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Nichols v. United States: Defining the Proper Role of Valid Uncounseled Misdemeanor Convictions in Subsequent Sentencing Enhancement

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Nichols v. United States: Defining the Proper Role of Valid Uncounseled Misdemeanor Convictions in Subsequent Sentencing Enhancement

"No! No!" said the Queen. "Sentence first—Verdict afterwards."—Lewis Carroll[1]

In 1990 Kenneth Nichols pleaded guilty to a federal charge of conspiracy to possess cocaine with intent to distribute.[2] At Nichols's sentencing, the district court applied the United States Sentencing Guidelines,[3] thereby requiring an examination of Nichols's past criminal convictions. Because his record contained a prior Georgia misdemeanor conviction of driving while under the influence of alcohol (DUI),[4] the district court added one additional criminal history point to Nichols's criminal history record.[5] At the time of this DUI conviction, Nichols, who was not represented by counsel, received no prison time and a fine of only $250.[6] Yet this one additional point from the prior uncounseled misdemeanor conviction proved significant, because it resulted in a prison sentence on the drug conviction that was two years longer than the maximum sentence Nichols could have otherwise received.[7]

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1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1895), *reprinted in* THE COMPLETE ILLUSTRATED WORKS OF LEWIS CARROLL 78 (Edward Guiliano ed., Avenel Books 1982).

2. Nichols v. United States, 114 S. Ct. 1921, 1924 (1994). Nichols was originally charged with a three-count indictment. United States v. Nichols, 979 F.2d 402, 405 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994). Count one was a charge of conspiracy to possess with intent to distribute cocaine; count two was a charge of attempt to possess with intent to distribute cocaine. *Id.* Both charges are violations of 21 U.S.C. § 841 (1988 & Supp. V 1993) and 21 U.S.C. § 846 (1988). *Nichols*, 929 F.2d at 405. Count three was a charge of traveling in interstate commerce to facilitate a drug trafficking offense in violation of 18 U.S.C. § 1952(a) (1988 & Supp. V 1993). *Nichols*, 979 F.2d at 405. Nichols pleaded guilty to the first count, and the remaining counts were dismissed. *Id.*

3. For a further explanation of the United States Sentencing Guidelines, see *infra* notes 45-59 and accompanying text.

4. Nichols's record also contained a 1983 federal felony drug conviction, for which the district court assigned three criminal points. *Nichols*, 114 S. Ct. at 1924. For a further explanation of the criminal history point system, see *infra* notes 51-57 and accompanying text.

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

6. *Id.* At the time of this conviction, Nichols faced a maximum sentence of one year imprisonment and a $1,000 fine. *Id.* at 1924 n.1.

7. The additional point raised Nichols's criminal history category from Category II to Category III. *Id.* at 1924. For an explanation of the criminal history category system see *infra* note 54 and accompanying text. The jump in category resulted in an increase in

In *Nichols v. United States*, the Supreme Court addressed the issue of whether such uncounseled misdemeanor convictions could be used to enhance the sentence imposed for a later conviction.[8] The Court held that such enhancement was allowed as long as the original uncounseled conviction was itself constitutional.[9] In so holding, the *Nichols* Court overruled *Baldasar v. Illinois*,[10] a thirteen-year-old plurality decision holding that an uncounseled misdemeanor conviction could not be used collaterally to transform a later misdemeanor into a felony.[11]

This Note reviews the Court's decision in *Nichols*[12] and examines the federal sentencing guidelines,[13] the case law defining the Sixth Amendment right to counsel,[14] and the case law explaining the extent to which uncounseled convictions may be used collaterally.[15] The Note then analyzes both the aftermath of *Baldasar*[16] and the eventual decision to overrule that case.[17] This Note concludes that the *Nichols* decision provides the guidance to the lower courts that *Baldasar* failed to provide. It then suggests a reconsideration of the standard the Court has used to determine the constitutional right to assigned counsel because of long-standing concerns that the holding in *Nichols* has made more acute.[18]

At the district court level, Nichols objected to the use of his uncounseled DUI conviction as a violation of his Sixth Amendment right to counsel under *Baldasar*.[19] The district court rejected

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the possible range of sentencing from 168-210 months to 186-235 months. *Nichols*, 114 S. Ct. at 1923. Thus, when the district court sentenced Nichols to the maximum of 235 months, Nichols received 25 months of imprisonment that he would not have received if the DUI conviction had not appeared on his record. *See id.* at 1924.

8. 114 S. Ct. 1921 (1994).

9. *Id.* at 1928.

10. 446 U.S. 222 (1980) (per curiam), *reh'g denied*, 447 U.S. 930 (1980), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994).

11. *Id.* at 224.

12. *See infra* notes 23-41 and accompanying text.

13. *See infra* notes 45-59 and accompanying text.

14. *See infra* notes 60-85 and accompanying text.

15. *See infra* notes 90-108 and accompanying text.

16. *See infra* notes 109-27 and accompanying text.

17. *See infra* notes 128-72 and accompanying text.

18. *See infra* notes 173-97 and accompanying text.

19. *Nichols*, 114 S. Ct. at 1924. Nichols had sought counsel, but was advised that he did not need a lawyer because he was planning to plead nolo contendere. *Id.* at 1937 (Blackmun, J., dissenting). The district court found that, because of the silent record of his DUI conviction, it could not hold that Nichols had waived his right to counsel. United States v. Nichols, 763 F. Supp. 277, 278 (E.D. Tenn. 1991), *aff'd*, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994). The Supreme Court determined that it did not need

Nichols's argument and instead pointed to *Baldasar* as a fragmented opinion that was limited to its facts.[20] After the court of appeals affirmed the district court in a two-to-one decision,[21] the Supreme Court granted certiorari.[22]

Chief Justice Rehnquist delivered the opinion of the Court,[23] expressly overruling *Baldasar*.[24] The Chief Justice reasoned that the marked splintering among both the lower federal courts and the state courts was reason enough to reexamine the *Baldasar* decision.[25] The Court held "that an uncounseled misdemeanor conviction, [that was constitutionally valid under *Scott v. Illinois*[26]], is also valid when used to enhance punishment at a subsequent conviction."[27] The Court reasoned that such "[e]nhancement statutes . . . do not change the penalty imposed for the earlier conviction. . . . '[They penalize] only the last offense committed by the defendant.' "[28] The Court also observed that sentencing traditionally has been "less exacting than the process of establishing guilt"[29] and that judges have therefore been allowed to consider a " 'wide variety of factors,' "[30] including "a defendant's past criminal behavior, even if no conviction resulted from the behavior."[31] The majority also rejected the petitioner's argument that due process requires a warning that an uncounseled misdemeanor conviction could be used to enhance a later sentence;

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to address the issue of whether or not Nichols had waived his right to counsel because it decided to overrule *Baldasar*. *Nichols*, 114 S. Ct. at 1924 n.4.

20. *Nichols*, 114 S. Ct. at 1924. *See infra* notes 93-108 and accompanying text. The district court read *Baldasar* to stand only for the proposition that uncounseled misdemeanor convictions could not be used to raise a later misdemeanor to a felony with a prison term. *Nichols*, 114 S. Ct. at 1924.

21. United States v. Nichols, 979 F.2d 402, 414-18 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

22. 114 S. Ct. 39 (1993).

23. *Nichols*, 114 S. Ct. at 1921. Justices O'Connor, Scalia, Kennedy, and Thomas joined in the majority opinion. *Id.* at 1923.

24. *Id.* at 1928.

25. *Id.* at 1927. The Court could have upheld *Baldasar*, finding only its "narrowest grounds" as binding precedent. *See id.* at 1926 (citing Marks v. United States, 430 U.S. 188, 193 (1977)). Instead the Court decided that such an inquiry would be useless in light of the extreme confusion over the *Baldasar* decision. *Id.*

26. 440 U.S. 367, 373-74 (1979). For a discussion of constitutionally valid uncounseled misdemeanors, see *infra* notes 80-85 and accompanying text.

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

28. *Id.* at 1927 (quoting Baldasar v. Illinois, 446 U.S. 222, 232 (1980) (Powell, J., dissenting)).

29. *Id.*

30. *Id.* at 1928 (quoting Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993)).

31. *Id.*

the Court found that such convictions usually occur in courts that do not maintain records, making it impossible to "memorialize any such warnings."[32]

Justice Souter concurred in the judgment, but argued that the majority did not properly differentiate between a sentencing scheme that is discretionary and one that requires automatic enhancement.[33] Justice Souter reasoned that, because the sentencing guidelines allow judges discretion in choosing whether to count a previous conviction as part of the criminal history record,[34] and because "the guidelines allow a defendant to rebut the negative implication to which a prior uncounseled conviction gives rise,"[35] the problem of reliability would be properly addressed.[36]

Justice Blackmun argued in dissent[37] that it was illogical to allow uncounseled misdemeanor convictions that originally could not serve as a basis for a prison sentence to be used collaterally as the basis for extending a prison sentence.[38] According to the dissent, whether used directly or collaterally, uncounseled misdemeanor convictions still retain a quality of "unreliability" that should bar their use as a basis for imprisonment.[39] Justice Blackmun also distinguished the use of prior conduct in sentencing procedures, finding that "a record of conviction generally carries greater weight than other evidence of

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32. *Id.*

33. *Id.* at 1931 (Souter, J., concurring in the judgment). For Justice Souter, a system of automatic enhancement would pose a more difficult constitutional question than the discretionary enhancement system at issue in *Nichols*. *Id.* at 1929-30 (Souter, J., concurring in the judgment). The majority, however, made no such distinction between a discretionary and an automatic system of enhancement. *See id.* at 1931 (Souter, J., concurring in the judgment).

34. *Id.* at 1930 (Souter, J., concurring in the judgment). The sentencing guidelines "expressly empower the district court to depart from the range of sentences prescribed for a criminal-history category that inaccurately captures the defendant's actual history of criminal conduct." *Id.* (Souter, J., concurring in the judgment).

35. *Id.* (Souter, J., concurring in the judgment).

36. *Id.* (Souter, J., concurring in the judgment). Justice Souter refused to offer an opinion on a system of automatic enhancement. *Id.* at 1931 (Souter, J., concurring in the judgment).

37. Justices Stevens and Ginsburg joined Justice Blackmun's dissent. *Id.* at 1931 (Blackmun, J., dissenting).

38. *Id.* at 1933 (Blackmun, J., dissenting) (stating that "it also is undeniable that Nichols's DUI conviction directly resulted in more than two years' imprisonment").

39. *Id.* (Blackmun, J., dissenting). Justice Blackmun reasoned: " 'An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent misdemeanor.' " *Id.* at 1936 (Blackmun, J., dissenting) (quoting Baldasar v. Illinois, 446 U.S. 222, 227-28 (1980) (Marshall, J., concurring in the judgment)).

prior conduct"[40] and that prior conduct can be rebutted with evidence, while a prior conviction cannot be so easily disavowed.[41]

Understanding the decision in *Nichols* requires an examination of the United States Sentencing Guidelines,[42] the case law defining the Sixth Amendment right to counsel,[43] and the case law examining the collateral use of uncounseled convictions.[44] The sentencing guidelines were designed to further the purposes of the criminal justice system—specifically deterrence, incapacitation, just punishment, and rehabilitation.[45] The guidelines are aimed at enhancing "the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[46] To make such a system a reality, the Sentencing Commission sought to achieve three objectives[47]: honesty—a system in which prisoners actually serve their full sentences;[48] uniformity—a system in which similar crimes by similar offenders receive similar sentences;[49] and proportionality—"a system that imposes appropriately different sentences for criminal conduct of differing severity."[50]

Under the guidelines, which are in the form of a chart, a judge first must assign a "basis" level for the offense that was committed,[51] and then must determine the defendant's criminal history category.[52]

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40. *Id.* at 1934 (Blackmun, J., dissenting).

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

42. *See infra* notes 45-59 and accompanying text.

43. *See infra* notes 60-85 and accompanying text.

44. *See infra* notes 90-108 and accompanying text.

45. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, § 1A2 (Nov. 1993) [hereinafter U.S.S.G.]. The United States Sentencing Guidelines were established by the United States Sentencing Commission with a grant of authority from Congress under the Sentencing Reform Act of 1984. *Id.* The Commission is composed of seven voting members who not only submitted the original guidelines in 1987, but who also have the authority to submit amendments annually that will "take effect 180 days after submission unless a law is enacted to the contrary." *Id.* (citing 28 U.S.C. § 994(p) (1988)).

46. *Id.* § 1A3.

47. *See id.*

48. *Id.* This objective was obtained by taking away the parole commission's power to determine the portion of a sentence a prisoner would actually serve. The abolition of parole means that a prisoner will serve the actual sentence mandated by the court, with only the possibility of an approximately 15% reduction for good behavior. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* §§ 2, 3. The base offense level is assigned by the specific type of crime, but it can vary due to specific characteristics of the offense committed. *See id.*

52. *See id.* § 4. A defendant's criminal history category is assigned by computing points from previous convictions. Values for such convictions vary: three points for prior sentences of imprisonment over one year and one month; two points for prior sentences

The basis level, which makes up the vertical axis of the sentencing chart, varies from one to forty-three.[53] The criminal history category, which comprises the horizontal axis of the chart, ranges from I to VI.[54] The sentences themselves are laid out in ranges and are determined by using the sentencing table to find the range at which a defendant's offense level and criminal history level intersect.[55] The court is allowed in atypical cases to impose a sentence outside this range,[56] but it must give specific reasons for departing from the guidelines.[57]

The Sentencing Commission was initially unsure if constitutionally valid uncounseled misdemeanor convictions could be used in determining the criminal history score, and thus it left this issue to the

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over 60 days (but less than one year and one month); and one point for any conviction that is less than 60 days' imprisonment (including those that result in no imprisonment at all). *Id.* § 4a1.1.(a)-(c).

53. *See id.* §§ 2, 3. Some examples of the basis level include: first degree murder--43, *id.* § 2A1.1; robbery—20, *id.* § 2B3.1; trespass—4, *id.* § 2B2.3. Nichols received 34 basis points for his drug conviction of conspiracy to possess with intent to distribute cocaine. *See supra* note 2 and accompanying text.

54. *See* U.S.S.G., *supra* note 45, § 4. The categories are grouped so that 0-1 criminal history points is a Category I classification, 2-3 points—Category II, 4-6 points—Category III, 7-9 points—Category IV, 10-12 points—Category V, 13 or more points—Category VI. *Id.*

55. *Id.* § 5A, comment (n.1). The greater the criminal history category or the offense level, the greater the range of sentencing. *Id.* Thus a defendant with an offense level of 6 and a criminal history category of III will receive a sentence between 2 and 8 months, while another defendant with the same offense level but in a criminal history category of IV will receive a sentence between 6 and 12 months. *See id.* § 5A.

56. *Id.* § 1A2. The sentencing statute allows courts to sentence above or below the sentencing range when "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed." *Id.* (citing 18 U.S.C. § 3553(b) (1988)); *see, e.g.*, United States v. Fadayani, 28 F.3d 1236, 1242 (D.C. Cir. 1994) (upholding sentence departure based on defendant's post-arrest criminal conduct and defendant's "long-standing and extensive" fraudulent activity that was not accounted for in the criminal history record); United States v. Roberson, 872 F.2d 597, 602-08 (5th Cir.) (upholding a sentence departure based on extreme conduct and a finding that the defendant's criminal history record inadequately represented his propensity for future crime), *cert. denied*, 493 U.S. 861 (1989).

57. U.S.S.G., *supra* note 45, § 1A2. A listing of the reasons for such departures is required so that the appellate court can review any departure for reasonableness. *See id.*; *see also, e.g.*, United States v. Lira-Barraza, 941 F.2d 745, 751 (9th Cir. 1991) (vacating and remanding defendant's sentence because of the district court's failure to provide reasons for a departure from the 0-6 month range to a sentence of 36 months); United States v. Palta, 880 F.2d 636, 639-40 (2d Cir. 1989) (holding that the district court's departure from the guidelines was unreasonable because there was no evidence of unusual circumstances that warranted such a departure).

courts.[58] In 1990, however, the Commission amended the guidelines to read: "Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed."[59]

Though the sentencing guidelines allow the use of uncounseled misdemeanor convictions in determining the criminal history record, only constitutionally valid convictions may be used. To be valid under the Constitution, such uncounseled convictions must meet the requirements of the Sixth[60] and Fourteenth Amendments.[61] These two Amendments form the framework within which the Court has determined the scope of the right to counsel.[62] One of the early cases in which the Court began to explore this issue was *Powell v. Alabama*.[63]

The Supreme Court in *Powell* held that assignment of counsel is necessary in a capital case when the defendant is unable to employ counsel and is incapable of adequately defending himself because of "ignorance, feeble mindedness, illiteracy or the like."[64] The Court ruled that a failure to provide effective counsel was a violation of the defendant's due process rights under the Fourteenth Amendment.[65] Reasoning that the right to counsel is of such a "fundamental character" that it must be "included in the conception of due process of law,"[66] the Court recognized that even an "intelligent and

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58. *See* U.S.S.G., *supra* note 45, app. C n.353. The guidelines formerly stated that "if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score." *Id.*

59. *Id.*

60. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

61. The Fourteenth Amendment states, "nor shall any state deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

62. Some hold the view that the original right to counsel was merely a guarantee that the federal government would not block a defendant from hiring an attorney. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 370 (1974) (Rehnquist, J.) (citing WILLIAM MERRITT BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955)).

63. 287 U.S. 45 (1932). In *Powell* four "ignorant and illiterate" black youths were convicted of the capital rape of two white girls on a train bound for Scottsboro, Alabama. *Id.* at 50-52.

64. *Id.* at 71.

65. *Id.*

66. *Id.* at 67-68 (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)). The Court reached this determination after tracing the history of the right to counsel. *See id.* at 60-68. Historically, the right to counsel in England was limited to civil cases and misdemeanor offenses and not allowed for more serious felony offenses. *Id.* at 60. The

educated layman" lacks the expertise in the law necessary to prove his case effectively at trial.[67] As the Court stated, the defendant "requires the guiding hand of counsel at every step in the proceedings against him."[68]

While the language in *Powell* limited its holding to the particular facts and circumstances of the case,[69] the Court did not specifically expand the right to counsel to fully encompass all defendants in state felony trials until thirty-one years later.[70] In *Gideon v. Wainwright*[71] the Court found that representation by counsel was so fundamental in assuring a fair trial that the states were obligated to provide counsel for indigents.[72] Yet the Court did not fully define

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colonies rejected this, though, and "in at least twelve of the thirteen colonies the rule of the English Common Law . . . had been fully rejected and the right to counsel fully recognized in all criminal prosecutions." *Id.* at 64-65.

67. *Id.* at 69. Such legal expertise may come into play at any step throughout the trial process. As the Court noted:

> If charged with a crime, [the defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one.

Id.

68. *Id.*

69. *See id.* at 71; Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

70. Between the *Gideon* and *Powell* decisions, the Court held in *Betts v. Brady* that "appointed counsel is not a fundamental right essential to a fair trial" and thus the Fourteenth Amendment's guarantee of due process did not make appointment of counsel to indigent defendants obligatory on the states. Betts v. Brady, 316 U.S. 455, 471-72 (1942). This ruling was explicitly reconsidered and overruled in *Gideon*, 372 U.S. at 339.

71. 372 U.S. 335 (1963). Clarence Earl Gideon was convicted of the Florida felony of breaking and entering a poolroom with the intent to commit a misdemeanor. *Id.* at 336. The trial court refused Gideon's request for assigned counsel on the grounds that assigned counsel is only necessary in capital cases. Without counsel, Gideon was sentenced to five years' imprisonment. *Id.* at 337.

72. *See id.* at 340-45. The Court focused not only on the earlier precedents of Powell v. Alabama, 287 U.S. 45 (1932) and Johnson v. Zerbst, 304 U.S. 458 (1938), but also on the policy ground that counsel is necessary to a fair system of justice. *Gideon*, 372 U.S. at 342-44. It reasoned:

> [I]n our adversary system of criminal justice . . . [g]overnments, both state and federal, spend vast sums of money to establish machinery to try defendants accused of crime. . . . [T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get. . . . [These examples] are the strongest indications that lawyers in criminal courts are necessities, not luxuries. . . . [Our society has] laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accuser without a lawyer to assist

the breadth of its decision. Justice Harlan stated in his concurrence that he believed the ruling applied to cases in which there was a "possibility of a substantial prison sentence,"[73] leaving open the question of whether the new rule of providing indigents with counsel should extend to other, less serious crimes.[74]

In *Argersinger v. Hamlin*, the Court established a standard to measure the necessity of assigning counsel.[75] The Court ruled that the Sixth Amendment right to counsel attaches in any case in which the "accused is deprived of his liberty."[76] The Court deemed imprisonment to be inherently different and more severe than any other type of punishment.[77] The Court also expressed a distrust in the reliability of the entire process for adjudicating misdemeanors because it feared that cases were forced through the system in an "assembly line" fashion.[78] In the end, the Court recognized that its ruling was limited to instances in which loss of liberty occurred, and thus declined to answer the question of whether counsel was required in cases in which a jail sentence may be authorized by statute, but none is actually imposed.[79]

Seven years later, the Court addressed the question left open by *Argersinger*, ruling in *Scott v. Illinois*[80] that the Sixth Amendment

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him.

Id. at 344.

73. *Gideon*, 372 U.S. at 351 (Harlan, J., concurring).

74. *Id.* (Harlan, J., concurring).

75. 407 U.S. 25 (1972). For nine years after *Gideon* the Court refused to review cases that raised the issue of whether the right to counsel pronounced in *Gideon* applied to misdemeanors. For a list of such cases see David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After* Scott *and* Baldasar, 34 U. FLA. L. REV. 517, 523 n.27 (1981-82).

76. *Argersinger*, 407 U.S. at 32-37. In so holding, the Court refused to acknowledge any distinction between the use of the terms "felony," "misdemeanor" or "petty offense." *See id.* at 37. By drawing a line at cases that result in imprisonment, the Court allowed for differences in state classifications of offenses. *See id.* at 38.

77. *See id.* at 32-34; *accord* Scott v. Illinois, 440 U.S. 367, 372-73 (1979). *But see Argersinger*, 407 U.S. at 47-48 (Powell, J., concurring in the result) (arguing that some consequences of a misdemeanor conviction are just as severe as imprisonment).

78. *Argersinger*, 407 U.S. at 34-37 ("An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication." (quoting The Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967))).

79. *Id.* at 37.

80. 440 U.S. 367 (1979).

right to counsel extends only to "actual imprisonment."[81] Because the Court followed the reasoning of *Argersinger* that imprisonment was inherently different from other punishments,[82] it was able to justify drawing the line at cases in which the defendant actually received a sentence that involved imprisonment.[83] In doing this, the Court expressed concern that extending the right to counsel beyond "actual imprisonment" would be too demanding upon local and state courts.[84] Thus, the Court established the rule that uncounseled misdemeanors are constitutionally valid, so long as they do not result in a jail sentence.[85]

Unfortunately for defendants, convictions may have ramifications other than just immediate punishment. The United States Sentencing Guidelines[86] and many states' criminal statutes[87] provide for the collateral use of previous convictions to enhance the sentence imposed for a current conviction. This enhancement means that a "person with a prior conviction [who] chooses to commit a subsequent crime . . . becomes subject to the increased penalty prescribed for the second crime."[88] The sentencing guidelines use a person's prior criminal history in the sentencing scheme because of a belief that prior history is "directly relevant" for the purposes of proper punishment, deterrence, public protection, and correctional treatment.[89]

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81. *Id.* at 373. *But cf. id.* at 382-85 (Brennan, J., dissenting) (arguing for an "authorized imprisonment" standard requiring counsel every time a defendant is prosecuted for a crime which, by statute, carries the possibility of imprisonment).

82. *See supra* notes 76-77 and accompanying text.

83. *Scott*, 440 U.S. at 373.

84. *Id.* at 372-73. The Court was concerned that "[a]ny extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States." *Id.*

85. *See id.* at 373-74. *Scott* represents the current state of the law regarding when a constitutional right to counsel attaches under the Sixth and Fourteenth Amendments.

86. *See* U.S.S.G., *supra* note 45, § 4; *see supra* notes 45-59 and accompanying text.

87. For an example of one such state recidivist statute, see *infra* note 94 and accompanying text.

88. Baldasar v. Illinois, 446 U.S. 222, 232 (1980) (Powell, J., dissenting).

89. *See* U.S.S.G., *supra* note 45, § 4A, Introductory Commentary. The Sentencing Commission's belief in criminal history as a gauge for punishment can be seen in the following:

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

Prior to the creation of the sentencing guidelines and after *Gideon*, the Court decided the extent to which an unconstitutional, uncounseled felony conviction could be used collaterally. In *Burgett v. Texas*[90] the Court concluded that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case."[91] The Court viewed any conviction that violated *Gideon* as "constitutionally infirm," and therefore unable to be used collaterally in any manner.[92]

Burgett effectively answered the question of whether uncounseled unconstitutional convictions could be used collaterally for enhancement, but the Court still had not decided whether uncounseled misdemeanor convictions that are valid under *Scott* were also valid for collateral use. The Court faced this issue in *Baldasar v. Illinois*,[93] which concerned an Illinois recidivist statute that treated a second conviction of petty theft as a felony.[94] The defendant, Thomas Baldasar, without the aid of counsel, was originally convicted of misdemeanor theft and was fined $159.[95] Six months later, Baldasar was charged with stealing a $29 shower head.[96] In the jury trial that followed, Baldasar received a felony conviction under the Illinois enhancement statute.[97]

The Supreme Court then reversed Baldasar's felony conviction by issuing a brief per curiam opinion. The per curiam opinion was merely a recitation of the facts and a statement that the lower court's decision was reversed "[f]or the reasons stated in the concurring

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Id.

90. 389 U.S. 109 (1967).

91. *Id.* at 115 (citation omitted); *see also* United States v. Tucker, 404 U.S. 443, 448-49 (1972) (holding that a judge's possible consideration of uncounseled unconstitutional convictions was enough to warrant a remand for sentencing).

92. *See Burgett*, 389 U.S. at 115.

93. 446 U.S. 222 (per curiam), *reh'g denied*, 447 U.S. 930 (1980), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994).

94. *Id.* at 223. The Illinois statute made a theft "not from the person" of property worth less than $150 a misdemeanor that was punishable by not more than one year imprisonment and a $1000 fine. ILL. REV. STAT., ch. 38, para. 16-1(e)(1), 1005-8-3(a)(1), 1005-9-1(a)(2) (1975). For a second conviction of the same offense, the statute provided for the conviction to be treated as a felony with a possible prison term of one to three years. *Id.* para. 1005-8-1(b)(5).

95. *Baldasar*, 446 U.S. at 223. Baldasar's uncounseled conviction was constitutionally valid under *Scott* because no jail sentence was imposed. *See supra* notes 80-85 and accompanying text.

96. *Baldasar*, 446 U.S. at 223.

97. *Id.*; *see supra* note 94.

opinions."[98] Justice Stewart wrote a very brief concurrence stating that the Illinois statute violated *Scott* because it allowed "an increased term of imprisonment *only* because [the defendant] had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense."[99] Justice Marshall added that the increased sentence that Baldasar received because of the uncounseled misdemeanor conviction constituted "actual imprisonment," and was thus unconstitutional under *Scott*.[100] He reasoned that uncounseled convictions that are constitutional under *Scott* are not constitutionally valid for all purposes; specifically, such convictions are "invalid for the purpose of depriving [the defendant] of his liberty."[101] Therefore, according to Justice Marshall, an uncounseled conviction is invalid for sending the defendant to jail either directly on the first conviction, or collaterally on the later conviction.[102]

Justice Blackmun wrote a third and distinct concurring opinion, reiterating his dissent in *Scott*.[103] By not accepting *Scott* as controlling precedent, Justice Blackmun limited the *Baldasar* decision to less than majority status because he never determined that *Baldasar* was a violation of *Scott*, as the other concurring opinions had held. The final result was a plurality with four concurring justices finding a violation of *Scott*, four dissenting justices finding no violation of *Scott*, and Justice Blackmun never directly addressing the *Scott* issue.[104]

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98. *Baldasar*, 446 U.S. at 224. Justices Stewart, Marshall, and Blackmun all wrote separate concurring opinions. Justices Brennan and Stevens joined both Justice Stewart's and Justice Marshall's opinions. *Id.* at 224, 229. Because the per curiam opinion is void of any rationale, the precedential value of *Baldasar* must be found in the concurring opinions.

99. *Id.* at 224 (Stewart, J., concurring).

100. *See id.* at 225-26 (Marshall, J., concurring) (quoting Scott v. Illinois, 440 U.S. 367, 373 (1979)).

101. *Id.* at 226 (Marshall, J., concurring).

102. *See id.* at 228-29 (Marshall, J., concurring). Justice Marshall stated:

> An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute.

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

103. *Id.* at 229 (Blackmun, J., concurring) (quoting Scott v. Illinois, 440 U.S. 367, 389-90 (1979) (Blackmun, J., dissenting) (arguing that a "bright line" test of six months of statutorily authorized imprisonment should be the proper standard by which the right to counsel should be measured)).

104. *See id.* at 229-30 (Blackmun, J., concurring). The four dissenting Justices were Chief Justice Burger and Justices White, Powell, and Rehnquist. *Id.* at 230.

The dissenting opinion, written by Justice Powell, rejected the idea that "enhancement equals imprisonment for the earlier offense."[105] The dissent also reasoned that because unconstitutional uncounseled convictions after *Gideon* were invalid for enhancement, constitutional uncounseled convictions after *Scott* should be valid for enhancement.[106] The dissent also labeled Justice Marshall's view that some convictions are not valid for all purposes as "hybrid," expressing special concern that the decision in *Baldasar* would "create confusion"[107] and would leave "the courts that try misdemeanor cases daily [without] clear guidance from this Court."[108]

The dissent's view proved prophetic, as demonstrated by the struggle of both state and lower federal courts to interpret *Baldasar*.[109] The confusion and fragmentation over the actual meaning of *Baldasar* made it a prime candidate for reconsideration.[110] Typically, a fragmented decision like *Baldasar*, in which no single rationale carries the assent of five Justices, is given the precedential value of "that position taken by those Members who concurred in the judgment[] on the narrowest grounds."[111] Yet because Justice Blackmun started with a different premise than the other four concurring justices,[112] some lower courts concluded that *Baldasar* did not contain a "narrowest ground[]" that could serve as precedent.[113]

Those courts that could not find a common denominator among *Baldasar*'s concurring opinions often limited the judgment to its strict facts; the district court and the Sixth Circuit took this approach in

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105. *Id.* at 234 (Powell, J., dissenting). Justice Powell stated that "[t]hese [enhancement statutes], commonplace in our criminal justice system, do not alter or enlarge a prior sentence." *Id.* at 232 (Powell, J., dissenting).

106. *See id.* at 232-33 (Powell, J., dissenting).

107. *Id.* at 234 (Powell, J., dissenting).

108. *Id.* at 231 (Powell, J., dissenting).

109. *See infra* notes 113-25 and accompanying text.

110. *See Nichols*, 114 S. Ct. at 1927.

111. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

112. *See supra* notes 103-04 and accompanying text.

113. *See, e.g.*, United States v. Castro-Vega, 945 F.2d 496, 499-500 (2d Cir. 1991) (finding no "common denominator" on which the *Baldasar* concurring Justices agreed), *cert. denied*, 113 S. Ct. 1250 (1993); United States v. Eckford, 910 F.2d 216, 219 n.8 (5th Cir. 1990) (noting no "common agreement" by the concurring justices in *Baldasar*); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983) (stating that *Baldasar* "provides little guidance outside of the precise factual context in which it arose"), *cert. denied*, 465 U.S. 1068 (1984); United States v. Robles-Sandoval, 637 F.2d 692, 693 n.1 (9th Cir.) (noting that "the Court in *Baldasar* divided in such a way that no rule can be said to have resulted"), *cert. denied*, 451 U.S. 941 (1981).

Nichols.[114] Yet some courts had moved to the other extreme and held that *Baldasar* prohibited any imprisonment in a subsequent conviction imposed on the basis of an uncounseled misdemeanor conviction.[115]

The confusion of the lower courts over *Baldasar* is evident in the Tenth Circuit's decision in *Santillanes v. United States Parole Comm'n*.[116] This court found the narrowest grounds, and thus the holding in *Baldasar*, to be "Justice Blackmun's rationale."[117] This is troublesome because Justice Blackmun's opinion was the only single-Justice opinion[118] and had as its starting point the rejection of the binding precedent of *Scott*.[119] The *Santillanes* court further concluded that *Baldasar* stands for both the strict rule "that an invalid uncounseled conviction cannot be used to enhance a subsequent conviction" and that "[i]f the prior conviction was valid, it can be used [collaterally] even though it was uncounseled."[120] The idea that as long as a conviction is valid it may be used collaterally lies instead at the heart of the *Baldasar* dissent, however, and not behind Justice Blackmun's view.[121]

State courts were just as divided over the meaning of *Baldasar*. Some found that *Baldasar* completely bars any prior uncounseled misdemeanor from enhancing a term of imprisonment,[122] while others found *Baldasar* no bar at all to using a valid, uncounseled misdemeanor conviction collaterally.[123] Taking a position between these two extremes, other states concluded that *Baldasar* bars an enhanced penalty only when such penalty is greater than that authorized in the absence of the prior uncounseled offense, or when

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114. *See supra* notes 20-21 and accompanying text; *see, e.g.*, *Castro-Vega*, 945 F.2d at 500 (ruling that *Baldasar* is not appropriate when the second conviction is already a felony); Wilson v. Estelle, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980) (holding that a prior uncounseled misdemeanor conviction cannot be used to enhance a later misdemeanor to a felony).

115. *See, e.g.*, United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991); United States v. Williams, 891 F.2d 212, 214 (9th Cir. 1989).

116. 754 F.2d 887 (10th Cir. 1985).

117. *Id.* at 889.

118. Baldasar v. Illinois, 446 U.S. 222 (per curiam), *reh'g denied*, 447 U.S. 930 (1980), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994).

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

120. *Santillanes*, 754 F.2d at 889-90.

121. *See Baldasar*, 446 U.S. at 232 (Powell, J., dissenting).

122. *See, e.g.*, Lovell v. State, 678 S.W.2d 318, 320 (Ark. 1984); State v. Vares, 801 P.2d 555, 557 (Haw. 1990); State v. Black, 277 S.E.2d 584, 585-86 (N.C. App. 1981).

123. *See, e.g.*, Sheffield v. City of Pass Christian, 556 So. 2d 1052, 1053 (Miss. 1990).

it would convert a misdemeanor to a felony.[124] A fourth approach applied by other states follows Justice Blackmun's concurrence and limits the use of valid uncounseled misdemeanor convictions to those for which any statutorily-authorized imprisonment was limited to less than six months.[125]

The confusion resulting from *Baldasar* was not limited to the courts, but also was shared by the Sentencing Guidelines Commission. Originally, the Sentencing Commission was concerned that the calculation of the criminal history category could violate *Baldasar* if an uncounseled misdemeanor was used in the sentencing determination.[126] Yet in 1990, the guidelines were amended to specifically include prior uncounseled misdemeanor convictions, thus reflecting the Sentencing Commission's belief that the application of *Baldasar* was limited to its facts.[127]

The standard that developed in the wake of *Baldasar* warranted Supreme Court review, which was finally accorded in *Nichols v. United States*.[128] In *Nichols*, the Court concluded that the logical consequence of the validity of uncounseled misdemeanors under *Scott* is that such convictions will still be valid for collateral use to enhance a later prison sentence.[129] This is a thorough rejection of Justice Marshall's "hybrid" approach in *Baldasar*, under which valid uncounseled convictions were not a valid basis for a jail sentence, whether imposed directly or collaterally.[130]

Indeed, Justice Marshall's position in *Baldasar* that the "actual imprisonment" standard of *Scott v. Illinois* eliminated the collateral use of uncounseled misdemeanor convictions to impose a later prison term may have advanced that standard beyond the Court's actual

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124. *See, e.g.*, State v. Laurick, 575 A.2d 1340, 1347 (N.J.), *cert. denied*, 498 U.S. 967 (1990).

125. *See, e.g.*, Hlad v. State, 565 So. 2d 762, 764-66 (Fla. App. 1990), *aff'd*, 585 So. 2d 928, 930 (Fla. 1991); State v. Orr, 375 N.W.2d 171, 175-76 (N.D. 1985).

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

127. *See supra* note 59 and accompanying text. When the Sentencing Guidelines Commission originally proposed this amendment for note and comment, it included the following background commentary: "The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by Baldasar v. Illinois, 446 U.S. 222 (1980)." 55 FED. REG. 5741 (1990).

128. 114 S. Ct. 1921, 1926 (1994). *But see id.* at 1932 (Blackmun, J., dissenting) (arguing that a common ground exists in *Baldasar* and thus precedent can be found in the decision).

129. *Id.* at 1927.

130. Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (Marshall, J., concurring); *see supra* notes 101-02 and accompanying text.

holding in *Scott*.[131] In *Scott* the Court was only dealing with a situation in which the defendant had directly received a fine for an uncounseled misdemeanor conviction.[132] Also, in *Scott* the uncounseled conviction analyzed by the Court resulted in a direct sentence,[133] whereas the uncounseled convictions in both *Nichols* and *Baldasar* were collateral to the sentences in dispute.[134] In *Nichols* and *Baldasar* the difference was that the defendants needed a subsequent conviction for a later offense when counsel was provided.[135]

By allowing enhancement based on a valid uncounseled misdemeanor conviction, *Nichols* remains truer than the *Baldasar* judgment to the traditional conception of sentencing envisioned by the Sentencing Commission.[136] Chief Justice Rehnquist considered this theme in *Nichols* when he stated that, "[a]s a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' "[137] This inquiry allows for the consideration of a defendant's past criminal behavior that did not result in a criminal conviction.[138] This prior conduct, though, needs only to be proven by a preponderance of the evidence, which is less stringent than the "beyond a reasonable doubt" standard that must be met at all criminal trials, even those in which the defendant is without the assistance of counsel.[139]

Besides being more consistent with the traditional theory of sentencing than the *Baldasar* judgment was, *Nichols* also is more

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131. *See supra* notes 80-81 and accompanying text.

132. *See* Scott v. Illinois, 440 U.S. 367, 374 (1979).

133. *See id.*

134. *See supra* notes 2-7, 95-97 and accompanying text.

135. *See Baldasar*, 446 U.S. at 232 (Powell, J., dissenting) (stating that "[i]f, as in this case, a person with a prior conviction chooses to commit a subsequent crime, he thereby becomes subject to the increased penalty prescribed for the second crime"). *But see* Rudstein, *supra* note 75, at 533 (arguing that the defendant is imprisoned due to the previous uncounseled conviction and that there is no difference between a direct jail sentence and a collateral enhancement of a jail sentence).

136. For a discussion of the Sentencing Commission's view of sentencing, see *supra* notes 48-50 and accompanying text.

137. *Nichols*, 114 S. Ct. at 1927-28 (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). The United States Sentencing Guidelines make an allowance for factors other than prior convictions. These factors allow the judge to move a defendant's criminal history record either up or down. *See* U.S.S.G., *supra* note 45, § 4A1.3.

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

139. *Id. But see id.* at 1934 (Blackmun, J., dissenting) (arguing that considering prior conduct differs from prior convictions because defendant can rebut evidence of prior conduct).

consistent with the precedent of *Burgett v. Texas*[140] than the "hybrid" conviction idea. *Burgett* made uncounseled felony convictions invalid for the purpose of sentence enhancement because they were themselves unconstitutional under *Gideon*.[141] Yet in *Nichols*, the uncounseled misdemeanor conviction was constitutional, so by looking to the converse of *Burgett*, the conviction also should have been valid for enhancement.[142] It is more consistent—a major goal of the Sentencing Commission[143]—to deem a prior conviction either valid or invalid for all purposes, instead of transforming previously valid convictions into invalid ones in certain circumstances.[144]

While the Court's logic in *Nichols* is more consistent with both the earlier precedent and the general concept of sentencing than is the "hybrid conviction" idea proposed by both Justice Blackmun in his *Nichols* dissent[145] and Justice Marshall in his *Baldasar* concurrence,[146] the underlying difference between the holding of *Nichols* and the "hybrid conviction" idea of Justice Blackmun stems from different views of what the criminal justice system is punishing when it enhances a subsequent conviction on the basis of a prior conviction.[147] Both Justice Blackmun (in his *Nichols* dissent) and Justice Marshall (in his *Baldasar* concurrence) explicitly stated that these are

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140. 389 U.S. 109 (1967).

141. *See supra* notes 90-92 and accompanying text.

142. *But see* Rudstein, *supra* note 75, at 534 (arguing that the key to *Burgett* is the uncounseled nature of the conviction, and thus *Burgett* is consistent with the conception of a "hybrid" conviction).

143. Consistency in sentencing is directly related to the Commission's goals of uniformity and proportionality. The ability to hand out like punishments to like offenders allows for accurate predictions of sentences. A system that is consistent in giving out stiffer punishment for repeat offenders will serve as a greater deterrent than a system that is inconsistent in its application. *See supra* notes 45-50 and accompanying text.

144. *See* Lily Fu, Note, *High Crimes From Misdemeanors: The Collateral Use of Prior Uncounseled Misdemeanors Under the Sixth Amendment,* Baldasar *and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 167, 191 (1992) (arguing that convictions are more "logically binary"—a person is either guilty or innocent—and thus splitting convictions into different classes of validity is "conceptually contrived").

145. *Nichols*, 114 S. Ct. at 1936 n.5 (Blackmun, J., dissenting).

146. Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (Marshall, J., concurring).

147. *Compare Nichols*, 114 S. Ct. at 1927 (stating that "[e]nhancement statutes . . . [and] recidivist statutes . . . do not change the penalty imposed for the earlier conviction") *and Baldasar*, 446 U.S. at 232 (Powell, J., dissenting) (stating that "[t]hese [recidivist and enhancement statutes] . . . do not alter or enlarge a prior sentence") *with Nichols*, 114 S. Ct. at 1933 (Blackmun, J., dissenting) (stating that it is "undeniable" that an earlier conviction "directly resulted" in a larger prison sentence) *and Baldasar*, 446 U.S. at 227 (Marshall, J., concurring) (stating that the later sentence was the "direct consequence" of the first conviction).

not cases of enlarging the original sentence,[148] but then use language to the contrary.[149] Both Justices knew that recidivist statutes had long been upheld as not violating double jeopardy,[150] yet they built their arguments on a fear that the defendant is being punished later for an earlier crime. Justices Marshall and Blackmun, though, were forced into this questionable line of reasoning because they had to acknowledge the precedent of *Scott v. Illinois*,[151] despite their continued objection to that decision.[152] By arguing against the later use of uncounseled convictions valid under *Scott*, they attempted to lessen the value and effectiveness of the "actual imprisonment" standard stated there.[153]

Several problems would arise if the type of system advocated by Justices Blackmun and Marshall, in which valid uncounseled convictions cannot be used to enhance a later sentence, were implemented. The first is that recidivist statutes would be made less effective. The United States Sentencing Commission noted this when it revised the guidelines in 1990 and stated that valid uncounseled misdemeanors should be considered, because without them "the criminal history score [might] not adequately reflect[] the defendant's failure to learn from the application of previous sanctions."[154] Recidivist statutes, holding repeat offenders to a higher degree of culpability, would by nature lose effectiveness if a valid conviction could not be considered.

Another problem would arise from the fact that most valid uncounseled misdemeanor convictions occur in courts that do not keep comprehensive records.[155] Defendants could be encouraged to lie and to claim they had been without counsel. Because the Court has held that a silent record raises a presumption that the defendant

148. *Nichols*, 114 S. Ct. at 1933 (Blackmun, J., dissenting) (stating that "it is undeniable that recidivist statutes do not impose a second punishment for the first offense"); *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring) (stating that "increased prison sentences in this case is not an enlargement of the sentence for the original offense").

149. *See supra* note 147.

150. *See* Oyler v. Boyles, 368 U.S. 448, 451 (1962); Moore v. Missouri, 159 U.S. 673, 676-77 (1895).

151. 440 U.S. 367 (1979).

152. *See Baldasar*, 476 U.S. at 225 (Marshall, J., concurring) (stating that he "remain[s] convinced that [*Scott*] was wrongly decided"); *id.* at 229-30 (Blackmun, J., concurring) (arguing that adoption of his own dissent in *Scott* would warrant reversal of the case at bar); *see also Nichols*, 114 S. Ct. at 1932 n.1 (Blackmun J., dissenting) (noting his own dissent in *Scott*).

153. *See* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE 13 (1992) (arguing that *Baldasar* "ameliorated" the harsh effects of *Scott*).

154. U.S.S.G., *supra* note 45, app. C n.353.

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

was both without counsel and had not waived such right to counsel,[156] a defendant who lies at a later proceeding will be rewarded with a less severe sentence.

The decision in *Nichols* solves these problems[157] and resolves the fragmentation that occurred in the lower courts after *Baldasar*.[158] However, the *Nichols* decision raises several policy concerns that have been reiterated during the Court's development of its right to counsel jurisprudence. Many of these concerns developed due to the "actual imprisonment" standard imposed in *Scott v. Illinois*.[159]

One concern that has been expressed over the "actual imprisonment" standard for determining when counsel is constitutionally required is that it fails to take into account other consequences of a misdemeanor conviction that may be just as serious as a sentence of immediate imprisonment.[160] *Nichols* shows that one consequence may be a later enhancement to a subsequent conviction. Such an enhancement can result in a sentence several years longer than an unenhanced sentence.[161] There are also other possible consequences. For example, in a case in which an individual's livelihood depends on the ability to drive, the suspension of a license to operate a motor vehicle could be more burdensome than spending several days in jail.[162] The community stigma and the negative effects on employment associated with a criminal sentence are just some of the possible effects that a misdemeanor conviction may have.[163]

A second concern is that the "actual imprisonment" standard in certain cases forces a judge to determine a likely sentence even before a trial begins.[164] These cases are ones in which a judge has before her an indigent defendant who faces a misdemeanor charge that

156. *See* Boyd v. Dutton, 405 U.S. 1, 3 (1972).

157. *See supra* notes 154-56 and accompanying text.

158. *See supra* notes 109-25 and accompanying text.

159. For an explanation of the "actual imprisonment" standard see *supra* notes 80-85 and accompanying text.

160. *See* Scott v. Illinois, 440 U.S. 367, 374 (1979) (Powell, J., concurring); Argersinger v. Hamlin, 407 U.S. 25, 47-48 (1972) (Powell, J., concurring in the result) ("Serious consequences also may result from convictions not punishable by imprisonment").

161. *See supra* note 7 and accompanying text.

162. *See Argersinger*, 407 U.S. at 48 (Powell, J., concurring in the result) (citing Bell v. Burson, 402 U.S. 535, 539 (1971)).

163. For a sampling of cases involving other potential serious effects of a criminal conviction, see *Argersinger*, 407 U.S. at 48 n.11 (Powell, J., concurring in the result).

164. *See Scott*, 440 U.S. at 372 (Powell, J., concurring); *Argersinger*, 407 U.S. at 42 (Burger, C.J., concurring in the result).

statutorily authorizes imprisonment as a possible sentence. If the judge does not assign counsel, she "will be compelled to forgo the legislatively granted option to impose a sentence of imprisonment upon conviction."[165] Problems could result if the judge does not appoint counsel in such a case and then decides as the trial develops that imprisonment is the only proper sentence for this defendant. At this point the judge's hands are tied, and it seems likely that the judge will be forced to impose a lesser sentence than she would like to simply because she must now comply with the "actual imprisonment" standard of *Scott v. Illinois*.[166]

A third concern, not mentioned in the majority opinion of *Nichols*, relates to the reliability of misdemeanor convictions, an issue first identified in *Argersinger v. Hamlin*.[167] The fear of assembly line justice where "[e]verything is rush, rush"[168] is apparently no longer of concern to the Court after the *Nichols* decision.[169] The *Nichols* Court probably followed the assumption that Justice Powell made in his *Baldasar* dissent that "the uncounseled conviction is conceded to be valid and thus must be presumed reliable."[170] Yet in the hasty misdemeanor criminal justice system, constitutional validity as determined by the Court may not coincide with the policy concern of reliability. Reliability is based on a fear that the innocent

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165. *Scott*, 440 U.S. at 374 (Powell, J., concurring); *see also Argersinger*, 407 U.S. at 53 (Powell, J., concurring in the result) (indicating a fear that judges will create their own categories of offenses that are imprisonable and thus will overrule de facto the legislature's determination of the proper range of sentencing).

166. 440 U.S. at 372-73; *see supra* notes 80-85 and accompanying text.

167. 407 U.S. 25, 34-37 (1972); *see also supra* note 78 and accompanying text.

168. *Argersinger*, 407 U.S. at 35 (quoting William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 THE LEGAL AID BRIEFCASE 151, 152 (1970)).

169. While the majority in *Nichols* completely neglected the issue of reliability, Justice Blackmun's dissent attempted to frame the issue solely on the basis of reliability. 114 S. Ct. at 1933 (Blackmun, J., dissenting). While Justice Blackmun effectively pointed out the risks of unreliability in the absence of counsel, *id.* at 1935-36 (Blackmun, J., dissenting), his reframing of the issue entirely on reliability grounds sidestepped the problem that the "hybrid conviction" view is based on a fear that enhancement statutes punish defendants later for earlier convictions, *see id.* at 1933 (Blackmun, J., dissenting) ("In any event, our concern here is not with multiple punishments, but with reliability."); *see supra* notes 145-53 and accompanying text. Such a view of enhancement statutes would seem to violate double jeopardy, yet the Court has previously rejected this limited view of enhancement statutes. *See supra* notes 147-50 and accompanying text.

170. *Baldasar*, 446 U.S. 222, 234 n.2 (1980) (per curiam) (Powell, J., dissenting). Justice Powell may even go beyond simply presuming reliability from validity by suggesting that misdemeanor convictions are just as reliable as felony convictions. Justice Powell notes that "[i]t cannot be denied . . . that the issues in the great majority of misdemeanor cases are not complicated and the facts often are not in dispute." *Id.* (Powell, J., dissenting).

may be steam-rolled through the system,[171] while validity is a determination by the Court as to what the Constitution allows. The two may exist independent of one another, and thus the reliability of a previous conviction should still be questioned.[172]

The three concerns raised by *Nichols*[173] could all be resolved by a future reconsideration of the "actual imprisonment" standard. Although the petitioner in *Nichols* argued in the alternative for a reconsideration of the "actual imprisonment" standard,[174] the Court never addressed this argument, and it was not briefed by the respondent. The first concern—that some consequences of a conviction are more serious than a jail sentence[175]—arises because the "actual imprisonment" standard fails to take these consequences into account. By extending the line at which counsel is constitutionally required too far, any consequence other than imprisonment is disregarded. Instead, a standard of "authorized imprisonment" as proposed by Justice Brennan in *Scott v. Illinois*,[176] under which counsel would be appointed so long as the charge has the statutory possibility of imprisonment,[177] would actually serve as a better

171. *See Argersinger*, 407 U.S. at 34-36.

172. For instance, reliability may be questioned in instances in which it is cheaper for a defendant to plead guilty and pay a fine than it is to hire an attorney and attempt to prove his innocence. Justice Souter recognized these instances in his concurrence in *Nichols*. 114 S. Ct. at 1930 (Souter, J., concurring in the judgment); *see supra* notes 33-36 and accompanying text. Justice Souter's declaration that the sentencing guidelines provide the necessary flexibility to allow the defendant "to convince the sentencing court of the unreliability of any prior valid but uncounseled convictions" may be misplaced. *Nichols*, 114 S. Ct. at 1930 (Souter, J., concurring in the judgment). The sentencing guidelines themselves suggest "despite the courts' legal freedom to depart from the guidelines, they will not do so very often." U.S.S.G., *supra* note 45, § 1A4.b. The Commission believes departures will become rarer as the guidelines develop over time and take into account all the factors sentencing judges may face. *Id.* Commentators have criticized this growth of the guidelines which is aimed at limiting the need for discretion. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1690, 1730-40 (1992) (arguing that the federal guidelines are too rigid, complex, and severe and that appellate courts have been narrow-minded in applying the guidelines); Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 AM. CRIM. L. REV. 899, 905 (1992) (arguing that the guidelines are unnecessarily complex and confusing, and that they result in a federal bureaucracy of sentencing that is void of judicial discretion). The development of the guidelines may ultimately foreclose to a defendant the argument that a previous conviction is unreliable.

173. *See supra* notes 159-72 and accompanying text.

174. Brief for Petitioner at 36-44, *Nichols*, 114 S. Ct. 1921 (1994) (No. 92-8556).

175. *See supra* notes 160-63 and accompanying text.

176. 440 U.S. 367, 382-84 (1979)

177. *Id.* at 382 (Brennan, J., dissenting).

indicator of the stigma and collateral consequences that may attach to a conviction.[178] For example, the stigma attached to a minor traffic conviction that carried no chance of imprisonment is quite different from that of a driving-while-intoxicated conviction that carried the possibility of a jail sentence, but which was never imposed. The "authorized imprisonment" standard takes such discrepancies into account much more effectively than the "actual imprisonment" standard.

An "authorized imprisonment" standard also would eliminate the second concern—that the "actual imprisonment" standard restricts the sentencing judge unnecessarily.[179] At the initial stages the judge, prosecutor, and defendant would know if the defendant is entitled to counsel simply by looking to the statute under which the defendant is charged. Not only would such a procedure be easier, it would also eliminate the need for potentially lengthy pre-trial conferences between the judge and prosecutor as to whether the Constitution requires assigning counsel for an indigent defendant.

The third problem, that of reliability, would also be alleviated by an "authorized imprisonment" standard.[180] In *Argersinger v. Hamlin*, counsel was viewed as the solution to unreliable misdemeanor convictions.[181] Because of this any expansion of the right to counsel would serve to lessen the fear that an innocent defendant would be found guilty.[182] It is undisputed that the "authorized imprisonment" standard would provide a much broader right to counsel than the current "actual imprisonment" standard. This would provide more defendants facing misdemeanor charges with counsel, thereby increasing reliability.

Yet providing more defendants with counsel also breathes new life into the primary objection to the "authorized imprisonment"

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178. *Id.* (Brennan, J., dissenting); *see also* SHELDON KRANTZ ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES 70 (1976) (arguing that appointment of counsel in all cases where imprisonment is permissible is the best way effectively to meet the concern for a fair trial, a concern that operates irrespective of the consequences).

179. *See supra* notes 164-66 and accompanying text.

180. *See supra* notes 167-72 and accompanying text.

181. 407 U.S. 25, 36-37 (1972); *see supra* notes 75-79 and accompanying text.

182. The *Argersinger* Court noted that those facing misdemeanor charges are five times more likely to have all charges dismissed if represented by counsel. 407 U.S. at 36 (citing AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, Preliminary Report 1 (1970)). This fear of unreliability, though, probably can never be fully eliminated due simply to the nature of the misdemeanor system. Also, a defendant who is not deemed indigent may nevertheless be unable to afford an attorney, and thus may feel pressured to plea merely to resolve the case in a speedy, less-costly fashion.

standard, specifically that it is unworkable and overburdens an already overloaded court system.[183] This fear of great economic expense caused by the need for additional attorneys induced the *Scott* Court to draw the line for the right to counsel at "actual imprisonment,"[184] yet this was a departure from the Court's previous rulings in *Powell*, *Gideon*, and *Argersinger*. In *Argersinger* the Court noted that it did not have doubts over the sufficiency of the nation's legal resources to meet the expansion of the right to counsel.[185] *Gideon* also dramatically increased the right to counsel without fear of severe economic impact.[186] Thus, drawing the line at "actual imprisonment" on economic grounds was a departure from the previous reasoning used by the Court in determining the right to counsel.[187]

The economic argument can also be questioned in light of the fact that a large majority of states already recognize a right to counsel that is more expansive than the federal right.[188] Of this majority, a large number already recognize a right to counsel that is equal to or greater than the "authorized imprisonment" standard.[189] These states make up a large percentage of the nation's population and are diverse in terms of urban and rural environments.[190] The fact that these states are still able to operate their criminal justice systems effectively is proof that an "authorized imprisonment" rule governing the right to counsel is workable.

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183. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979).

184. *See supra* note 84 and accompanying text.

185. *Argersinger*, 407 U.S. at 37 n.7; *id.* at 44 (Burger, C.J., concurring in the result) (stating that "[t]he holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it").

186. *See* Gideon v. Wainright, 372 U.S. 335, 339-45 (1963) (failing to mention any economic ramifications of the rule enunciated); *see also Scott*, 440 U.S. at 384 (Brennan, J., dissenting) (stating that the "Court's rule in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments").

187. *See* GARCIA, *supra* note 153, at 12 (noting the paradoxical nature of the Court's rejection of an economic burdens argument in *Argersinger* and acceptance of the same argument in *Scott*).

188. *See Scott*, 440 U.S. at 385-87 (Brennan, J., dissenting); *see also Nichols*, 114 S. Ct. at 1928 n.12 (recognizing that states may individually decide to provide counsel "for all indigent defendants charged with misdemeanors").

189. For a complete list of the states allowing a greater right to counsel, see *Scott*, 440 U.S. at 388 nn.18-22 (Brennan, J., dissenting). For a list of those states with an "authorized imprisonment" standard for the right to counsel, see *id.* at 388 n.18 (Brennan, J., dissenting).

190. *Id.* at 386 (Brennan, J., dissenting).

The "actual imprisonment" standard also seems to be at odds with the exact wording of the Sixth Amendment, which applies to "all criminal prosecutions."[191] The spirit of *Powell*, *Gideon*, and *Argersinger* was a recognition that counsel was a necessary ingredient in assuring a fair trial. The same concerns expressed in *Gideon* and *Powell* for a defendant's rights exist even if a conviction will not necessarily end in a jail sentence.

The decision in *Nichols v. United States* was necessary to provide the lower courts with the guidance that had been lacking since *Baldasar v. Illinois*.[192] The *Nichols* decision, by accepting constitutionally valid uncounseled misdemeanor convictions as valid for collateral purposes, is both logically consistent and consistent with the Sentencing Commission's ideals in sentencing.[193] Yet in light of the *Nichols* decision, new questions have arisen concerning the Court's decision in *Scott v. Illinois* that uncounseled convictions are constitutional so long as there is no "actual imprisonment."[194] The logical consistency of *Nichols* can be maintained[195] and the policy concerns of the "actual imprisonment" standard[196] eliminated by an adoption of the "authorized imprisonment" standard.[197] In fact, if the *Scott* Court had originally adopted the "authorized imprisonment" standard, the dispute over the proper use of valid uncounseled convictions that was posed in *Nichols* and *Baldasar* would never have arisen.

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191. U.S. CONST. amend. VI.

192. *See* 446 U.S. 222 (1980) (per curiam), *reh'g denied*, 447 U.S. 930 (1980), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994); *see also supra* notes 109-25 and accompanying text. Lower courts have found that applying *Nichols* is much easier than discerning the meaning of *Baldasar*. *See, e.g.*, United States v. Witzel, No. 93-50494, 1994 WL 465868, at *2-3 (9th Cir. Aug. 29, 1994) (following *Nichols* and dismissing defendant's challenge to the collateral use of constitutionally valid uncounseled convictions for driving while license suspended); United States v. Severe, 29 F.3d 444, 447 (8th Cir.), *cert. denied*, No. 94-6889, 1994 WL 664295 (U.S. 1994) (following *Nichols* and foreclosing argument that constitutionally valid uncounseled conviction cannot be used for sentencing enhancement purposes); United States v. Johnson, 28 F.3d 151, 153 n.3 (D.C. Cir. 1994) (following the logic of *Nichols* and holding that a constitutional non-jury juvenile offense can be validly used for sentence enhancement).

193. *See supra* notes 128-44 and accompanying text.

194. 440 U.S. 367, 373 (1979); *see supra* notes 80-85 and accompanying text.

195. *See supra* notes 129-44 and accompanying text.

196. *See supra* notes 160-72 and accompanying text.

197. *See supra* notes 173-82 and accompanying text.