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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 30, 2002

The Honorable Ralph Anderson
Senator, District No. 7
315 Elder Street
Greenville, South Carolina 29607

Re: Your Letter of July 25, 2002
Appointment of Counsel for Indigent Criminal Defendants

Dear Senator Anderson:

In your above-referenced letter, you ask for this Office's opinion concerning the status of South Carolina's laws requiring the appointment of legal counsel for indigent defendants in criminal matters. By way of background, you state that

> In an opinion dated May 20, 2002, the U.S. Supreme Court delivered an opinion on indigent defense and the right to competent counsel, based on Sixth Amendment rights. The opinion was based on the Alabama v. Shelton case, which involved a misdemeanor charge of third degree assault. The trial resulted in a 30 day jail sentence, which was suspended, and Shelton was placed on probation for two years. Mr. Shelton appealed the case thru the Alabama Court system to the U.S. Supreme Court, on the grounds that his liberty was deprived, albeit thru a suspended sentence, without the benefit of counsel.
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> ....
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> The effect of the ruling was to reaffirm the right of defendants to competent defense counsel, including misdemeanor charges, when loss of liberty, or incarceration is at stake. The court relied primarily on previous rulings of Argersinger v. Hamlin (1972), and Scott v. Illinois (1979), for its decision.
>
> The Argersinger v. Hamlin decision stated that "Defense counsel must be appointed in any criminal prosecution whether classified as petty, misdemeanor or felony, that actually leads to imprisonment even for a brief period".

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The Scott v. Illinois decision stated "counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment".

Given this background, you ask the following specific questions:

1. What is the status of the state of S.C. Code of Laws with regards to the U.S. Supreme Court Alabama v. Shelton ruling? Do the statutes place S.C. in a state of compliance or noncompliance? What are the specific statutes references?

2. What, in your opinion, would place S.C. in a state of full compliance with Alabama v. Shelton from a statute as well as common practice standpoint? Per your information, is the state of S.C. currently in a state of compliance or noncompliance, based on common courtroom/legal practices?

LAW/ANALYSIS

General Law

The right of a defendant to be represented by an attorney in criminal proceedings is guaranteed by the Sixth Amendment to the United States Constitution. The Sixth Amendment in part provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense." The guarantee of counsel is made applicable to the various states by the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). There is a distinction, however, between the absolute right to have the assistance of counsel and the requirement that the state provide counsel for the indigent defendant.

As you have noted in your request, the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972), held that provision of counsel by the state is required only when imprisonment is an authorized penalty of the offense charged. Subsequently, the United States Supreme Court found in Scott v. Illinois, 440 U.S. 367 (1979), that actual imprisonment is the defining line for appointment of counsel and held that "... the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id. at 373-374. The Argersinger and Scott holdings were recognized by South Carolina's Court of Appeals in State v. Rau, 320 S.C. 385, 465 S.E.2d 370 (1995).

Again as you have noted, the Supreme Court has recently had occasion to apply the Argersinger and Scott analysis in Alabama v. Shelton, 535 U.S. ____, 122 S.Ct. 1764 (2002). The Court in Shelton applied the "actual imprisonment" rule to a situation where an uncounseled defendant was sentenced to a term of imprisonment which was suspended pending the completion

of probation. The Court held that the Sixth Amendment required appointment of counsel for the defendant and stated

> A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point "result[s] in imprisonment."

Id. 122 S.Ct. at 1765.

Based on the above holdings, the State of South Carolina, in order to satisfy Sixth Amendment and due process requirements, must provide counsel for indigent defendants in situations where the defendant receives actual imprisonment. Actual imprisonment includes suspended sentences whereby the defendant is subject to incarceration upon the commission or omission of an act prohibited or required by the terms of his sentence.

Question 1

S.C. Code Ann. §17-3-10 provides, in pertinent part, that "[a]ny person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto." Further, pursuant to Section 17-3-110, the South Carolina Supreme Court has promulgated rules regarding the administration of the provision of counsel for indigent defendants. The relevant rule is South Carolina Appellate Court Rule (SCACR) 602.

With reference to General Sessions level and juvenile cases, Rule 602(a) states that "[e]very person arrested for the commission of a crime within the jurisdiction of the Court of General Sessions, every juvenile to be brought before any court on any charge for which he may be imprisoned, and every person charged with the violation of a probationary sentence shall be taken as soon as practicable before the Clerk of the Court of General Sessions in the county where the charges are preferred, or such other officer or officers as may be designated by the resident judge of the circuit, for the purpose of securing to the accused the right to counsel."

With reference to magistrate and municipal court level offenses, Rule 602(a) provides that "[i]n cases involving criminal charges within the jurisdiction of magistrates' courts, municipal courts, or other courts with like jurisdiction, if a prison sentence is likely to be imposed following any conviction, the presiding judge of the court in which the matter is to be determined shall inform the accused as provided in Rule 2 (his right to counsel and of his right to the appointment of counsel by the court, if the accused is financially unable to employ counsel) when the case is called for disposition."

Clearly, South Carolina's statutory law, that counsel be provided to any person entitled to such under the United States Constitution when that person is unable to afford counsel, is in compliance with the requirements of the Argersinger, Scott and Shelton holdings. Even if, in the extreme case, the United States Supreme Court were to hold that the Sixth Amendment required appointment of counsel to all indigent defendants, Section 17-3-10 would comply. Further, the rules promulgated by the South Carolina Supreme Court also indicate compliance with the requirements of the Sixth Amendment as interpreted by the Argersinger, Scott and Shelton cases.

Question 2

As stated above, it is my opinion that South Carolina's statutory laws and relevant Supreme Court rules are in full compliance with Alabama v. Shelton. Additionally, this Office has no indication that the trial courts of this State are failing to follow the relevant statute and rules from a "common practice standpoint."

In fact, with reference to the General Sessions Court, SCACR Rule 602 leaves no room for an application which violates the above referenced holdings. Rule 602(a) requires that "[e]very person arrested for the commission of a crime within the jurisdiction of the Court of General Sessions ..." be processed for the purpose of securing counsel. If a person charged with a General Sessions offense is indigent, Rule 602 requires appointment of counsel without regard to the sentence which may be imposed.

Further, South Carolina Court Administration, through the Bench Book for Magistrates and Municipal Judges, directs summary court judges that, "if a prison sentence is likely to be imposed upon conviction," they must "[a]dvise the accused of his right to counsel and of his right to appointment of counsel, if the accused is financially unable to employ counsel." While this Office has no indication of such, should it be determined that this rule is not being applied in accordance with the holding of Alabama v. Shelton, the remedy would lie in direction from the South Carolina Supreme Court through the issuance of an order or through instruction by Court Administration.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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