Maine Law Review

Volume 40 | Number 1 Article 4

January 1988

A Defendant's Right to Counsel in Commitment Hearings for Nonpayment of a Criminal Fine

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A DEFENDANT'S RIGHT TO COUNSEL IN COMMITMENT HEARINGS FOR NONPAYMENT OF A CRIMINAL FINE

I. INTRODUCTION

The federal constitutional right of an indigent[1] defendant to appointed counsel in state court proceedings derives from two constitutional provisions. First, the sixth amendment,[2] as incorporated[3] by

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1. ME. REV. STAT. ANN. tit. 15, § 810 (1983), *infra* note 8, authorizes the district court or the superior court to appoint counsel in criminal cases when it appears that "the accused does not have sufficient means to employ counsel." *Id.* Rule 44 of the Maine Rules of Criminal Procedure authorizes the court to "examine the defendant under oath concerning his financial resources." M.R. CRIM. P. 44(b). That Rule further provides:

> A defendant does not have sufficient means with which to employ counsel if his lack of resources effectively prevents him from retaining the services of competent counsel. In making its determination the court shall consider the following factors: the defendant's income, the defendant's credit standing, the availability and convertibility of any assets owned by the defendant, the living expenses of the defendant and his dependents, the defendant's outstanding obligations, the financial resources of the defendant's parents if the defendant is an unemancipated minor residing with his parents, and the cost of retaining the services of competent counsel.

Id.

2. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

3. Gideon v. Wainwright, 372 U.S. 335 (1963), held that the absolute sixth amendment right to counsel was binding on the states through the due process clause because representation by counsel was " 'fundamental and essential to a fair trial.' " *Id.* at 342 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)).

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trails in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344.

In holding that the sixth amendment, as an essential element of due process, guarantees an indigent defendant in a state felony prosecution the absolute right to appointed counsel, the *Gideon* Court expressly overruled its earlier decision of Betts v. Brady, 316 U.S. 455 (1942). *Betts* had held that the due process clause did not require the state to furnish counsel in every case, but rather only as mandated by the special circumstances of the particular case. *Id.* at 463-65.

In overruling *Betts*, the *Gideon* Court relied to a large extent on the pre-*Betts* decision of Powell v. Alabama, 287 U.S. 45 (1932). The *Powell* Court recognized that some of the rights protected by the first eight amendments against federal action are

the due process clause of the fourteenth amendment,[4] provides the basis for an absolute right to counsel in criminal prosecutions leading to actual imprisonment. Second, the due process clause, as an independent source of individual rights, provides the basis for the right to counsel in civil proceedings.[5] Both the sixth amendment and the due process rights may be implicated in a hearing for non-payment of a criminal fine.

Title 17-A, section 1304 of the Maine Revised Statutes Annotated establishes a procedure for enforcing payment of a criminal fine.[6]

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also protected against state action by virtue of the due process clause of the fourteenth amendment. *Id.* at 67-68 (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)). The Court stated, "If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Id.* at 67-68. The *Powell* Court concluded that "the right to . . . counsel is of this fundamental character." *Id.* at 68, *quoted in* Gideon v. Wainwright, 372 U.S. at 342-43. Despite the broad language in *Powell* which suggests that the Court upheld an absolute right to counsel, the Court ultimately limited its holding to capital cases. Powell v. Alabama, 287 U.S. at 71.

4. The due process clause of the fourteenth amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

5. For further discussion of the right to counsel in civil proceedings, see *infra* notes 143-202 and accompanying text.

6. ME. REV. STAT. ANN. tit. 17-A, § 1304 (1983) provides:

Default in payment of fines

1. When a convicted person sentenced to pay a fine defaults in the payment thereof or of any installment, the court, upon the motion of the official to whom the money is payable, as provided in section 1303, or upon its own motion, may require him to show cause why he should not be sentenced to be imprisoned for nonpayment and may issue a summons or a warrant of arrest for his appearance. Unless such person shows that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the court shall find that his default was unexcused and may order him imprisoned until the fine or a specified part thereof is paid. The term of imprisonment for such unexcused nonpayment of the fine shall be specified in the court's order and shall not exceed one day for each $5 of the fine or 6 months, whichever is the shorter. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursements from the assets of the organization to pay it from such assets and failure to do so may be punishable under this section. A person imprisoned for nonpayment of a fine shall be given credit towards its payment for each day that he is in the custody of the department, at the rate specified in the court's order. He shall also be given credit for each day that he has been detained as a result of an arrest warrant issued pursuant to this section.

2. If it appears that the default in the payment of a fine is excusable, the court may make an order allowing the offender additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or the unpaid portion thereof in whole or in part.

3. Upon any default in the payment of a fine or any installment thereof, execution may be levied, and such other measures may be taken for the

Section 1304 authorizes the court to order a convicted person who has defaulted on a fine to appear before the court to show cause why he should not be imprisoned for nonpayment. On the one hand, if the court finds the default excusable, it may allow additional time to pay, reduce the amount, or revoke the unpaid balance altogether. On the other hand, if the court attributes nonpayment to the defendant's "wilful refusal to obey the order" or to a "failure to make a good faith effort" to pay the fine, then the court may, in its discretion, order him imprisoned.[7]

A recent trilogy of decisions has generated confusion regarding the appropriate method of assessing the right to counsel in a section 1304 hearing. In *Colson v. State*,[8] the Maine Supreme Judicial

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collection of the fine or the unpaid balance thereof as are authorized for the collection of an unpaid civil judgment entered against a person. The levy of execution for the collection of a fine shall not discharge a person imprisoned for nonpayment of the fine until such time as the amount of the fine has been collected.

Id.

7. *Id.* § 1304(1).

8. 498 A.2d 585 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986). The defendant in *Colson* was convicted of operating a motor vehicle after suspension of his license in violation of ME. REV. STAT. ANN. tit. 29, § 2184 (Supp. 1987-1988). As a result of his conviction, the defendant was fined $350.00 payable in installments. He then failed to make any required payments. Colson v. Joyce, 646 F. Supp. 102, 104 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987). The district court conducted a hearing pursuant to section 1304, *see supra* note 6, but did not appoint counsel to represent the defendant. The court sentenced the defendant to incarceration at the conclusion of the proceeding "until the fine was paid with credit at $10 per day for the time served." Colson v. State, 498 A.2d at 586. Colson subsequently filed a motion for Appointment of Counsel and an Affidavit of Indigency. *See* Appendix of Appellant's Brief at 31-32, Colson v. Joyce, 816 F.2d 29 (1st Cir. 1987) (No. 86-2006).

The motion for Appointment of Counsel and the Affidavit of Indigency were filed pursuant to ME. REV. STAT. ANN. tit. 15, § 810 (1983), which provides in relevant part:

> The Superior or District Court may in any criminal case appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel. The District Court shall order reasonable compensation to be paid to counsel by the District Court for such services in the District Court. The Superior Court shall order reasonable compensation to be paid to counsel out of the state appropriation for such services in the Superior Court.

Id.

The defendant then appealed the district court's judgment and commitment order through the state courts. The superior court ultimately affirmed the judgment after having stayed the commitment and admitted the defendant to bail. Colson v. State, 498 A.2d at 586. The defendant then filed a Notice of Appeal to the Law Court. *Id.* The Law Court dismissed the appeal, holding that a commitment order made pursuant to section 1304, *see supra* note 6, "is reviewable only on post-conviction review and not on direct appeal from that order." State v. Colson, 472 A.2d 1381 (Me. 1984). The defendant petitioned for post-conviction review. The superior court denied his request, Colson v. State, No. CR83-233 (Me. Super. Ct., Cum. Cty., Nov. 28, 1984), and the defendant appealed. Colson v. State, 498 A.2d at 585.

Title 15, sections 2121-2132 of the Maine Revised Statutes Annotated provides for

Court, sitting as the Law Court, applied a due process balancing test[9] and held that an indigent defendant sentenced to imprisonment pursuant to section 1304 generally has no right to appointed counsel.[10] The indigent defendant in *Colson* subsequently petitioned for a writ of habeas corpus to the United States District Court for the District of Maine.[11] The federal district court applied the same due process balancing test, but disagreed with the result reached by the Law Court. The district court found that "the assistance of counsel is mandated at all section 1304 proceedings."[12] The Court of

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post-conviction review, a state remedial proceeding which resembles federal habeas corpus proceedings. The stated purposes of post-conviction review are:

> [To] provide a comprehensive and, except for direct appeals from a criminal judgment, the exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences. It is a remedy for illegal restraint and other impediments specified in section 2124 which have occurred directly or indirectly as a result of an illegal criminal judgment or post-sentencing proceeding. It replaces the remedies available pursuant to post-conviction habeas corpus, to the extent that review of a criminal conviction or proceedings were reviewable, the remedies available pursuant to common law habeas corpus, including habeas corpus as recognized in Title 14, sections 5501 and 5509 to 5546, coram nobis, writ of error, declaratory judgment and any other previous common law or statutory method of review, except appeal of a judgment of conviction or juvenile adjudication and remedies which are incidental to proceedings in the trial court. The substantive extent of the remedy of post-conviction review shall be as defined in this chapter and not as defined in the remedies which it replaces; provided that this chapter shall provide and shall be construed to provide such relief for those persons required to use this chapter as is required by the Constitution of Maine, Article I, Section 10.

ME. REV. STAT. ANN. tit. 15, § 2122 (Supp. 1987-1988). Section 1304 hearings are classified as post-sentencing proceedings and are expressly made subject to post-conviction review. *Id.* § 2121(2). "An action for post-conviction review . . . of a post-sentencing proceeding following the criminal judgment[] may be brought if the person seeking relief demonstrates that the challenged . . . post-sentencing proceeding is causing a present restraint . . . ." *Id.* § 2124. Specifically, review of post-sentencing proceedings may be obtained where "[i]ncarceration or increased incarceration [is] imposed pursuant to a post-sentencing proceeding following a criminal judgment, although the criminal judgment itself is not challenged . . . ." *Id.* § 2124(2).

9. The Law Court applied the balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319 (1976). The *Mathews* Court found that due process did not provide a constitutional right to a pre-termination evidentiary hearing to a recipient of social security benefits. The Court established a three-part test for determining whether the due process clause mandated the claimed right. *Id.* at 335. For a complete statement of the factors to be considered in the *Mathews* analysis, see *infra* text accompanying note 22.

10. Colson v. State, 498 A.2d at 589. The Law Court stated that "the simplified procedure and absence of complex issues involved in such hearings will normally obviate the need for appointed counsel." *Id.*

11. Colson v. Joyce, 646 F. Supp. 102 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987).

12. *Id.* at 108.

Appeals for the First Circuit subsequently upheld the district court's result, but reasoned that the sixth amendment, not the due process clause, governed the right to counsel at section 1304 hearings.[13]

The First Circuit did not substantiate its reliance upon the sixth amendment as the basis for its determination. This Comment argues, nonetheless, that the federal appellate court's determination is supported by two independent bases. First, although the section 1304 hearing is not technically a criminal trial, the proceeding resembles a criminal trial in such a manner that the sixth amendment right-to-counsel standard, promulgated by the Supreme Court, guarantees a section 1304 defendant the right to legal representation. Second, since the section 1304 proceeding arises directly from a prior criminal trial and conviction, the hearing constitutes a critical stage of the criminal proceedings to which the sixth amendment right to counsel attaches.

This Comment further argues that even if the section 1304 hearing is characterized as a civil proceeding, thus requiring a due process inquiry rather than a sixth amendment analysis, a sentence of imprisonment conclusively establishes a right to counsel without recourse to a due process balancing test. This Comment focuses on the right to counsel in all section 1304 hearings and, like the dissent in *Colson v. State*, argues that the courts should not distinguish between the sixth amendment and due process rights to counsel in proceedings that result in actual imprisonment.[14]

II. *COLSON* TRILOGY

In *Colson v. State*,[15] the Law Court held that the failure to appoint counsel at the defendant's section 1304 hearing, which resulted in a sentence of imprisonment, did not deprive the defendant of procedural due process under the fourteenth amendment.[16] The court initially determined that Colson was deprived of merely a conditional liberty interest rather than an absolute liberty interest. Colson was convicted at trial and subsequently fined for operating a

13. Colson v. Joyce, 816 F.2d 29, 30 (1st Cir. 1987).

14. Colson v. State, 498 A.2d at 591 n.5 (Nichols, J., dissenting).

15. 498 A.2d 585 (Me. 1985).

16. *Id.* at 588-89. The defendant claimed that the failure to appoint counsel at his section 1304 hearing violated his procedural due process rights under the Maine Constitution as well as under the fourteenth amendment of the federal Constitution. *Id.* at 586. The due process clause in the Maine Constitution parallels the federal guarantee by providing that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ." ME. CONST. art. I, § 6-A. The Law Court's failure to distinguish between the right to appointed counsel under the federal and state constitutions suggests that it regards the federal and state due process provisions as fundamentally equivalent for the purpose of assessing whether an individual has a right to counsel.

motor vehicle after suspension of his license.[17] The Law Court reasoned that when the trial court imposed the fine, Colson was exposed to possible incarceration for unexcused nonpayment pursuant to section 1304. The court concluded, therefore, that the imposition of the fine reduced Colson's liberty interest from an absolute right to a conditional right, which was dependant upon the payment of his fine.[18] After characterizing Colson's interest as "conditional," the court held that indigent section 1304 defendants do not have an absolute right to counsel.[19] The court found support for its determination in a Supreme Court decision holding that the right to counsel at a probation hearing must be examined on a case-by-case basis.[20] The Law Court then applied the due process balancing test set forth by the Supreme Court in *Mathews v. Eldridge*.[21] The *Mathews* test requires that countervailing interests be weighed as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[22]

The *Colson* court characterized the private interest as conditional liberty,[23] and found that the risk of erroneous deprivation was minimal.[24] The straightforward nature of the section 1304 proceeding,[25] Criminal Code provisions that prevent imprisonment for inability to pay a fine,[26] and post-conviction review proce-

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17. Colson v. State, 498 A.2d at 586.

18. The Law Court stated, "[A]lthough the sentence did not include imprisonment, the imposition of a fine exposed Colson to incarceration pursuant to section 1304 for unexcused default in payment. Thus Colson was deprived only of the conditional liberty dependent upon payment of the fine as ordered." *Id.* at 588.

19. The Law Court reasoned, "[T]he mechanics of a section 1304 hearing . . . are not so legally complex that due process should require an unqualified right to an attorney's assistance." *Id.*

20. *Id.* (citing Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)). For a complete discussion of *Gagnon* and its bearing on the right to counsel at section 1304 hearings, see *infra* notes 115-27 and accompanying text.

21. 424 U.S. 319 (1976). For further discussion of the applicability of the *Mathews* balancing test to the assessment of the right to counsel at section 1304 hearings, see *infra* notes 143-47 & 197-202 and accompanying text.

22. Mathews v. Eldridge, 424 U.S. at 335.

23. *See supra* text accompanying notes 18-19.

24. The Law Court stated, "The risk of improper incarceration due to lack of counsel was minimal." Colson v. State, 498 A.2d at 589.

25. *Id.* at 588.

26. *Id.* The court noted that the Maine Criminal Code "prohibits the imposition of a criminal fine unless the court determines that the convicted person has the ability to pay it." *Id.* ME. REV. STAT. ANN. tit. 17-A, § 1302 (1983) establishes criteria for imposing fines and provides as follows:

dures[27] were found to guard against an erroneous deprivation of liberty. The court held, therefore, that Colson did not have a right to court appointed counsel and that "the simplified procedure and absence of complex issues involved in [section 1304] hearings will normally obviate the need for appointed counsel."[28]

The *Colson* dissent also found that the question of an indigent's right to counsel at section 1304 hearings raised a procedural due process issue.[29] The dissent, however, contended that the majority's reliance on the *Mathews* balancing test was an inappropriate method of assessing the adequacy of procedural protections in a section 1304 hearing where an individual's liberty interest was actually deprived.[30] Furthermore, the dissent explicitly disagreed with the majority's characterization of Colson's liberty interest as conditional[31] and, thereby, implicitly rejected the majority's case-by-case approach to the section 1304 right-to-counsel question. The dissent argued that the Supreme Court decision, which held that a probationer had no absolute right to counsel at a probation revocation hearing, had no bearing on Colson's situation, since the conditional nature of the probationer's liberty interest provided the rationale for the Supreme Court decision.[32] Colson, unlike the probationer, had been neither sentenced to imprisonment as a result of his conviction

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> No convicted person shall be sentenced to pay a fine unless the court determines that he is or will be able to pay the fine. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose. No person shall be imprisoned solely for the reason that he will not be able to pay a fine.

Id. The court noted further, "Section 1304(2) permits the court to order imprisonment only when the convicted person's failure to pay the fine is found to be unexcused." Colson v. State, 498 A.2d at 588. For the text of section 1304, see *supra* note 6.

27. The Law Court concluded that the post-conviction review procedure, *supra* note 8, provides adequate redress against "any serious departures from substantial justice" which might occur at a section 1304 hearing. Colson v. State, 498 A.2d at 588. The court reasoned that the lack of direct appeal from a section 1304 hearing eliminates "[t]he need for an attorney's skills in preserving error for appellate review...." *Id.* at n.8. *But see id.* at 590 (Nichols, J., dissenting) (lack of direct appeal heightens the need for counsel at a section 1304 proceeding).

28. Colson v. State, 498 A.2d at 589.

29. *See id.* at 590 (Nichols, J., dissenting).

30. *Id.* See *infra* notes 143-47 & 197-202 and accompanying text for further discussion of the applicability of the *Mathews* balancing test in assessing the right of an indigent section 1304 defendant to representation by appointed counsel.

31. Colson v. State, 498 A.2d at 590-91 (Nichols, J., dissenting). For further discussion of the proper characterization of the liberty interest of a section 1304 defendant, see *infra* notes 125-34 and accompanying text.

32. Colson v. State, 498 A.2d at 591 n.4 (Nichols, J., dissenting) (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)). For further discussion of *Gagnon v. Scarpelli*, see *infra* notes 115-27 and accompanying text.

nor placed on probation.[33]

The dissent found a Supreme Court decision setting forth an actual imprisonment standard for analyzing right-to-counsel questions[34] more appropriate for resolving the issues raised in *Colson*.[35] The *Colson* dissent recognized that the Supreme Court decisions upon which it relied involved sixth amendment rather than procedural due process questions, but argued that the Supreme Court does not distinguish between the sixth amendment and the due process rights to counsel in actual imprisonment cases.[36] The dissent emphasized the similarity between civil contempt proceedings and section 1304 hearings to support its conclusion that the actual imprisonment standard should govern the right to counsel at section 1304 hearings. The dissent further argued that the actual imprisonment standard should govern the right to counsel at section 1304 hearings because many circuit courts of appeals have relied on the Supreme Court decision involving the sixth amendment to hold that civil contempt defendants are entitled to appointed counsel.[37]

In *Colson v. Joyce*,[38] the United States District Court for the District of Maine granted Colson's petition for a writ of habeas corpus,[39] concluding that all indigent section 1304 defendants have

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33. Colson v. State, 498 A.2d at 590-91 (Nichols, J., dissenting).

34. Argersinger v. Hamlin, 407 U.S. 25 (1972), *cited in* Colson v. State, 498 A.2d at 591 (Nichols, J., dissenting), held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Argersinger v. Hamlin, 407 U.S. at 37.

35. Colson v. State, 498 A.2d at 591 (Nichols, J., dissenting). For further discussion of the significance of the actual imprisonment standard in evaluating the right to counsel at section 1304 hearings, see *infra* notes 61-81 & 148-50 and accompanying text.

36. Colson v. State, 498 A.2d at 591 n.5 (Nichols, J., dissenting). For further discussion of the lack of distinction between the sixth amendment and the due process right to counsel in cases concerning actual imprisonment, see *infra* text accompanying notes 143-202.

37. Colson v. State, 498 A.2d at 591 (Nichols, J., dissenting). The dissent noted that several circuit courts relied on the sixth amendment decision of Argersinger v. Hamlin, 407 U.S. 25 (1972), in upholding the right to counsel in civil contempt proceedings. Colson v. State, 498 A.2d at 591 (Nichols, J., dissenting). The circuit court decisions specifically noted by the dissent include: United States v. Anderson, 553 F.2d 1154, 1156 n.2 (8th Cir. 1977); *In re* Di Bella, 518 F.2d 955, 959 (2d Cir. 1975); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973). See *infra* notes 174-93 and accompanying text for a discussion of these and other civil contempt cases addressing the right to counsel.

38. 646 F. Supp. 102 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987).

39. 28 U.S.C. § 2254 (1982). Section 2254, providing for remedies in the federal courts in the event of state custody, states in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or trea-

the right to representation by counsel. The district court, like the majority and the dissenting opinions in *Colson v. State*, concluded that the due process clause governed the right of an indigent section 1304 defendant to appointed counsel.[40] The district court agreed with the majority's finding that the *Mathews v. Eldridge* balancing test was applicable.[41] The district court, however, agreed with the dissenting opinion that the Supreme Court decision, which held that

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ties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

Id.

40. Colson v. Joyce, 646 F. Supp. at 107.

41. *Id.*

a probationer has no absolute right to counsel at a probation revocation hearing, has no bearing on the right to counsel in a section 1304 hearing because the defendant's liberty interest in the latter situation is absolute.[42] The section 1304 hearing, according to the district court, was more similar to a deferred sentencing proceeding, where the Supreme Court ruled that the defendant has a right to counsel,[43] than to the case involving a probation revocation hearing, where the defendant did not have a right to counsel.[44] The district court noted that the Supreme Court, in distinguishing the two cases, emphasized the significance of the underlying prison sentence.[45] The district court analogized the situation of Colson to that of the defendants in the deferred sentencing proceeding on the basis that neither Colson nor the defendants in the deferred sentencing proceeding had been sentenced to imprisonment at the time of the original hearing.[46] The district court, like the dissent in *Colson v. State*, compared section 1304 proceedings to civil contempt proceedings.[47] The district court agreed with the majority, however, that the *Mathews* balancing test must be employed to resolve the right to counsel question and, therefore, rejected the dissent's view that the actual imprisonment standard should be dispositive.[48] In applying the *Mathews* test to the *Colson* situation, however, the district court perceived the underlying interests differently from the *Colson v. State* majority, and reached a contrary result. Unlike the majority, the district court found that the section 1304 defendant's liberty interest was absolute and that the attorney's role in assuring the integrity of the section 1304 fact-finding process was critical.[49] The district court conse-

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42. *Id.* at 106-107 (construing Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

43. Mempa v. Rhay, 389 U.S. 128 (1967). For further discussion of *Mempa* and its relevance to the determination of an indigent's right to counsel at section 1304 hearings, see *infra* notes 91-121 and accompanying text.

44. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

45. The district court noted that the Supreme Court distinguished *Gagnon* from its earlier decision of *Mempa* by "specifically stress[ing] the significance of the [*Gagnon*] defendant's underlying sentence of imprisonment . . . ." Colson v. Joyce, 646 F. Supp. at 106. For a more extended discussion of the distinction between *Gagnon* and *Mempa* and the significance of that distinction to the right to counsel at section 1304 hearings, see *infra* notes 115-21 and accompanying text.

46. Colson v. Joyce, 646 F. Supp. at 106-107.

47. *Id.* at 107. The court noted that section 1304 hearings share a number of features with civil contempt proceedings. First, in both proceedings the court calls upon the defaultee to explain his failure to obey a court order. Second, the imprisonment sanction serves a coercive function in both situations. The incarceration continues only until the defendant complies with the court's order or pays the imposed fine. Finally, both section 1304 and the limitations on the court's civil contempt powers preclude incarceration of one who lacks the ability to obey the court order. *Id.*

48. *Id.*

49. *Id.* at 108. The court stated:

> One of the foremost roles of the advocate appearing before the court is his role in gathering and presenting the facts. Competent counsel understand

quently held that Colson's absolute liberty interest and counsel's role in protecting the interest outweighed "the State's interest in enforcing its penalties without incurring the costs of court-appointed counsel."[50] Furthermore, the district court argued that "[w]hen [the] balance of interests is weighed against the . . . presumption that an indigent has a right to counsel when, if he loses, he may be deprived of his liberty,"[51] the conclusion emerges that "counsel is mandated at all section 1304 proceedings."[52]

The state appealed the district court's decision, and the First Circuit affirmed the lower court's grant of habeas relief.[53] The decision of the court of appeals, however, obscures, rather than clarifies, the proper method of evaluating the right to counsel in section 1304 hearings. The First Circuit interjected a new element into the analysis by holding that the failure to offer appointed counsel violated Colson's sixth amendment right to counsel,[54] as distinguished from his fourteenth amendment due process rights. The added confusion stems not only from the novelty of the approach, but also from the fact that the First Circuit failed to provide any rationale for concluding that the sixth amendment resolved the question. The court of appeals simply purported to adopt the reasoning of the district court in *Colson v. Joyce*, even though the district court never held that the sixth amendment was applicable to the section 1304 right-to-counsel question.[55]

> the relevancy of facts and know whether they need to ferret out material information that an uncounseled defendant may forget or overlook. In addition, by presenting the facts in a cogent and organized fashion, competent counsel save the court valuable judicial time and aid in the integrity of the fact-finding process.

Id.

50. *Id.* The court relied to a large extent on decisions of both the Fifth and Tenth Circuits to reach its conclusion. In assessing the right to counsel at civil contempt hearings, both circuit courts "[b]ased on the significance of the factual findings . . . found that the risk of error, and the seriousness of the deprivation should error occur, shifted the due process balance in favor of providing counsel in all such cases." *Id.* (citing Walker v. McLain, 768 F.2d 1181, 1184 (10th Cir. 1985); Ridgway v. Baker, 720 F.2d 1409, 1415 (5th Cir. 1983)).

51. *Id.* (citing Lassiter v. Department of Social Servs., 452 U.S. 18, 26-27 (1981)). For further discussion of the *Lassiter* presumption that an indigent has a right to appointed counsel when faced with loss of liberty, see *infra* notes 156-64 and accompanying text.

52. Colson v. Joyce, 646 F. Supp. at 108.

53. Colson v. Joyce, 816 F.2d 29 (1st Cir. 1987).

54. *Id.* at 30.

55. The court of appeals stated, "The district court found, in a comprehensive and well-reasoned opinion, that petitioner had been unconstitutionally deprived of his sixth amendment right to counsel. . . . We affirm substantially for the reasons set out in the opinion of the district court." *Id.* (citation omitted).

The district court, however, clearly based its holding on the *Mathews* balancing test. The court stated that "a determination of whether counsel is necessary must rest on the due process analysis required by *Mathews v. Eldridge*." Colson v. Joyce, 646 F.

III. SIXTH AMENDMENT RIGHT

Although the First Circuit did not substantiate its reliance on the sixth amendment, Supreme Court decisions provide two possible grounds upon which the circuit court's decision can rest. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[56] The United States Supreme Court has held that an indigent defendant has a sixth amendment right to appointed counsel both in state criminal trials that result in imprisonment[57] and at all critical stages of the criminal prosecution.[58] The First Circuit, there-

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Supp. at 107. *See supra* text accompanying notes 38-52. The district court suggested that the enumeration of special circumstances, which called for the appointment of counsel in *Mempa*, demonstrated that a due process analysis was used in that case. Colson v. Joyce, 646 F. Supp. at 107 n.5 (citing Mempa v. Rhay, 389 U.S. 128, 135-37 (1967)). The district court analogized the deferred sentencing proceeding of *Mempa* to the section 1304 proceeding in order to support its due process analysis. *Id.* at 107. This comparison further illustrates that the district court assumed that *Mempa* was based on a due process analysis.

It is possible, nonetheless, to glean from the district court's opinion some insight into how the sixth amendment might be germane to a determination of the right to counsel at a section 1304 hearing. First, the district court recognized that *Mempa* may entitle a defendant in a deferred sentencing proceeding to an absolute sixth amendment right to counsel. For example, the court read *Mempa* to hold that the absolute sixth amendment right of Argersinger v. Hamlin, 407 U.S. 25 (1972), "attaches 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,' " including sentencing. Colson v. Joyce, 646 F. Supp. at 105 (quoting Mempa v. Rhay, 389 U.S. at 134). The court further noted, "The *Mempa* decision can be characterized as imposing an absolute right to counsel at sentencing proceedings." *Id.* at 107 n.5 (citing Mempa v. Rhay, 389 U.S. at 134). The parity between the section 1304 proceeding and the deferred sentencing proceeding of *Mempa*, *see infra* text accompanying notes 103-108, suggests therefore, that a section 1304 defendant has an absolute right to counsel.

Second, the district court suggested that imprisonment pursuant to section 1304 of one who is in Colson's particular situation—where an individual had the ability to pay a criminal fine when sentenced but was indigent at the time of his section 1304 hearing—closely resembles imprisonment for criminal contempt. Colson's imprisonment was punitive, rather than coercive, *see infra* note 179 and accompanying text, because his indigency prevented him from securing his own release. His incarceration, therefore, resembles incarceration for criminal contempt. Colson v. Joyce, 646 F. Supp. at 109. The district court suggested that Colson deserved the same absolute right to counsel that is enjoyed by defendants who are threatened with criminal imprisonment. *Id.* "[A]lthough there was a past wilful refusal to pay, the present indigency of the Petitioner transforms his imprisonment into criminal punishment to which an absolute right to the assistance of counsel attaches." *Id.*

56. U.S. CONST. amend. VI.

57. *See infra* notes 61-68 and accompanying text.

58. *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (post-arraignment interrogation was a critical stage at which the right to counsel attached); Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel attached at a preliminary hearing where the sole issue was whether there was sufficient evidence for presentation of case to grand jury); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel attached at a combined deferred sentencing and probation revocation hearing); United States v. Wade, 388 U.S.

fore, implicitly classified the section 1304 proceeding as either a criminal trial or a critical stage of the criminal prosecution when it concluded in *Colson v. Joyce* that the state violated the petitioner's sixth amendment right to counsel by failing to appoint counsel at his section 1304 hearing.

A. Analogy to Criminal Trial

The sixth amendment right to counsel, since its incorporation into the due process clause of the fourteenth amendment in *Gideon v. Wainwright*,[59] has provided the basis for an indigent's right to counsel in state criminal trials. The *Gideon* Court construed the sixth amendment to require the states to provide trial counsel for indigent felony defendants.[60] The Court subsequently extended this sixth amendment protection to state misdemeanor defendants actually sentenced to incarceration.[61] Emphasizing the severity of the impris-

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218 (1967) (right to counsel held applicable to corporeal line-up situation); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel held applicable at pre-indictment interrogation even though criminal prosecution had not been formally initiated).

In addition, a number of cases decided either simultaneously with or prior to Gideon v. Wainwright, 372 U.S. 335 (1963), held that the due process clause of the fourteenth amendment required courts to appoint counsel at various critical stages of the prosecution. The *Mempa* Court stated that, based upon *Gideon's* incorporation of the sixth amendment right to counsel under the fourteenth amendment and upon the elimination of the "special circumstances" requirement of Betts v. Brady, 316 U.S. 455 (1942), *cited in* Mempa v. Rhay, 389 U.S. at 134, one can conclude that these cases stand for the proposition that there is a sixth amendment absolute right to counsel at critical stages of the criminal prosecution. *Id.* at 133-34. For further discussion of this point, see *infra* text accompanying notes 92-98. *See also* White v. Maryland, 373 U.S. 59 (1963) (right to counsel at preliminary hearing where plea was entered); Douglas v. California, 372 U.S. 353 (1963) (right to counsel at first appeal granted as of right); Hamilton v. Alabama, 368 U.S. 52 (1961) (right to counsel at arraignment stage where certain defenses must be raised or lost); Townsend v. Burke, 334 U.S. 736 (1948) (defendant denied due process where counsel was not present at sentencing and a possibility existed that the sentence was predicated on misinformation); Powell v. Alabama, 287 U.S. 45 (1932) (due process violated where no counsel provided between arraignment and trial in capital case).

59. 372 U.S. 335 (1963). For further discussion of *Gideon*, see *supra* note 3.

60. Gideon v. Wainwright, 372 U.S. at 339, 344-45.

61. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972). The indigent defendant in *Argersinger* was convicted of carrying a concealed weapon, an offense punishable by up to six months in prison, a $1000 fine, or both. The trial court sentenced the defendant to serve 90 days in jail. *Id.* at 26. The Court rejected the state's argument that crimes that may be tried without a jury may also be tried without counsel for the defendant. The Court reasoned that there is historical support for limiting the right to a jury trial to serious criminal cases, but no parallel historical support for similarly restricting the right to counsel. At common law, in fact, an individual accused of a misdemeanor was entitled to full representation by counsel, whereas an individual accused of a felony was only entitled to counsel's assistance with respect to legal questions raised by the accused himself. *Id.* at 30 (citing Powell v. Alabama, 287 U.S. at 60, 64-65).

onment sanction,[62] the Court held in *Argersinger v. Hamlin* "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[63]

The *Argersinger* Court thus declined the opportunity to make the right to counsel contingent upon the gravity of the offense charged and elected to tie the right to the actual deprivation of the defendant's liberty.[64] The *Argersinger* decision left unresolved the question of whether the sixth amendment requires the appointment of counsel at trial where the sentencing scheme authorizes incarceration but where the trial court does not sentence the indigent to imprisonment.[65] The Court addressed this issue in *Scott v. Illinois*[66] and held that the sixth and fourteenth amendments require "that no indigent criminal defendant be sentenced to a term of imprisonment unless the state afford[s] him the right to assistance of appointed counsel in his defense."[67] The *Scott* Court thus reaffirmed that actual imprisonment is the decisive factor in assessing the sixth amendment right to counsel. In refusing to extend *Argersinger*, the Court stated, "[T]he central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."[68]

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62. The Court stated that " 'the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and reputation.' " *Id.* at 37 (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970)).

63. *Id.* The concurring opinion in *Argersinger* also recognized the need for counsel when the trial leads to the severe sanction of imprisonment although the offense charged may be minor.

> [S]everal cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman, especially when he is opposed by a law-trained prosecutor. There is little ground, therefore, to assume that a defendant, unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges.

Id. at 41 (Burger, C.J., concurring).

64. The Court held, "In those [misdemeanors] that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Id.* at 40.

65. *Id.* at 37.

66. 440 U.S. 367 (1979).

67. *Id.* at 373-74.

68. *Id.* at 373. The *Scott* Court further observed that *Argersinger* focused on the severity of the actual imprisonment sanction in upholding a sixth amendment right to counsel. *Scott* noted that the *Argersinger* Court rejected arguments against the requirement of appointed counsel, which were based on cost and lack of lawyers, par-

tially on the grounds that it believed these contentions to be unfounded. *Id.* at 372 (citing Argersinger v. Hamlin, 407 U.S. at 37 n.7). *Scott* observed, however, that the *Argersinger* Court rejected these arguments mostly for the reason "that incarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." *Id.* at 372-73 (construing Argersinger v. Hamlin, 407 U.S. 25 (1972)).

Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), further emphasized the crucial role of the imprisonment sanction in evaluating the sixth amendment right to counsel. The *Baldasar* Court held that a prior uncounseled misdemeanor conviction, which was constitutionally valid because no prison sentence was imposed, may not be the factor that transforms a subsequent misdemeanor into a felony with a prison term under an enhanced penalty statute. The *Baldasar* concurrence reasoned that the petitioner's prior conviction could only result in a sanction that did not involve imprisonment because the use of the prior conviction, as the basis for an enhanced penalty involving imprisonment for a second offense, violated the *Argersinger* and *Scott* rule that an uncounseled conviction may not result in a deprivation of liberty. *Id.* at 226-27 (Marshall, J., concurring). The concurrence stated:

> We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has "the guiding hand of counsel at every step in the proceedings against him," his conviction is not sufficiently reliable to support the severe sanction of imprisonment. An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense.

Id. at 227-28 (Marshall, J., concurring) (citations omitted).

In Middendorf v. Henry, 425 U.S. 25 (1976), the Court seemed to suggest, however, that imprisonment at a judicial proceeding does not necessarily indicate that the proceeding is a "criminal prosecution" mandating application of the sixth amendment counsel provision. The *Middendorf* decision, a plurality opinion, held that the sixth amendment counsel provision did not entitle military defendants in a summary court-martial proceeding to representation by counsel even though the proceeding resulted in confinement of the defendant. The Court asserted that the imposition of a prison sanction did not necessarily control the right to counsel even in a civilian context:

> It seems to us indisputably clear, therefore, that even in a civilian context the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a "criminal prosecution" for purposes of the Sixth Amendment. Nor does the fact that confinement will be imposed in the first instance as a result of that proceeding make it a "criminal prosecution."

Id. at 37 (dictum).

The Court's choice of precedent, however, undermines the authority of this statement in the context of assessing the right to counsel in section 1304 proceedings. The *Middendorf* Court cited Gagnon v. Scarpelli, 411 U.S. 778 (1973), which held that there is no absolute sixth amendment right to counsel at a probation revocation hearing, to support its assertion. Middendorf v. Henry, 425 U.S. at 35. The reasoning of the *Gagnon* Court demonstrates that the *Gagnon* decision does not control the determination of the right to counsel at section 1304 hearings. Two crucial factors distinguish the proceedings at issue in *Gagnon* from section 1304 proceedings. First, the trial court in *Gagnon* initially imposed a suspended prison term on the probationer. Second, the effect of probation substantially curtails the liberty of the probationer. *See infra* notes 115-27 and accompanying text. Neither factor is relevant to a section 1304 proceeding.

In addition, the *Middendorf* Court relied on *In re* Gault, 387 U.S. 1 (1967), to

Notwithstanding the differences,[69] a section 1304 hearing resembles a criminal trial to the degree that the actual imprisonment rule of *Argersinger* and *Scott* dictates that section 1304 defendants have a sixth amendment right to counsel. There is no doubt that a section 1304 hearing technically emanates from a prior criminal conviction.[70] One can nevertheless regard a section 1304 proceeding as a trial-like proceeding for an independent offense[71] because the issues of fact addressed in a section 1304 proceeding diverge widely from those involved at the initial trial. Moreover, various procedural similarities between a section 1304 hearing and a criminal trial underscore the trial-like character of the section 1304 proceeding. The state, acting through either its judicial or its executive arm, institutes the section 1304 show cause hearing. The issuance of an arrest warrant or a summons sets the section 1304 wheels in motion,[72] just as in a criminal prosecution.[73] Most important, the section 1304 proceeding frequently results in a sentence that is radically different from the sentence imposed after conviction of the initial offense.[74]

Colson's situation aptly demonstrates that the section 1304 hearing is tantamount to a trial for an independent offense. First, the factors that justified Colson's incarceration under section 1304 are entirely unrelated to those that formed the basis of his conviction of

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support its conclusion that the imprisonment sanction does not necessarily classify a proceeding as a criminal prosecution for purposes of assessing whether there is a sixth amendment right to counsel. Middendorf v. Henry, 425 U.S. at 35-36. While *Gault* did classify the juvenile delinquency proceeding as civil although it resulted in a loss of liberty, the Court nonetheless held that due process required that counsel be provided if the imprisonment sanction were imposed. *In re* Gault, 387 U.S. at 41.

69. There are, of course, differences between a section 1304 proceeding and a criminal trial. In criminal trials, for example, the state bears the burden of proving the defendant's guilt beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970). In section 1304 proceedings, by contrast, the defendant bears the burden of proving that his default in payment of a fine is excusable and, thus, that he should not be imprisoned for nonpayment. ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983). For the complete text of section 1304, see *supra* note 6. Furthermore, a prosecuting attorney represents the state in criminal cases, whereas the court itself inquires into the defendant's failure to pay in section 1304 proceedings. ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983). Moreover, the rules of evidence are inapplicable in a section 1304 proceeding and, as the Law Court noted in Colson v. State, 498 A.2d 585, 588 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986), the section 1304 proceeding is nonadversarial.

70. *E.g.*, Colson v. State, 498 A.2d 585 (Me. 1985) (failure to pay fine imposed upon conviction for operating motor vehicle after suspension of license ultimately led to defendant's arrest and hearing pursuant to section 1304).

71. For a discussion of how the Colson situation demonstrates that a section 1304 hearing may be analogized to a second trial on an independent offense, see *infra* text accompanying notes 75-80.

72. ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983). For the complete text of section 1304, see *supra* note 6.

73. M.R. CRIM. P. 4(a).

74. For an illustration of this point, see *infra* text accompanying notes 79-80.

operating a motor vehicle after suspension of his license. Conviction of the latter offense requires the state to prove that the defendant operated a motor vehicle on the public highways of Maine, that his license was suspended at the time of operation, and that he either knew or should have known of the suspension.[75] Incarceration pursuant to section 1304, in contrast, is a result of the defendant's failure to pay a criminal fine[76] without an excuse.[77] Second, the state arrested Colson pursuant to an arrest warrant issued sua sponte by the court.[78] Third, and most significant, Colson's sentence, which followed his conviction of operating after suspension, was a mere fine of $350.00.[79] His section 1304 hearing, by contrast, resulted in a loss of liberty for more than a month.[80]

When the state thus brings its authority to bear against an individual through the successive steps of warrant, arrest, hearing, and incarceration, that individual is, for all practical purposes, criminally accused. The hearing stage of the section 1304 process closely parallels the trial stage of the criminal prosecution. The *Argersinger-Scott* actual imprisonment standard, therefore, should apply to section 1304 hearings, even though the hearings are not technically labeled as criminal trials. The *Argersinger-Scott* rule requires that the court appoint counsel to represent indigent criminal defendants at trial when the trial results in actual imprisonment.[81] Colson thus possessed a sixth amendment right to counsel at his section 1304 hearing under the *Argersinger-Scott* standard.

B. Critical Stage

The sixth amendment governs the right to counsel at section 1304 hearings even if the proceedings are not the equivalent of independent criminal trials, because the sixth amendment right extends be-

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75. ME. REV. STAT. ANN. tit. 29, § 2184 (Supp. 1987-1988).

76. ME. REV. STAT. ANN. tit. 17-A, § 1304 (Supp. 1987-1988). For the complete text of section 1304, see *supra* note 6.

77. ME. REV. STAT. ANN. tit. 17-A, § 1304 (Supp. 1987-1988). Section 1304 declares that the nonpayment is unexcused "[u]nless [the defendant] shows that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment." *Id.*

78. Colson v. Joyce, 646 F. Supp. 102, 104 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987).

79. Colson v. State, 498 A.2d 585, 586 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986).

80. Following Colson's section 1304 hearing, the court committed him "to the county jail until the fine was paid with credit at $10 per day for the time served." *Id.* Assuming that Colson's indigency prevented him from paying the $350 fine, or any portion thereof, his prison term would last for 35 days.

81. See *supra* notes 61-68 and accompanying text for a more complete discussion of the actual imprisonment standard for assessing sixth amendment right-to-counsel issues.

yond the trial stage to all "critical stages" of the criminal process.[82] The Court has held that the sixth amendment right to counsel attaches at pre-indictment interrogations,[83] corporeal line-ups,[84] preliminary hearings,[85] arraignment,[86] sentencing,[87] deferred sentencing proceedings,[88] and first appeals granted as of right.[89] Thus, if the section 1304 proceeding is part of the original prosecution,[90] rather than an independent trial on an unrelated offense, the hearing implicates the sixth amendment right to counsel only if the hearing is a critical stage of the criminal process. The substantial similarities between a section 1304 proceeding and a deferred sentencing and probation revocation hearing, which the Court found to be a critical stage of the criminal process in *Mempa v. Rhay*,[91] suggest that the section 1304 hearing is a critical stage of the criminal process.

In *Mempa*, the Court held that the sixth amendment, as applied to the states through the due process clause of the fourteenth amendment, required that counsel be provided to represent the defendants at their respective deferred sentencing and probation revocation hearings.[92] An analysis of the *Mempa* reasoning shows that the district court in *Colson v. Joyce* incorrectly assumed that the *Mempa* decision was based on a due process rather than a sixth amendment right to counsel.[93] The *Mempa* Court relied on *Gideon*

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82. *See supra* note 58 and accompanying text.

83. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

84. *E.g.*, United States v. Wade, 388 U.S. 218 (1967).

85. *E.g.*, Coleman v. Alabama, 399 U.S. 1 (1970).

86. *E.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961). See *supra* note 58 for a discussion of how this due process decision now stands for an absolute sixth amendment right to counsel.

87. *E.g.*, Townsend v. Burke, 334 U.S. 736 (1948). See *supra* note 58 for a discussion of how this due process decision now stands for an absolute sixth amendment right to counsel.

88. Mempa v. Rhay, 389 U.S. 128 (1967). See *supra* text accompanying notes 91-120 for an extended discussion of the *Mempa* decision.

89. *E.g.*, Douglas v. California, 372 U.S. 353 (1963). See *supra* note 58 for a discussion of how this due process decision now stands for an absolute sixth amendment right to counsel.

90. The section 1304 proceeding relates directly to the original prosecution in that the amount of the fine imposed at the initial trial limits the length of the sentence of incarceration permissible under section 1304. That section provides: "The term of imprisonment . . . shall not exceed one day for each $5 of the fine or 6 months, whichever is the shorter." ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983).

91. 389 U.S. 128 (1967).

92. *See infra* text accompanying notes 94-98.

93. The district court stated, "Regardless . . . of whether section 1304 is characterized as a contempt or a deferred sentencing proceeding [as in *Mempa v. Rhay*], a determination of whether counsel is necessary must rest on the due process analysis required by *Mathews v. Eldridge*." Colson v. Joyce, 646 F. Supp. at 107. *But see supra* note 55 (discussion of the district court's recognition that *Mempa v. Rhay* could be read to stand for an absolute sixth amendment right to counsel at deferred sentencing proceedings).

v. Wainwright[94] as authority to hold that the sixth amendment guaranteed the right to counsel at the combination deferred sentencing and probation revocation hearing.[95] The *Mempa* Court first considered a line of pre-*Gideon* cases dealing with the right to counsel at various stages of the criminal process, including sentencing, pleading, and arraignment. In each of these cases, the right to counsel was contingent upon the presence of special circumstances.[96] The *Mempa* Court then stated that *Gideon* had eliminated the special circumstances requirement when it held that the sixth amendment applied to the states through the due process clause.[97] The *Mempa* Court concluded:

> [W]hen the . . . requirement of special circumstances is stripped away by *Gideon*, [the pre-*Gideon* cases addressing the right to counsel at various stages of the criminal prosecution] clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.[98]

The fact that the *Mempa* Court painstakingly explained the reasoning for its decision that the sixth amendment applied to the deferred sentencing proceeding suggests that the district court in *Colson v. Joyce* erroneously assumed that the *Mempa* Court founded its decision on the due process right to counsel.

Certain procedural aspects of *Mempa* are important in understanding the parallel between the deferred sentencing proceeding in *Mempa* and the section 1304 hearing. Following their respective trials, the petitioners in *Mempa* were placed on probation for a term of years with no prison term imposed. The state instituted probation revocation hearings against the petitioners when they violated the conditions of probation. The court did not appoint counsel to represent either defendant at his combination deferred sentencing and probation revocation hearing. At the hearings, the court revoked the probation of each petitioner and sentenced each to a term of incarceration. Each petitioner then filed for a writ of habeas corpus, claiming that the state had unconstitutionally deprived him of his right to counsel at his combination deferred sentencing and probation revocation hearing.[99] The state argued that the trial court had actually sentenced the petitioners when it placed them on probation and that the "imposition of sentence following probation revocation [was], in effect, a mere formality constituting part of the probation

94. 372 U.S. 335 (1963). For further discussion of *Gideon*, see *supra* note 3 and text accompanying notes 59-60.

95. Mempa v. Rhay, 389 U.S. at 134, 137.

96. *Id.* at 133-34.

97. *Id.* at 134.

98. *Id.*

99. *Id.* at 130-33.

revocation proceeding[s]."[100] The state presumably believed that the routine nature of the hearing obviated the need for counsel.

The *Mempa* Court found that counsel was necessary at the sentencing proceedings to protect the petitioners' interests, even though the sentencing scheme virtually eliminated the judge's discretion by requiring him to impose the maximum sentence. The Court reasoned that the sentencing judge's recommendations weighed heavily in the determination of the duration of the prison sentence, although the Board of Prison Terms and Paroles made the final decision. According to the Court, counsel plays a vital role in ensuring that the sentencing judge makes an appropriate recommendation.[101] "[T]o the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshalling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."[102]

The section 1304 proceeding resembles the combination deferred sentencing and probation revocation hearing at issue in *Mempa*. Comparing Colson's situation with that of the defendants in *Mempa* underscores substantial similarities between the two. First, the trial judges in both situations imposed sentences other than actual imprisonment. In *Colson*, the court sentenced the defendant to pay a fine[103] whereas in *Mempa* the court sentenced the defendants to probation.[104] Second, in both situations, the initial sentences gave rise to the possibility that violations thereof would lead to future incarceration.[105] Third, when both Colson and the defendants in *Mempa* violated the terms of their initial sentences, the states instituted further proceedings.[106] Fourth, the courts held hearings in

100. *Id.* at 135.

101. *Id.*

102. *Id.*

103. Colson v. State, 498 A.2d 585, 586 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986). In *Colson*, the defendant was fined $350 to be paid in monthly installments. *Id.*

104. Mempa v. Rhay, 389 U.S. at 130-32. In *Mempa*, the defendants were placed on probation for two and three years respectively. Each was required as a condition of probation to serve an initial term in jail. Further sentence of imprisonment was deferred pursuant to a state statute. *Id.*

105. For example, in *Colson*, the defendant's allegedly inexcusable failure to pay his original fine as ordered led to his incarceration pursuant to section 1304. Colson v. State, 498 A.2d at 586. In *Mempa*, subsequent criminal activities, presumably in violation of the terms of the defendants' probation, led to the revocation of probation and the imposition of prison terms. Mempa v. Rhay, 389 U.S. at 131-33.

106. In *Colson*, the court, on its own motion, initiated and conducted a hearing pursuant to section 1304. Colson v. Joyce, 646 F. Supp. 102, 104 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987). For further discussion of the procedural history of *Colson*, see *supra* note 8. In *Mempa*, prosecuting attorneys moved to have the petitioners' probations revoked. Mempa v. Rhay, 389 U.S. at 130-32.

each case, but did not provide the benefit of counsel to the defendants.[107] Finally, the trial judges sentenced both Colson and the defendants in *Mempa* to imprisonment at the conclusion of their respective hearings.[108]

There is, in fact, a more compelling need for counsel in section 1304 hearings than in the hearings at issue in *Mempa*. The judge in a section 1304 proceeding has broad discretion to determine the sanction imposed on the defendant. For example, if the section 1304 hearing judge finds that the defendant wilfully failed to make a good faith effort to pay his fine, then the judge may, but need not, order the defendant's incarceration. Section 1304 also grants the court discretion in setting the term of imprisonment.[109] Similarly, section 1304 permits the court to select from among several options when it excuses the defendant's default.[110] The section 1304 judge, in any case, ultimately determines the sentence imposed.[111] The judge presiding over the deferred sentencing proceedings at issue in *Mempa*, by contrast, must impose the maximum sentence permitted by statute and only has discretion to recommend a lesser penalty to the Board of Prison Terms and Paroles.[112] In sum, the section 1304 judge has far greater discretion than the deferred sentencing judge. Counsel plays an even more vital role, therefore, in "marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case"[113] at sec-

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107. In *Mempa*, one defendant claimed to have retained private counsel to represent him at his combined deferred sentencing and probation revocation hearing. After a 15-minute wait for defendant's counsel to arrive, the court proceeded without him. Mempa v. Rhay, 389 U.S. at 132.

108. At the conclusion of Colson's section 1304 hearing, the court sentenced him to incarceration in the "county jail until the fine was paid with credit at $10 per day for the time served." Colson v. State, 498 A.2d at 586. In *Mempa*, the court sentenced one petitioner to serve 10 years in the penitentiary, but recommended that he serve only one year. The court sentenced the second petitioner to imprisonment for 15 years. Mempa v. Rhay, 389 U.S. at 131-33. See *supra* text accompanying notes 100-102 for a discussion of the sentencing system involved in *Mempa*.

109. Section 1304 provides: "The court . . . *may* order the defendant imprisoned if it finds the default unexcused." ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983) (emphasis added). In addition, the statute confers upon the judge some discretion in deciding the length of the imprisonment in the event he chooses to impose that sanction. Unless the defendant complies with the prior court order to pay the fine, the court may imprison the defendant for a period which does not exceed "one day for each $5 of the fine or 6 months, whichever is the shorter." *Id.* The judge may impose a sentence that is shorter than that allowed by the provision. For example, "Colson was committed to the county jail until the fine was paid with credit at $10 per day for the time served." Colson v. State, 498 A.2d at 586.

110. The judge may, in his discretion, allow "additional time for payment, reduc[e] the amount [of the fine] or of each installment, or revok[e] the fine or the unpaid portion thereof . . . ." ME. REV. STAT. ANN. tit. 17-A, § 1304(2) (1983).

111. *Id.* § 1304. See *supra* note 6 for the text of section 1304.

112. *See supra* text accompanying notes 100-102.

113. Mempa v. Rhay, 389 U.S. at 135.

tion 1304 hearings.

The district court in *Colson v. Joyce* relied upon *Mempa* for its determination of Colson's right to counsel because of the similarities between the deferred sentencing proceeding in *Mempa* and the section 1304 hearing.[114] The Law Court in *Colson v. State*, on the other hand, found the simple probation revocation hearing of *Gagnon v. Scarpelli* a more apt analogy.[115] The Supreme Court's reasoning in *Gagnon*, however, underscores the similarities between the *Mempa* proceeding and a section 1304 hearing and thereby highlights the need for a court-appointed lawyer to protect an indigent defendant's liberty at section 1304 proceedings.

In *Gagnon*, the Supreme Court held that simple probation revocation hearings were not critical stages of the criminal prosecution and, therefore, that there was no sixth amendment right to counsel at the hearings. The Court distinguished the probation revocation hearing in *Gagnon* from the deferred sentencing and probation revocation hearing of *Mempa* by finding that the probationer in the former case had been "sentenced at the time of trial."[116] The *Gagnon* Court, however, overlooked the fact that the *Mempa* defendants had also been sentenced at the time of trial. In *Mempa*, the trial court had sentenced the defendants to probation for two and three years respectively. The court required as a condition of probation that each defendant serve an initial term in the county jail, but deferred further sentencing in accordance with state statute.[117] When the court subsequently sentenced the *Mempa* defendants to ten and fifteen years respectively,[118] the court in fact imposed de novo sentences. In *Gagnon*, on the other hand, the court imposed a fifteen-year prison term at the time of trial, suspended the sentence,

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114. The district court, in elaborating on the similarities between the section 1304 proceeding and the *Mempa* deferred sentencing proceeding, distinguished both proceedings from the probation revocation hearing in Gagnon v. Scarpelli, 411 U.S. 778 (1973), because the defendant in *Gagnon* had been conditionally sentenced to prison at trial. Colson v. Joyce, 646 F. Supp. at 106-107. For further discussion of the district court's opinion that section 1304 does not involve a conditional sentence of imprisonment, see *infra* text accompanying notes 128-33.

115. In Colson v. State, 498 A.2d 585 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986), the Law Court rejected the defendant's argument that Gagnon v. Scarpelli, 411 U.S. 778 (1973), which held that there is no absolute right to counsel at probation revocation hearings because the probationer has a reduced liberty interest, does not control the right to counsel at section 1304 hearings. The defendant argued that his liberty interest was undiminished, and therefore distinguishable from that of the probationer in *Gagnon*. In response, the Law Court stated, "Although the sentence did not include imprisonment, the imposition of a fine exposed Colson to incarceration pursuant to section 1304 for unexcused default in payment. Thus Colson was deprived only of the conditional liberty dependent upon payment of the fine as ordered." Colson v. State, 498 A.2d at 588.

116. Gagnon v. Scarpelli, 411 U.S. at 781.

117. Mempa v. Rhay, 389 U.S. at 130.

118. *Id.* at 131, 133.

and placed the defendant on probation for seven years.[119] The trial courts in both *Gagnon* and *Mempa* imposed sentences at trial. The true distinction between the two cases, therefore, is that a de novo sentence of imprisonment was imposed at the combined deferred sentencing and probation revocation hearing in *Mempa*, whereas a suspended prison sentence was merely reinstated at the subsequent hearing in *Gagnon*. A combined reading of *Gagnon* and *Mempa* leads to the conclusion that the sixth amendment guarantees the right to counsel in a proceeding where the court imposes imprisonment in the first instance, but not in a proceeding where the court merely revives a prior unexecuted sentence and thus forges a definite link between the sixth amendment right to counsel and the individual's absolute liberty interest.[120]

The distinction between the sentencing processes at the combined deferred sentencing and probation revocation proceeding in *Mempa* and the simple probation revocation hearing in *Gagnon* illuminates the similarities between the section 1304 proceeding and the hearings at issue in *Mempa*. In both situations, the court imposes a particular type of sentence at trial. The sentence consists of a fine in the former case, probation in the latter. The sixth amendment requires the appointment of counsel at the section 1304 proceeding, just as it did in the hearings of *Mempa*, when the hearing court subsequently imposes a prison sentence for the first time.

The second reason for the *Gagnon* Court's decision that simple probation revocation hearings are not critical stages of the criminal prosecution is rooted in the rationale of *Morrissey v. Brewer*.[121] In *Morrissey*, the Court concluded that revocation of *parole* occurred "after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the *conditional liberty* properly dependent on observance of special parole restrictions."[122] The *Gagnon* Court adopted the conditional liberty rationale of *Morrissey*[123] because it equated *probation* revocation with *parole* revocation.[124] Whether an individual's liberty interest is absolute or conditional thus affects the determination of whether a given proceeding constitutes a critical stage of the criminal prosecution. This fact warrants an evaluation of the liberty interest of a section 1304 defendant.

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119. Gagnon v. Scarpelli, 411 U.S. at 779.

120. *See supra* notes 59-68 and accompanying text.

121. 408 U.S. 471 (1972).

122. *Id.* at 480 (emphasis added).

123. Gagnon v. Scarpelli, 411 U.S. at 781 (quoting Morrissey v. Brewer, 408 U.S. at 480).

124. *Id.* at 782. "Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one." *Id.*

The Maine Law Court reasoned that the possibility of imprisonment pursuant to section 1304 qualifies the liberty interest of one sentenced to pay a fine as "conditional."[125] This characterization, however, fails to comport with the concept of conditional liberty as defined in *Morrissey*. When the *Morrissey* Court referred to "conditional liberty," it meant liberty that is diminished by restrictions more substantial than the simple requirement to pay a fine.[126] The *Morrissey* Court stated:

> Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities.[127]

Moreover, the Maine Law Court's characterization of a section 1304 defendant's liberty interest is questionable even under its own definition of conditional liberty. In *Colson v. State*, the Law Court stated, "[T]he imposition of a fine exposed Colson to incarceration pursuant to section 1304 for unexcused default in payment." Colson's liberty was therefore merely conditional, that is, contingent on his timely payment of a fine.[128] The district court in *Colson v. Joyce* noted, "This construction of section 1304, however, is inconsistent with the State's statutory scheme of 'Authorized Sentences'. . . ."[129]

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125. Colson v. State, 498 A.2d at 588. See *supra* text accompanying notes 17-18 & 20.

126. Elaborating on its concept of conditional liberty, the *Morrissey* Court explained, "To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." Morrissey v. Brewer, 408 U.S. at 478.

127. *Id.* (citing Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 CRIME & DELINQ. 267, 272-73 (1969)).

128. 498 A.2d at 588.

129. Colson v. Joyce, 646 F. Supp. at 106. ME. REV. STAT. ANN. tit. 17-A, § 1152 (1983) sets forth the sentences authorized under Maine law as follows:

1. Every natural person . . . convicted of a crime shall be sentenced in accordance with the provisions of this Part.
2. Every natural person convicted of a crime shall be sentenced to one of the following:

A. A suspended term of imprisonment or a suspended fine with probation as authorized by chapter 49;
B. Unconditional discharge as authorized by chapter 49;
C. To a period of imprisonment as authorized by chapter 51; or
D. To pay a fine as authorized by chapter 53. Subject to the limitations of chapter 53, section 1302, such a fine may be imposed in addition to probation or a sentence authorized by chapter 51.

Title 17-A, section 1152 of the Maine Revised Statutes Annotated, which delimits the sentencing power of the Maine courts,[130] authorizes a suspended sentence with probation.[131] Title 17-A, section 1204(2-A)(K) of the Maine Revised Statutes Annotated makes payment of a fine a permissible condition of probation.[132] The district court reasoned that "if section 1304 had the effect of imposing a conditional sentence of imprisonment *sub silentio* upon each criminal fine, section 1204(2-A)(K) would be superfluous."[133] The liberty interest of a section 1304 defendant necessarily remains absolute until the conclusion of the section 1304 proceeding. Section 1304 authorizes incarceration only for unexcused default. The determination of whether the default was excusable occurs only at some point *during* the section 1304 proceeding,[134] and, therefore, counsel must be provided to protect the defendant's absolute liberty interest.

An additional method of determining whether the section 1304 proceeding constitutes a critical stage of the criminal prosecution requires an "examination of the event in order to determine whether the accused [needs] aid in coping with legal problems or assistance in meeting his adversary."[135] The fact that section 1304 places the burden on the defendant to show cause why he should not be imprisoned[136] heightens his need for counsel at the hearing. To eliminate the threat of incarceration, the defendant must prove "that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment."[137] As noted by the dissent in *Colson v. State*, the defendant is "not likely to understand the legal decision" facing the court and, therefore, will likely fail to present information pertinent to the determination of the issue at hand.[138]

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130. Colson v. Joyce, 646 F. Supp. at 106. *See* ME. REV. STAT. ANN. tit. 17-A, § 1152(1) (1983).

131. Colson v. Joyce, 646 F. Supp. at 106. *See* ME. REV. STAT. ANN. tit. 17-A, § 1152(2)(A) (1983). See *supra* note 129 for the text of section 1152.

132. Colson v. Joyce, 646 F. Supp. at 106. *See* ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(K) (1983).

133. Colson v. Joyce, 646 F. Supp. at 106-107.

134. *See* ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983).

135. United States v. Ash, 413 U.S. 300, 313 (1973) (post-indictment photographic display where defendant not present held not a critical stage necessitating right to counsel under sixth amendment). The method articulated by the Court appears to have superseded the previous method for determining whether a given event in the criminal prosecution constitutes a critical stage. The crucial inquiry under the earlier test was whether the aid of counsel at the event in question was necessary to protect the defendant's right to a fair trial. *E.g.*, United States v. Wade, 388 U.S. 218, 227 (1967).

136. ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983).

137. *Id.*

138. Colson v. State, 498 A.2d at 589 (Nichols, J., dissenting). The dissent ex-

The particular facts of *Colson* demonstrate the need for counsel and thus provide additional justification for the conclusion that a section 1304 hearing is a critical stage of the criminal prosecution. Maine's statutory scheme does not specifically address Colson's situation—where an individual had the ability to pay the fine when it was imposed, but was indigent when sentenced to incarceration pursuant to section 1304. The sentencing statutes, however, prohibit incarceration of an indigent for nonpayment of a fine.[139] Title 17-A, section 1302 of the Maine Revised Statutes Annotated also prohibits imposition of a fine unless the court determines that the individual will be able to pay the fine.[140] The same section forbids imprisonment of an individual "solely for the reason that he will not be able to pay a fine."[141] These provisions suggest that where a court has initially chosen to sanction the defendant with a fine rather than with incarceration, the court cannot imprison the defendant if he subsequently becomes unable to satisfy his debt. The sentencing provisions of the Criminal Code, therefore, might preclude the incarceration of one in Colson's situation. Colson, however, apparently lacked the ability to make these arguments at his section 1304 hearing. Competent counsel, had it been provided, likely would have advanced the arguments on Colson's behalf. Colson's section 1304 hearing was an event at which he "required aid in coping with legal problems."[142] The proceeding, therefore, was a critical stage of the criminal prosecution at which Colson had a sixth amendment right to counsel.

In sum, the sixth amendment governs the right to counsel at section 1304 hearings under two possible methods of analysis. Either method supports the conclusion that a section 1304 defendant may not be incarcerated unless he has had the benefits of counsel. First, the section 1304 proceeding resembles a trial-like prosecution on a separate offense to the extent that the Court's decisions of *Argersinger* and *Scott*, which establish the actual imprisonment standard to determine when there is a right to counsel at trial, re-

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plained that where it is likely that the defendant does not understand the legal issues before the court, he might not know that he should

> present information about efforts to find employment, general employability, total available resources, and the way these resources were spent in the past. An attorney, understanding the significance of this information, can help the client ferret out the information. An attorney also can document employment difficulties, consult experts if necessary, and explain how [the defendant] has used his available resources in the past.

Id. (citing Hermann and Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M.L. REV. 275, 307 (1984)).

139. ME. REV. STAT. ANN. tit. 17-A, § 1302 (1983). For the complete text of section 1302, see *supra* note 26.

140. ME. REV. STAT. ANN. tit. 17-A, § 1302 (1983).

141. *Id.*

142. United States v. Ash, 413 U.S. 300, 313 (1973).

solve the issue in a section 1304 defendant's favor. Second, even if one regards the section 1304 hearing as part of the original conviction, rather than as an independent proceeding, a defendant nevertheless has a sixth amendment right to counsel because the hearing is a critical stage of the criminal prosecution. Under either method of analysis, the sixth amendment entitles the section 1304 defendant to representation by counsel when the presiding judge orders the defendant's incarceration pursuant to section 1304.

IV. Due Process Right

If the section 1304 hearing is classified as a civil proceeding rather than as the analogue of a criminal trial or as a critical stage of the criminal prosecution, the right to counsel is rooted in the due process clause, not the sixth amendment. The scope of the right to counsel in civil proceedings that result in imprisonment, however, is the same as the scope of the right in criminal proceedings.

Three factors compel the conclusion that the due process clause, like the sixth amendment, precludes the incarceration of any uncounseled indigent pursuant to section 1304. First, although *Argersinger* and *Scott* concern the right to counsel in criminal trials,[143] the rationale of both cases applies to all proceedings, whether civil or criminal, that deprive an individual of his unconditional liberty. Second, the Supreme Court has clearly indicated that the imposition of a prison sentence conclusively establishes an indigent's right to counsel notwithstanding the civil nature of the proceeding.[144] Third, every circuit court of appeals that has squarely faced the issue has held that counsel must be appointed to represent an indigent defendant in a civil contempt proceeding that leads to actual imprisonment despite the civil classification.[145] These considerations suggest that the actual imprisonment standard preempts the *Mathews v. Eldridge* balancing test as the method for deciding an indigent's due process right to counsel in any proceeding that deprives him of his absolute liberty. The Law Court in *Colson v. State*[146] and the district court in *Colson v. Joyce*[147] erred, therefore, in applying the *Mathews* test to determine whether there is a due process right to counsel in a section 1304 hearing that results in incarceration.

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143. *See supra* notes 61-68 and accompanying text.

144. *See infra* text accompanying notes 151-64.

145. *See infra* notes 174-78 and accompanying text.

146. 498 A.2d 585 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986). See *supra* notes 15-28 and accompanying text for a discussion of the Law Court's analysis of petitioner Colson's right to counsel at his section 1304 hearing.

147. 646 F. Supp. 102 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987). See *supra* notes 38-52 and accompanying text for a discussion of the district court's analysis of petitioner Colson's right to counsel under the *Mathews v. Eldridge* balancing test.

The rationale of *Argersinger* and *Scott* properly extends to civil proceedings.[148] The Court in both *Argersinger* and *Scott* refused to focus on the characterization of the proceedings and emphasized instead the relevance of the imprisonment sentences. The Court stressed that incarceration was too severe a sanction to impose on an uncounseled defendant.[149] The reasoning of *Argersinger* and *Scott* requires that counsel be provided to a section 1304 defendant before the court may impose imprisonment, regardless of whether the proceeding is civil because the "civil" label of a section 1304 proceeding mitigates neither the psychological nor the physical consequences of imprisonment.[150]

Two United States Supreme Court decisions, which address the issue of the right to counsel in civil proceedings, strongly suggest that the actual imprisonment standard of *Argersinger* and *Scott* is the appropriate test for assessing the due process, as well as the sixth amendment right to counsel. In the pre-*Argersinger* decision of *In re Gault*,[151] the Court considered whether a juvenile had a right to counsel in delinquency determination proceedings that resulted in confinement of the child to a correctional institution. The Court recognized that delinquency proceedings are traditionally classified as civil,[152] but nevertheless held that due process entitled the juve-

148. Colson v. State, 498 A.2d at 591 (Nichols, J., dissenting). See *supra* notes 29-37 and accompanying text for a discussion of the dissent's approach using the rationale of *Argersinger* and *Scott* to resolve the right-to-counsel issue in section 1304 proceedings.

149. See *supra* notes 61-68 and accompanying text for a discussion of the focus of *Argersinger* and *Scott* on the imprisonment sanction as the decisive factor in assessing right-to-counsel issues.

150. The Eighth Circuit in United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977), asserted, "Deprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature." *Id.* at 1156. In addition, the Tenth Circuit, in Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985), emphasized that a civil classification of the proceeding, which resulted in incarceration, did not alleviate the psychological burden of imprisonment. The court stated, "From the perspective of the person incarcerated, the jail is just as bleak no matter [whether the] label [criminal or civil] is used." *Id.* at 1183. Moreover, the facts of Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984), illustrate that detrimental practical consequences flow from incarceration, regardless of whether the proceeding at which the prison term is imposed is civil or criminal. The judge presiding over a civil contempt proceeding sentenced the *Sevier* petitioner to jail for sixteen days. *Id.* at 267. The petitioner's employer subsequently discharged him for absenteeism. *Id.* at 265-66.

151. 387 U.S. 1 (1967).

152. *Id.* at 17. Early reformers of the juvenile justice system believed that society's duty towards errant children should not be limited "by the concept of justice" at work in the criminal system. Rather, "society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' " *Id.* at 15 (quoting Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)). "The child was to be 'treated' and 'rehabilitated' and the

nile to representation by counsel.[153] The holding of *Gault* turned on the critical fact that the juvenile suffered a loss of physical liberty.

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may [[154]] result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[155]

Lassiter v. Department of Social Services[156] implies that the loss of freedom in a civil proceeding implicates a due process right to counsel for adults as well as for juveniles. The *Lassiter* Court addressed the issue of whether an indigent had a right to appointed counsel in a parental rights termination proceeding. The Court held that the due process standard of fundamental fairness[157] did not re-

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procedures . . . were to be 'clinical' rather than punitive." *Id.* at 15-16.

153. *Id.* at 41. The *Gault* Court relied on Kent v. United States, 383 U.S. 541 (1966). The *Kent* Court held that a juvenile court's decision to waive jurisdiction constituted a " 'critically important' proceeding," *id.* at 560, at which the juvenile was entitled to representation by counsel. *Id.* at 561-62. The Court in *Kent* stated, "The right to representation by counsel is not a formality. . . . It is the essence of justice." *Id.* at 561.

154. The Court's use of the word "may," rather than "shall" or "will," suggests that the possibility of imprisonment, not only the actual loss of freedom, triggers the due process right to counsel. The Court decided *In re* Gault, 387 U.S. 1 (1967), however, twelve years before deciding Scott v. Illinois, 440 U.S. 367 (1979). The *Scott* decision established that actual imprisonment was the crucial factor in the evaluation of the right to counsel question. *See supra* text accompanying notes 65-68. In light of *Scott*, it is unclear whether the Supreme Court would now hold that a juvenile is entitled to appointed counsel in a delinquency proceeding on the grounds that a deprivation of liberty is a potential consequence of the hearing. *Gault* indicates, at the very least, however, that deprivation of a juvenile's liberty, without benefit of counsel, contravenes the due process clause.

155. *In re* Gault, 387 U.S. at 41. Although some language in *Gault* indicates that the length of the incarceration was a factor in the Court's decision, *id.* at 36-37, the Court formulated its holding by reference to the fact of imprisonment, not its length. The Court also stated that if the juvenile was over 18 years old, he would be entitled to appointed counsel if a felony prosecution were involved, *id.* at 29, and that a proceeding entailing loss of freedom "for years is comparable . . . to a felony prosecution." *Id.* at 36. Argersinger v. Hamlin, 407 U.S. 25 (1972), however, eliminated the distinction between felony and misdemeanor prosecutions as the basis for assessing whether there is a right to counsel and instead employed an actual imprisonment test. *See supra* text accompanying notes 61-64. The juvenile's right to counsel in *Gault*, therefore, cannot now rest on an analogy between the delinquency determination proceeding and a felony prosecution.

156. 452 U.S. 18 (1981).

157. The *Lassiter* Court explained that the concept of "due process" eludes precise definition. " '[U]nlike some legal rules[ ] . . . due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' " *Id.* at 24 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)). Rather, the concept expresses the need for fundamental fairness that is ascertained only by reference

quire the appointment of counsel in that context primarily because there was no possibility that the proceeding would result in deprivation of physical freedom.[158] The Court stated:

> The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist where the litigant may[159] lose his physical liberty if he loses the litigation. . . .
>
> That it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault* . . . .[160]

The *Lassiter* Court repeatedly stressed the close connection between an individual's liberty interest and his constitutional right to counsel. First, the Court noted that all its decisions holding that the indigent defendant enjoys a constitutional right to counsel have involved a loss of liberty.[161] Second, the Court recognized that an individual's right to counsel diminishes as his liberty interest becomes

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to the particular situation. *Id.* at 24-25.

158. The *Lassiter* Court first concluded that prior Court decisions dealing with the right to counsel generate a presumption that an indigent has a right to appointed counsel only when an adverse decision in the proceeding leads to loss of liberty. *Id.* at 25-27. The *Lassiter* Court next evaluated the indigent parent's right to counsel in terms of the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). *See supra* text accompanying note 22 for the *Mathews'* balancing test. Finally, the Court weighed the results of that analysis against the initial presumption and concluded that there was no absolute right to counsel in a parental rights termination proceeding. Lassiter v. Department of Social Servs., 452 U.S. at 31-32.

159. The choice of the term "may" implies that the Court viewed the standard determining the right to counsel as potential, rather than actual, imprisonment. The fact that the *Lassiter* Court relied in part on the *Scott* decision, however, suggests that the mere threat of incarceration would not suffice to constitutionally require appointment of counsel. Moreover, the *Lassiter* Court specifically noted that *Scott* "endorsed [the] premise" that " 'actual imprisonment [is] the line defining the constitutional right to appointment of counsel.' " Lassiter v. Department of Social Servs., 452 U.S. at 26 (quoting Scott v. Illinois, 440 U.S. 367, 373 (1979)).

160. *Id.* at 25. In making this statement, the *Lassiter* Court referred to the *Gault* Court's announcement "that 'the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*' " the child is entitled to appointed counsel although the proceedings may be denominated "civil." *Id.* (quoting *In re* Gault, 387 U.S. at 41) (emphasis added by the *Lassiter* Court).

161. The *Lassiter* Court observed that when the Court overruled the case-by-case method of evaluating the right to counsel, it "did so in the case of a man sentenced to prison for five years." *Id.* at 25 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). *Argersinger* subsequently extended the right to criminal trials "even where the crime is petty and the prison term brief." *Id.* (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)).

less than absolute.[162] Third, the Court stated that the criminal nature of a proceeding does not require appointment of counsel unless a loss of liberty ensues.[163] This analysis yielded the following conclusion:

> [T]he Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.[164]

The Court concluded that an indigent lacks a constitutional right to appointed counsel when he is not threatened with a loss of liberty. Both the Court's reasoning and the tone of the opinion, however, strongly imply that the inverse is also correct—an individual is entitled to appointed counsel whenever he loses his liberty.

Both *Lassiter* and *Gault* suggest that counsel must be provided to an indigent section 1304 defendant before the court may impose imprisonment even if the hearing is characterized as civil. Imprisonment alone conclusively establishes the right to counsel no matter whether the proceeding is criminal or civil. Moreover, a comparison between the juvenile delinquency proceeding in *Gault* and the section 1304 hearing shows a more compelling need for counsel in the section 1304 proceeding. Historically, the courts have afforded juveniles fewer procedural protections than adults because the juvenile justice system protects, at least in theory, the children's best interests.[165] A policy of rehabilitation, rather than punishment, underlies the system.[166] In contrast, section 1304 promotes, above all else, the interests of the state in coercing payment of criminal fines.[167] In addition, incarceration pursuant to section 1304 serves a

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162. The *Lassiter* Court thought that the reasoning of *Gagnon v. Scarpelli* illustrated that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." *Id.* at 26 (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

163. "[T]he Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty." *Id.* (citing Scott v. Illinois, 440 U.S. 367 (1979)).

164. *Id.* at 26-27.

165. *In re* Gault, 387 U.S. 1, 14-15 (1967). The Court in *Gault* stated:

> From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.

Id. at 14 (footnote omitted).

166. *See supra* note 152.

167. See *supra* note 6 for the text of ME. REV. STAT. ANN. tit. 17-A, § 1304 (1983).

punitive purpose rather than a coercive function when imposed on individuals who are without the means to satisfy their debts to the state.[168] Furthermore, the concept of *parens patriae* theoretically limits the child's liberty interest,[169] whereas the liberty interest of a section 1304 defendant is absolute until the court determines that his default is inexcusable.[170] Finally, the section 1304 judge often plays the role of prosecutor[171] and thus is less likely to represent the defendant's interests adequately[172] than the judge in *Gault*, whose judicial representation fell short of constitutional standards.[173]

A strong similarity between section 1304 proceedings and civil contempt proceedings makes relevant an analysis of the methods used by the federal courts in evaluating the right to counsel in civil contempt proceedings. Several circuit courts of appeals have held that counsel must be provided at civil contempt proceedings where

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168. See *supra* note 55 for an explanation of how Colson's incarceration pursuant to section 1304 promoted a punitive purpose.

169. The Court in *Gault* explained:

> The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent"—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

In re Gault, 387 U.S. at 17 (footnote omitted).

170. *See supra* notes at 128-34 and accompanying text.

171. Section 1304 provides: "The court . . . upon its own motion, may require [the defendant] to show cause why he should not be sentenced to be imprisoned for nonpayment . . . ." ME. REV. STAT. ANN. tit. 17-A, § 1304(1) (1983).

172. The fact that the judge often is the moving party in a section 1304 hearing logically prevents the judge from acting as advocate for the defendant. Moreover, it impairs the judge's ability to act as an unbiased decisionmaker. This heightens the need for counsel at section 1304 hearings. The Court in Powell v. Alabama, 287 U.S. 45 (1932), stressed that a judge could not adequately fulfill the duties of defense counsel. *Powell* involved a criminal trial for a capital offense, but its reasoning applies equally well to the section 1304 hearing.

> But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

Id. at 61.

173. The Court in *Gault* found that neither the probation officer nor the judge could adequately represent the juvenile's interests in a delinquency determination proceeding. *In re* Gault, 387 U.S. at 36.

the proceedings lead to the defendant's incarceration.[174] These decisions support the proposition that a sentence of imprisonment conclusively determines that the defendant has a right to counsel, regardless of whether the proceeding is classified as civil or criminal.[175] The language of several of the opinions suggests that merely the *potential* for imprisonment might require representation by counsel.[176] Every case that has upheld the right to counsel, however, involved *actual* imprisonment.[177] The language indicating that the potential for incarceration implicates a right to counsel, therefore, is dicta; actual imprisonment is required before the right to counsel is constitutionally mandated. Moreover, every circuit court that has addressed the issue of the right to counsel in civil contempt proceedings has refused to base its decision on the civil-criminal dichotomy.[178] There

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174. Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985) (right to counsel upheld in civil contempt proceeding where incarceration imposed); Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984) (right to counsel upheld in civil proceeding where incarceration imposed); Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) (right to counsel upheld in civil proceeding where incarcerations imposed); *In re* Rosahn, 671 F.2d 690 (2d Cir. 1982) (right to counsel upheld where incarceration imposed in civil contempt proceeding after grand jury witness failed to comply with court order to provide photographs, fingerprints, handwriting exemplars, and hair samples to grand jury); United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977) (right to counsel upheld where imprisonment imposed in civil contempt proceeding for defendant's failure to comply with court order to produce records summoned by Internal Revenue Service); *In re* Di Bella, 518 F.2d 955 (2d Cir. 1975) (right to counsel upheld where incarceration imposed in civil contempt proceeding for failure to comply with court order to testify before grand jury); *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973) (right to counsel upheld where incarceration imposed in civil contempt proceeding for failure to comply with court order to testify before grand jury); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973) (right to counsel upheld in civil contempt proceeding where incarceration imposed for failure to comply with court order to pay child support); United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972) (right to counsel upheld in civil contempt proceeding where incarceration imposed for defendant's failure to comply with court order to respond to questions requested by grand jury).

175. *See infra* notes 179-193 and accompanying text.

176. *See, e.g., infra* text accompanying notes 188 & 193.

177. *See supra* note 174 and accompanying text.

178. Walker v. McLain, 768 F.2d at 1183, ("It would be absurd to distinguish [between] criminal and civil incarceration . . . ."); Sevier v. Turner, 742 F.2d at 267 ("[T]he relevant question in determining if a defendant is entitled to counsel during this type of contempt proceeding is not whether the proceeding be denominated civil or criminal, but rather is whether the court in fact elects to incarcerate the defendant."); Ridgway v. Baker, 720 F.2d at 1413 ("The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil.' "); *In re* Rosahn, 671 F.2d at 697 (Because "similar procedural safeguards [should be afforded] to persons charged with civil contempt as to those charged with criminal contempt[,] . . . a witness subjected to a . . . civil contempt proceeding is entitled to counsel . . . ." (citations omitted)); United States v. Anderson, 553 F.2d at 1155-56 ("[D]ue process requires that the right of an indigent to appointed counsel 'must be extended to a contempt proceeding, be it civil or criminal, where the defendant is faced with the prospect of imprisonment.' ") (footnote omitted) (quoting *In re* Di Bella, 518 F.2d at 959)); *In re* Di Bella 518 F.2d at 959

is thus little doubt that the actual imprisonment standard governs the right to counsel in civil, as well as criminal, proceedings.

The principle method of characterizing contempt proceedings as either criminal or civil focuses on the purpose of the incarceration. On the one hand, the proceeding is criminal if the imprisonment serves only to punish the defendant for his failure to comply with the court's order. On the other hand, the proceeding is civil if the imprisonment serves to coerce the defendant's future compliance with the court's order.[179] The issue of a constitutional right to coun-

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("[R]ight [to counsel] must be extended to a contempt proceeding, be it civil or criminal, where the defendant is faced with the prospect of imprisonment."); Henkel v. Bradshaw, 483 F.2d at 1389 ("While the state does not define the contempt proceeding here in question as 'criminal,' the label is not determinative. . . . *Argersinger* . . . prohibits the imprisonment of [the defendant] if he is not represented by counsel in the contempt hearing."); United States v. Sun Kung Kang, 468 F.2d at 1369 ("[A]n indigent [defendant] is entitled to appointed counsel in [a civil contempt] proceeding. Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil lable does not obscure its penal nature.").

179. Historically, the term contempt has described "any act done in violation of a direct order of the king or of any governmental process." Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 161 (1908). Contempt of court may be divided into two principal categories. The first is active contempt. Active contempt entails "[a]ny act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases . . . ." *Id.* at 162. Three kinds of conduct give rise to active contempt of court: first, an act committed in open court, in the presence of the judge; second, an act committed outside the courtroom which directly interferes with the judicial process; third, an act which interferes with "persons or property . . . in the hands of the court." *Id.* at 162-64. Active contempt is defined as criminal contempt and therefore is generally punishable by fine or imprisonment. *Id.* at 169.

The second principal category of contempt entails "mere disobedience to an order of the court" and differs "both in its nature and in its origin" from active contempt. *Id.* at 164. Historically, refusal to obey a direct order of the king or a writ authorized by the king's seal has been regarded as a contempt. *Id.* at 164-66. This type of contempt provided the source of the lord chancellor's judicial powers. "The chancellor had no direct power over property or persons . . . . Disobedience to the order of the court . . . could not be punished, since the order had no legal force . . . ." *Id.* at 166. The chancellor's decree derived "its force from the fact that it was granted by the keeper of the king's seal." *Id.* The use of the seal enabled the chancellor to compel compliance with his order. *Id.* at 166-68. When the person to whom the order was directed failed to obey, the chancellor's sole means of securing compliance was to commit the wrongdoer "to prison to remain until he purge[d] himself of his contempt by doing the right or undoing the wrong." *Id.* at 169. Contempt for disobedience to an order was civil contempt, *id.* at 168, and the "imprisonment was by no means a punishment, but was merely designed to secure obedience to the writ of the king." *Id.* at 170.

Although the purpose of imprisonment for disobedience of a court order, or civil contempt, has always been coercive rather than punitive, *id.* at 170, classification problems arise where the circumstances are such that it is no longer possible to coerce compliance. For example, where an individual disobeys a court order proscribing certain conduct, the harm is a fait accompli, and it is not possible to coerce him into undoing the wrong. In this instance, the imprisonment can serve only a punitive func-

sel originated in the context of criminal prosecutions. The courts of appeals that have confronted the question of whether there is a right to counsel in civil contempt proceedings, therefore, could have reasoned that there is a right to counsel only at contempt proceedings that are truly criminal in nature,[180] but not at civil contempt

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tion, although the contemptuous act was mere disobedience of a court order, a civil contempt.

Both the federal courts and the Maine courts look to the purpose of the imprisonment to determine whether the defendant's contempt was civil or criminal in nature. In the seminal case of Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), the defendants violated an injunction that prohibited them from publishing certain allegations about and from boycotting against the plaintiff. *Id.* at 435-36. The question before the Court was whether the proceeding involved a criminal contempt, in which case the trial judge's findings would be conclusive, or a civil contempt, in which case the Court could examine the entire record and enter its decree accordingly. *Id.* at 441. After recognizing the difficulties of classification that often arise in contempt proceedings, the Court stated:

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Id.

The Court further noted that where the defendant refuses to perform an act ordered by the court, the imprisonment "is intended to be remedial by coercing the defendant to do what he had refused to do." *Id.* at 442. The imprisonment continues until compliance is secured. On the other hand, if the defendant commits an act prohibited by court order and thus can no longer undo the wrong, "imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." *Id.* at 442-43. Applying these principles, the *Gompers* Court concluded that the purpose of the imprisonment imposed on the defendants was punitive in nature and that the contempt must therefore be classified as criminal. *Id.* at 443-44.

In Wells v. State, 474 A.2d 846 (Me. 1984), the Law Court also distinguished civil and criminal contempt by reference to the purpose of the incarceration. According to the Law Court, a criminal contempt proceeding functions "to punish an affront to the dignity and authority of the Court or an obstruction to the functioning of the Court. The punishment is to vindicate the dignity and authority of the Court." *Id.* at 851. The Law Court stressed that imprisonment for civil contempt has a coercive and remedial nature and therefore that the defendant has "the essential right to purge and thus obtain release from confinement." *Id.* at 850. In contempt involving failure to comply with a court order to pay funds, "a specific finding of present ability to pay" is a prerequisite of a commitment for civil contempt. *Id.* at 852. Absent such a finding, imprisonment constitutes commitment for criminal contempt because the individual lacks the ability to secure his release. Such incarceration "can properly be imposed only through the vehicle of criminal contempt proceedings with the attendant due process safeguards." *Id.* at 850.

180. For example, in Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985), the court could have classified as criminal a contempt proceeding that resulted in the incarceration of an indigent for his failure to make child support payments because the indigent lacked funds to secure his release. *See also* Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984); Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983). See *infra* text accompanying notes 189-93 for further discussion of *Ridgway*. See *infra* note 200 for further

proceedings. The courts of appeals, however, have rejected the civil-criminal distinction as a basis for decision[181] and have held that the *Argersinger* actual imprisonment standard applies to all contempt proceedings, regardless of whether the purpose of the incarceration is punitive or coercive.[182]

Several circuit courts of appeals have relied directly on the reasoning of *Argersinger* to hold that there is a right to counsel in civil contempt proceedings that result in imprisonment.[183] The circuit courts' reliance on *Argersinger* in situations that involve civil incarceration strongly indicates that the actual imprisonment standard is applicable to determine whether there is a right to counsel under either the sixth amendment or the due process clause of the fourteenth amendment. The Second Circuit, for example, in *In re DiBella*[184] held that a grand jury witness, sentenced to imprisonment for refusing to testify, had the right to counsel.[185] The court

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discussion of *Walker*.

181. The courts of appeals have upheld the right to counsel in civil contempt proceedings where the purpose of the imprisonment sanction was purely coercive in nature. *See In re* Rosahn, 671 F.2d 690 (2d Cir. 1982) (imprisonment coercive because defendant could secure her release by complying with court order to provide photographs, handwriting exemplars, fingerprints, and hair samples to grand jury); United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977) (imprisonment coercive because defendant could secure his release by complying with court order to produce records summoned by Internal Revenue Service); *In re* Di Bella, 518 F.2d 955 (2d Cir. 1975) (imprisonment coercive because defendant could secure release by complying with court order to testify before grand jury); *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973) (imprisonment coercive because defendant could secure release by complying with court order to testify before grand jury); United States v. Sun Kung Kang, 468 F.2d 1368 (1972) (imprisonment coercive because defendant could secure his release by answering questions requested by grand jury).

182. The decisions of the courts of appeals thus suggest that an indigent section 1304 defendant faced with imprisonment has an absolute right to counsel, even if he has the ability to pay his fine. This scenario occurs where a section 1304 defendant satisfies the standards for determining indigency yet has the means to pay his fine. This situation is most likely to happen where the defendant owes only a small fine.

183. *E.g.*, United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977). The *Anderson* court noted that although *Argersinger* applied directly to criminal cases, both the majority and the concurring opinions "suggest that where a court action may result in a deprivation of liberty, due process requires that the person facing loss of liberty be represented by counsel. *Id.* at 1156 n.2 (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)). *See also In re* Di Bella, 518 F.2d at 959; *In re* Kilgo, 484 F.2d at 1221 ("There can be no doubt that Kilgo was entitled to counsel at the civil contempt hearing." (citing Argersinger v. Hamlin, 407 U.S. 25 (1972))); Henkel v. Bradshaw, 483 F.2d 1386, 1390 (9th Cir. 1973) (Burger, C.J., concurring) ("*Argersinger* . . . makes it clear that a jail sentence may not be imposed upon an indigent unrepresented by counsel, absent the indigent's knowing and intelligent waiver." (citing Argersinger v. Hamlin, 407 U.S. at 42)).

184. 518 F.2d 955 (2d Cir. 1975).

185. Although the court in *In re Di Bella* upheld the right of a civil contemnor to counsel, the court did not reverse the district court's decision because the defendant was denied the assistance of counsel only during the reading of the grand jury min-

recognized that the contempt proceeding served a purely coercive purpose and was therefore civil in nature,[186] but refused to rely on this factor to decide whether the witness had a right to counsel. The court instead focused on the onerous character of the imprisonment sanction and reasoned that "the burden of imprisonment is just as great, regardless of what we call the order that imposed it. It is this fact that fosters the need for procedural protection."[187] The court concluded that the *Argersinger* rule, which provides that "no person may be imprisoned for any offense . . . unless he is represented by counsel at trial," necessarily "extend[s] to a contempt proceeding, be it civil or criminal, where the defendant is faced with the prospect of imprisonment."[188]

A number of circuit courts of appeals have opted to base a defendant's right to counsel at contempt proceedings on the fact that he was deprived of liberty, even though the courts could have grounded their decisions on the fact that the contempt proceeding in question was criminal in nature. In *Ridgway v. Baker*,[189] for example, the trial court sentenced an indigent defendant to prison for his failure to make child support payments pursuant to a prior order. The defendant owed in excess of $2000.00 at the time of the contempt proceeding and commitment.[190] The Fifth Circuit acknowledged that the incarceration was punitive because the defendant lacked the financial means to secure his release.[191] The court, however, declined the opportunity to base its decision, which upheld the defendant's right to counsel, on the criminal aspect of the contempt proceeding. Rather, the court referred to Supreme Court decisions that define the sixth amendment and the due process rights to counsel[192] and agreed with the Supreme Court's conclusion that "[t]he right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil.' "[193]

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utes. *Id.* at 959.

186. The court stated, "Admittedly, such a proceeding is basically civil in nature. The purpose of holding a witness in contempt is to coerce him to answer the grand jury's questions, not to punish him for reprehensible conduct." *Id.* at 958-59.

187. *Id.* at 959.

188. *Id.* (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)).

189. 720 F.2d 1409 (5th Cir. 1983).

190. *Id.* at 1411.

191. *Id.* at 1413-14. *Accord* Walker v. McLain, 768 F.2d 1181, 1184 (10th Cir. 1985) (The defendant in a contempt proceeding "does not have the keys to the prison door if he does not have the price.").

192. The *Ridgway* court in upholding the right to counsel relied both on the Supreme Court's sixth amendment decisions of Gideon v. Wainwright, 372 U.S. 335 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972), and on the Supreme Court's due process decisions of *In re* Gault, 387 U.S. 18 (1967), and Lassiter v. Department of Social Servs., 452 U.S. 18 (1981). Ridgway v. Baker, 720 F.2d at 1413.

193. Ridgway v. Baker, 720 F.2d at 1413 (citing *In re* Gault, 387 U.S. 1 (1967)).

The decisions of the Supreme Court in *Lassiter* and *Gault*, and the decisions of the courts of appeals upholding the right to counsel in civil contempt proceedings, lead to the conclusion that no indigent may be sentenced to incarceration pursuant to section 1304 unless the court has offered to appoint counsel to represent him. The similarities between section 1304 proceedings and civil contempt proceedings reinforce that view.[194] Accordingly, the absolute right of a section 1304 defendant to representation by counsel does not depend on whether the incarceration promotes a punitive or a coercive purpose.[195]

An actual sentence of imprisonment pursuant to section 1304, without more, makes the right to counsel absolute at the section 1304 hearing. Although the right might be rooted in the sixth amendment in cases where the incarceration serves a punitive func-

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The court in Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984), also focused on the fact of the defendant's imprisonment. The contempt court had sentenced an indigent defendant to imprisonment for failure to make court-ordered child support payments. *Id.* at 265. The Sixth Circuit in *Sevier*, like the Fifth Circuit in *Ridgway*, could have resolved the right to counsel question by reference to the punitive, and thus criminal, nature of the incarceration. The court, however, did not rest its decision on this factor. The court stated, "As indicated by the Supreme Court in *Lassiter*, the relevant question in determining if a defendant is entitled to counsel during this type of contempt proceeding is not whether the proceeding be denominated civil or criminal, but rather is whether the court in fact elects to incarcerate the defendant." *Id.* at 267. Moreover, the fact that the defendant was incarcerated for only sixteen days, *id.*, suggests that the length of the prison term has little, if any, effect on the right-to-counsel determination.

194. The district court in Colson v. Joyce, 646 F. Supp. 102 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987), analogized the section 1304 hearing to a civil contempt proceeding. The court pointed out that in both proceedings "the defaultee is called before the court to explain his failure to obey a court order." *Id.* at 107. The court continued to explain that each proceeding has a coercive function, because "confinement [in both situations] continues only 'until the fine or a specified part thereof is paid.'" *Id.* (quoting ME. REV. STAT. ANN. tit. 17-A, § 1304 (1983)). According to the court, the defendants in both proceedings "hold the keys" to their cell. *Id.* at 107. Moreover, the court noted that neither the section 1304 judge nor the judge in a civil contempt proceeding has the authority to imprison a defendant who lacks the ability to obey the court order. *Id.* There is, however, a distinction between the section 1304 proceeding and the civil contempt proceeding in that "the length of imprisonment that can be imposed at a section 1304 hearing is constitutionally limited by the statutory sentencing ceiling available for the original offense." *Id.* (citing Williams v. Illinois, 399 U.S. 235, 240-41 (1970)). By contrast, incarceration pursuant to a civil contempt proceeding is limited in duration only by the prisoner's compliance with the court order.

195. *But see id.* at 109 n.7. The district court in *Colson v. Joyce* concluded that the *Mathews* balancing analysis, *see supra* text accompanying note 22, governed the right to counsel in section 1304 hearings except where the incarceration promotes a punitive end. Colson v. Joyce, 646 F. Supp. at 107, 109. See *supra* note 55 for the district court's conclusion that the right to counsel in section 1304 hearings becomes absolute where the incarceration serves a punitive function.

tion,[196] the scope of the right is just as broad under the due process clause in cases where imprisonment serves a coercive function. Both the Maine Law Court in *Colson v. State*[197] and the district court in *Colson v. Joyce*[198] erred, therefore, in using the *Mathews v. Eldridge* balancing analysis. The *Mathews* test, which was established to evaluate due process questions where property interests are threatened,[199] is inapplicable to section 1304 hearings where liberty interests are deprived.[200] Although the Supreme Court would likely use the *Mathews* analysis to evaluate whether there is a right to counsel in proceedings that lead to a deprivation of conditional liberty,[201] the *Mathews* analysis is clearly inapposite to a determina-

196. The district court in *Colson v. Joyce* assumed that the sixth amendment provision alone confers an absolute right to counsel. Colson v. Joyce, 646 F. Supp. at 105. The court apparently thought, therefore, that the right to counsel in Colson's section 1304 hearing flowed from the sixth amendment, because the court concluded that the right to counsel in petitioner Colson's situation was absolute. *Id.* at 109.

197. 498 A.2d 585 (Me. 1985), *cert. denied*, 475 U.S. 1036 (1986).

198. 646 F. Supp. 102 (D. Me. 1986), *aff'd*, 816 F.2d 29 (1st Cir. 1987).

199. Mathews v. Eldridge, 424 U.S. 319 (1976). The Court in *Mathews* set forth its balancing analysis, *see supra* text accompanying note 22, as a method for determining whether a recipient of social security benefits had the right to an evidentiary hearing prior to termination of her benefits.

200. The Tenth Circuit in Walker v. McClain, 768 F.2d 118 (10th Cir. 1985), purported to rely on the *Mathews* test for its holding that an indigent, whose incarceration was the result of his failure to make court-ordered child support payments, had a right to appointed counsel at his contempt proceeding. *Id.* at 1183-84. The court first weighed the litigant's liberty interest against the state's pecuniary interest in minimizing the cost of contempt proceedings and then considered the need for counsel in assuring that an erroneous deprivation of liberty did not occur. *Id.* Despite this ostensible reliance on the *Mathews* balancing analysis, however, the court formulated its holding in absolute terms rather than by reference to the particular facts of the case. The court stated, "[D]ue process does require, at a minimum, that an indigent defendant threatened with incarceration for civil contempt for nonsupport, who can establish indigency under the normal standards for appointment of counsel in a criminal case, be appointed counsel to assist him in his defense." *Id.* at 1185.

Moreover, the *Walker* court stressed the importance of the relationship between a defendant's liberty interest and his right to counsel. The court adopted the *Lassiter* view that " '[i]t is the defendant's interest in personal freedom, and not simply the special sixth and fourteenth amendment right to counsel in criminal cases, which triggers the right to appointed counsel.' " *Id.* at 1183 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981)). The Tenth Circuit also recognized that "[t]he right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty." *Id.* at 1183. Accordingly, although the *Walker* court purported to rely on *Mathews*, the Tenth Circuit's holding is squarely based upon the actual imprisonment standard.

201. The Court in Gagnon v. Scarpelli, 411 U.S. 778 (1973), held that a defendant in a probation revocation hearing did not have an absolute sixth amendment right to counsel because his liberty was merely conditional. *See supra* notes 115-27 and accompanying text. The Court then proceeded to evaluate whether due process required the appointment of counsel. The *Gagnon* Court thought that the due process right must be analyzed on a case-by-case basis. Gagnon v. Scarpelli, 411 U.S. at 789-

tion of the right to counsel in a section 1304 proceeding that results in a loss of absolute liberty.[202]

V. CONCLUSION

There is an absolute right to counsel at section 1304 hearings no matter whether the right derives from the sixth amendment or from the due process clause of the fourteenth amendment. The sixth amendment mandates an absolute right to counsel at section 1304 hearings under two theories: first, the hearing resembles a criminal trial to the degree that the actual imprisonment standard of *Argersinger* and *Scott* is applicable to the proceeding; second, the hearing is a critical stage of the criminal prosecution even if the proceeding is not tantamount to an independent criminal trial on a separate offense. Moreover, the right to counsel at a section 1304 hearing is absolute even if one regards the hearing as a civil proceeding. A sentence of imprisonment imposed at a section 1304 hearing conclusively establishes the right to counsel under the due process clause, as well as under the sixth amendment. The federal courts' adoption of the actual imprisonment standard for determining the right to counsel has ramifications that extend beyond section 1304 proceedings. This standard requires appointment of counsel in any judicial proceeding, including civil contempt proceedings, that lead to actual imprisonment.[203]

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90. The Court had not yet developed the *Mathews* due process balancing test at the time *Gagnon* was decided. It is reasonable to assume, however, that the Court would apply the *Mathews* balancing analysis if it had to decide whether a defendant with merely a conditional liberty interest has a right to counsel.

202. The Maine Legislature could alter the section 1304 hearing to make it more analogous to the probation revocation hearing of *Gagnon*. The Legislature could implicitly define the liberty interest of any criminal defendant sentenced to pay a fine as conditional by rewriting section 1304 to require the court to impose a suspended sentence of imprisonment and to place the defendant on probation with timely payment of his fine as a condition of probation. The liberty interest of a section 1304 defendant would then resemble the liberty interest of the probationer in *Gagnon*. *See supra* notes 115-27 and accompanying text. A section 1304 defendant, under such a scheme, would no longer enjoy an absolute right to counsel, because his right to counsel diminishes as his liberty interest decreases. Lassiter v. Department of Social Servs., 452 U.S. 18, 26 (1981) (citing Gagnon v. Scarpelli, 441 U.S. 778 (1973)). The *Mathews* balancing analysis would be the appropriate method of evaluating the right to counsel in section 1304 hearings if the defendant's liberty interest were conditional, rather than absolute.

203. The Maine courts have violated this principle by holding that counsel is not required in civil contempt proceedings that result in imprisonment of the contemptor. *E.g.*, Meyer v. Meyer, 414 A.2d 236 (Me. 1980) (due process not violated by failure to provide counsel in contempt proceeding because contempt was civil and allowed defendant right to purge).