

Alabama v. Shelton:

**The Right to Counsel in Misdemeanor Cases
Resulting in Suspended or Probated Sentence**

National Center for State Courts

Knowledge & Information Services

300 Newport Ave.

Williamsburg, VA 23185-4147

800-616-6164

Prepared by

Anne Skove, Esq., Knowledge Management Analyst

Online research services provided by LexisNexis

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Introduction

The National Center for State Courts' Knowledge and Information Services (KIS) has prepared this briefing paper on [*Alabama v. Shelton*](#), 535 US 654 (2002), ^[1] particularly with regard to its potential effects on court operations in affected states. Included below is a summary of relevant resources relating to this case. Finally, we offer possible solutions for courts.

Background

The indigent defendant in *Shelton* was convicted without counsel by bench trial for third-degree misdemeanor assault after he engaged in a fistfight after a minor traffic accident. He then exercised his right to a jury trial, at which he was convicted. He was sentenced to a 30-day jail term, which was suspended, and placed on two years' unsupervised probation on the condition that he pay a \$500 fine, reparations of \$25, restitution of \$516.69, and court costs. Upon Shelton's appeal to the Alabama Supreme Court on Sixth Amendment grounds, the Alabama Supreme Court affirmed Shelton's conviction and the monetary portions of his punishment but invalidated the 30 days suspended jail time.

On petition for certiorari, the U.S. Supreme Court held that:

- 1) A suspended or probated sentence that may end up in the actual deprivation of a criminal defendant's liberty may not be imposed unless the defendant was accorded counsel in the prosecution for the crime charged;

- 2) an indigent misdemeanor defendant given a suspended jail sentence and placed on probation is entitled to counsel during the critical stage when defendant's guilt or innocence is determined and the "vulnerability to imprisonment" determined;
- 3) probation revocation hearings in which defendant has no right to counsel and the court need not follow customary rules of evidence, and where the sole issue is defendant's breach of probation, cannot compensate for the absence of trial counsel; and
- 4) that it is up to the Alabama Supreme Court, not the U.S. Supreme Court, to first consider whether invalidation of the suspended sentence necessarily vacated the two-year probationary term.

Which States Are Affected by *Shelton*?

Only 24 states provide counsel to all indigent misdemeanor defendants receiving suspended jail sentences. *Shelton* distinguishes between the different types of states.

State	Provide counsel where defendant receives substantial fine ^[2]	Provide counsel because state law authorizes incarceration for charged offense ^[3]	Provide counsel because state law provides for max. prison term of 1 year ^[4]	Authority
AL				
AK		X		<i>Alexander v. Anchorage</i> , 490 P.2d 910, 913 (Alaska 1971) Alaska Const., Art. I, §11
AZ				

AR				
CA		X		<i>Tracy v. Municipal Court for Glendale Judicial Dist.</i> , 22 Cal.3d 760, 766, 587 P.2d 227, 230, 150 Cal. Rptr. 785 (1978) Cal. Penal Code Ann. §686 (West 1985)
CO				
CT			X Suspended sentence of incarceration necessitates appointment of counsel	Conn. Gen. Stat. §51-296(a) (Supp. 2001)
DE		X		Del. Code Ann., Tit. 29, §4602 (1997)
DC		X All cases where a person faces a loss of liberty and the Constitution or any other law requires the appointment of counsel		DC Code Ann. §11-2602 (2001)
FL				
GA				
HI		X		Haw. Rev. Stat. §802-1 (1999)
ID			X Only when authorized penalty is at least 3 or 6 months' imprisonment	Idaho Code §§19-851(d)(2), 19-852(a)(1) (1997)

IL		X		Ill. Comp. Stat., ch. 725, §113-3 (1992)
IN		X		Ind. App. 146, 149, 394 N.E.2d 229, 231 (1979) Ind. Const., Art. I, §13
IA			X	Iowa Rule Crim. Proc. 26 (2002) <i>Wright v. Denato</i> , 178 N.W.2d 339, 341-342 (Iowa 1970)
KS				
KY		X		Ky. Rev. Stat. Ann. §§31.100(4)(b), 31.110(1) (1999)
LA		X		La. Const. Art. I, §13
ME				
MD			X Only when authorized penalty is at least 3 or 6 months' imprisonment	Md. Ann. Code. Art. 27A, §§ 2(h)2, 4(b)(2) (1997)
MA		X		Mass. Rule Crim. Proc. 8 (2001)
MI				
MN		X		Minn. Rule Crim. Proc. 5.02(1) (2001)
MS				

MO		X Public defenders are charged with representation of indigent persons “detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case.”		R.S.M.O. 600.042(4)(2)
MT				
NE		X		Neb. Rev. Stat. §29-3902 (1995); (Supp. 2002)
NV			X Only when authorized penalty is at least 3 or 6 months’ imprisonment	Nev. Rev. Stat. §§178.397, 193.120 (2001)
NH			X	N.H. Rev. Stat. Ann. §§604-A:2(I), 625:9(IV)(a)(1) (Supp. 2001)
NJ	X	Only when imprisonment is “likely” to be imposed.		N.J. Stat. Ann. §2A:158A-5.2 <i>State v. Hermanns</i> , 278 NJ Super. 19, 29, 650 A.2d 360 (1994)
NM			X Only when authorized penalty is at least 3 or 6 months’ imprisonment	N.M. Stat. Ann. §§31-16-2(D), 31-16-3(A) (2000)

NY		X		N.Y. Crim. Proc. §170.10(3)(c) (1993)
NC	X	Only when imprisonment is “likely” to be imposed		N.C. Gen. Stat. §7A-451(a)(1)(1999)
ND				
OH			X Only when authorized penalty is at least 3 or 6 months’ imprisonment	Ohio Rules Crim. Proc. 2(c), 44(A) (2002)
OK		X		OK. Stat. §1355.6A (Supp. 2002)
OR		X		Ore. Rev. Stat. Ann. §135.050(4) (Supp. 1998)
PA			X Does not apply to “summary offenses” punishable by no more than 90 days imprisonment	Pa. Rule Crim. Proc. 122(A) (2002) 18 Pa. Cons. Stat. §106(c)(2) (1998)
RI				
SC				
SD			X But not where maximum permissible sentence is 30 days imprisonment or less	S.C. Codified Laws §§23A-40-6, 23A-40-6.1, 22-6-2(1) (1998)
TN		X		Tenn. Sup. Ct. Rule 13(1)(d) (2001)

TX		X		Tex. Crim. Proc. Code Ann. §26.04(b)(3) (Supp. 2002)
		But construed by state courts 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,” <i>Fortner v. State</i> , 764 SW2d 934, 935 (Tex. App. 1989).		
UT				
VT	X			Vt. Stat. Ann., Tit. 13, §5201 (1998)
VA		X		Va. Code Ann. §§19.2-159, 19.2-160 (2000)
WA		X		Wash. Super. Ct. Crim. Rule 3.1(a) (2002)
WV		X		W.Va. Code §50-4-3 (2000)
WI		X		Wis. Stat. §967.06 (1998)
WY		X		Wyo. Stat. Ann. §7-6-102 (2001)

Thus, Alabama, Arizona, Arkansas, Colorado, D.C., Florida, Georgia, Idaho, Kansas, Maine, Maryland, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, and Utah may experience the most immediate effects of *Shelton*. In addition, however, in many of those 24 states whose statutory provisions appear to meet Shelton’s requirements it may be that the statutory provisions are not fully implemented in accord with constitutional

standards.

The National Legal Aid and Defender Association (NLADA) has surveyed public defense agencies and conducted detailed evaluations of specific agencies around the country and reports that information from the 24 states ostensibly complying with *Shelton* indicates that none of them actually provides counsel in all *Shelton*-required cases. However, at least one state has indicated that nearly one-third of the caseload for the state public defenders' office consists of misdemeanor cases. [\[5\]](#)

Solutions for States

The *Shelton* dissent noted that the decision imposed a large new burden of state-paid counsel on many states, including some of the poorest. Although the Court's assessment of the actual impact and cost of its ruling may have been limited by a lack of data on the actual implementation of the right to counsel around the country, [\[6\]](#) it is evident that the ruling will have significant resource implications for many jurisdictions. [\[7\]](#)

Below, we discuss several of the solutions that may be available to affected states.

“Pretrial probation”

The *Shelton* majority offered “pretrial probation” as a constitutionally sound alternative for those unable or unwilling routinely to provide counsel. Under this practice, which the Court noted was utilized in some form in 23 states, the defendant agrees to probation-type conditions (such as completing a treatment or rehabilitation program) in return for the case being suspended or the charges dropped upon successful completion. A violation of the conditions results in the case being reinstated, with both the possibility of incarceration and the assistance of counsel. But for the great majority of defendants who successfully comply with the conditions and consequently emerge from the system without a criminal conviction, the need for appointment of counsel is avoided. [\[8\]](#)

Difficulties might arise if the pretrial probation process required the uncounselled

defendant to first enter a guilty plea, or make any admission of guilt. Obtaining such an uncounselled admission or plea, would likely not comply with *Shelton*.

Waiver

A defendant may make a knowing, intelligent, and voluntary waiver of counsel.^[9] Thus, one solution for state courts is to make the option of waiver available on a systematic basis. State courts may want to rewrite and update forms for clarity and revisit processes by which waiver may be obtained. While not offered by the majority in *Shelton* as a possible solution, waiver is obviously an option for courts that is already in existence and can be simple and cost-effective..

The challenge, however, is to ensure that the waiver process is both fully informed and voluntary. One difficulty results from the collateral consequences of a criminal conviction. In order to knowingly enter a guilty plea without counsel, the defendant must be informed of collateral consequences, both criminal and civil. Waiver of the right to counsel without knowledge of such collateral consequences can result in overturned convictions and increased costs and delays.^[10]

The voluntariness of a waiver of counsel can also be questioned where the process imposes costs on the defendant for exercise of the right to counsel – such as where a plea “deal” is said to be good only on the day offered, and a request for counsel would require the case to be held over to another day.^[11] .

Decriminalization of Traffic and Other Misdemeanors

Another solution not mentioned in *Shelton*, but common throughout the states, is the decriminalization of traffic and other minor offenses. The effect of *Shelton* in Georgia, for example, is due in part to that state’s criminalization of all traffic offenses. Salt Lake City and West Valley City, Utah, for example, have come up with a plan to decriminalize traffic violations and misdemeanors and to create an administrative court for those matters.

Decriminalization necessarily requires development or utilization of means

other than imposition of suspended jail sentences to enforce payment of fines, fees, and restitution. Courts must utilize contempt or some other statutory tool, including potential incarceration or drivers license and vehicle registration sanctions, as an enforcement mechanism. Courts may also need to improve their fines, fees, and restitution collections programs.

Indigent Defense

Informal surveys show that many jurisdictions are unable to comply with *Shelton* due to budgetary constraints, staffing shortages, lack of awareness, or other reasons.^[12] Thus, while defenders and others may agree with the results of *Shelton* in spirit, the hardships enumerated by the dissent are a reality for many jurisdictions.

The type of defense provider may impact the cost of provision of indigent defense. Studies in many jurisdictions have found that it is more cost-effective to establish a full-time, salaried public defender agency than to rely primarily on appointment of private lawyers, usually paid on an hourly basis.^[13] Organizing public defender agencies under a single statewide entity further reduces redundancy, and enhances coordination, uniformity of services, administrative efficiency, accountability, and planning capacity, according to a U.S. Department of Justice report.^[14]

State courts may wish to reexamine their current defense provider systems. Many public defender offices have neither the personnel nor the budget to assist misdemeanor defendants. Indigent defense budgets may need to be augmented to comply with *Shelton*.

Resources

Reports

The [Georgia Indigent Defense Council](#) contracted with the Spangenberg Group to study and analyze the effects of *Shelton* on Georgia's court system. ^[15]

See also the [Georgia Indigent Defense Council's reports](#) generally. These include the Spangenberg study as well as hearings, press releases, FAQs, etc.

An evaluation of Clark County, Nevada's indigent defense system was undertaken by the National Legal Aid and Defender Association (NLADA). ^[16] The NLADA report touches briefly on *Shelton*, as Nevada, like Georgia, was not one of the states mentioned in the opinion's footnote on states with a statutory right to counsel in misdemeanor cases. NLADA notes that because of Nevada's status, the state: ^[17]

faces not only the prospect of significant increases in misdemeanor caseloads, but because of its failure to act statutorily earlier, the possibility of significant and costly collateral litigation over *Shelton* retroactivity issues (such as habeas corpus petitions by incarcerated misdemeanants, motions to strike convictions as priors for sentencing purposes, and appeals and other actions to overturn, vacate, expunge or pardon convictions).

For information about contracting for defender services, see Spangenberg et al, [Contracting for Indigent Defense Services](#), and NLADA's Model Contract for Public Defense Services (www.nlada.org/DMS/Documents/1015619283.17/Full%20volume.doc), both developed with BJA support.

For concise guidance about the basic elements of a public defense delivery system, see the American Bar Association's *Ten Principles of a Public Defense Delivery System* (www.abanet.org/legalservices/downloads/sclaid/10principles.pdf), which is based on the "Ten Commandments of Public Defense Delivery Systems" (www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm#Ten),

published by the Department of Justice as an introduction to its *Compendium of Standards for Indigent Defense Systems* (www.ojp.usdoj.gov/indigentdefense/compendium/).

Cases

Foster v. Fulton Co., 223 F.Supp. 2d 1303 (2002)

[*Barnes v. State*](#), 275 Georgia 499, 570 S.E.2d 277 (2002)

[*Scott v. Ill.*](#), 440 US 367 (1979)

[*Argersinger v. Hamlin*](#), 407 US 25 (1972): The right of an indigent defendant in a criminal trial to the assistance of counsel, which is guaranteed by the Sixth Amendment as made applicable to the states by the Fourteenth ^[18] is not governed by the classification of the offense or by whether or not a jury trial is required. No accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel.

Articles

NLADA. [“Five Problems Facing Public Defense on the 40th Anniversary of *Gideon v. Wainwright*”](#) (2003). Refers to the dearth of states in compliance with *Shelton*.

Huigens, Emily. [“Misdemeanor Work Puts Further Strain on Defenders.”](#) Independent-Mail (May 31, 2003). Discusses the strain of *Shelton* on defender budgets and caseloads in South Carolina and Georgia’s Mountain Judicial Circuit.

Clarke, Cait. [“Taking *Alabama v. Shelton* to Heart.”](#) [Champion Magazine](#) (January/February 2003): 25. Discusses enforcement of *Shelton*.

Farb, Robert L. [“Sixth Amendment Right to Counsel for Misdemeanors; Court Extends Sixth Amendment Right to Counsel to a Misdemeanor When the Punishment Includes a Suspended Sentence.”](#) 2001-2002 U.S. Supreme Court

Term: Cases Affecting Criminal Law and Procedure. [US Supreme Court Criminal Case Summaries](#). Chapel Hill, NC: Institute of Government, 2002.

Eurick, Janelle. "[ACLU Outlines the Effects of Alabama v. Shelton](#)," (July 1, 2002). Letter to Chief Judge Durham.

"Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row." *Georgia State University Law Review* 17 (2000): 605. While this article predates *Shelton*, it provides an overview and history of indigent defense in Georgia.

Vey, Gary S. "Misdemeanor Sentencing in Georgia." *Georgia Bar Journal* 7, no. 2 (October 2001): 8.

KIS Clearinghouse

KIS is continually adding to its resources on this topic. If your state or court has been involved with any *Shelton*-related initiatives, cases, etc., please contact us so that we can add your experiences to our clearinghouse.

For general information please refer to the [Indigent Defense](#) section of [Court Information by Topic](#). See also [Traffic Offenses](#), [Pro Se](#), and [Collection of Fines and Costs](#) for related information.

[1] Hereinafter "*Shelton*."

[2] *Shelton*, n. 7.

[3] *Shelton*, n. 8; comments based on *Shelton* (dissent), n. 4.

[4] *Shelton*, n. 9; comments based on *Shelton* (dissent), n. 4.

[5] Telephone conversation with Marty Robinson, State Public Defender of Missouri (March 15, 2004).

[6] In 1997, the Bureau of Justice Statistics undertook a comprehensive national study of the provision of indigent defense services in every state, but concluded after several years of effort that the data collection obstacles, owing to the wide range of systems and lack of centralized record-keeping, were insurmountable. Instead, BJS issued two narrower reports, examining limited data from the nation's 100 largest counties (*Indigent Defense Systems in Large Counties*, www.ojp.usdoj.gov/bjs/abstract/idslc99.htm) and the 22 states with statewide public defense

systems (*State-Funded Indigent Defense Services, 1999*, www.ojp.usdoj.gov/bjs/abstract/sfids99.htm).

[7] Nationally, according to the Bureau of Justice Statistics, the number of people on probation for a misdemeanor has increased by 600,000 over the past decade, to almost 4 million. Of the 4 million people under probation supervision nationally, one million were under a suspended sentence. *Probation and Parole in the United States, 2001* (BJS, 2002).

[8] Of the people serving a probationary or suspended sentence in 2001, only about 13% were subsequently incarcerated for a violation of their probationary conditions. This number has decreased dramatically, down from 21% in 1995. *Id.*

[9] "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at his trial." *Argersinger*, [407 U.S., at 37](#).

⁹ Nineteen states require advisement of immigration consequences, see *State v. Yanez*, 2002 WL 31840905, 2002-Ohio-7076 ¶¶ 7-8 (Ohio App. Dec 20, 2002) (citing states). A few courts require that a defendant be advised of particular collateral consequences at plea or sentence. See, e.g., *Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver's license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid); *Skok v. State*, 760 A.2d 647 (Md. 2000) (noncitizen permitted to challenge guilty plea by writ of coram nobis where he was not advised of immigration consequences as required by court rule).

[11] A U.S. Justice Department report examining implementation of Shelton's predecessor, *Argersinger v. Hamlin*, where the Court extended the right to counsel to misdemeanor cases, found that although "explicit threats designed to coerce waiver of counsel are rare," it happens "very often" that "defendants perceive, correctly or not, a tacit rule of court that those who ask for counsel are treated more harshly." *The Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin*, National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, 1976, at 11

[12] The National Legal Aid and Defender Association (NLADA), for example, conducted an informal survey of members.

[13] E.g., West Virginia (January 2000 Report of the Indigent Defense Task Force, and 1998 report by the Office of the Legislative Auditor, titled "[Preliminary Performance Review of Public Defender Services](#)") (savings of 9-31%); Florida ("[Justification Review: Administrative Commission, State Attorneys, Public Defenders](#)", Office of Program Policy Analysis and Government Accountability (OPPAGA), an office of the Florida Legislature (Report No. 01-64, December 2001) (effective hourly rate of \$25 for salaried public defenders, including benefits, versus assigned-counsel rates of \$50-75); and North Carolina ("[Indigent Defense Services: FY02 North Carolina Public Defender and Private Counsel Cost Analysis](#)," a May 2002 study compiled by Indigent Defense Services; and Report of the Commission on Indigent Services to the North Carolina General Assembly, March 2003) (statewide savings of \$3 million).

[14] *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations* (Office of Justice Programs, 2000), at x and 11-14. For an overview, see [Indigent](#)

[Defense: Executive Summary](#) in the [Indigent Defense](#) section of NCSC's [Court Information by Topic](#). For information about contracting, see Robert L. Spangenberg et al, [Contracting for Indigent Defense Services: A Special Report](#). (Washington, DC: Bureau of Justice Assistance, 2000).

[15] Marea L. Beeman, Robert L. Spangenberg, Jennifer Riggs, and Rangita de Silva-de Alwis, *Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense. Part II: Analysis of Implementing Alabama v. Shelton in Georgia* (West Newton, MA: Spangenberg, 2003). Hereinafter "Spangenberg Study."

[16]

http://www.co.clark.nv.us/Public_communications/pdf/Final%20Report%20_March%202003%20-%20NEW_.pdf

[17] NLADA evaluation, p. 37.

[18] *Gideon v. Wainwright*, [372 U.S. 335](#)