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Shaking the Foundation of Gideon: A Critique of Nichols in Overruling Baldasar v. Illinois, 25 Hofstra L. Rev. 507 (1996)

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SHAKING THE FOUNDATION OF *GIDEON*: A CRITIQUE OF *NICHOLS* IN OVERRULING *BALDASAR V. ILLINOIS*

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I. INTRODUCTION

Among the guarantees provided by the Sixth Amendment is the right of an accused person to have the assistance of counsel in preparing and presenting a defense.[1] This safeguard serves to protect the fundamental right of the accused to a fair trial. Over the past thirty-six years, the United States Supreme Court has defined the nature of this right. In doing so, the Court has fashioned this right to promote the interests of fairness.[2]

Significant in this long line of cases is *Baldasar v. Illinois*,[3] where a majority of the Court held, consistent with prior decisions of the Court, that a prior uncounseled misdemeanor conviction could not be used to

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1. *See* U.S. CONST. amend. VI.

2. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that states must appoint counsel to represent indigent defendants).

3. 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994).

convert a subsequent misdemeanor into a felony and bring about incarceration.[4] The Supreme Court overruled *Baldasar* in *Nichols v. United States*.[5] The immediate impact of *Nichols* is that a sentencing judge is no longer prohibited from enhancing a sentence on the basis of a prior uncounseled misdemeanor conviction.[6] Obviously, with the Court's overruling of *Baldasar*, a prior uncounseled misdemeanor conviction may now be used to convert a subsequent misdemeanor into a felony and result in imprisonment.

This Article contends that *Nichols* is significant for a more worrisome reason. *Nichols* harbors an antipathy to the right of counsel and may have larger implications for the Sixth Amendment. Possibly, it may be the beginning of a process which challenges the foundation of *Gideon v. Wainwright*.[7]

This Article traces in Part II the history of Sixth Amendment jurisprudence, including the decision of the Court in *Nichols*. In Part III, the Article then examines why the Court incorrectly decided *Nichols* and why the decision did not follow the logical flow of Sixth Amendment jurisprudence leading up to *Baldasar*. Finally, in Part IV, the Article addresses why *Nichols* threatens the reliability of convictions and sentences and concludes that the Court erred in its decision in *Nichols*.

II. RECENT HISTORY OF SIXTH AMENDMENT JURISPRUDENCE

A. *Cases Leading Up to* Baldasar v. Illinois

The United States Supreme Court first addressed the constitutional requirement of the right to counsel in *Powell v. Alabama*.[8] In this case, the Court held that the Fourteenth Amendment right to due process mandated that indigent defendants receive court-appointed counsel to help them prepare a meaningful defense.[9] However, the Court limited its holding to capital cases, specifically refusing to decide whether the right to counsel extended to indigent defendants accused of lesser crimes.[10]

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4. *See id.* at 225-30.
5. 114 S. Ct. 1921 (1994).
6. *See id.* at 1928.
7. 372 U.S. 335 (1963).
8. 287 U.S. 45 (1932).
9. *See id.* at 71.
10. *See id.* Prior to *Powell*, numerous jurisdictions afforded defendants the right to court-appointed counsel in various situations. *See, e.g.*, ALA. CODE § 5567 (1923) (capital cases); Conley v. United States, 59 F.2d 929, 936-37 (8th Cir. 1932) (finding no error in not appointing counsel

In arriving at its decision, the Court placed great emphasis on the specific circumstances and unique characteristics of the accused, explaining that they needed counsel due to their youth, ignorance, illiteracy, circumstances of public hostility, and the fact that they were physically far removed from their family and friends.[11] These factors made it particularly likely that they would not receive a fair trial or a reliable result unless counsel would help them to understand the nature of the charges, proceedings, and evidence, and to rebut the evidence against them.[12]

The most salient portion of the Court's opinion explained the importance of the aid of counsel in criminal proceedings.[13] According to the Court, the right to be heard would be meaningless if it did not include the right to be heard by counsel.[14] The Court explained that

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where there is no demand for such counsel); King v. United States, 55 F.2d 1058, 1062 (10th Cir. 1932) (counsel appointed to defend defendant charged with transporting female across state line to have sex); Miller v. United States, 53 F.2d 316, 317 (7th Cir. 1931) (finding no error in not appointing counsel where there is no demand for such counsel); Urban v. United States, 46 F.2d 291, 292 (10th Cir. 1931) (counsel appointed for defendant charged with possession and transportation of whiskey); Downer v. Dunaway, 1 F. Supp. 1001, 1002 (M.D. Ga. 1932) (counsel appointed in rape case); Stirling v. State, 297 P. 871, 871 (Ariz. 1931) (bigamy); People v. Farolan, 5 P.2d 893, 893 (Cal. 1931) (murder); People v. Rocco, 285 P. 704, 706 (Cal. 1930) (same); Carlson v. People, 15 P.2d 625, 625 (Colo. 1932) (same); Abshier v. People, 289 P. 1081, 1085 (Colo. 1930) (any criminal case); Cutts v. State, 45 So. 491 (Fla. 1907) (counsel appointed for any felony as a matter of practice but not required by law); People v. Spino, 183 N.E. 812 (Ill. 1932) (robbery); People v. Rose, 180 N.E. 791, 792 (Ill. 1932) (every criminal defendant); State v. Fountain, 143 So. 55 (La. 1932) (hog stealing); People v. Jury, 233 N.W. 389, 389-90 (Mich. 1930) (murder); People v. Williams, 195 N.W. 818, 819 (Mich. 1923) (any criminal case); State v. Worden, 56 S.W.2d 595, 596 (Mo. 1932) (rape); Commonwealth v. Flood, 153 A. 152, 153 (Pa. 1930) (murder); State v. Allen, 82 P. 1036, 1036 (Wash. 1905) (per curiam) (robbery). The *Powell* Court acknowledged the right to court-appointed counsel in its opinion:

> The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases.

Powell, 287 U.S. at 73.

Subsequent to *Powell*, most cases citing it have done so in reference to the question of effectiveness of counsel; very few have addressed the issue of when, or if, counsel must be appointed. See *Wilson v. Lanagan*, 19 F. Supp. 870, 873 (D. Mass. 1937), *aff'd*, 99 F.2d 544 (1st Cir. 1938); *Wadsworth v. State*, 186 So. 435, 445 (Fla. 1939) (Brown, J., concurring); *Commonwealth v. Millen*, 194 N.E. 463, 471 (Mass. 1935); and *People v. La Barbera*, 8 N.E.2d 884, 885 (N.Y. 1937), which only noted the holding of *Powell*. Two states provided for counsel in any criminal case. *See* Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405, 407 (Ind. 1940); Watkins v. Commonwealth, 6 S.E.2d 670, 671 (Va. 1940).

11. *See Powell*, 287 U.S. at 71.
12. *See id.* at 71-73.
13. *See id.* at 69.
14. *See id.*

even intelligent and educated persons have difficulty understanding the law and its application to them.[15] Most individuals, when charged with a crime, will be unable to determine whether the indictment is proper or improper because they do not understand the workings of the legal system.[16] As a result, a defendant without counsel suffers the danger of being put on trial without a proper charge and being convicted upon incompetent, irrelevant, or inadmissible evidence.[17] A defendant without

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15. *See id.*

16. Indictments may be improper or void for numerous reasons which are not apparent or detectable to the layperson. An indictment fails when it does not contain sufficient facts to constitute an offense, *see* State v. Geary, 239 N.W. 158, 159 (Minn. 1931), and when it does not include all the elements of the charged offense, *see* Hagner v. United States, 54 F.2d 446, 447 (D.C. Cir. 1931), *cert. granted*, 284 U.S. 614, *and aff'd*, 285 U.S. 427 (1932); State v. Ritchie, 136 So. 11, 14 (La. 1931). Similarly, where the indictment is not properly presented as defined by a particular criminal code, *see* Johnson v. United States, 59 F.2d 42, 43-44 (9th Cir. 1932), is not presented within the statute of limitations, *see* Grimsley v. United States, 50 F.2d 509, 510 (5th Cir. 1931), or improperly joins several counts, *see* Culjak v. United States, 53 F.2d 554, 555-56 (9th Cir. 1931), a defendant may challenge it. Other examples include an indictment which fails to properly lay jurisdiction, *see* Bowles v. United States, 56 F.2d 913, 914 (7th Cir. 1932), or venue, *see* State v. Myers, 49 S.W.2d 36, 37-40 (Mo. 1932); which is returned based on improper and incompetent evidence, *see* Marggraf v. Lewis, 54 F.2d 54, 56-57 (1st Cir. 1931), or coercion, *see* People v. Gould, 178 N.E. 133, 148 (Ill. 1931); which contains surplus or prejudicial language that cannot be cured by instructing the jury, *see* Beck v. United States, 33 F.2d 107, 114 (8th Cir. 1929), or by a bill of particulars which would eliminate any prejudicial or untrue charges, *see* Singer v. United States, 58 F.2d 74, 75-76 (3d Cir. 1932).

Another area defendants may challenge, but may be unaware of the opportunity if unrepresented by counsel, is where the proof at trial and the averments in the indictment are at variance. *See* Morton v. United States, 60 F.2d 696, 697 (7th Cir. 1932); Booth v. United States, 57 F.2d 192, 197 (10th Cir. 1932) (per curiam); People v. Ranney, 1 P.2d 423, 427 (Cal. 1931); People v. Popescue, 177 N.E. 739, 740-41 (Ill. 1931).

17. Examples of inadmissible, irrelevant, or incompetent evidence include hearsay evidence which does not fall within an exception, *see* United States v. Roberts, 62 F.2d 594, 596 (10th Cir. 1932); Singer v. United States, 58 F.2d 74, 77 (3d Cir. 1932); Rivera v. United States, 57 F.2d 816, 820 (1st Cir. 1932); Commonwealth v. Hoyt, 181 N.E. 473, 475 (Mass. 1932); Tatu v. State, 182 N.E. 681, 682-84 (Ohio Ct. App. 1932); evidence obtained after an illegal search or seizure, *see* Crank v. United States, 61 F.2d 981, 984-85 (8th Cir. 1932); Kerns v. United States, 50 F.2d 602, 602 (6th Cir. 1931); Cooper v. State, 143 So. 217, 218 (Fla. 1932); State v. Innocenti, 16 P.2d 439, 442 (Wash. 1932); testimony subject to a privilege, *see* Clark v. United States, 61 F.2d 695, 708-09 (8th Cir. 1932), *cert. granted*, 287 U.S. 595, *and aff'd*, 289 U.S. 1 (1933); O'Loughlin v. People, 10 P.2d 543, 546 (Colo. 1932); People v. Haab, 245 N.W. 545, 546 (Mich. 1932); evidence of other crimes defendant committed, *see* Hood v. United States, 59 F.2d 153, 154 (10th Cir. 1932); Minner v. United States, 57 F.2d 506, 510 (10th Cir. 1932); People v. Burkhart, 297 P. 11, 14 (Cal. 1931); Abbott v. People, 299 P. 1053, 1054 (Colo. 1931), *overruled on other grounds by* Adrian v. People, 770 P.2d 1243 (Colo. 1989); State v. Flores, 55 S.W.2d 953, 955 (Mo. 1932); Richards v. State, 183 N.E. 36, 39 (Ohio Ct. App. 1932); Boyd v. Commonwealth, 157 S.E. 546, 550 (Va. 1931); character evidence of defendant, *see* Davila v. United States, 54 F.2d 356, 356 (1st Cir. 1931); People v. Hill, 241 N.W. 873, 875 (Mich. 1932); State v. Bossart, 241 N.W. 78, 81-82 (N.D. 1932); co-defendant's statement admissible against him or her but not against other defendants, *see* Collenger v. United

counsel may not realize the potential defenses he has.[18] Thus, a defendant needs the assistance of counsel at every stage of the proceeding against him.[19] As stated in *Powell*, "[w]ithout [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[20] The Court explained that if educated persons were subject to this danger, illiterate or less intelligent defendants were even more likely to be unfairly convicted.[21] Thus, in forcing defendants to face the dangers of unreliable and unfair verdicts by refusing to allow them the assistance of counsel, uncounseled defendants will unquestionably suffer a denial of their due process rights.[22]

Six years later, the Supreme Court, applying a Sixth Amendment analysis in *Johnson v. Zerbst*,[23] unequivocally held that the Constitution requires the appointment of counsel for indigent defendants in federal

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States, 50 F.2d 345, 348 (7th Cir. 1931); Garcia v. People, 295 P. 491, 492-93 (Colo. 1931); People v. Gallo, 260 N.Y.S. 32, 34-35 (App. Div. 1932), *rev'd on other grounds sub nom.* People v. Dolce, 184 N.E. 690 (N.Y. 1933); defendant's involuntary confession, *see* People v. Dorr, 178 N.E. 476, 478-79 (Ill. 1931); State v. Washington, 144 So. 437, 438 (La. 1932); State v. Pierson, 56 S.W.2d 120, 124 (Mo. 1932); and the character or conduct of a decedent in certain circumstances, *see* State v. Oliver, 153 A. 399, 400-01 (N.J. 1931); Commonwealth v. Prophet, 160 A. 597, 601 (Pa. 1932).

18. A few more obvious and known defenses include insanity, *see* Young v. State, 299 P. 682, 683 (Ariz. 1931); alibi, *see* People v. Doody, 175 N.E. 436, 445 (Ill. 1931); self-defense, *see* Frank v. United States, 59 F.2d 670, 670 (9th Cir. 1932); Frisina v. United States, 49 F.2d 733, 736 (8th Cir. 1931); People v. Green, 17 P.2d 730, 733 (Cal. 1932); State v. Jones, 142 So. 693, 695 (La. 1932); State v. Green, 55 S.W.2d 965, 967 (Mo. 1932); voluntary intoxication, *see* Brennan v. People, 86 P. 79, 81 (Colo. 1906), *superseded by statute* COLO. REV. STAT. ANN. § 18-1-804 (1990); involuntary intoxication, *see* People v. Penman, 110 N.E. 894, 899 (Ill. 1915); defense of one's habitation or premises, *see* Brown v. United States, 256 U.S. 335, 342-43 (1921); People v. Doud, 193 N.W. 884, 887 (Mich. 1923); State v. Sorrentino, 224 P. 420, 422 (Wyo. 1924); defense of property, *see* Commonwealth v. Donahue, 20 N.E. 171, 172 (Mass. 1889); State v. Cleveland, 72 A. 321, 321 (Vt. 1909); Montgomery v. Commonwealth, 36 S.E. 371, 372-73 (Va. 1900); duress, *see* State v. Nargashian, 58 A. 953, 954 (R.I. 1904); and mistake, *see* State v. McCallister, 162 S.E. 484, 485-86 (W. Va. 1932).

19. *See Powell*, 287 U.S. at 69.

20. *Id.*

21. *Id.* ("If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

22. The Court stated:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id.

23. 304 U.S. 458 (1938).

felony prosecutions.[24] According to the Court, the Sixth Amendment recognizes that, generally, the criminally accused does not have adequate legal knowledge and skills to protect his or her interests in life and liberty in a criminal trial.[25] The Court explained that the Sixth Amendment "embodies a 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."[26] What seems clear and self-evident to an attorney will most likely be incomprehensible and confusing to a person answering without counsel.[27] Thus, according to the Court, indigent defendants must receive court-appointed counsel to enable them to fairly and fully defend themselves when accused of a crime.[28]

Although the Court seemed to broaden the constitutional right to counsel in *Johnson*, it limited this right in *Betts v. Brady*.[29] In *Betts*, the Court refused to apply the Sixth Amendment right to counsel to the states through the Fourteenth Amendment.[30] According to the Court,

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24. *See id.* at 462-68. "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.* at 467.

25. *See id.* at 462-63.

26. *Id.*

27. *See id.* at 463. Some examples include the right to counsel in various aspects of the prosecution against the criminal defendant, *see* Gilbert v. California, 388 U.S. 263, 269-74 (1967) (during a line-up); United States v. Wade, 388 U.S. 218, 223 (1967) (same); Miranda v. Arizona, 384 U.S. 436, 442 (1966) (during interrogation); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (same); White v. Maryland, 373 U.S. 59, 59-60 (1963) (per curiam) (during preliminary hearing); Douglas v. California, 372 U.S. 353, 356 (1963) (on appeal); Williams v. Kaiser, 323 U.S. 471, 475-76 (1945) (entering a plea); *Powell*, 287 U.S. at 58 (in capital cases); the right to remain silent, *see* Griffin v. California, 380 U.S. 609, 610 (1965); statute of limitations, *see* Scott v. State, 566 S.W.2d 737, 740 (Ark. 1978) (in banc); Hall v. Hopper, 216 S.E.2d 839, 840 (Ga. 1975); whether one can be convicted of multiple charges, *see* Jones v. Cunningham, 297 F.2d 851, 854 (4th Cir. 1962); Clark v. Commonwealth, 115 S.E. 704, 705-06 (Va. 1923), *overruled in part by* Chittum v. Commonwealth, 174 S.E.2d 779 (Va. 1970); and the right to a jury trial, *see* Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

28. *See Johnson*, 304 U.S. at 463.

29. 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

30. *See id.* at 471-72. The Court stated:

> [I]n 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. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power,

due process did not require the automatic appointment of counsel in every state criminal trial, because it was possible for a trial judge to

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if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

Id. This statement appears to be somewhat fallacious since at the time of this decision, twenty-five states provided for appointment of counsel in all criminal cases, sixteen states provided for counsel in capital or felony cases, two states provided for counsel in capital and non-capital cases, and only two states denied the right to appointment of counsel in any case, including capital.

Those states which provided appointment of counsel in all cases were: California, *see* CAL. PENAL CODE pt. 2, tit. 6, ch. 1, § 987 (Deering 1937); Colorado, *see* Abshier v. People, 289 P. 1081, 1086 (Colo. 1930); Connecticut, *see* CONN. GEN. STAT. § 6476 (1930); Georgia, *see* Elam v. Johnson, 48 Ga. 348, 350 (1873); Idaho, *see* IDAHO CODE ANN. §§ 19-1412, -1413 (Bobbs-Merrill 1932); Illinois, *see* ILL. ANN. STAT. ch. 38, ¶ 754 (West 1982); Vise v. County of Hamilton, 19 Ill. 78, 79 (1857); Indiana, *see* Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405, 407 (Ind. 1940); Iowa, *see* IOWA CODE § 13773 (1931); Kansas, *see* 1941 Kan. Sess. Laws ch. 291 (expanding on KAN. GEN. STAT. ANN. § 62-1304 (1935), which provided counsel in felony cases only); Kentucky, *see* Fugate v. Commonwealth, 72 S.W.2d 47, 48 (Ky. 1934); Michigan, *see* MICH. COMP. LAWS ch. 287, § 17486 (1929); Montana, *see* MONT. REV. CODE ANN. § 11186 (Tribune Printing & Supply 1935); Nevada, *see* NEV. COMP. LAWS § 10883 (1929); New Jersey, *see* N.J. REV. STAT. § 2:190-3 (1937); New York, *see* N.Y. CRIM. PROC. LAW § 308 (Thompson's 1939); North Dakota, *see* N.D. COMP. LAWS § 8965 (1913); Ohio, *see* OHIO REV. CODE ANN. § 13439-2 (Baldwin 1930); Oklahoma, *see* OKLA. STAT. ANN. tit. 22, § 1271 (West 1992); Oregon, *see* OR. COMP. LAWS ANN. § 26-804 (Bancroft-Whitney 1940); South Dakota, *see* S.D. CODE § 34.1901 (1939) (prior to this time, South Dakota did not provide for appointed counsel in any case, *see* State v. Sweeney, 203 N.W. 460, 461 (S.D. 1925)); Tennessee, *see* TENN. CODE ANN. § 11734 (1934); Utah, *see* UTAH CODE ANN. § 105-22-12 (1943); Virginia, *see* Watkins v. Commonwealth, 6 S.E.2d 670, 671-72 (Va. 1940); Wisconsin, *see* Carpenter v. County of Dane, 9 Wis. 249, 250-52 (1859); Wyoming, *see* WYO. REV. STAT. ANN. § 33-501 (1931).

Those states which appointed counsel in capital and/or felony cases included Alabama, *see* Campbell v. State, 62 So. 57 (Ala. 1913); Arkansas, *see* ARK. STAT. ch. 43, § 3877 (Pope's Digest 1937); Florida, *see* Cutts v. State, 45 So. 491, 491-92 (Fla. 1907); Louisiana, *see* State v. Davis, 131 So. 295, 295-96 (La. 1930); Maine, *see* ME. REV. STAT. ch. 146, § 14 (1930); Maryland, *see* Coates v. State, 25 A.2d 676, 679-80 (Md. 1942); Minnesota, *see* MINN. STAT. ch. 94, § 9957 (1927); Mississippi, *see* Reed v. State, 109 So. 715, 715 (Miss. 1926); Nebraska, *see* NEB. REV. STAT. § 29-1803 (1964); New Hampshire, *see* 1926 N.H. LAWS ch. 368, § 1; Pennsylvania, *see* Commonwealth *ex rel.* McGlinn v. Smith, 24 A.2d 1, 3 (Pa. 1942); Rhode Island, *see* State v. Hudson, 179 A. 130, 133-35 (R.I. 1935); South Carolina, *see* State v. Jones, 173 S.E. 77, 77 (S.C. 1934); Texas, *see* Lopez v. State, 80 S.W. 1016, 1017 (Tex. Crim. App. 1904); Vermont, *see* State v. Gomez, 96 A. 190, 192-93 (Vt. 1915); Washington, *see* WASH. REV. STAT. ANN. ch. 2, § 2305 (Bancroft-Whitney 1932).

Those states which provided appointment in capital or non-capital cases were Arizona, *see* ARIZ. CODE ANN. § 44-904 (Bobbs-Merrill 1939), and Missouri, *see* MO. REV. STAT. § 4003 (1939).

Those states which denied appointed counsel in any case were Massachusetts, *see* McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899), *aff'd*, 180 U.S. 311 (1901), and West Virginia, *see* State v. Yoes, 68 S.E. 181, 181 (W. Va. 1910), *overruled in part by* State *ex rel.* Stumbo v. Boles, 139 S.E.2d 259 (W. Va. 1964).

At the time of the Bill of Rights, Delaware provided for appointed counsel in all capital cases. *See* WILLIAM BEANEY, *The Right to Counsel, in* AMERICAN COURTS 20 (1995).

New Mexico and North Carolina had never addressed the issue at the time of the *Betts* decision, and Alaska and Hawaii were not yet states.

conduct a fair and reliable trial without appointing counsel for an indigent defendant.[31] In addition, the Court did not wish to "straight-jacket" the individual states' interpretation of the Fourteenth Amendment.[32] Instead, the Court held that the appointment of counsel would depend on the nature of the case.[33]

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31. *See Betts*, 316 U.S. at 471-72. This remark was made solely because the defendants in Maryland usually waived a jury trial and opted for a bench trial. No authority or support was given by the Court other than a statement from the trial judge who stated: "'Certainly my own experience in criminal trials over which I have presided (over 2000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners.'" *Id.* at 472 n.31.

32. *See id.* at 472.

33. *See id.* The Court went on to state:

> As we have said, the 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. at 473.

Many cases went to the federal courts on habeas corpus grounds. Most, if not all, followed *Betts* and refused to appoint counsel unless the case involved a capital offense. *See* Holly v. Smyth, 294 F.2d 396, 397 (4th Cir. 1961) (per curiam) (refusing to discuss whether capital and non-capital distinctions of *Betts* should be repudiated); United States *ex rel.* Carson v. Wilkins, 292 F.2d 321, 323 (2d Cir. 1961) (burglary, followed *Betts*); Dick v. Moore, 261 F.2d 233, 233 (5th Cir. 1958) (per curiam) (no counsel need be appointed where defendant was charged with robbery, because Texas only applied for appointment in capital cases); Henderson v. Bannan, 256 F.2d 363, 382-83 (6th Cir. 1958) (under Michigan law, defendant need not receive appointed counsel when charged with rape); Wiggins v. Ragen, 238 F.2d 309, 312 (7th Cir. 1956) (no special circumstances were necessary to require appointment of counsel in Illinois case for armed robbery); O'Brien v. Lindsey, 204 F.2d 359, 362 (1st Cir. 1953) (no counsel appointed for defendant charged with incest and carnal abuse of child because not capital offenses); Hanson v. Warden, 198 F.2d 470, 471 (4th Cir. 1952) (appointment of counsel not necessary for breaking and entry charge). *But see* Jones v. Cunningham, 297 F.2d 851, 853-54 (4th Cir. 1962) (breaking and entry, grand larceny, and possession of burglary tools required appointment of counsel even though the offenses were non-capital); United States *ex rel.* Savini v. Jackson, 250 F.2d 349, 353-54 (2d Cir. 1957) (*Betts* not applicable to experienced youth facing robbery charges).

Most states, subsequent to *Betts*, discussed special circumstances and principles of fairness based on the specific facts of each case rather than extending and applying *Betts* to all cases. They considered factors such as the gravity of the crime; the age and education of the defendant; the conduct of officials, including the court and prosecuting attorney; the complexity of the charged offense; and any possible defenses the defendant could have. *See* State v. Bell, 186 A.2d 805, 808 (Conn. Cir. Ct. 1962) (citing McNeal v. Culver, 365 U.S. 109, 111 (1961)); *see also* Artrip v. State, 136 So. 2d 574, 576 (Ala. Ct. App. 1962) (no need to appoint counsel for escape from prison charge), *superseded by statute on other grounds as stated in* Andrews v. State, 473 So. 2d 1211 (Ala. Crim. App. 1985); Swagger v. State, 296 S.W.2d 204, 206-08 (Ark. 1956) (facts surrounding burglary case warranted conclusion that defendant should have had the benefit of appointed counsel); People v. Mattson, 336 P.2d 937, 946 (Cal. 1959) (in banc) (stating that California's right to appointed counsel is similar to the federal right in that courts should look at the facts of each case if special circumstances exist); Kelley v. People, 206 P.2d 337 (Colo. 1949) (en banc) (circumstances

surrounding burglary case did not warrant appointment of counsel); Beck v. Wainwright, 147 So. 2d 515 (Fla. 1962) (no right to counsel in armed robbery; state law controls, not federal; court applied fairness test); People v. Clark, 91 N.E.2d 409, 410 (Ill. 1950) (appointment not required in non-capital cases per *Betts*; applied fairness test); Carpentier v. Lainson, 84 N.W.2d 32, 35-38 (Iowa 1957) (applied fairness test; state not required to appoint counsel in larceny of motor vehicle case); Willey v. Hudspeth, 178 P.2d 246, 250-51 (Kan. 1947) (age of defendant warranted conclusion that failure to appoint counsel rendered conviction for juvenile breaking and entry void); Gholson v. Commonwealth, 212 S.W.2d 537, 540 (Ky. 1948) (although no statute for appointment of counsel in felony cases, error not to appoint in concealed weapon charge); Roberts v. State, 150 A.2d 448, 450-51 (Md. 1959) (defendant not entitled to appointment of counsel where he was 29 years old and personally familiar with the conduct of criminal proceedings); Pugliese v. Commonwealth, 140 N.E.2d 476, 479-80 (Mass. 1957) (defendant charged with kidnapping and assault with dangerous weapon entitled to counsel under state constitution because he was a "high grade moron"); People v. Quicksall, 33 N.W.2d 904, 905-06 (Mich. 1948) (defendant charged with murder not entitled to counsel on evidence that he was 44 years old, of keen intellect, and had substantial court experience), *cert. granted*, 336 U.S. 916 (1949), *and aff'd*, 339 U.S. 660 (1950); Fogle v. State, 97 So. 2d 645 (Miss. 1957) (following *Betts* in a grand larceny case, Mississippi courts not authorized to appoint counsel in non-capital cases absent special circumstances); Skiba v. Kaiser, 178 S.W.2d 373, 375-76 (Mo. 1944) (en banc) (need not appoint attorney for robbery absent unfairness and special circumstances); People v. Eckert, 102 N.Y.S.2d 676, 677-78 (Livingston County Ct. 1950) (although no obligation to furnish counsel, courts have power to appoint if fairness dictates); State v. Cruse, 76 S.E.2d 320, 324-26 (N.C. 1953) (appointment proper in capital cases and others if necessary to protect rights of accused), *superseded by statute on other grounds* N.C. GEN. STAT. § 15A-1411 (1988); State v. Magrum, 38 N.W.2d 358, 360-61 (N.D. 1949) (appointment in capital and special circumstance cases only); *In re* Burson, 89 N.E.2d 651, 655-56 (Ohio 1949) (failure to appoint counsel for accused pleading guilty in a criminal prosecution did not violate defendant's due process); Commonwealth *ex rel.* Hallman v. Tees, 118 A.2d 273, 275 (Pa. Super. Ct. 1955) (per curiam) (no requirement of assignment of counsel to those who are without aid of counsel in a non-capital case); *Ex parte* Epperson, 223 S.W.2d 790, 791-92 (Tex. Crim. App. 1949) (necessity for furnishing counsel to accused on trial for a non-capital case depends upon the facts of each case); Stonebreaker v. Smyth, 46 S.E.2d 406, 410-13 (Va. 1948) (court's failure to appoint counsel for the accused, although not requested to do so, constituted a denial of due process); State v. Lei, 365 P.2d 609, 610 (Wash. 1961) (same as *Betts*). *But see* Wyatt v. Wolf, 324 P.2d 548, 550 (Okla. Crim. App. 1958) (appointment in all cases).

Some examples of other fundamental rights which courts have found may deny defendant a fair trial include the right to: a jury trial, *see* U.S. CONST. amend. VI; an impartial judge, *see* Connelly v. United States Dist. Court, 191 F.2d 692, 696-97 (9th Cir. 1951); Whitaker v. McLean, 118 F.2d 596, 596 (D.C. Cir. 1941); a trial conducted in substantial conformity with the law, *see* Shargaa v. State, 102 So. 2d 814, 817 (Fla. 1958); a trial in a fair tribunal, *see* Chessman v. Teets, 239 F.2d 205 (9th Cir. 1956), *cert. granted*, 353 U.S. 928, *and vacated*, 354 U.S. 156 (1957); Yancey v. State, 107 S.E.2d 265, 269-70 (Ga. Ct. App. 1959); Bryant v. State, 115 A.2d 502, 507 (Md. 1955); the absence of perjured testimony, *see* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam); effective assistance of counsel, *see* Harvey v. United States, 215 F.2d 330, 332 (D.C. Cir. 1954); testify on one's own behalf, *see* 18 U.S.C. § 3481 (1994); the absence of fraud or misconduct on the part of defense counsel, *see* Grandsinger v. Bovey, 153 F. Supp. 201, 236-40 (D. Neb. 1957), *aff'd*, 253 F.2d 917 (8th Cir. 1958); Tyson v. Warden, 84 A.2d 59 (Md. 1951); preclude disclosure of confidential information, *see* People v. Kor, 277 P.2d 94, 97-100 (Cal. Dist. Ct. App. 1954); proper jury instructions, *see* State v. Talbert, 174 S.W.2d 144, 145 (Mo. 1943); not to have inadmissible evidence lead to conviction, *see* State v. Arnwine, 171 A.2d 124, 126-27 (N.J. Super. Ct. App. Div. 1961); prevention of prejudicial and reversible improper comments in closing argument by the state, *see* State v. Bassano, 171 A.2d 108, 113-14 (N.J. Super. Ct. App. Div. 1961).

Twenty-one years later, the Supreme Court overruled *Betts* in *Gideon v. Wainwright*.[34] It rejected the *ad hoc* Fourteenth Amendment approach and opted instead for an automatic process under the Sixth Amendment.[35] According to the Court, reason and reflection required the conclusion that any indigent person brought before a criminal court would not receive a fair trial unless the court appointed counsel to aid him.[36] The Court reasoned that if states find it important enough to hire prosecutors to represent their interests, they must believe that lawyers in criminal courts are necessary to properly conduct a trial.[37] In addition, the Court recognized that almost every defendant who can afford to hire counsel does so.[38] This demonstrates that attorneys "in criminal courts are necessities, not luxuries."[39] The Court also stressed the ideal embraced by American courts that every defendant is entitled to procedural and substantive safeguards which assure him a fair trial before an impartial tribunal and preserve equality before the law for all.[40] Consequently, states must appoint counsel to represent indigent defendants.[41]

In *Burgett v. Texas*,[42] the Court further highlighted the importance

34. 372 U.S. 335 (1963).

35. *See id.* at 342-45.

36. *See id.* at 344. It appears the *Gideon* Court felt *Betts* misread or misinterpreted historical data regarding the right to counsel. The Court stated: "We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." *Id.* at 341. According to the *Gideon* Court, even at the time of *Betts*, one of those fundamental safeguards was the right to counsel. "We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights." *Id.* at 342. The Court then reviewed the Supreme Court cases addressing the right to counsel before *Betts*. *See id.* at 342-45; Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940); Johnson v. Zerbst, 304 U.S. 458 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936); Powell v. Alabama, 287 U.S. 45 (1932). The Court found that *Betts* made an abrupt break in the constitutional analysis of the right to counsel. *See Gideon*, 372 U.S. at 344-45.

37. *See Gideon*, 372 U.S. at 344.

38. *See id.*

39. *Id.*

40. *See id.* These safeguards include, among other things, the right to be free from unreasonable searches and seizures, *see* Mapp v. Ohio, 367 U.S. 643 (1961), and the right not to be subjected to cruel and unusual punishment, *see* Robinson v. California, 370 U.S. 660, 666-67 (1962).

41. *See Gideon*, 372 U.S. at 344-45. Because this case involved a felony and overruled *Betts* which involved a felony, by implication *Gideon* applied to felonies only. However, one could argue it was not intended to apply only to felonies, since the Court stated: "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, *any person* haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344 (emphasis added).

42. 389 U.S. 109 (1967).

of the right to court-appointed counsel for indigents when it held that convictions obtained in violation of the Sixth Amendment were constitutionally invalid and could not be used to enhance the seriousness of a subsequent conviction.[43] The Court explained that using a conviction, obtained without the assistance of counsel or a valid waiver, to support guilt or enhance punishment for a later charge would defeat the principles of *Gideon*.[44] Thus, a conviction gained in violation of the right to counsel is invalid for all purposes.[45]

The Court continued to develop its Sixth Amendment jurisprudence in *Argersinger v. Hamlin*,[46] in which it held that the right to counsel extends beyond felonies to misdemeanors which result in actual incarceration of any duration.[47] The Court contrasted the right to counsel to the right of an accused to have a trial by jury.[48] While it recognized that the right to a jury trial had historically been limited to capital and more serious crimes,[49] the Court simultaneously pointed out that no such historical support existed for limiting the right of an accused to representation by counsel.[50] According to the Court, the Sixth Amendment extended the right to counsel beyond what those cases originally provided at common law.[51] The Court could find no evidence in the Amendment's language, history, or previous court decisions to

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43. *See id.* at 115.

44. The Court stated:

> To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

Id. (citation omitted).

45. *See id.*

46. 407 U.S. 25 (1972).

47. *See id.* at 37.

48. *See id.* at 29-31.

49. The right to a jury trial was limited to those offenses that held a prison term of six months or more. *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

50. *See Argersinger*, 407 U.S. at 30.

51. *See id.* On the contrary, the Court explained, at least twelve of the thirteen colonies rejected the English common law rule and extended the right to counsel in all cases, including civil and misdemeanor proceedings. *See id.*

> In England, at common law, the assistance of counsel was provided in civil and misdemeanor cases only, including petty offenses. A defendant charged with treason or another felony may have had a right to the assistance of counsel but only on legal questions and only when the defendant posed the questions himself. The colonies provided for the assistance of counsel in all cases, with a few providing for counsel only in capital or more serious cases. *See* BEANEY, *supra* note 30, at 14-21.

show an intent to take away the common law right to counsel for petty offenses.[52]

The Court stated that the assistance of counsel is necessary to ensure a fair trial and pointed to *Powell* and *Gideon* to explain the importance of "the guiding hand of counsel."[53] Although the Court in *Powell* and *Gideon* discussed the right to counsel with respect to felony cases, the *Argersinger* Court held that this right need not be limited to felony cases.[54] On the contrary, the rationale of the prior cases applies to any circumstance in which an accused faces the loss of liberty.[55] The Court remained unconvinced that the legal and constitutional questions involved in petty offenses with sentences of imprisonment are any less complex because they are not felonies.[56] The Court pointed out that the accused needs the assistance of counsel even when he decides to plead guilty so that he will know exactly what he is doing when he agrees to the loss of his liberty without a trial.[57] In dictum, the Court also expressed a concern that the great volume of misdemeanors may tempt the system to engage in a speedy disposition of these cases without regard for the fairness of the process.[58] Thus, every accused should have the assistance

52. *See Argersinger*, 407 U.S. at 30.

53. *Id.* at 31-33.

54. *See id.* at 32. The Court also noted other safeguards which were so "basic" they could not be denied in petty cases: the right to a public trial, *see In re* Oliver, 333 U.S. 257, 278 (1948); the right to be informed of the nature and cause of the accusations, *see Argersinger*, 407 U.S. at 28; the right to confrontation, *see* Pointer v. Texas, 380 U.S. 400, 405-06 (1965); and the right to compulsory process to obtain one's own witnesses, *see* Washington v. Texas, 388 U.S. 14, 23 (1967).

55. *See Argersinger*, 407 U.S. at 32.

56. *See id.* at 33. The Court cited, as an example, vagrancy cases which typically result in only brief sentences of imprisonment, but "often bristle with thorny constitutional questions." *Id.* Thus, counsel may be necessary to ensure that the accused in a misdemeanor case adequately understands and can defend against the charges pending against him or her. *See id.* at 36-37.

57. *See id.* at 34.

58. *See id.* at 34-36. The Court gave statistics concerning the number of misdemeanors filed and prosecuted in the states. *See id.* at 34 n.4. In addition, it pointed out that because of the great number of cases, speed takes precedence over protecting defendants' rights. *See id.* at 34-35. According to one report, public officials are often overworked and harassed, and cannot put the time necessary into prosecuting and preparing cases. This includes police officers investigating the cases, prosecutors who review the file on the day of trial, and defense counsel who speak with their clients for the first time on the day of trial. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967) [hereinafter FREE SOCIETY]. In accenting the importance of counsel in misdemeanor and petty cases, the Court stated: "One study concluded 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.'" *Argersinger*, 407 U.S. at 36 (quoting AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)).

of an attorney whose duty is to ensure that the overworked judicial system does not trample an individual's right to a fair proceeding.[59] The Court focused its analysis on the actual loss of liberty and declined to address the right to counsel in a situation where the loss of liberty is not involved.[60] Rather, the right to counsel was limited to those cases in which a jail sentence will be imposed if the accused is convicted of the crime.[61] In its closing remarks, the Court observed:

> [E]very judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.[62]

Therefore, the *Argersinger* Court explicitly declared that no term of incarceration may be imposed on the accused unless he or she is represented by counsel.[63]

In *Scott v. Illinois*,[64] the Court answered the question left unanswered in *Argersinger*: whether the accused is entitled to appointed counsel where the loss of liberty is not involved.[65] In *Scott*, the Court limited the right to court-appointed counsel to those cases in which the defendant actually received imprisonment.[66] Thus, if the relevant statute authorized imprisonment, but the trial judge did not intend to impose such a sentence, the defendant had no right to court-appointed counsel.[67] In reaching this conclusion, the Court interpreted the decision in

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59. *See Argersinger*, 407 U.S. at 37.

60. *See id.*; *see also* Scott v. Illinois, 440 U.S. 367, 386-88 & nn.18-21 (1979) (Brennan, J., dissenting) (outlining states which provide counsel in various types of cases where periods of imprisonment are involved); Geehring v. Municipal Court, 357 F. Supp. 79, 82 (N.D. Ohio 1973) (finding that "justice and fairness demand the appointment of counsel to any person found to be indigent if a possibility exists that said person might lose his liberty as a result of his being prosecuted"); United States v. Rogers, 354 F. Supp. 502, 504 (D. Colo. 1973) (no right to appointment of counsel in petty cases); Hendrix v. City of Seattle, 456 P.2d 696, 704 (Wash. 1969) (no right to counsel in municipal court misdemeanor cases), *overruled in part by* McInturf v. Horton, 538 P.2d 499, 500 (Wash. 1975) (entitling defendant to appointment of counsel in misdemeanor prosecution where imprisonment for up to six months was possible).

61. *See Argersinger*, 407 U.S. at 37.

62. *Id.* at 40.

63. "[I]n those [cases] that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Id.*

64. 440 U.S. 367 (1979).

65. *See id.* at 373-74.

66. *See id.*

67. *See id.*

Argersinger.[68] According to the Court, the central premise of *Argersinger* was that a jail sentence is entirely different from a fine or threat of imprisonment.[69] The *Scott* Court agreed and determined that *Argersinger* created a workable standard for determining when the accused is entitled to the assistance of counsel.[70] Any attempt to expand the right to counsel to other situations would create confusion and unpredictable costs for the fifty states.[71] The Court reasoned that economic and efficiency considerations require that the right to counsel be limited to those cases which involved the actual loss of liberty.[72] As a result, the Sixth Amendment does not require the appointment of counsel when a criminal defendant is merely fined or otherwise punished, short of incarceration.[73]

B. The Baldasar v. Illinois *Decision*

After the Court's decision in *Scott*, the question arose whether a valid uncounseled misdemeanor conviction could be used to convert a later misdemeanor into a felony. The Supreme Court answered this question in *Baldasar v. Illinois*.[74] In *Baldasar*, the defendant was convicted of an enhanced misdemeanor turned felony theft.[75] During the jury trial, the prosecution introduced evidence of his prior misdemeanor theft conviction since Illinois law allowed such evidence to enhance a subsequent misdemeanor theft into a felony.[76] The defendant did not have counsel at his first trial, nor did he waive it, and was fined.[77] He had counsel at his second trial.[78] At the second trial, the defendant's attorney objected to the introduction of the first conviction.[79] She argued that the absence of an attorney at the first trial made the conviction too unreliable to support enhancement of a second misde-

68. *See id.*
69. *See id.* at 373.
70. *See id.*
71. *See id.*
72. *See id.* at 374.
73. *See id.* Despite the Supreme Court's holding, many jurisdictions prior to *Scott* supplied counsel in all criminal cases, even where imprisonment was only authorized. For a recitation of such cases and a more extensive discussion of the issue, see *Scott*, 440 U.S. at 385-88 & nn.18-22.
74. 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994).
75. *See id.* at 223.
76. *See id.* (citing ILL. STAT. ANN. ch. 38, § 1005-8-1(b)(5) (West 1973-74)).
77. *See id.*
78. *See id.*
79. *See id.*

meanor.[80] The Illinois Appellate Court rejected this argument and affirmed the jury verdict finding the defendant guilty of a felony and also affirmed his prison sentence.[81]

However, the United States Supreme Court disagreed. In a *per curiam* opinion, the Court overruled the Illinois Appellate Court's decision and held that a prior uncounseled misdemeanor conviction could not be used to enhance a subsequent misdemeanor to a felony.[82] The Justices offered several differing opinions in determining that the defendant's felony conviction and imprisonment were obtained in violation of the Sixth Amendment right to counsel.[83] Justice Stewart, with whom Justices Brennan and Stevens joined in one concurring opinion, argued that *Scott* clearly forbade *any* imprisonment, direct or collateral, which flows from an uncounseled conviction.[84] They believed that since the defendant's prison sentence would not have occurred but for the use of his prior uncounseled misdemeanor conviction, *Scott* prevented the use of this conviction at his subsequent trial.[85]

In another concurring opinion by Justice Marshall, joined by Justices Brennan and Stevens, it was maintained that the *Scott* decision created a type of conviction which is valid for some purposes, but not for

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80. *See id.* The decision of the Illinois Appellate Court was divided with respect to this issue. *See* People v. Baldasar, 367 N.E.2d 459 (Ill. App. Ct. 1977) (presiding Justice Rechenmacher disagreeing with the majority's affirmance of the lower court's use of a prior uncounseled misdemeanor theft conviction to elevate a subsequent misdemeanor theft offense to a felony), *rev'd per curiam*, 446 U.S. 222 (1980).

81. *See Baldasar*, 446 U.S. at 223. The appellate court held that *Argersinger*

> was not intended to limit the use of a properly obtained, although uncounseled, conviction in future proceedings based upon subsequent conduct of a defendant. We believe this to be true whether such use of the conviction is sought to be made for purposes of impeachment, sentence determination or, as in the instant case, to establish an element of a second or subsequent offense prosecution for which an enhanced penalty might be imposed.

Baldasar, 367 N.E.2d at 463. In arriving at its decision, the court stated:

> There is no language in [*Argersinger*] suggesting a prospective application or readjudication of a defendant's right to counsel should he be convicted in the future of the commission of another offense and be then subject to another sentence. The notion that repeat offenders are subject to enhanced penalties for their conduct is so basic to our criminal justice system that it could not have escaped the notice of the *Argersinger* court.

Id. at 461-62. The Illinois Supreme Court refused to hear the case on appeal.

82. *See Baldasar*, 446 U.S. at 224.

83. In arriving at the *per curiam* decision, the *Baldasar* Court wrote three separate concurring opinions. *See id.* (Stewart, J., concurring); *id.* at 224-29 (Marshall, J., concurring); *id.* at 229-30 (Blackmun, J., concurring).

84. *See id.* at 224.

85. *See id.*

others.[86] Since *Scott* determined that actual imprisonment was the circumstance which required the appointment of counsel, no uncounseled conviction could be used to sentence a defendant to prison, no matter when or how that conviction took place.[87] Thus, an uncounseled misdemeanor conviction might be valid for the imposition of a fine, but it is unquestionably invalid for the purpose of imposing a prison sentence.[88] The Justices' main concern was the unreliability of an uncounseled conviction.[89] They reasoned that an uncounseled conviction, unreliable to begin with, would not become more reliable just because it was used to enhance a valid subsequent conviction.[90] They concluded that it would be illogical to hold an uncounseled misdemeanor invalid for imposing a prison sentence directly, but valid for imposing the same sentence indirectly, and resolved that *Scott* required them to invalidate the defendant's conviction.[91]

Justice Blackmun delivered the deciding vote with his own concurring opinion.[92] In his dissent in *Scott*, Justice Blackmun had argued for a "bright line" rule that mandated the appointment of counsel for any offense punishable by incarceration beyond six months.[93] In *Baldasar*, Justice Blackmun adhered to this view.[94] Thus, since the defendant's first theft conviction was an offense punishable by incarceration for more than six months, Justice Blackmun believed that he should have received court-appointed counsel.[95] Since the defendant did not receive counsel, Justice Blackmun concluded that the first conviction was unconstitutional and therefore, under *Burgett v. Texas*, invalid to enhance the misdemeanor theft into a felony.[96] Unlike Justices Stewart, Brennan, Stevens, and Marshall, who found the defendant's first conviction to be

86. *See id.* at 226.
87. *See id.*
88. *See id.*
89. *See id.* at 227-29.
90. *See id.* at 227-28.
91. *See id.* at 228-29.
92. *See id.* at 229-30 (Blackmun, J., concurring).
93. "I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment." Scott v. Illinois, 440 U.S. 367, 389-90 (1979) (Blackmun, J., dissenting).
94. "I still am of the view that this 'bright line' approach would best preserve constitutional values and do so with a measure of clarity for all concerned." *Baldasar*, 446 U.S. at 230.
95. *See id.*
96. *See id.* In *Burgett*, 389 U.S. 109 (1967), the Supreme Court held that an uncounseled felony conviction could not be used in a subsequent trial to enhance punishment. *See id.* at 115.

valid for the imposition of a fine, Justice Blackmun insisted that the defendant's first conviction was invalid for all purposes.[97]

Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, dissented. According to the dissenters, *Scott* and *Argersinger* required only that an indigent defendant receive court-appointed counsel when he suffered actual imprisonment.[98] Because the defendant did not suffer actual imprisonment at the time of his first conviction, they felt the conviction was constitutionally valid.[99] They concluded that the second conviction and sentence did not amount to imprisonment for the first offense.[100] Thus, since the defendant had not been imprisoned previously without the appointment of counsel, it was the dissenters' opinion that his subsequent felony conviction and sentence should stand.[101]

C. *The Impact of Justice Blackmun's Opinion in* Baldasar

Since the plurality had differing views as to why the defendant's conviction and imprisonment had violated the Sixth Amendment right to counsel, subsequent lower courts likewise have interpreted the *Baldasar* decision in conflicting ways, causing great inconsistency in both federal and state courts.[102] Justice Blackmun's concurring opinion caused the greatest difficulty. Although Justice Blackmun aligned himself with the majority, there was much dispute over whether he agreed or disagreed with the use of a prior uncounseled conviction to impose or enhance imprisonment in a subsequent conviction.[103] His opinion was anchored in the view that anyone accused of a crime which had a potential jail term of more than six months must receive the appointment of counsel.[104] Therefore, because the defendant's prior misdemeanor had a

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97. *See Baldasar*, 446 U.S. at 230.
98. *See id.* at 233.
99. *See id.*
100. The dissenting Justices stated:

> This line of argument [defendant's and Justice Blackmun's] misapprehends the nature of enhancement statutes. These laws, commonplace in our criminal justice system, do not alter or enlarge a prior sentence. If, as in this case, a person with a prior conviction chooses to commit a subsequent crime, he *thereby* becomes subject to the increased penalty prescribed for the second crime. This Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.

Id. at 232.
101. *See id.* at 233.
102. *See infra* Part II.C.1-3.
103. *See infra* Part II.C.1-3.
104. *See Baldasar*, 446 U.S. at 229-30.

possible jail sentence of more than six months, the absence of counsel in that case rendered the resultant conviction constitutionally invalid.[105] That prior uncounseled conviction could not be used for any purpose.[106] This explains why Justice Blackmun's view is pivotal for any interpretation of *Baldasar*.

The federal circuits, extremely confused by Justice Blackmun's position, developed three separate interpretations of *Baldasar*. Some state courts mimicked these federal courts. However, state courts often engaged in little discussion of *Baldasar*, and quite a few reached their decisions with little or no analysis of the case. Instead, they simply stated that *Baldasar* required the interpretation that the particular state court gave it.[107] Thus, although *Baldasar* created the same disparity in state court decisions as it did in federal court decisions, the individual states appeared less confused about *Baldasar* than the federal courts.

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105. *See id.* at 230.

106. *See id.*

107. *See* Krewson v. State, 552 A.2d 840, 841 (Del. 1988) (holding that *Baldasar* forbids the use of uncounseled convictions to enhance a sentence for a subsequent conviction); State v. Vares, 801 P.2d 555, 557 (Haw. 1990) (same); State v. Grogan, 385 N.W.2d 254, 255 (Iowa 1986) (same); State v. Oehm, 680 P.2d 309, 312 (Kan. Ct. App. 1984) (same), *overruled by* State v. Delacruz, 899 P.2d 1042, 1047 (Kan. 1995) (adopting *Nichols* in affirming the use of an uncounseled misdemeanor conviction to enhance a subsequent offense); State v. Wiggins, 399 So. 2d 206, 208 (La. 1981) (holding that an uncounseled guilty plea cannot be used to enhance punishment upon conviction of a subsequent driving while intoxicated ("DWI") offense); State v. Smith, 329 N.W.2d 564, 566 (Neb. 1983) (holding that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute" (quoting *Baldasar*, 446 U.S. at 228 (Marshall, J., concurring))); State v. Ulibarri, 632 P.2d 746, 748 (N.M. Ct. App. 1981) (holding that *Baldasar* prevents any sentence enhancement which is supported by a prior uncounseled conviction); State v. Black, 277 S.E.2d 584, 585-86 (N.C. Ct. App. 1981) (holding that a prior uncounseled conviction "could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction"); Bromley v. State, 757 P.2d 382, 385-86 (Okla. Crim. App. 1988) (holding that *Baldasar* prevents the state from using evidence of a dismissed charge to enhance sentencing after a guilty plea for a subsequent offense); State v. O'Brien, 666 S.W.2d 484, 485 (Tenn. Crim. App. 1984) (construing *Baldasar* to mean that "even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense" (quoting *Ulibarri*, 632 P.2d at 747-48)); State v. Triptow, 770 P.2d 146, 147 (Utah 1989) (holding that *Baldasar* prevents an uncounseled prior conviction from being used in a later prosecution "'either to support guilt or enhance punishment for another offense'" (quoting Burgett v. Texas, 389 U.S. 109, 115 (1967))); State v. Armstrong, 332 S.E.2d 837, 841 (W. Va. 1985) (holding that an uncounseled prior conviction "may not be used to enhance a sentence of imprisonment for a subsequent offense"), *overruled by* State v. Hopkins, 453 S.E.2d 317 (W. Va. 1994) (adopting *Nichols*).

1. Interpretations Based on the Narrowest Decision

Some courts applied the narrowest interpretation of *Baldasar* and simply pointed to Justice Blackmun's rationale.[108] According to these courts, two groups of Justices had broad opinions which were diametrically opposed: one group of Justices would unequivocally forbid the use of all uncounseled convictions for the purpose of imposing or enhancing imprisonment,[109] and the other group of Justices would unequivocally allow the use of all uncounseled convictions for any purpose in a subsequent conviction.[110] Contrary to these broad, all-encompassing opinions, Justice Blackmun's opinion forbade the use of only constitutionally invalid uncounseled convictions.[111] Thus, these courts held that Justice Blackmun's opinion was the narrowest interpretation and the only real holding of *Baldasar*.

The Tenth and Fourth Circuits construed *Baldasar* in this fashion. In *Santillanes v. United States Parole Commission*,[112] a Tenth Circuit case, the court explained that since none of the *Baldasar* opinions commanded the support of the majority of the Justices, the holding of *Baldasar* had to be interpreted by the position of the Justices who had based their concurrence on the narrowest grounds.[113] According to the court, Justice Blackmun's opinion was the narrowest because it merely held that an invalid uncounseled conviction could not be used to enhance a later charge.[114] They interpreted Justice Blackmun's position as permitting the use of a prior uncounseled misdemeanor conviction in a subsequent case so long as the first crime did not carry a sentence potential of more than six months' imprisonment.[115] Consequently, the court held that it had to construe *Baldasar* as forbidding only the use of invalid prior uncounseled convictions, namely, those obtained in violation of the six month rule.[116]

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108. Where no opinion in a decision commands the support of the majority, the holding of the Court is the position taken by the Justice or Justices who based their acquiescence in the decision on the narrowest grounds. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

109. *See Baldasar*, 446 U.S. at 224 (Stewart, J., concurring); *id.* at 224-29 (Marshall, J., concurring). Both concurring opinions were joined by Justices Brennan and Stevens.

110. *See id.* at 230 (Powell, J., dissenting) (joined by Burger, C.J., White & Rehnquist, JJ.).

111. *See id.* at 229-30 (Blackmun, J., concurring).

112. 754 F.2d 887 (10th Cir. 1985).

113. *See id.* at 889 (citing *Marks*, 430 U.S. at 193).

114. *See id.*

115. *See id.*

116. *See id.* at 889; *see also* United States v. Falesbork, 5 F.3d 715, 718 (4th Cir. 1993) ("recognizing that the holding of *Baldasar* is limited to prohibiting the elevation of a *misdemeanor*

One group of states similarly limited *Baldasar*'s reach to Justice Blackmun's opinion and held that it prevented the subsequent use of a prior uncounseled conviction only when the prior conviction was constitutionally invalid.[117] As the federal circuits found, these states recognized that *Baldasar* had to be interpreted on its narrowest grounds. They focused on the fact that four Justices held that no prior uncounseled conviction could validly result in imprisonment after a second offense and that four Justices held that any prior uncounseled conviction could be used to increase or impose a jail sentence in a second offense. According to these states, *Baldasar*'s conflicting opinions required them to rely on the one Justice who refused to create such a broad holding. Justice Blackmun agreed that the initial uncounseled misdemeanor conviction in *Baldasar* was invalid for the purpose of increasing the defendant's later misdemeanor conviction to a felony.[118] However, according to these states, Justice Blackmun ruled this way only because he believed that the initial conviction in *Baldasar* was constitutionally invalid. Had Justice Blackmun believed that the prior conviction was valid, he would have aligned himself with the dissenters, which would have formed a five-person majority and allowed its use in the prosecution of the subsequent offense. Thus, these states insisted that the only principle for which *Baldasar* could stand was that it prevented the use of a prior constitutionally invalid conviction to impose or enhance imprisonment in a subsequent case. Pursuant to this interpretation, these states allowed the use of prior valid uncounseled convictions for many

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to a felony by reason of an uncounseled conviction that could have resulted in imprisonment for more than six months").

117. *See* State v. Orsini, 445 A.2d 887, 894 (Conn. 1982) (holding that *Baldasar* requires only that "a conviction which has been procured in violation of constitutional rights cannot be used to increase the punishment which would ordinarily be permissible," but giving no rationale for this interpretation); Hlad v. State, 585 So. 2d 928, 930 (Fla. 1991) (holding that the deciding opinion in *Baldasar* was Justice Blackmun's, which forbids only the use of constitutionally invalid prior convictions in subsequent proceedings); Ratliff v. Commonwealth, 719 S.W.2d 445, 450-51 (Ky. Ct. App. 1986) (holding that *Baldasar* only prevents the use of constitutionally invalid prior convictions), *overruled by* Commonwealth v. Ramsey, 920 S.W.2d 526 (Ky. 1996); State v. Orr, 375 N.W.2d 171, 176 (N.D. 1985) (holding that *Baldasar* must be interpreted according to Justice Blackmun's opinion which forbids only the use of unconstitutionally obtained prior convictions in subsequent proceedings); State v. LaFountain, 628 A.2d 1243, 1245-46 (Vt. 1993) (holding that Justice Blackmun's narrow holding controls the application of *Baldasar* to subsequent cases); State v. Novak, 318 N.W.2d 364, 367-69 (Wis. 1982) (holding that Justice Blackmun's *Baldasar* opinion controls, and only the use of unconstitutionally obtained prior convictions is forbidden).

118. *See Baldasar*, 446 U.S. at 230.

purposes, including enhancing the degree of the subsequent offense.[119]

2. Limitation of *Baldasar* to Its Facts

Other courts interpreted *Baldasar* narrowly by limiting it to its facts. However, these courts did not base their rationale on Justice Blackmun's opinion. Rather, they used his opinion as an excuse to dismiss *Baldasar*'s implications by determining that it applied only in a very unique factual situation. According to these courts, *Baldasar* was too conflicting to determine its ultimate holding. Since four Justices would allow the subsequent use of an uncounseled misdemeanor conviction and four Justices would not allow it, these courts claimed that there was no common denominator upon which the concurring Justices agreed and, therefore, no binding rule to follow. Justice Blackmun's opinion was of no use because it was impossible to tell how he would rule if he believed the prior uncounseled conviction was valid. Thus, according to these courts, for precedential purposes, the opinion was four-to-four and had to be limited to its particular facts.

Several federal circuits followed this rationale.[120] As a result, in

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119. *See Orsini*, 445 A.2d at 894 (allowing use of valid prior felony convictions to increase term of imprisonment for subsequent persistent felony offender conviction); *Hlad*, 585 So. 2d at 930 (allowing fourth DUI conviction to be enhanced to a felony, even though one of previous DUI convictions was uncounseled, because under Justice Blackmun's rationale, the prior conviction could not have resulted in more than six months' imprisonment and was therefore valid); *Ratliff*, 719 S.W.2d at 449 (allowing enhancement of DUI conviction if prosecution could prove the constitutional validity of the previous uncounseled drunken driving convictions); *Orr*, 375 N.W.2d at 176 (concluding that first DUI conviction could be used to enhance second DUI because at the time of the first conviction defendant could not have received more than six months' imprisonment); *LaFountain*, 628 A.2d at 1245 (finding that defendant's third offense for driving with a suspended license could be upgraded to a misdemeanor rather than a civil offense under the enhancement statute through the introduction of two prior uncounseled convictions for the same offense); *Novak*, 318 N.W.2d at 369 (classifying the defendant's second conviction for operating a motor vehicle while under the influence of an intoxicant ("OWI") as a misdemeanor and holding that he could be sentenced to five days in jail because after his prior uncounseled conviction for the same offense he was not subject to any jail term, therefore *Baldasar* was not applicable).

120. *See* United States v. Castro-Vega, 945 F.2d 496, 499-500 (2d Cir. 1991) (holding that there is no common denominator upon which all the concurring Justices in *Baldasar* agreed, and stating that *Baldasar* does not apply where a prior uncounseled conviction is used to enhance a defendant's criminal history score); United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990) (holding that *Baldasar* must be limited to its facts due to the potentially conflicting nature of the concurring opinions and, therefore, does not forbid the use of uncounseled misdemeanor convictions during sentencing for a subsequent crime); Moore v. Jarvis, 885 F.2d 1565, 1572-73 (11th Cir. 1989) (holding that *Baldasar* "forbid[s] only the sentencing of a defendant to an increased term of incarceration solely upon consideration of a prior conviction obtained in a proceeding for which . . . counsel was *unavailable* to the defendant"); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983) (holding that *Baldasar* "provides little guidance outside of the precise

these jurisdictions, *Baldasar* could be read only to forbid the use of a prior uncounseled misdemeanor conviction to convert a subsequent misdemeanor to a felony.[121] When the prosecutor sought to use a defendant's prior uncounseled misdemeanor conviction for other purposes, such as increasing his or her criminal history points after a later conviction, these circuits simply distinguished *Baldasar* and held it inapplicable to the case before them.[122]

In *Schindler v. Clerk of Circuit Court*, the Seventh Circuit analyzed the *Baldasar* decision closely.[123] In attempting to decide whether a determination of a statutory violation in an uncounseled civil forfeiture proceeding could be used to impose a prison sentence for a subsequent violation of the same statute, the court expressed confusion about Justice Blackmun's opinion.[124] Since Justice Blackmun's opinion was necessary to form a majority, the *Schindler* court found it had to construe Justice Blackmun's opinion to reach a decision.[125] However, the court was unable to determine whether Justice Blackmun would permit the use of a prior uncounseled misdemeanor in a subsequent proceeding when the first offense held no prison term whatsoever.[126] The court observed: "Justice Blackmun's views on this question are not clear because he expressed no opinion in *Baldasar* on whether an uncounseled conviction that is valid because no prison sentence is imposed or authorized may nonetheless be the predicate for imposing a prison term for a subsequent offense."[127] Due to the confusion over Justice Blackmun's opinion, the

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factual context in which it arose," because Justice Blackmun expressed no opinion in *Baldasar* as to whether a valid prior uncounseled conviction could be used in subsequent proceedings).

121. *See* cases cited *supra* note 120.

122. *See Castro-Vega*, 945 F.2d at 500 (*Baldasar* does not apply where a prior uncounseled misdemeanor conviction is used to enhance a defendant's criminal history score); Thompson v. Estelle, 642 F.2d 996, 999 (5th Cir. Unit A 1981) (prior uncounseled misdemeanor conviction for which defendant was not given a prison term could be used at punishment stage of subsequent criminal offense); United States v. Robles-Sandoval, 637 F.2d 692, 693 (9th Cir. 1981) (uncounseled administrative hearing resulting in deportation order could be used as basis for criminal proceeding charging alien with illegal entry into the United States).

123. 715 F.2d at 344-45.

124. *See id.*; *see also* David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After* Scott *and* Baldasar, 34 U. FLA. L. REV. 517, 529-30 (1982).

125. *See Schindler*, 715 F.2d at 344-45. Although the court agreed that it must look to the narrowest opinion, it agreed with a Wisconsin state court, *see* State v. Novak, 318 N.W.2d 364, 367-68 (Wis. 1982), that there was no least common denominator in *Baldasar*. *See Schindler*, 715 F.2d at 345 n.5.

126. *See Schindler*, 715 F.2d at 344-45.

127. *Id.*

court concluded that *Baldasar* had little use beyond its distinct facts.[128] Thus, the court declined to extend *Baldasar* to the situation in *Schindler* and held that prior uncounseled civil adjudications could be used to enhance a prison sentence for a subsequent offense of the same nature.[129]

A second group of states also interpreted *Baldasar* narrowly by confining it strictly to its facts.[130] These states engaged in little discussion of *Baldasar* and its various interpretations. They simply explained that *Baldasar*'s holding prevents the use of prior uncounseled misdemeanor convictions in converting a subsequent misdemeanor to a felony.[131] After stating the holding of *Baldasar*, these states distinguished it and allowed the use of prior uncounseled convictions for various purposes, such as classifying a defendant as a habitual offender

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128. *See id.* at 345. The court also found significant differences between *Baldasar* and the case before it and held that *Baldasar* was not controlling. *See id.*

129. *See id.* at 345-46. The court found *Baldasar* inapplicable because it believed that none of the Justices in that case ever "suggest[ed] that [a] prior conviction [was] invalid for other collateral purposes." *Id.* at 345. It further believed that the use of defendant's first civil offense for OWI was not used in the subsequent proceeding "to 'support guilt or enhance punishment.'" *Id.* Instead, "[t]he civil adjudication had the effect of specifically putting [the defendant] on notice that he was a high-risk individual, that the State had a public policy against driving while intoxicated, and that future violations would subject him to criminal sanctions." *Id.* at 346. Thus, the use of the first offense at the subsequent proceeding was not punishment for the first offense. *See id.*

130. *See* Moore v. State, 352 S.E.2d 821, 822 (Ga. Ct. App. 1987) (holding that *Baldasar* does not apply where the defendant is not sentenced under an enhanced-penalty statute); Berry v. State, 561 N.E.2d 832, 840 (Ind. Ct. App. 1990) (holding that *Baldasar* does not apply when a prior uncounseled misdemeanor is used to enhance a subsequent sentence, not an offense); State *ex rel.* Majerus v. Carter, 693 P.2d 501, 506 (Mont. 1984) (holding that *Baldasar* does not apply when prior uncounseled traffic violations are used in a civil proceeding to declare the defendant a habitual traffic offender); Bonds v. State, 784 P.2d 1, 2 (Nev. 1989) (per curiam) (holding that *Baldasar* forbids only the use of a prior uncounseled misdemeanor to convert a subsequent offense into a felony but giving no rationale for this narrow interpretation); People v. Butler, 468 N.Y.S.2d 274, 277 (App. Div. 1983) (interpreting *Baldasar* as being limited to those cases where the state seeks to use a prior uncounseled misdemeanor to convert a subsequent offense into a felony); *In re* Kean, 520 A.2d 1271, 1277 (R.I. 1987) (interpreting *Baldasar* only to mean that "a prior uncounseled misdemeanor conviction cannot be used under an enhanced-penalty statute to convert a subsequent misdemeanor into a felony with a prison term," but giving no rationale for this interpretation); State v. Chance, 405 S.E.2d 375, 376 (S.C. 1991) (holding that "when a defendant [is] not actually incarcerated for a prior uncounseled misdemeanor, that offense may be used for enhancement"); Disheroon v. State, 687 S.W.2d 332, 334 (Tex. Crim. App. 1985) (en banc) (holding that *Baldasar* does not prevent the use of a prior uncounseled felony conviction as evidence of a defendant's prior criminal record at trial); State v. Hickok, 695 P.2d 136, 140-41 (Wash. Ct. App. 1985) (holding that *Baldasar* prevents only the use of a prior uncounseled misdemeanor to convert a subsequent offense into a felony, but offering no rationale for this narrow interpretation).

131. *See* cases cited *supra* note 130.

or imposing an enhanced sentence.[132]

In *State v. Chance*, the South Carolina Supreme Court attempted to determine whether a prior uncounseled conviction for driving under the influence ("DUI") could be used to convert a subsequent DUI offense to a more serious crime with a prison sentence.[133] The court concluded that the opinions in *Baldasar* were irreconcilably divided.[134] Accordingly, *Baldasar* never decided the issue of whether a conviction valid under *Scott* could result in increased imprisonment for a second offense.[135] Therefore, the South Carolina Supreme Court determined that *Baldasar* must be limited to its facts and an uncounseled conviction was valid for all purposes.[136] Thus, the court allowed the prior uncounseled DUI conviction to enhance the penalty for a subsequent DUI offense.[137]

3. Interpretations Based on Concern for Reliability

Finally, another group of courts seemed to have no difficulty in reconciling Justice Blackmun's opinion with the other concurring Justices. These courts found that all of the concurring Justices were concerned with the question of reliability of an uncounseled conviction. Indeed, these courts interpreted the concurring Justices' opinions as holding that prior uncounseled convictions were unreliable. Therefore, these convictions could not be subsequently used to impose imprisonment

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132. *See Moore*, 352 S.E.2d at 822 (holding *Baldasar* inapplicable because the relevant statute was not a penalty enhancement statute and did not increase maximum commitment nor convert a misdemeanor into a felony); *Berry*, 561 N.E.2d at 840 (holding *Baldasar* inapplicable when attempting to use defendant's juvenile uncounseled conviction of aggravation at trial for attempted delivery of marijuana on school grounds because the prior offense was not used to enhance the offense but merely used to sentence defendant); *Carter*, 693 P.2d at 506 (finding *Baldasar* inapplicable in a civil habitual traffic offender proceeding and only applicable to criminal proceedings); *Butler*, 468 N.Y.S.2d at 277 (stating that *Baldasar* did not prohibit use of defendant's prior DWI conviction because defendant did not contend he was unrepresented in prior proceeding); *Kean*, 520 A.2d at 1277-78 (holding that *Baldasar* did not prohibit use of prior juvenile DUI offense in second juvenile DUI offense because there was no evidence defendant did not waive counsel in prior proceeding); *Chance*, 405 S.E.2d at 376 (holding that *Baldasar* did not prohibit use of first DUI at second DUI proceeding because defendant was not imprisoned for first DUI offense); *Disheroon*, 687 S.W.2d at 334 (finding that defendant's prior felony conviction for swindling could be used during sentencing for aggravated robbery as evidence of prior criminal history, because there was no evidence that defendant was indigent, he was not represented by counsel, and he did not waive counsel); *Hickok*, 695 P.2d at 144 (holding that prior first degree theft guilty plea could be used at sentencing for defendant's subsequent willful failure to return to work release facility).

133. 405 S.E.2d at 375.

134. *See id.* at 375-76.

135. *See id.* at 375.

136. *See id.* at 376.

137. *See id.*

on the defendant. According to these courts, this underlying rationale of *Baldasar* was clear despite Justice Blackmun's seemingly unclear opinion. In fact, these courts argued that Justice Blackmun was just as concerned about reliability as were the other concurring Justices. Thus, if the main concern of the concurring Justices was to ensure the reliability of convictions resulting in imprisonment, then the narrowest holding of *Baldasar* forbids the use of any prior uncounseled conviction because of its unreliable nature.

Four circuits adopted this rationale.[138] These courts argued that if an uncounseled misdemeanor conviction could not support a term of imprisonment on its own merits, its use in a subsequent conviction to enhance or increase a prison sentence should be constitutionally forbidden. Thus, these circuits held that *Baldasar* precluded the use of a prior uncounseled conviction for any purpose that involved imprisonment.

In *Wang v. Withworth*, the Sixth Circuit addressed the issue of whether *Baldasar* precluded the use of a prior uncounseled misdemeanor to impose an enhanced prison term and to impose an enhanced felony charge.[139] The court recognized that "*Baldasar* prohibits the use of [an] uncounseled conviction to 'be used collaterally to impose an increased term of imprisonment.'"[140] The court interpreted this statement to mean that a defendant may not be subjected to an increased prison sentence through any means.[141] Since the object of the enhanced felony charge was to subject the defendant to a greater deprivation of liberty, the court held that *Baldasar* precluded the use of the prior uncounseled misdemeanor to achieve this end.[142]

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138. *See* United States v. Norquay, 987 F.2d 475, 482 (8th Cir. 1993) (holding that *Baldasar* unquestionably prevents a court from using uncounseled misdemeanor convictions as a basis for enhancing a defendant's sentence for a subsequent offense); United States v. Nichols, 979 F.2d 402, 408 (6th Cir. 1992) ("[E]ven a narrow reading of *Baldasar* proscribes the use of a prior uncounseled misdemeanor conviction to enhance a defendant's sentence upon a subsequent conviction under the sentencing guidelines."), *cert. granted in part*, 114 S. Ct. 39 (1993), *and aff'd*, 114 S. Ct. 1921 (1994); United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991) (stating that *Baldasar* clearly holds that an "'uncounseled misdemeanor conviction [may] not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction'" (alteration in original) (quoting Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (Marshall, J., concurring), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994))); Wang v. Withworth, 811 F.2d 952, 955 (6th Cir. 1987) (holding that *Baldasar* clearly prevents the use of an uncounseled conviction to impose imprisonment, no matter when the conviction occurred).

139. 811 F.2d at 955.

140. *Id.* (quoting *Baldasar*, 446 U.S. at 226 (Marshall, J., concurring)).

141. *See id.*

142. *See id.*

In reaching this conclusion, the Sixth Circuit acknowledged that *Baldasar* created a class of convictions which were valid for one purpose and invalid for another.[143] According to the court, "[t]he imposition by *Baldasar* of a 'limited use' requirement on uncounseled convictions is a logical extension of the Court's decision in *Scott* and *Burgett v. Texas*."[144] Thus, *Baldasar*'s holding addressed the concern raised in those cases: protecting the accused from imprisonment as a result of an uncounseled conviction.[145] In keeping consistent this interpretation of *Baldasar*, the court in *Wang* precluded the use of the defendant's prior uncounseled conviction to convert the defendant's subsequent offense into a felony charge.[146]

Like the federal courts, a large number of states interpreted *Baldasar* broadly and extended the case beyond its facts, holding that it prevented the use of prior uncounseled convictions in a variety of situations.[147]

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143. *See id.*

144. *Id.* (citation omitted).

145. *See id.*

146. *See id.* at 955-56.

147. *See* Pananen v. State, 711 P.2d 528, 532 (Alaska Ct. App. 1985) (holding that a prior uncounseled civil forfeiture cannot be used to impose a jail term for a second conviction because, according to *Baldasar*, "an uncounseled conviction is simply too unreliable to be depended on for purposes of imposing a sentence of incarceration"); State v. Brown, 675 S.W.2d 822, 823 (Ark. 1984) (holding that *Baldasar* prevents the use of a prior uncounseled misdemeanor to convert a subsequent misdemeanor into a felony); People v. Roybal, 618 P.2d 1121, 1126 (Colo. 1980) (en banc) (discussing the unreliability of uncounseled convictions and holding that a state "Driving After Judgment Prohibited statute must be construed to prohibit use of a conviction obtained without benefit or waiver of counsel as a part of the foundation for the sentence of imprisonment which is mandated for violation of that statute"); People v. Finley, 568 N.E.2d 412, 415 (Ill. App. Ct. 1991) (discussing the unreliability of uncounseled convictions and holding that "the use of defendant's prior uncounseled DUI conviction to enhance his current offense to a Class 4 felony is prohibited by *Baldasar*"); State v. Dowd, 478 A.2d 671, 677 (Me. 1984) (holding that *Baldasar* prohibits the use of a prior uncounseled conviction for operating a motor vehicle under the influence of alcohol to enhance the penalty of defendant's later conviction for operating his vehicle without a license); People v. Stratton, 384 N.W.2d 83, 88 (Mich. Ct. App. 1985) (per curiam) (holding that *Baldasar* prohibits the use of a prior uncounseled conviction for operating a motor vehicle under the influence to convert a subsequent "operating under the influence" misdemeanor into a felony); State v. Nordstrom, 331 N.W.2d 901, 905 (Minn. 1983) (holding that *Baldasar* forbids the use of a prior uncounseled misdemeanor DWI conviction to convert a subsequent DWI offense into a gross misdemeanor); State v. Wilson, 684 S.W.2d 544, 547-48 (Mo. Ct. App. 1984) (holding that *Baldasar* forbids the use of a prior uncounseled misdemeanor to enhance the punishment for a subsequent offense, but upholding the defendant's conviction after finding he waived his right to counsel at the prior conviction); State v. Laurick, 575 A.2d 1340, 1347 (N.J. 1990) (holding that *Baldasar* unquestionably prevents the use of a prior uncounseled DWI conviction to impose a higher sentence for a subsequent DWI conviction); State v. Baldauf, 586 N.E.2d 237, 240 (Ohio Ct. App. 1990) (holding that *Baldasar* prevents a defendant's prior misdemeanor conviction from being "used collaterally to enhance his subsequent conviction to a higher degree where such enhanced crime is

These state courts found that the concurring Justices in *Baldasar* were concerned about the unreliability of uncounseled convictions and did not intend to merely prevent the use of a prior uncounseled misdemeanor conviction in converting a second misdemeanor to a felony. Instead, they meant to preclude the use of prior uncounseled convictions in a variety of situations. Some states extended *Baldasar* to prevent the use of uncounseled misdemeanors in increasing the sentence of a subsequent conviction.[148] Other states went further and held that *Baldasar* precluded the use of prior uncounseled misdemeanor convictions to convert a subsequent misdemeanor into a gross misdemeanor or a second level misdemeanor.[149] Finally, some states interpreted *Baldasar* even more broadly, holding that the case prevented the use of uncounseled civil sanctions or forfeitures to convert a second offense to a misdemeanor which resulted in imprisonment.[150]

In *People v. Roybal*, the Colorado Supreme Court addressed the issue of whether a prior uncounseled traffic conviction could be used to support the determination that the defendant was a habitual traffic offender, a felony offense.[151] In analyzing *Baldasar*, the court recognized the opinion's confusing nature.[152] The court, however, was able to discern the central idea behind *Baldasar*, namely, that uncounseled convictions are too unreliable to support the severe sanction of deprivation of liberty.[153] According to the Colorado court, *Baldasar* merely followed the requirements of *Argersinger* in determining that a defendant's conviction without the defendant having the assistance of counsel was inherently unreliable.[154] Thus, the Colorado court had no difficulty in determining that *Baldasar* prevented the use of prior

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punished by imprisonment"); City of Pendleton v. Standerfer, 688 P.2d 68, 70 (Or. 1984) (in banc) (interpreting *Baldasar* as holding 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"); Sargent v. Commonwealth, 360 S.E.2d 895, 899 (Va. Ct. App. 1987) (explicitly interpreting *Baldasar* broadly and holding that the decision prevents the use of a prior uncounseled misdemeanor to increase the sentence for a subsequent misdemeanor).

148. *See, e.g., Roybal*, 618 P.2d at 1126; *Dowd*, 478 A.2d at 677; *Wilson*, 684 S.W.2d at 547; *Laurick*, 575 A.2d at 1347; *Baldauf*, 586 N.E.2d at 240; *Standerfer*, 688 P.2d at 70; *Sargent*, 360 S.E.2d at 899.

149. *See, e.g., Nordstrom*, 331 N.W.2d at 905.

150. *See, e.g., Pananen*, 711 P.2d at 532.

151. 618 P.2d at 1124-26.

152. *See id.* at 1125.

153. *See id.* at 1126.

154. *See id.*

convictions to support or enhance subsequent imprisonment at any time.[155] According to the court, uncounseled convictions were simply too unreliable to be used for any purpose other than an initial sanction not involving a prison sentence.[156] Consequently, different courts have used Justice Blackmun's opinion to structure diametrically opposed interpretations of *Baldasar*.

4. Miscellaneous Treatment of *Baldasar*

The First Circuit avoided interpreting *Baldasar*,[157] and the Third Circuit has had no occasion to address the arguments in *Baldasar*. Likewise, several states have found various ways to avoid interpreting *Baldasar*.[158] Neither Maryland nor South Dakota has had the opportunity to address a *Baldasar* situation.

III. THE RATIONALE AND HOLDING OF *NICHOLS V. UNITED STATES*

The *Baldasar* opinion was reversed by *Nichols v. United States*.[159] The defendant in *Nichols* plead guilty to conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 846.[160] In determining the defendant's sentence, pursuant to the United States Federal Sentencing Guidelines ("Sentencing Guidelines"),[161] the United

155. *See id.*

156. *See id.*

157. *See* United States v. Unger, 915 F.2d 759 (1st Cir. 1990). The First Circuit avoided interpreting *Baldasar* by finding that the defendant waived counsel at the prior proceeding. *See id.* at 762.

158. *See* State v. Natoli, 764 P.2d 10, 12 (Ariz. 1988) (en banc) (holding that the use of a prior uncounseled conviction is not forbidden where the accused waived his right to counsel in a prior proceeding); People v. Wohl, 276 Cal. Rptr. 35, 38 (Ct. App. 1990) (holding that *Baldasar* does not apply where the accused voluntarily pled guilty to the prior offense); State v. Maxey, 873 P.2d 150, 152 (Idaho 1994) (avoiding interpretation of *Baldasar* by applying a broader state law which requires the appointment of counsel if the accused has been convicted of previous DUI violations); Sheffield v. City of Pass Christian, 556 So. 2d 1052, 1053 (Miss. 1990) (avoiding having to interpret *Baldasar* by finding that no rule of law can be gleaned from the case); State v. Grondin, 563 A.2d 435, 439-40 (N.H. 1989) (holding that *Baldasar* does not apply where the accused is collaterally attacking his conviction); City of Laramie v. Cowden, 777 P.2d 1089, 1090 (Wyo. 1989) (allowing a prior uncounseled bond forfeiture to serve as a prior conviction for enhancement purposes and engaging in no discussion or interpretation of *Baldasar*).

159. 114 S. Ct. 1921 (1994).

160. *See id.* at 1924.

161. U.S. SENTENCING GUIDELINES MANUAL (1995). The Sentencing Guidelines were developed to further "deterrence, incapacitation, just punishment, and rehabilitation." *Id.* § 1A2. There are two categories used by the sentencer in sentencing a defendant: offense behavior and offender characteristics. *See id.* The sentencing court is required to sentence within the range unless the facts presented before it are unique. *See id.* The court is then allowed to depart from the range, either

States District Court for the Eastern District of Tennessee assessed him three criminal history points for a 1983 federal felony drug conviction.[162] The court then assessed him an additional criminal history point for his 1983 state misdemeanor DUI conviction.[163] In that case, he had received a fine, but was not incarcerated.[164] He did not have the assistance of counsel at this 1983 misdemeanor conviction.[165] The additional criminal history point increased the term for which he could be sentenced to prison from a maximum of seventeen years and six

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upwards or downwards. *See id.*; *see also* Wade v. United States, 504 U.S. 181, 185-86 (1992) (holding that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive").

There are three principal objectives set forth in the Sentencing Guidelines: (1) to enhance the ability of the justice system to combat crime through effective, fair sentencing; (2) reasonable uniformity for similar offenders who commit similar crimes; and (3) proportionality. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A3.

There are six categories of ranges under the Sentencing Guidelines which are determined based on a defendant's criminal history points. Criminal history points are based on the defendant's prior criminal record. *See id.* § 5A. Although this may sound simple, to render a sentence under the Sentencing Guidelines, a detailed and thorough procedure is used. *See id.* § 1B1.1.

In determining a sentence, the judge must consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission . . . and that are in effect on the date the defendant is sentenced; or
> >
> > (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . . ;
>
> (5) any pertinent policy statement issued by the Sentencing Commission . . . that is in effect on the date the defendant is sentenced;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (1994).

162. *See Nichols*, 114 S. Ct. at 1924.

163. *See id.*

164. *See id.*

165. *See id.*

months to a maximum of nineteen years and seven months.[166] In keeping with this additional criminal history point, the district court sentenced him to the maximum term allowed under the Sentencing Guidelines.[167] This term was twenty-five months longer than it would have been had the court not used the defendant's prior uncounseled misdemeanor conviction to increase his criminal history points.

The defendant objected to the district court's use of his 1983 misdemeanor conviction to establish his sentence, claiming that consideration of this uncounseled conviction in enhancing his sentence for a later offense violated his Sixth Amendment rights under *Baldasar*.[168] The district court, however, rejected the defendant's argument by construing *Baldasar* narrowly.[169] It explained that *Baldasar* was inapplicable to the defendant's case because the absence of a majority opinion in that case allowed it to stand only for the limited proposition that a prior uncounseled misdemeanor conviction may not be used to turn a second misdemeanor into a felony with a prison sentence.[170] Since the present offense was already defined as a felony, the court ruled that *Baldasar* did not apply to the defendant's case.[171] Thus, the use of his prior uncounseled misdemeanor conviction to

166. *See id.*

167. *See id.* at 1925. The district court sentenced the defendant to 235 months, where the range was 188-235 months. *See* United States v. Nichols, 763 F. Supp. 277, 281 (E.D. Tenn. 1991), *aff'd*, 979 F.2d 402 (6th Cir. 1992), *cert. granted in part*, 114 S. Ct. 39 (1993), *and aff'd*, 114 S. Ct. 1921 (1994). It found the highest level appropriate as it did "not significantly underrepresent the defendant's criminal history which, except for the 1988 incident, contains only one other (albeit serious) drug conviction." *Id.* at 281.

168. *See Nichols*, 114 S. Ct. at 1924.

169. *See id.*

170. *See Nichols*, 763 F. Supp. at 279. In his brief to the Supreme Court, the defendant argued that even a narrow interpretation of *Baldasar* prevents the use of the prior uncounseled conviction because a majority of the Justices did agree that a court should not use a defendant's prior uncounseled conviction to increase the defendant's sentence in a subsequent case when the defendant could have received more than six months' imprisonment for the prior uncounseled conviction. *See* Petitioner's Brief at 23, *Nichols* (No. 92-8556).

> Thus, even under the narrowest reading of the majority opinion in *Baldasar*, the view of Justice Blackmun, the petitioner's sentence should not have been enhanced because of the previous DUI conviction because Nichols was subject to more than six months imprisonment. Since the previous conviction was also used to increase his sentence in this case, the enhancement was unconstitutional according to the view of the four other concurring Justices in *Baldasar*. Therefore, the previous uncounseled misdemeanor conviction should not have been considered to enhance petitioner's sentence in this case.

Id. at 34-35.

171. *See Nichols*, 114 S. Ct. at 1924.

enhance his sentence for the current felony conviction did not violate the Sixth Amendment right to counsel.[172]

Although the defendant appealed the district court's decision, a divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the lower court's decision.[173] The appellate court agreed with the district court's interpretation of *Baldasar* and held that *Baldasar* merely limits the collateral use of a prior uncounseled misdemeanor conviction in converting a subsequent misdemeanor into a felony.[174] The dissent, however, insisted that *Baldasar* stands for the broader principle that a prior uncounseled misdemeanor conviction cannot be used in any way to enhance the sentence of a subsequent offense.[175] Therefore, the dissent concluded that *Baldasar* should apply to the defendant's case and the district court's decision should be reversed.[176]

On certiorari review, the Supreme Court analyzed *Baldasar*, reviewed each opinion, and explained that the case evinced no clear majority opinion.[177] The Court then reviewed the federal circuits' various interpretations of *Baldasar*.[178] These inconsistent interpretations demonstrated that *Baldasar* was a very troublesome case and the lower courts' attempts to apply it to the Sixth Amendment rights of citizens created nothing but uncertainty and confusion.[179] Although the Court briefly discussed the possibility of interpreting *Baldasar* on its narrowest grounds, preventing only the subsequent use of an invalid uncounseled misdemeanor conviction, the Court ultimately rejected this consideration, and refused "to pursue [this argument] to the utmost logical possibility when [*Baldasar*] has so obviously baffled and divided the lower courts which have considered it."[180]

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172. *See id.*

173. *See id.* at 1925.

174. *See id.*

175. *See id.* The dissenting circuit judge found the facts of Nichols' case exactly the same as the facts in *Baldasar*. He concluded that the difference between enhancement statutes and sentencing guidelines was a "distinction without a constitutional difference." United States v. Nichols, 979 F.2d 402, 408 (6th Cir. 1992) (Jones, J., dissenting in part), *cert. granted in part*, 114 S. Ct. 39 (1993), *and aff'd*, 114 S. Ct. 1921 (1994).

176. *See Nichols*, 979 F.2d at 408.

177. *See Nichols*, 114 S. Ct. at 1926-27.

178. *See id.* The Court noted that the Second, Fifth, and Sixth Circuits limited *Baldasar* to its facts. *See id.* at 1925 n.8. In comparison, the Court also found that the Ninth Circuit allowed no imprisonment in any subsequent case. *See id.* The Court also reviewed various states' interpretations of *Baldasar*. *See id.* at 1925 n.7.

179. *See id.* at 1927.

180. *Id.* In his brief, the defendant conceded that courts have interpreted *Baldasar* in various ways. *See* Petitioner's Brief at 19, *Nichols* (No. 92-8556). However, the defendant advocated the

Instead, the Court elected to overrule *Baldasar*, reverting back to the Sixth Amendment analysis that ended with *Scott v. Illinios*.[181] According to Chief Justice Rehnquist, a logical consequence of the *Scott* decision was that a valid uncounseled misdemeanor conviction—i.e., an uncounseled misdemeanor conviction which did not result in actual imprisonment—may be relied upon to enhance the sentence for a subsequent offense even though that sentence entails imprisonment.[182] The Court stated that enhancement statutes, such as criminal history provisions (federal) and recidivist statutes (states), do not violate *Scott* because they do not change the penalty imposed for the earlier conviction.[183] Rather, the statutes penalize only the later offense.[184] Thus, so long as the accused has had the benefit of counsel at his later trial which results in a conviction, an increase in sentence based upon a prior uncounseled misdemeanor conviction does not violate *Scott*.[185]

In further support of the decision, Chief Justice Rehnquist explained that reliance on these prior convictions is consistent with the traditional understanding of the sentencing process, which has always been less exacting than the process of establishing guilt.[186] He explained that

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interpretation which concluded that *Baldasar* precludes the use of prior uncounseled misdemeanor convictions in any sentence enhancement procedure. *See id.* at 34-35. He also urged the Court to adopt an "authorized imprisonment approach" whereby a defendant would have the right to appointed counsel whenever he was accused of a crime authorizing imprisonment for a period longer than six months. *See id.* at 36-37. This approach, according to the defendant, would be more in keeping with the progression of Supreme Court decisions since *Powell*, and would alleviate any future confusion about whether a prior uncounseled misdemeanor conviction could be used in a subsequent sentencing proceeding. *See id.* at 37-44. In addition, such an approach would also achieve the purposes intended by recidivism statutes and the Sentencing Guidelines because repeat offenders could legitimately and reliably pay the consequences of committing repeated crimes. *See id.*

The Supreme Court did not address the defendant's authorized imprisonment standard argument.

181. *See Nichols*, 114 S. Ct. at 1927-28.

182. *See id.* at 1927.

183. *See id.* The ACLU, however, in its Amicus Brief, argued that the *Baldasar* Justices agreed that when a prior offense is used to enhance a subsequent sentence, the enhancement is attributable to the prior offense. *See* ACLU Amicus Brief at 7-9, *Nichols* (No. 92-8556). In addition, the ACLU argued that a majority in *Baldasar* agreed that "an uncounseled conviction that is insufficiently reliable to provide a basis for a sentence of incarceration is also insufficiently reliable to form a basis for a subsequent automatic enhancement of a sentence of imprisonment." *Id.* at 9.

184. *See Nichols*, 114 S. Ct. at 1927. However, the defendant argued that "[i]f an uncounseled conviction cannot, consistent with the Sixth Amendment, support a term of imprisonment initially, the existence of a subsequent conviction does not make an increased term of imprisonment based on that conviction constitutionally more palatable." Petitioner's Brief at 32, *Nichols* (No. 92-8556). The Supreme Court did not address this argument.

185. *See Nichols*, 114 S. Ct. at 1928.

186. *See id.* at 1927-28.

sentencing judges have always conducted broad inquiries into a wide variety of factors when determining the appropriate sentence for a particular offender.[187] These factors go beyond the mere determination of guilt and allow sentencing judges to consider the offender's past behavior in determining the price he or she should pay for the crime currently charged.[188] One important factor is his or her past convictions.[189] State recidivism statutes and the criminal history component of the Sentencing Guidelines acknowledge the significance of this factor.[190] In addition, sentencing courts also consider an offender's past criminal behavior short of a conviction.[191] As a result, the Court

187. *See id.* Several factors which courts may use in sentencing defendants include, but are not limited to, a prior criminal and juvenile record, *see infra* note 190, and defendant's refusal to cooperate with government officials, *see* Roberts v. United States, 445 U.S. 552, 558 (1980). Other factors include the seriousness of the offense; history and characteristics of the defendant; financial condition; education; employment background; social history, including family relationships and activities; resident history; medical history; and the extent of the victim's loss or injury. *See, e.g.*, FLA. STAT. ANN. § 921.231 (West 1996); 730 ILL. COMP. STAT. ANN. 5/5-3-2 (West 1992); N.Y. CRIM. PROC. § 390.30 (McKinney 1994).

188. *See Nichols*, 114 S. Ct. at 1928.

189. *See id.*

190. *See id.* All states have recidivist statutes. *See* ALA. CODE § 13A-5-9 (1994); ALASKA STAT. § 12.55.145 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-604 (West Supp. 1995); ARK. CODE ANN. § 5-4-501 (Michie Supp. 1995); CAL. PENAL CODE §§ 666-669 (West 1988); COLO. REV. STAT. ANN. §§ 16-13-101, -103 (West 1990 & Supp. 1996); CONN. GEN. STAT. ANN. § 53a-40 (West 1994); DEL. CODE ANN. tit. 11, §§ 4214-4215 (1995); D.C. CODE ANN. § 22-104a (1989); FLA. STAT. ANN. § 775.084 (West Supp. 1996); GA. CODE ANN. § 17-10-7 (Supp. 1996); HAW. REV. STAT. §§ 706-662, -665 (1993); IDAHO CODE § 19-2514 (1987); 730 ILL. COMP. STAT. ANN. 5/5-5-3(c)(8) (West Supp. 1996); IND. CODE ANN. § 35-50-2-8 (West Supp. 1996); IOWA CODE ANN. § 902.8 (West 1994); KAN. STAT. ANN. § 21-4504 (1995); KY. REV. STAT. ANN. § 532.080 (Michie Supp. 1994); LA. REV. STAT. ANN. § 15:529.1 (West Supp. 1996); ME. REV. STAT. ANN. tit. 17-A, § 362 (West Supp. 1995); MD. CODE ANN. art. 27, § 643B (Supp. 1996); MASS. GEN. LAWS ANN. ch. 279, § 25 (West 1981); MICH. COMP. LAWS ANN. §§ 769.10-.12 (West Supp. 1996); MINN. STAT. ANN. § 609.152 (West Supp. 1997); MISS. CODE ANN. § 99-19-81 (1994); MO. ANN. STAT. § 558.016 (West Supp. 1996); MONT. CODE ANN. §§ 46-18-501 to -502 (1995); NEB. REV. STAT. § 29-2221(1) (1995); NEV. REV. STAT. ANN. § 207.010 (Michie Supp. 1995); N.H. REV. STAT. ANN. § 651:6 (1996); N.J. STAT. ANN. § 2C:44-4 (West 1995); N.M. STAT. ANN. § 31-18-17 (Michie 1994); N.Y. PENAL LAW § 70.06 (McKinney 1987 & Supp. 1996); N.C. GEN. STAT. § 14-7.1 (1993); N.D. CENT. CODE § 12.1-32-09 (Supp. 1995); OHIO REV. CODE ANN. § 2929.11(B)(1)(b)-(3)(b) (Anderson Supp. 1996) (for offenses committed prior to July 1, 1996); OKLA. STAT. ANN. tit. 21, § 51 (West Supp. 1996); OR. REV. STAT. § 161.725 (1995); PA. CONS. STAT. ANN. § 97145(b)(1) (1982); R.I. GEN. LAWS § 12-19-21(a) (1994); S.C. CODE ANN. § 17-25-45 (Law Co-op. Supp. 1995); S.D. CODIFIED LAWS § 22-7-7 (Michie 1988); TENN. CODE ANN. §§ 40-35-106(c), -107(c), -108(c) (1990); TEX. PENAL CODE ANN. § 12.42 (West 1994 & Supp. 1996); UTAH CODE ANN. § 76-3-407 (1995); VT. STAT. ANN. tit. 13, § 11 (Supp. 1995); VA. CODE ANN. § 19.2-297.1 (Michie 1995); WASH. REV. CODE ANN. § 9.92.090 (West 1988); W. VA. CODE § 61-11-18 (Supp. 1996); WIS. STAT. ANN. § 939.62 (West Supp. 1995); WYO. STAT. ANN. § 6-10-201 (Michie 1996).

191. *See Nichols*, 114 S. Ct. at 1928; *see also* Watkins v. Thomas, 623 F.2d 387, 388 (5th Cir. 1980) (evidence of two prior federal convictions, for which defendant had received a presidential

concluded that the defendant could have been sentenced more severely for his drug conviction "based simply on evidence of the underlying conduct which gave rise to the previous DUI offense."[192] According to the Court, since the prosecutor need only prove this underlying conduct by a preponderance of the evidence, it must be constitutional to consider a prior uncounseled misdemeanor conviction based on the same conduct which had been proven beyond a reasonable doubt.[193] Thus, the Court

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pardon, was properly introduced at sentencing stage); United States v. Morgan, 595 F.2d 1134, 1136-37 (9th Cir. 1979) (sentencing judge may consider other offenses of which defendant had been acquitted); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944 (2d Cir. 1976) (same); United States v. Cardi, 519 F.2d 309, 314 (7th Cir. 1975) (same); Micelli v. LeFevre, 444 F. Supp. 1187, 1190-91 (S.D.N.Y. 1978) (same); Smiley v. State, 435 So. 2d 202, 205 (Ala. Crim. App. 1983) (trial judge may properly consider arrest record of defendant during sentencing); Evans v. State, 550 P.2d 830, 847 (Alaska 1976) (trial judge could properly consider defendant's prior arrest for sale of narcotics even though charge did not result in conviction); State v. Cawley, 648 P.2d 142, 144 (Ariz. Ct. App. 1982) (defendant's history of peculiar sexual behavior, prowling, and voyeurism discussed in presentence report and in Navy record, although not resulting in convictions, properly could be considered in sentencing); State v. Kelly, 595 P.2d 1040, 1043-44 (Ariz. Ct. App. 1979) (sentencing judge may consider prior offense of which defendant had been acquitted); People v. Wagoner, 152 Cal. Rptr. 639, 646 (Ct. App. 1979) (trial court did not prejudice defendant by considering arrests which did not result in conviction in his probation report when sentencing defendant to state prison instead of committing defendant to a rehabilitation center); Jansson v. State, 399 So. 2d 1061, 1064 (Fla. Dist. Ct. App. 1981) (sentencing judge properly considered presentence report, indicating defendant had been arrested on 18 prior occasions); People v. Lemke, 338 N.E.2d 226, 228 (Ill. App. Ct. 1975) (defendant's prior arrest and dismissal for a drug related crime was relevant at defendant's current sentencing for unlawful delivery of cocaine); Arthur v. State, 499 N.E.2d 746, 748 (Ind. 1986) (in imposing sentence for attempted murder, trial judge properly considered that defendant had been arrested 39 times as an adult and 9 times as a juvenile); Lottie v. State, 406 N.E.2d 632, 640 (Ind. 1980) (sentencing judge may consider other offenses of which defendant had been acquitted); State v. Swartz, 278 N.W.2d 22, 26 (Iowa 1979) (trial court properly considered prior conviction which had been set aside because of illegal search and another charge which had been dismissed following the sustaining of motion to suppress under the Fourth Amendment in imposing sentence on defendant); State v. Baldwin, 629 P.2d 222, 224 (Mont. 1981) (sentencing judge may consider other offenses of which defendant had been acquitted); State v. Hayes, 246 N.W.2d 76, 77 (Neb. 1976) (same); State v. Wells, 265 N.W.2d 239, 242-43 (N.D. 1978) (same); Commonwealth v. Straw, 361 A.2d 427, 428-29 (Pa. Super. Ct. 1976) (same).

The trial court may also consider juvenile charges. *See* State v. Lewis, 407 A.2d 955, 957-58 (Conn. 1978) (in sentencing defendant to life in prison as persistent felony offender following robbery conviction, trial court properly considered presentence report containing six references to prior juvenile difficulties even though each allegation was eventually dismissed); People v. Gray, 336 N.W.2d 491, 493 (Mich. Ct. App. 1983) (in sentencing defendant who pled guilty to breaking and entering, trial judge properly considered, for purposes of determining sentencing, prior juvenile charges that did not result in conviction).

192. *Nichols*, 114 S. Ct. at 1928.

193. *See id.* The defendant argued that the entire line of prior Supreme Court cases focused on the unreliable nature of uncounseled convictions. *See* Petitioner's Brief at 32-34, *Nichols* (No. 92-8556). According to the dissenters in *Nichols*, these cases acknowledged that uncounseled convictions are per se unreliable. *See Nichols*, 114 S. Ct. at 1935-37 (Blackmun, J., dissenting)

overruled *Baldasar*, stating that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment for a subsequent conviction."[194]

Justice Souter concurred in the judgment.[195] While he agreed that the use of the defendant's prior uncounseled misdemeanor conviction to increase his sentence for a later crime did not infringe upon his right to the assistance of counsel, Justice Souter argued that the Court did not need to overrule *Baldasar* to reach their conclusion.[196] On the contrary, he argued that *Baldasar* was not controlling precedent.[197] Once again, Justice Blackmun's opinion caused difficulty.[198] According to Justice Souter, since Justice Blackmun's opinion in *Baldasar* did not accept the premise that the prior uncounseled conviction was valid under *Scott*, but rather insisted that certain uncounseled convictions are invalid for any purpose, the *Baldasar* opinion did not represent a majority of Justices who agreed that *Scott* allowed automatic sentence enhancement based on prior uncounseled convictions.[199] Thus, Justice Souter concluded that the *Baldasar* decision embodied the opinions of an equally divided Court and was therefore entitled to no precedential value.[200]

Once Justice Souter concluded that *Baldasar* could not be used as controlling precedent, he reexamined *Scott*. In doing so, he recognized that the *Scott* Court determined that "the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty."[201] Justice Souter acknowledged that *Scott*

(joined by Stevens & Ginsburg, JJ.). As a result, if a later sentencing court uses these convictions to enhance sentencing, the court will be relying on a proceeding which the Supreme Court has previously ruled to be per se unreliable. *See id.* According to the defendant, this problem is exacerbated in the case of the Sentencing Guidelines because criminal history points provide for an automatic increase in the defendant's possible sentence range. *See* Petitioner's Brief at 11. The sentencing judge must sentence the defendant within this range. *See id.* Thus, the judge has no discretion to ignore the increased criminal history points if he believes that the prior uncounseled conviction was unreliable. *See id.*

194. *Nichols*, 114 S. Ct. at 1928. The Court also rejected the defendant's argument that due process requires a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should he be convicted of a later crime. *See id.* The Court explained that there would be no way to memorialize such a warning since a large number of misdemeanor convictions occur in courts which are not courts of record. *See id.* In addition, it would be impossible to determine how expansive such a warning must be. *See id.*

195. *See id.* at 1929-31.

196. *See id.* at 1929.

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *Id.* (citing Scott v. Illinois, 440 U.S. 367, 372-73 (1979)).

would be violated if a defendant was given an increased prison term based solely on the existence of a prior uncounseled conviction.[202] However, he argued that this difficult situation did not occur in *Nichols* since "the Sentencing Guidelines do not provide for automatic enhancement based on prior uncounseled convictions."[203] Instead, Justice Souter argued, they allow for punishment of a pattern of criminal conduct, rather than convictions.[204] Thus, they do not bind a district court to automatically increase a prison sentence based on the number of previous convictions.[205] In addition, the Sentencing Guidelines explicitly allow the district court to depart from the range of sentences for a particular criminal history category if the court finds that the sentencing range does not adequately capture the accused's actual criminal history.[206] Therefore, a defendant has the chance to convince a sentencing judge that a particular prior uncounseled conviction was unreliable and does not demonstrate that he or she is likely to continue such conduct in the future.[207] Since the Sentencing Guidelines allow a defendant to rebut the negative impact of a prior uncounseled conviction, it does not ignore the potential unreliability of such convictions.[208]

In addition, Justice Souter observed that the historic understanding of the sentencing process allows a judge to consider previous

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202. *See id.*

203. *Id.* at 1930.

204. *See id.*

205. *See id.*

206. *See id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1995)). In making his decision, Justice Souter found dispositive that "the [Sentencing] Guidelines authorize downward departure 'where the court concludes that a defendant's criminal history category significantly overrepresents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes.'" *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3); *see also* United States v. Whitehorse, 909 F.2d 316, 319-20 (8th Cir. 1990) (holding the release of an alcoholic inmate on an unsupervised furlough by prison officials constituted a mitigating factor warranting downward departure); United States v. Terry, 900 F.2d 1039, 1044 (7th Cir. 1990) (finding improper upward sentencing departure where the district court failed to specify aggravating circumstances pursuant to 18 U.S.C. § 3553(b) (1994)), *superseded by statute as stated in* United States v. Lee, 22 F.3d 736 (7th Cir. 1994); United States v. Pridgen, 898 F.2d 1003, 1004-05 (5th Cir. 1990) (concluding that the trial court properly departed upward from the Sentencing Guidelines due to aggravating circumstances surrounding bank robbery); United States v. Newsome, 894 F.2d 852, 856-57 (6th Cir. 1990) (finding that a court cannot exceed the sentencing range imposed by the Sentencing Guidelines without a finding of aggravating circumstances, even if the sentencing range was specified in defendant's plea bargaining arrangement).

207. *See Nichols*, 114 S. Ct. at 1930. "A defendant may show, for example, that his prior conviction resulted from railroading an unsophisticated indigent, from a frugal preference for a low fine with no counsel fee, or from a desire to put the matter behind him instead of investing the time to fight the charges." *Id.*

208. *See id.*

uncounseled misdemeanor convictions in determining the sentence of a later crime.[209] This process allows a judge to consider a broad range of information in determining the appropriate sentence for a recidivist defendant.[210] Fairness requires only that the accused receive a reasonable opportunity to show the sentencer that the information upon which he or she seeks to rely is inaccurate or irrelevant to the consideration of the sentence.[211] Thus, since the Sentencing Guidelines give the accused an opportunity to convince the judge that he or she should not rely on a prior uncounseled conviction in increasing the sentence for a subsequent crime, reliability concerns are satisfied.[212] Therefore, Justice Souter determined that the *Nichols* majority was correct in its conclusion that the defendant's increased sentence did not violate his constitutional rights.[213]

Justices Blackmun, Stevens, and Ginsburg joined in a dissenting opinion.[214] According to these Justices, the majority's holding violated both the holding in *Scott* and the "faithful . . . concern for reliability that lies at the heart of [the] Sixth Amendment cases."[215] The dissenters reviewed the Sixth Amendment cases beginning with *Gideon v. Wainwright*[216] and concluded that one principle was unquestionably clear: no imprisonment may be imposed on the basis of an uncounseled conviction.[217] *Scott* solidified this principle with its holding that any actual imprisonment, no matter how short, requires that the accused receive the assistance of counsel.[218] They argued that the *Baldasar* opinion adhered to this principle when a majority of the Justices concluded that an uncounseled misdemeanor conviction could not be used to support a prison term at any time, whether at the earlier

209. *See id.*

210. *See id.*

211. *See id.* The Court stated:

> Where 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.

212. *See id.*

213. *See id.* at 1931. Justice Souter, however, refused to "endors[e] 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." *Id.*

214. *See id.* at 1931-37.

215. *Id.* at 1931.

216. 372 U.S. 335 (1963).

217. *See Nichols*, 114 S. Ct. at 1931.

218. *See id.* at 1932 (citing Scott v. Illinois, 440 U.S. 367, 373-74 (1979)).

conviction, or at the time of a subsequent offense.[219] The *Nichols* dissenters refuted the majority's claim that its holding was the logical consequence of *Scott*'s actual imprisonment standard.[220] On the contrary, the dissenting Justices argued that "[i]t is more logical, and more consistent with the reasoning in *Scott*, to hold that a conviction that is invalid for imposing a sentence for the offense itself remains invalid for increasing the term of imprisonment imposed for a subsequent conviction."[221] According to the dissenters, the use of a prior uncounseled misdemeanor conviction to enhance an offender's later sentence violates *Scott* because it directly results in a sentence of imprisonment based on an uncounseled conviction.[222] If not for the use of the uncounseled conviction, the accused either would not receive any time in prison or would receive a shorter prison sentence. Thus, the uncounseled conviction directly results in a deprivation of the defendant's liberty.[223] This result is one which *Scott* explicitly forbids.[224]

According to the dissenters in *Nichols*, the majority abrogated the Court's concern for reliability.[225] Since "imprisonment is a punishment 'different in kind' from fines or the threat of imprisonment, [the Court] consistently ha[s] read the Sixth Amendment to require that courts decrease the risk of unreliability, through the provision of counsel, where a conviction results in imprisonment."[226] The dissenters explained that

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219. *See id.* (citing Baldasar v. Illinois, 446 U.S. 222, 224 (1980) (Stewart, J., concurring); *id.* at 226 (Marshall, J., concurring); *id.* at 230 (Blackmun, J., concurring)).

In the *Nichols* dissent, Justice Blackmun included a footnote explaining his intention in his concurring opinion in *Baldasar*. *See id.* at 1932 n.1. According to Justice Blackmun, he did not intend to imply that the use of prior uncounseled misdemeanor convictions to impose a prison sentence was permissible at any time, regardless of whether the underlying misdemeanor was punishable by more or less than six months in prison.

> Although I based my decision [in *Baldasar*] 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. Obviously, logic dictates that, where the threat of imprisonment is enough to trigger the Sixth Amendment's guarantee of counsel, the actual imposition of imprisonment through an enhancement statute also requires the appointment of counsel.

Id. (citation omitted).

220. *See id.* at 1933.

221. *Id.*

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *Id.* (citation omitted).

the overriding concern in the Court's Sixth Amendment jurisprudence has been to ensure that all indigent defendants receive the assistance of counsel when faced with imprisonment.[227] They argued that it should not matter whether the prison sentence is imposed in the first instance or at a later date as a result of an enhancement statute.[228] An uncounseled conviction remains unreliable, no matter when it is used.[229]

The dissenters also refuted the majority's claim that the use of an uncounseled conviction to enhance a sentence is permissible because, traditionally, "the process of sentencing is 'less exacting' than the process of establishing guilt."[230] According to the dissenters, this does not obviate the need for reliability.[231] When a prior conviction is introduced at a sentencing hearing, the sentencing judge hears only the fact of the conviction, not the circumstances surrounding it.[232] Thus, the judge will be unaware of the absence of counsel and the concomitant unreliability of the prior conviction.[233] In addition, the prosecution's introduction of a prior conviction traditionally carries significant weight

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227. *See id.*

228. *See id.*

229. *See id.*

230. *Id.* In its brief, the United States argued that the use of a prior uncounseled conviction to enhance sentencing is permissible because "a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" Respondent's Brief at 21-22, *Nichols* (No. 92-8556) (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). Thus, since a sentencing judge may consider other arguably unreliable information in determining a defendant's sentence, he should certainly be able to consider a valid prior conviction, albeit an uncounseled one. *See id.* at 22.

231. *See Nichols*, 114 S. Ct. at 1934. Other courts recognized this need for reliability in sentencing procedures. *See, e.g.*, United States v. Gaytan, 74 F.3d 545, 557 (5th Cir.), *cert. denied*, 117 S. Ct. 77 (1996); United States v. Windle, 74 F.3d 997, 1001 (10th Cir. 1996); United States v. Clements, 73 F.3d 1330, 1342 (5th Cir. 1996); United States v. Townsend, 73 F.3d 747, 751 (7th Cir. 1996); United States v. Darden, 70 F.3d 1507, 1544 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 (1996); United States v. Lee, 68 F.3d 1267, 1275 (11th Cir. 1995); United States v. Shrader, 56 F.3d 288, 294 (1st Cir. 1995); United States v. Huckins, 53 F.3d 276, 279 (9th Cir. 1995); United States v. Brown, 52 F.3d 415, 425 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 754 (1996); United States v. McMeen, 49 F.3d 225, 226 (6th Cir. 1995); United States v. Hicks, 948 F.2d 877, 883 (4th Cir. 1991); *In re* Appeal in Maricopa County, 901 P.2d 464, 467 (Ariz. Ct. App. 1995); Aguehounde v. District of Columbia, 666 A.2d 443, 447 (D.C. Cir. 1995); State v. Viehweg, 896 P.2d 995 (Idaho Ct. App. 1995); People v. Sanchez, 662 N.E.2d 1199, 1210 (Ill.), *cert. denied*, 117 S. Ct. 392 (1996); State v. Atkinson, 898 P.2d 1179, 1181 (Kan. Ct. App. 1995); *In re* Registrant C.A., 666 A.2d 1375, 1377 (N.J. Super. Ct. App. Div. 1995), *cert. granted*, 670 A.2d 1068, *and aff'd*, 679 A.2d 1153 (N.J. 1996); State v. Balkin, 895 P.2d 311, 312 (Or. Ct. App. 1995); State v. Wilson, 1995 WL 764989, at *6 (Tenn. Crim. App. Dec. 28, 1995); Beasley v. State, 902 S.W.2d 452, 463 (Tex. Crim. App. 1995) (en banc).

232. *See Nichols*, 114 S. Ct. at 1934.

233. *See id.*

and will be likely to sway the judge in his or her sentencing determination.[234] As a result, the dissenters were concerned that the sentencing judge would place great importance on this unreliable conviction when depriving a person of his or her liberty.

The dissenters argued that the ever-present concern for reliability should prevent the use of uncounseled misdemeanor convictions in imposing any term of imprisonment, at any time.[235] Since previous Supreme Court cases had indisputably determined that uncounseled convictions are too unreliable to allow for imprisonment, they claimed the *Nichols* majority was wrong in holding that such convictions can be used to enhance punishment for a later offense.[236] According to the dissenters:

> Under the clear rule that an uncounseled misdemeanor conviction can never justify any term of imprisonment, the judge and the parties will know, at the beginning of a misdemeanor trial, that no imprisonment may be imposed, directly or collaterally, based on that proceeding, unless counsel is appointed to represent the indigent accused.[237]

IV. THE *NICHOLS* COURT WAS WRONG TO OVERTURN *BALDASAR*

The decision of the United States Supreme Court in *Nichols* was constitutionally wrong. Moreover, the *Nichols* decision did not follow the logical flow of Sixth Amendment jurisprudence leading up to *Baldasar*. Rather, the holding in *Nichols* reflects an abrupt departure from previous Sixth Amendment decisions and endangers the reliability of convictions and fairness of sentencing proceedings. The Court was mistaken in allowing judges to rely on inherently unreliable uncounseled convictions to enhance an offender's sentence because judges traditionally may only use reliable evidence to determine a sentence. Ultimately, in allowing the use of prior uncounseled convictions to enhance sentencing, *Nichols* unwisely opens the door for the Court to revisit *Gideon v. Wainwright*

234. *See id.* at 1934.

235. *See id.* at 1935-37.

236. *See id.* In its brief, the United States argued that "[b]y upholding the constitutional validity of uncounseled misdemeanor convictions where imprisonment is not imposed, *Scott* necessarily adopted the view that such convictions are reliable enough to establish the defendant's guilt beyond a reasonable doubt and to support the imposition of criminal sanctions." Respondent's Brief at 25, *Nichols* (No. 92-8556). According to the government, convictions which are valid for purposes of criminal fines and collateral civil consequences should also be valid for the purpose of punishment enhancement. *See id.*

237. *Nichols*, 114 S. Ct. at 1936.

and its progeny at a later date.

A. *Overturning* Baldasar: *A Departure from a Long-Standing, Logical Progression in the Development of the Right to Counsel*

Since the Supreme Court decided *Gideon*, Sixth Amendment jurisprudence has progressed in a logical fashion, step by step. In each case, the Court saw the right to counsel as fundamental in ensuring that the accused receive a fair trial. Linked to that concern was the Court's steadfast commitment that no person may be deprived of his or her liberty unless he or she has had the benefit of a fair trial *with* the assistance of counsel. *Baldasar* was a logical extension of *Gideon* and its progeny. When the Court overruled *Baldasar*, it took an unwise and dangerous step backward, leaving open an opportunity for the Court to reexamine *Gideon*'s Sixth Amendment foundation.

In *Gideon*, the Court recognized that the Sixth Amendment right to appointed counsel is fundamental in a felony prosecution and essential to a fair trial.[238] This right applies to the states through the Fourteenth Amendment.[239] Here, the Court took the first step in developing a basis for its Sixth Amendment jurisprudence by concluding that an attorney is the essential predicate to a fair criminal trial.[240] The adversarial nature of a criminal trial is confusing and intimidating to a layperson who has little chance of defending himself or herself against a felony charge without the guiding hand of an attorney.[241] Thus, the Sixth Amendment promise of a fair trial requires courts to appoint an attorney to assist indigent felony defendants.[242]

The Court took the next step when it decided *Burgett v. Texas*.[243] Here, the Court determined that convictions obtained in violation of *Gideon* could not be used to support guilt or enhance punishment in a later case.[244] Thus, if a court failed to provide counsel to aid an indigent defendant in defending against a felony charge and the defendant was convicted, that conviction could not be used in any later proceedings.[245] Specifically, if the defendant was later charged with

238. *See* Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963).
239. *See id.* at 341.
240. *See id.* at 344.
241. *See id.*
242. *See id.* at 344-45.
243. 389 U.S. 109 (1967).
244. *See id.* at 114-15.
245. *See id.*

another crime, the felony conviction obtained in violation of *Gideon* could not be used to obtain a larger sentence for the defendant or to help prove the defendant's guilt in the second trial.[246]

Thus, in *Burgett*, the Court recognized that a conviction obtained in violation of the accused's right to counsel was tainted and its later use was inherently prejudicial to the accused.[247] In deciding this case, the Court once again emphasized the importance of counsel to the fairness of the proceedings against a felony defendant.[248] The Court recognized that counsel is so important that a felony conviction obtained without counsel is virtually useless in future proceedings against that person.[249] By so holding, the Court implicitly determined that punishment enhancement, where a prior crime increases a defendant's sentence for a later offense, is equally as reprehensible as using a prior conviction to support guilt. Thus, an uncounseled felony conviction is inherently unreliable for any purpose.

That rationale was extended to misdemeanor convictions in *Argersinger v. Hamlin*.[250] In this case, the Court articulated the rule that no indigent defendant can be imprisoned unless he or she has had the assistance of counsel at trial.[251] The Court used the reasoning of previous Sixth Amendment cases, including *Gideon*, to conclude that the loss of one's liberty is so drastic that it cannot be accomplished unless the accused has had the benefit of counsel's guiding hand.[252] Without an attorney to ensure the fairness of the proceedings, the accused cannot be subjected to the loss of liberty; one of the most important guarantees in the Bill of Rights.[253] Thus, the Court in *Argersinger* clearly understood that no imprisonment can be justified for a person who has not received the assistance of counsel at his or her misdemeanor trial.

In *Scott v. Illinois*,[254] the Court clarified its ruling in *Argersinger* by limiting the right to counsel to those cases in which the accused was actually imprisoned.[255] The Court explained that the absolute necessity for counsel arose only in those cases in which the defendant actually

246. *See id.*
247. *See id.*
248. *See id.*
249. *See id.*
250. 407 U.S. 25 (1972).
251. *See id.* at 37.
252. *See id.* at 31-37.
253. *See id.* For an in-depth discussion of this case, see *supra* text accompanying notes 46-63.
254. 440 U.S. 367 (1979).
255. *See id.* at 373-74.

received imprisonment.[256] In those cases where the judge decided not to impose a prison sentence, counsel was not absolutely necessary for the accused.[257] The Court reached this conclusion because incarceration, no matter how long or short, is much more serious and detrimental to the accused than a fine or the mere threat of imprisonment.[258] In those cases where the accused does not actually stand to lose freedom, courts need not expend their resources to appoint counsel.[259] The underlying concern of this ruling was economic efficiency.[260] The Court recognized that states do not have infinite resources to appoint counsel for every person accused of a crime which holds a potential jail sentence.[261] As a result, the Court permitted states to save their resources and required them to appoint counsel in only the more serious cases, where the accused faced the actual loss of his or her liberty.[262]

When the Court decided *Baldasar v. Illinois*,[263] it merely took the next logical step in the development of Sixth Amendment jurisprudence. *Gideon* had determined that only the assistance of an attorney can ensure a fair trial for the accused,[264] and *Burgett* had decided that a conviction obtained in violation of an accused's right to counsel is unreliable and therefore cannot be used in future criminal proceedings to enhance punishment or establish guilt.[265] *Scott* and *Argersinger* had established actual imprisonment as the litmus test, distinguishing between those who had the right to court-appointed counsel and those who did not.[266]

In *Baldasar*, the Court completed the process which began with *Gideon*. Focusing on the idea that any form of imprisonment without the benefit of counsel is forbidden by the Sixth Amendment, the Court held that the use of a previous uncounseled misdemeanor conviction to bring about actual imprisonment in a later trial violated the Sixth Amendment right to counsel.[267] The Court had already established in *Burgett* that

256. *See id.* at 373.
257. *See id.*
258. *See id.*
259. *See id.*
260. "*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States." *Id.*
261. *See id.*
262. *See id.* For a detailed discussion of this case, see *supra* text accompanying notes 64-73.
263. 446 U.S. 222 (1980) (per curiam).
264. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
265. *See* Burgett v. Texas, 389 U.S. 109, 114-15 (1967).
266. *See Scott*, 440 U.S. at 372-74; *Argersinger*, 407 U.S. at 37.
267. *See Baldasar*, 446 U.S. at 222-24 (per curiam).

using an uncounseled conviction to enhance punishment was virtually the same as using it to support imprisonment initially.[268] The Court in *Baldasar* saw no distinction between imprisonment for the initial offense and imprisonment at a later date which directly resulted from the use of the prior uncounseled conviction.[269] Either way, the uncounseled conviction resulted in the deprivation of the accused's liberty, a result forbidden by *Gideon* and its progeny.[270] According to the *Baldasar* Court, it was sensible to conclude that a conviction which was invalid for bringing about imprisonment in the first instance was also invalid for purposes of imprisonment at a later time.[271] Since *Scott* and *Argersinger* placed such great importance on actual imprisonment as the dividing line between those who have the right to counsel and those who do not, the *Baldasar* Court logically concluded that imprisonment is the same form of punishment no matter when it occurs.[272] Thus, an uncounseled conviction which results in imprisonment at any time violates the accused's Sixth Amendment right to counsel.[273]

In reaching this conclusion, the *Baldasar* Court reiterated the long-standing *Gideon* notion that a trial in which the accused does not receive the assistance of counsel is inherently unfair and that any resulting conviction is unreliable.[274] While the Court in *Scott* was willing to accept this unfairness in certain situations because of economic constraints, it unequivocally refused to allow unfairness of proceedings or unreliability of convictions for the accused who actually lost his or her liberty.[275] Thus, the *Scott* Court grudgingly accepted the idea that an accused may be convicted without appointed counsel so long as he or she did not suffer the loss of his or her liberty.[276] When *Baldasar* refused to allow an uncounseled conviction to cause a defendant imprisonment at any time, it upheld *Scott*'s reasoning. *Baldasar* reached the logical conclusion that if uncounseled convictions are so potentially unreliable because of the unfairness of the proceedings, and therefore cannot result in imprisonment initially, they will not become reliable at a later

268. *See Burgett*, 389 U.S. at 114-15.
269. *See Baldasar*, 446 U.S. at 222-24.
270. *See id.*
271. *See id.*
272. *See id.*
273. *See id.* For a detailed discussion of the *Baldasar* opinion, see *supra* Part II.B.
274. *See Baldasar*, 446 U.S. at 227-28 (Marshall, J., concurring).
275. *See* Scott v. Illinois, 440 U.S. 367, 372-74 (1979).
276. *See id.*

date.[277] *Baldasar* took the next logical step in the Sixth Amendment progression, finding that once a defendant is convicted without counsel, that conviction remains unreliable and invalid to result in imprisonment no matter when it is used against him or her.[278]

When the *Nichols* Court overturned *Baldasar*, it approved of a way for prosecutors to circumvent the letter and spirit of the previous judicially interpreted Sixth Amendment rules. Rather than preserving the dividing line between imprisonment and other forms of punishment as the Court did in *Baldasar*, the *Nichols* Court found a way to cross that line. Although the loss of liberty is indisputably the same form of punishment no matter when it occurs, the Court backtracked on the *Scott* and *Argersinger* decisions by concluding that the use of an uncounseled conviction to affect actual imprisonment is sometimes acceptable and sometimes not.[279] *Scott*, *Argersinger*, and *Gideon* made it clear that using an uncounseled conviction to support imprisonment is never acceptable.[280] *Baldasar* upheld this rule.[281] *Nichols* did not. Under *Nichols*, an uncounseled misdemeanor conviction can constitutionally come back to haunt the accused by extending the duration of subsequent imprisonment at a later date.[282] The Court necessarily concluded that a trial which is inherently unfair at an earlier stage, yielding an unreliable conviction, somehow becomes magically fair and useful at a later date for setting the limits of a prison term. Thus, *Nichols* stands at odds with *Scott*, *Argersinger*, and *Burgett*, which made it clear that an unreliable conviction remains so for all future purposes.[283] Ultimately, *Nichols* strikes at the heart of *Gideon* and creates a dangerous starting point for those who oppose the foundation and wisdom of *Gideon*.

B. Nichols *Endangers the Reliability of Sentences*

The prevailing theme in these Sixth Amendment cases is the concern for the reliability of the proceeding that yields a conviction. The Supreme Court wanted to ensure that proceedings resulting in the loss of an individual's liberty would be reliable and fair. In keeping with this goal, it has long been an accepted notion that sentencing judges may use

277. *See Baldasar*, 446 U.S. at 227-28 (Marshall, J., concurring).
278. *See id.* at 228-29.
279. *See* Nichols v. United States, 114 S. Ct. 1921, 1927-28 (1994).
280. *See Scott*, 440 U.S. at 372-74; *Argersinger*, 407 U.S. at 37; *Gideon*, 372 U.S. at 342-45.
281. *See Baldasar*, 446 U.S. at 222-24 (per curiam).
282. *See Nichols*, 114 S. Ct. at 1928.
283. *See Scott*, 440 U.S. at 372-74; *Argersinger*, 407 U.S. at 37; *Burgett*, 389 U.S. at 115-16.

only reliable evidence when determining a sentence. Since *Nichols* allows judges to consider uncounseled, and therefore unreliable, convictions in fashioning a prison sentence under the Sentencing Guidelines, the Court's previous emphasis on fairness of proceedings and reliability of convictions is defeated.

1. The Supreme Court's Jurisprudence Prior to *Nichols*: Reliability of Proceedings as the Main Concern

From *Powell v. Alabama*[284] through *Scott*, the Court recognized the importance of counsel in ensuring the reliability of the trial proceedings. In *Powell*, the Court focused on the inherent disadvantages the accused encounters when he or she stands alone in court without the assistance of an attorney.[285] Recognizing that the prompt disposition of criminal cases is important, the Court cautioned that this goal should not be realized at the expense of the accused's right to a sufficient and thorough preparation of a defense.[286] Thus, a defendant must receive counsel who has sufficient opportunity to investigate and prepare his or her case.[287]

At trial, the *Powell* Court noted, the accused needs counsel to intervene to ensure that he or she does not fall victim to a bad indictment.[288] In addition, the accused needs an attorney who has the legal training which he or she lacks because if "[l]eft without the aid of counsel[, the accused] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."[289] Thus, the accused needs the guiding hand of counsel throughout the proceedings so that he or she may establish innocence; a task which the accused, unskilled in the workings of the law, may find impossible to do on his or her own.[290]

The foregoing forceful language demonstrates the great emphasis that the Court placed on the reliability of trial proceedings. Without the assistance of an attorney, the defendant faces the danger of being convicted on incompetent and inadmissible evidence. In addition, the

284. 287 U.S. 45 (1932).

285. *See supra* notes 13-22 and accompanying text.

286. *See Powell*, 287 U.S. at 59.

287. *See id.* "'It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.'" *Id.* (quoting Commonwealth v. O'Keefe, 148 A. 73, 74 (1929)).

288. *See id.* at 69.

289. *Id.*

290. *See id.* at 69-70; *supra* notes 16-17 and accompanying text.

defendant may be deprived of his or her liberty simply because he or she does not know the substantive, procedural, or evidentiary rules to establish innocence. Thus, without an attorney, the defendant may face conviction based on completely unreliable and improper evidence.

This concern for reliability continued in *Johnson v. Zerbst*,[291] in which the Court referred to counsel as a safeguard "necessary to insure fundamental human rights of life and liberty."[292] According to the *Johnson* Court, it is obvious that the ordinary defendant will not have the legal skill and ability to adequately defend himself or herself in a tribunal where the prosecution is represented by trained and experienced attorneys.[293] The Court implied that a proceeding where the prosecution is represented by an attorney, while the defendant has no counsel, is necessarily skewed, unfair, and unreliable, as the defendant will have virtually no chance of combating a vigorous and skilled prosecutor and ultimately establishing his or her innocence.[294] Since an uncounseled defendant will face a complex and mysterious proceeding which provides no chance to defend, the result necessarily will be unreliable. There will be no means by which to ascertain whether the accused was actually innocent, albeit unable to defend himself or herself.[295] The presence of an attorney will eliminate this unreliability.[296] A defense attorney can create order and simplicity out of the mysterious proceedings.[297] Thus, the Court viewed an attorney's presence as an essential and necessary ingredient to the reliability of proceedings against the accused.

The Court continued the concern for reliability in *Gideon v. Wainwright*.[298] In explaining the accused's need for counsel to receive a fair and reliable trial, the Court stated that "[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[299] The Court recognized that this ideal was impossible to achieve if the accused was forced to face these tribunals without the assistance

291. 304 U.S. 458 (1938).
292. *Id.* at 462.
293. *See id.* at 462-63.
294. *See id.*
295. *See id.*; *supra* notes 15-27.
296. *See Johnson*, 304 U.S. at 462-63.
297. *See id.* at 463.
298. 372 U.S. 335 (1963).
299. *Id.* at 344.

of counsel.[300] According to the Court, the government hiring of attorneys to prosecute cases against citizens proves the necessity of legal assistance in the courtroom.[301] If the government does not attempt to secure a conviction without the benefit of a specially trained attorney, it follows that the accused will be at a serious disadvantage if he or she does not have the same opportunity for trained legal assistance.[302] The absence of legal assistance for the accused would result in an unreliable, skewed result.

The Court once again reinforced its adherence to the reliability of proceedings in *Burgett v. Texas*.[303] In this case, the Court held that a conviction obtained in violation of the accused's right to counsel is inherently unreliable and remains unreliable, no matter when it is used.[304] This unreliability stays with the conviction and prevents its use in future proceedings; the stigma, unfairness, and unreliability taint the conviction forever.[305] "The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial . . . ."[306] Thus, the Court continued the theme of emphasizing the importance of counsel to ensure the reliability of the proceedings.

The importance of reliability led the Court to its conclusion in *Argersinger v. Hamlin*.[307] In this case, the Court explained the need for defense counsel, even in misdemeanor cases, where the accused faces imprisonment.[308] The Court justified this need by emphasizing the necessity for reliable convictions.[309] According to the Court, "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[310] There is a special danger of unfairness in misdemeanor cases, as the sheer volume of these cases "may create an obsession for speedy dispositions, regardless of the fairness of the result."[311] The need to move this large volume of cases

300. *See id.*
301. *See id.*
302. *See id.*
303. 389 U.S. 109 (1967).
304. *See id.* at 114-15.
305. *See id.*
306. *Id.* at 115.
307. 407 U.S. 25 (1972).
308. *See id.* at 32-40.
309. *See id.* at 36-37.
310. *Id.* at 34.
311. *Id.*

through the system will create a preoccupation with speed.[312] This speed may often be substituted for careful evaluation of the defendant's case.[313] Casual, out-of-court compromise may replace a fair trial.[314] "Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure."[315]

The only way to combat this prospect for the haphazard shuffling of citizens through the system is to ensure that they receive the assistance of counsel.[316] This will enable them to have a complete, fair, and thorough adjudication of their cases.[317] Without the assistance of counsel, they will become "numbers on dockets, faceless ones to be processed and sent on their way."[318] Such convictions necessarily will be unreliable since scant attention will be paid to their individual cases and situations and the facts which may establish their innocence.[319] Thus, the assistance of counsel is necessary to stop the mindless processing of accused individuals and to ensure reliable results at trial.

In *Scott v. Illinois*,[320] the Court again recognized that uncounseled convictions are inherently unreliable.[321] However, the Court recognized that economic concerns made it impossible to require appointed counsel for every person in every case.[322] Consequently, the Court concluded that courts must appoint counsel for indigent defendants only in those cases where the defendant encounters actual imprisonment.[323] According to the Court, "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."[324] The seriousness and severity of imprisonment make the prospect of unreliable convictions intolerable. Thus, an accused who suffers the consequences of actual imprisonment must have the assistance of counsel at trial.[325] However,

312. *See id.* at 35-36.
313. *See id.*
314. *See id.*
315. *Id.* at 35 (quoting FREE SOCIETY, *supra* note 58, at 128).
316. *See id.* at 36-37.
317. *See id.*
318. *Id.* at 35 (quoting FREE SOCIETY, *supra* note 58, at 128).
319. *See id.* at 35-36.
320. 440 U.S. 367 (1979).
321. *See id.* at 373-74.
322. *See id.* at 373.
323. *See id.* at 373-74.
324. *Id.* at 373.
325. *See id.* at 373-74.

the *Scott* Court was willing to live with the reality that his or her conviction could be obtained without the assistance of counsel if the accused did not face the prospect of losing his or her liberty.[326] In so ruling, the Court did not admit to the reliability of such uncounseled convictions, but accepted this reality in view of finite resources.

As shown by the preceding discussion, the progression of Sixth Amendment cases has had the fairness of proceedings and reliability of convictions as its central concern. According to the Court, reliability of convictions is ensured by the assistance of counsel for the accused. Without the assistance of counsel, convictions are inherently unreliable due to the skewed nature of the proceedings and the potential for bulldozing the accused through the criminal justice system without regard or consideration for his or her rights. If the conviction is obtained in the absence of counsel, the taint of unreliability remains with the conviction forever.

2. The Court's Concern for the Reliability of Evidence Used to Determine the Length of a Prison Sentence

According to the *Nichols* majority, the use of prior uncounseled misdemeanor convictions to enhance sentencing in later proceedings is permissible because the traditional method of sentencing is a less exacting process than that of establishing guilt.[327] For that reason, judges may rely on evidence that has not been proven beyond a reasonable doubt. For example, sentencing judges may consider a defendant's past criminal conduct, even if no conviction resulted from that behavior.[328] According to the *Nichols* majority, this allows judges and the Sentencing Guidelines to rely on uncounseled misdemeanor convictions in determining a person's sentence, since a conviction is inherently more reliable than mere criminal behavior which does not result in a conviction.[329]

However, the fact that the sentencer may use "less exacting" procedures to determine a sentence does not *a priori* make an uncounseled misdemeanor conviction reliable. When a judge relies on the criminal behavior of the accused in formulating a sentence, the prosecutor must prove at some level that the conduct actually occurred.[330] The

326. *See id.*
327. *See* Nichols v. United States, 114 S. Ct. 1921, 1927 (1994).
328. *See id.* at 1928.
329. *See id.*
330. *See id.* at 1934 (Blackmun, J., dissenting).

judge needs an opportunity to evaluate the circumstances and reliability of the information presented to establish the conduct.[331] He can then question the prosecutor and the defendant about the conduct and determine for himself or herself whether to rely on the information in setting the sentence.[332]

In contrast, if the prosecutor presents a record of a prior uncounseled misdemeanor conviction for consideration in sentencing, the sentencing judge does not have an opportunity to evaluate the circumstances of the conviction.[333] In the prior proceeding, the accused could have fallen victim to one of the situations discussed in *Argersinger* or *Gideon*. The defendant could have pled guilty or been convicted merely because he or she did not know how to establish their innocence. The defendant could have admitted guilt simply because he or she did not understand the proceedings, or wanted to pay a fine in order to return to work or to his or her family. The defendant could easily have been the subject of a case that was quickly and efficiently processed in the system to clear the court's docket, at the expense of his or her constitutional right and ability to establish innocence. However, a later sentencing court does not have an opportunity to recognize these circumstances. The Court noted that "as a practical matter, introduction of a record of conviction generally carries greater weight than other evidence of prior conduct."[334] Thus, while a judge may question and carefully consider claims of the accused's prior conduct, he or she will simply see a record of conviction and automatically take it into consideration when sentencing the defendant.[335] Thus, the prior uncounseled misdemeanor conviction, which the Supreme Court has previously concluded is inherently unreliable, will lead to a longer prison term; a result forbidden by the Court in both *Argersinger* and *Scott*.[336]

The use of prior uncounseled convictions in conjunction with the Sentencing Guidelines is even more dangerous than the situation where

331. *See id.*

332. *See id.*

333. *See id.*

334. *Id.*

335. *See id.* Although the subsequent sentencing judge arguably has the ability to inquire into the previous conviction to determine the circumstances and reliability, this is unlikely to happen. Even though the accused will be represented by counsel at the second trial, the facts of the first conviction probably will not come to the surface, as the accused is unlikely to realize that he should argue the unreliability of the prior conviction.

336. *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

a sentencing judge merely considers the prior conviction with a host of other factors. Under the Sentencing Guidelines, a prior conviction automatically places the accused in a higher criminal history category.[337] Thus, the sentencing judge has little choice but to use the prior conviction to increase the defendant's prison sentence.[338] Unlike the case where a judge can disregard a prior uncounseled conviction if he or she deems that the circumstances make it unreliable, the Sentencing Guidelines force the judge to give the defendant a higher sentence due to the higher criminal history category which defines the limits of the judicial sentencing discretion. This was the case in *Nichols*, where the defendant's potential sentence increased from 168-210 months to 188-235 months.[339] The Sentencing Guidelines automatically subjected the defendant to a prison sentence twenty-five months greater than the one he would have faced had his prior conviction not been used.[340] Although the sentencing judge could impose a longer sentence than that dictated by the Sentencing Guidelines, they prevent him or her from giving the defendant a lesser sentence.[341] Thus, the Sentencing Guidelines force the sentencing judge to consider an unreliable conviction, and deny him or her an opportunity to question and examine the circumstances which led to the uncounseled adjudication.

Although a sentencing judge may consider past conduct in determining a defendant's sentence for a subsequent offense, such evidence does not carry the same stigma of unreliability as do prior uncounseled convictions. Judges are unlikely to question the circum-

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337. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (1995); *see also* Petitioner's Brief at 11, *Nichols*, 114 S. Ct. at 1921 (discussing the relationship between prior convictions and the Sentencing Guidelines).

338. "If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." U.S. SENTENCING GUIDELINES MANUAL § 4A1.3.

339. *See Nichols*, 114 S. Ct. at 1924.

340. *See id.* at 1925.

341. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 187-88 (1991). Judge Heaney stated:

> No longer is a sentence subject to reduction by the Parole Commission, and no longer does the court retain its traditional ability to moderate the effect of the prosecutor's decisions by ultimately controlling the sentence imposed. A district court *must* consider the relevant conduct and the sentencing facts as presented to it and must impose a sentence within a given range if the appropriate facts are established by reliable evidence.

Id. at 190; *see also* Melendez v. United States, 116 S. Ct. 2057, 2063 (1996) (holding that a motion by the government for departure from applicable guideline range did not authorize the court to depart from statutory minimum sentence).

stances behind uncounseled convictions when the prosecutor presents them with a public record of conviction.[342] In addition, the Sentencing Guidelines prevent sentencing judges from questioning the circumstances and reliability of prior uncounseled convictions.[343] Thus, the use of prior uncounseled convictions to enhance punishment endangers the reliability of the defendant's sentence. As a direct consequence of the prior uncounseled conviction, the defendant is deprived of his liberty to a greater extent; a result explicitly forbidden by *Argersinger* and *Scott*.[344]

The potential for a sentencing judge to automatically consider an uncounseled prior conviction without inquiring about the surrounding facts becomes even more clear when one considers how the Sentencing Guidelines work. After conviction and before sentencing, the probation office determines what essential sentencing facts will be included in the sentencing report.[345] In deciding which facts to use, "[p]robation offices are compelled to rely primarily on the government files because they have neither the human nor material resources to make an independent investigation of the facts."[346] In addition, research shows that the sentencing judge usually accepts the version of facts set forth in the sentencing report and complies with the probation officer's calculation of the sentencing range.[347]

Thus, since probation officers are unquestionably relying on the prosecution's records in forming the sentencing report, and judges are unquestionably relying on the information in the sentencing report, it is unlikely that anyone at any stage will inquire into the circumstances surrounding the prior uncounseled conviction. Probation officers will not investigate, but instead will automatically use the information from the prosecution's records. Judges will not investigate. Instead, they will automatically use the information which the probation officers had given them. Thus, no one will question the unreliable nature of and circum-

342. *See Nichols*, 114 S. Ct. at 1934 (Blackmun, J., dissenting).

343. *See* Heaney, *supra* note 341, at 209.

344. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

345. *See* Heaney, *supra* note 341, at 172-73.

346. *Id.* at 168. "Clearly, in practice, the prosecutors control the ultimate judicial finding of facts. Several probation officers believed that they had no choice but to rely on the government-provided facts. As one probation officer summarized, 'we basically rely on what the prosecutors and investigators give us.'" *Id.* at 173 (footnote omitted).

347. *See id.* at 174. According to one public defender, "the relationship between the court and the probation office 'has always been [one] of trust, so the court relies very heavily on the calculations made by the probation officer in the PSI.'" *Id.* (alteration in original).

stances surrounding the prior uncounseled conviction. In the end, the conviction will automatically become a factor in increasing the defendant's prison sentence, and no questions will be asked.

V. CONCLUSION

Since *Gideon*, an accused's right to counsel has firmly been established as fundamental and essential to a fair trial. In the absence of a knowing and intelligent waiver of counsel, an uncounseled conviction is inherently unreliable.[348] Because of this reality, any conviction obtained without the assistance of counsel should not be used in a subsequent proceeding to impose or enhance imprisonment, as *Baldasar* has held.[349] When the Supreme Court overruled *Baldasar* in *Nichols*, it shook the foundation of *Gideon* and the accused's right to counsel. It abruptly departed from Sixth Amendment jurisprudence which had evolved over the years and had reliability of convictions as its central premise.[350] Convictions are only reliable when the proceedings are fair, which in turn depends on the assistance of counsel. Through *Nichols*, defendants may now receive imprisonment or greater prison terms in subsequent proceedings based on prior uncounseled misdemeanor convictions, a situation at odds with *Gideon*. Similarly, the reliability of such sentences is no longer stable. Accused persons can easily be shuffled through the system now without the assistance of counsel, which in turn may result in unfair trials and ultimately unfair sentences. In allowing the use of prior uncounseled misdemeanor convictions without questioning their reliability, judges are free to use inherently unreliable evidence to fix the length of incarceration, a result without constitutional safeguards. For these reasons, the Supreme Court was wrong and should be encouraged to revisit the issue and reverse its position.

348. *See supra* Part IV.B.
349. *See* Baldasar v. Illinois, 446 U.S. 222, 222-24 (1980) (per curiam).
350. *See supra* Part IV.