it "doubt[s]" that any procedures attending the reimposition of the suspended sentence "could satisfy the Sixth Amendment," *ante*, at 12, n. 5, it must be using doubt as a euphemism for certitude.

The Court has no basis, moreover, for its "doubt." Surely the procedures attending reimposition of a suspended sentence would be adequate if they required, upon the defendant's request, complete retrial of the misdemeanor violation with assistance of counsel. By what right does the Court deprive the State of that option?[2] It

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[2]The Court asserts that pretrial probation, which its opinion permits, is the "functional equivalent" of post-trial probation with later retrial if the suspended sentence is to be activated. Even if that were so, I see no basis for forcing the State to employ one "functional equivalent" rather than the other. But in fact there is nothing but the Court's implausible speculation to support the proposition that pretrial probation will "yiel[d] a similar result," *ante*, at 15. That would certainly be a curious coincidence, inasmuch as pretrial probation has the quite different purpose of conserving prosecutorial and judicial resources by forgoing trial. See, *e.g.*, 3a U. S. Dept. of Justice, United States Attorneys' Manual §9–22.000 (1988); H. Abadinsky, Probation and Parole: Theory and Practice 348–349 (3d ed. 1987) (pretrial probation programs "use the fact that an arrest has occurred as a means of identifying defendants in need of treatment or, at least, not in need of criminal prosecution"). Moreover, pretrial probation is generally available only for minor offenses, App. to Reply Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 1a, and is available in States (*e.g.*, Alabama) that also employ post-trial probation, *id.*, at 3a. If the thesis that it is the "functional equivalent" of post-trial probation were true, we would expect to see pretrial probation used for both major and minor crimes and to see it used in place of, not in addition to, post-trial probation.

may well be a sensible option, since most defendants will be induced to comply with the terms of their probation by the mere threat of a retrial that could send them to jail, and since the expense of those rare, counseled retrials may be much less than the expense of providing counsel initially in all misdemeanor cases that bear a possible sentence of imprisonment. And it may well be that, in some cases, even procedures short of complete retrial will suffice.[3]

Our prior opinions placed considerable weight on the practical consequences of expanding the right to appointed

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[3]The Court quotes Chief Justice Burger's concurrence in *Argersinger* to support its "doubt that providing counsel after the critical guilt adjudication stage '[would] be of much help to a defendant,' for 'the die is usually cast when judgment is entered on an uncounseled trial record.' [*Argersinger* v. *Hamlin,* 407 U. S. 25, 41 (1972)]." *Ante*, at 12, n. 5. But that passage was addressing the limited benefits of "*[a]ppeal* from a conviction after an uncounseled trial," *Argersinger*, *supra*, at 41 (emphasis added), and was doubtless correct in light of the uniformly restricted scope of appellate review. But it makes no sense to transfer the Chief Justice's concerns to unknown and unknowable forms of probation revocation proceedings, which may provide various means of retesting (with assistance of counsel) the validity of the original conviction. The Court notes that a "large number of misdemeanor convictions take place in police or justice courts which are not courts of record," making it quite difficult for a defendant "to demonstrate error in the original proceeding." *Ante*, at 12, n. 5 (internal quotation marks omitted). But it is entirely irrelevant whether a "*large number of misdemeanor convictions*" take place in police or justice courts. What matters is whether a record is available in misdemeanor convictions *that result in a suspended prison sentence* (a presumably small fraction of all misdemeanor convictions). We have no reliable information on that point other than the experience of the present case—which shows that Alabama does provide a record which counsel can comb for substantive and procedural inadequacy. Respondent was tried before a judge in State District Court, a court of record; he subsequently exercised his right, under Ala. Code §12–12–71 (1995), to trial *de novo* before a jury in State Circuit Court, a higher court of record. See *Ex parte Maye*, 799 So. 2d 944, 947 (Ala. 2001).

counsel beyond cases of actual imprisonment. See, *e.g.*, *Scott*, 440 U. S., at 373 (any extension of *Argersinger* would "impose unpredictable, but necessarily substantial, costs on 50 quite diverse States"); see also *Argersinger*, 407 U. S., at 56–62 (Powell, J., concurring in result) (same). Today, the Court gives this consideration the back of its hand. Its observation that "[a]ll but 16 States" already appoint counsel for defendants like respondent, *ante*, at 13, is interesting but quite irrelevant, since today's holding is not confined to *defendants like respondent*. Appointed counsel must henceforth be offered before *any* defendant can be awarded a suspended sentence, no matter how short. Only 24 States have announced a rule of this scope.[4] Thus, the Court's decision imposes a large,

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[4]Ten of the thirty-four States cited by the Court do not offer appointed counsel in all cases where a misdemeanor defendant might suffer a suspended sentence. Six States guarantee counsel only when the authorized penalty is *at least* three or six months' imprisonment. See Idaho Code §§19–851(d)(2), 19–852(a) (1948–1997); *State* v. *Hardman*, 120 Idaho 667, 669–670, 818 P. 2d 782, 784–785 (App. 1991); Md. Ann. Code, Art. 27A, §§2(h)(2), 4(b)(2) (1957–1997); Nev. Rev. Stat. §§178.397, 193.120 (1996); N. M. Stat. Ann. §§31–16–2, 31–16–3 (2000); *State* v. *Woodruff*, 124 N. M. 388, 396, n. 3, 951 P. 2d 605, 613, n. 3 (1997); Ohio Rules Crim. Proc. 2(C), 44(A) (2002); 18 Pa. Cons. Stat. §106(c) (1998); Pa. Rules Crim. Proc. 122(A), (B) (2002); *Commonwealth* v. *Thomas*, 510 Pa. 106, 111, n. 7, 507 A. 2d 57, 59, n. 7 (1986). South Dakota does not provide counsel where the maximum permissible sentence is 30 days' imprisonment, S. D. Codified Laws §22–6–2 (1998), if "the court has concluded that [the defendant] will not be deprived of his liberty if he is convicted," §§23A–40–6, 23A–40–6.1. Texas's statute declares that appointed counsel should be offered to any defendant "charged with a misdemeanor punishable by confinement," Tex. Code Crim. Proc. Ann., Art. 26.04(b)(3) (Vernon Supp. 2002), but the state courts have construed this provision to require appointment only "when the court *knows* that the punishment it will assess includes imprisonment or when the trial is before the jury and the possible punishment includes imprisonment." *Fortner* v. *State*, 764 S. W. 2d 934, 935 (Tex. App. 1989) (emphasis added). Thus, nothing in Texas law assures

new burden on a majority of the States, including some of

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counsel in a misdemeanor bench trial resulting in a suspended sentence. Finally, in two of the States that appoint counsel when imprisonment is "likely" to be imposed, the courts have not yet decided whether the likelihood of a *suspended* sentence qualifies, but the answer—as has been held with respect to the similarly phrased Michigan and Pennsylvania statutes cited *supra*—is probably no. N. J. Stat. Ann. §2A:158A–5.2 (1985); *Rodriguez* v. *Rosenblatt*, 58 N. J. 281, 295, 277 A. 2d 216, 223 (1971); N. C. Gen. Stat. §7A–451(a)(1) (1999); *State* v. *McCoy*, 304 N. C. 363, 370, 283 S. E. 2d 788, 791–792 (1981).

The District of Columbia must also be numbered among the jurisdictions whose law is altered by today's decision. D. C. Code Ann. §11–2602 (2001) guarantees counsel in "all cases where a person faces a loss of liberty *and* the Constitution or any other law requires the appointment of counsel." (Emphasis added.) Today's decision, discarding the rule of *Argersinger*, brings suspended sentences within this prescription.

The Court asserts that the burden of today's decision on these jurisdictions is small because the "circumstances in which [they] currently allow prosecution of misdemeanors without appointed counsel are quite *narrow*." *Ante*, at 14, n. 10 (emphasis added). But the narrowness of the range of circumstances covered says nothing about the number of suspended-sentence cases covered. Misdemeanors punishable by less than six months' imprisonment may be a narrow category, but it may well include the vast majority of cases in which (precisely *because* of the minor nature of the offense) a suspended sentence is imposed. There is simply nothing to support the Court's belief that few offenders are prosecuted for crimes in which counsel is not already provided. The Court minimizes the burden on Pennsylvania by observing that the "summary offenses" for which it permits uncounseled suspended sentences include such rarely prosecuted crimes as failing to return a library book within 30 days and fishing on Sunday. *Ante*, at 14, n. 10. But they also include first-offense minor retail theft, driving with a suspended license, and harassment (which includes minor assault). See *Thomas, supra*, at 109, 507 A. 2d, at 58; 75 Pa. Cons. Stat. §1543(b)(1) (Supp. 2002); 18 Pa. Cons. Stat. §§2709(a), (c)(1) (2000). Over against the Court's uninformed intuition, there is an *amicus* brief filed by States that include 2 of the 10 with exceptions that the Court calls "narrow," affirming that the rule the Court has adopted today will impose "significant burdens on States." Brief for Texas, Ohio, Montana, Nebraska, Delaware, Louisiana, and Virginia as *Amici Curiae* 22.

the poorest (*e.g.*, Alabama, Arkansas, and Mississippi, see U. S. Census Bureau, Statistical Abstract of the United States 426 (2001)). That burden consists not only of the cost of providing state-paid counsel in cases of such insignificance that even financially prosperous defendants sometimes forgo the expense of hired counsel; but also the cost of enabling courts and prosecutors to respond to the "over-lawyering" of minor cases. See *Argersinger, supra,* at 58–59 (Powell, J., concurring in result). Nor should we discount the burden placed on the minority 24 States that currently provide counsel: that they keep their current disposition forever in place, however imprudent experience proves it to be.

Today's imposition upon the States finds justification neither in the text of the Constitution, nor in the settled practices of our people, nor in the prior jurisprudence of this Court. I respectfully dissent.