The Burger Court Opinion Writing Database

Scott v. Illinois

440 U.S. 367 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 18, 1979

Dear Bill:

Re: 77-127 Scott v. Illinois

I join.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1979

RE: No. 77-1177 Aubrey Scott v. Illinois

Dear Bill:

I'll circulate a dissent in this case in due course.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner.
v.
State of Illinois.
} On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE BRENNAN, dissenting.

The Sixth Amendment provides that "In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." (Emphasis supplied.) *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), extended the Sixth Amendment right to counsel to the States through the Fourteenth Amendment and held that the right includes the right of the indigent to have counsel provided. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), held that the right recognized in *Gideon* extends to the trial of any offense for which a convicted defendant is likely to be incarcerated.

This case presents the question whether the right to counsel extends to a person accused of an offense that, although punishable by incarceration, is actually punished only by a fine. Petitioner Aubrey Scott was charged with theft in violation of Ill. Rev. Stat. ch. 38, § 16-1 (A)(1) (1972), an offense punishable by imprisonment up to one year or by a fine up to $500, or by both. About four months before *Argersinger* was decided, Scott had a bench trial, without counsel, and without notice of entitlement to retain counsel or, if indigent,[1] to have counsel provided. He was found guilty as charged and sentenced to pay a $50 fine.

[1] Scott was found to be indigent at the time of his initial appeal, and an attorney was therefore appointed for him and he was provided a free transcript of his trial for use on the appeal. The Illinois courts and the parties have assumed his indigency at the time of trial for purposes of this case. See Appendix to Pet. for Cert., at 1a–2a, 10a–11a.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The Sixth Amendment provides that "In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." (Emphasis supplied.) *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), extended the Sixth Amendment right to counsel to the States through the Fourteenth Amendment and held that the right includes the right of the indigent to have counsel provided. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), held that the right recognized in *Gideon* extends to the trial of any offense for which a convicted defendant is likely to be incarcerated.

This case presents the question whether the right to counsel extends to a person accused of an offense that, although punishable by incarceration, is actually punished only by a fine. Petitioner Aubrey Scott was charged with theft in violation of Ill. Rev. Stat. ch. 38, § 16-1 (A)(1) (1972), an offense punishable by imprisonment up to one year or by a fine up to $500, or by both. About four months before *Argersinger* was decided, Scott had a bench trial, without counsel, and without notice of entitlement to retain counsel or, if indigent,[1] to have counsel provided. He was found guilty as charged and sentenced to pay a $50 fine.

[1] Scott was found to be indigent at the time of his initial appeal, and an attorney was therefore appointed for him and he was provided a free transcript of his trial for use on the appeal. The Illinois courts and the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1979

Re: No. 77-1177 - Scott v. Illinois

Dear Bill:

Subject to our telephone conversation, I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 15, 1979

Re: 77-1177 - Scott v. Illinois

Dear Bill,

I agree.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1979

Re: No. 77-1177 - Aubrey Scott v. Illinois

Dear Bill:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 12, 1979

Re: No. 77-1177 - Aubrey Scott v. Illinois

Dear Bill:

Please join me in your dissent.

Sincerely,

TM

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Re: No. 77-1177 - Scott v. Illinois

Dear Bill:

My short dissent in this case, I suspect, speaks for itself.

I dislike to do this to you and to deprive you of a "court." You have, however, five votes for the judgment. I found this case tantalizing. The solution I propose reconciles, I think, the respective conclusions that have been reached in the right to counsel and right to a jury trial cases. I must confess, of course, that neither side urged this middle ground. Each wanted his own way all the way.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: [illegible] 1979

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE BLACKMUN, dissenting.

For substantially the reasons stated by MR. JUSTICE BRENNAN in Parts I and II of his dissenting opinion, I would hold that the right to counsel secured by the Sixth and Fourteenth Amendments extends at least as far as the right to jury trial secured by those amendments. Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).

This resolution, I feel, would provide the "bright line" that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan*, *Baldwin*, and *Argersinger*.

On this approach, of course, the judgment of the Supreme Court of Illinois upholding petitioner Scott's conviction should be reversed, since he was convicted of an offense for which he was constitutionally entitled to a jury trial. I, therefore, dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 16, 1979

77-1177 Scott v. Illinois

Dear Bill:

Although I probably will concur in the judgment, I will write something in this case.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 26 JAN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

The petitioner was tried for shoplifting under an Illinois statute providing for a maximum penalty of a $500 fine or one year in jail, or both. After waiving his right to a jury trial, the petitioner was convicted and fined $50. The Court rejects the petitioner's argument that as an indigent, he should have been provided with counsel because imprisonment was an authorized penalty for the crime with which he was charged. Relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court holds instead that the Sixth and Fourteenth Amendments require the States to provide counsel only to indigents who are sentenced to terms of imprisonment. Although I concur in the affirmance of the petitioner's conviction, I am unable to join the opinion of the Court. See *id.*, at 44 (POWELL, J., concurring).

The Court's opinion, with commendable candor, states that "our decided cases [have] forsaken the literal meaning of the Sixth Amendment." *Ante*, at 5. This acknowledgement is highlighted by the absence of historical or precedential justification for the line the Court draws to limit the "already extended" reach of the Sixth Amendment. *Ibid.* As the Sixth Amendment provides no guidance in this area, the Court should recur to the Due Process Clause, which in its basic concept of fairness gives full recognition to the constitutional interests of criminal defendants. Instead, the Court finds in the Sixth Amendment a categorical difference between indi-

1, 2, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: 12 FEB 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

The petitioner was tried for shoplifting under an Illinois statute providing for a maximum penalty of a $500 fine or one year in jail, or both. After waiving his right to a jury trial, the petitioner was convicted and fined $50. The Court rejects the petitioner's argument that as an indigent, he should have been provided with counsel because imprisonment was an authorized penalty for the crime with which he was charged. Relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court holds instead that the Sixth and Fourteenth Amendments require the States to provide counsel only to indigents who are sentenced to terms of imprisonment. Although I concur in the affirmance of the petitioner's conviction, I am unable to join the opinion of the Court. See *id.*, at 44 (POWELL, J., concurring).

The Court's opinion, with commendable candor, states that "our decided cases [have] departed from the literal meaning of the Sixth Amendment." *Ante*, at 5. This acknowledgement is highlighted by the absence of historical or precedential justification for the line the Court draws to limit the "already extended" reach of the Sixth Amendment. *Ibid.* As the Sixth Amendment provides no guidance in this area, the Court should recur to the Due Process Clause, which in its basic concept of fairness gives full recognition to the constitutional interests of criminal defendants. Instead, the Court finds in the Sixth Amendment a categorical difference between indi-

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 15 FEB 1979

2

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

The petitioner was tried for shoplifting under an Illinois statute providing for a maximum penalty of a $500 fine or one year in jail, or both. After waiving his right to a jury trial, the petitioner was convicted and fined $50. The Court rejects the petitioner's argument that as an indigent, he should have been provided with counsel because imprisonment was an authorized penalty for the crime with which he was charged. Relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court holds instead that the Sixth and Fourteenth Amendments require the States to provide counsel only to indigents who are sentenced to terms of imprisonment. Although I concur in the affirmance of the petitioner's conviction, I am unable to join the opinion of the Court. See *id.*, at 44 (POWELL, J., concurring).

The Court's opinion, with commendable candor, states that "our decided cases [have] departed from the literal meaning of the Sixth Amendment." *Ante*, at 5. This acknowledgement is highlighted by the absence of historical or precedential justification for the line the Court draws to limit the "already extended" reach of the Sixth Amendment. *Ibid.* As the Sixth Amendment provides no guidance in this area, the Court should recur to the Due Process Clause, which in its basic concept of fairness gives full recognition to the constitutional interests of criminal defendants. Instead, the Court finds in the Sixth Amendment a categorical difference between indi-

February 22, 1979

77-1177 Scott v. Illinois

Dear Potter:

In view of our discussions, and those that took place at last Friday's Conference, I am considering concurring in Bill Rehnquist's opinion for the purpose of making a Court.

I would accompany this with a brief concurring statement along the lines set forth in the enclosed draft.

What do you think?

Sincerely,

Mr. Justice Stewart

lfp/ss

Rewritten

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 26 FEB 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1177

Aubrey Scott, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1979]

MR. JUSTICE POWELL, concurring.

For the reasons stated in my opinion in *Argersinger* v. *Hamlin*, 407 U. S. 25, 44 (1972), I do not think the rule adopted by the Court in that case is required by the Constitution. Moreover, the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences. The *Argersinger* rule also tends to impair the proper functioning of the criminal justice system in that trial judges, in advance of hearing any evidence and before knowing anything about the case except the charge, all too often will be compelled to forego the legislatively granted option to impose a sentence of imprisonment upon conviction. Preserving this option by providing counsel often will be impossible or impracticable—particularly in congested urban courts where scores of cases are heard in a single sitting, and in small and rural communities where lawyers may not be available.

Despite my continuing reservations about the *Argersinger* rule, it was approved by the Court in the 1972 opinion and four Justices have reaffirmed it today. It is important that this Court provide clear guidance to the hundreds of courts across the country that confront this problem daily. Accordingly, and mindful of *stare decisis*, I join the opinion of the Court. I do so, however, with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 12 JAN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1177

Aubrey Scott, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[January —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to resolve a conflict among state and lower federal courts regarding the proper application of our decision in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).[1] Petitioner Scott was convicted of theft and fined $50 after a bench trial in the Circuit Court of Cook County, Ill. His conviction was affirmed by the state intermediate appellate court and then by the Supreme Court of Illinois, over Scott's contention that the Sixth and Fourteenth Amendments to the United States Constitution required that Illinois provide trial counsel to him at its expense.

Petitioner Scott was convicted of shoplifting merchandise valued at less than $150. The applicable Illinois statute sets the maximum penalty for such an offense at a $500 fine or one year in jail, or both.[2] The petitioner argues that a line of

[1] Compare, *e. g.*, *Potts* v. *Estelle*, 529 F. 2d 450 (CA5 1976); *In re Di Bella*, 518 F. 2d 955 (CA2 1975); *State ex rel. Winnie* v. *Harris*, 75 Wis. 2d 547, 249 N. W. 2d 791 (1977), with *United States* v. *White*, 529 F. 2d 1390 (CA8 1976); *Sweeten* v. *Sneddon*, 463 F. 2d 713 (CA10 1972); *Rollins* v. *State*, 299 So. 2d 586 (Fla. 1974), cert. denied, 419 U. S. 1099 (1974).

[2] Ill. Rev. Stat. 1969, ch. 38, par. 16-1. The penalty provision of the statute provides in relevant part:

"A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned

Pp. 1,2,3,5,6,7

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqui

Circulated: _____

Recirculated: 2 9 JAN 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1177

Aubrey Scott, Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Supreme Court of Illinois.

[January —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to resolve a conflict among state and lower federal courts regarding the proper application of our decision in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).[1] Petitioner Scott was convicted of theft and fined $50 after a bench trial in the Circuit Court of Cook County, Ill. His conviction was affirmed by the state intermediate appellate court and then by the Supreme Court of Illinois, over Scott's contention that the Sixth and Fourteenth Amendments to the United States Constitution required that Illinois provide trial counsel to him at its expense.

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[1] Compare, *e. g.*, *Potts* v. *Estelle*, 529 F. 2d 450 (CA5 1976); *State ex rel. Winnie* v. *Harris*, 75 Wis. 2d 547, 249 N. W. 2d 791 (1977), with *Sweeten* v. *Sneddon*, 463 F. 2d 713 (CA10 1972); *Rollins* v. *State*, 299 So. 2d 586 (Fla. 1974), cert. denied, 419 U. S. 1009 (1974). [ ] [ ] OMISSIONS

[2] Ill. Rev. Stat. 1969, ch. 38, par. 16–1. The penalty provision of the statute provides in relevant part:

"A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Scott v. Illinois, No. 77-1177

There are two cases being held for Scott v. Illinois. They are Baldasar v. Illinois, No. 77-6219 and Williams v. North Carolina, No. 77-6595. Baldasar presents the question whether under Argersinger v. Hamlin, 407 U.S. 25 (1972), and Burgett v. Texas, 389 U.S. 109 (1967), a prior uncounseled misdemeanor conviction that did not result in imprisonment may be used to enhance the penalty for a subsequent misdemeanor offense. Since Scott establishes that there is no right to appointed counsel where imprisonment is not in fact imposed, this petition should be denied.

The second case, Williams v. North Carolina, raises precisely the same issue and similarly does not warrant a grant of certiorari as to that issue. However, the petition does raise another question: the constitutionality of the North Carolina appellate procedure whereby after a trial in the District Court, petitioner can appeal for a trial de novo in the Superior Court. Williams claims that this procedure constitutes a due process violation because the record transmitted to the Superior Court includes a notation of

I agree with Justice Rehnquist and would deny both petitions. —B.R.W.

prior convictions and the terms of the sentence imposed below, and that consequently the sentence imposed by the Superior Court often is harsher than that meted out by the District Court. Obviously, Scott has nothing to say on this question. I do not think that the issue is certworthy under North Carolina v. Pearce, 395 U.S. 711 (1969) and its progeny, and I plan to vote to deny.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 12, 1979

Re: 77-1177 - Scott v. Illinois

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

Copies to the Conference