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Kerry R. Northup

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NICHOLS v. UNITED STATES:
 USING PRIOR, UNCOUNSELED MISDEMEANOR
 CONVICTIONS TO ENHANCE SENTENCES —
 A DISPUTE RESOLVED

I. INTRODUCTION

The Sixth Amendment right to counsel is one of the linchpin rights contained in the Bill of Rights.¹ In recognition of its pivotal role, the United States Supreme Court extended the Sixth Amendment right to counsel to the states for the first time more than thirty years ago.² Like many other Constitutional provisions, the parameters of the right to counsel have changed over the years, mirroring the changes in the personalities and policies of the Supreme Court.³ Since the end of the Warren era,

1. U.S. CONST. amend. VI. The Sixth Amendment reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his [or her] defence." *Id.*; see ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 1 (1992) ("The Sixth Amendment occupies a pivotal role in the panoply of rights accorded criminal defendants through the Bill of Rights to the U.S. Constitution.").

2. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). *Gideon* represents the first case in which the Sixth Amendment was truly incorporated into the Fourteenth Amendment's Due Process Clause. *Id.* at 342-43. Although prior to *Gideon*, *Powell v. Alabama*, 287 U.S. 45 (1932), had held that four state defendants were entitled to have counsel appointed for their defense, the *Powell* Court based its decision solely on Fourteenth Amendment due process grounds, rather than the incorporation of the Sixth Amendment's right to counsel into the Fourteenth Amendment. *Powell*, 287 U.S. at 71-73; see WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 34 (1955) ("The Supreme Court would appear to have merely applied to the states through the due-process clause of the Fourteenth Amendment the same requirement which a federal statute had since 1790 imposed on federal courts in capital cases."); FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 123-24 (1969) (stating that Supreme Court "found that its problem was to determine whether, under the circumstances of the case, the trial court's failure to make an effective appointment of counsel constituted a denial of due process"). Thus, the Supreme Court in *Powell* neither redefined the Sixth Amendment, nor applied it to the states. HELLER, *supra*, at 124. In subsequent cases, however, the Supreme Court implied that *Powell* had indeed been based upon the Sixth Amendment's right to counsel. *Id.* at 124-26. For a complete discussion of *Gideon*, see *infra* notes 54-61 and accompanying text. For a complete discussion of the *Powell* decision, see *infra* notes 22-33 and accompanying text.

3. Compare *Betts v. Brady*, 316 U.S. 455 (1942) (holding that Due Process Clause does not require application of Sixth Amendment right to counsel to states), *overruled by Gideon*, 372 U.S. at 335 with *Gideon*, 372 U.S. at 335 (extending right to counsel to states through Fourteenth Amendment Due Process Clause); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (defining right to counsel broadly and extending it to misdemeanor defendants who are actually incarcerated) and *Scott v. Illinois*, 440 U.S. 367 (1979) (defining right to counsel narrowly and limiting *Argersinger* to only those defendants who are actually incarcerated, rather than authorized to be incarcerated); see also GARCIA, *supra* note 1, at 1-2 (noting that ex-

commentators have generally perceived the Supreme Court as retracting the protections afforded by the Sixth Amendment.⁴ The Supreme Court last term lent credence to such perceptions when it handed down its decision in *Nichols v. United States*,⁵ holding that prior, uncounseled misdemeanor convictions may be used to enhance a subsequent penalty.⁶

In *Nichols*, the Court held that a sentencing court could use a defendant's prior, uncounseled misdemeanor conviction to enhance a sentence.⁷ The defendant in *Nichols* pled guilty to a drug distribution charge.⁸ During sentencing, Nichols was assessed an additional twenty-five months in prison under the United States Sentencing Guidelines (Guidelines) because of his prior, uncounseled misdemeanor conviction for driving under the influence.⁹ The Guidelines include a system for penalizing recidivism, even if the conviction was based on misdemeanor charges.¹⁰ *Nichols* raised

pansive view of Sixth Amendment rights taken by Warren Court has been replaced by Burger and Rehnquist Courts' more restrictive view). See generally RICHARD L. PACELLE, THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA 193-206 (1991) (providing excellent discussion of shifting views of Court with respect to Sixth Amendment right to counsel).

4. See GARCIA, *supra* note 1, at 1 ("The promise of an expansive interpretation of the amendment engendered by the Warren Court has given way to a fundamentally different conception. As a result, both the functional and symbolic roles of the amendment have been steadily eroded."); Samuel Rosenthal & Michelle Rice, *Whittling Away the Right to Counsel*, CRIM. JUST., Fall 1988, at 2. See generally PACELLE, *supra* note 3, at 193-206 (discussing Burger and Rehnquist Court's more restrictive view of Sixth Amendment right to counsel). Even Justices of the Supreme Court have had occasion to lash out in dissent against holdings they perceived as narrowing the scope of previous holdings. *Scott*, 440 U.S. at 389 (Brennan, J., dissenting). In *Scott*, Justice Brennan did just that in reaction to what he believed was the majority's reinterpretation of the Court's holding in *Argersinger*. *Id.* (Brennan, J., dissenting) (stating that majority's opinion unconscionably "restricts the right to counsel" in effect "turn[ing] the reasoning of *Argersinger* on its head"). For a full discussion of *Scott*, see *infra* notes 68-74 and accompanying text.

5. 114 S. Ct. 1921 (1994).

6. *Id.* at 1932 (Blackmun, J., dissenting) (stating that although Court has long grappled with Sixth Amendment rights, "it has never permitted, before now, an uncounseled conviction to serve as the basis for any jail time").

7. *Id.* at 1928. The *Nichols* Court expressly overruled its decision fourteen years earlier in *Baldasar v. Illinois*, 446 U.S. 222 (1980), *overruled by Nichols v. United States*, 114 S. Ct. 1921 (1994). For a discussion of the rationale in *Nichols*, see *infra* notes 99-110 and accompanying text. For a discussion of *Baldasar*, see *infra* notes 75-86 and accompanying text.

8. *Nichols*, 114 S. Ct. at 1924.

9. *Id.* at 1924-25. The maximum sentence that could have been given under the Guidelines was 235 months. *Id.* at 1924. Had the prior, uncounseled misdemeanor conviction not been included in the pre-sentence Report, then the maximum sentence allowable under the Guidelines would have been 210 months. *Id.* The sentencing court gave Nichols the maximum term of 235 months. *Id.* at 1925.

10. UNITED STATES SENTENCING GUIDELINES, GUIDELINES MANUAL, ch. 4, pt. A. intro. comment (Nov. 1994) [hereinafter U.S.S.G.]. The Guidelines state the basis for the government's policy of penalizing recidivism:

A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent

the issue of whether the Guidelines under the Sixth Amendment could be extended to increase incarceration even when the defendant was uncounseled during his previous misdemeanor conviction.¹¹ Given the popularity of recidivist statutes in the states and the consideration of recidivism in the Guidelines, *Nichols* is an important decision.¹²

This Note begins by examining the conflict among both courts and commentators surrounding the Supreme Court decision in *Baldasar v. Illinois*,¹³ the splintered decision that, prior to *Nichols*, "controlled" the issue of whether prior, uncounseled convictions could be used to enhance subsequent penalties.¹⁴ Section II provides an analysis of the Sixth Amendment to the United States Constitution, including the Supreme Court's Sixth Amendment decisions through *Baldasar*, the decision *Nichols* overruled.¹⁵ Section III of the Note presents the facts of *Nichols* and an examination of the majority, concurring and dissenting opinions.¹⁶ Then, section IV analyzes the Justices' rationale.¹⁷ Finally, section V outlines the immediate impact of *Nichols* upon the lower courts and criminal defendants.¹⁸ This section concludes with an examination of whether we can

to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.

Id.

A simple definition of the Guidelines' method of taking recidivism into account was provided in the majority's opinion in *Nichols*:

The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the intersection of the defendant's offense level and his [or her] criminal history category.

Nichols, 114 S. Ct. at 1924 n.3 (citing U.S.S.G., *supra*, ch. 5, pt. A (Sentencing Table)).

11. *Nichols*, 114 S. Ct. at 1924.

12. Other statutes or judicial decisions allow other collateral uses for criminal convictions. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 48 n.11 (1972) (listing wide range of civil disabilities that may result from misdemeanor convictions). For a general discussion of recidivist statutes, including the Sentencing Guidelines, see D. Brian King, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. Rev. 1373 (1989).

13. 446 U.S. 222 (1980) (per curiam), *overruled by Nichols v. United States*, 114 S. Ct. 1921 (1994).

14. For a discussion of the split among the circuit and state courts before *Nichols*, see *infra* notes 82-83 and accompanying text.

15. For a discussion of the original intent of the Sixth Amendment, see *infra* notes 20-21 and accompanying text.

16. For a discussion of the facts in *Nichols*, see *infra* notes 87-98 and accompanying text. For a discussion of the opinions in *Nichols*, see *infra* notes 99-136 and accompanying text.

17. For a critique of the Supreme Court's opinion, see *infra* notes 137-61 and accompanying text.

18. For a discussion of the impact of the Supreme Court's decision in *Nichols*, see *infra* notes 151-52 & 160 and accompanying text.

discern a meaningful trend in order to predict the future of the Sixth Amendment's right to counsel.¹⁹

II. BACKGROUND

A. *Original Intent, Early Decisions and Betts v. Brady*

The Sixth Amendment right to counsel was originally intended to protect a defendant's right in federal court to have whatever representation he or she could afford or arrange.²⁰ The United States Supreme Court, however, has expanded the Sixth Amendment to include the right of indigent defendants to appointed counsel despite any original intent arguments to the contrary.²¹

Over sixty years ago, the Supreme Court first found that the government may be required to provide counsel for indigent defendants in *Powell v. Alabama*.²² *Powell*, also known as the "Scottsboro case," involved the charging of several black youths (the "Scottsboro boys") with the rape of two white girls.²³ The indictment was handed down six days after the crime was supposed to have been committed and the trial began six days after that.²⁴ The trial court "appointed all the members of the bar" to

19. For a discussion of discernable Supreme Court trends in interpreting the Sixth Amendment, see *infra* notes 151-61 and accompanying text. See generally GARCIA, *supra* note 1 (discussing Burger and Rehnquist Courts' contraction of Sixth Amendment rights).

20. See *Scott v. Illinois*, 440 U.S. 367, 370 (1979). The Court noted that "[t]here is considerable doubt that the Sixth Amendment itself, . . . contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Id.* (citing BEANEY, *supra* note 2, at 27-30); see also HELLER, *supra* note 2, at 110 (discussing original intent of framers in adopting Sixth Amendment); Stephen G. Gilles, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial*, 50 U. CHI. L. REV. 1380, 1388 (1983) (same).

The Sixth Amendment mirrored a right present in twelve of the original thirteen states' constitutions. *Powell v. Alabama*, 287 U.S. 45, 60-65 (1932). It was also a reaction to English common law, which originally denied counsel to certain defendants. *Id.* at 60; see BRUCE A. GREEN, *LETHAL FICTION: THE MEANING OF "COUNSEL" IN THE SIXTH AMENDMENT* 433, 438 (1993) ("The principal purpose of the Sixth Amendment right . . . [to counsel] was to forbid laws, like those in England, which required criminal defendants to represent themselves.").

21. See *Johnson v. Zerbst*, 304 U.S. 458, 467-69 (1938) (extending right to appointed counsel to all federal felony prosecutions). *Zerbst* was well-noted for its failure to even mention the original intent of the Sixth Amendment. See BEANEY, *supra* note 2, at 42 ("[Justice] Black's opinion is perhaps equally notable for its . . . indifference to the historical aspects of the right to counsel."). It was not until 1963, however, that the Supreme Court found the Sixth Amendment right to counsel to be a fundamental right and therefore applicable to the states. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

22. 287 U.S. 45, 71-73 (1932). *Powell* was, however, based solely on Fourteenth Amendment due process grounds and did not purport to rely on the Sixth Amendment right to counsel. *Id.*

23. *Id.* at 49.

24. *Id.* at 49, 53.

represent the defendants.²⁵ Each of the three trials was completed in a day and the juries found the defendants guilty, sentencing them all to the death penalty.²⁶ The Court determined that the “representation” the defendants had received was merely *pro forma* and that the defendants were entitled to the benefit of counsel under the Due Process Clause of the Fourteenth Amendment.²⁷

The *Powell* Court initially engaged in a lengthy historical review of the right to counsel.²⁸ The Court proceeded to analyze the concept of due process, determining that it had been denied to the defendants on the facts before it.²⁹ The Court also emphasized the especially unusual facts

25. *Id.* at 53.

26. *Id.* at 50. See generally JAMES E. GOODMAN, *STORIES OF SCOTTSBORO* (1994) (providing full background of Scottsboro incident and effects to present).

27. *Powell*, 287 U.S. at 53, 58. *Powell's* reliance solely on the Fourteenth Amendment helped shape the evolution of the Sixth Amendment right to counsel and its application to the states. See, e.g., *Betts v. Brady*, 316 U.S. 455, 462-64 (1942) (emphasizing that *Powell* was based solely on Fourteenth Amendment grounds and refusing to extend Sixth Amendment right to counsel to state defendants accused of non-capital crimes), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Gideon*, the Court stated that it was returning to the philosophy of *Powell* and overruled *Betts*, a case that limited *Powell* and refused to extend the Sixth Amendment right to counsel to felony defendants. See *Gideon*, 372 U.S. at 335, 342-45 (“The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court’s holding in *Powell v. Alabama* rested.”).

28. *Powell*, 287 U.S. at 69-73. The Court, per Justice Sutherland, conducted a lengthy analysis of the history of the Sixth Amendment and its state counterparts, before determining that the Due Process Clause of the Fourteenth Amendment required the appointment of counsel to *Powell* and his co-defendants. *Id.* The Court noted that at the time of the ratification of the Constitution, England did not allow the advice of counsel for defendants accused of non-petty crimes. *Id.* at 60. The Court also noted, however, that this English rule of law was vigorously attacked by many English commentators, including Blackstone. *Id.* at 60-61. Further, in the United States, at least twelve of the thirteen colonies had recognized the right to counsel in almost all criminal prosecutions. *Id.* at 64-65.

29. *Id.* at 65-73. The Court’s analysis was strictly limited to determining whether the Due Process Clause of the Fourteenth Amendment had been violated. *Id.* As previously mentioned, it is important to note that *Powell* did not purport to base its decision on the Sixth Amendment. *Id.* at 71-73.

The Due Process Clause of the Fourteenth Amendment provides in pertinent part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. Similar to the Due Process Clause of the Fifth Amendment, which protects against federal incursions, the Fourteenth Amendment’s Due Process Clause has “two aspects: procedural, in which a person is guaranteed fair procedures and substantive which protects a person’s property from unfair governmental interference or taking.” BLACK’S LAW DICTIONARY 500 (6th ed. 1990). Courts will find a violation of the procedural aspect of the Due Process Clause where there has been a violation of the defendant’s right to “fundamental fairness.” *Cf. id.* at 501 (“Aside from all else, ‘due process’ means fundamental fairness and substantial justice.”). Due process “means fundamental fairness and substantial justice” as well as “embod[y] . . . the basic rights of a defendant in criminal proceedings and the requisites for a fair trial.” *Id.*

The Court in *Powell* explained its Due Process Clause-based holding in light of *Hurtado v. California*, 110 U.S. 516 (1884), in which the Court held that the Fifth Amendment right to obtain an indictment did not extend to the states, even in a

involved before finding that the defendants' right to due process was violated.³⁰ The Court's emphasis of the facts involved in this particular case and the clear tying of its decision to those facts, became very important in determining the path of the right to counsel.³¹ Surprisingly, given the shocking fact pattern involved, the Supreme Court failed to hand down a unanimous decision.³² Despite its limiting language to both the Fourteenth Amendment and the particular facts involved in the case, *Powell* became the seminal case in providing the right to counsel, and the one

capital trial. *Powell*, 287 U.S. at 65-66. The *Powell* Court reasoned that *Hurtado* did not dispose of the issue before it because the Court had previously found violations of the Fourteenth Amendment regardless of what the Fifth Amendment allowed. *Id.* at 66; see *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (holding that state seizure of land subject to statute and judicial order still violates Due Process Clause of Fourteenth Amendment). The *Powell* Court also made note of other Supreme Court cases, and stated that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." *Id.* at 67 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

The Supreme Court then analyzed the concept of due process and what it reasonably entailed. *Id.* at 67-68. The Court noted that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. The Court acknowledged that there is a greatly increased likelihood of even an innocent defendant obtaining a conviction due to his lack of counsel. *Id.* at 69. Further, Judge Cooley of England is cited as suggesting that the right of counsel is "perhaps [a defendant's] most important privilege," and that "[w]ith us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." *Id.* at 70 (quoting 1 COOLEY'S CONST. LIM. 700, 8th ed.).

30. See *Powell*, 287 U.S. at 71. The Court stated:

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

Id.

31. See *Betts*, 316 U.S. at 462-63 (suggesting that holding in *Powell* was largely based on unusual fact pattern involved). For a discussion of *Betts*, see *infra* notes 40-53 and accompanying text.

32. *Powell* reversed the Alabama Supreme Court, which voted 5-1 in favor of affirming the conviction. *Powell v. State*, 141 So. 201 (Ala. 1932). The United States Supreme Court was divided by a margin of seven justices to two on the resolution of the issue. *Powell*, 287 U.S. at 49, 73. Justice Sutherland's majority opinion was joined by Chief Justice Hughes and Justices van DeVanter, Brandeis, Stone, Roberts and Cardozo. Justices Butler and McReynolds dissented from the majority, suggesting that the facts were not nearly so bad as they appeared, and noting that the trial court had appointed, in addition to the entire bar, one member of the bar to act as lead counsel. *Id.* at 74-75 (Butler, J., dissenting). Further, the dissent disagreed with the majority's characterization of the representation of counsel at trial, stating that it was not merely "pro forma." *Id.* (Butler, J., dissenting).

that all subsequent decisions purported to rely upon.³³

Shortly after *Powell*, the Court for the first time read the Sixth Amendment right to counsel as requiring the appointment of counsel to indigent defendants.³⁴ In *Johnson v. Zerbst*,³⁵ two United States Marine Corps enlisted men were arrested and convicted of uttering and possessing counterfeit money.³⁶ The Court, after a relatively brief analysis, found that federal defendants accused of felonies were entitled to representation by counsel under the Sixth Amendment.³⁷ The Court's reasoning revolved around the concern that justice will not "still be done" if defendants do not receive the benefit of counsel.³⁸ Further, the Court noted *Powell's* recogni-

33. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) ("The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested."). For a discussion of *Gideon*, see *infra* notes 54-61 and accompanying text.

34. 304 U.S. 458 (1938).

35. *Id.*

36. *Id.* at 459. Johnson and his co-defendant Bridwell, while on leave from the Marines, were arrested in Charleston, South Carolina. *Id.* at 459-60. They were both residents of distant cities and had no friends or relatives in Charleston. *Bridwell v. Aderhold*, 13 F. Supp. 253, 254 (1935), *rev'd sub nom.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938). Further, they were men of little education and had never been charged with any offense before. *Id.* After being represented at their preliminary hearing, they were unable to afford counsel for subsequent proceedings, and were arraigned, tried and sentenced on the same day without benefit of counsel. *Zerbst*, 304 U.S. at 460. For a lengthy discussion of the facts in *Zerbst*, including the unusual circumstances of the appeal, see BEANEY, *supra* note 2, at 36-42.

37. *Zerbst*, 304 U.S. at 462-63. The *Zerbst* case was well-noted for its lack of analysis, especially with respect to historical precedent. See BEANEY, *supra* note 2, at 42 ("[Justice] Black's opinion is perhaps equally notable for its matter-of-fact tone and for its indifference to the historical aspects of the right to counsel."). The reason for the Court's failure to provide historical analysis is quite clear, given that if Justice Black had "used the narrow historical approach to constitutional interpretation, he would [have found] it difficult to justify this decision." *Id.* at 44. Further, "[i]t was obvious that this particular judicial vacuum could not be filled as the justices wished by recourse to history." *Id.* at 42.

The Court's decision was, however, particularly well received:

In effect, the Court chose to adopt a more enlightened procedure because modern conditions and attitudes seemed to make such action desirable. It was certain to be a popular move. The criminal defendants would appreciate it. The United States Government, speaking through the Department of Justice, had indicated its support for a broad and generous rule. The judges and lawyers in the majority of federal districts would not oppose it, because their practice and custom had placed them in most instances under such a rule. A few judges and a few attorneys were the only possible dissidents.

Id. at 44.

38. *Zerbst*, 304 U.S. at 462 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court's decision instead relied upon the "realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Id.* at 462-63. Justice Black's opinion, which failed to "refer[] to or dispos[e] of the previously accepted meaning of the [Sixth A]mendment," was clearly driven by this concern. HELLER, *supra* note 2, at 111.

tion that the right of defendants to be heard holds little significance if it does not "comprehend the right to be heard by counsel."³⁹

Six years later, however, in *Betts v. Brady*,⁴⁰ the Supreme Court declined to extend *Zerbst* to the states.⁴¹ In *Betts*, the defendant was accused of robbery and was denied the assistance of counsel despite his indigency.⁴² The defendant proceeded to conduct his own defense as competently as could be expected, was found guilty and was sentenced to eight years in jail.⁴³ On appeal, the Supreme Court found that due process did not entail the appointment of counsel in all state felony cases, and the defendant was not entitled to counsel unless he could show unusual cir-

39. *Zerbst*, 304 U.S. at 463 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). There were two other questions faced by the Court in *Zerbst*, each implicating the Sixth Amendment right to counsel. *Id.* at 462-69. First, the Court decided that a defendant's waiver of counsel cannot be lightly assumed by the trial court. *Id.* at 464-65. Although defendants may waive counsel if they wish, there is a "serious and weighty responsibility upon the trial judge of determining whether . . . [the waiver] is intelligent and competent." *Id.* at 465. Second, the Court approved the use of habeas corpus to determine whether a conviction had been obtained by violating the right to counsel. *Id.* at 465-69. Notably, the Court stated that "a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity." *Id.* at 468.

Justice Black played an unusual role in Sixth Amendment right to counsel jurisprudence. After writing for the Court in *Zerbst*, he would write the stinging dissent six years later in *Betts v. Brady*, 316 U.S. at 474. Then, nineteen years later, Justice Black vindicated his dissent in *Betts* by authoring the majority opinion in *Gideon*, which overturned *Betts*. *Gideon*, 373 U.S. at 335.

Zerbst was decided by a vote of 6-2, with Justice Black being joined by Chief Justice Hughes, and Justices Brandeis, Stone and Roberts. Justice Reed concurred without opinion with the majority. *Id.* at 469. Justice McReynolds dissented without opinion. *Id.* Justice Butler expressed his view that the record revealed that petitioner waived the right to counsel. *Id.* (Butler, J., dissenting). Justice Cardozo took no part in the case. *Id.*

40. 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

41. *Id.* at 473. The *Betts* Court held that:

[T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Id.

42. *Id.* at 456-57. Defendant was indicted in the Circuit Court of Carroll County, Maryland. *Id.* at 456. Unable to afford counsel, petitioner requested counsel at his arraignment. *Id.* at 456-57. The trial court refused, citing the county practice of appointing counsel only in cases of rape or murder. *Id.* at 457.

43. *Id.* Defendant conducted his own defense without waiving his right to counsel. *Id.* He plead not guilty and waived his right to trial by jury. *Id.* He called witnesses, subjected them to examination and cross-examined those of the prosecution. *Id.* Defendant also declined to testify in his own behalf. *Id.*

cumstances.⁴⁴ The *Betts* Court, speaking through Justice Roberts, first noted that the Sixth Amendment applied only to federal trials.⁴⁵

The Court then engaged in a historical analysis of the right to counsel afforded in both the Sixth Amendment and the original colonies.⁴⁶ The Court concluded that those provisions guaranteeing the right to counsel never encompassed or contemplated the right to have counsel appointed by the state.⁴⁷ Further, the Court noted that an analysis of the right to counsel in many state statutory provisions reveals that "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy."⁴⁸ Thus, the Court found that:

while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.⁴⁹

The *Betts* Court reasoned that the *Powell* Court had found a violation of the Due Process Clause because it was a capital case with a highly unusual fact pattern.⁵⁰ *Betts* was neither a capital case nor did it involve an extremely unusual set of circumstances such that the Due Process Clause was violated.⁵¹ Justice Black wrote a vigorous dissent arguing that (1) the Sixth Amendment should be made applicable to the states through the Fourteenth Amendment;⁵² and (2) even if the Court declined to apply the Sixth Amendment to the states through the Fourteenth Amendment,

44. *Id.* at 473; see also *Scott v. Illinois*, 440 U.S. 367, 371 (1979) (summarizing *Betts* as holding that "[a] determination had to be made in each individual case whether failure to appoint counsel was a denial of fundamental fairness").

45. *Betts*, 316 U.S. at 461.

46. *Id.* at 465-72.

47. *Id.* at 466.

48. *Id.* at 471.

49. *Id.* at 473.

50. *Id.* at 463. The Court noted the unusual factual circumstances in *Powell* and upheld the state's argument that "emphasized the holding and glossed over the dicta in the *Powell* case." BEANEY, *supra* note 2, at 161.

51. *Betts*, 316 U.S. at 471-73.

52. *Id.* at 474-75 (Black, J., dissenting). Justice Black's dissent, joined by Justices Douglas and Murphy, attempted to show that counsel was commonly accepted as an integral part of due process by including a lengthy appendix listing the states that require the appointment of counsel. *Id.* at 477-80 (Black, J., dissenting). The listed states required the appointment of counsel, either by constitutional provision, statute or judicial decision, in both capital as well as non-capital cases. *Id.* (Black, J., dissenting). Only two states, the dissent found, "affirmatively rejected" providing counsel for indigent defendants in non-capital cases. *Id.* at 480 (Black, J., dissenting).

prior Fourteenth Amendment cases clearly called for counsel to be appointed in this case.⁵³

B. *Betts Overruled: The Right to Counsel Included in Due Process*

Although *Betts* remained the law for nearly twenty years, the Supreme Court overruled *Betts* and extended the Sixth Amendment to the states in *Gideon v. Wainwright*.⁵⁴ In *Gideon*, a defendant was charged and convicted of breaking and entering with intent to commit a misdemeanor, a felony under Florida law.⁵⁵ The defendant requested and was denied counsel, and then proceeded to conduct his defense as well as could be expected of a layperson.⁵⁶

In *Gideon*, the Supreme Court unanimously and unceremoniously buried *Betts v. Brady*, holding that state defendants accused of a felony were entitled to the appointment of counsel for their defense.⁵⁷ The Court relied heavily on its opinion in *Powell* and other precedent to conclude that the right to counsel was fundamental.⁵⁸ The *Gideon* Court,

53. *Id.* at 475 (Black, J., dissenting). Justice Black relied heavily upon *Powell* in his dissent, stating that *Powell* demanded the reversal of *Betts*' conviction. *Id.* at 475-76.

54. 372 U.S. 335, 345 (1963).

55. *Id.* at 336. Defendant would have been entitled to counsel under *Johnson v. Zerbst*, 304 U.S. 458 (1938), had this been a federal case. *Zerbst* at 458. For a discussion of *Zerbst*, see *supra* notes 34-39 and accompanying text. Clearly, however, under *Betts* there would have been no unusual circumstances, and therefore, no violation of the Sixth or Fourteenth Amendments would have occurred. *Betts*, 316 U.S. at 473. For a discussion of *Betts*, see *supra* notes 41-53 and accompanying text.

56. *Gideon*, 372 U.S. at 337. Defendant appeared in court without counsel and requested the court to appoint counsel for him. *Id.* The court informed petitioner that only defendants in capital cases were entitled to counsel in Florida. *Id.* Petitioner went on to conduct his defense pro se, making an opening statement to the jury, presenting and cross-examining witnesses and declining to testify personally. *Id.* The jury found petitioner guilty and he was sentenced to five years in state prison. *Id.* After the Florida Supreme Court denied his petition for habeas corpus relief, the United States Supreme Court granted certiorari. *Id.* at 337-38.

57. *Id.* The Court, per Justice Black, completely refuted *Betts*, stating that it "made an abrupt break with its own well considered precedents," and that *Betts* was "an anachronism when handed down." *Id.* at 344-45. Justice Black's vindication of his dissent in *Betts* was perceived as perhaps being too vigorous. See *id.* at 349 (Harlan, J., concurring) ("I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the court when that case was decided."); see also DANIEL J. MEADOR, PRELUDES TO GIDEON 283 (1967) ("[Justice] Black's opinion has been criticized for the approach it took . . . [and its] tenor . . . appears to have been the reason for the separate concurring opinions by Justices Clark and Harlan.").

58. *Gideon*, 372 U.S. at 341-45. The Court relied on *Powell*'s broad language and downplayed the narrow holding that *Betts* attributed to it. *Id.* at 341-42. It emphasized that the *Powell* Court had "unequivocally declared that 'the right to the aid of counsel is of . . . fundamental character.'" *Id.* at 342-43 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)). For a discussion of *Powell*, see *supra* notes 22-33 and accompanying text.

therefore, through the Due Process Clause, extended the right to counsel to defendants in state courts.⁵⁹ Justices Douglas, Harlan and Clark concurred in the opinion,⁶⁰ one of the most popular ever handed down by the Supreme Court.⁶¹

Nine years later, in *Argersinger v. Hamlin*,⁶² the Court extended the Sixth Amendment right to counsel to include any indigent state defendant who suffered a loss of liberty.⁶³ In *Argersinger*, the defendant, an indigent

The Court also relied on *Powell*, *Zerbst* and other cases that preceded *Betts* to show that the right to counsel was fundamental even when *Betts* was handed down. *Gideon*, 372 U.S. at 343-44 (citing *Smith v. O'Grady*, 312 U.S. 329 (1941); *Avery v. Alabama*, 308 U.S. 444 (1940); *Grosjean v. American Press Co.*, 297 U.S. 233, 233-34 (1936)). The Court, as it had in *Zerbst*, failed to provide any original intent analysis. *Id.* at 336-45. For a discussion of *Zerbst*, see *supra* notes 34-39 and accompanying text.

59. *Gideon*, 372 U.S. at 345. The Court subsequently determined that *Gideon* was also fully retroactive. See, e.g., *Kitchens v. Smith*, 401 U.S. 847, 847 (1971) (per curiam).

60. *Id.* at 345-52 (Douglas, Clark and Harlan, JJ., concurring). Justice Douglas wished to express his thoughts on the history of the interrelation between the Sixth and Fourteenth Amendments. *Id.* at 345-47 (Douglas, J., concurring). Justice Clark wrote separately to downplay Justice Black's suggestion that precedent required either the *Betts* or *Gideon* Courts to hold that the appointment of counsel was required. *Id.* at 347 (Clark, J., concurring). Rather, Justice Clark concurred because he felt that the *Gideon* decision merely "erase[d] a distinction which has no basis in logic and an increasingly eroded basis in authority." *Id.* at 348 (Clark, J., concurring) (referring to distinction between *Zerbst* and *Betts*).

Justice Harlan clearly did not subscribe to Justice Black's characterization of *Betts*. *Id.* at 349-50 (Harlan, J., concurring). Instead, Justice Harlan supported the reversal of *Betts* because *Betts*' unusual circumstances requirement is often found with the slightest excuse and "[t]o continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do a disservice to the federal system." *Id.* at 351 (Harlan, J., concurring).

61. See, e.g., Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y. TIMES, Mar. 10, 1988, at A27 (noting that *Gideon* is "one of the most popular decisions ever handed down by the United States Supreme Court"). Further bolstering the Court's holding were the *amici curiae* briefs of 22 of the states supporting its decision. *Gideon*, 372 U.S. at 336.

62. 407 U.S. 25 (1972).

63. *Id.* at 40. Although *Gideon* was broadly written, the Supreme Court's decisions after *Gideon* but before *Argersinger* suggested that the Court at the very least failed to resolve the issue of whether the right to appointed counsel extended to misdemeanor cases. See *Loper v. Beto*, 405 U.S. 473, 481 (1972) ("In [*Gideon*] the Court unanimously announced a clear and simple constitutional rule: In the absence of waiver, a *felony* conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer." (emphasis added)); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) ("There was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required, but . . . clearly . . . th[e] 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."); *Burgett v. Texas*, 389 U.S. 109, 114 (1967) (noting that *Gideon* made it "unconstitutional to try a person for a *felony* in a state court unless he had a lawyer or had validly waived one." (emphasis added)); *In re Gault*, 387 U.S. 1, 29 (1967) ("[Gault] would be entitled to clear advice that he could be represented by counsel, and at least, if a *felony* were involved, the State would be required to provide counsel if his parents were unable to afford it." (emphasis added)). Justice

charged with a misdemeanor, was tried and convicted without benefit of counsel and sentenced to six months imprisonment.⁶⁴ The Court emphasized the importance of counsel for defendants to receive a fair trial,⁶⁵ and the illogic of distinguishing between misdemeanor and felony defendants.⁶⁶ The Court therefore reversed the lower court and extended the

Harlan's concurrence also noted that the facts of *Gideon* did not extend to the question of whether an indigent *misdemeanor* defendant was entitled to counsel. *Gideon*, 372 U.S. at 351 (Harlan, J., concurring); see also *Argersinger*, 407 U.S. at 44-45 n.1 (Powell, J., concurring).

There was also some difficulty in determining whether a crime was a felony or misdemeanor for purposes of determining whether the defendant was entitled to counsel. Soon after *Gideon* was decided, the Supreme Court, in *Patterson v. Warden*, 372 U.S. 776 (1963), vacated the uncounseled misdemeanor conviction of a defendant and remanded the case for reconsideration in light of *Gideon*. *Patterson*, 372 U.S. at 776. The convictions in *Patterson*, however, imposed a sentence of two years and would therefore constitute a felony under federal law. See 18 U.S.C. § 1 (1976). One interpretation of *Patterson*, therefore, may be that "*Gideon* applies in cases in which the accused is charged with an offense that provides a felony-length sentence, regardless of whether it is classified as a misdemeanor in the particular jurisdiction." David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar*, 34 U. FLA. L. REV. 517, 523 n.26 (1982).

64. *Argersinger*, 407 U.S. at 26. Defendant was charged with carrying a concealed weapon. *Id.* The trial judge sentenced him to 90 days in jail, though the statute allowed imprisonment of up to six months, a \$1,000 fine, or both. *Id.* Defendant appealed and his conviction was narrowly affirmed by the Florida Supreme Court. *Id.* at 26-27; see also *Argersinger v. Hamlin*, 236 So. 2d 442 (Fla. 1970) (4-3 decision) (providing further factual background), *rev'd*, 407 U.S. 25 (1972).

65. *Argersinger*, 407 U.S. at 31-40. *Powell* and *Gideon* were both predicated on the view that counsel is "often a requisite to the very existence of a fair trial." *Id.* at 31. Further, the Court reasoned that the rationale of *Powell* and *Gideon* extended to any trial where a defendant may be deprived of his liberty. *Id.* at 32. The Court found no support for the contention that a petty-offense prosecution will be less legally complex and that counsel is not needed for a fair trial. *Id.* at 33.

66. *Argersinger*, 407 U.S. at 27-31. There are three general classifications of crimes: petty offenses, serious misdemeanors and felonies. BLACK'S LAW DICTIONARY 1146 (6th ed. 1990). Petty offenses, or petty misdemeanors, are those crimes with a possible sentence of six months or less. *Id.* Serious misdemeanors are those crimes with a potential sentence of greater than six months to one year. *Id.* Felonies consist of "any offense punishable by death or imprisonment for a term exceeding one year." *Id.* at 617; see 18 U.S.C.A. § 1 (West 1988); MODEL PENAL CODE § 1.04(2).

The Court, per Justice Douglas, first noted that the Sixth Amendment does not differentiate between felony and misdemeanor crimes, but rather, "provides specified standards for 'all criminal prosecutions.'" *Argersinger*, 407 U.S. at 27 (quoting U.S. CONST. amend. VI). Along this vein, the Court noted that it had not distinguished between felonies, serious misdemeanors and petty misdemeanors in the Sixth Amendment's protections regarding the right to public trial, to be informed of the nature and cause of the accusation, the confrontation clause, or compulsory process. *Id.*; see also *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (extending right of defendant "to have compulsory process for obtaining witnesses" to state trials); *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965) (extending confrontation clause to states); *In re Oliver*, 333 U.S. 257 (1948) (holding that right to "public trial" applied to state proceeding even though sentence was for only 60 days).

right to counsel to certain misdemeanor defendants.⁶⁷

The Court also noted with approval that:

It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf.

Argersinger, 407 U.S. at 28 (quoting Junker, *The Right to Counsel in Misdemeanor Cases*, 32 WASH. L. REV. 685, 705 (1968)).

One possible method of determining whether the right to counsel attached was to use the same standard used in determining whether the Sixth Amendment right to jury attached. The Court had recently held that the Sixth Amendment right to jury attaches only in serious misdemeanor crimes. See *Argersinger*, 407 U.S. at 29-31; see also *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that right to trial by jury applies to imprisonment of six months or greater). The Court explained that *Duncan* was hardly controlling because the Sixth Amendment right to jury had "a different genealogy and is brigaded with a system of trial to a judge alone." *Id.* at 29. The Court determined that linking the attachment to the right to counsel to the attachment of the right to jury simply because both rights appeared in the same amendment was inappropriate. *Id.* at 29-31.

The Supreme Court also noted another concern that led to the need for counsel in misdemeanor cases. The vast number of misdemeanor cases could "create an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* at 34. This obsession could easily lead to prejudice. *Id.* at 36. The Court quoted a report concluding that "[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." *Id.* (quoting AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)).

67. *Argersinger*, 407 U.S. at 40. Specifically, the narrowest holding that could be read from *Argersinger* is 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." *Id.* at 37.

Justices Brennan, Stewart, White, Marshall and Blackmun joined Justice Douglas' majority opinion. *Argersinger*, 407 U.S. at 25. Justice Brennan's concurrence, joined by Justices Douglas and Stewart, merely remarked that although *Argersinger* had increased the burden on the resources of the legal community, innovative programs like law student clinical programs could "make a significant contribution" to reducing that burden. *Id.* at 45 (Brennan, J., concurring).

Chief Justice Burger also wrote a separate concurrence, emphasizing the increased burden placed on the legal community. *Id.* at 41-42 (Burger, C.J., concurring). He stated, however, that the Court's decision should not surprise the legal profession and that he had confidence in the ability of the profession to "ris[e] to the burden[] placed on it." *Id.* at 43-44 (Burger, C.J., concurring).

Justice Powell's lengthy concurrence, joined by Justice Rehnquist, sought a more flexible approach than that adopted by the majority in *Argersinger*. *Id.* at 47 (Powell, J., concurring). He disagreed with the majority's "rigid[]" rule that a defendant may not be imprisoned without the benefit of counsel. *Id.* (Powell, J., concurring). Justice Powell would instead "hold that the right to counsel in petty-offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis." *Id.* at 63 (Powell, J., concurring).

Justice Powell initially agreed with the majority that the Supreme Court of Florida incorrectly held that misdemeanor defendants, even those charged with petty misdemeanors, are not entitled to the benefit of counsel. *Id.* at 47 (Powell, J., concurring). According to Justice Powell, many petty offenses present issues of such complexity that a fair trial may not result when the defendant lacks the benefit of counsel. *Id.* at 47-48 (Powell, J., concurring). Justice Powell believed that the appointment of counsel in only serious misdemeanors, or where the defendant is

Seven years after *Argersinger*, however, in *Scott v. Illinois*,⁶⁸ a sharply-divided Court decided which misdemeanor defendants *Argersinger* encompassed.⁶⁹ The uncounseled defendant in *Scott* had been fined after a conviction for theft.⁷⁰ The statute under which *Scott* had been convicted, however, permitted a jail sentence of up to one year.⁷¹ The Court was split over whether the standard should be that of "actual imprisonment" or "authorized imprisonment."⁷² The Court held that a defendant's uncounseled conviction was valid even where imprisonment of up to one year was authorized, as long as no term of imprisonment was actually imposed.⁷³ The dissent believed, however, that the spirit of *Gideon* and

incarcerated ignores the fact that "[d]ue process . . . embodies principles of fairness rather than immutable line drawing." *Id.* at 49 (Powell, J., concurring). Serious consequences may result from a penalty, though it does not involve incarceration. *Id.* at 47-48 (Powell, J., concurring). The majority's rule, according to Justice Powell, fails to take into account concepts of fairness critical to Fourteenth Amendment analysis. *Id.* at 52 (Powell, J., concurring). Justice Powell's concurrence also expressed a concern for the increased burden on the lower courts. *Id.* at 58-62 (Powell, J., concurring).

Justice Powell concluded that the majority decision, because it did not take into account concepts of fairness, was too drastic. *Id.* at 63 (Powell, J., concurring). According to Justice Powell, the right to counsel for misdemeanants should be extended on a case-by-case basis. *Id.* (Powell, J., concurring). Justice Powell perhaps best summarized his opinion by stating that "[i]t is my view that relying upon judicial discretion to assure fair trial of petty offenses not only comports with the Constitution but will minimize problems which otherwise could affect adversely the administration of criminal justice in the very courts which already are under the most severe strain." *Id.* at 66 n.34 (Powell, J., concurring).

68. 440 U.S. 367 (1979).

69. *Id.* at 373 (5-4 decision) ("Although the intentions of the *Argersinger* Court are not unmistakably clear, . . . we conclude today that . . . actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."). As the majority in *Scott* recognized, the majority opinion in *Argersinger* did not consider whether its rule applied in the context of a defendant who had served no sentence "for here petitioner was in fact sentenced to jail." *Id.* at 370 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)).

70. *Scott*, 440 U.S. at 368. *Scott* was fined \$50 for shoplifting merchandise valued at under \$150. *Id.* His bench trial conviction was affirmed on appeal by the Illinois intermediate appellate court and the Supreme Court of Illinois. *Id.* These convictions were obtained over his objection that he was entitled to counsel under the Sixth and Fourteenth Amendments to the Constitution. *Id.*

71. *Id.* The penalty provision of the statute under which *Scott* was convicted provided in pertinent part:

A person first convicted of theft of property not from the person and not exceeding \$150 in value shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to five years.

Id. at n.2 (quoting ILL. REV. STAT. ch. 38, § 16-1 (1969)).

72. *Scott*, 440 U.S. at 373, 375.

73. *Id.* at 373-74. The Court began its analysis by stating that it was unlikely that the Sixth Amendment contemplated the appointment of counsel for indigent defendants. *Id.* at 370. The Court then reviewed the history of the Sixth Amend-

Argersinger compelled a finding that Scott was entitled to counsel.⁷⁴

ment right to counsel decisions. *Id.* at 370-72. First, the Court noted that the Framers never "contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Id.* at 370 (citing BEANEY, *supra* note 2, at 27-30). The Court went on to state that decisions starting with *Powell* and continuing up to *Argersinger*, have "departed from the literal meaning of the Sixth Amendment." *Id.* at 370-72. The Court proceeded to dissect *Argersinger* and characterized it as holding that only imprisoned defendants are entitled to counsel. *Id.* at 373. *Argersinger*, therefore, mandated a finding that Scott's conviction was valid. *Id.* at 373-74. The Court stated that *Argersinger's* holding was justified "because of the Court's conclusion that incarceration was 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." *Id.* at 372-73. Otherwise, *Scott* reasoned that the societal cost of appointing counsel for every defendant who *may* lose his liberty would be too high. *Id.* Further, "the 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." *Id.* at 373.

Justice Powell again wrote a separate concurrence, though he joined the opinion of the Court. *Id.* at 374-75 (Powell, J., concurring). He stated that he believed *Argersinger's* holding was not "required by the Constitution." *Id.* at 374 (Powell, J., concurring). Further, he had "continuing reservations about the *Argersinger* rule." *Id.* Considerations of stare decisis and the need for "clear guidance" to trial courts, however, compelled him to join the Court's opinion. *Id.* at 374-75 (Powell, J., concurring). He hoped, however, that a majority of the Court would eventually adopt a more flexible rule. *Id.* at 375 (Powell, J., concurring). He may have had in mind the more flexible rule he promulgated in *Argersinger*. See *Argersinger*, 407 U.S. at 44-67 (1972) (Powell, J., concurring). For a discussion of Justice Powell's concurrence in *Argersinger*, see *supra* note 67.

74. *Scott*, 440 U.S. at 375-76 (Brennan, J., dissenting). Justice Brennan, joined by Justices Marshall and Stevens, vigorously argued against the majority's characterization of *Gideon* and *Argersinger*. *Id.* at 377-84 (Brennan, J., dissenting). They argued that the Sixth Amendment right to counsel should extend to "all criminal prosecutions." *Id.* at 375 (Brennan, J., dissenting) (quoting U.S. CONST. amend. VI).

The theme of this dissenting opinion revolved around the "clear and sound" principles of *Gideon* and *Argersinger* which the majority "chooses to ignore." *Id.* at 376 (Brennan, J., dissenting). Justice Brennan's dissent noted that "implicit and explicit" in *Argersinger* was the understanding that the right to counsel existed in trials involving serious misdemeanors. *Id.* at 380-82 (Brennan, J., dissenting); see also Steven Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601, 609 (1975) (stating that *Argersinger* established "two-dimensional" test for right to counsel where either incarceration is likely or offense is non-petty misdemeanor).

Justice Brennan then argued that the correct standard for determining whether to appoint counsel should be in all cases where there is "authorized imprisonment," rather than the majority's adoption of an "actual imprisonment" standard. *Scott*, 440 U.S. at 382 (Brennan, J., dissenting). First, the dissent argued, "the 'authorized imprisonment' standard more faithfully implements the principles of the Sixth Amendment identified in *Gideon*." *Id.* (Brennan, J., dissenting). Second, "authorized imprisonment" is a test that presents fewer administrative problems. *Id.* at 383 (Brennan, J., dissenting). Justice Brennan's dissent referred with approval to many of the problems enunciated in Justice Powell's concurrence in *Argersinger*. *Id.* (Brennan, J., dissenting); see also *Argersinger*, 407 U.S. at 52-55 (Powell, J., concurring) (providing detailed prediction of difficulties majority decision would create). Justice Brennan also characterized the majority's "concern for

The next year, in *Baldasar v. Illinois*,⁷⁵ the Court was presented with the question of whether a prior, uncounseled, misdemeanor conviction could be used to increase the sentence of a defendant found guilty in a subsequent proceeding.⁷⁶ When the defendant in *Baldasar* was convicted

the economic burden that an 'authorized imprisonment' standard" would impose as "both irrelevant and speculative." *Scott*, 440 U.S. at 384 (Brennan, J., dissenting). Further, the defendant would be entitled to counsel in at least 33 of the current states because those states "appear to be governed only by the 'likelihood of imprisonment' standard." *Id.* at 388 & n.22 (Brennan, J., dissenting).

Justice Brennan's dissent continued by criticizing the majority for providing defendants with less rights under the right to counsel "than the admittedly less fundamental right to jury trial." *Id.* at 389 (Brennan, J., dissenting) (citing Justice Powell's concurrence in *Argersinger*). This dissenting opinion also managed to predict the confusion over the collateral consequences allowable under *Scott*. *Id.* at 382 n.13 (Brennan, J., dissenting); see, e.g., GARCIA, *supra* note 1, at 13 ("Despite *Baldasar's* mitigating effect, the opinion fails to remove the bulk of the pernicious effects fostered by *Scott*."). This confusion led to the Court's plurality opinion the following term in *Baldasar* and fourteen years of diverging lower court views until the *Nichols* decision was handed down. For a discussion of the *Baldasar* holding and the confusion it created, see *infra* notes 75-85 and accompanying text.

Justice Blackmun, in a separate dissent, stated his view that the right to counsel was invoked when defendants were either prosecuted for a non-petty offense or convicted and incarcerated. *Scott*, 440 U.S. at 389-90 (Blackmun, J., dissenting). Consequently, he argued not that the right to counsel should attach where there is authorized imprisonment (as the other dissenters did), but rather that the right to counsel should attach where either: (1) the offense is non-petty, or (2) actual imprisonment is imposed. *Id.* (Blackmun, J., dissenting). For further criticism of the majority's holding in *Scott* as inconsistent with prior precedent, see GARCIA, *supra* note 1, at 12-14; Lawrence Herman & Charles A. Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 91-94 (1979); Alan Rubin, Note, *Scott v. Illinois: The Right to Counsel Retreats*, 41 U. PITT. L. REV. 647, 655-61 (1980); Stephan A. Waring, Note, *Criminal Procedure: The Outer Limits of the Indigent's Right to Appointed Counsel*, 5 U. DAYTON L. REV. 177, 185-86 (1980).

75. 446 U.S. 222 (1980) (per curiam).

76. *Baldasar*, 446 U.S. at 222. Under *Scott*, the uncounseled misdemeanor conviction was valid as long as no sentence of imprisonment was imposed. *Scott*, 440 U.S. at 373-74 (stating "that no indigent criminal defendant be sentenced to a term of imprisonment" without benefit of counsel). The question in *Baldasar*, therefore, was whether the conviction, valid under *Scott* because no sentence had been imposed, could be *collaterally* used to increase a sentence. *Baldasar*, 446 U.S. at 222; see also GARCIA, *supra* note 1, at 13 (explaining *Baldasar* as "proscribing the use of an uncounseled conviction for the purpose of sentence enhancement").

There is, however, some dispute over what question was presented in *Baldasar*. Some lower courts, in attempting to interpret *Baldasar*, limited the holding to the exact facts of the case, which involved increasing a misdemeanor to a felony due to a prior uncounseled conviction. See, e.g., *Wilson v. Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. Unit A 1980) (stating that *Baldasar* only held that "a prior uncounseled misdemeanor conviction may not [be] used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term"), *cert. denied*, 451 U.S. 912 (1981). *But see* *United States v. Brady*, 928 F.2d 844, 854 (holding "that an 'uncounseled misdemeanor conviction [may] not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction'") (quoting *Baldasar v. Illinois*, 446 U.S. 222, 226 (1980) (Marshall, J., concurring)). Further, the per curiam opinion in *Baldasar* itself states that the question is whether "a conviction [valid under *Scott*] may be used under an enhanced penalty

of a misdemeanor for the second time, a state recidivist statute turned the second misdemeanor into a felony despite the fact that his first conviction was uncounseled.⁷⁷ The Court, by the narrowest of margins, held that such use of a prior conviction was unconstitutional under the Sixth Amendment.⁷⁸ A vigorous dissent, however, garnered more votes than

statute to convert a subsequent misdemeanor into a felony with a prison term." *Baldasar*, 446 U.S. at 222. Because, however, *Nichols* presumed the broadest holding of *Baldasar* and reversed it, the distinction is not particularly important. *Nichols v. United States*, 114 S. Ct. 1921, 1924 (1994).

77. *Baldasar*, 446 U.S. at 223. The defendant, Thomas Baldasar, was convicted of misdemeanor theft in May of 1975. *Id.* Proceeding without benefit of counsel, he was convicted, fined \$159 and sentenced to a year of probation. *Id.* (citing ILL. REV. STAT., ch. 38, §§ 16-1(e)(1), 1005-8-3(a)(1), 1005-9-1(a)(2) (1975)). In November of that year, he was charged with the theft of a \$29 shower head. *Id.* Pursuant to an Illinois recidivist statute, the prosecution charged him with a felony. *Id.* (citing ILL. REV. STAT., ch. 38, § 1005-8-1(b)(5) (1975)). Defense counsel unsuccessfully objected to the use of the prior, uncounseled conviction. *Id.* Baldasar was convicted and sentenced to imprisonment for one to three years. *Id.* The Illinois Appellate Court affirmed and the Supreme Court of Illinois denied leave to appeal. *Id.* at 223-24.

78. *Baldasar*, 446 U.S. at 224 (5-4 decision) (per curiam). The per curiam opinion, after reviewing the facts, did not provide a detailed rationale but rather merely referred the reader to the three concurrences. *Id.* Justice Stewart, joined by Justices Brennan and Stevens, wrote a three-sentence concurrence. *Id.* at 224. Justice Stewart, despite his lack of explanation, provided the swing vote from the *Scott* decision. It was his vote, joined with those of the dissenters in *Scott* that gave the *Baldasar* majority the minimum number of votes needed to reverse the lower court. *See id.*; *Scott*, 440 U.S. at 367.

Justice Stewart's concurrence simply stated that because defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense . . . [i]t seems clear to me that this prison sentence violated the constitutional rule of *Scott*." *Baldasar*, 446 U.S. at 224 (Stewart, J., concurring). Justice Stewart also noted that Illinois, prosecuting here as in *Scott*, expressly anticipated the result in this case in its brief in *Scott*:

When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from enhancing subsequent offenses*. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion.

Id. at 224-25 n.* (Stewart, J., concurring) (quoting Brief for Respondent at 20, *Scott v. Illinois*, 440 U.S. 367 (1979) (No. 77-1177)).

Justice Marshall, also joined by Justices Brennan and Stevens, wrote the broadest of the three concurring opinions. *Baldasar*, 446 U.S. at 224-29 (Marshall, J., concurring). Justice Marshall reasoned that the basis of *Argersinger* was that an uncounseled misdemeanor conviction was too unreliable to allow imprisonment. *Id.* at 227-28 (Marshall, J., concurring). Due to this unreliability, an uncounseled misdemeanor conviction is "not valid for all purposes." *Id.* at 226 (Marshall, J., concurring). Further, to allow "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases." *Id.* at 228-29 (Marshall, J., concurring).

Justice Blackmun, writing a separate concurrence, provided the critical fifth vote. *Id.* at 229-30 (Blackmun, J., concurring). Justice Blackmun limited his con-

any one of the three concurrences that constituted the majority.⁷⁹

Baldasar, however, did not give clear guidance to the lower courts.⁸⁰ Rather, the per curiam opinion merely referred to the reasoning in the three concurring opinions, none of which commanded the votes of more than three Justices.⁸¹ The Court in *Baldasar* splintered in such a way that both the states⁸² and the federal circuit courts of

currence to reaffirming his dissenting view in *Scott*. *Id.* (Blackmun, J., concurring). Had the *Scott* Court adopted his approach, he stated that "the present litigation, in all probability, would not have reached us." *Id.* at 230 (Blackmun, J., concurring). Because *Baldasar* was prosecuted for a serious misdemeanor and was entitled to counsel under Justice Blackmun's test in his *Scott* dissent, Justice Blackmun therefore concurred with the majority. *Id.* (Blackmun, J., concurring). For a discussion of Justice Blackmun's dissent in *Scott*, see *supra* note 74 and accompanying text.

79. *Baldasar*, 446 U.S. at 230-35 (Powell, J., dissenting). Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, dissented. *Id.* Justice Powell found "logically indefensible" the majority's finding that a conviction, valid under *Scott*, was invalid for collateral purposes. *Id.* at 231 (Powell, J., concurring). He further expressed concern that the lower courts "no longer have clear guidance from this Court." *Id.* For a discussion of the confusion created by *Baldasar*, see *infra* notes 80-83 and accompanying text.

Justice Powell asserted that just as constitutionally invalid convictions were invalid for all purposes, so should constitutionally valid convictions be valid for all purposes. *Baldasar*, 446 U.S. at 232-33 (Powell, J., concurring); see also *Loper v. Beto*, 405 U.S. 473, 483 (1972) (holding that uncounseled felony conviction, invalid under *Gideon*, could not be used to impeach defendant); *United States v. Tucker*, 404 U.S. 443, 448-49 (1972) (holding that prior uncounseled felony conviction, invalid under *Gideon*, could not be used by sentencing judge); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (holding that uncounseled felony conviction, invalid under *Gideon*, could not enhance punishment under recidivist statute). For a general discussion of collateral uses of invalid convictions, see Paul D. Leake, Note, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense: Extending Burgett v. Texas and United States v. Tucker*, 19 COLUM. HUM. RTS. L. REV. 123 (1987).

80. See, e.g., *United States v. Nichols*, 979 F.2d 402, 407 (6th Cir. 1992) (stating that "[g]iven the diverse rationales supporting *Baldasar's* result, numerous courts have questioned whether the case expresses any single holding and, accordingly, have largely limited *Baldasar* to its facts"); see also Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment, Baldasar and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 165, 167 (1992) (stating that "no discernible rule emerges" from *Baldasar* and calling on Supreme Court to "clarify the nebulous state of the law").

81. For a discussion of the various concurring opinions and the dissenting opinion in *Baldasar*, see *supra* notes 78-79 and accompanying text.

82. See, e.g., *Bilbrey v. State*, 531 So. 2d 27, 32 (Ala. Crim. App. 1987) (holding that *Baldasar* prohibits using prior uncounseled convictions to enhance subsequent sentence); *Pananen v. State*, 711 P.2d 528, 532 (Alaska Ct. App. 1985) (construing *Baldasar* to hold "that an uncounseled conviction is simply too unreliable to be depended on for purposes of imposing a sentence of incarceration, whether that sentence is imposed directly or collaterally"); *Lovell v. State*, 678 S.W.2d 318, 320 (Ark. 1984) (citing *Baldasar* and stating that it is impermissible to use prior conviction to enhance sentence unless misdemeanor was represented by counsel or waived counsel); *Krewson v. State*, 552 A.2d 840, 841 (Del. 1988) (same); *State v. Beach*, 592 So. 2d 237, 239 (Fla. 1992) (reaffirming adoption of Blackmun's concurrence as holding of *Baldasar*); *State v. Vares*, 801 P.2d 555, 557 (Haw. 1990) (stating that "[a]n uncounseled conviction cannot be used collaterally to support

an enhanced sentence where such enhanced sentence includes a term of imprisonment"); *People v. Finley*, 568 N.E.2d 412, 414 (Ill. App. Ct. 1991) (explaining that "[t]he rationale underlying the *Baldasar* decision is that an uncounseled conviction is not sufficiently reliable to support a sentence of imprisonment"); *State v. Cooper*, 343 N.W.2d 485, 486 (Iowa 1984) (disallowing use of prior, uncounseled misdemeanor conviction to enhance sentence of incarceration); *State v. Priest*, 722 P.2d 576, 579 (Kan. 1986) (same), *overruled by State v. Delacruz*, 899 P.2d 1042 (Kan. 1995); *State v. Wiggins*, 399 So. 2d 206, 207 (La. 1981) (stating that *Baldasar* precluded use of prior, uncounseled misdemeanor conviction to enhance subsequent sentence); *State v. Dowd*, 478 A.2d 671, 678 (Me. 1984) (same); *People v. Olah*, 298 N.W.2d 422 (Mich. 1980) (stating that *Baldasar* held that "[a] court may not enhance punishment at sentencing because of a misdemeanor or ordinance conviction obtained when defendant was not represented by counsel"), *cert. denied*, 450 U.S. 957 (1981); *People v. Martinez*, 485 N.W.2d 124, 128 (Mich. Ct. App. 1992) (holding that sentencing court may not consider prior uncounseled convictions in subsequent sentencing); *State v. Fussy*, 467 N.W.2d 601, 605 (Minn. 1991) (reaffirming Minnesota Supreme Court holding in *State v. Nordstrom*, 331 N.W.2d 901, 905 (Minn. 1983), which disallowed use of prior, uncounseled misdemeanor conviction); *State v. Welty*, 729 S.W.2d 594, 601 (Mo. Ct. App. 1987) (stating that prior uncounseled conviction cannot be used to enhance sentence in subsequent proceeding where incarceration is to be imposed unless counsel is waived); *State v. Reimers*, 496 N.W.2d 518, 523 (Neb. 1993) (allowing use of prior, uncounseled misdemeanor conviction only where defendant had benefit of counsel or where knowing, intelligent waiver affirmatively appears on record); *State v. Smith*, 329 N.W.2d 564, 566 (Neb. 1983) (rejecting pre-*Baldasar* Nebraska precedent and adopting Justice Marshall's concurrence in *Baldasar* that prior, uncounseled misdemeanor conviction could not be used to enhance subsequent sentence); *State v. Laurice*, 575 A.2d 1340, 1347 (N.J.) (same), *cert. denied*, 498 U.S. 967 (1990); *State v. Ulibarri*, 632 P.2d 746, 748 (N.M. Ct. App.) (recognizing that *Baldasar* and *Argersinger* stand for proposition that "an uncounseled prior conviction, felony or misdemeanor, may not be used to enhance a subsequent offense"), *cert. denied*, 632 P.2d 1181 (N.M. 1981); *People v. Butler*, 468 N.Y.S.2d 274 (App. Div. 1983) (requiring record showing of knowing, intelligent waiver in order to use prior, uncounseled misdemeanor conviction to enhance subsequent penalty); *State v. Black*, 277 S.E.2d 584, 585 (N.C. Ct. App.) (disallowing collateral increase of sentences based upon prior, uncounseled, misdemeanor conviction), *cert. denied*, 281 S.E.2d 395 (N.C. 1991); *State v. Lober*, No. 92-CA-29, 1993 WL 81923, at *3 (Ohio Ct. App. March 23, 1993) (same); *Bromley v. State*, 757 P.2d 382, 386 (Okla. Crim. App. 1988) (holding that Justice Marshall's opinion is holding of *Baldasar* and prohibiting use of prior, uncounseled misdemeanor convictions to enhance subsequent penalty); *City of Pendleton v. Standerfer*, 688 P.2d 68, 70 (Or. 1984) (stating that *Baldasar*'s most "straight-forward" holding is that "[i]f the initial uncounseled misdemeanor conviction cannot be used directly to impose a prison term, then it cannot be used indirectly either to elevate a subsequent charge from a misdemeanor to a felony or to impose an increased term of imprisonment"); *In re Kean*, 520 A.2d 1271, 1277-78 (R.I. 1987) (stating that *Baldasar* disallowed use of prior, uncounseled misdemeanor convictions to enhance subsequent sentence but placing burden on defendant to show lack of waiver of counsel in prior proceeding); *State v. O'Brien*, 666 S.W.2d 484, 485 (Tenn. Crim. App. 1984) (adopting Supreme Court of New Mexico's holding in *State v. Ulibarri*, 632 P.2d 746, 748 (N.M. 1981) and concluding that subsequent use of prior, uncounseled misdemeanor conviction is barred by *Baldasar*); *State v. Triptow*, 770 P.2d 146, 147 n.3 (Utah 1989) (stating that *Baldasar* bars use of prior, uncounseled misdemeanor conviction to enhance subsequent sentence); *Sargent v. Commonwealth*, 360 S.E.2d 895, 902 (Va. Ct. App. 1987) (same); *State v. Armstrong*, 332 S.E.2d 837, 841 (W. Va. 1985) (stating that both Sixth Amendment and state constitution forbid use of prior uncounseled conviction to enhance current sentence), *overruled by*

appeals⁸³ could not agree on the exact holding of *Baldasar*.⁸⁴ With the

State v. Hopkins, 453 S.E.2d 317, 324 (W. Va. 1994) (relying in part on *Nichols* and holding that prior, uncounseled misdemeanor conviction can be used to enhance sentence); State v. Novak, 318 N.W.2d 364, 368-69 (Wis. 1982) (allowing use of prior, uncounseled conviction where prior proceeding merely involved civil forfeiture proceeding); Laramie v. Cowden, 777 P.2d 1089, 1090 (Wyo. 1989) (requiring either showing of representation or affirmative waiver of counsel in order to use prior uncounseled conviction in enhancing subsequent sentence); see also State v. Keyes, No. 950048, 1995 WL 510359, at *2 (N.D. Aug. 29, 1995) (holding that State v. Orr, 375 N.W. 171, 176 (N.D. 1985), held that as matter of state constitutional law, prior uncounseled conviction cannot be used to enhance sentence). But see Moore v. State, 352 S.E.2d 821, 822 (Ga. Ct. App.) (restricting *Baldasar* to its facts and holding that use of prior, uncounseled misdemeanor conviction to enhance subsequent sentence is constitutional), cert. denied, 484 U.S. 904 (1987); Berry v. State, 561 N.E.2d 832, 840 (Ind. Ct. App. 1990) (limiting *Baldasar* to its facts and holding that subsequent penalty may be enhanced by prior, uncounseled conviction); State v. Grogan, 385 N.W.2d 254, 255 (Iowa 1987) (allowing use of prior, uncounseled convictions in repeat offender statute to be used to revoke driver's license); Sheffield v. City of Pass Christian, 556 So. 2d 1052, 1053 (Miss. 1990) (restricting *Baldasar* to facts and allowing collateral use to enhance sentence); State v. Grondin, 563 A.2d 435, 439-40 (N.H. 1989) (same); Commonwealth v. Thomas, 507 A.2d 57 (Pa. 1986) (allowing use of prior, uncounseled misdemeanor conviction to enhance sentence of defendant believing Justice Blackmun and four dissenters in *Baldasar* would have held his prior conviction valid for such use); State v. Chance, 405 S.E.2d 375 (S.C. 1991) (same), cert. denied, 502 U.S. 1120 (1992); State v. Hickok, 695 P.2d 136, 140 (Wash. Ct. App. 1985) (stating in dicta that *Baldasar* merely stood for proposition that prior, uncounseled misdemeanor conviction cannot result in elevation of subsequent offense from misdemeanor to felony).

83. See *Nichols*, 114 S. Ct. at 1926-27. Given the diverse holdings and reasons involved, it is difficult to categorize the split in circuits into two groups. It is clear, however, that some of the circuits construed the *Baldasar* opinion narrowly, while others considered it to be more far reaching. The former group of circuits limited *Baldasar* to its facts and held that a prior, uncounseled, misdemeanor conviction should be allowed to increase a subsequent penalty as long as it did not specifically involve elevating a misdemeanor to a felony. See *United States v. Thomas*, 20 F.3d 817, 823 (8th Cir.) (en banc) (holding that *Baldasar* only prevents incarceration where it would otherwise not be imposed but does not apply to strictly sentence-enhancing circumstances), cert. denied, 115 S. Ct. 98 (1994); *United States v. Falesbork*, 5 F.3d 715, 718 (4th Cir. 1993) (restricting *Baldasar* decision only to prevent elevation of misdemeanor to felony and holding that use of prior conviction to enhance subsequent sentence is constitutional); *United States v. Follin*, 979 F.2d 369, 376 (5th Cir. 1992) (finding *Baldasar* to be of little guidance and concluding that prior uncounseled misdemeanor offenses valid for all purposes), cert. denied, 113 S. Ct. 3004 (1993); *United States v. Castro-Vega*, 945 F.2d 496, 500 (2d Cir. 1991) (same); *United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988) (per curiam) (allowing sentencing court to consider uncounseled convictions); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) (stating that *Baldasar* "decision provides little guidance outside of the precise factual context in which it arose"), cert. denied, 465 U.S. 1068 (1984). Some circuits, however, have held that *Baldasar* should be read as prohibiting prior, uncounseled misdemeanor convictions from enhancing a subsequent penalty, or allowing only very limited use of the prior conviction. See *United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991) (using Justice Marshall's broad concurrence as basis for holding that prior uncounseled convictions may not be used to enhance subsequent sentence); cf. *Santillanes v. United States Parole Comm'n*, 754 F.2d 887 (10th Cir. 1985) (allowing use of uncounseled conviction where use depends on fact that

state and federal courts in disarray as to the answer to this important question of Constitutional and criminal law, the United States Supreme Court granted certiorari in *Nichols v. United States*.⁸⁵ The *Nichols* Court intended to resolve the confusion caused by *Baldasar* and to provide clear guidance to the lower courts.⁸⁶

III. *NICHOLS V. UNITED STATES*

A. *Facts*

In September of 1990, defendant Kenneth Nichols and his co-conspirator Robert Harkins attempted to purchase cocaine from federal agents.⁸⁷ Harkins contacted the agents and agreed to pay \$65,000 for three kilograms of cocaine.⁸⁸ Harkins and Nichols were arrested when they at-

conviction exists rather than reliability of conviction); *Charles v. Foltz*, 741 F.2d 834, 837 (6th Cir. 1984) (allowing use of uncounseled misdemeanor convictions only for impeachment purposes), *cert. denied*, 469 U.S. 1193 (1985).

84. See *Fu*, *supra* note 80, at 166 n.13 (recognizing that "conflicting views of the effect of *Baldasar* on the Federal Sentencing Guidelines has resulted in a split of opinion between circuits"). The Supreme Court also provided little guidance during the period between *Baldasar* and *Nichols*. See *Thomas*, 20 F.3d at 822 n.3 (noting that Supreme Court's "most revealing restatement of *Baldasar's* rule is enclosed within parentheses within a citation within a footnote," which stated that a "court may not constitutionally use prior uncounseled misdemeanor conviction collaterally to enhance a subsequent misdemeanor to a felony with an enhanced term of imprisonment" (referring to Court's cite to *United States v. Mendoza-Lopez*, 481 U.S. 841 n.18 (1987))).

85. *United States v. Nichols*, 114 S. Ct. 1921 (1994).

86. *Id.* Justice White had previously argued that the Court should grant certiorari in order to resolve the confusion over *Baldasar's* holding. See *Moore v. Georgia*, 484 U.S. 904, 905 (1987) (White, J., dissenting). Justice White stated that he would grant certiorari to determine *Baldasar's* "scope and proper application" because "the confusion over *Baldasar's* holding has led to uneven application of that case and conflicting decisions in the courts below." *Id.*

Justice White's concerns clearly animated the Court's grant of certiorari in *Nichols*. *Id.* at 1925. In *Nichols*, the Court stated that "[w]e granted certiorari . . . to address this important question of Sixth Amendment law, and to thereby resolve a conflict among state courts as well as Federal Courts of Appeals." *Id.* For a discussion concerning the confusion in the lower courts after *Baldasar*, see *supra* notes 82-83 and accompanying text.

87. *United States v. Nichols*, 979 F.2d 402, 405 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994). This was the second time Nichols and Harkins had attempted to make a drug purchase from federal agents. *Id.* The first attempt occurred in March of 1990 when, through a third party, federal agents contacted Nichols and Harkins and offered to sell them cocaine in large quantities. *Id.* at 404. Nichols and Harkins agreed to purchase five kilograms at \$20,000 per kilogram. *Id.* Nichols sent Harkins to meet with the agents and instructed him to bring one kilogram back for testing without paying for it. *Id.* at 404-05. If the cocaine was found to be satisfactory, Harkins planned to meet with the agents and make full payment on the cocaine. *Id.* at 405. Harkins met with the agents in a Tennessee motel room, but the agents refused to allow Harkins to leave with an unpaid kilogram of cocaine. *Id.* Harkins telephoned Nichols and was instructed to call off the deal, which was never completed. *Id.*

88. *Id.*

tempted to make their purchase and soon thereafter, Harkins decided to cooperate with the authorities.⁸⁹

A grand jury handed down a three-count indictment against Nichols, who subsequently plead guilty to count one, possession with intent to distribute cocaine.⁹⁰ Three months later, a pre-sentence report set a sentencing guideline range of 188 to 235 months.⁹¹ The sentencing court held hearings to consider Nichols' objections to the report.⁹² The objections included the pre-sentence report's use of an uncounseled drunk-driving conviction, a misdemeanor Nichols had received in 1983.⁹³ After the sec-

89. *Id.* Nichols, in an attempt to protect himself, sent Harkins to meet the federal agents and conduct the transaction. *Id.* Nichols and Harkins were unaware, however, that surveillance officers had observed their meeting prior to the transaction. *Id.* Approximately 15 minutes after Harkins' attempt to conduct the transaction was halted by his arrest, Nichols was also arrested. *Id.* The officers found Nichols emerging from a wooded area and walking towards his truck. *Id.* A subsequent search of the woods uncovered \$40,000 hidden in a tree stump. *Id.* Harkins' cooperation and subsequent testimony served to incriminate Nichols even further. *Id.* at 413.

90. *Id.* at 405 (citing 21 U.S.C. § 841 (1988) (amended 1990) and 21 U.S.C. § 846 (1988)). Both Nichols and Harkins were charged with the same three counts. *Id.* Count two charged them with attempt to possess with the further attempt to distribute, also in violation of 21 U.S.C. § 841 (1988) (amended 1990) and 21 U.S.C. § 846 (1988). *Id.* Count three charged them with violating 18 U.S.C. § 1952(a) (1988) (amended 1990), by facilitating a drug trafficking offense by traveling in interstate commerce. *Id.*

91. *Nichols*, 114 S. Ct. at 1424. The report included an assessment of four criminal history points. *Id.* Three resulted from a 1983 felony drug conviction, while the fourth resulted from a 1983 misdemeanor conviction for driving under the influence. *Id.* With respect to the misdemeanor conviction, Nichols could have potentially been punished with up to one year of imprisonment and fined \$1,000. *Id.* at 1424 n.1 (citing GA. CODE ANN. § 40.6-391(c) (1982)). He was, however, only fined \$250 and not incarcerated. *Id.* at 1424. His conviction was therefore valid under *Scott v. Illinois*, 440 U.S. 367 (1979), because he was not "actually" incarcerated. *Scott*, 440 U.S. at 374. For a discussion of the *Scott* decision, see *supra* notes 68-74 and accompanying text.

The fourth criminal history point (the misdemeanor conviction) increased Nichols' Criminal History Category from Category II to Category III under the Sentencing Guidelines, resulting in an increase from a possible 168-210 month sentence for Category II to a possible 188-235 month sentence under Category III. *Nichols*, 114 S. Ct. at 1424 (citing U.S.S.G., *supra* note 10, ch. 4, pt. A). For a discussion of the Sentencing Guidelines, see *supra* note 10.

92. *Nichols*, 979 F.2d at 405. In addition to the *Baldasar* claim, Nichols contested the sentencing court's consideration of suppressed evidence in connection with a prior narcotics charge for which no conviction had been obtained. *United States v. Nichols*, 763 F. Supp. 277, 280-81 (E.D. Tenn. 1991), *aff'd*, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

93. *Nichols*, 763 F. Supp. at 278. Nichols offered two objections to the use of the prior uncounseled conviction. First, he argued that the pre-sentence report improperly applied a version of the Sentencing Guidelines that had been amended *after* his offense. *Id.* at 278-79. The November 1, 1990 amendment to the Sentencing Guidelines stated that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." *Id.* at 278 (quoting U.S.S.G., *supra* note 10, § 4A1.2 cmt.). The Commission included the following

ond hearing, the sentencing court concluded that it would consider the uncounseled misdemeanor conviction in calculating Nichols' criminal-history score.⁹⁴

The court then sentenced Nichols to 235 months imprisonment, the maximum sentence within the Guidelines given Nichols' status.⁹⁵ Nichols appealed the sentence to the United States Court of Appeals for the Sixth Circuit, attacking, *inter alia*, the use of his prior, uncounseled misdemeanor conviction.⁹⁶ A divided panel affirmed his con-

explanatory language: "[t]he Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar*." *Nichols*, 114 S. Ct. at 1927 n.11 (quoting 55 Fed. Reg. 5741 (1990)).

The November 1, 1990 amendment replaced the language of the 1989 Sentencing Guidelines that read "if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score." *Nichols*, 763 F. Supp. at 278-79 (quoting UNITED STATES SENTENCING GUIDELINES, *Guidelines Manual*, § 4A1.2, cmt., n.6 (Nov. 1989)). This language, Nichols argued, which was in effect when he committed his offense, was the proper language to use for determining his criminal history score. *Id.* Further, this language clearly precluded the use of his prior, uncounseled misdemeanor conviction in determining his offense level. *Id.*

Nichols' second claim was based on *Baldasar*. *Nichols*, 979 F.2d at 406. Nichols argued that the Sentencing Guidelines, if read to allow the use of his prior conviction, promulgated a system in violation of his Sixth Amendment rights. *Id.* Under *Baldasar*, Nichols argued, his uncounseled misdemeanor conviction could not be used to increase his sentence and therefore the pre-sentence report was incorrect. *Id.*

94. *Nichols*, 979 F.2d at 405. The sentencing court rejected Nichols' threshold objection that the pre-sentence report had applied the wrong version of the Sentencing Guidelines. *Id.* at 405-06. The district court determined that this objection could not be sustained because it was "clear that the Sentencing Guidelines have, even prior to November 1, 1990, permitted the counting of uncounseled misdemeanor convictions toward a defendant's criminal history score, although perhaps not very clearly." *Nichols*, 763 F. Supp. at 279.

The district court then rejected Nichols' *Baldasar* claim. *Id.* The court adopted the view taken by the United States Court of Appeals for the Fifth Circuit in *United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990). *Id.* In *Eckford*, the Fifth Circuit interpreted *Baldasar* to stand "only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." *Id.* (citing *Eckford*, 910 F.2d at 220). The district court, therefore, found that Nichols' prior, uncounseled misdemeanor conviction could be used to enhance his sentence. *Id.*

95. *Id.* at 281. The district court remained within the Sentencing Guidelines despite the prosecution's request that the court depart upwards from the guideline range. *Id.* at 280-81. The prosecution sought this departure because it felt that even the maximum guideline range of 235 months did not adequately reflect the seriousness of defendant's criminal behavior. *Id.* at 280. The Court, however, felt that 235 months did not "significantly underrepresent" the defendant's past criminal history. *Id.* at 281; see also U.S.S.G., *supra* note 10, § 4A1.3 (explaining grounds for district courts to depart from Sentencing Guidelines).

96. *United States v. Nichols*, 979 F.2d at 405. In addition to his *Baldasar* claim, Nichols also appealed on four other grounds. First, Nichols argued that the sentencing court's consideration of the suppressed evidence of his 1988 arrest on

drug charges was a violation of his rights under the Fourth Amendment. *Id.* at 408-09. The Sixth Circuit upheld Nichols' first argument in principle, indicating in dicta that illegally seized evidence should not normally be used by a sentencing court in determining a defendant's sentence. *Id.* at 409-12. On the specific facts presented in the case before it, however, the court held that the purpose sought from excluding evidence, to deter police misconduct, would not be properly served by withholding evidence, which was illegally seized in a separate and unrelated incident, from the sentencing court's decision. *Id.* at 411-12.

Second, Nichols cited as error the sentencing court's decision to increase his offense by two levels for firearm possession under § 2D1.1(b)(1) of the Guidelines. *Id.* at 412-13. Nichols contended that his co-conspirator's possession of a firearm was not reasonably foreseeable, and therefore, Nichols was exempt from having the possession attributed to him under the Guidelines. *Id.*; see U.S.S.G., *supra* note 10, § 2D1.1(b)(1). The Sixth Circuit rejected Nichols' unforeseeability arguments, citing Harkins' undisputed testimony that he had asked Nichols whether he should carry a weapon, that the evidence indicated Nichols had previously purchased weapons from Harkins and that the firearms were linked to their drug trafficking activities. *Nichols*, 979 F.2d at 412. The sentencing court increased Nichols' offense by two levels based on these facts and because § 2D1.1(b)(i) of the Guidelines does not require actual knowledge. *Id.* at 412-13.

Next, Nichols argued that the sentencing court's use of a prior, uncompleted drug transaction to set his base offense level was erroneous. *Id.* at 413. This claim arose out of the first attempted drug transaction with federal agents, which Nichols aborted when he was not allowed to test the drugs he was purchasing. *Id.* Because that particular transaction involved a greater quantity of drugs than was actually purchased in the subsequent transaction, the sentencing court allowed that quantity to be used in determining the base offense level pursuant to § 1B1.3(a) of the Guidelines. *Nichols*, 979 F.2d at 413. That section allows the base level to be determined by "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* (citing U.S.S.G., *supra* note 10, § 1B1.3(a)(2)). Further, the sentencing court relied on § 2D1.4 of the Guidelines, which provides:

If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

Id. (quoting U.S.S.G., *supra* note 10, § 2D1.4, cmt. n.1). Specifically, Nichols argued that the prior, uncompleted transaction, having occurred three months before the successful transaction, could not be "part of the same course of conduct or common scheme or plan." *Nichols*, 979 F.2d at 413. Nichols further argued that the prior deal should not be counted because he decided not to complete the deal. *Id.* at 414.

The Sixth Circuit rejected both arguments, stating that precedent allowed a great deal of flexibility in determining whether a particular factual circumstance was included in the same scheme or plan. *Id.* at 413-14. In addition, the Sixth Circuit noted that the Sentencing Guidelines clearly intended the inclusion of an earlier transaction unless "the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount." *Id.* at 414 (quoting U.S.S.G., *supra* note 10, § 2D1.4, cmt., n.1).

Finally, Nichols argued that the sentencing court mistakenly failed to grant him a two-level adjustment for acceptance of responsibility pursuant to § 3E1.1 of the Guidelines. *Id.* The Sixth Circuit recognized that the issue of acceptance of responsibility was a factual determination left to the district court's discretion. *Id.*

viction.⁹⁷ Nichols then appealed to the United States Supreme Court, which granted certiorari.⁹⁸

B. Chief Justice Rehnquist's Majority Opinion

The United States Supreme Court revisited its holding in *Baldasar* and once again examined the question of whether a prior, uncounseled misdemeanor conviction could be used to enhance the sentence of a subsequent conviction.⁹⁹ Chief Justice Rehnquist, who authored the majority opinion in *Nichols*, began his analysis with a brief overview of relevant Supreme Court precedent.¹⁰⁰ The Court then reviewed the concurring and dissent-

The court determined that the lower court had not acted clearly erroneously in refusing to grant Nichols a two-level adjustment because of his denial "despite persuasive evidence to the contrary" of his involvement in the attempted purchase of five kilograms of cocaine in March of 1990. *Id.*

97. *Id.* The Sixth Circuit was only divided with respect to the *Baldasar* question. *Id.* at 415. Judge Jones, writing for the majority on the other four issues, disagreed with his colleagues and would have remanded for sentencing pursuant to a holding that *Baldasar* barred the use of a prior, uncounseled misdemeanor conviction to enhance the penalty in a subsequent conviction. *Id.* at 405-08.

On appeal, Nichols presented the same two-pronged attack to the use of his prior, uncounseled conviction that was used at sentencing. *Id.* at 406. Judge Jones agreed with his colleagues and the sentencing court that the Sentencing Guidelines in effect before 1990 requires the use of his prior, uncounseled conviction "unless so doing would violate the Constitution." *Id.* at 406. Judge Jones did, however, accept Nichols' argument that *Baldasar* barred the use of the prior conviction. *Id.* at 406-08. Judge Jones, relying solely on *Baldasar*, believed "that even a narrow reading" of that case required a finding that the use of a prior, uncounseled misdemeanor conviction to increase a prison sentence for a subsequent conviction was unconstitutional. *Id.* at 407-08.

Judge Nelson, writing for the majority solely with respect to the *Baldasar* issue, disagreed with Judge Jones' analysis. *Id.* at 414-18. Judge Nelson, joined by Judge Lively, relied upon the findings of a majority of the circuit courts and believed that in the wake of confusion following *Baldasar*, the only recourse for the court was to limit *Baldasar* to its facts. *Id.* at 415-18.

Surprisingly, neither Judge Jones nor Judge Nelson addressed the court's dicta in *Wang v. Withworth*, 811 F.2d 952 (6th Cir.), *cert. denied*, 481 U.S. 1051 (1987), where a different Sixth Circuit bench construed *Baldasar* quite broadly and seemed to accept Justice Marshall's concurring opinion as controlling. *Wang*, 811 F.2d at 955. The holding in *Wang* seems clear in light of the unequivocal language used when the Sixth Circuit stated that "*Baldasar* prohibits the use of that uncounseled conviction to 'be used collaterally to impose an increased term of imprisonment.'" *Id.* (quoting *Baldasar v. Illinois*, 446 U.S. 222, 226 (1980) (Marshall, J., concurring), *overruled by Nichols v. United States*, 114 S. Ct. 1921 (1994)). Further, "[i]t does not matter that Wang's prior misdemeanor conviction did not result in imprisonment. *Baldasar* clearly prevents the use of that uncounseled conviction to subject Wang to the possibility of increased imprisonment at a subsequent trial." *Id.* at 956.

98. *Nichols v. United States*, 114 S. Ct. 39 (1994). The Court limited the grant of certiorari to the question of whether a prior, uncounseled misdemeanor conviction could be used to enhance the sentence of a subsequent conviction. *Id.* at 1925 & nn.8-9.

99. *Id.* at 1924-25.

100. *Id.* at 1925-26. Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy and Thomas. *Id.* at 1923. Justice Souter filed an opinion concur-

ing opinions in *Baldasar*.¹⁰¹

The Court attempted to determine what constitutional rule could be derived from *Baldasar*.¹⁰² The Court found, as many lower courts had, that normal methods of determining the holding of a per curiam opinion were unhelpful in interpreting *Baldasar*.¹⁰³ The Court also noted that the confusion *Baldasar* engendered among the lower courts further supported its conclusion that *Baldasar* needed re-examination.¹⁰⁴

After repeating its "continued adherence" to its holding in *Scott v. Illinois*,¹⁰⁵ the Court provided its rationale for overturning *Baldasar* and allowing the use of an uncounseled, misdemeanor conviction to increase a

ring only in the judgment. *Id.* at 1923, 1929. Justice Blackmun, joined by Justices Ginsburg and Stevens, filed a dissenting opinion. *Id.* at 1923, 1931. Justice Ginsburg also filed a separate dissenting opinion. *Id.* at 1923, 1937.

The Court started by analyzing *Scott v. Illinois*, 440 U.S. 367 (1979). *Id.* at 1923. The Court stated that *Scott* had been "dictated" by the Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *Id.* at 1925. Even if that was not the case, the majority repeated its belief that the line drawn in *Argersinger*, requiring actual imprisonment, was "eminently sound." *Id.* (quoting *Scott v. Illinois*, 440 U.S. 367, 373 (1979)). For a further discussion of the *Scott* decision, see *supra* notes 68-74 and accompanying text.

101. *Nichols*, 114 S. Ct. at 1926-27. For a discussion of the opinions in *Baldasar*, see *supra* notes 78-79 and accompanying text.

102. *Nichols*, 114 S. Ct. at 1926-27.

103. *Id.* at 1926-27. Generally, the Supreme Court analyzes per curiam opinions such as *Baldasar* under the methodology set out in *Marks v. United States*, 430 U.S. 188 (1977). The *Marks* Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). See generally Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1972) (providing criticism of and alternative to *Marks'* position).

The *Nichols* Court also cited to the divergent holdings of circuit courts to support the proposition that no discernable rationale can be derived from *Baldasar*. *Nichols*, 114 S. Ct. at 192-27; see, e.g., *United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991) (stating that no "lowest common denominator" can be derived from *Baldasar*); *United States v. Eckford*, 910 F.2d 216, 219 (5th Cir. 1990) (finding that inconsistencies in opinions "has clouded the scope of the *Baldasar* decision"); *United States v. Williams*, 891 F.2d 212, 214 (9th Cir. 1989) (implying that Justice Marshall's *Baldasar* concurrence is holding of that case), *cert. denied*, 494 U.S. 1037 (1990); *Santillanes v. United States Parole Comm'n*, 754 F.2d 887, 889 (10th Cir. 1985) (determining that Justice Blackmun's concurrence is holding of *Baldasar*). For a discussion of the split among the state and federal courts over the proper interpretation of *Baldasar*, see *supra* notes 82-83 and accompanying text.

104. *Nichols*, 114 S. Ct. at 1927. Specifically, the Court stated that "[t]his degree of confusion following a splintered decision such as *Baldasar* is itself a reason for re-examining that decision." *Id.* (citations omitted).

105. *Id.* at 1927. The Court noted that five members of the *Baldasar* Court—the four dissenters and Justice Stewart, continued to adhere to the Court's decision in *Scott*. *Id.*

sentence in a subsequent proceeding.¹⁰⁶ The Court explained that repeat-offender laws “penaliz[e] only the last offense committed by the defendant.”¹⁰⁷ The opinion also emphasized that the sentencing process is “less exacting” than the process to determine guilt.¹⁰⁸ The Court then rejected the petitioner’s argument that due process requires a warning to a misdemeanor defendant that his uncounseled conviction may be used to enhance the penalty for a subsequent conviction.¹⁰⁹ Finally, the Court, without comment, rejected Nichols’ argument that *Scott* be overruled.¹¹⁰

106. *Id.* at 1927-28. The Court expressly overturned *Baldasar* and held that “consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.” *Id.* at 1928.

107. *Id.* at 1927 (quoting *Baldasar v. Illinois*, 446 U.S. 222, 232 (1979) (Powell, J., dissenting), overruled by *Nichols v. United States*, 114 S. Ct. 1921 (1994)); see also *Oyler v. Boles*, 368 U.S. 448, 451 (1962) (noting “constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders”); *Moore v. Missouri*, 159 U.S. 673, 677 (1895) (explaining justification of increased severity for repeat offenders).

In *Baldasar*, Justice Marshall accepted the statement “that the increased [subsequent] prison sentence . . . is not an enlargement of the sentence for the original offense.” *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring). He rejected the notion, however, that the collateral use of a prior, uncounseled conviction was valid to enhance a subsequent penalty. *Id.* If the sentence punished the first conviction and not the second, Justice Marshall cogently noted, that “this would be a double jeopardy case.” *Id.*

108. *Nichols*, 114 S. Ct. at 1927. The Court proceeded to note that sentencing judges have historically been able to consider a “‘wide variety of factors in addition to evidence of guilt in determining what sentence to impose on a convicted defendant.’” *Id.* at 1928 (quoting *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993)). Recidivism is one of the most important factors that a judge may consider when sentencing a defendant, as evidenced by the inclusion of recidivism into the Sentencing Guidelines and many state recidivist statutes. *Id.* In addition, the Court noted that consideration of previous conduct that did not result in a conviction is also a constitutionally valid factor in the determination of a sentence. *Id.*; see also *Williams v. New York*, 337 U.S. 241, 247 (1949) (noting that sentencing judge must have “fullest information possible concerning defendant’s life” in order to select appropriate sentence).

109. *Nichols*, 114 S. Ct. at 1928. The Court first stated that *Scott* did not suggest any warning requirement. *Id.* A warning would be problematic because it would not be clear exactly how expansive the warning would have to be. *Id.* The Court also noted that many misdemeanor convictions occur in courts that are not courts of record. *Id.* The inability to memorialize these warnings “[w]ithout a drastic change in the procedures of these courts,” justified a rejection of defendant’s due process claim. *Id.* Further, such a warning “would merely tell him what he must surely already know.” *Id.*

110. *Id.* at 1928. Nichols’ brief in support of overruling *Scott* stated that [t]his position is consistent with the position taken by the American Bar Association on August 8, 1990, in the Standards for Criminal Justice Providing Defense Services, Third Edition which provides as follows: Standard 5-5.1 Criminal Cases Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise.

C. *Justice Souter's Concurring Opinion*

Justice Souter wrote a concurring opinion in *Nichols*, concurring only in the Court's result.¹¹¹ Primarily, he disagreed with the broadness of the majority holding.¹¹² Rather than overrule *Baldasar*, Justice Souter believed that the Court could find *Nichols*' sentence constitutional simply because the Sentencing Guidelines did not *mandate* a higher sentence for someone in *Nichols*' position.¹¹³ He argued instead that the ability of the sentencing court to depart from the Guidelines allowed the Court to decide the case on other grounds.¹¹⁴ Justice Souter then stated that because he believed the issue was not presented in *Nichols*, he would leave unanswered the question of whether the Sixth Amendment allowed a scheme in which a prior, uncounseled misdemeanor *automatically* increased a sen-

Brief for Petitioner at 37, *United States v. Nichols*, 114 S. Ct. 1921 (1994) (No. 92-8556). The Court failed to comment on this argument but explicitly reaffirmed its holding in *Scott. Nichols*, 114 S. Ct. at 1928.

111. *Nichols*, 114 S. Ct. at 1929 (Souter, J., concurring).

112. *Id.* at 1929, 1931 (Souter, J., concurring). Justice Souter specifically stated, "I write separately because . . . I wish to be clear about the narrow ground on which I think this case is properly decided." *Id.* at 1929 (Souter, J., concurring).

113. *Id.* at 1929-30 (Souter, J., concurring). Justice Souter began by expressing his belief that *Baldasar* had no "holding that can be overruled." *Id.* at 1929 (Souter, J., concurring). He read *Baldasar* as splitting the Court, four votes to four, over whether a conviction valid under *Scott* could be used to enhance a subsequent sentence. *Id.* (Souter, J., concurring). The potential tie-breaking vote, that of Justice Blackmun, "refused to accept the premise upon which the other Justices proceeded" and resolved the matter on separate grounds. *Id.* (Souter, J., concurring). The equally-divided Court, therefore, was "entitled to no precedential value." *Id.* (Souter, J., concurring). For a discussion of the opinions in *Baldasar*, see *supra* notes 78-79 and accompanying text.

Justice Souter distinguishes *Baldasar* by noting that "unlike the sentence-enhancement scheme involved in *Baldasar*, the Sentencing Guidelines do not provide for automatic enhancement based on prior uncounseled convictions." *Nichols*, 114 S. Ct. at 1930 (Souter, J., concurring). Although the Sentencing Guidelines automatically include prior uncounseled convictions in the criminal history score, they are nonetheless constitutional because "they also expressly empower the district court to depart from the range of sentences prescribed for a criminal-history category that inaccurately captures the defendant's actual history of criminal conduct." *Id.*; see U.S.S.G., *supra* note 10, § 4A1.3. Because the role of the Sentencing Guidelines is "presumptive, not conclusive," a sentencing court may take into account the unreliability of the prior conviction and thereby resolve the potential constitutional infirmity. *Nichols*, 114 S. Ct. at 1930 (Souter, J., concurring).

114. *Nichols*, 114 S. Ct. at 1930 (Souter, J., concurring). Specifically, Justice Souter stated that "[b]ecause the Guidelines allow a defendant to rebut the negative implication to which a prior uncounseled conviction gives rise, they do not ignore the risk of unreliability associated with such a conviction." *Id.* (Souter, J., concurring). Further, "[w]here concern for reliability is accommodated, as it is under the Sentencing Guidelines, nothing in the Sixth Amendment or our cases requires a sentencing court to ignore the fact of a valid uncounseled conviction, even if that conviction is a less confident indicator of guilt than a counseled one would be." *Id.* (Souter, J., concurring).

tence in a subsequent conviction.¹¹⁵

D. Justice Blackmun's Dissenting Opinion

Justice Blackmun's dissent, although agreeing with some of the underlying bases for the majority's holding, vigorously disagreed with the conclusions the majority drew.¹¹⁶ He argued that (1) deriving a discernible holding from *Baldasar* was not as difficult as the majority contended;¹¹⁷ (2) the majority's holding in *Nichols* was not consistent with *Scott*;¹¹⁸ and (3) the slim distinction upon which Justice Souter's concurrence is based had no real world applicability.¹¹⁹ Justice Blackmun also relied upon both the language and spirit of the Supreme Court's decisions in *Gideon* and *Argersinger* to determine that a defendant may not be incarcerated for any length of time, either directly or collaterally, for an uncounseled conviction.¹²⁰

First, Justice Blackmun disagreed with the majority's characterization of *Baldasar*, stating that the holding of *Baldasar* is clear and should be fol-

115. *Id.* at 1931 (Souter, J., concurring). After stating that he agreed that the Sentencing Guidelines' use of a prior conviction is constitutional, Justice Souter stated that "[t]hat is enough to answer the constitutional question this case presents." *Id.* (Souter, J., concurring). He expressly withheld his opinion on the broad constitutional question the majority viewed *Nichols* as presenting, stating that he was "shy, however, of endorsing language in the Court's opinion that may be taken as addressing the constitutional validity of a sentencing scheme that automatically requires enhancement for prior uncounseled convictions, a scheme not now before us." *Id.* (Souter, J., concurring).

Justice Souter, therefore, like Justice Blackmun in *Baldasar*, concurred in the result but on fundamentally different grounds from the rest of the majority. It is important to note, however, that Justice Souter's vote was the sixth for the majority. Because there was a majority opinion that garnered five votes in *Nichols*, Justice Souter's concurrence will not play a pivotal role in creating confusion among the lower courts as did Justice Blackmun's concurrence in *Baldasar*. See *id.* at 1923. For a discussion of the important role of Justice Blackmun's concurring opinion in *Baldasar*, see *supra* note 78.

116. *Id.* at 1933 (Blackmun, J., dissenting) (stating that "although it is undeniable that recidivist statutes do not impose a second punishment," it is undeniable that defendant's sentence was directly increased by prior, uncounseled misdemeanor conviction). Justice Blackmun was joined by Justices Stevens and Ginsburg. *Id.* (Blackmun, J., dissenting).

117. See *id.* at 1932 (Blackmun, J., dissenting). For a discussion of the dissent's view of the majority's analysis of *Baldasar*, see *infra* note 121-23 and accompanying text.

118. *Id.* at 1933-34 (Blackmun, J., dissenting). For a discussion of the dissent's characterization of *Scott*, see *infra* notes 122-23 and accompanying text.

119. *Id.* at 1935 n.4 (Blackmun, J., dissenting). Justice Blackmun refers to Justice Souter's concurrence only in a lengthy footnote. *Id.* (Blackmun, J., dissenting). For a discussion of Justice Blackmun's response to Justice Souter's argument, see *infra* notes 126-31 and accompanying text.

120. *Id.* at 1931-32, 1935-37 (Blackmun, J., dissenting). The majority opinion does not mention *Gideon* and mentions *Argersinger* only in the context of explaining *Scott*. *Id.* 1924-28. For a discussion of *Gideon*, see *supra* notes 54-61 and accompanying text. For a discussion of *Argersinger*, see *supra* notes 62-67 and accompanying text.

lowed in *Nichols*.¹²¹ The dissent proceeded to analyze *Scott*, reading *Scott* as holding that uncounseled misdemeanor convictions are too unreliable to incarcerate a defendant.¹²² Therefore, he argued that the inherent unreliability of an uncounseled conviction which served as the basis of the *Scott* decision is also insufficiently reliable to increase a sentence for a subsequent conviction.¹²³

The dissent also stated that it failed to understand how the majority concluded that the process of sentencing is "less exacting" than that of obtaining a conviction "justif[ies] greater punishment."¹²⁴ Moreover, the rule that an uncounseled misdemeanor conviction cannot serve as the ba-

121. *Id.* at 1932 (Blackmun, J., dissenting). Justice Blackmun readily disposes of any argument that *Baldasar* has no discernible holding. *Id.* (Blackmun, J., dissenting). He quotes or defines the holdings of the three concurring opinions in *Baldasar* and in a lengthy footnote attempts to clarify his opinion in that case. *Id.* at 1932 n.1 (Blackmun, J., dissenting).

In a parenthetical, he describes his opinion in *Baldasar* as "adhering to dissenting position in *Scott* that an uncounseled conviction is invalid not only where the defendant is sentenced to any actual incarceration but also where the defendant is convicted of an offense punishable by more than six months in prison." *Id.* (Blackmun, J., dissenting). Further, Justice Blackmun stated:

[A]lthough I based my decision on my belief that the uncounseled conviction was invalid in the first instance because *Baldasar* was charged with an offense punishable by more than six months in prison, I expressed no disagreement, and indeed had none, with the premise that an uncounseled conviction that was valid under *Scott* was invalid for purposes of imposing increased incarceration for a subsequent offense.

Id. n.1 (Blackmun, J., dissenting) (citation omitted).

It should be noted, however, that Justice Blackmun failed to join either Justice Marshall's or Justice Stewart's concurrence in *Baldasar*. *Baldasar v. Illinois*, 446 U.S. 222, 224 (1980), *overruled by Nichols v. United States*, 114 S. Ct. 1921 (1994). For a discussion of the reasoning contained in the concurring opinions in *Baldasar*, see *supra* note 78. For a discussion of the confusion *Baldasar* engendered, see *supra* notes 80-84 and accompanying text.

122. *Nichols*, 114 S. Ct. at 1932-36 (Blackmun, J., dissenting). Justice Blackmun focused primarily on the uncounseled conviction's reliability, rather than its validity under *Scott*. *Id.* at 1933, 1935-36. The dissent summed up *Scott* as "confirm[ing] that any deprivation of liberty, no matter how brief, triggers the Sixth Amendment right to counsel." *Id.* (Blackmun, J., dissenting).

123. See *id.* (Blackmun, J., dissenting). This inherent unreliability of prior, uncounseled convictions that may or may not lead to incarceration is what the dissent argued was one reason that the use of the conviction was unconstitutional in *Baldasar*. *Id.* (Blackmun, J., dissenting). In addition, Justice Blackmun noted that "the animating concern in the Court's Sixth Amendment jurisprudence has been to ensure that no indigent is deprived of his liberty as a result of a proceeding in which he lacked the guiding hand of counsel." *Id.* (Blackmun, J., dissenting).

124. *Id.* at 1934 (Blackmun, J., dissenting). Justice Blackmun argued that although sentencing may be a "less exacting" process than determining guilt, this does not mean that an uncounseled conviction is reliable enough to enhance the length of a sentence. *Id.* at 1933-34. Justice Blackmun also disputed whether the cases cited by the majority supporting the notion that judges traditionally have had a great deal of discretion in sentencing is particularly relevant in determining this narrow Sixth Amendment question. *Id.* at 1933 n.2 (Blackmun, J., dissenting) (citing majority's use of *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Williams v. New York*, 337 U.S. 241 (1949)). The

sis of incarceration "is faithful to the principle born of *Gideon* and announced in *Argersinger* that an uncounseled misdemeanor . . . is not reliable enough to form the basis for the severe sanction of incarceration."¹²⁵

The dissent also disagreed with the reasoning behind Justice Souter's concurrence.¹²⁶ In a lengthy footnote, the dissent strongly disagreed with Justice Souter's belief that the Sentencing Guidelines' structure, in allowing a defendant to convince the sentencing court that a downward departure is warranted, passes Sixth Amendment muster.¹²⁷ Justice Blackmun forcefully argued that it is unrealistic to expect a defendant to successfully dispute a prior conviction and obtain a downward departure from the Sentencing Guidelines.¹²⁸ The dissent quoted Chief Justice Burger's concurrence in *Argersinger*, where he stated that an "[a]ppeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record."¹²⁹ In addition, such convictions will now benefit from the same presumption of validity as other convictions.¹³⁰ Therefore, the dissent found "the district court's authority to depart downward too tenuous a check on the use of unreliable misdemeanor convictions to salvage a sentencing scheme that is, in my view, a violation of *Scott*."¹³¹

dissent argued that "[t]he cases provide scant, if any, support for the majority's rule . . . [n]one even addresses the Sixth Amendment guarantee of counsel." *Id.*

Furthermore, the majority cites to a case in which the Court ruled that a sentencing court may consider conduct, but the dissent easily distinguished consideration of conduct from consideration of prior convictions. *Id.* at 1933-34 (Blackmun, J., dissenting). The conduct case cited, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), allowed the defendant to rebut the state's evidence and "put the State to its proof, examining its witnesses, rebutting its evidence, and testing the reliability of its allegations." *Id.* at 1934 (Blackmun, J., dissenting). This ability of the defendant to rebut the state's evidence on conduct is easily differentiated from allowing the state to merely introduce practically irrebuttable evidence of a prior conviction. *Id.* (Blackmun, J., dissenting).

125. *Id.* at 1935 (Blackmun, J., dissenting). Here, the dissent refers to the broad language in both *Gideon* and *Argersinger* to advance its reliability argument. *See id.* (Blackmun, J., dissenting) (stating that "[c]ontrary to the rule set forth by the Court, . . . an uncounseled misdemeanor . . . is not reliable enough to form the basis for the severe sanction of incarceration"). Further, reliability concerns have previously led the Court to hold that uncounseled felony convictions cannot be subsequently used to increase a prison term under state recidivist statutes. *Id.* (Blackmun, J., dissenting); *see* *Burgett v. Texas*, 389 U.S. 109, 115 (1967). Clearly, the dissent argues that there is no logical ground upon which to distinguish *Nichols* from these cases. *Nichols*, 114 S. Ct. at 1935 (Blackmun, J., dissenting).

126. *Nichols*, 114 S. Ct. at 1935 n.4 (Blackmun, J., dissenting).

127. *Id.* (Blackmun, J., dissenting). For a discussion of Justice Souter's concurrence, *see supra* notes 111-15 and accompanying text.

128. *Id.* (Blackmun, J., dissenting).

129. *Id.* (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring)).

130. *See, e.g., Custis v. United States*, 114 S. Ct. 1732 (1994) (restricting defendant's right to attack prior conviction as unconstitutional when used to enhance sentence).

131. *Nichols*, 114 S. Ct. at 1935 n.4 (Blackmun, J., dissenting).

Finally, Justice Blackmun argued that the rule the dissent promotes “that an uncounseled misdemeanor conviction can never be used to increase a prison term,” was “eminently logical,” and workable.¹³² Its logic, the dissent notes, is grounded in Justice Marshall’s concurrence in *Baldasar*.¹³³ There, Justice Marshall argued that “[a]n uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent [offense].”¹³⁴ Moreover, Justice Blackmun maintained that the rule is workable because it acts as a clear guide to trial courts, attorneys and defendants that an uncounseled conviction may not serve as the basis for incarceration, either directly or collaterally.¹³⁵ Justice Ginsburg also wrote a separate dissent to indicate a minor disagreement with part of Justice Blackmun’s reasoning.¹³⁶

IV. ANALYSIS

In upholding the sentencing court’s use of the prior conviction, the Supreme Court reversed its holding in *Baldasar* and drifted away from the spirit, if not the narrowest possible interpretation of its holdings in *Gideon* and *Argersinger*.¹³⁷ To support its conclusion that *Baldasar* must be overturned and the *Nichols* rule be put in its stead, the *Nichols* majority rested primarily upon the need for a clear, workable rule and its decision in *Scott*.¹³⁸ Although the majority’s opinion successfully sets forth a workable

132. *Id.* at 1936 (Blackmun, J., dissenting).

133. *Id.* (Blackmun, J., dissenting).

134. *Id.* (Blackmun, J., dissenting) (quoting *Baldasar v. Illinois*, 446 U.S. 222, 227-28 (1980) (Marshall J., concurring), *overruled by* *Nichols v. United States*, 114 S. Ct. 1921 (1994)). For a full discussion of Justice Marshall’s concurrence in *Baldasar*, see *supra* note 78 and accompanying text.

135. *Id.* at 1936 (Blackmun, J., dissenting). Although this rule may cause an increase in appointed counsel, the burden upon the states that may result must be “subordinated” to the Sixth Amendment. *Id.* (Blackmun, J., dissenting).

136. Justice Ginsburg, who joined in Justice Blackmun’s dissent, also wrote a brief, separate dissent to disagree with Justice Blackmun’s interpretation of a supporting case. *Id.* at 1937 (Ginsburg, J., dissenting). Justice Ginsburg merely wished to note that *Custis v. United States*, 114 S. Ct. 1732 (1994), cited by Justice Blackmun as supporting the presumptive validity of a valid conviction, “presented a forum question. The issue was *where*, not *whether*, the defendant could attack a prior conviction for constitutional infirmity.” *Id.* (Ginsburg, J., dissenting). She therefore agreed with Justice Blackmun’s opinion in its entirety except for its reliance on *Custis*. *Id.*

137. *Nichols*, 114 S. Ct. at 1928-31 (Blackmun, J., dissenting); see also, GARCIA, *supra* note 1, at 12-13 (stating that *Baldasar* had helped mitigate damaging effects of *Scott*, which was “paradoxical in light of its disapproval by the *Argersinger* majority”); Rudstein, *supra* note 63, at 531 (stating that because “[i]n *Argersinger* and *Scott*, the Court was concerned with the imprisonment of an uncounseled indigent defendant convicted of a misdemeanor . . . [t]he additional period of imprisonment, therefore, must be the key to *Baldasar*”).

138. See *Nichols*, 114 S. Ct. at 1924-28 (stating that fractured decision of *Baldasar* has resulted in conflict among lower courts and need for clear, concise rule). For a discussion of the majority’s analysis, see *supra*, notes 99-110 and accompanying text.

rule, the dissent suggested a rule that was equally workable and more closely comported to the standards and ideals set forth in *Powell* and *Gideon*.

To its advantage, the Court's opinion in *Nichols* successfully resolves a contentious area of law and hands down a clear, unequivocal and workable rule.¹³⁹ Further, the logic that a conviction, valid under *Scott*, should be valid for all purposes is persuasive.¹⁴⁰ As Justice Blackmun stated in dissent, however, the majority's "logic is not unassailable."¹⁴¹

Foremost among the problems with the Court's opinion is its "scant" Sixth Amendment analysis. After determining that no constitutional rule can be derived from *Baldasar's* concurring opinions, the Court offered only two paragraphs of Sixth Amendment analysis.¹⁴² First, the Court reaffirmed the undisputed notion that recidivist statutes "do not change the penalty imposed for the earlier conviction."¹⁴³ Second, the Court emphasized that sentencing judges have a great deal of discretion in the sentencing process.¹⁴⁴ Yet, neither of these undisputed facts supports the *Nichols*

139. See *Baldasar*, 446 U.S. 222, 230-31 (1980) (Powell, J., dissenting) (noting that lower courts are entitled to clear rule that majority's opinion fails to provide), *overruled by Nichols v. United States*, 114 S. Ct. 1921 (1994). Compare *United States v. Nichols*, 979 F.2d 402, 407 (1992) (noting that *Baldasar's* holding is based on reasoning from three separate concurrences, none of which had the support of five justices, and questioning whether *Baldasar* has any one single holding), with *United States v. Martin*, 30 F.3d 142 (10th Cir.) (unpublished opinion) (stating that *Nichols* resolves confusion caused by splintered court in *Baldasar*), *cert. denied*, 115 S. Ct. 454 (1994). For a discussion of the dissent's alternative rule and its alignment with precedent, see *infra* notes 148-51 and accompanying text.

140. See *Baldasar*, 446 U.S. at 233-34 (Powell, J., concurring) (stating that "[l]ogically, just as a constitutionally *invalid* felony judgment could not be used for sentence enhancement . . . the *valid* misdemeanor conviction in this case should be available to enhance petitioner's sentence"). But see *id.* at 228-29 (Marshall, J., concurring) (stating that "[t]o the contrary, a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases").

141. *Nichols*, 114 S. Ct. at 1933 (Blackmun, J., dissenting). Additional support for Justice Blackmun's statement is provided by the fact that the Court's perception differed 14 years earlier in *Baldasar*. See *Baldasar*, 446 U.S. at 224. Further, the split among the states and circuit courts evidences the numerous possible interpretations of the Court's opinions in *Argersinger*, *Scott* and *Baldasar*. *Nichols*, 114 S. Ct. at 1924-25. For a discussion of the split among the states and circuit courts in interpreting *Baldasar*, see *supra* notes 82-83 and accompanying text.

142. *Id.* at 1926-28. For a discussion of the majority opinion in *Nichols*, see *supra* notes 99-110 and accompanying text.

143. *Id.* at 1927. Neither the dissenters in *Nichols* nor even the broadest concurrence in *Baldasar* disagreed with this claim. *Id.* at 1933 (Blackmun, J., dissenting) ("[I]t is undeniable that recidivist statutes do not impose a second punishment for the first offense in violation of the Double Jeopardy Clause."); *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring) ("I agree that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this would be a double jeopardy case.").

144. *Nichols*, 114 S. Ct. at 1927-28. The dissent also agrees with this contention, stating that the less exacting sentencing process "may be true as a general proposition." *Id.* at 1933 (Blackmun, J., dissenting).

majority's conclusion.¹⁴⁵ The majority's review of the dissenting opinion in *Baldasar*, with which it agreed, is of little assistance, reducing Justice Powell's powerful dissent to a single paragraph.¹⁴⁶ This minimal Sixth Amendment analysis by the Court undermines the persuasiveness of its reasoning.¹⁴⁷

145. See *id.* at 1931-37 (Blackmun, J., dissenting).

146. *Id.* at 1927. The Court's summation of the dissent in *Baldasar* stated: Justice Powell authored the dissent, in which the remaining three Members of the Court joined. The dissent criticized the majority's holding as one that "undermines the rationale of *Scott* and *Argersinger* and leaves no coherent rationale in its place." The dissent opined that the majority's result misapprehended the nature of enhancement statutes which "do not alter or enlarge a prior sentence," ignored the significance of the constitutional validity of the first conviction under *Scott*, and created a "hybrid" conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution. Finally—and quite presciently—the dissent predicted that the Court's decision would create confusion in the lower courts.

Id. at 1926 (citations omitted). For a discussion of the dissenting opinion in *Baldasar*, see *supra* note 79 and accompanying text.

147. Cf. *id.* at 1937 (Blackmun, J., dissenting) (stating that majority overturns *Baldasar* "[w]ith scant discussion of Sixth Amendment case law or principles"). The majority opinion also fails to note other potentially persuasive arguments. An illustration is the failure of the Court to mention the argument that a majority of the circuit courts of appeal have found that a misdemeanor conviction, valid under *Scott*, could be used to enhance a subsequent sentence. The Second, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuit Courts of Appeal, at least to some degree, limited *Baldasar* and held that a prior, uncounseled misdemeanor conviction could be considered in subsequent sentencing. See, e.g., *United States v. Thomas*, 20 F.3d 817, 823 (8th Cir. 1994) (*en banc*) (holding that *Baldasar* only prevents incarceration where it would otherwise not be imposed and does not apply to strictly sentence-enhancing circumstances); *United States v. Falesbork*, 5 F.3d 715, 718 (4th Cir. 1993) (restricting *Baldasar* to elevation of misdemeanor to felony and holding that use of prior conviction to enhance subsequent sentence is constitutional); *United States v. Follin*, 979 F.2d 369, 375-76 (5th Cir. 1992) (restricting *Baldasar* to its facts and allowing uncounseled conviction to enhance subsequent sentence), *cert. denied*, 113 S. Ct. 3004 (1993); *United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991) (same); *United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988) (*per curiam*) (allowing sentencing court reliance on uncounseled convictions in collateral proceedings); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) (stating that "decision provides little guidance outside of the precise factual context in which it arose"), *cert. denied*, 465 U.S. 1068 (1984).

Only the Ninth Circuit read *Baldasar* broadly, applying the holding espoused by Justice Marshall's concurrence and Justice Blackmun's dissent in *Nichols*. See *United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991) (holding that prior uncounseled convictions may not be used to enhance subsequent sentence). The Tenth Circuit fell short of the Ninth Circuit's broad rule against the use of prior, uncounseled convictions, but they still limited the *Baldasar* holding, allowing the use of an uncounseled conviction only where the use depends on the fact of conviction, but not when it depends on the reliability of conviction. See *Santillanes v. United States Parole Comm'n*, 754 F.2d 887 (10th Cir. 1985).

A simple jurisdictional count, therefore, clearly indicates that a majority of the circuit courts had not only expressed dismay over the unclear holding in *Baldasar*, but when faced with deciding the rule of law to apply, applied that of the dissent.

The persuasively written dissenting opinion also undermines the majority in *Nichols*.¹⁴⁸ The dissent not only successfully undercuts the reasoning of the majority, but it also promulgates an equally clear and logical rule.¹⁴⁹ Furthermore, it adheres more faithfully to the principles of *Gideon* and *Argersinger*.¹⁵⁰ Most importantly, Justice Blackmun's dissent best protects the rights guaranteed to all defendants under the Sixth Amendment.

V. CONCLUSION

The majority opinion in *Nichols* will have a direct and substantial effect on numerous criminal cases.¹⁵¹ *Nichols* will have a direct impact on any repeat offender who was previously convicted of a misdemeanor without the benefit of counsel. After *Nichols*, these offenders are subject to enhanced penalties based on their prior, uncounseled misdemeanor convictions. Although the Supreme Court's opinion settled an important area of law that had been very unclear, it also set a disturbing precedent that may lead to stiffer sentencing of defendants after prior convictions which may not be constitutionally reliable.¹⁵²

The Court did not suggest any possibility of re-examining *Gideon* or *Argersinger*. Those seminal Sixth Amendment cases seem beyond the possibility of attack, much less reversal. The Court in *Nichols*, however, fur-

The majority in *Nichols*, however, failed to mention this persuasive argument and discussed those cases only in reference to the confusion *Baldasar* created. *Nichols*, 114 S. Ct. at 1926-27.

148. See *Nichols*, 114 S. Ct. at 1931-37 (Blackmun, J., dissenting).

149. *Id.* at 1931-37 (Blackmun, J., dissenting). The dissenting opinion is very broad in scope, carefully examining and undermining each of the majority's supporting points. *Id.* at 1933-37 (Blackmun, J., dissenting). In each instance, the dissent attempts to thwart the thrust of the majority's attack on *Baldasar*. *Id.* According to Justice Blackmun, *Baldasar* had a clear holding, despite the failure of any Justice to garner five votes. See *id.* at 1932 (Blackmun, J., dissenting). The majority in *Nichols*, the dissent contends, overrules that holding in clear defiance of both logic and precedent. See *id.* at 1933-37 (Blackmun, J., dissenting). For a full discussion of the dissenting opinion in *Nichols*, see *supra* notes 116-36 and accompanying text. For a discussion of an alternative rule to those of both the majority and dissent, see Note, *Sixth Amendment Limits on Collateral Uses of Uncounseled Convictions*, 91 YALE L.J. 1000, 1008-13 (1982) (establishing three conditions as requirements before uncounseled conviction can be used in collateral proceedings).

150. See, e.g., Comment, "Strike Three, Yer Out!?: Examining the Constitutional Limits on the Use of the Prior Uncounseled DWI Convictions to Impose Mandatory Prison Sentences on Repeat DWI Offenders, 28 SAN DIEGO L. REV. 685, 704-10 (1991) (arguing that because "lawyers are essential to ensure fair trials with accurate and reliable results . . . [uncounseled] convictions may not be used for 'incarceration' purposes").

151. See, e.g., LAFAYE & ISRAEL, CRIMINAL PROCEDURE 9 (1985) (estimating that only 20% to 30% of all arrests are for felonies, with remaining 70% to 80% constituting misdemeanors).

152. Cf. GARCIA, *supra* note 1, at 13; Note, *Criminal Procedure: The Outer Limits of the Indigent's Right to Counsel—Scott v. Illinois*, 440 U.S. 367 (1979), 5 U. DAYTON L. REV. 177 (1980).

thered *Scott's* success in undermining *Argersinger*.¹⁵³

The problems with using a misdemeanor conviction to increase the penalty of a subsequent conviction were well enunciated by the Court's concurring justices in *Baldasar* and the dissent in *Nichols*.¹⁵⁴ The *Baldasar* Court's inability to form a coherent, unified precedent for the lower courts does not reduce or diminish the logic of forbidding the collateral use of a prior, uncounseled misdemeanor conviction.¹⁵⁵ The *Nichols* Court, meanwhile, failed to cogently enunciate the reasons for reversing *Baldasar*, other than the fact that *Baldasar* failed to give clear guidance to the lower courts.¹⁵⁶

One method of reducing the detrimental effect of the Court's decision was suggested in the majority opinion itself. The *Nichols* Court explicitly stated that its ruling does not bar state courts from relying upon their own state constitutions either to provide counsel for all misdemeanor defendants or bar the use of a prior, uncounseled conviction to enhance the penalty of a subsequent conviction.¹⁵⁷ Indeed, the Court pointed out that many states have already done so.¹⁵⁸ For instance, many states have already made the assistance of counsel a requirement in cases where the Supreme Court has determined the United States Constitution does not.¹⁵⁹ It remains to be seen how many more states will adopt similar

153. Cf. GARCIA, *supra* note 1, at 13 (stating that *Scott's* harmful effects were somewhat mitigated by *Baldasar*); Herman & Thompson, *supra* note 74 (noting that *Scott* answered negatively issue remaining after *Argersinger* about whether there was right to counsel when there was no imprisonment); Rubin, *supra* note 74, at 647 (noting that prior precedent established right to counsel at all critical steps, but *Scott* limited right to situations where criminal is imprisoned).

154. See *Baldasar v. Illinois*, 446 U.S. 222, 224-30 (1980) (Stewart, Marshall, Blackmun, Brennan and Stevens, JJ., concurring), *overruled by Nichols v. United States*, 114 S. Ct. 1921 (1994); *Nichols*, 114 S. Ct. at 1933-37 (Blackmun, J., dissenting). For a discussion of the concurring opinions in *Baldasar*, see *supra* note 78 and accompanying text. For a discussion of the dissent in *Nichols*, see *supra* notes 116-36 and accompanying text.

155. For a discussion of the various concurring opinions in *Baldasar*, see *supra* note 78 and accompanying text.

156. *Nichols*, 114 S. Ct. at 1925-27 (stating that "[t]his degree of confusion following a splintered decision such as *Baldasar* is itself a reason for re-examining that decision").

157. *Id.* at 1928 n.12. States are, of course, free to define liberty interests more broadly than the Supreme Court under their own state constitutions. See, e.g., *Oregon v. Haas*, 420 U.S. 714, 719 (1975) ("[A] state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."); *Cooper v. California*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."). For a discussion of state protections against the collateral use of an uncounseled, misdemeanor conviction, see *infra* notes 159-60 and accompanying text.

158. *Nichols*, 114 S. Ct. at 1928 n.12 (noting that many "states guarantee the right to counsel whenever imprisonment is authorized . . . not imposed").

159. See, e.g., ALASKA CONST. art. 1, § 11 ("to have assistance of counsel for his defense") (interpreted as including misdemeanor defendants in *Alexander v. City*

statutory provisions in the aftermath of *Nichols*, or alternatively, how many state courts will follow the Court's suggestion and breathe new life into

of Anchorage, 490 P.2d 910 (1971)); IND. CONST. art. 1, § 13 (providing counsel in all criminal prosecutions); CAL. PENAL CODE § 987 (West 1995) (providing counsel in all criminal cases); COLO. REV. STAT. § 21-1-103 (1990) (providing counsel in all misdemeanors and all municipal code violations at discretion of public defender); CONN. GEN. STAT. ANN. §§ 51-296(a), 51-297(f) (West 1995) (same); DEL. CODE ANN. tit. 29, § 4602 (1995) (providing counsel for all indigents under arrest or charged with crime if defendant requests or court orders); GA. CODE ANN. § 17-12-2, 4 (1990) (providing counsel for any violation of state law or local ordinance which may result in incarceration); HAW. REV. STAT. § 802-1 (1994) (providing counsel for any offense "punishable by confinement in jail"); IDAHO CODE § 19-851 (1995) (requiring counsel be provided to retain incarceration as sentencing option); MD. ANN. CODE, art. 27A, § 4 (1994) (requiring counsel where incarceration may be imposed); MINN. STAT. §§ 609.02, 611.14 (1995) (providing counsel for felonies and "gross misdemeanors" and where "petty" misdemeanors are those not punishable by imprisonment or fine greater than \$200); MISS. CODE ANN. § 99-15-15 (1993) (requiring counsel where defendant is charged with felony or misdemeanor punishable by greater than 90 days imprisonment); MONT. CODE ANN. § 95-1001 (1994) (allowing court to assign counsel where court desires to retain sentencing option or if counsel is "in the interest of justice"); NEV. REV. STAT. § 178.397 (1993) (providing counsel for persons accused of "gross misdemeanors" or felonies); N.J. STAT. ANN. § 2A:158A-2 (West 1994) (providing counsel for those threatened with incarceration); N.M. STAT. ANN. § 31-15-12 (Michie 1994) (providing counsel for any offense carrying possible sentence of imprisonment); N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 1993) (providing counsel for all misdemeanors except traffic violations); N.C. GEN. STAT. § 7A-451(a) (1977) (providing for counsel in any misdemeanor case in which imprisonment or fine of \$500 or more is likely to be imposed); OKL. STAT. tit. 22, § 251 (1995) (providing counsel in all criminal cases); S.D. CODIFIED LAWS ANN. § 23-2-1 (1995) (providing counsel to retain option of incarceration for longer than six months); TENN. CODE ANN. §§ 40-2002, 40-2003 (1994) (providing counsel where defendant is in "jeopardy of incarceration"); TEX. CRIM. PROC. CODE ANN. art. 26.04 (West 1993) (providing counsel for any felony or misdemeanor punishable by imprisonment); VT. STAT. ANN. tit. 13, §§ 5201, 5231 (1994) (providing counsel in any misdemeanor punishable by any period of imprisonment or fine over \$1,000 unless prior determination that imprisonment or fine over \$1,000 will not be imposed); VA. CODE ANN. §§ 19.2-157, 19.2-160 (Michie 1995) (providing counsel for all misdemeanors for which penalty may be confinement in jail); W. VA. CODE § 62-3-1a (1995) (providing counsel to persons under indictment for crime); WYO. STAT. § 7-6-102(a)(v) (1994) (providing that defendants are entitled to appointed counsel where incarceration is "a practical possibility"); ARK. R. CRIM. P. 8.2(b) (providing for counsel in all criminal cases except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment); ARIZ. R. CRIM. P. 6.1(b) (providing counsel in any criminal proceedings that could result in punishment by loss of liberty, or where court determines that interest of justice so requires); FLA. R. CRIM. P. 3.111(b) (providing for counsel in all prosecutions punishable by imprisonment); KY. R. CRIM. P. § 3.05 (providing counsel for all offenses "punishable by confinement"); MASS. SUP. JUD. CT. R. 3:10 (providing counsel for any crime for which sentence of imprisonment may be imposed); N.D. R. CRIM. P. 44 (providing counsel in all nonfelony cases unless magistrate determines that sentence upon conviction will not include imprisonment); PA. R. CRIM. P. § 316(a)-(c) (providing for counsel in all criminal cases); R.I. ST. DIST. CT. R. CR. P. 15 (Dist. Ct.) (providing counsel to retain option of incarceration for longer than six months); WASH. JUSTICE COURT CRIM. R. 2.11(a)(1) (providing counsel in all criminal offenses punishable by loss of liberty).

Baldasar via independent state grounds.¹⁶⁰

In conclusion, given the clarity and workability of the dissent's rule in *Nichols*, and its closer adherence to the principles "born of *Gideon* and announced in *Argersinger*," it may have been better to simply clarify, rather than overrule *Baldasar*.¹⁶¹

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160. Thus far, all the states faced with the issue have fallen into lock-step with *Nichols*. See *State v. Delacruz*, 899 P.2d 1042 (Kan. 1995) (holding that prior, uncounseled misdemeanor conviction may be used to enhance sentence); *State v. Hansen*, No. 94-584, 1995 WL 567010 (Mont. June 15, 1995) (same); *State v. Stewart*, 892 P.2d 1013 (Or. 1995) (same); *Garcia v. State*, No. 13-93-670-CR, 1995 WL 515538 (Tx. Ct. App. Aug. 31, 1995) (same); *Griswold v. Commonwealth*, No. 2269-92-2, 1995 WL 519192 (Va. Ct. App. Sept. 5, 1995) (same); *State v. Hopkins*, 453 S.E.2d 317 (W. Va. 1994) (same); *State v. Schoenick*, 532 N.W.2d 470 (Wis. 1995) (same).

161. *Nichols*, 114 S. Ct. at 1935 (Blackmun, J., dissenting). For a discussion of whether the majority or dissenting opinion more closely adheres to Sixth Amendment precedent, see *supra* notes 138-50 and accompanying text.