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3 ALABAMA, :

4 Petitioner :

5 v. : No. 00-1214

6 LeREED SHELTON. :

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8 Washington, D.C.

9 Tuesday, February 19, 2002

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:11 a.m.

13 APPEARANCES:

14 WILLIAM H. PRYOR, JR., ESQ., Attorney General of Alabama,  
15 Montgomery, Alabama; on behalf of the Petitioner.

16 CHARLES FRIED, ESQ., Cambridge, Massachusetts; on behalf  
17 of amicus curiae in opposition to the judgment below.

18 WILLIAM H. MILLS, ESQ., Birmingham, Alabama; on behalf  
19 of the Respondent.

20 STEVEN B. DUKE, ESQ., New Haven, Connecticut; on behalf of  
21 the National Association of Criminal Defense Lawyers,  
22 as amicus curiae, supporting the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-1214, Alabama v. LeReed Shelton.

General Pryor.

ORAL ARGUMENT OF WILLIAM H. PRYOR, JR.

ON BEHALF OF THE PETITIONER

MR. PRYOR: Thank you, Mr. Chief Justice, and may it please the Court:

30 years ago in *Argersinger v. Hamlin* and then more than 20 years ago in *Scott v. Illinois*, this Court established the principle that, under the Sixth and Fourteenth Amendments, a State is not obligated to provide an indigent defendant in a misdemeanor case court-appointed and taxpayer-funded counsel, provided that the defendant is not actually imprisoned upon conviction.

8 years ago in *Nichols v. the United States*, this Court reaffirmed that principle.

The Supreme Court of Alabama distorted this well-established and workable rule and held that a probated or suspended sentence, which actually liberates a defendant to return to free society, nevertheless triggers a right to court-appointed and taxpayer-funded counsel.

There are three arguments that I would like to address this morning.

1 QUESTION: Do you -- do you concede that the  
2 State can never impose the original sentence of time in  
3 jail?

4 MR. PRYOR: Your Honor, obviously that is not a  
5 court -- a question that this Court has directly addressed  
6 in either Argersinger or Scott. Our best reading --

7 QUESTION: I'm asking whether the State of  
8 Alabama concedes that it can't ever impose that original  
9 sentence.

10 MR. PRYOR: Our reading of Scott is that -- that  
11 we cannot activate the suspended sentence. We acknowledge  
12 that Mr. Fried, as an amicus, certainly has a plausible  
13 reading that would allow the court to activate that  
14 sentence. In our judgment, that original sentence relates  
15 back to the original offense and that the court --

16 QUESTION: What -- what happens in Alabama if --  
17 if a -- a criminal defendant is convicted of a misdemeanor  
18 and placed on probation and then violates probation? Does  
19 that enable the State to impose the original sentence for  
20 violation of the probation?

21 MR. PRYOR: Yes, ordinarily it would. But for  
22 the problem presented involving an uncounseled defendant,  
23 it would allow the State to activate the suspended  
24 sentence.

25 QUESTION: Well, then we're jumping probably

1 ahead into what you're going to tell us, but while we're  
2 at this point, it seems to me that if -- if you say that  
3 the sentence cannot be reimposed, you're saying that the  
4 State courts are in the position of imposing a sentence  
5 that is something of a rouse. Why should you put your own  
6 courts in this position? I -- I just don't think it's  
7 very sound for us to tell the State courts, well, you go  
8 ahead and tell these people that they can -- might be put  
9 in prison, but that that won't really happen. It seems to  
10 me that that's your position.

11 MR. PRYOR: Well, there's still a risk of  
12 imprisonment, the same risk of imprisonment, under our  
13 reading of Argersinger and Scott, that -- that is  
14 accompanied with the judgment of a mere fine. Every court  
15 has the power to enforce any judgment as an essential  
16 aspect of the administration of justice through the power  
17 of contempt.

18 QUESTION: But you're -- you're treating the  
19 contempt proceeding, in effect, as a separate proceeding  
20 then, and I take it, though I'm not sure that I remember  
21 this from your briefs -- I take it that on -- on your view  
22 of the way the scheme ought to operate in the contempt  
23 proceeding, before there could be any confinement on a  
24 finding of contempt, that counsel would have to be  
25 provided then if -- if the individual is indigent and

1 didn't waive it.

2 MR. PRYOR: That's -- that's correct, Justice  
3 Souter.

4 QUESTION: So, it's the separate counseled  
5 proceeding that distinguishes your case from -- from the  
6 case that Mr. Fried argues for.

7 MR. PRYOR: That -- that's correct, Justice  
8 Souter. And -- and at a minimum I would say, although I  
9 don't think the Court has to ever address this question  
10 because there's been no violation of probation -- at a  
11 minimum the State would have the same power to enforce its  
12 judgment that it would a judgment of a mere fine which  
13 this Court held squarely in Scott does not trigger a right  
14 to court-appointed --

15 QUESTION: From your point of view, General  
16 Pryor, what does the State gain as -- as opposed to what  
17 the Supreme Court of Alabama said, by following --  
18 following your -- your line of reasoning? I think as  
19 Justice Kennedy said, it -- it imposes a sentence, but a  
20 sentence that everybody knows can't be enforced.

21 MR. PRYOR: The State gains the powerful tool of  
22 probation to rehabilitate an offender that the State  
23 believes is a good risk, a risk to return to free society  
24 who can be rehabilitated, depending on whatever mechanisms  
25 of probation have been adopted by the trial court.

1 Meanwhile, the State is preserving its scarce judicial  
2 resources to incarcerate more dangerous offenders and  
3 provide counsel in more serious cases.

4 QUESTION: But what -- how effective is  
5 probation going to be if there isn't the threat of -- of a  
6 sentence in case of probation violation?

7 MR. PRYOR: I think at a minimum, the probation  
8 is going to be as effective as a judgment of a fine  
9 because the State is going to still have the flexible  
10 power of contempt, whether civil or criminal in nature, to  
11 ensure that its orders are followed and -- and will  
12 continue to exercise jurisdiction of the probationer  
13 during that period of probation.

14 QUESTION: Is it the -- is it the case in  
15 Alabama that probation cannot be imposed without a  
16 suspended sentence?

17 MR. PRYOR: That is correct. Technically that  
18 is how probation is imposed, Justice Souter.

19 QUESTION: Wouldn't -- wouldn't we have at least  
20 a more candid system or wouldn't the interaction of  
21 Argersinger and -- and the Alabama system, as you view  
22 Argersinger, produce a more candid system if -- if we took  
23 the position that, no, they can't impose a suspended  
24 sentence, and Alabama would then presumably amend its laws  
25 so that probation could be imposed without imposing a

1 suspended sentence, and you on your view would have your  
2 -- your contempt remedy. We wouldn't be -- in effect, the  
3 -- the two systems wouldn't be producing this kind of  
4 silly effect of -- of a sentence which everyone realizes  
5 as such cannot be imposed.

6 MR. PRYOR: Alabama certainly has the freedom to  
7 adopt I think either system without running afoul of the  
8 Constitution, which is the -- the issue before this Court.  
9 Although it might make more sense and not seem as silly to  
10 impose probation without going through the mechanics of --

11 QUESTION: Well, is -- is there any State which  
12 imposes probation without a suspended sentence that you  
13 know of?

14 MR. PRYOR: I know from the amicus brief of the  
15 National Association of Criminal Defense Lawyers that  
16 there are some States that impose, in fact, pretrial  
17 probation, that that is something that --

18 QUESTION: How about post-trial, after a  
19 conviction?

20 MR. PRYOR: I just don't know. I know that  
21 there were several States that were cited in Shelton's  
22 briefly correctly that -- that used the same mechanism  
23 that Alabama does. There were several cites --

24 QUESTION: General Pryor --

25 QUESTION: Well, what -- what authority would --



1 would the State have to -- to put somebody on probation  
2 unless -- unless it is the suspension of -- of a judgment  
3 of incarceration? I mean, can a State just go around  
4 saying you're going to be on probation?

5 MR. PRYOR: Well --

6 QUESTION: It seems to me the only -- the only  
7 reason it -- it has that grip over the person is that --  
8 is that it has a right to incarcerate him.

9 MR. PRYOR: The States certainly view that as an  
10 effective mechanism in most --

11 QUESTION: I'm not sure there's an alternative  
12 to it. I'm not sure you can just pass a law saying judges  
13 can put on probation whomever they want to put on  
14 probation.

15 MR. PRYOR: I think that -- that the Alabama  
16 legislature has the inherent power to define what a  
17 sentence is, whether a sentence is a fine or whether a  
18 sentence is imprisonment. And in fact, I think the State  
19 would have the flexibility to define a sentence -- one of  
20 the sentencing options as -- as probation.

21 QUESTION: I take it what they would do on that  
22 scheme would be to say, upon conviction of offense A, the  
23 court may impose probation, and if the conditions of  
24 probation are violated and are shown in a separate trial  
25 or proceeding to that effect, the violation itself can be

1 punished. That would be the way the scheme would work,  
2 wouldn't it?

3 MR. PRYOR: That's correct.

4 QUESTION: If -- if Alabama wanted it.

5 MR. PRYOR: If Alabama wanted it. But -- but  
6 this is really -- in my judgment this would be elevating  
7 form over substance because the -- the effect is the same  
8 with whichever system Alabama wants to adopt --

9 QUESTION: General Pryor, explain to me how some  
10 other States approach it. If I understand correctly,  
11 there is no trial. It's a deferred prosecution on  
12 condition that the -- the defendant abide by certain terms  
13 and conditions. Is that how it works?

14 MR. PRYOR: That's -- that's correct.

15 QUESTION: And if -- if the defendant then  
16 doesn't live up to it, then it proceeds to trial.

17 MR. PRYOR: Then it proceeds to trial.

18 QUESTION: How many States use a system like  
19 that?

20 MR. PRYOR: I believe the -- the brief listed 23  
21 States.

22 QUESTION: Well, these are pretrial diversion  
23 programs which have been very helpful in the drug context,  
24 but they're extremely expensive to administer.

25 MR. PRYOR: Absolutely. Absolutely. And -- and

1 many States may very well feel that -- that there's  
2 something almost unseemly about using this kind of  
3 bargaining process before you have adjudicated guilt or  
4 innocence, and -- and the State certainly should have  
5 the --

6 QUESTION: Well, why is it any more unseemly  
7 than the ordinary plea bargain?

8 MR. PRYOR: Because at least in the -- in the  
9 case of the ordinary plea bargain, the defendant comes  
10 forward and admits the wrongdoing. There's an indicia of  
11 reliability there for the State that's not present in this  
12 kind of pretrial system. And -- and the States who trust  
13 their system to adjudicate innocence or guilt may find  
14 that that's a -- that the system that Alabama has is a  
15 preferable system.

16 QUESTION: But Shelton was not given any  
17 pretrial diversion. He was convicted, was he not?

18 MR. PRYOR: That's correct, and Alabama doesn't  
19 have it in this context except with respect to drug  
20 offenders.

21 QUESTION: General Pryor, I can understand a  
22 line between a fine and any kind of confinement, and  
23 probation may involve no immediate incarceration, but it  
24 does involve what could be very significant restraints on  
25 the person. So, isn't it more logical to draw the line

1 between money only on the one hand and confinement, be it  
2 in jail or under terms and conditions of probation?

3 MR. PRYOR: Justice Ginsburg, I'd say no for a  
4 couple of reasons. This Court has recognized that  
5 imprisonment is an intrinsically different form of  
6 punishment that has special constitutional significance.  
7 The probation system is one that is meant more as  
8 rehabilitation and not as punishment to give an offender a  
9 second chance in free society. And -- and even with the  
10 judgment of a fine, as I mentioned earlier, there -- it --  
11 it is accompanied by the risk of imprisonment should the  
12 defendant willfully refuse to pay that fine. So, even in  
13 that context, in the judgment of -- of a fine, there is at  
14 least that risk, the same risk that would exist under the  
15 regime that we propose.

16 I do not discount the fact that probation has --  
17 can have serious restrictions on liberty, but it's not the  
18 -- the deprivation of liberty, the loss of physical  
19 liberty, that is, physical confinement that this Court has  
20 held triggers a right to court-appointed counsel under the  
21 Sixth and Fourteenth Amendments.

22 QUESTION: Under your view, if you enforced the  
23 jail sentence through the contempt mechanism and reached  
24 the same result, I take it you now have a second jury  
25 trial.

1           MR. PRYOR: Well, I guess it would be dependent  
2 in part on the nature of the contempt proceeding. If it's  
3 civil contempt, if it's a direct contempt or an indirect  
4 contempt, but if it's criminal contempt, I would imagine  
5 -- I say that. In Alabama, a criminal contempt procedure  
6 only has a maximum term of imprisonment of 5 days. So,  
7 I'm not sure that -- that there would be a right to a jury  
8 trial.

9           For more than 20 --

10          QUESTION: But then -- but then the contempt is  
11 -- is really not a substitute of an equivalent for the --  
12 for the imposition of the suspended sentence. They're not  
13 equivalent. If it's just 5 days, that's not equivalent to  
14 the suspended sentence.

15          MR. PRYOR: Oh, absolutely. That's absolutely  
16 right, although I would argue that -- that the threat of  
17 imprisonment is still enough to give the probationer an  
18 incentive to follow the orders of the court. It's  
19 absolutely correct that there is a material difference  
20 between activation of the probated sentence in this case  
21 and the use of -- of the criminal contempt remedy that's  
22 provided by the code of Alabama. There's no doubt about  
23 that.

24          The -- what is at stake in this case is -- is  
25 the use of probation, a valuable tool for the States that

1 allow them the freedom and flexibility again to ensure  
2 that scarce judicial resources can be preserved for more  
3 serious cases to provide counsel and to incarcerate more  
4 serious offenders.

5 If there are no further questions from the  
6 Court, Mr. Chief Justice, I'd like to reserve the balance  
7 of my time for rebuttal.

8 QUESTION: Very well, General Pryor.

9 Mr. Fried, we'll hear from you.

10 ORAL ARGUMENT OF CHARLES FRIED

11 ON BEHALF OF THE AMICUS CURIAE

12 IN OPPOSITION TO THE JUDGMENT BELOW

13 MR. FRIED: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 First, if I might just refer to the deferred  
16 prosecution point, which was raised by Mr. Duke in his  
17 amicus brief and in one of the questions. I think that's  
18 a red herring because, as Mr. Duke points out, the  
19 deferred prosecution requires the consent of both the  
20 prosecutor and the defendant. Obviously, the kind of  
21 prosecutions we have here are usually not consented to by  
22 the defendant.

23 I think it is --

24 QUESTION: Why -- why is that a red herring?  
25 Because I got from your brief the impression that the --

1 the -- there's a practical problem that a lot of States do  
2 without giving people lawyers. Perhaps thousands and  
3 thousands of cases say, go plead guilty. We'll give you  
4 some light sentence that won't involve prison, but then  
5 they attach to that a suspended sentence. And what I  
6 wondered is, well, isn't the solution to this to say --  
7 it's called pretrial diversion or pretrial probation or  
8 they call it different names, but to say if you violate  
9 the condition, what happens to you is not prison, what  
10 happens to you is the trial that we haven't yet given you  
11 with a lawyer. And I thought maybe that works as a  
12 practical matter in a lot of these States in a lot of the  
13 cases to which you referred.

14 MR. FRIED: It -- it does work. For instance,  
15 we use it a great deal in the Commonwealth of  
16 Massachusetts where there is a quite different rule from  
17 -- from the Argersinger rule where in Massachusetts we say  
18 if there's a risk of imprisonment, you must get a lawyer.  
19 And a number of States have that rule which is perhaps why  
20 they also have the deferred prosecution.

21 I say it's a red herring because what we're  
22 considering today is not the very best possible system but  
23 what is the constitutional minimum. Our emphasis in the  
24 brief on Nichols is not in order to show that Nichols  
25 somehow resolves this question in favor of allowing the

1     probated sentence and in favor of allowing it then to be  
2     activated on violation, but rather Nichols shows that the  
3     question is an open one. Nichols doesn't resolve it, but  
4     then neither does Argersinger. And I think it's a mistake  
5     and it's a mistake the Alabama Supreme Court made to treat  
6     Argersinger as having resolved this question.

7             Argersinger made quite clear that there is a  
8     continuum here all the way from mere due process, which  
9     was the law prior to Gideon, to a criminal -- to the right  
10    of a criminal defendant having a counsel in any criminal  
11    case. And it picked a point. It picked a point which the  
12    Court recognized had a certain arbitrariness, and it  
13    picked it for reasons of practicality and fairness. And  
14    those considerations of practicality and fairness require  
15    no more than that there be counsel if the person is  
16    sentenced immediately then and there to prison.

17            The fairness aspect is, as the Illinois court  
18    pointed out, that in these cases the defendant carries the  
19    key to the prison in his own pocket. Whether he ends up  
20    in prison is a matter of his choice whether or not he  
21    violates the terms of the probation.

22            That's why I think Mr. Duke enters two more red  
23    herrings into the argument. The stay on appeal.  
24    Obviously in a stay case, the keys are not in the pocket  
25    of the defendant, but in the pocket of the appeals court.



1 And the 30-day or \$30 prison which is executed  
2 immediately, in those cases the fine is either an illegal  
3 fine under the -- this Court's decision in Bierdon -- the  
4 person doesn't pay because he cannot, and that is itself a  
5 constitutional violation -- or once again, he is  
6 imprisoned because he chooses not to pay. And once again,  
7 that is the fairness point. The keys are in his pocket.

8 That is a reasonable place to draw the line  
9 because of the very important practicalities. The  
10 practicalities are the literally millions of misdemeanor  
11 cases, the very large number -- it's hard to say exactly  
12 what the number is -- the very large number of  
13 probationary misdemeanor sentences, and the fact that  
14 those probationary sentences overwhelmingly are intended  
15 to serve a rehabilitative or preventive function. Don't  
16 drive again. Take a anger management course. Go to  
17 counseling. And the -- this is meant to keep people out  
18 of prison, not to put them into prison.

19 Unfortunately, if you insert a mandatory  
20 formality into something which is a little bit like family  
21 court proceeding, necessarily you will have a perverse  
22 effect. The State has to spend more time, has to spend  
23 more resources. It will do this less frequently, but it  
24 will make sure it gets more of, if you like, deterrent  
25 bang for its buck, and the result will be perverse.

1           This system, as simply a constitutional minimum,  
2 allows the States the flexibility which this Court from  
3 the beginning, from Argersinger on, has recognized.

4           QUESTION: You do allow the possibility that  
5 counsel could be provided in the event the probation is  
6 revoked.

7           MR. FRIED: I think that's a very real  
8 possibility. Ganyon talks about that in terms of due  
9 process, and I think the practicalities change --

10          QUESTION: But the issue with the revocation  
11 hearing would not necessarily be whether he committed a  
12 crime. It would just be whether he violated a term of  
13 probation such as leaving the jurisdiction or something.

14          MR. FRIED: That is correct.

15          QUESTION: He can get counsel to defend him  
16 against that.

17          MR. FRIED: That is correct.

18          QUESTION: Not against the crime itself.

19          MR. FRIED: That is correct.

20          QUESTION: Well, it would -- it would also  
21 cover, I take it, whether or not the plea was voluntary  
22 and knowingly made originally.

23          MR. FRIED: That could be brought up. Nothing  
24 -- nothing precludes bringing that up. What you have is a  
25 funnel with a very large opening, and in terms of the

1 statistics, a very small tube at the bottom. It would  
2 not --

3 QUESTION: Well, is it your view that at the  
4 probation hearing you reexamine the validity of the  
5 original offense, the original conviction?

6 MR. FRIED: The -- Alabama is a good example of  
7 what is open at probation. In most jurisdictions, oddly  
8 enough, not in Massachusetts -- in most jurisdictions, the  
9 court on probation is free to impose new -- the revocation  
10 proceeding -- new conditions, the sentence that has  
11 already been imposed, or a lesser sentence in light of all  
12 circumstances, and it mentions specifically  
13 depreciating --

14 QUESTION: Yes, but all those alternatives  
15 assume the original conviction is valid.

16 MR. FRIED: I don't see why in those  
17 proceedings --

18 QUESTION: At least in a typical case.

19 MR. FRIED: -- the lawyer could not argue, look,  
20 you're asking whether this will depreciate the gravity of  
21 the original offense. Let me tell you a little bit about  
22 that. And I would think the judge would listen, and he  
23 has the discretion to impose a lesser sentence.

24 QUESTION: This is all pretty speculative, isn't  
25 it, since that question doesn't confront us here?

1           MR. FRIED: No question. And I simply want to  
2 emphasize that that is open and is an important question  
3 perhaps best considered in a case where it can be fully  
4 developed. But I don't think the Court should decide this  
5 case on the assumption that that possibility might not in  
6 a later case be open. And I think that leaves the kind of  
7 flexibility which is very desirable in these low level but  
8 very frequently encountered cases. I think that's what  
9 will serve the -- the Constitution and the interests of  
10 rehabilitation best.

11           QUESTION: Do we have any idea of the 1.4  
12 million to 1.8 million people who are on probation for  
13 misdemeanors, of what percentage of those cases the -- the  
14 probation -- or the defendant was not offered a lawyer? I  
15 mean, the relevant feature is --

16           MR. FRIED: We try --

17           QUESTION: That's a rather -- yes.

18           MR. FRIED: We try to infer that in the brief.  
19 It's -- the statistics are not kept in a transparent or  
20 useful way. But it may be in the hundreds of thousands.  
21 It may be in the hundreds of thousands because as -- as we  
22 explain in our brief, there are a very large number of  
23 persons on probation who did not have lawyers, and given  
24 Argersinger, we may assume that they were misdemeanors.  
25 So, it's a very large number.

1           But the number of persons who are actually  
2 incarcerated for breach of those conditions is quite  
3 small. It's in the thousands. And that's why I think it  
4 becomes quite practical to offer an attorney to help in  
5 that condition, but really I think very confining and  
6 perhaps with a perverse effect to require it as a  
7 constitutional minimum in the much larger -- very much  
8 larger number of cases where the matter is first  
9 considered. After all, if the person has to be sent to  
10 prison, that's a failure.

11           I thank the Court for its attention.

12           QUESTION: Thank you, Mr. Fried, and thank you  
13 for your participation as an amicus.

14           Mr. Duke, we'll hear from you. I'm sorry. Mr.  
15 Mills.

16           ORAL ARGUMENT OF WILLIAM H. MILLS

17           ON BEHALF OF THE RESPONDENT

18           MR. MILLS: Mr. Chief Justice, and may it please  
19 the Court:

20           It obviously is apparent here that both the  
21 petitioner and the respondent come to this Court relying  
22 on the same authority, the -- primarily the Argersinger  
23 and Scott cases.

24           It seems that the State is taking a rather  
25 shallow view, in our judgment, of the Argersinger and

1 Scott cases both as to their background and how  
2 Argersinger is -- is implemented and the effect of that  
3 implementation.

4 QUESTION: Do you agree that neither of those  
5 cases squarely control the outcome here?

6 MR. MILLS: It -- it would be my position that  
7 Argersinger does by the -- some of the pronouncements that  
8 it makes.

9 QUESTION: Certainly the holding does not.

10 MR. MILLS: The holding does not certainly.

11 And it would further be my position that -- that  
12 the Scott case has something to say to us about this issue  
13 also, although the holding -- the -- the facts certainly  
14 do not coincide with this case.

15 It seems to me that the background of the  
16 Argersinger and Scott cases, of course, are the -- the  
17 Powell v. Alabama, Gideon v. Wainwright series of cases.  
18 And in those cases, it seems that the Court has  
19 established the purpose of the Counsel Clause which if we  
20 -- if we reduce to its barest terms is this. The purpose  
21 of the Counsel Clause is to prevent, to the extent humanly  
22 possible, the conviction of the innocent in an adversary  
23 proceeding. That seems to be what Justice Sutherland said  
24 in Powell v. Alabama and what Justice Black said in Gideon  
25 v. Wainwright, that what is to be done is to eliminate the

1 risk that the innocent may be convicted.

2 And when we come to the Argersinger case,  
3 although the -- the Gideon case had -- had spoken of this  
4 as being a -- or noble idea was the -- were the words used  
5 -- but I believe spoke of counsel for every defendant in  
6 every case as being a constitutional ideal. I think in  
7 Argersinger, the Court was faced with the argument of  
8 practicability and expense and -- and the other arguments  
9 that -- that the State makes in this case, that the  
10 mandate can't be absolute, that there must be some  
11 accommodation to those arguments.

12 And in Argersinger, it -- it seems that the  
13 Court made those accommodations. And if we include --

14 QUESTION: Well, the Court basically said, fine  
15 only? Okay. We're not going to extend the Sixth  
16 Amendment to that.

17 Now, here we have a State that says, well, we  
18 know we can't enforce the sentence. It's a toothless  
19 tiger. We'll say probation, but it -- we don't mean it.  
20 I mean, we'll -- we'll maybe have proceedings, but we --  
21 we can never enforce the sentence. In light of that,  
22 should we be concerned here?

23 MR. MILLS: Well, that -- that puzzled me  
24 somewhat when the State made that concession in its reply  
25 brief that this was in -- in effect a sham sentence. And

1 I see no authority in the law of Alabama or any other  
2 State that I'm aware of that authorizes a court --

3 QUESTION: Well, if that's the case, what do we  
4 think about this?

5 MR. MILLS: Perhaps we're dealing with a sham  
6 sentence. And perhaps that's the way the Alabama Supreme  
7 Court treated it. But certainly there shouldn't be, from  
8 this Court or any other court, an authorization for a  
9 trial court to enter a sentence that can't be enforced.

10 QUESTION: Would you just clarify one thing for  
11 me? Did the Alabama Supreme Court endorse that view, or  
12 is that the Attorney General?

13 MR. MILLS: That's the Attorney General's view.  
14 What the Alabama petit court -- Supreme Court did was  
15 merely strike the sentence.

16 QUESTION: I guess whether you strike it or not  
17 is a matter of State law, isn't it? I mean -- I don't  
18 know what the remedy should be for a sentence that's not  
19 -- not an enforceable sentence and the person writes it in  
20 the -- the judge writes in the book, suspended sentence.  
21 And the State and everyone else, let's say, agree that  
22 that isn't a lawful sentence. So, the State Supreme Court  
23 says, erase those words. Strike them. Did anyone suggest  
24 that was a matter of Federal law or what you do under  
25 State law when a --



1 MR. MILLS: Well, I believe the Alabama Supreme  
2 Court said it was -- it was a matter of Federal law.

3 QUESTION: That it be struck rather than just  
4 left to lie there unenforceable.

5 MR. MILLS: I'm not sure they articulated in  
6 those terms, but their -- their basis for reaching the  
7 decision they reached was the Federal cases that deal with  
8 the right of counsel.

9 QUESTION: One of the things that didn't happen,  
10 we know for sure, in this case was that an offer of  
11 counsel. Was that merely a -- an inadvertence on the  
12 court's part or does Alabama not provide assigned counsel  
13 for indigents in -- in a misdemeanor like this?

14 MR. MILLS: Perhaps it was inadvertence, but the  
15 -- the Alabama rules of criminal procedure have that as a  
16 part of the -- the processing of any -- any case.

17 QUESTION: In any misdemeanor?

18 MR. MILLS: Any criminal prosecution, yes, sir.

19 QUESTION: All right. So that if -- if there  
20 had been -- if there were an offense in Alabama that  
21 carried as much as a 1-day sentence, the State would  
22 provide counsel for an indigent, at least if requested?

23 MR. MILLS: Not -- not in those terms. Not -- I  
24 believe the Alabama rules say where constitutionally  
25 required. And of course the --

1 QUESTION: So, they're not providing counsel in  
2 these cases now because, I take it, the State's position  
3 is it's not constitutionally required.

4 MR. MILLS: That's correct, Your Honor.

5 QUESTION: At what point do they regard it as  
6 being constitutionally required? When the sentence can  
7 exceed 6 months or what? What -- what I'm getting at is I  
8 want to know -- I want your response to the argument that  
9 there's going to be a -- a great practical difference if  
10 we say now you may not impose sentences like this at all,  
11 even though they're merely suspended. I want to know what  
12 the practical difference is.

13 MR. MILLS: From the -- the wording of the  
14 Alabama Rules of Criminal Procedure about appointment of  
15 counsel at the present time, I would assume that the trial  
16 judge must go through the process outlined in Argersinger,  
17 that is, make the pretrial determination of whether  
18 imprisonment is a likely punishment in this particular  
19 case, and if -- if so, appoint counsel. If not so,  
20 counsel is not appointed.

21 QUESTION: Well, any imprisonment? 1 day of  
22 imprisonment?

23 QUESTION: Isn't that what the Federal --  
24 Argersinger requires?

25 MR. MILLS: I think that's what Argersinger

1 says.

2 QUESTION: Okay. But Alabama, in other words,  
3 is not doing something eccentric in this respect.

4 MR. MILLS: That -- that's correct.

5 QUESTION: The -- the only difference then  
6 between the cases in which -- misdemeanor cases, for  
7 example, in which counsel is offered, if an individual is  
8 indigent, and counsel is not offered are cases in which  
9 the judge says in advance I'm not going to put this guy  
10 away at all even if we convict him.

11 MR. MILLS: Presumably that's the process that's  
12 being followed.

13 QUESTION: Now, do you have -- do you have any  
14 basis to tell us what practical difference it would make  
15 if the judge said, well, I may impose a suspended sentence  
16 and therefore I will have to offer counsel because I read  
17 Argersinger as requiring that? Do you know what  
18 difference that would make in practical terms? How many  
19 cases would counsel have to be offered and potentially  
20 provided for where it's not being offered and potentially  
21 provided for now?

22 MR. MILLS: I don't have any data that would --  
23 would support that, but it -- but it would seem that if  
24 the trial judge makes the pretrial determination that any  
25 sentence, whether -- whether immediate or suspended, is

1 warranted or may be warranted in this particular case,  
2 that counsel should be appointed -- of course, that's the  
3 position.

4 QUESTION: I understand that.

5 MR. MILLS: That's the position.

6 QUESTION: Mr. Mills, there is one thing that I  
7 think is a piece of information that -- that is in the  
8 record, and that is that most non-indigent misdemeanors  
9 appear in court without counsel. So, the position that  
10 you're urging is kind of a superior justice for the  
11 indigents. Counsel, you would say, in every case where,  
12 at the end of the line, there may be any jail time,  
13 although most people who can't afford counsel do not have  
14 counsel in cases of -- of this kind.

15 MR. MILLS: That perhaps is correct. I suppose  
16 my response to that would be that that's -- that that's a  
17 free choice that the non-indigent makes.

18 QUESTION: Isn't it true also -- isn't it true  
19 also, at least according to some of the statistics quoted,  
20 that frequently these cases are not prosecuted by lawyers?  
21 They're simply prosecuted by the arresting officer.

22 MR. MILLS: That happens occasionally in  
23 Alabama. It used to happen a lot. It's -- it's fairly  
24 rare at the present time. But -- but that does happen.  
25 That does happen.

1           And, of course, in -- in Alabama, all  
2 misdemeanors, except those that are initiated by  
3 indictment, the first trial is in a -- a district or  
4 municipal court where there's no jury trial. And the jury  
5 trial, if there is a right to jury trial, comes only by a  
6 -- an appeal and a de novo trial in the circuit court,  
7 which is an administrative problem. I don't see that as a  
8 -- as a philosophical problem. It's -- it's still the --  
9 most misdemeanors are -- are being tried in courts where  
10 there is no jury, certainly all of them in the first  
11 instance or most of them in the first instance.

12           It seems that the petitioner's position  
13 overlooks the fact that -- that the Sixth Amendment is --  
14 is prophylactic rather than curative. Now, its -- its  
15 ideal is to prevent the convictions, not to do something  
16 about them after they occur.

17           Now, let me jump right quick to -- to the point  
18 that Argersinger deals with it somewhat in that way.  
19 Argersinger is what we might call an outcome-based  
20 analysis of whether there's a right to counsel. And --  
21 and to that extent, maybe it's -- it's curative rather  
22 than prophylactic.

23           But if -- if it is to be outcome-based analysis,  
24 certainly it ought to be the -- the total outcome not just  
25 the immediate outcome, and if a suspended sentence results

1 in incarceration, when the probation is revoked, that  
2 certainly is a part of the -- of the outcome that  
3 Argersinger was -- was dealing that the trial judge is  
4 required to make some decision on before trial even  
5 begins. So --

6 QUESTION: Do you suppose it would be  
7 constitutional for the State to offer the defendant at the  
8 outset the promise of imposition of a suspended sentence  
9 if counsel were waived?

10 MR. MILLS: If knowingly waived, I don't see a  
11 constitutional problem with that. And I'm sure that  
12 happens in fact.

13 QUESTION: Is that done sometimes in Alabama?

14 MR. MILLS: It -- it is. It is done. And, of  
15 course, this is -- this is the distinction between the --  
16 the pretrial diversion mechanism that was addressed  
17 earlier and a trial. Most pretrial -- perhaps all  
18 pretrial diversions are by definition.

19 QUESTION: Well, put in its raw form, if the  
20 judge said, now, if -- if you agree not to have a counsel,  
21 I'll agree not to impose a jail sentence, that -- that  
22 wouldn't be permitted. I mean --

23 MR. MILLS: Yes, sir, and it seems if --

24 QUESTION: I assume. Correct me if I'm wrong.  
25 I assume it wouldn't be permitted.

1           MR. MILLS: I think that's correct. In fact, I  
2 think that's what Argersinger requires. I think  
3 Argersinger requires a trial judge to assure the defendant  
4 who goes to trial without a lawyer that he's not going to  
5 get jail sentence. And if he can receive a jail sentence  
6 somewhere down the line, the judge has given him a false  
7 assurance. But --

8           QUESTION: The -- the jail sentence would not be  
9 for the original crime necessarily but perhaps just for  
10 breaking probation.

11          MR. MILLS: Well, I couldn't speak to all  
12 jurisdictions, but certainly under Alabama law, there  
13 would be no -- no way to impose a sentence for breaking  
14 probation. It would either be the original sentence --

15          QUESTION: Well, that's what I mean. But the  
16 reason this -- the original sentence now becomes effective  
17 is because he broke probation.

18          MR. MILLS: This, of course, is correct. This  
19 is the -- the carrot and stick analogy which -- which  
20 the --

21          QUESTION: Well, maybe I misunderstood General  
22 Pryor's argument, but I thought he was here arguing no, he  
23 wouldn't impose the original sentence ever. We'd just  
24 proceed on contempt, maximum 5 days. Did I misunderstand?

25          MR. MILLS: I think that's what he -- he said.

1 I'm sure he -- he told us the whole story about contempt  
2 under Alabama law. Each day that a contempt continues can  
3 be a separate violation, a separate contempt, and -- and  
4 could warrant a -- an additional 5-day sentence. So,  
5 contempt -- if a person was cited for violating his  
6 probation because he quit his job --

7 QUESTION: Well, but that wouldn't -- that  
8 wouldn't involve imposition of the original sentence.  
9 That's something else.

10 MR. MILLS: That --

11 QUESTION: That was what I understood --

12 MR. MILLS: That would be something else. That  
13 is -- that is for the contempt itself.

14 QUESTION: What is your position in the case of  
15 the individual who refuses to pay the fine? No suspended  
16 sentence of incarceration, simply a sentence of a fine,  
17 and he refuses to pay it. Assuming the facts are  
18 otherwise the same, he did not have counsel and he was not  
19 offered counsel if indigent. Could the fine be enforced  
20 by a contempt sanction?

21 MR. MILLS: I think this Court has addressed  
22 that issue that it constitutionally can, and I -- I assume  
23 there's no -- no impediment to that under Alabama law.

24 QUESTION: Well, does -- is there -- is there  
25 some tension between the position you take about the



1 inability of the State to enforce a -- a condition of  
2 sentence or a condition of suspension in the position that  
3 you take or acknowledge about the ability to enforce the  
4 -- the sentence of fine? Why should the two cases be  
5 different?

6 MR. MILLS: Well, I think the -- the difference  
7 is if the suspended sentence is imposed, a person is being  
8 imprisoned because he committed a crime. That would  
9 never --

10 QUESTION: And if the fine -- if the fine is  
11 imposed, the fine is being imposed because the individual  
12 committed a crime.

13 MR. MILLS: Well, this is true, but only if he  
14 willfully refuses to pay it where he has the ability to do  
15 so.

16 QUESTION: Well, is the -- is the difference  
17 that you're making willful? That -- that violations of  
18 the conditions of suspension are not willful and refusals  
19 to pay a fine are willful?

20 MR. MILLS: Well, I believe willfulness --  
21 willfully refusing to pay a fine would be a -- a  
22 precondition to -- to a contempt sentence.

23 QUESTION: All right. Then let's assume that  
24 we're talking about the class of -- of breach of -- of  
25 conditions of suspension that are willful. Let's assume

1 there's a condition of suspension that says you will be  
2 home every night at 9 o'clock to keep you away from the --  
3 you know, the bad influences you've had, and he willfully  
4 refuses. I take it your position is that the suspended  
5 sentence still cannot be imposed. Is that correct?

6 MR. MILLS: That -- that's --

7 QUESTION: But that's just as -- the willfulness  
8 factor is the same in the refusal to abide by that  
9 condition as it is in the refusal to pay the fine. So,  
10 I'm having difficulty seeing why you -- why on your view  
11 the -- the two should come out differently.

12 MR. MILLS: Well, the -- the fine and the -- the  
13 contempt for willfully refusing to comply with some other  
14 conditions, I -- I could not distinguish those.

15 QUESTION: No.

16 MR. MILLS: Of course, let me add one other  
17 thing about the contempt process to -- to enforce. Under  
18 Alabama law, it wouldn't save the State any money. It  
19 would -- in fact, it would cost the State a lot of money  
20 because of the formalities required in a criminal contempt  
21 proceeding. There must be a separate proceeding. I think  
22 there probably would not have to be a jury trial, but  
23 certainly there would have to be counsel if it is  
24 anticipated that imprisonment will be one of the  
25 punishments for willfully refusing.

1           QUESTION: But -- but it would only -- it would  
2 only undergo that expense where there has been a breach of  
3 the conditions of -- of probation. Whereas, you're  
4 arguing that the State must undergo the expense of counsel  
5 in all cases. The number of cases where there's a  
6 violation of probation is -- is presumably quite small,  
7 and -- and to say that the State has to provide counsel in  
8 those cases in order to get the contempt sanction is -- is  
9 not nearly as much of an imposition as -- as you're urging  
10 us to impose.

11           MR. MILLS: Well, I would say one thing.  
12 Perhaps the -- the number of cases would not be as large  
13 as -- as might be anticipated. Presumably in many of the  
14 suspended sentence cases, the judge perhaps has already  
15 made that decision, this is a possible jail case or this  
16 is not a possible jail case. Or if he's made a decision  
17 it is a possible jail case, appoints counsel, he may, of  
18 course, impose a suspended sentence rather than an  
19 immediate sentence. So, perhaps many of the cases are  
20 already being appointed counsel. So, the -- the number  
21 may not be that large.

22           I thank the Court.

23           QUESTION: Thank you, Mr. Mills.

24           Mr. Duke, we'll hear from you.

25           ORAL ARGUMENT OF STEVEN B. DUKE

1           ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL  
2           DEFENSE LAWYERS, AS AMICUS CURIAE, SUPPORTING RESPONDENT

3           MR. DUKE: Mr. Chief Justice, may it please the  
4 Court:

5           Were this a petty offense prosecution, perhaps  
6 the only legitimate, appropriate question would be the one  
7 that has occupied the Court thus far this morning, but  
8 this is a not a petty offense prosecution. This is a  
9 serious offense prosecution. As such, it is a criminal  
10 prosecution within the Sixth Amendment.

11           The Sixth Amendment guarantees counsel  
12 regardless of the sentence or sanction imposed. There are  
13 two reasons why this is so. One is textual; the other is  
14 common sensical.

15           QUESTION: You're not saying it would guarantee  
16 counsel if only a fine were imposed.

17           MR. DUKE: Yes, Mr. Chief Justice. The counsel  
18 would be guaranteed in any serious offense prosecution.

19           QUESTION: Well, how do you reconcile that with  
20 Argersinger?

21           MR. DUKE: Because Argersinger, Mr. Chief  
22 Justice, was a petty offense case. Argersinger explicitly  
23 assumed that if it were a serious offense case, there  
24 would be the right to counsel. In fact, the lower court  
25 said there would be a right to counsel, but the lower

1 court said he can't have a lawyer here because this was a  
2 petty offense.

3 QUESTION: Well, but wasn't the basis on -- the  
4 basis you're submitting now wasn't the basis on which the  
5 Supreme Court of Alabama ruled, was it?

6 MR. DUKE: It -- it was not the -- the  
7 rationale, but it -- it does support the result of the  
8 Alabama Supreme Court's decision.

9 QUESTION: But I thought that the main issue  
10 that we had here is the one we've been talking about, is  
11 you have to give a person a lawyer when it is a petty  
12 offense. And the fact is that there's going to be a  
13 suspended sentence. So, what about that question?

14 I mean -- and I -- I thought that Mr. Fried's  
15 main point was don't do it because if you say you have to  
16 give a person a lawyer, where it's a petty offense and the  
17 only key thing is is a suspended sentence, I'll tell you  
18 there are 1,800,000 people who have received probation in  
19 petty offenses. And there must have been some stick if  
20 they violated probation, and that stick is like a  
21 suspended sentence. So, deal with it when you worry about  
22 the probation violation; don't worry about it up front.  
23 That's -- that's what, I take it, is basically the  
24 argument.

25 And I've been waiting for you to talk because I

1 thought you might be a person who'd know the statistics.  
2 So, you might know if that's really so if -- or which  
3 seems hard to get at how many of those \$1.5 million  
4 walking-around probation people did -- were never offered  
5 a lawyer. What's --

6 MR. DUKE: We don't know.

7 QUESTION: We don't know. So, what are we  
8 supposed to do?

9 MR. DUKE: The -- the studies that I've seen  
10 suggest that in misdemeanor -- petty misdemeanor cases,  
11 frequently the -- the people are offered a lawyer in a --  
12 in a group and it's suggested that most of them don't need  
13 lawyers because they're not going to jail.

14 But I submit, Justice Breyer, that the -- that  
15 the real red herring in this case is treating this as a  
16 petty offense. This is not a petty --

17 QUESTION: And it's not offense because?

18 MR. DUKE: Because the authorized sentence in  
19 this case was 1 year, which made the jury trial right --  
20 guaranteed him a right to a jury trial under the Sixth  
21 Amendment, and because this was a criminal prosecution.

22 QUESTION: But the question presented is this.  
23 In light of the actual imprisonment standard established  
24 in Argersinger, refined in Scott, does the imposition of a  
25 suspended or conditional sentence in a misdemeanor case

1 invoke a defendant's Sixth Amendment right to counsel?

2 Now, I think what you're saying is that the  
3 Supreme Court of Alabama decision could be supported on  
4 another ground, but I'm not sure it -- it fits within the  
5 question presented.

6 MR. DUKE: Well, I submit it does, Mr. Chief  
7 Justice, because as I suggested, Argersinger dealt with a  
8 petty offense. Scott dealt with the question of  
9 imprisoning somebody, but the -- but the fundamental  
10 question here that -- that this Court should not allow  
11 itself to get embroiled in it to repeat the mistake is to  
12 treat this as if this is a trivial case because -- or to  
13 put it this way, at some point someone has to ask the  
14 question how is it that this defendant in this case had a  
15 constitutional right to a jury trial under the Sixth  
16 Amendment because this was a criminal prosecution, but he  
17 did not have a right to assistance of counsel.

18 QUESTION: Our -- our cases have reached  
19 different results on those two issues.

20 MR. DUKE: But, Mr. Chief Justice, the -- the  
21 Scott opinion, which you wrote, did not actually address  
22 the serious offense 6-month distinction because the  
23 parties were not addressing it.

24 QUESTION: Where do you get that from? You're  
25 appealing to the text of the Constitution. Aren't all

1       misdemeanors criminal offenses?

2               MR. DUKE:   All --

3               QUESTION:   Aren't all misdemeanors criminal  
4 offenses?

5               MR. DUKE:   They're criminal offenses but they're  
6 not criminal prosecutions.

7               QUESTION:   And -- and what does the Constitution  
8 say?

9               MR. DUKE:   Pardon?

10              QUESTION:   And what does the Constitution say?  
11 It says in all criminal prosecutions.

12              MR. DUKE:   Yes.

13              QUESTION:   So, if you're appealing to the  
14 Constitution -- and -- and you say it's clear language.  I  
15 don't think it is.  But if -- if you think it's clear  
16 language, you should be arguing that even in petty  
17 offenses you're entitled to counsel.

18              MR. DUKE:   I -- I don't think I have to argue  
19 that, Justice Scalia.

20              QUESTION:   No, only if you rely on the text of  
21 the Constitution, which is what I thought you were doing.

22              MR. DUKE:   I'm saying that the right to a jury  
23 trial exists because and only because it's a criminal  
24 prosecution under the Sixth Amendment.  Logically,  
25 therefore, if it is a criminal prosecution under the Sixth



1 Amendment, then there is a right to counsel because the  
2 Sixth Amendment says there is. But what the right to  
3 counsel should be in petty offenses is a different issue.

4 QUESTION: Why? It's a criminal offense. If --  
5 if you're arguing --

6 MR. DUKE: It's a criminal offense --

7 QUESTION: -- from the text of the Constitution  
8 that says in all criminal prosecutions, it includes petty  
9 misdemeanors as well as what you call major misdemeanors.

10 MR. DUKE: I'm not arguing that all petty  
11 offenses are criminal prosecutions. They plainly are not.

12 QUESTION: I know you're arguing it.

13 MR. DUKE: They're not.

14 QUESTION: They are not criminal prosecutions?

15 MR. DUKE: No, otherwise there would be a right  
16 to a jury trial. There is not a right to a jury trial.

17 QUESTION: Has this Court held that there is a  
18 congruent right to a jury trial and --

19 MR. DUKE: No.

20 QUESTION: No. All right.

21 MR. DUKE: But nor has it --

22 QUESTION: Now, before I wrote an opinion  
23 signing on to that, I'd like to see a brief.

24 MR. DUKE: Nor has it --

25 QUESTION: I'd like everybody to --

1 MR. DUKE: Nor has it held otherwise.

2 QUESTION: What?

3 MR. DUKE: Nor has it held otherwise.

4 QUESTION: Fine. But before I decide something  
5 like that, I'd like to have everyone present their point  
6 of view. I actually read the briefs. I'm interested in  
7 both sides. And -- and suddenly to decide it in this  
8 case, what would you suggest we do? I'm not going to  
9 decide something like that myself without having it fully  
10 briefed. And -- and so, what would you suggest we do with  
11 this case?

12 MR. DUKE: Then -- then I urge the Court to at  
13 least reserve the issue of what is the appropriate right  
14 to counsel in a serious offense where, as in this case,  
15 the defendant has a constitutional right to jury trial.

16 Let me just briefly quote Justice Powell, joined  
17 by then Justice Rehnquist, on the following proposition.  
18 Wherever the right to counsel line is to be drawn, it must  
19 be drawn so that an indigent has a right to appointed  
20 counsel in all cases where there's a right to a jury  
21 trial. If there is no accompanying right to counsel, the  
22 right to a jury trial becomes meaningless. No Justice of  
23 this Court, so far as I know, in the last 40 years has  
24 disagreed with that proposition.

25 QUESTION: But the jury trial line is 6 months'

1 imprisonment, isn't it?

2 MR. DUKE: Yes.

3 QUESTION: And here, under Argersinger, it could  
4 be 1 day.

5 MR. DUKE: Argersinger dealt with a stop-gap  
6 issue about where there's no right to a jury trial, can we  
7 deny counsel, and Argersinger said no, not if you send the  
8 person to prison because that's the basic due process  
9 proposition. There's no -- it's not a criminal  
10 prosecution under the Sixth Amendment. It's a due process  
11 issue as in Powell against Alabama. It's fundamentally  
12 unfair to send somebody to prison without giving him a  
13 lawyer.

14 With respect to the -- the argument that Mr.  
15 Fried makes, that this is essentially a little bit of an  
16 extension of Nichols, there's no way that a -- the  
17 sentence in this case could be activated, imposed without,  
18 in effect, holding that the defendant can be sent to jail,  
19 convicted of a crime and sent to jail, without providing  
20 him a lawyer. This Court --

21 QUESTION: Well, it doesn't follow that he could  
22 be sent to jail without providing him a lawyer in the  
23 subsequent proceeding.

24 MR. DUKE: Yes, but --

25 QUESTION: I mean, in Nichols, after all, we had

1 another conviction, and we had a lawyer representing the  
2 individual when the question came up whether the first  
3 conviction should be considered and so on. And that may  
4 well be so, let's say, on -- on Mr. Fried's view. There  
5 would be a subsequent proceeding, and there would at least  
6 -- this is not a position he's arguing for this morning,  
7 but it would be consistent with his position that counsel  
8 be provided in that subsequent proceeding.

9 MR. DUKE: Yes, but the crucial difference is  
10 that the defendant under this proceeding that Mr. Fried is  
11 -- is urging the Court to approve -- the defendant would  
12 be sent to jail without his guilt ever being determined in  
13 a criminal trial in which he was represented by counsel.  
14 Never.

15 QUESTION: Thank you, Mr. Duke.

16 General Pryor, you have 6 minutes remaining.

17 REBUTTAL ARGUMENT OF WILLIAM H. PRYOR, JR.

18 ON BEHALF OF THE PETITIONER

19 MR. PRYOR: Thank you, Mr. Chief Justice.

20 QUESTION: General, what was the -- assuming  
21 that Mr. Fried's position is adopted by the Court, what is  
22 the maximum time that the Alabama trial judge could  
23 sentence the violator to? What's the maximum time in  
24 prison?

25 MR. PRYOR: The suspended sentence was 30 days,

1 Justice Kennedy.

2 QUESTION: The suspended sentence of 30 days.

3 MR. PRYOR: That's -- that's correct.

4 QUESTION: Can I ask you before --

5 MR. PRYOR: Yes, Justice Breyer.

6 QUESTION: There are -- at the bottom line of  
7 the Alabama Supreme Court has two phrases in it. The  
8 first one, it says, we reverse that aspect of his sentence  
9 imposing 30 days of suspended jail time. We reverse.

10 MR. PRYOR: Right.

11 QUESTION: Then it goes to say, we tell  
12 everybody to the trial court vacate that aspect which  
13 imposed the suspended jail time. Those are two things.  
14 We reverse and we tell them to vacate.

15 As to the first, we reverse that aspect, the  
16 State of Alabama agrees because they were there arguing in  
17 the Alabama Supreme Court that a real suspended sentence  
18 that meant something could be imposed, and here you're  
19 saying it's not a real sentence because we can never carry  
20 it out. So, am I right in thinking it's the second part  
21 that you disagree with and not the first part?

22 MR. PRYOR: We're trying to make sense, as we  
23 understand it, of -- of the application of the rule of  
24 actual imprisonment. And I will acknowledge Mr. Fried may  
25 be right, and if so, we would welcome that. But our

1 understanding of Argersinger and Scott is we cannot  
2 activate the suspended sentence --

3 QUESTION: I'm not really asking about your -- I  
4 just want to know if you agree or you disagree with their  
5 part which says we reverse that aspect of the sentence.

6 MR. PRYOR: No. No, Justice Breyer, I don't  
7 agree with that. And -- and the reason I don't agree with  
8 that is because Mr. Mills said something that I think is  
9 correct when he said that the Alabama Supreme Court struck  
10 only the suspended sentence and based only on Federal law,  
11 and what I contend is a misapprehension of Federal law.  
12 But the suspended sentence itself is not a sham. It's a  
13 device to allow the court to impose probation, which is at  
14 a minimum then fully enforceable through the same power  
15 that's available to the -- to any court to enforce any  
16 judgment, including a mere fine, which Mr. Mills concedes  
17 does not trigger a right to court-appointed counsel.

18 Now, I wanted to address one of the concerns  
19 raised by Justice Souter as to the practicality. There  
20 are some aspects -- some statistics we know as to the  
21 practicalities that are helpful, but I will admit we don't  
22 know everything that we need to know. We know that there  
23 are approximately 115,000 misdemeanors each year in the  
24 State of Alabama. Those are addressed in our reply brief,  
25 the yellow brief. We know that approximately 25,000 of

1 those result in supervised probation. We don't know from  
2 the administrative office of courts in Alabama how many  
3 result in unsupervised probation.

4 We also know in Alabama -- this is not addressed  
5 in our brief, but I checked it with -- with information in  
6 State government -- that between -- there are between  
7 2,100 and 2,200 attorneys in Alabama who accept court-  
8 appointed work. Unfortunately, the fact that we don't  
9 know is how many of these cases, whether supervised or  
10 unsupervised probation and in misdemeanor cases, involve  
11 indigent defendants. But I hope that's at least somewhat  
12 helpful.

13 QUESTION: Let me ask you one more question.  
14 And I -- I don't imagine your statistics show this, but I  
15 want to pass it up. Out of the 115, do we know, A, how  
16 many of those were fine-only cases, not suspended  
17 sentences, but fine-only cases, and B, how many of those  
18 were motor vehicle cases?

19 MR. PRYOR: Were -- were?

20 QUESTION: Were motor vehicle cases because the  
21 motor vehicle cases take you out of this problem, I  
22 assume, in fine situations because if the fine isn't paid,  
23 the motor vehicle -- I mean, the -- the motor vehicle laws  
24 simply provide a -- a purely civil administrative means of  
25 -- of remedying the problem. And if they are a

1 substantial part of the 115, then the -- the fear of what  
2 this will do, in fact, is somewhat -- the Alabama Supreme  
3 Court's view is -- is somewhat lessened. Do you know  
4 those numbers?

5 MR. PRYOR: No, I don't. But -- but I do know  
6 that 2,100 lawyers to take -- when we have 25,000  
7 supervised probation and some number in excess of that of  
8 unsupervised probation, still means that it's a daunting  
9 task.

10 Justice Ginsburg, the point that you raised  
11 about the cost of counsel not being incurred by more  
12 affluent defendants I think is relevant from this  
13 standpoint, when you consider that it is reasonable then  
14 for the State to preserve its own resources, just as a  
15 more affluent defendant would -- would preserve its  
16 resources not to incur the cost of counsel in this kind of  
17 circumstance.

18 As to the argument that Argersinger would  
19 require the trial judge to inform the defendant that a  
20 sentence of imprisonment will not be imposed because  
21 counsel is not being appointed, that is not what  
22 Argersinger or Scott require. Argersinger and Scott  
23 merely deprive the trial court of that remedy upon  
24 conviction, but there's no requirement that the defendant  
25 be informed of that.



1           As to Mr. Duke's argument that -- that there's a  
2 distinction made in those decisions between petty and  
3 serious offenses, it's -- it's simply not there, and --  
4 and this is a misdemeanor case. It's clearly a criminal  
5 proceeding where the defendant not only enjoyed a Sixth  
6 Amendment right to retain counsel, but the record shows  
7 that he clearly understood that right to retain counsel.

8           Thank you.

9           CHIEF JUSTICE REHNQUIST: Thank you, General  
10 Pryor.

11          The case is submitted.

12          (Whereupon, at 11:12 p.m., the case in the  
13 above-entitled matter was submitted.)