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Note

High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment, *Baldasar* and the Federal Sentencing Guidelines

*Lily Fu*

In 1983, a Georgia state court convicted Kenneth Nichols of misdemeanor drunken driving without appointing a defense attorney to represent him.¹ Because Nichols did not receive a jail sentence, his conviction and $250 fine did not violate his Sixth Amendment right to counsel.² Eight years later, Nichols was again convicted, this time of drug-related criminal activity. A federal judge used Nichols' prior, uncounseled misdemeanor conviction to increase his criminal history score under the United States Sentencing Guidelines,³ thereby adding two years to the seventeen year prison sentence Nichols otherwise would have received for the offense.⁴ Nichols challenged the additional prison time as violating his Sixth Amendment right to counsel.⁵ Nichols argued that in effect, he was being incarcerated for the prior, uncounseled conviction, for which he did not have the benefit of counsel.⁶

In a bench opinion rejecting Nichols' constitutional chal-

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¹ United States v. Nichols, 763 F. Supp. 277, 278 (E.D. Tenn. 1991). A district court later considering this conviction assumed that Nichols did not waive his right to counsel in these proceedings, since no evidence of waiver appeared on record. *Id.*
² See Scott v. Illinois, 440 U.S. 367 (1979) (5-4 decision). For an explanation of the Court's holding in *Scott*, see *infra* notes 36-40 and accompanying text.
³ Nichols, 763 F. Supp. at 278-80.
⁴ *Id.* at 281. The court sentenced Nichols to 235 months of imprisonment, 25 months more than would have otherwise been authorized had the prior uncounseled misdemeanor been disregarded. *Id.* In its determination to sentence Nichols at the top of his authorized guideline range, the court in part relied upon evidence of Nichols' 1988 involvement in other drug-related activity which never led to conviction. *Id.* at 280-81.
⁵ *Id.* at 279.
⁶ *Id.* at 278-80.
lenge, the sentencing court determined that the Supreme Court's decision in *Baldasar v. Illinois* was inapplicable. In *Baldasar*, the Court held unconstitutional the collateral use of a prior, uncounseled misdemeanor conviction to convert a subsequent misdemeanor into a felony conviction carrying a greater prison term. Although a majority of the Court voted to reverse Thomas Baldasar's felony conviction and enhanced sentence, only four justices reasoned that no valid, uncounseled prior misdemeanor convictions can be constitutionally used to enhance sentences in subsequent offenses. Four justices dissented, further obscuring the scope of the decision. Unsurprisingly, the sentencing court found no guidance from the Supreme Court's opinion, and distinguished *Baldasar* on its facts.

As a result of the ambiguous *Baldasar* opinion, countless trial courts every day sentence criminal defendants such as Kenneth Nichols to prison, unsure of the constitutionality of using uncounseled misdemeanor convictions for sentence enhancement. The United States Sentencing Guidelines clearly mandate the result in *United States v. Nichols*, instructing federal courts to use all prior uncounseled misdemeanor convictions for sentence enhancement. The Guidelines, however, so conflict with the apparent holding of *Baldasar* that despite the provisions' unequivocal terms, lower federal courts have applied them inconsistently. Without Supreme Court clarifica-

8. *Id.* at 224-30.
9. See *infra* notes 52-60 and accompanying text.
10. See *infra* notes 61-64 and accompanying text.
12. See *infra* notes 65-71 and accompanying text.
13. Within the last two years, conflicting views of the effect of *Baldasar* on the Federal Sentencing Guidelines has resulted in a split of opinion between circuits. Compare *United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991) (holding that any term of imprisonment based on a prior uncounseled conviction violates the Sixth Amendment) with *United States v. Eckford*, 910 F.2d 216, 220 (5th Cir. 1990) (holding that uncounseled misdemeanor convictions can be considered in imposing subsequent sentences). Explicit statements anticipating or lamenting the confusion *Baldasar* creates abound in opinions addressing the issue. See, e.g., *Baldasar v. Illinois*, 446 U.S. at 222, 235 (1980) (Powell, J., dissenting) (stating that "[f]ollowing today's pronounce-
ment, there is no way to predict the outcome" of any constitutional challenge to the collateral use of prior uncounseled misdemeanors); *Moore v. Georgia*, 434 U.S. 904, 905 (1977) (White, J., dissenting) (stating that because "the confusion over *Baldasar*'s holding has led to uneven application of that case and conflicting decisions in the courts below, [he] would grant certiorari here to answer the outstanding questions concerning *Baldasar*'s scope and proper ap-
tion of Baldasar, the scope of a basic constitutional right of hundreds of criminal defendants remains shrouded in uncertainty.14

This Note examines the propriety of using prior, uncounseled misdemeanors to enhance sentences in subsequent convictions, particularly under the Federal Sentencing Guidelines. Part I traces judicial development of the Sixth Amendment right to counsel, details Baldasar v. Illinois' landmark extension of that right, and delineates the United States Sentencing Commission's and lower courts' applications of Baldasar. Part II analyzes interpretive approaches adopted by two disagreeing federal circuits applying the Federal Sentencing Guidelines. Part III posits that no discernible rule emerges from Baldasar v. Illinois, and advocates Supreme Court review to clarify the nebulous state of the law. This Note concludes that uncounseled misdemeanor convictions, valid in their original proceedings, should also be constitutionally valid for enhancing sentences collaterally.

14. Although beyond the inquiry of this Note, the ambiguity of the Baldasar opinion poses a problem that extends beyond the federal system to perplex a myriad of state courts sentencing defendants under enhanced penalty statutes that take into account prior, uncounseled misdemeanors. Compare, e.g., Commonwealth v. Thomas, 507 A.2d 57, 61 (Pa. 1986) (holding valid the use of prior, uncounseled theft convictions to enhance sentence for later theft conviction) and State v. Orr, 375 N.W.2d 171, 173 (N.D. 1985) (holding valid the use of prior, uncounseled misdemeanor convictions to enhance subsequent sentence only if valid waiver of right to counsel existed for prior conviction) with State v. Oehm, 680 P.2d 309, 310 (Kan. Ct. App. 1984) (prohibiting use of prior uncounseled conviction for driving while intoxicated to enhance subsequent driving while intoxicated sentence under second offense statute) and State v. Dowd, 478 A.2d 671, 678 (Me. 1984) (holding that prior uncounseled driving while intoxicated convictions cannot be used to trigger statutory enhancement of the penalty for a second offense).
I. THE RIGHT TO COUNSEL AND ITS EXTENSION TO THE COLLATERAL USE OF PRIOR, UNCOUNSELED MISDEMEANORS

A. THE ROAD TO THE RIGHT TO COUNSEL IN MISDEMEANOR CASES

1. Right to Counsel in Felony Cases

The evolution of the right to counsel was not an inevitable process. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."\(^{15}\) The Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."\(^{16}\) For the first century and a half following the enactment of the Sixth Amendment, the question of a defendant's right to counsel was seldom litigated. Some commentators have noted that the drafters of the Bill of Rights probably intended only to prevent federal courts from barring an accused from hiring defense counsel.\(^{17}\) In 1932 however, the Supreme Court held in *Powell v. Alabama*\(^{18}\) that four disadvantaged, illiterate youths charged with capital rape possessed a fundamental right under the Fourteenth Amendment to court-furnished defense counsel.\(^{19}\) The *Powell* court reasoned that to comport with constitutional due process requirements, trial courts must grant defendants a "right to be heard" in criminal

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15. U.S. CONST. amend. VI.


18. 287 U.S. 45 (1932). The famous Scottsboro defendants, Ozie Powell, Willie Roberson, Andy Wright, and Olen Montgomery, were convicted of raping two white girls. Under Alabama statute, juries determine sentences for rape, within a range of 10 years' imprisonment to death. Amid widespread racial hostility in the community against the defendants, the jury in *Powell* imposed the death penalty upon all four youths. *Id.* at 49-56. The record reflects that until the day of trial, "no lawyer had been named or definitely designated to represent the defendants." *Id.* at 56.

19. The Court stated that in "a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Id.* at 71.
proceedings. This right to a hearing, according to the Court, would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Thus, the Court in Powell equated the right to court-appointed counsel, even for the "intelligent and educated layman," with the very basic right of a criminal defendant to be heard in court.

Thirty-one years later, the Supreme Court in Gideon v. Wainwright explicitly held the right to counsel a "fundamental right, essential to a fair trial." Incorporating the right to counsel to the states through the Fourteenth Amendment, the Court emphasized that in an adversarial criminal justice system, courts must consider representation by defense counsel...

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20. Id. at 68-69.
21. Id. at 69.
22. Id.
23. A decade after Powell, the Court in Betts v. Brady, 316 U.S. 455 (1942), held that although the Sixth Amendment guarantees defendants the aid of counsel in federal trials, the right to counsel itself was not a right fundamental to a fair trial; therefore, states did not need to appoint counsel for every indigent accused felon to comply with Fourteenth Amendment due process requirements. 316 U.S. at 461-63 & n.13. Betts licensed state trial courts to determine whether appointment of counsel would be necessary to ensure a fair trial by individually performing "an appraisal of the totality of facts" in each case. Id. at 462. In Betts, the indigent petitioner requested appointed counsel at his arraignment hearing, but was refused because the custom of the Maryland trial court was to furnish court-appointed counsel only to defendants charged with murder or rape. Betts was tried before a judge, convicted of felony robbery, and sentenced to eight years imprisonment. Id. at 456-57. The holding in Betts ran contrary to some of the broader language in Powell and directly contrary to the Court's holding four years earlier in Johnson v. Zerbst, 304 U.S. 458 (1938). Johnson held that the Sixth Amendment required court-appointed defense counsel in all federal trials of indigent defendants who do not waive the right to counsel. Id. at 467-68.

The Court later overruled Betts in Gideon v. Wainwright, 372 U.S. 335, 339 (1963). Gideon, however, did not reinstate the absolute right to counsel in Johnson. See infra notes 24-26 and accompanying text.

24. 372 U.S. 335 (1963). Clarence Earl Gideon, charged with the felony of breaking and entering a poolroom with intent to commit a misdemeanor, requested court-appointed counsel as an indigent but was refused on the ground that Florida trial courts furnished counsel only to indigent defendants in capital cases. The jury convicted Gideon and sentenced him to five years imprisonment. Id. at 345. The Supreme Court reversed his conviction. Id.
25. Id. at 342-45 (quoting Betts v. Brady, 316 U.S. 455, 462-63 (1942)).
requisite to fair proceedings.\textsuperscript{26}

Despite its sweeping language, \textit{Gideon} did not definitively set forth the scope of the Sixth Amendment right to counsel. In a concurring opinion, Justice Harlan qualified the holding of \textit{Gideon}, stating that it required court-appointed counsel only for defendants charged with "offenses which, as the one involved here, carry the possibility of a substantial prison sentence."\textsuperscript{27} Justice Harlan then stated parenthetically: "[w]hether the rule should extend to all criminal cases need not now be decided."\textsuperscript{28} As a result, courts widely interpreted the right to counsel announced in \textit{Gideon} to extend only to accused felons and not to accused misdemeanants.\textsuperscript{29} In the nine years following \textit{Gideon v. Wainwright}, the Supreme Court denied certiorari to cases questioning whether the right to counsel attached to misdemeanor convictions.\textsuperscript{30}

2. Right to Counsel in Misdemeanor Cases

The Court at last faced the issue unresolved by \textit{Gideon} in its 1972 decision of \textit{Argersinger v. Hamlin}.\textsuperscript{31} \textit{Argersinger} held 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."\textsuperscript{32} To support its decision to extend the right to coun-

\textsuperscript{26} \textit{Id.} at 344. "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime . . . . Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses . . . . [These are] the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." \textit{Id.} Aside from policy considerations, the Court relied upon precedent, citing, inter alia, Johnson v. Zerbst, 304 U.S. 458 (1938) and Powell v. Alabama, 287 U.S. 45 (1932) to buttress its ruling. \textit{Id.} at 343.

\textsuperscript{27} \textit{Id.} at 351 (Harlan, J., concurring).

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} For a list of citations to lower court and Supreme Court cases that appear to limit the holding in \textit{Gideon} to accused felons, see David S. Rudstein, \textit{The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar}, 34 U. Fla. L. Rev. 517, 523 nn.25 & 26 (1982).

\textsuperscript{30} For a list of citations to such certiorari-denied cases, see \textit{id.} at 523-24 n.27.

\textsuperscript{31} 407 U.S. 25 (1972). Indigent petitioner Argersinger was charged with carrying a concealed weapon, a misdemeanor punishable defense by up to six months' imprisonment, a $1,000 fine, or both. Without appointing defense counsel, the court convicted Argersinger and sentenced him to 90 days' imprisonment. \textit{Id.} at 26.

\textsuperscript{32} \textit{Id.} at 37 (emphasis added) (footnote omitted). Although the holding in \textit{Argersinger} extended the right to counsel to all defendants sentenced to im-
sel to misdemeanor convictions resulting in actual imprisonment, the Court relied on Powell and Gideon principles regarding the fundamental nature of the right to counsel to ensure indigent defendants receive a fair hearing. The Court recognized that when the serious consequence of imprisonment is involved, the right to counsel is no less critical in misdemeanor convictions than in felony convictions.

Although Argersinger made clear that trial courts may not constitutionally impose a term of imprisonment in misdemeanor cases without providing the defendant with court-appointed counsel, the decision explicitly left open the question of whether the Sixth Amendment requires court-appointed counsel in misdemeanor cases where a jail term is statutorily authorized, but not actually imposed. The Supreme Court addressed that question seven years later in Scott v. Illinois, a case that represents the current state of the right to counsel in misdemeanor cases.

Scott restated the "actual imprisonment" standard utilized in Argersinger, holding conclusively that the right to counsel

prisonment, Justice Powell's concurring opinion, joined by Justice Rehnquist, suggested a different standard by which to define the scope of the constitutional right to counsel. Justice Powell's standard would have extended the right without reservation to all cases in which more than six months' imprisonment is authorized. In "petty" cases — where the authorized imprisonment is less than six months — the trial court would have discretion to determine the right to counsel on a case-by-case basis. Such a determination, to be made before the defendant pleads, would then be subject to appellate review. Id. at 46, 63.

33. Id. at 32-33.
34. Id. at 34-37. The court also considered the ""insufficient and frequently irresponsible"" treatment of misdemeanor cases in backlogged trial courts in its decision to extend the right to counsel. Id. at 35 (quoting William E. Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal, 28 THE LEGAL AID BRIEFCASE, 151, 152 (1970)).
35. "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." Id. at 37.
36. 440 U.S. 367 (1979) (5-4 decision). Unrepresented by counsel at a bench trial, petitioner Scott was convicted of misdemeanor theft and fined $50. Id. at 368. Under an Illinois statute, the maximum penalty authorized for Scott's alleged offense was one year's imprisonment, a $500 fine, or both. Id. The Illinois Appellate Court, Illinois Supreme Court, and United States Supreme Court all rejected Scott's Sixth Amendment challenge to the conviction and fine. Id. at 368-69, 373-74.
37. Id. at 373. The Court was persuaded that the Argersinger formulation of the right to counsel standard was intended to limit the right to counsel in misdemeanor cases because the Argersinger Court chose the "actual imprisonment" standard from several plausible options presented by briefs filed in the case. See id. at 373 n.4. Among those options were a right to counsel for all
attaches only in misdemeanor convictions resulting in imprison-
ment. The Court accordingly refused to extend the constitu-
tional right to counsel to Scott, an unrepresented, indigent
defendant who was fined, but not sentenced to prison. In de-
ciding Scott v. Illinois, Justice Powell noted the imperative for
a clear standard to define the right to counsel of a multitude of
criminal defendants. The Court failed to meet this imperative
the next year when it decided Baldasar v. Illinois.

B. THE EXTENSION OF THE RIGHT TO COUNSEL TO SENTENCES
COLLATERALLY ENHANCED BY PRIOR, UNCOUNSELED
MISDEMEANORS

For criminal defendants who commit subsequent offenses,
the consequences of an uncounseled misdemeanor conviction do
not always end with a fine or probation. Many states’ criminal
statutes and the Federal Sentencing Guidelines permit the
collateral use of prior misdemeanors to enhance sentences
under subsequent convictions. These provisions punish recidi-
ivism by looking to a defendant’s previous conviction record to
increase the grading and severity of punishment for a particu-
lar offense. Baldasar v. Illinois questioned whether such col-
laterally imposed sentences constitute “actual imprisonment”
without counsel, which Scott prohibits.

cases in which any imprisonment was authorized and a right to counsel only
for cases in which more than six months’ imprisonment was authorized. Id.
38. Id. at 373-74.
39. Id. at 369.
40. See id. at 374 (Powell, J., concurring) (“It is important that this Court
provide clear guidance to the hundreds of courts across the country that
confront this problem daily.”).
41. For an example of such a penalty enhancement provision, see the stat-
ute applied in Baldasar v. Illinois, infra note 47.
42. United States Sentencing Commission, Guidelines Manual, §§ 4A1.1-
1.3 (Nov. 1991).
43. The United States Sentencing Commission has explained the sentenc-
ing policy behind the recidivist provision:

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 re-
cidivism and future criminal behavior must be considered.

U.S.S.G. Ch.4, Pt.A, intro. comment.
1. Baldasar v. Illinois

*Baldasar v. Illinois* involved sentence enhancement under an Illinois repeat-offender statute. In May 1975, Thomas Baldasar was convicted of misdemeanor theft in an uncounseled proceeding, fined $159, and sentenced to one year of probation. Six months later, Baldasar allegedly shoplifted a $29 shower head from a department store, and was again charged with misdemeanor theft. In this proceeding, the prosecution introduced evidence of Baldasar’s prior, uncounseled conviction to convert the misdemeanor charge into a felony charge under an Illinois penalty enhancement statute. The jury returned a guilty verdict and sentenced Baldasar to prison for one to three years. Because the jury convicted him of a felony, Baldasar received a prison term in excess of the maximum sentence he could have received under an unenhanced misdemeanor conviction. The Illinois Appellate Court affirmed the conviction and sentence, and the United States Supreme Court granted certiorari.

In a per curiam decision, five members of the Court — Justices Stewart, Brennan, Marshall, Blackmun, and Stevens — voted to reverse Baldasar’s felony conviction and enhanced sentence. Justices Stewart, Marshall, and Blackmun each wrote a separate opinion concurring in the judgment. These three concurrences espoused two distinct theories supporting reversal.

Justice Stewart’s three-sentence concurrence, joined by Justices Brennan and Stevens, offered no rationale untreated by Justice Marshall’s concurrence. Justice Marshall’s concur-

44. 446 U.S. 222 (1980) (per curiam).
45. Id. at 223.
46. Id.
47. Id. Illinois criminal statutes provide that a first theft of property under $150, like Baldasar’s initial offense, constitutes a misdemeanor punishable by not more than a year’s imprisonment and a fine of not more than $1,000. Ill. Rev. Stat. ch. 38, ¶¶ 16-1(e)(1), 1005-8-3(a)(1), 1005-9-1(a)(2) (1975). A second misdemeanor theft offense, however, may be converted into a felony punishable by up to three years’ imprisonment. Id. ¶¶ 16-1(e)(1), 1005-8-1(b)(5), 1005-9-1(a)(1) (1975).
48. Baldasar, 446 U.S. at 223.
49. See supra note 47.
53. See id.
54. See id. at 224 (Stewart, J., concurring). In his brief concurrence, Justice Stewart stated that
rence, also joined by Justices Brennan and Stevens, reasoned that the trial court imposed an increased jail sentence, and hence “actual imprisonment,” as an immediate and direct consequence of Baldasar’s prior, uncounseled misdemeanor conviction.\(^{55}\) Since \textit{Scott v. Illinois} held that an unrepresented defendant may not be constitutionally sentenced to prison, Justice Marshall concluded that Baldasar’s increased sentence similarly violated the Sixth and Fourteenth Amendments.\(^{56}\) Justice Marshall phrased the rationale thus:

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\text{[a]n 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.}^{57}
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Justice Blackmun’s unjoined concurrence contained a different basis for reversal. He did not subscribe to Justice Marshall’s “hybrid conviction” theory, which characterized uncounseled misdemeanors as a special class of convictions with diminished validity, distinct from all other valid convictions. Instead, Justice Blackmun voted for reversal because he thought Baldasar’s prior misdemeanor, a “non-petty” offense punishable by up to a year’s imprisonment,\(^{58}\) was itself invalid—unconstitutionally obtained without appointed defense counsel.\(^{59}\) In reaching his conclusion, however, Justice Blackmun refused to recognize the majority’s rule in \textit{Scott}, and relied rather upon the rule he set out in dissent in that case:

an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months’ imprisonment, or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment.\(^{60}\)

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\(^{[i]}\)In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of \textit{Scott v. Illinois}, and I, therefore, join the opinion and judgment of the Court.

\textit{Id.} (footnote and citation omitted).


56. \textit{Id.}

57. \textit{Id.} at 227-28.

58. \textit{See supra} note 47.

59. \textit{Baldasar}, 446 U.S. at 230 (Blackmun, J., concurring).

In reversing Baldasar's enhanced sentence by declaring the prior misdemeanor conviction unconstitutional, Justice Blackmun's concurrence represents a conceptual departure from the other concurrences and from the dissent. In the dissent, Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, refuted the central notion in Justice Marshall's concurrence—that Baldasar's enhanced sentence resulted directly from the initial uncounseled conviction.\(^6\) The dissent characterized the additional jail time as "solely a penalty for the second [counseled] theft."\(^6\) In addition, the dissent reasoned that just as constitutionally invalid convictions are invalid for all uses, such as enhancement or impeachment, Baldasar's valid prior conviction should also be valid for the purposes of enhancing the sentence for his second conviction.\(^6\)

Due to the fractured decision, the dissent predicted confusion and further litigation in Baldasar's wake.\(^6\) Because of the various interpretations a reasonable court may reach regarding the holding in Baldasar, the dissent's forecast has been proven accurate.


Like the repeat-offender statute in Baldasar, the Federal Sentencing Guidelines consider prior offenses in determining sentences, and punish defendants with criminal histories more harshly than first-time offenders. Under these provisions, a sentencing court adds together points the Guidelines assign to

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61. See 446 U.S. at 231-32 (Powell, J., dissenting).
62. Id. at 232. Justice Powell further explained: "If, as in this case, a person with a prior conviction chooses to commit a subsequent crime, he thereby becomes subject to the increased penalty prescribed for the second crime. This Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." Id. (citing Oyler v. Boles, 368 U.S. 448, 451 (1962); Moore v. Missouri, 159 U.S. 673, 677 (1895)).
63. Id. at 232-33. Justice Powell supported his view that convictions are binary by citing Supreme Court cases that, as a whole, have held invalid prior convictions invalid for all purposes: Loper v. Beto, 405 U.S. 473, 483 (1972) (holding uncounseled felony conviction invalid for impeachment of defendant); United States v. Tucker, 404 U.S. 443 (1972) (holding that a sentencing judge cannot consider a prior, uncounseled felony conviction); Burgett v. Texas, 389 U.S. 109, 115 (1967) (holding uncounseled felony conviction invalid for sentence enhancement). Baldasar, 446 U.S. at 232-33.
64. Baldasar, 446 U.S. at 234-35.
each prior offense. The resulting “criminal history score” then becomes part of the final sentencing equation. Ambiguity in Baldasar has led to conflicting conclusions about whether federal courts may constitutionally consider prior, uncounseled misdemeanors to increase a defendant’s criminal history score.

Contrary to the Baldasar concurrences, the November 1990 amendments to the Federal Sentencing Guidelines provide that “[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor

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65. See infra note 66.

66. The determination of a defendant’s Criminal History Category and sentencing range under Chapters Four and Five of the Federal Sentencing Guidelines exemplifies the operation of the wide assortment of recidivist penalty enhancement laws existing today. A description of some of the Sentencing Guidelines’ mechanics will allow them to serve as a paradigm.

At sentencing under the Guidelines, the court first calculates a numerical Offense Level according to the defendant’s current conviction. See United States Sentencing Commission, Guidelines Manual, Chs.2-3 (Nov. 1991). Offense Levels 1-43 form the vertical axis of a Sentencing Table that governs the range of imprisonment authorized for a particular offense. See id. Ch.5. After locating the position of defendant’s offense level on the vertical axis of the Sentencing Table, the court must then calculate the defendant’s Criminal History Category. See id. Ch.4. Criminal History Categories 1-6 constitute the horizontal axis of the Sentencing Table. See id. Ch.5. The intersection of the defendant’s Offense Level and Criminal History Category on the Sentencing Table determines the defendant’s Guideline Range. See id.

At every Offense Level, the Sentencing Table lists a series of ranges of authorized imprisonment, graduated according to the severity of the defendant’s Criminal History Category. See id. To calculate a defendant’s Criminal History Category, sentencing courts add together Criminal History Points assigned by the Guidelines to each of a defendant’s prior criminal sentences. Id. § 4A1.1. The more prior criminal activity of which a defendant has been convicted, the more Criminal History Points the Guidelines assign. For example, for each prior sentence of imprisonment exceeding one year and one month, the Guidelines assign three Criminal History Points. Id. For each prior sentence of imprisonment exceeding sixty days and one year and one month, the Guidelines assign two Criminal History Points. Id. The Guidelines assign one Criminal History Point for all other sentences of less than sixty days’ imprisonment. Id.

The more Criminal History Points assigned to a defendant, the higher his or her Criminal History Category will be. The Guidelines place defendants with 0-1 Criminal History Points in Criminal History Category I; 2-3 Criminal History Points in Criminal History Category II; 4, 5, and 6 Criminal History Points in Criminal History Category III; and so on. See id. Ch.5.

The higher a defendant’s Criminal History Category, the higher his or her sentencing range will be. For instance, at Offense Level 7, a defendant at Criminal History Category I would be sentenced to between one and seven months’ imprisonment. A defendant at Criminal History Category II, however, would be sentenced to between two and eight months’ imprisonment. At Criminal History Category V, a defendant convicted at Level 7 could receive between 12 and 18 months’ imprisonment. See id.
sentences where imprisonment was not imposed. These amendments also deleted the following text expressing doubt regarding the dictates of Baldasar v. Illinois from the application notes following the guideline: "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." In adopting these amendments, the Sentencing Commission clearly announced its belief that the Constitution permits collateral use of uncounseled misdemeanors to increase a defendant's criminal history score. The Commission justified its position by arguing that the amendments eliminate disparate application of the guideline and ensure commensurate punishment for recidivism. The Commission thus abandoned its earlier, more cautious approach of suspending judgment on the decisive effect of Baldasar in favor of boldly taking a concise yet more

69. The Sentencing Commission, in adopting the 1990 amendments, was concerned not only about sentencing courts' disparate interpretations of whether Baldasar precluded the use of prior, uncounseled misdemeanors in calculating criminal history categories, see infra note 70, but also about the sentencing disparity created among courts that excluded uncounseled misdemeanors. In a proposed version of the 1990 amendment, eventually unadopted, the Sentencing Commission stated as background to § 4A1.2:

To exclude prior sentences resulting from constitutionally valid convictions on the basis of whether the convictions were counseled or uncounseled would create wide disparity (e.g., some jurisdictions routinely provide counsel in all misdemeanor cases; others do not). To avoid such disparity by prohibiting use of all misdemeanor convictions not resulting in imprisonment would deprive the court of significant information relevant to the purposes of sentencing.

70. The Sentencing Commission explained its adoption of the 1990 amendments to § 4A1.2 thus:

This amendment clarifies the circumstances under which prior sentences are excluded from the criminal history score. In particular, 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.
constitutionally vulnerable stance. Since the Guidelines instruct sentencing courts to use prior, uncounseled misdemeanors for sentence enhancement without qualification, the Sentencing Commission effectively adopted the position of the dissent in *Baldasar*.\(^{71}\)

The Sentencing Commission was not the first authority to depart from *Baldasar*. In August 1990, the Court of Appeals for the Fifth Circuit held in *United States v. Eckford*\(^{72}\) that uncounseled misdemeanor convictions not resulting in imprisonment, and therefore valid under *Scott v. Illinois*, were also valid for sentence enhancement.\(^{73}\) Although Eckford's prior, uncounseled misdemeanor convictions were petty,\(^{74}\) i.e., punishable by no more than six months' imprisonment, the court did not limit its holding in the manner Justice Blackmun advocated in his concurrence in *Baldasar*. Without drawing a distinction between the constitutionality of petty and non-petty prior convictions, the court in effect held all valid uncounseled misdemeanors equally valid for sentence enhancement.\(^{75}\) To reach its decision, the court limited *Baldasar* to its facts: it held that *Baldasar* precluded a prior, uncounseled misdemeanor from being used to convert a subsequent misdemeanor into a felony with an enhanced prison term.\(^{76}\)

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71. The four dissenters in *Baldasar* would have been the only justices to condone the Sentencing Commission's position. The plurality would not have endorsed any collateral use of prior, uncounseled misdemeanors in the calculation of criminal history scores; Justice Blackmun would have limited collateral use to petty, uncounseled misdemeanors. *See supra* notes 44-64 and accompanying text.

72. 910 F.2d 216 (5th Cir. 1990). Charles Eckford was charged with attempted bank robbery and the unlawful possession of a firearm. Eckford pled guilty to attempted bank robbery; the government dropped the unlawful possession charge. At sentencing, the district court adopted the presentence report's recommendation that appellant be sentenced at criminal history category II, due to two prior, uncounseled municipal court misdemeanor convictions for which Eckford was fined but not jailed. At criminal history level II, Eckford received a sentence four months longer than the maximum sentence authorized at criminal history I. *Id.* at 217-18.

73. *Id.* at 220.

74. *See supra* text accompanying notes 58-59.

75. The *Eckford* court did not accept Justice Blackmun's concurrence as representing the holding of *Baldasar*; consequently, although the Fifth Circuit mentions that its result does not conflict with Justice Blackmun's concurrence, it expressly avoided limiting its holding to remain consistent with the concurrence. *Eckford*, 910 F.2d at 219-20 n.8.

76. *Id.* at 220. The court noted that it was bound by stare decisis to interpret *Baldasar* in accordance with previous circuit decisions: "[I]t is well settled that prior panel decisions of this Court may not be disturbed except on reconsideration en banc." *Id.* at 220 (citing Hodge v. Seiler, 558 F.2d 284, 287 (5th
In contrast, the Ninth Circuit's 1991 decision in *United States v. Brady* disagreed with the opinions of the Sentencing Commission and the Fifth Circuit. *Brady* held that the collateral use of uncounseled tribal misdemeanor convictions to depart upward from the Guidelines' recommended sentencing range violated Brady's right to counsel. Adopting the reasoning of the Justice Marshall's concurrence in *Baldasar*, the *Brady* court formulated its holding broadly, stating that *Scott v. Illinois* precluded all imprisonment based upon uncounseled convictions, either directly or collaterally. Since Brady's prior uncounseled misdemeanors were petty, and therefore indisputably valid, *Brady* is inconsistent with the Guidelines,


*Brady* was previously convicted of two "petty" misdemeanors, punishable under the Cheyenne Code of Indian Tribal Offenses by no more than six months' imprisonment or $300. Since in tribal court Brady was not entitled to any absolute right to counsel, his uncounseled misdemeanor convictions were valid even though he received a sentence that alternatively imposed a fine or term of imprisonment. *Id.* at 853.

Just as the Sentencing Guidelines were not the first authority to seemingly depart from *Baldasar*, the Fifth Circuit was not the last authority to adopt the reasoning of the *Baldasar* dissent. In April, 1991 the United States District Court for the Eastern District of Tennessee declared in *United States v. Nichols*, 763 F. Supp. 277 (E.D. Tenn. 1991), that because the *Baldasar* opinion offered no clear guidance about the constitutionality of the Guidelines' advocated policy of including prior, uncounseled misdemeanors in the calculation of a defendant's criminal history score, and because the Supreme Court has been silent on the issue since *Baldasar*, the court could properly adopt what it deemed the "most appropriate" standard for the right of counsel in sentence enhancement cases: the one set forth in *United States v. Eckford*. *Id.* at 279-80; *see also supra* notes 5-14 and accompanying text.

Tribal convictions are not counted in a defendant's criminal history category. *See United States Sentencing Commission, Guidelines Manual*, § 4A1.1, comment n.2; § 4A1.2(h) (Nov. 1991); *see also Brady*, 928 F.2d at 852. In *Brady*, the sentencing court made an upward departure in an unspecified amount from the Guidelines' recommended sentencing range pursuant to § 4A1.3, p.s. *Id.* at 846, 852.

*Brady*, 928 F.2d at 854 (citing *Baldasar v. Illinois*, 446 U.S. 222 (1980)).

The court cites two cases in addition to *Baldasar* to support its rationale: *United States v. Tucker*, 404 U.S. 443 (1972) (holding unconstitutional sentence enhancement using prior uncounseled felony convictions) and *United States v. Williams*, 891 F.2d 212 (9th Cir. 1989) (citing *Baldasar* to hold unconstitutional the collateral use of uncounseled juvenile offenses to enhance subsequent sentences in adult proceedings), cert. denied, 494 U.S. 1037 (1990).

*See supra* note 77.
Eckford, and Justice Blackmun’s concurrence in Baldasar.

II. CRITICISM OF PRIOR INTERPRETATIONS OF BALDASAR

The division of opinion in Baldasar has created considerable confusion, as the contradictory holdings from courts purporting to follow the case’s authority evidence. Although the decision has spawned several irreconcilable interpretations, all ultimately fail to read Baldasar in a manner true to its text and intent.

A. UNITED STATES V. BRADY: INCORRECT APPLICATION OF BALDASAR

United States v. Brady offered criminal defendants the most expansive right to counsel possible under the Baldasar decision: Brady held all constitutionally valid, uncounseled misdemeanors invalid to enhance subsequent sentences, because uncounseled convictions are never reliable enough to support imprisonment, collateral or otherwise. Although this interpretation of the Baldasar rule enjoys the status of being the rationale in which the greatest number of concurring justices joined, five justices disagreed with this formulation of the rule and its rationale. The four dissenters in Baldasar would have reasoned that since the criminal proceedings leading to Brady’s initial convictions did not violate Brady’s right to counsel, these valid prior convictions would also have been valid to enhance his sentence for a subsequent offense under the Guidelines. Justice Blackmun would have similarly held collateral enhancement constitutional in Brady. Brady’s two prior, uncounseled misdemeanor charges were punishable by a maximum of six months’ imprisonment; as such, they were “petty,” and therefore constitutional under Justice Blackmun’s rule in Scott. Because Brady’s prior convictions were valid, Justice Blackmun would likely have held such convictions also valid for sentence enhancement. Since a majority of the Baldasar Court would have disagreed with the result, the Ninth Circuit decided Brady incorrectly.

83. Indeed, the Brady court cites the holding of United States v. Eckford contra to its holding. 928 F.2d at 854.
84. See supra note 13 (citing contradictory cases).
85. See supra notes 77-81 and accompanying text.
86. See supra notes 61-64 and accompanying text.
87. See supra notes 58-60 and accompanying text.
B. United States v. Eckford: Correct Result, Incorrect Interpretation

Another interpretation of Baldasar limits the case to its facts. The court in United States v. Eckford described Baldasar as standing only for the proposition that "a prior uncounseled misdemeanor conviction may not [be] used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term."\(^88\) The Eckford court based its characterization upon a largely semantic distinction between enhancement under state law and enhancement under Chapter Five of the Federal Sentencing Guidelines. Some repeat-offender statutes, like the Illinois statute in Baldasar, enhance sentences by converting a subsequent misdemeanor charge into a felony charge, thereby triggering a greater prison term.\(^9^9\) The Guidelines, however, do not employ "misdemeanor" or "felony" classifications, but rather determine prison sentences by grading defendants with numerical criminal history categories.\(^9^0\) Regardless of the differences in nomenclature, the effect of all the systems is the same: they increase the punishment of repeat offenders.

The Fifth Circuit therefore erroneously distinguished Baldasar from Eckford. The Scott "actual imprisonment" standard enjoined courts from incarcerating defendants on uncounseled convictions.\(^9^1\) The reversal of Baldasar's conviction hinged only on that but for the collateral use of his prior, uncounseled misdemeanor, the trial court would not have increased his term of imprisonment. The reversal did not rest upon the rationale that the collateral use would have imposed the burden of being graded a felon rather than a misdemeanor. The concurrences contain strong language refuting the limitation of Baldasar that Eckford suggests.\(^9^2\) Had the court

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89. See supra note 47 (describing Illinois' sentence-enhancing statute).
91. See supra notes 37-40 and accompanying text.
92. For example, Justice Stewart's concurrence states:
In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his defense.
It seems clear to me that this prison sentence violated the constitutional rule of Scott v. Illinois.
enhanced Baldasar's subsequent offense to a high misdemeanor carrying an increased term of imprisonment, rather than to a felony, the result of the case would undoubtedly have been the same.93

After incorrectly dismissing the controlling influence of 

_Baldasar_, the 

_Eckford_ court advanced the 

_Baldasar_ dissent's theory that prior misdemeanor convictions valid under 

_Scott_ should be valid for all purposes, including sentence enhance-

ment.94 The Fifth Circuit failed to note, however, that Eckford's prior convictions were petty misdemeanors for which he received no term of imprisonment.95 In simply distinguishing 

_Baldasar_, the Fifth Circuit perhaps failed to appreciate that the 

_Baldasar_ Court would have reached the same result had it 

decided 

_Eckford_. Justice Blackmun would have held Eckford's petty uncounseled misdemeanors valid for collateral enhance-

ment.96 To the extent that 

_Eckford_ involved petty prior misde-

meanors valid under Blackmun's rule in 

_Scott_, the case reaches 

the correct result by following the most restrictive formulation of the holding in 

_Baldasar_.97 The reasoning in 

_Eckford_, how-

ever, remains faulty and the holding unnecessarily broad, thereby contributing to the murky state of the law under 

_Baldasar_.

III. THE UNRESOLVABLE AMBIGUITY OF 

BALDASAR

AND PROPOSAL FOR CLARIFICATION

A. THE PRECEDENTIAL VALUE OF 

BALDASAR

The irreconcilable manner in which the Court split in 

_Baldasar_ has led to uneven application and strained interpreta-


_I think it plain that petitioner's prior uncounseled misdemeanor con-

viction could not be used collaterally to impose an increased term of 

imprisonment upon a subsequent conviction. . . . [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 unwork-

able deviation from our previous cases._

_Id._ at 225-26, 228-29 (footnote omitted).

93. See Rudstein, _supra_ note 29, at 530-31 (arguing that the additional 
term of imprisonment, rather than the nature of the offense, controlled the 

_Baldasar_ decision).

94. See _supra_ notes 72-76 and accompanying text.

95. See _supra_ notes 74-75 and accompanying text.

96. See _supra_ notes 58-60 and accompanying text.

97. See _infra_ note 101 and accompanying text (explaining why Justice 

Blackmun's concurrence contains the narrowest formulation of the 

_Baldasar_ holding).
tion of the decision in the lower courts. A close examination of Baldasar reveals that the decision fails to support any rule governing the collateral use of uncounseled misdemeanor convictions.

Under any of the various interpretations of the rule in Baldasar, Justice Blackmun's concurrence occupies a pivotal position. For instance, the interpretations of Baldasar in Eckford and Brady, although opposed to each other, both contradict Justice Blackmun's concurrence. Still another interpretation of Baldasar advances Justice Blackmun's concurrence itself as being the correct holding of the case. Because of its centrality, the unresolvable ambiguity in Justice Blackmun's opinion renders the entire Baldasar decision unworkable.

Of the rationales supporting reversal in Baldasar, Justice Blackmun's theory represented the narrowest ground, since he approved the reversal of some, but not all, sentences enhanced by uncounseled misdemeanors. If the narrowest ground upon which all the concurring justices can agree may be said to be the appropriate formulation of the holding, then Baldasar held the collateral use of prior, uncounseled misdemeanors for sentence enhancement unconstitutional, only in cases where the prior misdemeanor was a non-petty offense, punishable by more than six months' imprisonment. Unfortunately, Jus-

98. For a description of interpretations of Baldasar aside from the ones in Eckford and Brady, see generally, Joseph R. Podraza, Jr., Using Prior Uncounseled Convictions to Enhance the Grading and Sentencing of Subsequent Offenses Resulting in Imprisonment. The Pennsylvania Supreme Court's Questionable Reading of Baldasar v. Illinois, 60 TEMP. L.Q. 331, 344-49 (1987); Rudstein, supra note 29, at 530-35.


100. See supra notes 58-60 and accompanying text.

101. This version of the Baldasar holding, fairly attributable to Justice Blackmun, seems to be the most cautious of all: the formulation is fact-specific and represents the least common denominator upon which all five concurring justices could have agreed. The Supreme Court has held 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. . . . '" 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.)). Indeed, the Eckford court noted that by this rule of interpretation, the Court of Appeals for the Tenth Circuit adopted Justice Blackmun's concurrence as the holding of Baldasar. United States v. Eckford, 910 F.2d 216, 219-20 n.8 (5th Cir. 1990) (citing Santillanes v. United States Parole Comm'n, 754 F.2d 887, 889 (10th Cir. 1985)). Having noted the plausibility of such a holding, however, the Eckford court nevertheless did not agree with
tice Blackmun's concurrence is internally inconsistent, and even this narrow formulation of the Baldasar rule must be rejected.

Justice Blackmun's rule in Baldasar renders the class of nonpetty misdemeanor convictions, currently constitutional under Scott v. Illinois if not accompanied by a term of imprisonment, unconstitutional for collateral use. Under this proposal, uncounseled nonpetty convictions in effect become "hybrid" convictions,\(^\text{102}\) since they would be constitutionally valid for some purposes, but constitutionally invalid for others.

The four other justices concurring in Baldasar embraced the "hybrid" conviction theory to justify their result, and conceded that the Scott "actual imprisonment" standard represented binding precedent.\(^\text{103}\) Significantly, however, Justice Blackmun did not join the "hybrid" theory concurrences to reverse Baldasar's conviction and sentence. In refusing to recognize the Scott standard and instead assailing the constitutionality of Baldasar's prior conviction, Justice Blackmun found a way to express dissatisfaction with the reliability of uncounseled non-petty convictions while conveniently avoiding the further step of declaring some convictions constitutionally valid for some purposes but invalid for others. By implication, Justice Blackmun is the fifth justice to reject the "hybrid" conviction theory, ironically rendering his own opinion contradictory and unsuited to constitute the holding of Baldasar.

The crux of the problem in Baldasar is Justice Blackmun's rejection of the Scott "actual imprisonment" standard to govern misdemeanants' right to counsel. Justice Blackmun's reconsideration of the Scott standard, and his subsequent determination that Baldasar's nonpetty conviction ran afoul of the right to counsel in its original proceeding, were not considerations

Santillanes that a discernable rationale representing a least common denominator among five justices existed. 910 F.2d at 220 n.8.

102. Justice Powell makes this criticism of Justice Marshall's concurrence: [t]he Court creates a special class of uncounseled misdemeanor convictions. Those judgments are valid for the purposes of their own penalties as long as the defendant receives no prison term. But the Court holds that these convictions are invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction.

By creating this new hybrid, the Court departs from the position it took after Gideon v. Wainwright.


103. See supra notes 54-57 and accompanying text.
proper to the disposition of the case.\textsuperscript{104} \textit{Scott} remains unreviewed and thus continues to define the right to counsel in misdemeanor cases.\textsuperscript{105} As long as courts respect stare decisis by

\textsuperscript{104.} The Court did not decide these issues for adjudication, since petitioner did not collaterally challenge the constitutionality of his prior convictions but instead conceded their validity. \textit{Baldasar}, 446 U.S. at 234 n.2 (Powell, J., dissenting).

\textsuperscript{105.} The propriety of the \textit{Scott} standard affects the propriety of allowing the collateral use of prior, uncounseled misdemeanors. Adoption of the \textit{Baldasar} dissent’s theory that valid misdemeanor convictions should be valid for all purposes exposes the \textit{Scott} “actual imprisonment” standard’s potentially inadequate protection of a defendant’s due process rights. As recognized in \textit{Argersinger} v. \textit{Hamlin}, congested courts often dispose of misdemeanor cases with undue haste and lack of care. 407 U.S. 25, 34-37 (1972). Moreover, the Supreme Court has acknowledged that without counsel, few laypersons can conduct a successful defense in a criminal proceeding. \textit{See Powell} v. \textit{Alabama}, 287 U.S. 45, 69 (1932). Hence, in misdemeanor cases, an innocent, unrepresented defendant runs some risk of an unreliable conviction. The Court in \textit{Argersinger} and \textit{Scott} mitigated this risk by assuring accused misdemeanants that they will not be jailed in such potentially unreliable proceedings. \textit{See supra} notes 31-40 and accompanying text.

Although the “hybrid” misdemeanor conviction theory in \textit{Baldasar} should be rejected and all valid prior convictions should be available for collateral use, justice demands the reconsideration of the \textit{Scott} “actual imprisonment” standard governing the validity of uncounseled misdemeanors in the original proceedings. As it currently stands, \textit{Scott} not only allows potentially unreliable convictions to lead to sentence enhancement, it more importantly allows the state to take a defendant’s property and harm his reputation as a direct penalty for such a conviction.


None of these alternative standards is superior to the “actual imprisonment” standard. Justice Brennan’s “authorized imprisonment” standard would require appointed counsel whenever an indigent is charged with an offense punishable by jail time. Although this standard offers the greatest protection of accused misdemeanants, it would probably result in the unwise distribution of limited court-appointed defense counsel resources. Furnished counsel would be squandered indiscriminately on simple cases, cases in which the evidence is overwhelming, or cases in which incarceration is improbable. This distribution would in turn channel precious defender resources away from other misdemeanor cases where incarceration is likely or the issues presented are complex.

Justice Blackmun’s standard would burden defender resources less than Justice Brennan’s standard since Justice Blackmun would not grant petty misdemeanants a right to counsel unless they were actually incarcerated. Justice Blackmun’s standard, however, would nonetheless result in an unwise distri-
recognizing the constitutional validity of both petty and nonpetty uncounseled misdemeanors not directly resulting in imprisonment, the internal conflict of Baldasar, and the uncertainty of its authority, will remain unremedied.

Ultimately, the Baldasar decision offers no more than extremely weak and controversial guidance to legislative bodies and lower courts. The court in United States v. Robles-Sandoval accurately summed up the consequence of Baldasar: "[t]he Court in Baldasar divided in such a way that no rule can be said to have resulted."106 In the absence of Supreme Court clarification of Baldasar, lower courts necessarily must continue to flounder in uncertainty.

The Scott "actual imprisonment" standard serves as an acceptable minimum level of due process, but it is vulnerable to two objections. First, the standard allows for the collateral use of an uncounseled misdemeanor for sentence enhancement, as long as the misdemeanor did not result in a jail term. The standard ignores the prior conviction's reliability in light of its complexity or its hasty disposition. Second, upon similar reasoning, the "actual imprisonment" standard allows potentially unreliable convictions to lead to conviction and probation or fines.

Adopting the "actual imprisonment" standard as a base-line rule and then making a case-by-case determination of the right to counsel for non-imprisonment cases would provide optimal protection of defendants and insure the equitable distribution of defender resources to needy cases. The standard would void uncounseled misdemeanors resulting in actual imprisonment. Unreliable misdemeanors that did not result in jail time, but did result in harsh fines or collateral sentence enhancement, may be challenged by raising defendant's constitutional right to counsel. Appellate courts could then review trial courts' right to counsel determinations to determine the reliability of the conviction without counsel and the soundness of the trial courts' discretion after the admission of evidence.

B. PROPOSAL FOR CLARIFICATION BY REVIEW

Because recidivist enhancement provisions are so "commonplace in our criminal justice system," the difficulty commentators and lower courts have had deriving the rule emerging from Baldasar v. Illinois presents a significant problem. If the Baldasar rule is as the concurring justices state it, then a fundamental right of many accused recidivists goes unprotected. If the Baldasar rule is as the dissenters state it, repeat offenders in some jurisdictions go unpunished while equally culpable repeat offenders in other jurisdictions receive significant added jail time. Widespread disparity and inequity mandate Supreme Court review of the constitutionality of the collateral use of prior, uncounseled misdemeanors to enhance subsequent sentences.

Upon review, the Supreme Court should adopt the position of the dissenting justices. Insurmountable problems exist with accepting the Baldasar concurring justices. The position of Justice Marshall's concurrence, that Scott v. Illinois mandates the creation of a class of "hybrid" uncounseled misdemeanor convictions valid for initial conviction and for imposing fines, but invalid to support a term of imprisonment and to collaterally enhance a later sentence, should be rejected for several reasons.

Although Scott precludes the direct imposition of a term of imprisonment for an uncounseled misdemeanor, it does not necessarily follow that Scott also precludes the use of the misdemeanor to determine whether additional imprisonment is warranted for a second, counseled conviction. Incarceration resulting from the collateral use of an uncounseled misdemeanor is not equivalent to incarceration directly imposed for an uncounseled misdemeanor. Collaterally imposed incarceration requires the intervening link of a subsequent counseled conviction, often of a similar offense. Justice Powell's dissent in Baldasar noted this distinction between a direct sentence of imprisonment and one collaterally imposed: "[i]f . . . a person with a prior conviction chooses to commit a subsequent crime, he thereby becomes subject to the increased penalty prescribed for the second crime. This Court consistently has sustained repeat-offender laws as penalizing only the last offense.

committed by the defendant."  

Hence, collateral sentences of imprisonment should not be subjected to the same rigorous due process requirements as direct sentences. In direct imprisonment, a wholly innocent person accused of a crime runs an unreasonable risk of incarceration unless he is provided with defense counsel. The very bases of free society demand the stringent application of procedural safeguards to avoid imprisoning an innocent defendant. In a collateral enhancement case, however, a defendant receives representation. The state must prove its case and meet all procedural safeguards before any sentence is imposed. Therefore, even in a hypothetical worst case in which a prior conviction was entirely unreliable, the government would not imprison an innocent person, but would only sentence a defendant already proven guilty of a crime to a term of imprisonment potentially longer than statutorily warranted for the convicted offense. Although one may argue that such a result nonetheless would be unfair, the injustice that may result from direct sentencing upon an uncounseled conviction would be immediate and vastly more egregious. The due process principles in Scott that preclude direct imprisonment for an uncounseled misdemeanor are of a different magnitude than those applicable in Baldasar. The Scott principles do not necessarily mandate the preclusion of collateral sentence enhancement.

By no means does the Scott "actual imprisonment" standard governing the right to counsel afford uncounseled defendants absolute protection from punishment. Although the standard precludes direct imprisonment for an uncounseled misdemeanor, a court may still impose significant fines and the stigma of conviction upon an unrepresented defendant. As previously discussed, enhancing the sentence of a guilty defendant already sentenced to prison is a sanction much less harsh than the direct imprisonment of an unrepresented defendant. If placed in a spectrum of punishment severity, extra prison time added to an already existent sentence corresponds more closely to the direct imposition of a very large fine or to being branded a convict than to sending an innocent person to jail. It is inconsistent to hold that the imposition of severe direct sanc-


110. For a list of sources detailing the possible consequences of a misdemeanor conviction, see Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring in the result).
tions against an unrepresented, indigent defendant does not offend due process under Scott, but also hold that the similarly severe collateral imprisonment of a represented defendant transgresses those identical principles.

Furthermore, because of the heightened moral culpability of repeat offenders and the social consideration of general and specific deterrence, the criminal justice system should encourage effective enhancement laws to punish recidivism. The position taken by Justices Stewart, Marshall, Brennan, and Stevens in Baldasar would hamper this goal significantly. In adopting the Scott "actual imprisonment" standard, Justice Powell noted the scarcity of court-appointed defender resources, especially in urban areas. Often trial judges must hand down sentences to convicted misdemeanants that do not include a term of imprisonment even though incarceration is merited, simply because public defender shortages mean a certain number of misdemeanor cases cannot proceed with appointed counsel. Further injustice and social harm would result if judges must additionally forego enhancing the sentences of subsequently convicted misdemeanants who have initially escaped incarceration because of defender shortages. Alternatively, courts may distribute defender resources imprudently if, anticipating a bar on the collateral use of an uncounseled misdemeanor, they allot counsel to simple or trivial cases merely to preserve the conviction's validity for penalty enhancement.

In addition to impairing the ability of criminal justice systems to punish recidivism, prohibiting the use of uncounseled misdemeanors under penalty enhancement provisions would create wide disparities in sentencing because of varying procedural practices of different jurisdictions. For example, some misdemeanor courts do not keep a record of whether convic-

111. See supra notes 54-57 and accompanying text.
113. The Argersinger rule also tends to impair the proper functioning of the criminal justice system in that trial judges, in advance of hearing any evidence and before knowing anything about the case except the charge, all too often will be compelled to forgo the legislatively granted option to impose a sentence of imprisonment upon conviction. Preserving this option by providing counsel often will be impossible or impracticable—particularly in congested urban courts where scores of cases are heard in a single sitting, and in small and rural communities where lawyers may not be available.

Id. at 374 (Powell, J., concurring).
tions proceeded with court-appointed counsel. Subsequent sentencing courts would need to depend upon the memory and sincerity of the defendants themselves in determining whether prior misdemeanors from these courts were uncounseled, and therefore excludable for collateral use. Because of divergent record-keeping practices, sentencing disparities may arise between similarly culpable defendants on the mere basis of misdemeanor jurisdiction, or the honesty or recollection of the defendant.

Even if records of counsel appointment were available, the exclusion of prior uncounseled misdemeanors from collateral use may create sentencing disparity because the presence of defense counsel at prior misdemeanor proceedings is a poor proxy for defendant culpability. Such sentencing disparity would be most evident under the Federal Sentencing Guidelines, where sentence enhancement involves consideration of misdemeanor convictions from the full array of American jurisdictions. Some jurisdictions routinely assign defense counsel to misdemeanors not resulting in imprisonment, others do not, yet others cannot assign defense counsel to misdemeanor cases that strongly warrant sentences of imprisonment because of lack of resources. By excluding the collateral use of prior misdemeanors solely on the basis of whether they were counseled, similarly culpable defendants with prior convictions from different jurisdictions would receive disparate sentences, depending only on the characteristics of the public defender system of the jurisdiction.

114. See, e.g., Brief for Appellee at 2, United States v. Eckford, 910 F.2d 216 (5th Cir. 1990) (No. 89-4826) (stating that “[m]unicipal courts in the State of Mississippi are not courts 'of record,' hence they are relatively informal and no verbatim transcripts are made of their proceedings. Nor are written waivers of counsel the norm in those courts.”); United States v. Nichols, 763 F. Supp. 277, 278 (E.D. Tenn. 1991) (assuming no waiver of counsel because record from misdemeanor court was silent).

115. For example, in Eckford, no record of appellant's waiver of counsel existed from the municipal court that convicted him of his prior misdemeanor. See Brief for Appellee at 2, United States v. Eckford, 910 F.2d 216 (5th Cir. 1990) (No. 89-4826). At sentencing for his subsequent offense, Eckford did not deny being advised of his right to counsel, nor did he deny that he knowingly waived that right. He testified only that he could not recall, after six years, whether he orally waived that right or not, or even the identity of the judge who took his plea.

116. See supra note 69.

117. See supra note 113.

118. The United States Sentencing Commission expressed concern for this kind of sentencing disparity when it proposed its 1990 amendments to the Fed-
This Note advocates Supreme Court clarification of *Baldasar v. Illinois*. In its reconsideration, the Court should declare all misdemeanor convictions, valid when originally obtained, equally valid for the purpose of collaterally enhancing sentences under subsequent convictions. In addition to being conceptually sound, such a position heeds precedent, effectuates important sentencing policy, and fosters wise distribution of public defender resources.

To hold properly obtained, uncounseled misdemeanor convictions valid for all purposes avoids the conceptually contrived position of creating two distinct classes of convictions—those that are “normal” convictions, and those that are only limited “hybrid” convictions, ineffective for collateral sentence enhancement. Convictions seem more logically binary—either the defendant is guilty or the defendant is innocent. The Supreme Court has held constitutionally improper convictions invalid for all purposes because they are void. Reciprocally, constitutionally proper convictions should be held valid for all purposes, because they are not void.

This conceptual flaw indicates more underlying trouble in the *Baldasar* concurrences. The necessity of creating a lesser class of valid convictions, unavailable for collateral use, reflects a reluctance by the concurring justices to accept the *Scott* “actual imprisonment” standard. Although *Scott* represented, and still represents, the standard defining the right to counsel in misdemeanor cases, the concurring *Baldasar* justices must have viewed the *Scott* standard as inadequately protecting defendants’ rights. In rendering uncounseled misdemeanors invalid for collateral enhancement, these justices attempted to mitigate the harshness of the *Scott* “actual imprisonment” standard by reducing the potency of these otherwise valid convictions.

A position that convictions valid under *Scott* are valid also for collateral sentence enhancement acknowledges that the *Scott* standard is binding law. This position further recognizes that any unjust enhancement resulting from collateral use is fairly attributable to the failure of the *Scott* standard to adequately protect defendants’ rights in the original conviction, not to repeat-offender statutes’ collateral use of valid convictions.

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119. See cases cited supra note 63.
120. See *Baldasar*, 446 U.S. at 225-26 (Marshall, J., concurring) (stating “I remain convinced that [*Scott*] was wrongly decided”). For a discussion of the flaws in the *Scott* standard, see *supra* note 105.
for enhancement.\textsuperscript{121} Dissatisfaction with the Scott standard may militate for legislative or even judicial reform of the right to counsel in misdemeanor cases; however, it should not justify the adoption of an unsound position with regard to the collateral use of valid prior convictions.

Under Scott, uncounseled misdemeanor convictions that do not result in incarceration are valid to directly impose fines, probation, and a conviction record on a defendant. If such consequences may attach to an uncounseled conviction, the law must certainly regard them as substantially reliable.\textsuperscript{122} In a subsequent conviction, sentencing courts should be able to view as likely indicators of recidivist behavior substantially reliable convictions that are recorded as valid.\textsuperscript{123} Since the policy of punishing recidivist behavior is so crucial to our system of criminal justice, sentencing courts should be able to consider reliable convictions to arrive at commensurate sentences.

Most penalty enhancement laws, such as the Federal Sentencing Guidelines, utilize prior convictions only to enlarge the range of punishment authorized for particular offenses;\textsuperscript{124} consequently, a court has much discretion to determine if it will actually increase a defendant’s jail term. Since subsequent offenses are counseled, defense attorneys have the opportunity to highlight the potential unreliability of prior convictions, and to mitigate or eliminate the likelihood that judges will sentence at the greater end of a sentencing range enhanced by a prior uncounseled misdemeanor. If all validly procured convictions

\textsuperscript{121} For a proposal of a right-to-counsel standard more protective of criminal defendants’ due process rights than the Scott “actual imprisonment” standard, see supra note 105.

\textsuperscript{122} For instance, because the uncounseled conviction may be unspecified as such on record, see supra note 114, one would justifiably expect that an employer will take notice of a defendant’s criminal history and will draw conclusions regarding the defendant’s character that may dissuade the employer from hiring the defendant.

\textsuperscript{123} Indeed, the Federal Sentencing Guidelines provide for a court’s consideration of “reliable information [that] 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” to support an upward departure from the otherwise applicable guideline range. United States Sentencing Commission, Guidelines Manual, § 4A1.3, p.s. (Nov. 1991). Such “reliable information” includes information concerning “foreign” or “tribal offenses,” “misconduct established by a civil adjudication,” and “prior similar adult criminal conduct not resulting in a criminal conviction.” Id. (emphasis added). Surely, conduct actually leading to a conviction is an inherently more reliable indicator of recidivism than such evidence of prior conduct.

\textsuperscript{124} See provisions cited supra note 66.
were considered valid for sentence enhancement, sentencing courts could fully consider a defendant's prior convictions to assess how much to enhance a sentence, if at all. A contrary position would mechanically exclude all collateral consideration of prior uncounseled misdemeanors, regardless of how reliable, frustrating the goal of punishing recidivism.

To carry out sentencing policy that efficiently and effectively punishes recidivism, all validly procured prior misdemeanors should be valid for sentence enhancement. Such a policy fosters the wise distribution of scarce defender resources by discouraging courts from appointing counsel to misdemeanor cases solely to ensure the conviction's validity for future collateral use. For instance, courts should allocate defender resources to cases presenting legal issues which are too complex for a pro se defendant to manage, where circumstances strongly indicate that an appropriate sentence should include a term of imprisonment, or where fines and other punishment would pose atypical hardship for the defendant. Indiscriminate distribution of defender resources would inevitably channel defense counsel away from more deserving cases to cases where counsel is less critical to ensure fair proceedings.

**CONCLUSION**

In *Baldasar v. Illinois*, the Supreme Court purportedly invalidated the collateral use of prior, uncounseled misdemeanors to enhance a sentence for a subsequent offense as a violation of the Sixth Amendment right to counsel. *Baldasar*, however, was a murky per curiam decision containing four separate opinions. The fractured decision left the scope and authority of the case highly ambiguous. Lower federal courts and the Federal Sentencing Guidelines have found little guidance in *Baldasar* to help resolve constitutional challenges to the collateral use of uncounseled misdemeanors. As a result, these courts have applied *Baldasar* erratically. The Ninth Circuit and the Fifth Circuit, for example, have interpreted *Baldasar* in ways that are diametrically opposed to each other. The crucial question unresolved in *Baldasar* affects the scope of a constitutional right

125. Sentencing courts may already rightfully consider a variety of reasonably reliable indications of prior criminal activity, aside from convictions. See *supra* note 123; cf. *infra* note 126.

126. For a contrary perspective and a thoughtful discussion of the closely related issue of judicial sentencing discretion in the absence of a penalty enhancement statute, see Rudstein, *supra* note 29, at 535-42.
of a great number of criminal defendants sentenced under state
repeat offender statutes and the criminal history provisions of
the Federal Sentencing Guidelines.

The unsolvable ambiguity in *Baldasar* and the considerable
injustice resulting from it necessitate Supreme Court review.
This Note asserts that adopting the rationale of the dissent in
*Baldasar*—that all constitutionally procured, uncounseled mis-
demeanor convictions should be constitutional for sentence en-
hancement—would yield clarity in the law and a result sound
in principle and policy.