4-15-1996

What Goes Around Comes Around-Nichols v. United States: Validating the Collateral Use of Uncounseled Misdemeanor Convictions for the Purpose of Sentence Enhancement

Andrea E. Joseph
What Goes Around Comes Around—
Nichols v. United States: 
Validating the Collateral Use of Uncounseled Misdemeanor Convictions for the Purpose of Sentence Enhancement

I. INTRODUCTION

re·cid·i·vism /rəˈsidsəˌvizəm/ Webster’s Dictionary defines recidivism as “repeated relapse into criminal or delinquent habits.”¹ The criminal justice system combats recidivism through harsher sentencing and enhanced prison sentences for repeat offenders.² In order for a sentencing judge to determine whether a defendant deserves a more severe penalty, however, it is vital that the judge be fully apprised of the defendant’s criminal background.³ In making this assessment, it is well accepted that a judge cannot consider prior convictions that have subsequently been deemed unconstitutional.⁴ On the other hand,

2. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.
4. Id. The United States Sentencing Guidelines dictate that “[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.” Id.
5. Id. § 4A1.2, comment. (n.6). Id. App. C, amend. 353. “[S]entences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid . . . are not to be counted.” Id. App. C, amend. 353; see also United States v. Tucker, 404 U.S. 443, 448-49 (1972) (holding that a defendant’s prior uncounseled felony conviction could not be considered at sentencing). See generally D. Brian King, Note, Sentence Enhancement Based on Unconstitutional Prior Convictions, 64 N.Y.U.
whether a sentencing judge can consider an uncounseled misdemeanor conviction constitutionally valid because no imprisonment was imposed is an issue that has long been debated.6

A major catalyst for this debate was the Supreme Court’s plurality decision in Baldasar v. Illinois.6 In Baldasar, the Court invalidated a sentence that had been enhanced as a result of a prior uncounseled misdemeanor conviction.7 The failure of the Baldasar justices to adopt a majority rationale8 caused great disparity among the lower courts.9 Ten years after Baldasar, the United States Sentencing Commission amended the Federal Sentencing Guidelines to reflect the Commission’s view that such prior convictions should be considered in determining the most appropriate sentence for a defendant.10 Finally, in 1994, the United States Supreme Court in Nichols v. United States,11 overturned Baldasar and adopted a viewpoint consistent with the Guidelines.12 In addition to providing the guidance that the lower courts had long been seeking, the Nichols decision advanced the policy of enhancing the punishment for recidivist behavior.

Part II of this Note examines the legal history behind the Supreme Court’s opinion in Nichols and provides an extensive discussion of the Court’s plurality decision in Baldasar.13 Part II also offers an overview of the structure and application of the Federal Sentencing Guidelines.14 Part III details the facts surrounding Nichols’ conviction and the prior offenses that led to his enhanced sentence.15 Part III also contains an outline of Nichols’ procedural history.16 Part IV briefs the Court’s opinion in Nichols and examines the views taken in the concurring and

---

5. See infra note 88 and accompanying text.
7. Id. at 224.
8. The Court’s plurality opinion consisted of three separate concurring opinions and one dissent. For a complete breakdown of the Court’s decision in Baldasar, see infra note 47.
9. See infra notes 71-80 and accompanying text.
12. “[W]e hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.” Id. at 1928.
13. See infra notes 20-80 and accompanying text.
14. See infra notes 81-89 and accompanying text.
15. See infra notes 90-96 and accompanying text.
16. See infra notes 97-102 and accompanying text.
dissenting opinions. Part V discusses the impact of the Court’s decision on the criminal justice system and its place in the current trend of harsher sentencing for repeat offenders. Lastly, Part VI focuses on the long-awaited harmonization of case law and the United States Federal Sentencing Guidelines.

II. HISTORICAL BACKGROUND

A. The History of the Sixth Amendment Right to Counsel

The Sixth Amendment to the United States Constitution provides, in pertinent part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” Although this wording seems to afford the assistance of counsel to all criminal defendants, the Supreme Court’s interpretation of this constitutional right has not been quite so broad. One of the Court’s earliest examinations of the scope of the Sixth Amendment right to counsel came in 1932 with the Court’s decision in *Powell v. Alabama.* In *Powell,* four indigent black defendants were convicted of rape and sentenced to death. The Supreme Court relied on the Fourteenth Amendment to reverse the convictions, holding that the defendants had been denied due process of law when the trial court failed to appoint counsel in their defense. In making this determination, the

17. See infra notes 103-98 and accompanying text.
18. See infra notes 199-217 and accompanying text.
19. See infra Part VI.
20. U.S. Const. amend. VI.
22. Id. at 49-50. More specifically, the defendants were charged with the rape of two white females. Id. at 49. The trial took place in Scottsboro, Alabama, in 1932, where the environment of the community was described as “one of great hostility.” Id. at 51. As late as the morning of the first day of trial, the defendants were not appointed formal counsel. Id. at 56. The most the judge had done was to appoint “all the members of the bar” for arraignment purposes. Id. Counsel that finally represented the defendants did so without the slightest preparation for their defense. Id. at 57. Not surprisingly, the Supreme Court held that the defendants had been denied assistance of counsel. Id. at 58. The real issue before the Court was whether this denial violated the Due Process Clause of the Fourteenth Amendment. Id. at 60.
23. Id. at 50. The Fourteenth Amendment provides in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV, § 1.
24. *Powell,* 287 U.S. at 71. Although the Court acknowledged that the appointment
Powell Court equated the defendants' right to counsel with the fundamental right to be heard that is guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments.25

Thirty-one years after Powell, the Court revisited the right to counsel issue in Gideon v. Wainwright.26 In Gideon, the Court closely reexamined its determination in Betts v. Brady27 that the right to counsel was not fundamental and essential to a fair trial and was therefore not binding on the state courts.28 The Court criticized its prior holding as "an abrupt break with its own well-considered precedents."29 Expressly
overruling Betts, the Gideon Court found the Sixth Amendment right to counsel to be both fundamental and essential to a fair trial and thus applicable to the states through the Due Process Clause of the Fourteenth Amendment. Although no language in Gideon expressly limited the Court's holding to felony cases, lower courts applying Gideon declined to extend the right to counsel to misdemeanor defendants.

Powell as strong evidence of the fundamental nature of the right to counsel. Id. at 342-43; see supra notes 21-25 and accompanying text. The Court additionally alluded to the irrefutable fact that both nonindigent defendants, as well as the government, hire lawyers to defend and prosecute cases on a regular basis. Gideon, 372 U.S. at 344. The Court stated that this process, combined with the long and “unmistakable” line of precedent supporting the fundamental nature of the right to counsel, further emphasized 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. (commas omitted).


31. Id. at 341. In his concurring opinion, Justice Clark noted that the impact of the Court's decision was simply to erase any distinction between the right to counsel for capital and noncapital offenses. Id. at 348 (Clark, J., concurring). According to Justice Clark, a distinction of this nature has no basis in the Constitution and therefore the Sixth Amendment must be equally applied in both capital and noncapital cases at the state level through the Due Process Clause of the Fourteenth Amendment. Id. at 349 (Clark, J., concurring).

Justice Harlan, in a separate concurring opinion, confined his interpretation of the right to counsel to defendants charged with “offenses which, as the one involved here, carry the possibility of a substantial prison sentence.” Id. at 351 (Harlan, J., concurring). Parenthetically, Justice Harlan noted, “Whether the rule should extend to all criminal cases need not now be decided.” Id. (Harlan, J., concurring).

32. See, e.g., Cableton v. State, 420 S.W.2d 534, 537 (Ark. 1967) (“We choose not to anticipate that the Supreme Court of the United States will extend the rule of Wainwright to misdemeanor cases.”); Winters v. Beck, 397 S.W.2d 364, 365 (Ark. 1965) (declining to extend Gideon to misdemeanor cases), cert. denied, 385 U.S. 907 (1966); New Orleans v. Cook, 191 So. 2d 634, 638 (La. 1966) (same); State v. Sherron, 151 S.E.2d 599, 601 (N.C. 1966) (same); City of Toledo v. Frazier, 226 N.E.2d 777, 781 (Ohio Ct. App. 1967) (“[A]ny argument . . . that the Gideon case embraces misdemeanors is wholly without merit.”). The various courts' limited interpretation of Gideon was most likely due in part to the language found in Justice Harlan's concurring opinion. See supra note 31. For the Supreme Court's treatment of Gideon, see David S. Rudstein, The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar, 34 U. Fla. L. Rev. 517, 523 nn.26-27 (1982). In his concurring opinion in Argersinger v. Hamlin, Justice Powell noted that the Court's decisions after Gideon presumed that Gideon was not relevant to misdemeanor convictions. 407 U.S. 25, 44 n.1 (1972) (Powell, J., concurring).
Finally, in 1972, the Supreme Court in *Argersinger v. Hamlin* defined the constitutional boundaries of an indigent defendant's right to counsel in criminal prosecutions. The Court drew the distinguishing line between those cases in which the defendant is actually imprisoned and those in which the court imposes no prison time. The Court made no distinction between the type of crime committed; rather, it focused on the type of punishment imposed by the sentencing judge. The Court concluded that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Although the *Argersinger* Court attempted to establish actual

34. Argersinger, an indigent defendant, was convicted of carrying a concealed weapon, a misdemeanor “offense punishable by imprisonment up to six months, a $1,000 fine, or both.” *Id.* at 26. Unrepresented by counsel, Argersinger was sentenced to ninety days imprisonment. *Id.* In his habeas corpus action, Argersinger alleged that he had been denied his constitutional right to assistance of counsel. *Id.* The Florida Supreme Court rejected his contention by analogizing the right to counsel to the right to a trial by jury. *Id.* at 26-27. Since the right to a jury trial attaches only when a defendant faces the possibility of a prison sentence of six months or more, the Court held that the same rule should apply to the right to counsel and thus denied Argersinger the relief he sought. *Id.* (citing Duncan v. Louisiana, 391 U.S. 145 (1968)).
35. *Id.* at 37. The Supreme Court rejected the Florida Supreme Court's equating the right to counsel with the right to a jury trial, noting that, "[w]hile there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel." *Id.* at 30 (footnote omitted).

The *Argersinger* Court did not attempt, however, to define the scope of the Sixth Amendment for cases that did not involve actual incarceration of the defendant. "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . . for here petitioner was in fact sentenced to jail." *Id.* at 37.
36. *Id.* Chief Justice Burger wrote a concurring opinion in which he noted the burden this decision would inevitably place on the courts. *Id.* at 42 (Burger, C.J., concurring). It would force judges to decide before trial whether a charged offense was worthy of imprisonment and thus whether the indigent defendant would be entitled to the appointment of counsel. Although the Chief Justice foresaw an increased strain on the judicial system as a result of the Court's decision, he noted that it was not beyond the ability of experienced judges to make this initial determination. *Id.* (Burger, C.J., concurring). Additionally, he viewed the Court's decision as logical, given the continuing evolution of the Sixth Amendment right to counsel. *Id.* at 43-44 (Burger, C.J., concurring).

Justice Powell, joined by Justice Rehnquist, authored a separate concurring opinion in which he rejected the majority's bright-line approach as "inflexible" and opted for a case-by-case analysis of whether a defendant was afforded a fair trial despite the absence of counsel. *Id.* at 49, 63 (Powell, J., concurring). The court's individual determination would still be subject to the careful scrutiny of appellate review. *Id.* at 63-64 (Powell, J., concurring). Justice Powell further opined that the Court's blanket
imprisonment as the bright line at which the appointment of counsel becomes constitutionally required, the decision still generated confusion among the lower courts.\(^3\)

Seven years later, in *Scott v. Illinois*,\(^3\) the Supreme Court clarified the proper application of *Argersinger* for cases in which imprisonment was statutorily authorized but not actually imposed.\(^3\) The Court again adopted actual imprisonment as the constitutional dividing line, relying on the main principle espoused in *Argersinger*, that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."\(^3\) Additionally, the Court set explicit limits on the reach of denial of discretion to judges in cases where any length of imprisonment is imposed was a major flaw in the Court's decision. *Id.* at 51-52 (Powell, J., concurring). He envisioned that most judges would elect to appoint counsel for indigent defendants in nearly all cases, regardless of the seriousness of a charge, in order to preserve the range of sentences prescribed by law. *Id.* at 55 (Powell, J., concurring). Justice Powell felt that this burden would be too much for the criminal justice system to bear. *Id.* at 58-59 (Powell, J., concurring).

37. *Compare Sweeton v. Sneddon*, 463 F.2d 713, 715-16 (10th Cir. 1972) (construing *Argersinger* as prohibiting imprisonment without the assistance of counsel, but not forbidding trial without representation) and *Rollins v. State*, 299 So. 2d 586, 589 (Fla.), *cert. denied*, 419 U.S. 1009 (1974) (finding no violation of *Argersinger* when uncounseled defendants were assessed a fine with the condition that if the fine were not paid, imprisonment would result) with *Potts v. Estelle*, 529 F.2d 450, 454 (5th Cir. 1976) (holding that after *Argersinger*, the right to counsel extends to misdemeanor defendants faced with the possibility of imprisonment) and *Webster v. Jones*, 587 P.2d 528, 530 (Utah 1978) (holding that a defendant charged with an offense punishable by imprisonment is entitled to counsel). In an effort to resolve the confusion among lower courts, the Supreme Court granted certiorari in *Scott v. Illinois*, 436 U.S. 925 (1978).

38. *440 U.S. 367 (1979).*

39. *Id.* at 373-74. The petitioner in *Scott*, an unrepresented indigent defendant, was convicted of misdemeanor theft and fined $50. *Id.* at 368. The Illinois statute governing this offense provided a maximum penalty of either a $500 fine or one year in jail, or both. *Id.* Scott argued that although he was not actually imprisoned, the possibility of imprisonment associated with his offense required the court to appoint counsel in his defense. *Id.* Both the Illinois Supreme Court and the United States Supreme Court rejected Scott's contention that he had a constitutional right to the assistance of counsel. *Id.* at 369.

40. *Id.* at 373. Justice Powell authored a concurring opinion reemphasizing the belief he espoused in *Argersinger*. *Id.* at 374 (Powell, J., concurring). Justice Powell stated that drawing the line at actual imprisonment would create a heavy burden on the criminal justice system and, in many cases, force the judge to impose a fine rather than the statutorily authorized prison sentence solely because of the impracticality of appointing defense counsel at that particular time. *Id.* (Powell, J., con-
of the Sixth Amendment right to counsel by holding that "the Sixth and the Fourteenth Amendments . . . require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 41

Justice Brennan's dissenting opinion correctly predicted the next issue which would arise as a result of the "actual imprisonment" standard enumerated by the Scott Court—the constitutionality of the collateral use of an uncounseled conviction. 42

41. Id. at 373-74 (emphasis added). Plainly speaking, the right to counsel attaches only if the defendant is actually sentenced to a term of imprisonment, no matter how short. Id. Therefore, even though the statute under which Scott was convicted authorized a maximum of one year of incarceration, the key fact was that Scott was only fined for his offense and thus not constitutionally entitled to defense counsel at the court's expense. Id. at 368-69.

After Scott, it was clear that an indigent defendant could be denied the assistance of counsel and convicted of the charged offense, as long as no imprisonment was imposed, even if incarceration was an authorized sanction for the offense. Yet, this clarity in the law was not long-lived. Two years later, the picture began to blur with the Court's plurality opinion in Baldasar v. Illinois, 446 U.S. 222 (1981) (per curiam), overruled by Nichols v. United States, 114 S. Ct. 1921 (1994). See infra notes 44-80 and accompanying text. The picture did not come into focus again until the Court's recent decision in Nichols. See infra notes 103-34 and accompanying text.

42. Scott, 440 U.S. at 375-89. In his criticism of the "actual imprisonment" standard, Justice Brennan noted that "[t]he scope of collateral consequences that would be constitutionally permissible under the 'actual imprisonment' standard remains unsettled, and this uncertainty is another source of confusion generated by this standard." Id. at 382 n.13 (Brennan, J., dissenting). In fact, three years later, the confusion culminated with the Court's plurality opinion in Baldasar.

Justice Brennan drew from the roots of the Argersinger decision and suggested that the Court adopt an "authorized imprisonment" standard, so that at a minimum, the right to counsel equaled the right to a jury trial. Id. at 381-82 (Brennan, J., dissenting). An "authorized imprisonment" standard would compel the appointment of counsel for all indigent defendants charged with an offense merely punishable by any amount of imprisonment. Id. at 382 (Brennan, J., dissenting). Justice Brennan believed that the reasoning in Argersinger, which labeled the right to counsel as "more fundamental to a fair proceeding" than the right to a jury trial, mandated this result. Id. at 380-81 (Brennan, J., dissenting). In his opinion, the "actual imprisonment" standard was an illogical extension of this reasoning. The Justice pointed out that when an offense charged is punishable by more than six months imprisonment but no prison time is imposed, the defendant may enjoy his right to a jury trial while being denied his right to assistance of counsel. Id. at 382 (Brennan, J., dissenting). Justices Mar-

One year after Scott, the very concern to which Justice Brennan had alluded in his Scott dissent came to life before the Supreme Court in Baldasar v. Illinois. At issue was whether a prior uncounseled misdemeanor conviction, valid under Scott, could be collaterally used to transform a subsequent misdemeanor into a felony with a mandatory term of imprisonment attached. Although Baldasar was victorious in

shall and Stevens joined Justice Brennan’s dissenting opinion. Id. at 375.

Justice Blackmun wrote a dissenting opinion which would later become the basis of his tie-breaking opinion in Baldasar. Id. at 380 (Blackmun, J., dissenting). For a complete discussion of Justice Blackmun’s Baldasar opinion, see infra notes 57-60 and accompanying text. The basic premise of Justice Blackmun’s dissent paralleled that of Justice Brennan’s dissent in that both advocated that at a minimum the right to counsel should mirror the right to a jury trial. Scott, 440 U.S. at 389 (Blackmun, J., dissenting). Under Justice Blackmun’s rule, an indigent defendant would be afforded the assistance of counsel whenever he was accused of an offense that authorized imprisonment exceeding six months or whenever a defendant was actually imprisoned, regardless of the possible penalties associated with the offense. Id. at 389-90 (Blackmun, J., dissenting).

43. For purposes of this Note, unless otherwise indicated, phrases utilizing the language “prior uncounseled misdemeanor conviction” assume the defendant did not validly waive his right to counsel.

44. 446 U.S. 222 (1980) (per curiam), overruled by Nichols v. United States, 114 S. Ct. 1921 (1994); see infra notes 57-60 and accompanying text.

45. For a discussion of when an uncounseled misdemeanor satisfies the constitutional guarantee enumerated in the Sixth Amendment, see supra notes 38-41 and accompanying text.

46. Baldasar, 446 U.S. at 222. Baldasar was unrepresented by counsel when he was convicted of misdemeanor theft and fined $159. Id. at 223. He was subsequently convicted of theft of a $20 item. Id. At the time of his convictions, Illinois law treated theft of property valued at less than $150 as a misdemeanor, punishable by not more than one year of imprisonment and a fine not to exceed $1000. Id. (citing ILL. REV. STAT. ch. 38, ¶ 16-1(e)(1), 1005-8-3(a)(1), 1005-9-1(a)(2) (1975) (amended and reordered 1994)). Under an Illinois enhancement statute, however, a second conviction for the same offense was converted into a felony with a prison term ranging from one to three years. Id. (citing ILL. REV. STAT. ch. 38, ¶ 1005-8-1(b)(5) (1975)). Relying on this statute, the judge sentenced Baldasar to prison. Id.
his claim, the Court failed to adopt a single majority rationale. This disunity would later lead to the downfall of the *Baldasar* decision.

1. Justice Stewart’s Concurrence

Justice Stewart, relying on the principles announced in *Scott*, felt that *Baldasar*’s sentence enhancement was constitutionally unsound. Although *Baldasar* did not go to jail for the offense for which he was unrepresented by counsel, in Justice Stewart’s opinion, *Baldasar*’s subsequent prison sentence directly resulted from the prior uncounseled conviction, in direct contradiction to the rule espoused in *Scott*.


In a separate concurring opinion, Justice Marshall embraced much of the same reasoning as Justice Stewart in deciding that *Baldasar*’s uncounseled conviction could not serve as the basis for increasing the prison term attached to his subsequent sentence. Justice Marshall specifically noted that although *Baldasar*’s initial theft conviction was constitutionally valid under *Scott*, it “was not valid for all purposes.” More notably, Justice Marshall stated that *Baldasar*’s prior conviction was “invalid for the purpose of depriving [Baldasar] of his liberty.”

---

47. The Supreme Court reversed *Baldasar*’s felony conviction, citing the reasoning found in the concurring opinions. *Baldasar*, 446 U.S. at 224. The plurality opinion contained three concurring opinions, written by Justices Stewart, Marshall and Blackmun, with Justices Brennan and Stevens joining both the Stewart and Marshall opinions. Id. at 224, 229. Justice Powell wrote for the dissent, gaining the support of Chief Justice Burger and Justices White and Rehnquist. Id. at 230.

48. *Baldasar* met its end with the Court’s 6-3 decision in *Nichols v. United States*. *Nichols*, 114 S. Ct. at 1923, 1928 (1994); see infra notes 103-98 and accompanying text.

49. *Baldasar*, 446 U.S. at 224 (Stewart, J., concurring). Justices Brennan and Stevens joined the concurrence. Id. (Stewart, J., concurring).

50. Id. (Stewart, J. concurring). The *Scott* Court held that an indigent defendant could not be sentenced to any prison time without the assistance of counsel to aid in his defense. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); see supra notes 38-41 and accompanying text.


52. Id. at 226 (Marshall, J., concurring).

53. Id. (Marshall, J., concurring). In a footnote, Justice Marshall addressed the fact that *Baldasar* could have received up to a year of incarceration for the second theft offense without any consideration of his earlier uncounseled conviction. Id. at 226-27
Justice Marshall additionally expressed concern over the reliability of using an uncounseled conviction for the purpose of sentence enhancement. Responding to criticism by the four dissenting justices, the Justice fired back, stating that "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases."

3. Justice Blackmun's "Tie-Breaking" Concurrence

Justice Blackmun cast the deciding vote in favor of the defendant; however, his reasoning differed conceptually from the other concurring opinions. Justice Blackmun focused his attention on the validity of the underlying uncounseled conviction rather than on its use as an enhancement device. In Scott, Justice Blackmun dissented, establishing his own rule concerning the point at which the constitutional right to counsel attaches. Equating the right to counsel with the right to a jury trial, Justice Blackmun declared that an indigent criminal defendant is entitled to the assistance of counsel whenever charged with an offense bearing a possible penalty of more than six months imprisonment. Relying solely on this bright-line rule, Justice Blackmun de-

n.1 (Marshall, J., concurring). In his opinion, this fact was not of great significance in deciding the issue. Id. (Marshall, J., concurring). To Justice Marshall, the mere fact that Baldasar suffered "further deprivation of liberty on the basis of an uncounseled conviction" was enough to invalidate his subsequent conviction on constitutional grounds. Id. (Marshall, J., concurring).

54. Id. at 227-28 (Marshall, J., concurring). Justice Marshall stressed the Argeringer Court's emphasis on reliability and its recognition that, without the assistance of counsel, a conviction is not sufficiently reliable to serve as the vehicle for imprisonment. Id. (Marshall, J., concurring).

Working from this central premise, the Justice asserted, "An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense." Id. (Marshall, J., concurring).

55. In his dissent, Justice Powell characterized the Court's invalidation of the collateral use of a valid uncounseled conviction as the creation of a "new hybrid." Id. at 232 (Powell, J., dissenting). Under this "new hybrid," an uncounseled misdemeanor conviction, valid under Scott, would subsequently become meaningless for purposes of sentence enhancement. Id. (Powell, J., dissenting).

56. Id. at 228-29 (Marshall, J., concurring) (footnote omitted).

57. Id. at 229-30 (Blackmun, J., concurring).


59. Id. (Blackmun, J., dissenting).
clared Baldasar’s prior uncounseled misdemeanor constitutionally in-
firm and thus invalid for any purpose.60

4. Justice Powell’s Dissent

Justice Powell, writing for the dissent, criticized the Court’s decision as being inconsistent with the holding in Scott and providing no clear guidance for the lower courts.61 The Scott Court had specifically validated misdemeanor convictions obtained in the absence of counsel where no prison term was imposed.62 Based on this rule, Justice Powell adamantly rejected the position taken by Justices Stewart and Marshall, that an enhanced sentence based on a prior uncounseled conviction is tantamount to imposing imprisonment on the initial conviction.63 Justice Powell noted the long history supporting the proposition that enhancement statutes do not alter or enlarge the prior conviction.64 This being the case, the constitutional balance of Baldasar’s prior conviction was not upset merely because the trial court used it to enhance his subsequent sentence.65

Justice Powell additionally pointed out the confusion created by the Court’s decision.66 The Justice maintained that the decision forces judges to predict a defendant’s future criminal behavior in deciding whether to forego appointing counsel and in turn forfeit the ability to impose imprisonment.67 Denying the defendant counsel will ultimately lead to a burial of the conviction in the sense that it cannot resurface in a later proceeding to increase the sentence of a repeat offender.68 Just-

60. Baldasar, 446 U.S. at 229-30 (Blackmun, J., concurring). Because Baldasar’s original theft offense was punishable by up to one year in prison, Justice Blackmun espoused that Baldasar’s being denied appointed counsel nullified his conviction. Id. at 230 (Blackmun, J., concurring).
61. Id. at 231 (Powell, J., dissenting). Joining Justice Powell were Chief Justice Burger and Justices White and Rehnquist. Id. at 230.
62. See supra notes 35-41 and accompanying text.
63. Baldasar, 446 U.S. at 231-32 (Powell, J., dissenting).
64. Id. at 232 (Powell, J., dissenting); see, e.g., Oyler v. Boles, 368 U.S. 448, 451 (1962) (“Petitioners recognize that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge . . . .”); Moore v. Missouri, 159 U.S. 673, 676-77 (1895) (“The increased severity of the punishment for the subsequent offence is not a punishment for the same offence for the second time, but a severer punishment for the subsequent offence . . . to deter those so inclined from the further commission of crime . . . .”) (internal quotation marks omitted).
65. Baldasar, 446 U.S. at 231-32 (Powell, J., dissenting).
66. Id. at 231 (Powell, J., dissenting).
67. Id. (Powell, J., dissenting).
68. Id. (Powell, J., dissenting).
tice Powell envisioned that the Court's decision would compel judges to appoint counsel in all criminal proceedings in order to preserve the life of the conviction, a burden Argersinger and Scott attempted to alleviate. Justice Powell concluded that the Baldasar decision would muddy the waters the Scott Court had cleared.

5. Baldasar's Impact: A Web of Uncertainty

Justice Powell's fears proved well founded. Both state and federal courts attempted to interpret the true meaning and breadth of Baldasar, leading to a multitude of conflicting decisions about the collateral use of constitutionally valid uncounseled misdemeanors. Most of the ambiguity arose when courts attempted to apply the "narrowest grounds" doctrine established in Marks v. United States for Supreme Court plurality opinions. A majority of state courts have read Baldasar broadly, prohibiting the collateral use of any uncounseled misdemeanor conviction from increasing the term of imprisonment of a subsequent offense. Many of the federal courts have taken a more re-
stricted view of Baldasar and limited its holding to the specific facts of the case. Essentially, these federal courts have refused to extend Baldasar beyond those cases in which the prior misdemeanor conviction acted as the catalyst in converting the subsequent misdemeanor into a felony carrying an attached prison term.

The inability of the lower courts to find a "common denominator" among the Baldasar opinions is not surprising, given that the only rule that emerges after aligning all the opinions is that an uncounseled misdemeanor conviction punishable by more than six months imprisonment cannot be used to convert a subsequent misdemeanor into a felony bearing enhanced prison time. Despite the great disparity in determining the proper scope and application of Baldasar, courts concurred that Baldasar provided no clear guidance and therefore its precedential value was questionable at best.


Other courts have interpreted Baldasar as barring the use of a prior misdemeanor or conviction only when it enhances the subsequent penalty to a term greater than that authorized for the subsequent offense itself. See, e.g., Moore v. State, 362 S.E.2d 821, 822 (Ga. Ct. App.), cert. denied, 484 U.S. 904 (1987); State v. Laurick, 575 A.2d 1340, 1347 (N.J.), cert. denied, Laurick v. New Jersey, 498 U.S. 967 (1990).

Still, other states have limited Baldasar's scope to the extent of Justice Blackmun's concurrence, thereby allowing sentence enhancement when the prior conviction was not punishable by more than six months imprisonment. See, e.g., Hlad v. State, 565 So. 2d 762, 764-66 (Fla. Dist. Ct. App. 1990), aff'd, 585 So. 2d 928, 930 (Fla. 1991); Commonwealth v. Thomas, 507 A.2d 57, 60-61 (Pa. 1986); State v. Novak, 318 N.W.2d 364, 368-69 (Wis. 1982).


78. See supra note 46 and accompanying text.


80. See, e.g., Schindler v. Clerk of Circuit Court, 715 F.2d 341, 344 (7th Cir. 1983) ("In light of ... the failure of the Baldasar majority to agree upon a rationale for its result, the scope of the decision remains unclear." (footnote omitted)), cert. denied, 465 U.S. 1068 (1984); United States v. Robles-Sandoval, 637 F.2d 692, 693 n.1 (9th Cir.) ("The Court in Baldasar divided in such a way that no rule can be said to
C. The Federal Sentencing Guidelines

Disparity in sentencing was also the central concern that prompted Congress, through the Sentencing Reform Act of 1984 and the United States Sentencing Commission (Commission), to reevaluate the sentencing scheme present in the federal court system. Eventually, the United States Federal Sentencing Guidelines (Guidelines) emerged with two main goals intact. First, the Guidelines intended to achieve certainty and honesty in sentencing, to guarantee that the sentence the judge imposed was the sentence the defendant actually served. Second, the legislature proposed the Guidelines to reduce the disparity among federal judges and in turn provide greater uniformity in sentencing.

In order to accomplish its goals, the Commission designed a sentencing table to assist judges in determining the appropriate sentencing range for a particular defendant. Once a judge determines a
defendant's offense level and criminal history category, the sentencing table provides a range of imprisonment from which the judge must choose the defendant's sentence. Some discretion in sentencing is necessary; therefore, the Commission provided certain mechanisms by which the judge could depart from the sentencing range prescribed by the sentencing table.

Late the defendant's criminal history category, of which there are six. Id. §§ 1B1.1(f), 4A1.1. To assess the defendant's criminal history category, the judge adds together the criminal history points the defendant has accumulated as a result of his prior convictions. Id. § 4A1.1. The number of points assigned to each particular offense varies depending upon sentences imposed, not time served. Id. For example, a defendant earns three points for "each prior sentence of imprisonment exceeding one year and one month," two points for sentences between 60 days and 13 months, and one point, up to four total, for all other sentences. Id. §§ 4A1.1(a)-(f). For a complete list of the potential criminal history points, see id. § 4A1.1(f). A defendant with a total of zero or one criminal history point is placed in Criminal History Category I. Category II includes those with two or three points; Category III, four through six points; Category IV, seven through nine; Category V, ten through twelve; and Category VI is reserved for those defendants with thirteen or more points. Id. § 5A.

By using prior convictions to increase a defendant's criminal history category and corresponding sentence, the Commission sought to punish recidivism and to protect the public from the defendant's future criminal behavior. In the Guidelines, the Commission notes, "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." Id. Ch.4, Pt.A, intro. comment.

85. Id. Ch.5, Pt.A, intro. comment.
86. When assessing a defendant's criminal history category, the Guidelines allow for a departure from a particular sentencing range if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes" or over-represents the seriousness or likelihood. Id. § 4A1.3; see, e.g., United States v. Shoupe, 35 F.3d 835, 839 (3d Cir. 1994) (upholding the validity of downward departure of base offense level and criminal history category); U.S. v. Brown, 999 F.2d 1150, 1152 (7th Cir. 1993) (per curiam) (upward departure justified when criminal history calculations did not include pending charges and Canadian conviction); U.S. v. Tilley, 964 F.2d 66, 74 (1st Cir. 1992) (upward departure justified when criminal history calculation did not accurately reflect likelihood of recidivism based on prior offenses for negotiating worthless instruments); cf. United States v. Wyne, 41 F.3d 1405, 1409 (10th Cir. 1994) (defendant's four DUI convictions not considered sufficiently serious to warrant an upward departure). The Guidelines provide a non-exhaustive list of other types of information that the judge may consider when contemplating a departure. U.S.S.G. § 4A1.3(a)-(e).

A second departure device for defendants who substantially assist the prosecution in the investigation of a third person is available upon motion of the government. Id. § 5K1.1. Furthermore, the judge has authority to depart from the assigned sentencing range if the particular case includes "an aggravating or mitigating circumstance" that the Commission did not adequately consider. Id. § 5K2.0. The Commission recently amended § 5K2.0 to allow a judge in exceptional or extraordinary cases to consider circumstances that are not "ordinarily relevant" to a
1. The Interrelation Between the Guidelines and the Sixth Amendment Right to Counsel

The Sixth Amendment imposes some obvious restrictions on what type of information and which convictions a judge may consider in determining an appropriate sentence under the Guidelines. For example, any conviction initially obtained in violation of the right to counsel is forbidden from use both in calculating a defendant's criminal history score and in enhancing a subsequent sentence. On the other hand, whether an uncounseled misdemeanor conviction, valid under Scott, can be considered in the sentencing phase was a source of great controversy in the courts for many years. In 1990, the Commission made its position clear, approving the use of valid uncounseled misdemeanors departure determination. Id. App. C, amend. 508. The victim's conduct, rather than the defendant's, can also play a role in reducing a sentence. Id. § 5K2.10.

Justice Souter relied upon these departure mechanisms in his Nichols concurrence. Nichols v. United States, 114 S. Ct. 1921, 1930 (1994); see infra notes 135-53 and accompanying text. For a complete discussion and list of cases involving the various departure mechanisms available to a sentencing judge, see JEFI WOOD & DIANE SHEEHEY, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES 108-51 (1994).

87. See, e.g., United States v. Tucker, 404 U.S. 443, 449 (1972) (holding that felony conviction obtained in violation of Gideon cannot be used to enhance punishment for another offense); Evenstad v. United States, 978 F.2d 1154, 1157 (9th Cir. 1992) (remanding case because of defendant's claim that robbery conviction considered in sentencing was tainted by ineffective assistance of counsel); see also supra note 4.

88. Despite the Commission's 1990 amendment to § 4A1.2, see infra note 89, courts were split on whether to count this type of misdemeanor in a defendant's criminal history score. Compare United States v. Ford, 19 F.3d 1271, 1274 (8th Cir. 1994) (approving use of uncounseled misdemeanor for computing criminal history score), cert. denied, 115 S. Ct. 741 (1995) and United States v. Falesbork, 5 F.3d 715, 717-19 (4th Cir. 1993) (enhancing sentence through consideration of uncounseled misdemeanor conviction) and McCullough v. Singletary, 967 F.2d 530, 533-34 (11th Cir. 1992) (refusing to extend Baldasar to invalidate enhancement based on a juvenile conviction), cert. denied, 113 S. Ct. 1423 (1993) and United States v. Castro-Vega, 945 F.2d 496, 499-500 (2d Cir. 1991) (declining to extend Baldasar by considering uncounseled misdemeanor conviction in determining criminal history score under the Guidelines), cert. denied, 113 S. Ct. 1250 (1993) and United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990) (allowing use of constitutionally valid uncounseled misdemeanor for sentence enhancement) with United States v. Norquay, 887 F.2d 475, 482 (8th Cir. 1993) (prohibiting use of possibly uncounseled prior tribal conviction for sentence enhancement) and United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991) (barring use of uncounseled tribal misdemeanor conviction as vehicle for upward departure), abrogated by Nichols v. United States, 114 S. Ct. 1921 (1994).
in calculating the defendant's criminal history score.88 The Supreme Court's decision in Nichols ends the ambiguity that had plagued the lower courts for more than a decade. Moreover, by finally placing the Guidelines in sync with case law the Nichols decision allows one of the original purposes of the Guidelines—to minimize disparity in sentencing—to become a reality.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

In 1990, Kenneth Nichols found himself in the familiar surroundings of a courtroom, faced with a charge of conspiracy to possess cocaine with intent to distribute.90 Seven years prior to his arrest, Nichols was similarly convicted of federal felony drug charges.91 That same year, Nichols was convicted in Georgia under state misdemeanor laws for driving under the influence (DUI). Unrepresented by counsel, Nichols was fined $250, but spared any prison time for his misdemeanor offense.92 After pleading guilty to the 1990 drug charge, Nichols was sentenced to a 235-month term of imprisonment.93 In determining Nichols'

89. In 1990, the Commission took a stance in opposition to the concurring opinions in Baidasar by amending § 4A1.2 of the Guidelines and adding the following passage as background commentary: “Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.” U.S.S.G. App. C, n.353. In explaining the newly adopted amendment, the Commission stated:

[The amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A.]


91. Nichols, 114 S. Ct. at 1924.

92. Id. Under the applicable Georgia law, the maximum punishment for driving under the influence was one year in prison and a $1000 fine. Id. at 1924 n.1. For a discussion on the effect of the presence of counsel at misdemeanor proceedings, see generally Gerald R. Wheeler, The Benefits of Legal Representation in Misdemeanor Court, 19 CRIM. L. BULL. 221 (1983).

93. Nichols, 114 S. Ct. at 1924.
sentence, the court relied upon the sentencing table found in the United States Federal Sentencing Guidelines. Nichols' two prior offenses, including his uncounseled misdemeanor conviction, were used to increase his criminal history category from Category II to Category III. As a direct result of his placement in this higher category, Nichols received a twenty-five month enhancement to his sentence. The Supreme Court's opinion focused on the lower court's use of Nichols' uncounseled misdemeanor conviction in assessing his criminal history score.

B. Opinions of the Lower Courts

In an attempt to overturn his conviction on constitutional grounds, Nichols relied on the Court's previous ruling in Baldasar. Nichols contended that the lower court's consideration of his uncounseled misdemeanor conviction violated his Sixth Amendment right to counsel as construed in Baldasar. The United States District Court for the Eastern District of Tennessee rejected this argument, stating that Baldasar "stands only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term."

94. The Sentencing Table consists of 43 offense levels and six criminal history levels, which increase with the severity of the crime. U.S.S.G. § 4A1.1; see supra notes 84-86 and accompanying text.

95. Nichols, 114 S. Ct. at 1924. Nichols' previous felony drug conviction counted as three criminal history points, while his misdemeanor DUI conviction added another point. The combination of these points led to the increase in Nichols' criminal history category. Id. This elevated criminal history category then served as the basis for increasing Nichols' sentence range from the 168-210 months allowed under Category II to the 188-235 months allowed under Category III. Id. For a complete discussion of the different categories and sentences available under the Sentencing Guidelines, see supra notes 84-86 and accompanying text.

96. Nichols, 114 S. Ct. at 1924. Nichols' maximum sentence of imprisonment was increased from 210 months to 235 months. See supra note 95.

97. Nichols, 114 S. Ct. at 1924. The ultimate result of the plurality opinion in Baldasar, which Nichols attempted to rely on, was that a defendant's "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (per curiam) (Marshall, J., concurring), overruled by Nichols v. United States, 114 S. Ct. 1921 (1994). For a more complete discussion of Baldasar, see supra notes 44-80 and accompanying text.

98. Nichols, 114 S. Ct. at 1924. For a detailed discussion of a criminal defendant's Sixth Amendment right to counsel, see supra notes 34-41 and accompanying text.

Therefore, since Nichols' offense was already characterized as a felony, *Baldasar's* narrow ruling did not apply, and Nichols' enhanced sentence was free of constitutional defects.\(^{100}\)

The Sixth Circuit Court of Appeals affirmed, similarly relying on a narrow reading of *Baldasar*.\(^{101}\) The United States Supreme Court granted certiorari to resolve the Sixth Amendment issue surrounding the collateral use of prior uncounseled misdemeanor convictions for sentence enhancement.\(^{102}\)

IV. ANALYSIS OF THE COURT'S OPINION

A. The Majority Opinion: A Reexamination of *Baldasar* v. Illinois

Chief Justice Rehnquist, writing for the Court,\(^ {103}\) identified the main issue as "[w]hether the Constitution prohibits a sentencing court from considering a defendant's previous [valid] uncounseled misdemeanor conviction in sentencing him for a subsequent offense."\(^ {104}\)

The Court commenced its opinion with the basic premise that a misdemeanor defendant has no constitutional right to counsel as long as no term of imprisonment is imposed for the offense.\(^ {105}\) In support of

\(^{100}\) [Nichols, 763 F. Supp. at 280.](#) The district court based its narrow reading of *Baldasar* in part on the absence of a majority opinion in *Baldasar*. Id. at 279.

\(^{101}\) *Nichols*, 979 F.2d at 407. The court of appeals confined the rule in *Baldasar* to situations in which the consideration of a prior uncounseled misdemeanor would convert the current misdemeanor into a felony. Id. at 415-16. The court based its narrow application of *Baldasar* in part on its previous decision in *Charles v. Foltz*, 741 F.2d 834, 837 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1986) (holding that evidence of prior constitutionally valid uncounseled misdemeanor convictions could be used for impeachment purposes). *Nichols*, 979 F.2d at 418.

\(^{102}\) *Nichols*, 114 S. Ct. at 1925.

\(^{103}\) Justices O'Connor, Scalia, Kennedy, and Thomas joined in the majority opinion. *Id.* at 1923. Justice Souter filed an opinion concurring in judgment. *Id.* at 1929 (Souter, J., concurring). Justice Blackmun authored a dissenting opinion, joined by Justices Stevens and Ginsburg. *Id.* at 1931 (Blackmun, J., dissenting). Justice Ginsburg also authored a separate dissenting opinion. *Id.* at 1937 (Ginsburg, J., dissenting).

\(^{104}\) *Id.* at 1924.

\(^{105}\) *Id.* at 1925.
this proposition, the Court relied on its decisions in *Argersinger v. Hamlin* and *Scott v. Illinois* which emphasized actual imprisonment as the boundary line between constitutional and unconstitutional uncounseled convictions. In accordance with *Gideon v. Wainwright*, the Court briefly acknowledged the difference between the constitutional guarantees afforded to felony defendants and misdemean- or defendants.

The *Nichols* Court then began a detailed examination of the plurality opinion in *Baldasar*, the main reason for its grant of certiorari. The Court split its examination of the case into separate discussions of the four opinions authored by the *Baldasar* Justices.

108. *Nichols*, 114 S. Ct. at 1925-26. The Court first noted the *Argersinger* distinction between actual imprisonment and the mere threat of imprisonment or monetary fines. *Id.; see Argersinger*, 407 U.S. at 37. The Court reemphasized this difference in *Scott*, stating, "[T]he central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373.
110. *Nichols*, 114 S. Ct. at 1925 n.9. In *Gideon*, the Court acknowledged an indigent defendant's constitutional right to counsel in the absence of a valid waiver. *Gideon*, 372 U.S. at 344. Aligning the Court's decision in *Gideon* with its later decision in *Scott*, the difference in constitutional rights enjoyed by felons or misdemeanants becomes clear. An indigent felon, whether actually incarcerated or not, is constitutionally entitled to the assistance of counsel, whereas an indigent misdemeanant is afforded constitutional recourse under the Sixth Amendment only if the court fails to provide counsel and imposes a prison sentence. *Compare* *Gideon v. Wainwright*, 372 U.S. 335 (1963) with *Scott v. Illinois*, 440 U.S. 367 (1979). For a more complete discussion of *Gideon*, see *supra* notes 26-31 and accompanying text.
111. *Nichols*, 114 S. Ct. at 1925.
112. *Id.* at 1926. Three of the four *Baldasar* opinions—including Justice Stewart's concurrence joined by Justices Brennan and Stevens—supported the holding that a prior uncounseled misdemeanor conviction could not be used to increase a later misdemeanor to a felony. *Baldasar v. Illinois*, 446 U.S. 222, 224 (1980) (per curiam), *overruled by* *Nichols v. United States*, 114 S. Ct. 1921 (1994); see *supra* notes 49-60 and accompanying text. Justice Marshall, joined by Justices Brennan and Stevens, also authored a concurring opinion. *Baldasar*, 446 U.S. at 224; see *supra* notes 51-56 and accompanying text. Justice Blackmun wrote a concurring opinion, causing the 5-4 split to fall in favor of the defendant. *Baldasar*, 446 U.S. at 229; see *supra* notes 57-60 and accompanying text. Justice Powell, writing for the dissent, was joined by Chief Justice Burger and Justices White and Rehnquist. *Baldasar*, 446 U.S. at 230; see *supra* notes 61-70 and accompanying text.
Next, the Court considered its opinion in *Marks v. United States*,\textsuperscript{113} which set out a test for determining how to apply a plurality holding to subsequent cases. The “narrowest grounds” doctrine, as it has been called, espouses that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”\textsuperscript{114} The *Nichols* Court noted, however, that this approach has not been easily applied with respect to the *Baldasar* opinion.\textsuperscript{115} Numerous state and federal courts have struggled to find the narrowest grounds that represent the Court’s holding in *Baldasar*.\textsuperscript{116} Recognizing the great uncertainty and ambiguity that has resulted from attempts to apply the *Marks* “narrowest grounds” doctrine to *Baldasar*, the Court concluded that it would be illogical to continue down the same path “when it has so obviously baffled and divided the lower courts which have considered it.”\textsuperscript{117} Instead, the Court conceded that this high “degree of confusion” created by the *Baldasar* plurality decision compelled a reexamination of the issue.\textsuperscript{118}

The Court began its examination by noting that a majority of the *Baldasar* Court\textsuperscript{119} had supported the holding in *Scott v. Illinois*.\textsuperscript{120}

\begin{flushleft}
115. Nichols, 114 S. Ct. at 1926.
116. Id. at 1926-27. One court noted its frustration in attempting to apply *Marks* “narrowest grounds” doctrine: “[T]here does not seem to be any such least common denominator among the *Baldasar* opinions . . . .” State v. Novak, 318 N.W.2d 364, 368 (Wis. 1982). The *Nichols* Court mentioned numerous federal courts that found the narrowest grounds doctrine unworkable when attempting to apply it to *Baldasar*. *Nichols*, 114 S. Ct. at 1926; see, e.g., United States v. Castro-Vega, 945 F.2d 496, 499-500 (2d Cir. 1991), cert. denied, 113 S. Ct. 1250 (1993); United States v. Eckford, 910 F.2d 216, 219, n.8 (5th Cir. 1990); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984). Other courts have defaulted to one of the concurring opinions as their version of the holding in *Baldasar*. Courts adopting Justice Blackmun’s opinion include Santillanes v. United States Parole Comm’n, 754 F.2d 887, 889 (10th Cir. 1985) and State v. Orr, 375 N.W.2d 171, 176 (N.D. 1985). Of the courts that have selected one opinion as the “holding,” a majority have adopted Justice Marshall’s concurrence. Thurmon, supra note 114, at 445; see, e.g., United States v. Williams, 891 F.2d 212, 214 (9th Cir. 1989), cert. denied, 494 U.S. 1037 (1990); Addvensky v. Gunnell, 605 F. Supp. 334, 338 (D. Conn. 1983); People v. Olah, 298 N.W.2d 422, 422 (Mich. 1980), cert. denied, 450 U.S. 957 (1981).
118. Id.
119. This majority included the four dissenters from *Baldasar*: Chief Justice Burger,
Accordingly, the Court returned its attention to its decision in Scott, the basic principle being that a criminal defendant’s Sixth Amendment right to counsel does not attach when no prison time is imposed, even if imprisonment is authorized by statute. In other words, uncounseled misdemeanor convictions are constitutionally valid, as long as the defendant is not sentenced to any prison time. Embracing Scott, the Court expanded its ruling one step further into the sentencing phase, holding that “an uncounseled conviction valid under Scott may be relied upon to enhance the sentence for a subsequent offense, even though . . . [the subsequent] sentence entails imprisonment.”

In finding that the collateral use of an uncounseled misdemeanor for enhancement purposes does not violate Scott or the Constitution, the Court reasoned that even though the subsequent sentence involves additional prison time as a result of a prior offense, the penalty for the earlier conviction remains unchanged. In support of its position, the Court referred to numerous past decisions that have characterized repeat-offender laws as penalizing only the subsequent offense. The

---

and Justices Stewart, White, Powell, and Justice Rehnquist. Id.
120. Id. (discussing the holding in Scott v. Illinois, 440 U.S. 367 (1979)); see supra notes 35-41 and accompanying text.
121. Nichols, 114 S. Ct. at 1927.
122. See id.
123. Id.
124. Id. This very principle was brought to the Court’s attention by the dissent in Baldasar. Baldasar v. Illinois, 446 U.S. 222, 232 (1980) (per curiam) (Powell, J. dissenting), overruled by Nichols v. United States, 114 S. Ct. 1921 (1994).
125. Nichols, 114 S. Ct. at 1927; see supra note 64. Repeat-offender or “recidivist” statutes have also been found nonviolative of the Eighth Amendment’s prescription against cruel and unusual punishment. See generally Romualdo P. Eclavea, Annotation, Imposition of Enhanced Sentence Under Recidivist Statute as Cruel and Unusual Punishment, 27 A.L.R. Fed. 110 (1976). Further, these statutes have withstood other constitutional challenges. See Graham v. West Virginia, 224 U.S. 616, 631 (1912) (rejecting contention that recidivist statute violates double jeopardy clause, right to trial by jury or proscription against cruel and unusual punishment); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901) (same); Jill C. Rafaloff, Note, The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?, 56 FORDHAM L. REV. 1085, 1093-94 (1988) (highlighting the constitutional validity of recidivist statutes).

As the Court noted in Parke v. Raley, “[W]e have repeatedly upheld recidivism statutes ‘against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.’” Parke v. Raley, 506 U.S. 20, 27 (1992) (quoting Spencer v. Texas, 385 U.S. 554, 560 (1967)).
Court further noted that the sentencing process has continually afforded judges wide latitude in determining the appropriate sentence to impose on an individual defendant.\textsuperscript{126} Sentencing courts have consistently considered a defendant's prior convictions and past criminal behavior, even without attached convictions.\textsuperscript{127} The Court found it logical that Nichols' DUI conviction be considered constitutionally permissible for enhancement purposes.\textsuperscript{128} In fact, the prosecution had proven the DUI conviction under a higher standard, beyond a reasonable doubt.\textsuperscript{129}

The Court then dismissed Nichols' contention that at a minimum courts should warn misdemeanor defendants of the possibility that their convictions could be used to enhance a later sentence.\textsuperscript{130} In rejecting Nichols' argument, the Court reasoned that such a warning would require dramatic changes in the misdemeanor conviction process, the cost of which would substantially outweigh any benefit defendants might receive from being reminded that the courts do not look favorably on past criminal offenses and consequently are likely to impose a harsher sentence the next time around.\textsuperscript{131}

The Court concluded its opinion by expressly overruling \textit{Baldasar} and holding that "consistent with the Sixth and Fourteenth Amendments of the Constitution, . . . an uncounseled misdemeanor conviction, valid under \textit{Scott} because no prison term was imposed, is also valid

\begin{thebibliography}{130}
\bibitem{Nichols} Nichols, 114 S. Ct. at 1927-28; see, \textit{e.g.}, Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993) ("Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.").
\bibitem{Nichols2} \textit{Nichols}, 114 S. Ct. at 1928.
\bibitem{Nichols3} \textit{Id.}
\bibitem{Nichols4} \textit{Id.} In essence, the Court was trying to emphasize that, according to its decision in Williams v. New York, 337 U.S. 241 (1949), it would have been constitutionally permissible for the judge to increase Nichols' sentence by presenting evidence of his conduct leading up to the DUI, without any mention of his DUI conviction. \textit{Nichols}, 114 S. Ct. at 1928 (citing McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986)). Therefore, it would be irrational to exclude evidence of a conviction based on the very same conduct when the court requires a higher standard of proof for use of the conviction than it does for consideration of the conduct. \textit{Id.}
\bibitem{Nichols5} In direct response to this point, a recent article stated, "The Court's assumption that an uncounseled misdemeanor conviction is necessarily as reliable as evidence presented by counsel and proved by a preponderance at a sentencing hearing ignores the unique role of counsel in adversary proceedings." \textit{The Supreme Court, 1993 Term--Leading Cases}, 108 Harv. L. Rev. 159, 188 (1994) [hereinafter \textit{Leading Cases}].
\bibitem{Nichols6} \textit{Nichols}, 114 S. Ct. at 1928.
\bibitem{Nichols7} \textit{Id.} Since many misdemeanor convictions take place in police or justice courts, which are not courts of record, documentation of whether a warning was actually given would not be feasible. \textit{Id.} Moreover, defining the parameters of such a warning would be a difficult task since states and the federal courts, under the Federal Sentencing Guidelines, are likely to treat recidivism in different ways. \textit{Id.}
\end{thebibliography}
when used to enhance punishment at a subsequent conviction." The Court qualified its holding by adding that individual states do have the liberty, based on their own constitutions, to provide counsel for all indigent defendants charged with misdemeanors, regardless of the sentence imposed. In fact, many States provide counsel whenever imprisonment is even authorized by statute.

B. Justice Souter’s Concurrence

Justice Souter concurred separately to emphasize that, although he agreed with the majority’s judgment, he differed in his reasoning. Justice Souter rejected the majority’s contention that the holding in *Baldasar* should be overruled. In his opinion, the *Baldasar* Court was equally divided on the issue of whether an uncounseled misdemeanor, valid under *Scott*, could be used to enhance a subsequent sentence. Justice Souter pointed out that despite Justice Blackmun’s *Baldasar* concurrence, he differed from the other Justices in that he

132. *Id.*
133. *Id.* at 1928 n.12.

Willingness of these states to provide counsel for all indigent defendants charged with misdemeanors is likely a result of the Court’s decision in *Scott*. Because *Scott* mandates that counsel be appointed when any jail time is imposed, the only way to avoid forcing a judge to decide before trial whether imprisonment will be ordered is to appoint counsel in all misdemeanor cases. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). Denial of counsel forecloses a judge from imposing a prison sentence of even one day without the sentence being considered unconstitutional under *Scott*. *Id.*

136. *Id.* (Souter, J., concurring).
abided by his dissent in Scott and found Baldasar's uncounseled conviction invalid for any purpose. According to Justice Souter, Justice Blackmun's opinion was devoid of any consideration of whether a conviction, valid under Scott, could subsequently be used for enhancement purposes. Essentially, as Justice Souter viewed it, the Baldasar Court was equally divided, and thus no precedential value should be given to the decision.

Justice Souter criticized Baldasar for espousing no clear principle to which the Court could adhere. Nonetheless, the Justice acknowledged the concern of Justices Stewart and Marshall, that Scott had been violated because Baldasar's prior uncounseled conviction essentially served as the basis for a prison sentence. According to Justice Souter, though, the court did not need to address this question to determine the outcome of the instant case, because the unique structure of the Sentencing Guidelines was not in effect when the Court decided Baldasar. This unique structure is the "escape route" provided by the Guidelines that authorizes a judge to depart from the set range of sentences prescribed for a particular criminal history category.

---

137. See supra notes 57-60 and accompanying text.
138. Nichols, 114 S. Ct. at 1929 (Souter, J., concurring). According to Justice Blackmun's dissenting view in Scott, which he reemphasized in Baldasar,

[A]n indigent defendant in a state criminal case must be afforded counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months imprisonment, . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment.

Scott, 440 U.S. at 389-90 (Blackmun, J., dissenting) (emphasis added).

Therefore, according to Justice Blackmun, because Baldasar's offense was punishable by more than six months imprisonment and he was unrepresented by counsel, his conviction was invalid for any purpose. Baldasar v. Illinois, 446 U.S. 222, 230 (1980) (per curiam) (Blackmun, J., concurring), overruled by Nichols v. United States, 114 S. Ct. 1921 (1994).

139. Nichols, 114 S. Ct. at 1929 (Souter, J., concurring).
140. Id. (Souter, J., concurring); see United States v. Pink, 315 U.S. 203, 216 (1942) (holding that an affirmance by an equally divided Court is of no precedential value); see also Thurmon, supra note 114, at 443 n.133 (discussing Baldasar's precedential value).
141. See Nichols, 114 S. Ct. at 1929 (Souter, J., concurring).
142. Id. at 1929-30 (Souter, J., concurring).
143. Id. (Souter, J., concurring).
144. Id. at 1930 (Souter, J., concurring).
145. Id. (Souter, J., concurring). Even though a 1993 amendment to the Sentencing Guidelines expressly stated that uncounseled misdemeanor convictions where imprisonment was not imposed should be counted in the criminal history score, U.S.S.G. App. C, amend. 353, the Guidelines also provide a departure mechanism if "reliable information indicates that the criminal history category does not adequately reflect
tice Souter noted that relevant to the issue at hand, the Guidelines allow for a downward departure in cases where the assigned criminal history category “significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes.” A defendant thus has the opportunity to highlight the unreliable aspects of his prior uncounseled conviction.

A defendant can further attempt to “explain away” a prior conviction by demonstrating that, in deciding whether to plead guilty to a misdemeanor, the temptation of a low fine and no attorney fees outweighed the foreseeable repercussions of having a conviction on his record. According to Justice Souter, this departure mechanism adequately addresses the “risk of unreliability” commonly associated with an uncounseled misdemeanor conviction. He agreed with the majority that the authority to consider past criminal conduct, combined with the discretion to depart, was consistent with the broad inquiry traditionally involved in the sentencing process.

Based largely on the fact that Nichols did not attempt to invoke the discretionary departure mechanism, Justice Souter limited his agreement with the majority to the constitutional question before the Court: Whether the district court's consideration of Nichols' previous uncounseled misdemeanor in computing his criminal history score violated the Constitution? Although he agreed that it was “constitutionally permissible . . . to consider a prior uncounseled misdemeanor conviction,” Justice Souter distinguished himself from the majority by rejecting the proposition that prior uncounseled misdemeanors should lead to automatic sentence enhancement. Because of his belief that

the seriousness of the defendant's past criminal conduct” or over-represents the severity of the defendant's record. See supra note 86 and accompanying text; see, e.g., United States v. Beckham, 968 F.2d 47, 54 (D.C. Cir. 1992) (noting that career offender status over-represented defendant's criminal history).

147. Id. (Souter, J., concurring).
148. Id. (Souter, J., concurring).
149. Id. (Souter, J., concurring). Given that the nature of the departure mechanism found in the Guidelines satisfies the concern for reliability, Justice Souter found no authority for interpreting the Sixth Amendment to preclude a court from considering a valid uncounseled conviction at the sentencing phase. Id. (Souter, J., concurring).
150. Id. (Souter, J., concurring); see supra note 126 and accompanying text.
151. Nichols, 114 S. Ct. at 1931 (Souter, J., concurring).
152. Id. (Souter, J., concurring). What Justice Souter failed to recognize was that prior uncounseled misdemeanors are not necessarily vehicles for automatic sentence

991
the majority's opinion took this additional step, Justice Souter concurred only in the judgment.153

C. Justice Blackmun's Dissent: A Concern for Reliability

Justice Blackmun dissented, joined by Justices Stevens and Ginsburg.154 He began his opinion in much the same fashion as did the majority, with a historical look at the Sixth Amendment.155 Justice Blackmun, however, focused most of his attention on the reasoning from his concurrence in Baldasar,156 that the right to counsel should attach "not only where the defendant was convicted and sentenced to jail time, but also where the defendant was convicted of any offense punishable by more than six months imprisonment, regardless of the punishment actually imposed."157 Justice Blackmun made clear that although he did not expressly advocate it in his Baldasar concurrence, he supported the view espoused in Baldasar that an uncounseled conviction valid under Scott was void for purposes of sentence enhancement for a subsequent offense.158

Enhancement. Notably, the defendant in Nichols received only one point for his prior uncounseled misdemeanor conviction. Id. at 1924. This point alone would not have been enough to increase his criminal history category; however, Nichols had already accumulated three points from a prior felony. Id. It was the one point from the misdemeanor that pushed him into the higher category and enhanced his sentence. Id. Therefore, had Nichols' record been clean, consideration of his prior uncounseled misdemeanor would not have automatically enhanced his sentence. See supra notes 84-86 and accompanying text.

154. Id. at 1931 (Blackmun, J., dissenting).
155. Id. at 1931-32 (Blackmun, J., dissenting). Justice Blackmun began with the Court's recognition of the Sixth Amendment in Gideon v. Wainwright as being "fundamental and essential to a fair trial." Id. at 1931 (Blackmun, J., dissenting) (quoting Gideon v. Wainwright, 372 U.S. 335, 342 (1963)). Next, Justice Blackmun emphasized the Court's affirmation in Scott v. Illinois, 440 U.S. 367 (1979), that "any deprivation of liberty, no matter how brief, triggers the Sixth Amendment's right to counsel." Id. at 1932 (Blackmun, J., dissenting) (citing Scott, 440 U.S. at 373-74). Finally, the Justice discussed the Court's decision in Baldasar, noting that a majority of the Court, including himself, concluded that the defendant's uncounseled misdemeanor conviction could not serve as a basis for enhancing a subsequent sentence. Id. (Blackmun, J., dissenting).
156. See supra notes 57-60 and accompanying text.
157. Nichols, 114 S. Ct. at 1932 n.1 (Blackmun, J., dissenting) (citing Scott, 440 U.S. at 389-90 (1979)).
158. Id. (Blackmun, J., dissenting). This clarification was no doubt in response to Justice Souter's remark in his concurring opinion that Justice Blackmun's opinion was devoid of any consideration of whether a conviction, valid under Scott, could be used later for enhancement purposes. See supra note 139 and accompanying text.
Justice Blackmun criticized the Court’s opinion as falsely adhering to Scott.\textsuperscript{159} According to the Justice, the Court misread Scott.\textsuperscript{160} In Justice Blackmun’s view, because the Court held unconstitutional the direct use of an uncounseled conviction in imposing a term of imprisonment, it logically followed that the Court should also prohibit its use collaterally.\textsuperscript{161} Justice Blackmun stressed concern over what he declared was an irrefutable fact, that Nichols’ twenty-five month sentence enhancement was a direct consequence of his uncounseled DUI conviction, in direct violation of Scott.\textsuperscript{162}

Justice Blackmun then shifted his focus to his main concern—the reliability of misdemeanor convictions as an indicator of guilt.\textsuperscript{163} He noted that the Supreme Court’s interpretation of the Sixth Amendment had long centered on decreasing the risk of unreliability through the appointment of counsel.\textsuperscript{164} In his opinion, no distinction should be drawn between imposing a prison sentence for the convicted offense and imposing or increasing the amount of prison time for a later offense.\textsuperscript{165} He emphasized that a conviction obtained in the absence of counsel may not accurately reflect the defendant’s guilt.\textsuperscript{166} In a counseled sentencing proceeding, the defense attorney can test the reliability of the State’s evidence through cross-examination.\textsuperscript{167} If the State presents only the record of a prior conviction, which was the outcome of a trial at which the defendant had no assistance of counsel, there exists a marked difference in reliability.\textsuperscript{168} Justice Blackmun further alluded to

\begin{itemize}
  \item \textsuperscript{159} Nichols, 114 S. Ct. at 1933 (Blackmun, J., dissenting).
  \item \textsuperscript{160} Id. (Blackmun, J., dissenting).
  \item \textsuperscript{161} Id. (Blackmun, J., dissenting). “It 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.” Id. (Blackmun, J., dissenting).
  \item \textsuperscript{162} Id. (Blackmun, J., dissenting). Justice Blackmun did agree with the Court’s contention, however, that recidivist statutes do not violate the Double Jeopardy Clause. Id. (Blackmun, J., dissenting); see supra notes 124-25 and accompanying text.
  \item \textsuperscript{163} Nichols, 114 S. Ct. at 1933. (Blackmun, J., dissenting). Justice Blackmun identified the issue he thought was truly facing the Court: “[I]s a prior uncounseled misdemeanor conviction sufficiently reliable to justify additional jail time imposed under an enhancement statute?” Id. (Blackmun, J., dissenting).
  \item \textsuperscript{164} Id. (Blackmun, J., dissenting).
  \item \textsuperscript{165} Id. (Blackmun, J., dissenting).
  \item \textsuperscript{166} Id. at 1934 (Blackmun, J., dissenting).
  \item \textsuperscript{167} Id. (Blackmun, J., dissenting).
  \item \textsuperscript{168} Id. (Blackmun, J., dissenting). Justice Blackmun used McMillan v. Pennsylvania,
the innate danger in allowing a sentencing judge to consider an "unreliable" conviction, stating that "introduction of a record of conviction generally carries greater weight than other evidence of prior conduct." 169

Next, Justice Blackmun attempted to discredit the majority’s reliance on the tradition embedded in the broad discretion afforded sentencing judges by noting that the case law the Court cited did not address the Sixth Amendment. 170 Furthermore, in Justice Blackmun’s view, the cases to which the majority referred were factually dissimilar in that they did not rely on prior convictions as the method of sentence enhancement. 171

477 U.S. 79 (1986), which the Court had previously cited, as an example of the procedure defense counsel would use in a situation where the State was attempting to prove actual conduct at the sentencing phase. Nichols, 114 S. Ct. at 1934 (Blackmun, J., dissenting). The State in McMillan, in an attempt to enhance the defendant’s sentence, presented evidence of the defendant’s possession of a firearm during the course of the crime for which he had just been convicted. McMillan, 477 U.S. at 82. Justice Blackmun asserted that defense counsel would have the opportunity during the proceeding to examine the witnesses and present counter-proof to discredit the State’s evidence, thus allowing a sufficient probe into the reliability of the State’s contentions. Nichols, 114 S. Ct. at 1934-35 (Blackmun, J., dissenting). On the other hand, when a record of conviction is introduced at this stage, no similar opportunity exists to test the reliability of a conviction obtained in the absence of counsel. Id. (Blackmun, J., dissenting).

169. Nichols, 114 S. Ct. at 1934 (Blackmun, J., dissenting). Justice Blackmun noted that the nature of the Guidelines compels this increased emphasis. Id. (Blackmun, J., dissenting). The process of determining a defendant’s criminal history category requires a judge to tally the number of prior convictions on the defendant’s record and impose a sentence that corresponds to the particular category. Id. (Blackmun, J., dissenting); see supra notes 84-85 and accompanying text. Departures from this category are given only after defense counsel offers the requisite proof. See supra note 86 and accompanying text.

170. Nichols, 114 S. Ct. at 1933 n.2 (Blackmun, J., dissenting). Justice Blackmun again cited McMillan, this time for the proposition that the case was devoid of any mention of the Sixth Amendment right to counsel and it did not involve the use of a prior conviction for enhancement purposes. Id. (Blackmun, J., dissenting). Justice Blackmun also attacked the Court’s reliance on Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), on the grounds that Mitchell involved the First Amendment, not the Sixth, and did not discuss the use of prior convictions. Nichols, 114 S. Ct. at 1934 n.2 (Blackmun, J., dissenting).

171. Nichols, 114 S. Ct. at 1933-34 n.2 (Blackmun, J., dissenting). Justice Blackmun also alluded to McMillan for the fact that it involved felony convictions as opposed to misdemeanors. Id. at 1933 n.2 (Blackmun, J., dissenting) (citing McMillan, 477 U.S. at 82). He identified the distinguishing factor in the Court’s use of United States v. Tucker. Tucker dealt with prior uncounseled felony convictions. Nichols, 114 S. Ct. at 1933-34 n.2 (Blackmun, J., dissenting); see United States v. Tucker, 404 U.S. 443, 446 (1972). The Justice further criticized the Court’s reliance on Williams v. New York, because it did not involve a defendant who was unrepresented by counsel, and more-
Justice Blackmun then launched a direct attack on Justice Souter's concurring opinion. He noted that allowing the defendant a chance to explain his prior conduct does not sufficiently alleviate the reliability concerns embedded in the Sixth Amendment. Furthermore, Justice Blackmun did not share Justice Souter's belief that the ability of a sentencing judge to depart downward validates the use of a prior un counselled misdemeanor conviction for enhancement purposes.

Justice Blackmun rejected the Court's rule, espousing one that in his opinion was truly consistent with the Sixth Amendment as well as the case law interpreting it: "[A]n uncounselled misdemeanor conviction over, the defendant did not receive any type of enhanced sentence, both which where important factors in Nichols. Nichols, 114 S. Ct. at 1934 n.2 (Blackmun, J., dissenting); see Williams v. New York, 337 U.S. 241, 244 (1949).

172. Nichols, 114 S. Ct. at 1935 n.4 (Blackmun, J., dissenting); see supra notes 135-63 and accompanying text (providing an analysis of Justice Souter's opinion).

173. Nichols, 114 S. Ct. at 1935 n.4 (Blackmun, J., dissenting). Given the mechanical structure of the sentencing guidelines, Justice Blackmun envisioned that it was highly unlikely that courts gave much credence to a defendant's attempt to discredit a prior conviction. Id. (Blackmun, J., dissenting). "As Chief Justice Burger recognized in Argersinger, '[a]ppeal from a conviction after an uncounselled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounselled trial record.'" Id. (Blackmun, J., dissenting) (quoting Argersinger v. Hamlin, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring)).

174. Id. (Blackmun, J., dissenting). Again, Justice Blackmun's skepticism arose from the structure of the sentencing guidelines, in particular the scope of the departure mechanism. Id. (Blackmun, J., dissenting); see supra note 86 and accompanying text; see also U.S.S.G. § 4A1.3. Because of its narrow definition, Justice Blackmun saw the departure mechanism as being invoked in very limited circumstances, thus leaving the reliability concern—which lies at the heart of the Sixth Amendment—unmet. Nichols, 114 S. Ct. at 1935 n.4 (Blackmun, J., dissenting).

A recent article reviewing the Nichols decision raised a similar concern with respect to the departure mechanism. See Leading Cases, supra note 129, at 190. "Even when courts are allowed to depart, in reality most judges have applied the Guidelines mechanically, without an appreciation of the opportunities for discretion."

175. The majority held that "consistent with the Sixth and Fourteenth Amendments of the Constitution . . . an uncounselled misdemeanor conviction, valid under Scott because no term of imprisonment was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nichols, 114 S. Ct. at 1928.
never can form the basis for a term of imprisonment ...” Justice Blackmun defended his rule by referring to the precedent supporting the proposition that an inherent risk of unreliability exists in convictions obtained in the absence of counsel. He noted that it was these very same reliability concerns that caused the Court to prohibit the collateral use of uncounseled felonies for the purpose of sentence enhancement. In fact, Justice Blackmun expressed the view that the need for counsel in a misdemeanor proceeding is just as compelling as the need in a felony proceeding, and thus there is no need to draw a distinction between the two for purposes of the Sixth Amendment right to counsel.

Justice Blackmun then cited the plurality opinion in Baldasar to enhance the foundation for his rule and quoted Justice Marshall’s opinion in that case:

176. Id. at 1935 (Blackmun, J., dissenting) (emphasis added).
177. Id. (Blackmun, J., dissenting). Justice Blackmun cited Gideon v. Wainwright, 372 U.S. 335 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972), in support of the proposition that a conviction’s reliability rests upon the assurance that the defendant was afforded a fair trial, which in turn depends upon the presence and assistance of counsel at trial. Nichols, 114 S. Ct. at 1936 (Blackmun, J., dissenting).

A recent article analyzing Nichols raised these same reliability concerns. See Leading Cases, supra note 129, at 186. According to the article, by the Court’s arguing that Nichols’ sentence enhancement was not additional “punishment” for his misdemeanor conviction, it avoided the real issue at hand, reliability. Id. In further criticism, the article noted, “Because the Nichols Court neither applied the reasoning of past Sixth Amendment cases nor developed a new analysis, the opinion does not provide any principled guidance for future cases. Nichols thus leaves open the possibility that the right to counsel will be further eroded.” Id.

179. Id. at 1935-36 (Blackmun, J., dissenting).

Given the utility of counsel in [misdemeanor] cases, the inherent risk of unreliability in the absence of counsel, and the severe sanction of incarceration that can result directly or indirectly from an uncounseled misdemeanor, there is no reason in law or policy to construe the Sixth Amendment to exclude the guarantee of counsel where the conviction subsequently results in an increased term of incarceration.

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

Justice Blackmun failed to mention, however, the distinguishing factor separating felonies from misdemeanors with respect to the Sixth Amendment. Uncounseled felony convictions are invalid for any purpose. Nichols, 114 S. Ct. at 1926 n.9; see Gideon v. Wainwright, 372 U.S. 335, 341 (1963). Uncounseled misdemeanors are invalid only if a sentence of imprisonment is attached. Scott v. Illinois, 440 U.S. 367, 373 (1979).

In effect, Justice Blackmun attempted to redefine the holding in Scott, which was not the Court’s focus in Nichols. If an uncounseled misdemeanor conviction, constitutionally valid under Scott, cannot be used in a subsequent proceeding, it is essentially stripped of its constitutional validity. The initial conviction, as well as the rule in Scott, is thereby rendered useless.
An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent misdemeanor. For this reason, a conviction which is invalid for purposes of imposing a sentence for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute.\textsuperscript{180}

Under this rule,\textsuperscript{181} the uncounseled misdemeanor retains validity for initially imposing a penalty short of imprisonment, but loses its validity for the purpose of enhancing the term of imprisonment in a subsequent conviction.\textsuperscript{182} Despite its dual nature, Justice Blackmun found his rule to be both workable and logical.\textsuperscript{183} Further, the Justice envisioned that his rule would provide the necessary bright line, making it easy for lower courts to follow and apply.\textsuperscript{184}

Although Justice Blackmun conceded that his rule would likely lead to an increase in the appointment of counsel for indigent defendants, he criticized the majority's rule for producing that same result.\textsuperscript{185} Because of the more severe repercussions that could result from a misdemeanor conviction after Nichols, Justice Blackmun emphasized the likelihood that the majority's rule would encourage indigent defendants to obtain counsel, where before they might have pleaded on their own.\textsuperscript{186}


181. In his \textit{Baldasar} dissent, Justice Powell labeled the use of a misdemeanor conviction for limited purposes a "hybrid" conviction. \textit{Baldasar}, 446 U.S. at 232 (Powell, J., dissenting).


183. \textit{Id.} at 1936 (Blackmun, J., dissenting).

184. \textit{Id.} (Blackmun, J., dissenting). Justice Blackmun noted that his rule's definitive nature would give judges and parties the knowledge up front that no imprisonment could be imposed directly or collaterally unless counsel was appointed. \textit{Id.} (Blackmun, J., dissenting).

Justice Blackmun overlooked the fact that his proposed rule contradicts \textit{Scott}, or at least nullifies its value to the judicial system by mandating the appointment of counsel in every misdemeanor case in order for the conviction to have any future judicial worth. \textit{See} \textit{Scott} v. \textit{Illinois}, 440 U.S. 367, 373 (1979).


186. \textit{Id.} at 1937 (Blackmun, J., dissenting). Justice Blackmun noted that defendants like Nichols, who might have been advised in the past to plead without the help of counsel, would now be compelled to seek counsel because of the threat of imprisonment that lingered in the future. \textit{Id.} (Blackmun, J., dissenting).
In conclusion, Justice Blackmun returned to the issue of reliability and reiterated his concern that the Court's holding did not adequately address or correctly resolve this important constitutional principle with regard to uncounseled misdemeanor convictions.187

D. Justice Ginsburg's Dissent

Justice Ginsburg, in addition to joining Justice Blackmun's dissent,188 authored a brief dissent of her own.189 She focused entirely on the distinction between the situations in Nichols and Custis v. United States.190 Decided two weeks before Nichols,191 Custis involved a defendant who attempted to collaterally attack the validity of two prior convictions that had served as the basis for his classification as an Armed Career Criminal.192 He claimed that both convictions were obtained in violation of his Sixth Amendment right to effective assistance of counsel.193 Justice Ginsburg framed the question presented in Custis as "where, not whether, the defendant could attack a prior conviction for constitutional infirmity."194 Justice Ginsburg immediately noted the different issue introduced by Nichols.195

187. Id. (Blackmun, J., dissenting).
188. See supra notes 164-87 and accompanying text.
192. Custis, 114 S. Ct. at 1734. The two convictions Custis objected to were obtained in a Maryland state court. One was a 1985 burglary conviction and the other a 1989 attempted burglary conviction. Id.
193. Id. Although Custis was represented by counsel in both proceedings, he claimed that his attorneys failed to provide him with adequate representation and as a result he had been denied his constitutional right to effective assistance of counsel. Id.
194. Nichols, 114 S. Ct. at 1937 (Ginsburg, J., dissenting). Justice Ginsburg described the holding of Custis as follows: "With the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to attack collaterally a prior state conviction used to enhance his sentence under the Armed Career Criminal Act of 1984." Id. (Ginsburg, J., dissenting) (citing Custis, 114 S. Ct. at 1738). The Armed Career Criminal Act of 1984 mandates a minimum sentence of 15 years and a maximum of life in prison without parole for felons convicted of possession of a firearm if the felon's criminal record contains three previous convictions for a violent felony or serious drug offense. 18 U.S.C. § 924(e) (1988); see Custis, 114 S. Ct. at 1734. The Custis Court acknowledged that Custis was free to attack his convictions in either the Maryland state courts or through habeas review. Custis, 114 S. Ct. at 1739.
195. Nichols, 114 S. Ct. at 1937 (Ginsburg, J., dissenting). Justice Ginsburg noted that in Nichols, the defendant was not objecting to the constitutional validity of the prior conviction itself, but rather to its subsequent use as an enhancement device in the sentencing phase. Id. (Ginsburg, J., dissenting).
Justice Ginsburg then identified the flaw that, in her view, was evident in the majority's opinion: Although Nichols' uncounseled misdemeanor conviction was valid under Scott, the impact of the conviction was greatly intensified through its enhancement of his subsequent conviction. She noted that the prior uncounseled misdemeanor was given much "heavier weight" than first contemplated. Justice Ginsburg would have invalidated Nichols' enhanced sentence on the ground that his prior uncounseled conviction should have been restricted to its constitutional limits, providing no basis for any term of imprisonment.

V. IMPACT

Nichols' main contribution to the criminal justice system is undoubtedly its resolution of the ambiguity that has plagued the lower courts since Baldasar. Sentencing judges now have direct authority to consider prior uncounseled misdemeanor convictions as part of a defendant's criminal history. A defendant may avoid this result only if the prior misdemeanor conviction was constitutionally invalid under the rule espoused in Scott. The lower courts have followed Nichols without hesitation.

It seems odd that Justice Ginsburg would choose to focus so intently on the differences between Custis and Nichols when the Court itself placed very little, if any, emphasis on Custis. See id. at 1924-28. 196. Id. (Ginsburg, J., dissenting). 197. Id. (Ginsburg, J., dissenting). 198. Id. (Ginsburg, J., dissenting). 199. See supra notes 71-80 and accompanying text. 200. See supra note 132 and accompanying text. 201. See supra notes 38-41 and accompanying text. 202. See, e.g., United States v. Corrado, 53 F.3d 620, 621-22 n.1 (3d Cir. 1995) (noting that the defendant's concession that Nichols allows the use of uncounseled misdemeanor convictions in assessing criminal history score rendered the issue moot on appeal); United States v. Evans, 51 F.3d 764, 765 n.2 (8th Cir. 1995) (noting the defendant's concession that Nichols "forecloses" the question of whether a judge can include constitutionally valid uncounseled misdemeanors in assessing a defendant's criminal history score); United States v. Lockhart, 37 F.3d 1451, 1454 (10th Cir. 1994) ("[B]ecause none of defendant's misdemeanor convictions resulted in imprisonment, each was constitutional. Their use by the trial court was therefore proper."); United States v. Severe, 29 F.3d 444, 447 (8th Cir. 1994) (applying Nichols to uphold district court's consideration of defendant's three prior uncounseled misdemeanor convictions), cert. denied, 115 S. Ct. 763 (1995); Snyder v. Grayson, 872 F. Supp. 416, 417-24 (E.D. Mich. 1994) (discussing Nichols and declaring defendant's 17 prior misde-
Nichols also represents another step in the criminal justice system's current trend of intolerance for recidivism. Several states, most recently California, have enacted mandatory sentencing laws that significantly enhance the punishment for recidivist behavior. Most of these enhancement statutes were passed in response to public pressure urging the legislature to toughen penalties for the rising tide of crime plaguing communities across America. In essence, Nichols reaches one step

meanor convictions constitutionally valid and thus properly considered for sentence enhancement purposes), cert. denied, 116 S. Ct. 234 (1995); Paletta v. City of Topeka, 893 P.2d 280, 284-86 (Kan. Ct. App. 1995) (citing Nichols as the reason for declining to follow two cases that had previously relied upon Baldasar); Goshon v. State, 645 So. 2d 936, 938 (Miss. 1994) (citing Nichols as controlling on the issue of whether prior unconsneled misdemeanors can be considered in sentencing phase of subsequent offense); Griswold v. Commonwealth, 453 S.E.2d 287, 289 (Va. Ct. App. 1995) (relying on Nichols to hold that defendant's conviction, which was unconstitutional under Scott, could not be used to enhance his subsequent sentence); James v. Commonwealth, 446 S.E.2d 900, 902 (Va. Ct. App. 1994) (relying on Nichols to affirm trial court's sentence enhancement based on defendant's prior unconsnled DUI conviction); State v. Hopkins, 453 S.E.2d 317, 322-24 (W. Va. 1994) (applying Nichols to uphold lower court's use of defendant's prior unconsnled misdemeanor for sentence enhancement); cf. Jackson v. State, 643 A.2d 1360, 1374 n.13 (Del. 1994) (declining to extend Nichols' holding to a capital sentencing hearing), cert. denied, 115 S. Ct. 956 (1995).

Nichols was also used as the basis for two recent cases that arose in the military justice system. See United States v. Lawer, 41 M.J. 751, 754 (C.G. Ct. Crim. App. 1995) (suggesting the requirements surrounding the subsequent use of nonjudicial punishment be reexamined in light of Nichols); United States v. Kelly, 41 M.J. 833, 842 (N.M. Ct. Crim. App.) (applying Nichols to abandon restrictions placed on subsequent use of nonjudicial punishment record for sentence enhancement), review granted, 43 M.J. 172 (C.M.A. 1995).


Although Nichols is distinguishable from the current three strikes laws because it addresses misdemeanors as opposed to felonies, the goal in Nichols is similar—deter and punish recidivism. Nichols reaches even deeper by forcing first-time offenders to accept responsibility for their actions and learn quickly from their mistakes.

204. See generally Barbara S. Barrett, Sentencing Guidelines: Recommendations for Sentencing Reform, 57 Mo. L REV. 1077 (1992). "As Baltimore Circuit Court Judge Marshall Levin, chairperson of the Maryland Sentencing Guidelines Board, said, 'Judges are sentencing to prison more, longer and avowedly for purposes of retribution. They seem to do so partly out of response to public outrage over crime and partly because of their own concern and frustration about increasing crime.'" Id. at 1080
further by expanding the class of recidivists who receive enhanced sentences to include misdemeanants. While deterrence of crime is a laudable goal, scholars have been quick to criticize sentence enhancement laws as an expensive and unworkable solution to the nation’s crime problem.\(^5\) One of the major concerns about the rise in sentence enhancement schemes is the corresponding increase in the prison population.\(^2\)

Although the detrimental effects associated with an increase in the prison population are valid concerns with any enhancement scheme, a closer look at *Nichols* reveals that the Court’s decision will not result in mandatory sentence enhancement for every defendant that has been previously convicted of one uncounseled misdemeanor. *Nichols* simply allows the judge to consider a defendant’s prior uncounseled misdemeanor in determining the most appropriate sentence. Under the current Sentencing Guidelines, a defendant can acquire only one criminal history point for every constitutionally valid uncounseled misdemeanor conviction on his record.\(^7\) Because the Guidelines are set up so that there is a minimum two-point spread between each criminal history category,\(^2\) only those defendants whose records are replete with prior convictions will be subject to an increased sentence. In fact, if Kenneth Nichols had not been previously convicted of a felony drug charge, which counted as three criminal history points,\(^2\) he would have had a criminal history


One of the most public displays of distrust for the criminal justice system came after 12 year-old Polly Klaas was abducted from her home and murdered by a repeat offender. See Jennifer Warren, *Thousands Say Tearful Goodby to Polly Klaas*, L.A. Times, Dec. 10, 1993, at A1, A38. California passed the Three Strikes law directly following this incident. Cal. Pen. Code § 667 (West Supp. 1995); see supra note 203 and accompanying text.


207. See supra note 84 and accompanying text.

208. See supra note 84.

209. See Nichols v. United States, 114 S. Ct. 1921, 1924 (1994); supra note 95 and
score of one, which corresponds to Criminal History Category I. As a result of this categorization, Nichols would have received the same sentence as if he had no prior convictions on his record. The only reason that Nichols' misdemeanor conviction carried such great weight in the sentencing phase was because of the recidivist behavior on his record. Kenneth Nichols was going to serve a long prison sentence regardless of his prior DUI conviction.

Commentators have also criticized enhanced sentencing schemes for their potential impact on a defendant's desire to plead guilty or proceed without the assistance of counsel. The balancing test that a defendant undoubtedly goes through before deciding whether to plead guilty now takes on a new dimension. As Justice Souter noted in his Nichols concurrence, the attraction of a low fine and ability to avoid attorney fees usually outweighs the minimal repercussions normally associated with a misdemeanor conviction. Yet, a misdemeanor that has the ability to significantly increase a defendant's future sentence also has the potential to tip the scale to the other side. It is conceivable that in light of Nichols, a defendant will place greater weight on the future consequences of a guilty plea and therefore choose to expend both the time and resources to hire an attorney.

A likely result of a defendant's unwillingness to plead guilty or proceed without counsel would be an increase in costs and delay for both the courts and the defendant. Any rise in the number of criminal defendants awaiting trial would ultimately lead to an increase in court crowding and delay, a problem courts are already desperately struggling to combat. Furthermore, individual defendants would incur greater costs, not only in attorney fees, but also in the costs inherent in a process that is plagued by delay. These potential effects are the same concerns that Justice Blackmun alluded to in his dissenting opinion in Nichols.

It is possible, however, that any detrimental impact Nichols might have on misdemeanor defendants or the criminal justice system has been over emphasized. As Chief Justice Rehnquist noted in Nichols, even prior to the decision, defendants were undoubtedly well aware that the next time

accompanying text.

210. See supra note 84.
211. This result is due to the fact that Criminal History Category I consists of both those defendants that have zero or one criminal history points. Id.
213. Nichols, 114 S. Ct. at 1930 (Souter, J., concurring).
214. See Mauer, supra note 212, at 63.
215. Nichols, 114 S. Ct. 1936-37 (Blackmun, J., dissenting); see supra note 186 and accompanying text.
they faced criminal charges the court was likely to look unfavorably upon any prior criminal conduct on their records.\textsuperscript{216} Therefore, it is unlikely that the number of defendants who actually choose to bypass an inexpensive and expedient resolution to misdemeanor charges will dramatically increase. Pleading guilty to a misdemeanor might still represent the best option for most defendants, regardless of any future ramifications that may attach to their decisions.

It is inevitable that some of the hostility toward the criminal justice system's current trend of sentence enhancement will be aimed at the Court's recent decision in \textit{Nichols}. Yet, aligning \textit{Nichols} with the Sentencing Guidelines indicates that the decision will not have a grave impact on those defendants who have previously been convicted of one uncounseled misdemeanor.\textsuperscript{217} On the other hand, for those who fail to learn from their past mistakes and who continue to add criminal behavior to their resume, \textit{Nichols} sends the message that recidivism will not be tolerated. As the old adage states, "What goes around comes around."

\section*{VI. Conclusion}

After fourteen years of ambiguity and uncertainty following the Supreme Court's decision in \textit{Baldasar}, the \textit{Nichols} decision has finally provided lower courts with a bright-line rule that should be easy to apply. In holding that constitutionally valid uncounseled misdemeanor convictions can be used to enhance a subsequent sentence, the \textit{Nichols} Court took a position consistent with both the Sentencing Guidelines and the current trend of enhanced penalties for recidivists. \textit{Nichols} supplies clear guidance as to when a lower court may use an uncounseled conviction to enhance a sentence. As a result, the Sentencing Commission's goal of consistency in sentencing, which lies at the heart of the Sentencing Guidelines, is now closer to becoming a reality.

\begin{flushright}
\textbf{ANDREA E. JOSEPH}
\end{flushright}

\footnotesize
\textsuperscript{216} \textit{Nichols}, 114 S. Ct. at 1928.
\textsuperscript{217} See supra notes 207-11 and accompanying text.