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The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar

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THE COLLATERAL USE OF UNCOUNSELED MISDEMEANOR CONVICTIONS AFTER *SCOTT* AND *BALDASAR*

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INTRODUCTION

It has been ten years since the United States Supreme Court extended the sixth amendment right to appointed counsel to misdemeanor cases.[1] The Court held no person may be imprisoned for any offense unless he either was represented by counsel at trial or validly waived the assistance of counsel.[2] The decision left open several questions concerning the precise scope of the right to appointed counsel in misdemeanor cases. Three years ago, in *Scott v. Illinois*,[3] the Court answered one of these questions by holding the right to counsel applies only when a defendant is actually imprisoned for a misdemeanor conviction, not when there is merely a possibility of imprisonment. The next year, in *Baldasar v. Illinois*,[4] a closely-divided Court prohibited the collateral use of an uncounseled misdemeanor conviction under an enhanced penalty provision following the defendant's subsequent conviction for another offense. A majority of the Court was unable to agree on the reason for this result.

The Court's failure to sufficiently delineate constitutional uses of prior uncounseled misdemeanor convictions presents questions of using such convictions in sentencing under enhanced penalty provisions, sentencing for subsequent convictions and revoking probation, parole or a suspended sentence. The proper evidentiary role of uncounseled misdemeanor convictions in impeaching the defendant's testimony at a subsequent trial is also unclear. Similar uncertainty pervades the use of these convictions for revoking a driver's license and subsequently imprisoning the defendant for driving while his license was revoked. Because the collateral use of uncounseled misdemeanor convictions often may result in imprisonment, this void has great constitutional significance. This article analyzes these problem areas and suggests answers to the difficult questions presented. Proper background for understanding these issues, however, initially must be provided by a brief review of relevant Supreme Court cases concerning the right to appointed counsel in both felony and misdemeanor cases.

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1. Argersinger v. Hamlin, 407 U.S. 25 (1972). The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

2. 407 U.S. 25, 37 (1972).

3. 440 U.S. 367 (1979).

4. 446 U.S. 222 (1980).

THE RIGHT TO COUNSEL: *Gideon* AND ITS PROGENY

The landmark decision establishing right to appointed counsel is *Gideon v. Wainwright*.[5] The Court overruled precedent[6] by holding the sixth amendment right to counsel "fundamental and essential to a fair trial," and extending that requirement to the states through the Due Process Clause of the fourteenth amendment.[7] The Court ruled that under the sixth and fourteenth amendments an indigent defendant in a state criminal proceeding must be furnished trial counsel at the state's expense. An indigent defendant can only be assured of a fair trial by providing him with counsel, the Court reasoned,[8] because lawyers are indispensable to our adversarial criminal justice system.[9]

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5. 372 U.S. 335 (1963). Gideon, an indigent, had been charged in a Florida court with the felony of breaking and entering with intent to commit a misdemeanor. His pre-trial request for appointed counsel was denied because state law provided for the appointment of counsel only in capital cases. He conducted his own defense at trial before a jury, but was convicted and sentenced to serve five years in the state prison. Subsequently he filed a petition for a writ of habeas corpus in the Florida Supreme Court, claiming that the trial court's refusal of his request to appoint counsel had denied him his rights under the federal Constitution. That court denied him relief, without an opinion. *Id.* at 336-38. *See generally* A. LEWIS, GIDEON'S TRUMPET (1964).

6. *See* Betts v. Brady, 316 U.S. 455 (1942). In *Betts*, the indigent petitioner had been charged in a Maryland court with the felony of robbery. After his request at arraignment for appointed counsel to represent him at trial was refused, Betts conducted his own defense in a bench trial and was convicted and sentenced to serve eight years in the penitentiary. His habeas corpus petitions were rejected in the state courts, and on *certiorari* the Supreme Court affirmed. Johnson v. Zerbst, 304 U.S. 458 (1938), had construed the sixth amendment to require appointment of counsel in all federal trials in which the defendant cannot afford to retain an attorney and does not validly waive counsel. The Court in *Betts*, however, held the assistance of counsel was not fundamental to a fair trial and therefore states were not obligated by the fourteenth amendment to appoint counsel for every indigent defendant. 316 U.S. at 461-63 & n.13. Instead, the facts in each particular case must be examined to determine whether the accused in that case could receive a fair trial in the absence of counsel. *Id.* at 462. The Court concluded that the defendant, who "had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure, was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue [credibility]." *Id.* at 472. Justice Black, who subsequently wrote the *Gideon* opinion, dissented in an opinion joined by Justices Douglas and Murphy. The dissent reasoned:

> A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.

Id. at 476.

7. 372 U.S. at 335. U.S. CONST. amend XIV provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

8. 372 U.S. at 335. The Court quoted from its opinion in Powell v. Alabama, 287 U.S. 45 (1932), concerning a defendant's need for a lawyer to assist him.

> "The right to be heard 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

Since *Gideon* in 1963, the Court has addressed several issues concerning the collateral use of uncounseled felony convictions.[10] The Court held a conviction invalid under *Gideon* cannot subsequently be used for enhancement of punishment under a recidivist statute,[11] for consideration by a court in sentencing for a subsequent conviction,[12] nor for impeaching the defendant's

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small and sometimes no skill in the science of law . . . . 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."

372 U.S. at 344-45, *quoting Powell*, 287 U.S. at 68-69. In *Powell*, the famous "Scottsboro Boys" case, several "ignorant and illiterate" black youths were charged with the capital offense of rape, allegedly committed upon two white girls. Although the defendants were indigent, no lawyer was appointed until the morning of trial. 287 U.S. at 49. The trial proceeded as scheduled, without giving the lawyer an opportunity to investigate or otherwise prepare for trial. *Id.* at 57. On the same day the jury found the defendants guilty and imposed the death penalty. The United States Supreme Court reversed the convictions, holding, *inter alia*, that under the circumstances present in that case the defendants had been denied due process of law within the meaning of the fourteenth amendment by the trial court's failure to make an effective appointment of counsel. *Id.* at 71.

9. The Court noted:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society . . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

372 U.S. at 344.

10. *Gideon* has been held to be fully retroactive. *See, e.g.*, Kitchens v. Smith, 401 U.S. 847, 847 (1971) (per curiam); Doughty v. Maxwell, 376 U.S. 202, 202 (1964) (per curiam); Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963) (per curiam).

11. Burgett v. Texas, 389 U.S. 109 (1967). In *Burgett* the first count of a five-count indictment charged the petitioner with assault with intent to murder. Pursuant to the state's recidivist statutes, the remaining counts contained allegations that the petitioner had previously been convicted of four felonies, one in Texas for burglary and three in Tennessee for forgery. At the commencement of the petitioner's trial the entire indictment, including the counts relating to the prior convictions, was read to the jury. During the course of the trial the state was allowed to introduce a certified copy of one of the prior Tennessee convictions, which failed to show on its face that the accused had either been represented by counsel or validly waived the assistance of counsel. This evidence was later withdrawn and the trial judge instructed the jury to disregard it. The Supreme Court reversed the conviction, because the state failed to show the defendant had counsel or validly waived it at the prior conviction. Notwithstanding the jury instruction, such evidence was inherently prejudicial. *Id.* at 114-15. In regard to the enhancement provision, the Court observed:

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

Id. at 115.

12. United States v. Tucker, 404 U.S. 443 (1972). The respondent in *Tucker* had been convicted in a federal court in 1953 for armed bank robbery. At trial the prosecutor had

general credibility in a subsequent trial for another offense.[13] These decisions

impeached the respondent's credibility by showing that he had three previous felony convictions, two in Florida and one in Louisiana. The trial judge considered these convictions when he sentenced the respondent to serve 25 years in prison. *Id.* at 444. Several years later it was conclusively determined that the Louisiana and one of the Florida convictions were invalid under *Gideon*. In a proceeding to vacate the sentence, the district court concluded the trial court had erred in allowing the prior convictions to be used for impeachment purposes. Nevertheless, it denied relief, holding that the error was harmless beyond a reasonable doubt. *Id. See* 299 F. Supp. 1376 (N.D. Cal. 1969). The Court of Appeals for the Ninth Circuit agreed with the district court's conclusions, but went on to find that there was "a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence then it otherwise would have imposed," and it remanded the case for resentencing. 431 F.2d 1292, 1294 (9th Cir. 1970). The Supreme Court affirmed the judgment of the court of appeals to prevent erosion of *Gideon*, stating:

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.
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> [I]f the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who, beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on chain gang.

404 U.S. at 447-48 (footnotes omitted).

13. Loper v. Beto, 405 U.S. 473 (1972). The petitioner in *Loper* was convicted in a state court in 1947 for the statutory rape of his eight-year-old stepdaughter. His stepdaughter was the only witness who identified him at trial as the one who committed the crime. The petitioner was the sole witness for the defense and denied assaulting her in any way. The prosecutor was allowed on cross-examination to impeach the petitioner's credibility by bringing out the fact that he had been convicted of four felonies during the period 1931-1940. Id. at 474-75. At the hearing on petitioner's habeas corpus petition, he testified that he was not represented by counsel for at least two of these prior convictions; that he could not then have afforded counsel; that he was not advised that he had a right to appointed counsel if he could not afford to retain one; and that he did not advise the court that he did not want to be represented. *Id.* at 476-77 & n.3. The petitioner produced court records corroborating this testimony. The court denied habeas corpus relief. *Id.* at 477-78 & n.4. The Court of Appeals for the Fifth Circuit affirmed, reasoning "that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal." *Id.* at 479. *See* 440 F.2d 934, 937 (5th Cir. 1971). Justice Stewart, writing for the plurality in reversing the conviction, stated:

> "We conclude that the *Burgett* rule against use of uncounseled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt."

405 U.S. at 483, *quoting* Gilday v. Scafati, 428 F.2d 1027, 1029 (1st Cir.), *cert. denied*, 400 U.S. 926 (1970). Concerning the significance of using the conviction to attack general credibility, the plurality pointed out in a footnote:

considerably expanded *Gideon*'s reach by prohibiting certain collateral uses of uncounseled convictions.[14] This trend of limiting the collateral use of an invalid conviction recently came to an end, however, in the 1980 case of *Lewis v. United States*.[15] The Court held a defendant's prior uncounseled felony conviction may support a subsequent conviction under the Omnibus Crime Control and Safe Streets Act of 1968.[16] The Act prohibits any convicted felon

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> This is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand . . . . The previous convictions were used, rather, simply in an effort to convict Loper by blackening his character and thus damaging his *general* credibility in the eyes of the jury.

405 U.S. at 482 n.11 (emphasis added) (citations omitted). In a separate opinion Justice White would have allowed the court of appeals to consider whether the challenged convictions were in fact invalid, a question he viewed as unresolved, and if they were invalid, whether their use for impeachment purposes constituted harmless error. *Id.* at 485 (White, J., concurring). As to this latter point, the plurality opinion stated, "[i]n the circumstances of this case there is little room for a finding of harmless error, if as appears on the record now before us, Loper was unrepresented by counsel and did not waive counsel at the time of the earlier convictions." *Id.* at 483 n.12.

14. At the same time that the Court was expanding the reach of *Gideon* by prohibiting certain collateral uses of invalid convictions, it was also expanding the scope of the sixth amendment right to counsel by holding that an accused is constitutionally entitled to the assistance of counsel at stages of the criminal process other than the trial itself. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing to determine whether there is probable cause to send case to grand jury); Mempa v. Rhay, 389 U.S. 128 (1967) (combined probation revocation and sentencing proceeding); United States v. Wade, 388 U.S. 218 (1967) (eyewitness identification proceeding; subsequently limited in Kirby v. Illinois, 406 U.S. 682 (1972), to those occurring after the initiation of adversary judicial proceedings); Massiah v. United States, 377 U.S. 201 (1964) (post-indictment, non-custodial interrogation). In some cases, however, the Court refused to extend the right to counsel. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1967) (taking of handwriting exemplars); Schmerber v. California, 384 U.S. 757 (1966) (taking of blood samples).

On the same day that the Court decided *Gideon* it also held in Douglas v. California, 372 U.S. 353 (1963), that an indigent criminal defendant has a constitutional right to appointed representation on an appeal by right. In reaching this result, however, the Court relied not upon the sixth amendment right to counsel that was applicable to the states through the fourteenth amendment, but rather on the equal protection and due process clauses of the fourteenth amendment. *Id.* at 356-57. In *In re* Gault, 387 U.S. 1 (1967), the Court additionally held a juvenile has the due process right to counsel at a delinquency proceeding that may result in his confinement in an institution.

15. 445 U.S. 55 (1980).

16. *Id.* at 56. Lewis, who in 1961 had pled guilty in a Florida court to the felony of breaking and entering with intent to commit a misdemeanor, was arrested in Virginia in January of 1977 and later indicated for, *inter alia*, knowingly receiving and possessing a firearm in violation of 18 U.S.C. § 1202(a)(1) (1976). Prior to his trial on this charge, his attorney informed the court Lewis had not been represented by counsel at the 1961 conviction proceeding in violation of *Gideon*. He argued the conviction could not constitutionally serve as a predicate for a conviction under § 1202(a)(1). 445 U.S. at 54-56. The trial court rejected that claim, holding the prior conviction's constitutionality immaterial to Lewis' status under § 1202(a)(1) as a previously convicted felon at the time of his arrest. Consequently, the government was allowed to introduce into evidence a copy of the 1961 judgment. *Id.* at 58. Lewis was convicted of violating § 1202(a)(1) and the Fourth Circuit Court of Appeals affirmed. *Id. See* 591 F.2d 978 (4th Cir. 1979).

from receiving, possessing, or transporting any firearm.[17] In rejecting the defendant's sixth amendment claim,[18] the Court stated its prior cases had never invalidated an uncounseled conviction for all purposes.[19] The Court distinguished *Lewis* from prior cases by noting federal gun laws focus on the mere fact of indictment[20] or conviction, and not on the reliability of a prior uncounseled conviction. This gun control regulation, as a civil disability enforced through criminal sanctions, attached immediately upon the defendant's first conviction. The Court viewed Congress' broad purpose in denying such persons the ability to handle firearms as a rational restriction that did not support guilt or enhance punishment based on a prior unreliable conviction.[21] *Lewis* therefore established that a conviction obtained in violation of a defendant's sixth amendment right to counsel may be used collaterally for at least some purposes.

THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: *Argersinger* TO *Baldasar*

Although nothing in *Gideon* expressly limited the holding to felonies,

17. 18 U.S.C. § 1202(a)(1) (1976).

18. 445 U.S. at 66-67. Before reaching this issue the Court first concluded that the unambiguous language of § 1202(a)(1) and its legislative history made clear that Congress did not intend to allow challenges to the constitutional validity of the predicate felony conviction as a defense to a charge under that statute. *Id.* at 62-63. It then held that the statute, as so interpreted, did not violate the concept of equal protection because "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Id.* at 66.

19. *Id.* at 66-67.

20. The Court was referring to 18 U.S.C. § 922(h)(1), which provides, in part: "It shall be unlawful for any person — (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year: . . . to receive any firearm. *Id.*

21. 445 U.S. at 67. Justice Brennan, joined by Justices Marshall and Powell, dissented, stating that § 1202(a)(1) should be interpreted to allow only constitutionally valid convictions to serve as the predicate for a conviction. *Id.* at 69 (Brennan, J., dissenting). He reasoned that the statute's language could fairly be interpreted either to allow *any* outstanding felony conviction to serve as the predicate for a conviction or to allow only a *constitutionally valid* conviction to serve as the predicate. The dissent concluded the latter construction should be adopted because of the principles of statutory construction that any doubts as to an ambiguous criminal statute's interpretation should be resolved in favor of the accused and so as to avoid raising doubts as to the statute's constitutionality. *Id.* at 68-70. In discussing the serious constitutional questions that he believed would be raised by the former interpretation, Justice Brennan stated that *Burgett*, *Tucker*, and *Loper* would seem to prohibit the use of a felony conviction that was invalid under *Gideon* as a predicate for a prosecution under § 1202(a)(1). *Id.* at 71-72. He reasoned that since a conviction could not be obtained in the absence of the prior uncounseled conviction, that prior conviction would clearly be used "to support guilt" for the current offense, an impermissible use under *Burgett*. He found the Court's attempt to distinguish *Burgett*, *Tucker*, and *Loper* "unconvincing," because "Congress' decision to include convicted felons within the class of persons prohibited from possessing firearms can rationally be supported only if the historical fact of conviction is indeed a reliable indicator of potential dangerousness." *Id.* at 72 (Brennan, J., dissenting). He concluded it was not, since "the absence of counsel impairs the reliability of a felony conviction just as much when used to prove potential dangerousness as when used as direct proof of guilt." *Id.*

Clarence Earl Gideon was in fact charged with and convicted of a felony.[22] Justice Harlan, in his concurring opinion, read the Court's opinion as applying only to "offenses which, as the one involved here, carry the possibility of a substantial prison sentence."[23] He stated parenthetically that it was unnecessary to determine whether the rule should apply to all criminal convictions.[24] Consequently, many lower courts interpreted *Gideon* as deciding an indigent's right to appointed counsel only in felony cases.[25] The Supreme Court on several occasions also appeared to view *Gideon* as limited to felony cases[26] and added uncertainty by refusing to review cases raising the issue of whether *Gideon* applied to misdemeanor convictions.[27] Finally, in 1971, the Court

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22. *See supra* note 5.

23. 372 U.S. at 351 (Harlan, J., concurring).

24. *Id.*

25. *E.g.*, Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967); Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966); State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909, *cert. denied*, 385 U.S. 925 (1966); State v. Sherron, 268 N.C. 694, 151 S.E.2d 599 (1966); City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967). *Contra, e.g.*, Beck v. Winters, 407 F.2d 125 (8th Cir.) *cert. denied*, 395 U.S. 963 (1969); MacDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

26. *E.g.*, United States v. Tucker, 404 U.S. 443, 449 (1972) ("The *Gideon* case established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one.' "); Mempa v. Rhay, 389 U.S. 128, 134 (1967) ("In *Gideon v. Wainwright* . . . this Court held that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment was applicable to the States and, accordingly, that there was an absolute right to appointment of counsel in felony cases."); Burgett v. Texas, 389 U.S. 109, 114 (1967) ("*Gideon v. Wainwright* established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one."). *But see* Smith v. Hooey, 393 U.S. 374, 380 n.11 (1969) (Court described the holding in *Gideon* without any indication that it was limited to felony cases); Escobedo v. Illinois, 378 U.S. 478, 487 (1964) (every person accused of a crime is entitled to a lawyer); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (right to counsel is fundamental in all criminal cases).

It is true that only a few weeks after its decision in *Gideon* the Court vacated the conviction of a defendant who had been charged with various misdemeanor weapons offenses, remanding the case for further consideration in light of *Gideon*. Patterson v. Warden, 372 U.S. 776 (1963), *vacating and remanding* 227 Md. 194, 175 A.2d 746 (1961). Even though at least two of the offenses were labeled "misdemeanors" in the applicable statute, however, the maximum penalty under the statute was two years' imprisonment. Since under federal law, 18 U.S.C. § 1 (1976), and many state statutes, a felony is defined as any offense punishable by death or imprisonment for a term exceeding one year, these offenses would have been considered felonies in many jurisdictions. Thus, an appropriate reading of *Patterson* is that *Gideon* applies in cases in which the accused is charged with an offense that provides a felony-length sentence, regardless of whether it is classified as a misdemeanor in the particular jurisdiction.

27. Beck v. Winters, 407 F.2d 125 (8th Cir.), *cert. denied*, 395 U.S. 963 (1969) (Douglas, J., dissenting); Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364, *cert. denied*, 385 U.S. 907 (1966) (Stewart & Black, JJ., dissenting); State v. Heller, 4 Conn. Cir. 174, 228 A.2d 815 (1966), *cert. denied*, 389 U.S. 902 (1967) (Fortas & Douglas, JJ., dissenting); State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966) (Stewart, Black, & Douglas, JJ., dissenting); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909, *cert. denied*, 385 U.S. 925 (1966) (Black & Stewart, JJ., dissenting); People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266

granted *certiorari* in *Argersinger v. Hamlin.*[28]

Jon Argersinger, an indigent, had been charged in Florida state court with carrying a concealed weapon, an offense punishable by up to six months' imprisonment and a $1,000 fine. Argersinger was convicted without being represented by counsel and sentenced to serve ninety days in jail. He then instituted a habeas corpus proceeding in the Florida Supreme Court, alleging he had been denied his sixth amendment right to counsel. A closely divided court rejected Argersinger's contention[29] and held indigent defendants accused of misdemeanors are entitled to court-appointed counsel only when the offense carries a potential penalty of more than six months' imprisonment.[30] In reaching this result, the Florida court followed the Supreme Court's standard for determining the scope of the sixth amendment right to trial by jury.[31]

The United States Supreme Court reversed, holding the sixth amendment provides standards for all criminal prosecutions.[32] The Court observed it had never limited other sixth amendment rights to felony cases, except for the

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N.Y.S.2d 368 (1965), *cert. denied*, 384 U.S. 911 (1966); Hendrix v. City of Seattle, 76 Wash. 2d 142, 456 P.2d 696 (1969), *cert. denied*, 397 U.S. 948 (1970).

28. 401 U.S. 908 (1971).

29. State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970), *rev'd*, 407 U.S. 25 (1972).

30. 236 So. 2d at 444. Justice Boyd, in a separate opinion for himself and two other members of the seven-person court, would have held that under the sixth amendment an indigent was entitled to the appointment of counsel at government expense whenever he was "charged with violating any state law or county or municipal ordinance punishable by a jail sentence or imprisonment for any time whatever." *Id.* at 446 (Boyd, J., concurring in part, dissenting in part).

31. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Duncan v. Louisiana, 391 U.S. 145 (1968), held the jury trial provision applicable to states through the Due Process Clause of the fourteenth amendment.

The Florida court cited the following cases for authority in *Argersinger*: Franks v. United States, 395 U.S. 147 (1969) ("sentences for criminal contempt of up to six months may constitutionally be imposed without a jury trial,"); Duncan v. Louisiana, 391 U.S. 145 (1968) (no right to jury trial for a "petty offense"; "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses,"); Bloom v. Illinois, 391 U.S. 194 (1968) (prosecution for criminal contempt that resulted in prison term of two years is not a "petty offense" to which the right to jury trial does not apply); Cheff v. Schnackenberg, 384 U.S. 373 (1966) (no right to jury trial in prosecution for criminal contempt that resulted in sentence of six months' imprisonment, since such offense is a "petty" one). The Florida court first reasoned that if the right to counsel were held applicable to all misdemeanor cases, " 'the administration of justice [would be] thrown into senseless chaos.' " 236 So. 2d at 443-44 (quoting Brinson v. State, 273 F. Supp. 840, 847 (S.D. Fla. 1967)). It noted a contrary holding would require counsel to be provided in the vast number of cases involving minor offenses, such as parking and other petty traffic offenses. *Id.* at 444. The Florida court also observed that a misdemeanor conviction, unlike a felony conviction, does not impose sanctions, such as the forfeiture of civil rights, in addition to a fine or imprisonment. 236 So. 2d at 444.

32. Argersinger v. Hamlin, 407 U.S. 25, 27 (1972). Justice Douglas wrote the Court's opinion in which Justices Brennan, Stewart, White, Marshall, and Blackmun joined. Justice Brennan, who was joined by Justices Douglas and Stewart, wrote a brief concurring opinion. Chief Justice Burger wrote a separate opinion concurring in the result, as did Justice Powell, who was joined by Justice Rehnquist. *Id.*

right to trial by jury.[33] The Court acknowledged it had limited the right to a jury trial to cases with potential imprisonment for six months or more,[34] but explained that right has a "different genealogy" than the right to counsel and is brigaded with a system of trial to a judge alone."[35] The *Argersinger* Court "reject[ed] . . . the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."[36]

Quoting extensively from earlier sixth amendment opinions,[37] the Court stated a fair trial often requires assistance of counsel.[38] Although recognizing the earlier cases involved felonies, the *Argersinger* Court held when an accused is deprived of his liberty a fair trial may require counsel's assistance regardless of the nature of the offense.[39] The Court concluded "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[40]

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33. *Id.* at 28.

34. *Id.* at 29 (citing Duncan v. Louisiana, 391 U.S. 145 (1968)).

35. *Id.* The Court, *citing* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980-82 (1926), and James v. Headley, 410 F.2d 325, 331 (5th Cir. 1969), concluded that "there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases.'" 407 U.S. at 30 & n.2. It reached a contrary conclusion, however, with respect to the right to counsel, stating that at early common law in England "'persons accused of misdemeanors were entitled to the full assistance of counsel,'" and that "'in at least twelve of the thirteen colonies . . . the right to counsel [was] fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes . . . .'" *Id.*, *quoting* Powell v. Alabama, 287 U.S. 45, 60, 64-65 (1932).

36. 407 U.S. at 30-31.

37. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

38. 407 U.S. at 31.

39. *Id.* at 33. Using vagrancy cases as an example, the Court stated these cases "often bristle with thorny constitutional questions" and cited as support Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). 407 U.S. at 33. The Court then discussed *In re* Gault, 387 U.S. 1 (1967), where it held that the Due Process Clause of the fourteenth amendment entitles a juvenile to the assistance of counsel in a delinquency proceeding which might lead to his detention in a state institution. 407 U.S. at 33. The Court concluded that "[t]he premise of *Gault* is that even in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer." *Id.* at 34.

The Court also pointed out the problem guilty pleas present in felony cases also looms large in misdemeanor cases. Counsel is therefore needed to assist a misdemeanor defendant contemplating entering a plea of guilty and to assure that he receives fair treatment. *Id.* Finally, the Court emphasized that because there are many more misdemeanor cases than felony prosecutions, there may be "an obsession for speedy dispositions, regardless of the fairness of the result." *Id.* Consequently, the rights of a misdemeanor defendant might not be adequately protected in the absence of a lawyer. *Id.* at 36-37.

40. 407 U.S. at 37. The Court further explained:

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

Argersinger laid to rest the notion that the right to appointed counsel was limited to felony prosecutions. Nevertheless, the decision raised the primary question of whether an indigent charged with a misdemeanor offense for which the authorized punishment included imprisonment was entitled to a state-appointed lawyer at trial or whether the right to counsel in misdemeanor cases was restricted to situations of conviction and actual imprisonment. State and lower federal courts differed in their interpretation and application of *Argersinger*. Some read the decision as adopting an actual imprisonment standard,[41] while others required the appointment of counsel whenever the offense authorized imprisonment.[42]

The Supreme Court resolved this conflict in *Scott v. Illinois*[43] by holding *Argersinger* had adopted the actual imprisonment test. The Constitution "require[s] only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State ha[s] afforded him the right to assistance of appointed counsel in his defense."[44] Defendant Scott, an indigent, had been charged with an offense punishable by a fine of not more than $500 or not more than one year in jail, or both.[45] The failure to provide him with an attorney at state expense did not deprive him of his constitutional right to counsel because upon conviction he was merely sentenced to pay a fine of fifty dollars. Justice Rehnquist, for the majority, found *Argersinger* somewhat ambiguous, yet controlling.[46] The Court observed the actual imprisonment standard "has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[47] This inability to establish any other manageable

Id. at 40.

Chief Justice Burger wrote a separate opinion concurring in the result. *Id.* at 41. Conceding that the holding of the Court would create additional burdens for the states and for the legal profession, he rejected drawing the line for the right to counsel at penalties in excess of six months' confinement because "any deprivation of liberty is a serious matter," and a defendant, unaided by counsel, cannot adequately defend himself even in a trial for a misdemeanor or petty offense. *Id.*

Justice Powell, who was joined by Justice Rehnquist, also wrote a separate opinion concurring in the result. He agreed with the majority that "an indigent accused's need for the assistance of counsel does not mysteriously evaporate when he is charged with an offense punishable by six months or less." *Id.* at 47. But because of the problems he found in the Court's rule, especially its impact on the states, and because, in his view, many defendants charged with petty offenses could obtain a fair trial even in the absence of counsel, Justice Powell concluded due process requires the right to counsel in petty cases only when "the assistance of counsel is necessary to assure a fair trial," a decision to be made on a case-by-case basis. *Id.* at 66.

41. *E.g.*, Sweeten v. Sneddon, 463 F.2d 713 (10th Cir. 1972); Rollins v. State, 299 So. 2d 586 (Fla.), *cert. denied*, 419 U.S. 1009 (1974); Mahler v. Birnbaum, 95 Idaho 14, 501 P.2d 282 (1972); Empy v. State, 571 S.W.2d 526 (Tex. Crim. App. 1978).

42. *E.g.*, Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976); Webster v. Jones, 587 P.2d 528 (Utah 1978); Bullett v. Staggs, 250 S.E.2d 38 (W. Va. 1978); State *ex rel.* Winnie v. Harris, 75 Wis. 2d 547, 249 N.W.2d 791 (1977).

43. 440 U.S. 367 (1979).

44. *Id.* at 374.

45. ILL. REV. STAT. ch. 38, § 16-1 (1969).

46. 440 U.S. at 373.

47. *Id.*

standard and fear of explosive costs warranted adoption of the actual imprisonment test.[48] Although *Scott* drew the line at actual imprisonment in recognition of the criminal justice system's inability to handle another standard, it did not determine whether an uncounseled misdemeanor conviction could be used for collateral purposes. The following term, however, the Court had an opportunity to address this issue in one context when it decided *Baldasar v. Illinois*.[49]

The petitioner in *Baldasar* was convicted of felony theft and sentenced to

48. The Court began its analysis by questioning the validity of its prior sixth amendment interpretations requiring the government in certain cases to provide an attorney to represent an indigent criminal defendant. It stated that "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to *employ* a lawyer to assist in his defense." *Id.* at 370 (emphasis added), *citing* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955). The Court did not, however, indicate it was willing to overrule these prior interpretations. This asserted departure from the sixth amendment's literal meaning was nevertheless relevant to the Court's decision in *Scott* because it concluded that "[a]s a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so." 440 U.S. at 372.

Justice Powell concurred, reiterating his disagreement with the holding in *Argersinger*, *see supra* note 40. He explained that in order to give clear guidance to the lower courts, and "mindful of *stare decisis*," he joined the Court's opinion, "with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice." 440 U.S. at 374-75.

Justice Brennan, who was joined by Justices Marshall and Stevens, wrote a vigorous dissent in which he asserted that *Argersinger* "established a 'two dimensional' test for the right to counsel: the right attaches to any 'nonpetty' offense punishable by more than six months in jail and in addition to any offense where actual incarceration is likely regardless of the maximum authorized penalty." *Id.* at 380 (Brennan, J., dissenting). He then chastised the majority for adopting the "actual imprisonment" standard as the exclusive test for determining the right to appointed counsel in misdemeanor cases. *Id.* at 381-82. The dissent argued the "authorized imprisonment" standard was superior to the "actual imprisonment" standard because (1) it is a truer measure of the seriousness of an offense, *id.* at 382; (2) unlike the "actual imprisonment" standard, which requires a pre-trial determination of the likely sentence, it presents no problems of administration, *id.* at 383; and (3) it "ensures that courts will not abrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense," by declining to appoint counsel and thereby abandoning the possibility of imposing a sentence of imprisonment should the defendant be convicted after a trial at which he was not represented by counsel, *id.* at 383-84 (citing *Argersinger*, 407 U.S. at 53 (Powell, J., concurring)). Finally, Justice Brennan attacked the majority's rationale that the "authorized imprisonment" standard would create economic burdens for the states. He stated such considerations were not relevant in enforcing constitutional guarantees, and, in any event, there were no indications such burdens would in fact result. *Id.* at 384-88.

Justice Blackmun also wrote a dissenting opinion. He felt that the right to counsel must extend at least as far as the right to trial by jury. Consequently, Justice Blackmun would have adopted a "bright line" standard requiring an indigent defendant to be provided 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 . . . ." *Id.* at 389-90 (Blackmun, J., dissenting) (emphasis in original).

49. 446 U.S. 222 (1980).

serve from one to three years in prison for stealing a shower head worth twenty-nine dollars from a department store. Although counsel represented the defendant at trial, the prosecutor introduced, over objection, evidence establishing an earlier misdemeanor conviction for theft. This prior conviction, for which the petitioner was fined and placed on probation, under Illinois law enhanced the subsequent offense from a misdemeanor punishable by a fine and imprisonment for up to one year[50] to a felony punishable by a fine and imprisonment for up to three years.[51] Defense counsel contended the prior conviction could not be used for enhancement because Baldasar, an indigent without counsel at the prior trial, had not validly waived the assistance of counsel. Both the trial court and the Illinois Appellate Court rejected this argument.[52] The Supreme Court, however, reversed the conviction in a brief per curiam opinion[53] and remanded the case for the reasons stated in the concurring opinions.[54]

The *Baldasar* concurrences were written by Justices Stewart and Marshall, who were joined by Justices Brennan and Stevens, and by Justice Blackmun. In a very brief opinion, Justice Stewart, after quoting the holding of *Scott*,[55] stated that imposing an increased prison term solely because of a prior conviction obtained in violation of *Argersinger* clearly violated the constitutional

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50. ILL. REV. STAT. ch. 38, §§ 16-1(e)(1), 1005-8-3(a)(1), 1005-9-1(a)(2) (1975).

51. *Id.* §§ 16-1(e)(1), 1005-8-1(b)(5), 1005-9-1(a)(1) (1975).

52. People v. Baldasar, 52 Ill. App. 3d 305, 367 N.E.2d 459 (1977).

53. 446 U.S. at 224. In *Baldasar* the petitioner's first conviction for theft, a misdemeanor, resulted in probation for one year. He did not challenge this sentence in his state court appeals, and in the United States Supreme Court he conceded that his conviction, as opposed to the sentence of probation, was constitutionally valid. Brief for Petitioner at 12 n.5, Baldasar v. Illinois, 446 U.S. 222 (1980). This made it unnecessary for the Court to consider the question whether an indigent misdemeanor defendant who neither had nor waived counsel's assistance can constitutionally be sentenced to a period of probation upon his conviction. At first glance it may seem that the Supreme Court answered this question "no" in both *Argersinger* and *Scott*; but neither of those cases dealt with this specific situation. In *Argersinger* the defendant had actually been sentenced to jail, and in *Scott* the defendant had only been sentenced to pay a fine.

54. A persuasive argument can be fashioned that in some circumstances placing an indigent defendant on probation following an uncounseled misdemeanor conviction violates the rule of *Argersinger* and *Scott* and denies the defendant his sixth amendment right to counsel. Proper application of the rule turns upon the definition given to the term "imprisonment;" however, the Court did not define what it meant by "imprisonment" in either of these cases. It is quite possible the definition encompasses more than confinement in a jail or penitentiary. Support for such a reading can be drawn from the *Argersinger* opinion itself. The Court stated that the "rationale [of *Powell* and *Gideon*] has relevance to any criminal trial, where an accused is *deprived of his liberty*," 407 U.S. at 32 (emphasis added). In the last paragraph of its opinion, the Court also stated: "[In misdemeanor cases] that end up in the actual *deprivation of a person's liberty*, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's *liberty* is in jeopardy." *Id.* at 40, quoted with approval in *Scott*, 440 U.S. at 370 (emphasis added). The Court's use of the term "incarceration" in *Scott*, *id.* at 372, does not undermine this argument, since incarceration also means imprisonment. This broad interpretation of the term "imprisonment" is also supported by an analysis of some of the incidents of probation. *See infra* notes 142-47.

55. See *supra* text accompanying note 44.

rule of *Scott*.[56] Justice Marshall's opinion focused on the rationale underlying the right to counsel: an indigent criminal defendant's fundamental right to a fair trial depends upon the appointment of counsel.[57] Although indicating *Scott* had been wrongly decided, Justice Marshall stated that even if actual imprisonment determines the constitutional right to appointment of counsel, the defendant's "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction."[58] He reasoned a valid conviction for a subsequent offense does not render a prior uncounseled conviction more reliable. Justice Marshall concluded if the initial conviction could not be used directly to impose a prison term, logically it could not be used to indirectly impose an increased prison term under a recidivist statute.[59]

Justice Blackmun differed from the other two concurrences in *Baldasar* and maintained the position of his *Scott* dissent. His concurrence reiterated the "bright-line" test which requires counsel to be appointed when an indigent defendant is charged with a non-petty offense or is actually sentenced to a prison term.[60] Because Baldasar was not provided counsel at his prior trial for an offense punishable by more than six months' imprisonment, the conviction denied him the sixth amendment right to counsel and could not subsequently be used to support enhancement.

COLLATERAL USES OF PRIOR UNCOUNSELED MISDEMEANOR CONVICTIONS

The *Baldasar* decision established an uncounseled misdemeanor conviction punishable by more than six months' imprisonment,[61] cannot constitutionally be used to increase a prison term under an enhanced penalty provision. The failure of the *Baldasar* majority to agree upon a rationale for the result, and the unique approach taken by Justice Blackmun, whose vote was necessary for that result, leave open questions concerning the decision's scope. For example, the question remains whether a prior uncounseled misdemeanor conviction for an offense punishable by imprisonment for six months or less requires the

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56. 446 U.S. at 224 (Stewart, J., concurring). In a footnote Justice Stewart stated:

> It is noteworthy that the brief filed by the State of Illinois in *Scott* expressly anticipated the result in this case:
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> "When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from enhancing subsequent offenses.* To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion." Brief for Respondent in *Scott v. Illinois*, O.T. 1977, No. 77-1177, p. 20 (emphasis added).

446 U.S. at 224-25 n.*.

57. *Id.* at 225 (Marshall, J., concurring).

58. *Id.* at 226.

59. *Id.* at 226-29.

60. *See supra* note 48 and *infra* note 92.

61. By the phrase "prior uncounseled conviction," this article assumes counsel's assistance was not validly waived, unless specifically indicated to the contrary.

same result. It is also unclear whether the trial judge constitutionally can consider an uncounseled misdemeanor conviction when sentencing the defendant for a subsequent conviction of another offense. The propriety of these and other collateral uses will help define the contours of the right to counsel in misdemeanor cases.

Enhanced Penalty Provisions

Although *Baldasar* prohibited the collateral use of an uncounseled misdemeanor conviction punishable by more then six months imprisonment to elevate a subsequent misdemeanor to a felony under an enhancement provision,[62] it did not address other enhancement uses of a prior uncounseled misdemeanor conviction. At least two state courts intimated *Baldasar* should be limited to its facts and applied only to cases in which the prior uncounseled misdemeanor conviction is used to enhance the sentence in a later conviction for the same offense.[63] Other state courts interpreted *Baldasar* as applying only to cases in which a misdemeanor is enhanced to a felony because of the prior uncounseled conviction.[64] None of these cases, however, required the court to determine *Baldasar*'s limitations, since either the case's particular facts did not raise the issue, or the court decided the case on grounds making *Baldasar* inapplicable, or both.[65] These interpretations can be fairly characterized as *dicta*,

62. In the period between the Supreme Court's decisions in *Argersinger* and *Baldasar* the lower courts had divided on this issue. Several courts held that it could not elevate the subsequent misdemeanor, even when it had not resulted in the defendant's imprisonment as punishment for that offense. *See* State v. Franklin, 337 So. 2d 1152 (La. 1976); State v. Carlisle, 315 So. 2d 675 (La. 1975); State v. Strange, 308 So. 2d 795 (La. 1975); City of Monroe v. Fincher, 305 So. 2d 108 (La. 1974); State v. Kirby, 33 Ohio Misc. 48, 289 N.E.2d 406 (1972) (reading *Argersinger* as adopting an "authorized imprisonment" standard); Maghe v. State, 507 P.2d 950 (Okla. Crim. App. 1973) (unclear whether *Argersinger* read as adopting an "authorized imprisonment" standard). Several other courts, however, held such an uncounseled conviction could be so used when it did not result in a sentence of imprisonment, therefore rendering it valid under *Argersinger*. *See* Wood v. Superintendent Caroline Correctional Unit, 355 F. Supp. 338 (E.D. Va. 1973); State v. McCurdy, 603 P.2d 1017 (Idaho 1979); People v. Baldasar, 52 Ill. App. 3d 305, 367 N.E.2d 459 (1977), *rev'd per curiam*, 446 U.S. 222, *reh'g denied*, 447 U.S. 930 (1980); Trimble v. State, 593 S.W.2d 542 (Mo. 1980); State v. McGrew, 127 N.J. Super. 327, 317 A.2d 390 (1974); Lopez v. State, 507 S.W.2d 776 (Tex. Crim. App. 1974). One court even held that a prior uncounseled misdemeanor conviction that actually resulted in the defendant's imprisonment could subsequently be used for enhancement purposes. *See* State v. Henderson, 549 S.W.2d 566 (Mo. Ct. App. 1977). *Contra*, City of Monroe v. Coleman, 304 So. 2d 332 (La. 1974); State v. Guillotte, 297 So. 2d 423 (La. 1974); *Ex parte* Woodard, 541 S.W.2d 187 (Tex. Crim. App. 1976); *Ex parte* Burt, 499 S.W.2d 109 (Tex. Crim. App. 1973); *Ex parte* Webster, 497 S.W.2d 305 (Tex. Crim. App. 1973); Walker v. State, 486 S.W.2d 330 (Tex. Crim. App. 1972).

63. *See* People v. Sirianni, 109 Misc. 2d 781, 782, 440 N.Y.S.2d 988, 990 (Sup. Ct. 1981); State v. Smith, 280 S.E.2d 200, 201 (S.C. 1981).

64. McKenney v. State, 388 So. 2d 1232, 1234-35 (Fla. 1980); State v. Holt, 613 S.W.2d 707, 709 (Mo. Ct. App. 1981); People v. Bourdrieau, 107 Misc. 2d 3, 3-4, 433 N.Y.S.2d 377, 378 (Sup. Ct. 1980).

65. McKenney v. State, 388 So. 2d 1232 (Fla. 1980) (defendant sentenced as habitual misdemeanant; held, prior conviction obtained following valid waiver of counsel); State v. Holt, 613 S.W.2d 707 (Mo. Ct. App. 1981) (prior misdemeanor conviction not uncounseled since defendant was represented by counsel on appeal to circuit court where trial *de novo* could

which, for the reasons stated below, should not be followed if the issues are actually presented.

Several courts have described the holding in *Baldasar* without such limitations.[66] One court actually reaching the issue, held *Baldasar* prohibits using a prior uncounseled misdemeanor conviction to convert a petty misdemeanor into a high misdemeanor that results in imprisonment.[67] This result is correct. While *Baldasar* involved aggravation of a second theft offense from a misdemeanor to a felony, the additional period of imprisonment controlled, rather than the nature of the offense.[68] The *Baldasar* result would have been the same if the additional two-year prison term had been imposed under an enhancement provision that either was triggered by a prior conviction for a misdemeanor other than theft or raised the offense from a lower grade of misdemeanor to a higher one. In *Argersinger* and *Scott*, the Court was concerned with the imprisonment of an uncounseled indigent defendant convicted of a misdemeanor. The additional period of imprisonment, therefore, must be the key to *Baldasar*.[69] At a minimum, *Baldasar* precluded imprisonment for any

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have been obtained); People v. Sirianni, 109 Misc. 2d 781, 440 N.Y.S.2d 988 (1981) (prosecution sought to use prior misdemeanor conviction for driving while intoxicated to convert second offense into a felony); People v. Bourdrieau, 107 Misc. 2d 3, 433 N.Y.S.2d 377 (1980) (prosecution sought to use prior misdemeanor conviction for driving while intoxicated to convert second offense into a felony; held, motion to dismiss indictment denied, without prejudice to renew it, because of insufficient allegations concerning prior uncounseled conviction); State v. Smith, 280 S.E.2d 200 (S.C. 1981) (defendant convicted for third offense of driving under the influence, which had felony-length sentence; held, prior conviction obtained following valid waiver of counsel).

66. *See* People v. Hampton, 619 P.2d 48, 52 (Colo. 1980) (en banc); People v. Roybal, 618 P.2d 1121, 1125 (Colo. 1980) (en banc); People *ex rel.* Carey v. Chrastka, 83 Ill. 2d 67, 75, 413 N.E.2d 1269, 1273 (1980); People v. McCarty, 101 Ill. App. 3d 355, 358, 427 N.E.2d 1382, 1385 (1981); People v. Olah, 409 Mich. 948, 948-49, 298 N.W.2d 422, 422 (1980), *cert. denied*, 450 U.S. 957 (1981); State v. Ulibarri, 96 N.M. 511, 513-15, 632 P.2d 746, 747-48 (Ct. App. 1981); People v. Williams, 78 A.D.2d 643, 643, 432 N.Y.S.2d 120, 121 (1980); State v. Black, 51 N.C. App. 687, 689-90, 277 S.E.2d 584, 585-86 (1981).

67. State v. Ulibarri, 96 N.M. 511, 632 P.2d 746 (Ct. App. 1981).

68. *Id.* at 514, 632 P.2d at 748.

69. In *Ulibarri*, 96 N.M. at 511, 632 P.2d at 746, discussed *supra* in text accompanying note 67, the court stated:

> We read *Baldasar* to mean that even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense. All instances where an enhancement follows a prior offense in which the defendant did not have the assistance of counsel in his defense are controlled by *Baldasar*.

96 N.M. at 512-14, 632 P.2d at 747-48. Taken on its face, this reading of *Baldasar* is too broad. It was the *increased* imprisonment term that concerned the *Baldasar* Court. It does not seem likely that mere enhancement from a petty misdemeanor to a high misdemeanor, or perhaps even from a misdemeanor to a felony, without any increased term of imprisonment would run afoul of *Baldasar*, because the prior uncounseled misdemeanor conviction would not have led to the defendant's imprisonment. The court in *Ulibarri* need not have used such broad language in describing *Baldasar*'s rule, since the defendant in that case had been sentenced under the enhanced penalty provision to nine months' imprisonment, whereas the maximum penalty without enhancement was imprisonment for up to 90 days. N.M. STAT. ANN. § 66-8-102 (1978 & Supp. 1981).

subsequent offense when based upon a prior uncounseled conviction for any misdemeanor punishable by more than six months' imprisonment but not actually resulting in the defendant's imprisonment.

It is unclear whether *Baldasar* can be read more broadly than this to preclude the enhancement use of all prior uncounseled misdemeanor convictions when the result is a longer prison term for the subsequent offense. Almost all courts discussing *Baldasar* indicate it applies regardless of the punishment authorized for the prior misdemeanor and regardless of whether the defendant was actually imprisoned for the prior offense.[70] Yet, these courts apparently overlook the lack of a real majority opinion in *Baldasar*[71] and the differences between Justice Blackmun's concurrence and the approach taken by the other four justices comprising the majority for reversal. In determining *Baldasar*'s scope it is imperative to examine closely the various opinions.

Justice Marshall concluded that since Baldasar's prior misdemeanor conviction was invalid under *Argersinger* and *Scott* for imposing imprisonment for the original offense, it remained invalid for increasing a term of imprisonment for a later conviction under a recidivist statute.[72] He followed the rationale of *Argersinger* and *Scott* that an uncounseled misdemeanor conviction is not sufficiently reliable to justify the harsh penalty of imprisonment.[73] Baldasar's prior uncounseled misdemeanor conviction, which did "not become more reliable merely because [he] ha[d] been validly convicted of a subsequent offense,"[74] did in fact result in his subsequent imprisonment, since the enhancement provision authorizing additional imprisonment would not have been triggered "but for" the prior conviction.[75] The additional imprisonment was therefore a direct consequence of the prior conviction.[76] Like Justice Marshall, Justice Stewart, who had joined the Court's opinion in *Scott*, applied

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70. *See* People v. Hampton, 619 P.2d 48, 52 (Colo. 1980) (en banc); People v. Roybal, 618 P.2d 1121, 1125 (Colo. 1980) (en banc); McKenney v. State, 388 So. 2d 1232, 1234-35 (Fla. 1980); People *ex rel.* Carey v. Chrastka, 83 Ill. 2d 67, 75, 413 N.E.2d 1269, 1273 (1980); People v. McCarty, 101 Ill. App. 3d 355, 358, 427 N.E.2d 1382, 1385 (1981); People v. Olah, 409 Mich. 948, 948-49, 298 N.W.2d 422, 422 (1980), *cert. denied*, 450 U.S. 957 (1981); State v. Holt, 613 S.W.2d 707, 709 (Mo. Ct. App. 1981); State v. Ulibarri, 96 N.M. 511, 512-14, 632 P.2d 746, 747-48 (Ct. App. 1981); People v. Williams, 78 A.D.2d 643, 643, 432 N.Y.S.2d 120, 121 (1980); People v. Sirianni, 109 Misc. 2d 781, 782, 440 N.Y.S.2d 988, 989 (Sup. Ct. 1981); People v. Bourdrieau, 107 Misc. 2d 3, 3-4, 433 N.Y.S.2d 377, 378 (Sup. Ct. 1980); State v. Black, 51 N.C. App. 687, 689-90, 277 S.E.2d 584, 585-86 (1981), State v. Smith, 280 S.E.2d 200, 201 (S.C. 1981).

71. Only a few courts have pointed out that there was no majority opinion articulating the rationale for the result reached in *Baldasar*. United States v. Plisek, 657 F.2d 920, 925 n.1 (7th Cir. 1981); United States v. Robles-Sandoval, 637 F.2d 692, 693 n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981); United States v. Mack, 9 M.J. 300, 312 n.11 (C.M.A. 1980); McClure v. Commonwealth, 283 S.E.2d 224, 225 (Va. 1981). In *Robles-Sandoval*, which involved the collateral use of a deportation order to support a conviction for illegally re-entering the United States, the court stated: "The Court in *Baldasar* divided in such a way that no rule can be said to have resulted." 637 F.2d at 693 n.1.

72. 446 U.S. at 228 (Marshall, J., concurring).

73. *Id.* at 227.

74. *Id.* at 228.

75. *Id.* at 227.

76. *Id.*

a but for test in his *Baldasar* concurrence. He concluded *Scott* had been violated because the increased prison term was imposed only because of the prior uncounseled misdemeanor conviction.[77]

Justice Powell, writing for the four *Baldasar* dissenters, recognized Baldasar's prior uncounseled misdemeanor conviction was constitutionally valid under the actual imprisonment standard of *Argersinger* and *Scott*. The dissent concluded that just as a constitutionally defective felony conviction could not be used for enhancement,[78] logically Baldasar's valid misdemeanor conviction could be used for enhancement,[79] because a valid conviction is valid for all purposes. Justice Blackmun cast the deciding vote in *Baldasar*. This concurrence reiterated his dissenting opinion in *Scott*: appointed counsel must be provided whenever an indigent defendant is prosecuted for an offense punishable by more than six months' imprisonment or is convicted and actually imprisoned.[80]

These opinions clearly demonstrate *Baldasar* applies to any prior uncounseled misdemeanor conviction for which the defendant was actually imprisoned. Justice Blackmun reached his result in *Baldasar* because he viewed the prior conviction as invalid. Since under his bright-line test[81] an uncounseled misdemeanor conviction that actually resulted in imprisonment would be equally invalid, it also could not subsequently be used for enhancement purposes. The opinions of Justice Marshall and Justice Stewart, both of which were joined by Justices Brennan and Stevens, also support this result. Their opinions focused on increased imprisonment because of the prior uncounseled misdemeanor conviction. Under this view it makes no difference whether, as in *Baldasar,* the prior uncounseled conviction and sentence were valid under *Argersinger* and *Scott,* or invalid because the defendant was actually imprisoned for that offense. Since the prior conviction in this latter situation would be invalid for the purpose for which it was directly used, the case is stronger for prohibiting its collateral use for enhancement purposes.

The dissenting opinion in *Baldasar* may also support this result. In con-

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

78. *Id.* at 233. *See supra* note 11 and accompanying text.

79. 446 U.S. at 233 (Powell, J., dissenting). In addition, Justice Powell observed:

> The Court's decision . . . also will create confusion in local courts and impose greater burdens on state and local governments . . . . Providing counsel for all defendants charged with enhanceable misdemeanors will exacerbate the delays that plague many state misdemeanor courts and will impose unnecessary costs on local governments. Those communities that cannot provide counsel for misdemeanor defendants will lose by default the possibility of enhancing future sentences if criminal conduct persists. The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties.
>
> In addition, . . . [the] ruling will incite further litigation claiming that uncounseled misdemeanor convictions cannot be used to impeach a defendant's testimony, or that judges should not consider such convictions in later sentencing determinations.

Id. at 234-35.

80. *Id.* at 229 (Blackmum, J., concurring), *quoting* Scott v. Illinois, 440 U.S. 367, 389 (1979) (Blackmun, J., dissenting).

81. *See supra* note 48.

cluding Baldasar's prior conviction could be used collaterally under the enhanced penalty provision, the dissent relied primarily upon the fact that the prior conviction was constitutionally valid under *Argersinger* and *Scott*. By negative implication a prior misdemeanor judgment, invalid because the defendant was actually imprisoned for that offense, cannot be used for enhancement purposes.[82] This sensible result parallels cases involving the collateral use of uncounseled felony convictions. In *Burgett v. Texas*,[83] for example, the Court held a judgment obtained in a felony case in violation of the accused's sixth amendment right to counsel could not constitutionally be used for sentence enhancement. The Court explained that to allow the use of such a conviction either to support guilt or increase punishment for a subsequent offense would cause the defendant to suffer anew from deprivation of counsel, thereby eroding *Gideon*.[84] The same is true of misdemeanors.

Baldasar should not be read, however, to preclude the subsequent use of a prior uncounseled misdemeanor conviction under an enhanced penalty provision when the previous offense was punishable by imprisonment for six months or less and the conviction did not actually result in the defendant's imprisonment. The opinions of Justices Marshall and Stewart would clearly preclude the subsequent enhancement use of *any* prior uncounseled misdemeanor conviction. These opinions focused only on the increased imprisonment for the subsequent offense without any mention of the authorized punishment for the prior offense. It is equally clear the four dissenters would allow such a conviction to be used for enhancement purposes if, as in *Baldasar*, the prior conviction was constitutional under *Argersinger* and *Scott*.

The deciding opinion, therefore, would be that of Justice Blackmun. Although he did not expressly deal with this situation in *Baldasar*, it is fair to infer from Justice Blackmun's emphasis on the invalidity of Baldasar's previous conviction under his bright-line test[85] that he would allow a prior uncounseled misdemeanor conviction that was constitutionally *valid* to be subsequently used under an enhanced penalty provision.[86] Additionally, in Justice Black-

82. It is, of course, possible the *Baldasar* dissenters would consider the initial *conviction* valid even though the defendant was imprisoned for that offense in violation of *Argersinger* and *Scott*. Some lower courts have held only the sentence of imprisonment is invalid in such a situation, not the underlying conviction. *E.g.*, Morgan v. Juvenile & Domestic Relations Court, 491 F.2d 456 (4th Cir. 1974); State v. Henderson, 549 S.W.2d 566 (Mo. Ct. App. 1977). If the dissenters in *Baldasar* adopted this view, they would presumably allow the prior valid conviction to be used for subsequent sentence enhancement purposes, since they concluded "sentence enhancement [does not] equal imprisonment for the earlier offense." 446 U.S. at 234 (Powell, J., dissenting). Nevertheless, the opinions representing the views of a majority of the *Baldasar* Court would still support the conclusion reached in the text.

83. 389 U.S. 109 (1967).

84. *Id.* at 115.

85. Justice Blackmun stated that Baldasar's prior uncounseled conviction, "in my view, is invalid and may not be used to support enhancement." 446 U.S. at 230 (Blackmun, J., concurring).

86. *See* United States v. Mack, 9 M.J. 300, 327 (C.M.A. 1980) (Cook, J., concurring in part and dissenting in part). *But see* the court's opinion in *Mack*, where, in discussing the various opinions in *Baldasar*, it stated: "[I]t is unclear how Justice Blackmun would have voted if the initial conviction had been in a trial where, under his view, counsel need not be provided." *Id.* at 312 n.11.

mun's view, a misdemeanor conviction for an offense punishable by not more than six months imprisonment that does not actually result in the defendant's imprisonment is constitutionally valid, even though uncounseled. It therefore follows he would join with the four *Baldasar* dissenters and allow its subsequent use for sentence enhancement purposes.[87]

This analysis indicates *Baldasar* can be read only to prohibit an increased prison term under an enhanced penalty provision when it is based upon a prior uncounseled misdemeanor conviction that either resulted in the defendant's imprisonment or was obtained for an offense punishable by more than six months' imprisonment. This interpretation is somewhat narrower than those provided by the lower courts.[88] Insofar as this result allows prior uncounseled misdemeanor convictions to be used for enhancement purposes if they did not actually result in the defendant's imprisonment, it contradicts the rationale of *Argersinger* and *Scott*. Whenever a prison term is increased under an enhanced penalty provision, the prior uncounseled conviction has caused the actual deprivation of the defendant's liberty. There could be no additional imprisonment but for the prior conviction. This is true regardless of the authorized punishment for the prior offense or whether the defendant was actually incarcerated. Yet in *Argersinger* and *Scott*, the Court concluded an uncounseled misdemeanor conviction was too unreliable to support imprisonment. As Justice Marshall pointed out in *Baldasar*, "[a]n uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense."[89] The better rule would prohibit enhancement use of all prior uncounseled misdemeanor convictions if the accused had not validly waived the right to counsel.

Sentencing for a Subsequent Offense

Whether a defendant's prior uncounseled misdemeanor conviction can be considered by a judge or jury[90] in sentencing the defendant upon a subsequent conviction for another offense is closely related to the issue raised in *Baldasar*.

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87. Because there was no actual majority opinion in *Baldasar* and because there has been a change in the Court's composition, caused by Justice Stewart's retirement and his replacement by Justice O'Connor, the Court might reconsider the issue presented in *Baldasar*. *See* United States v. Ross, 102 S. Ct. 2157 (1982), where the Court, with Justice O'Connor in the majority, overruled Robbins v. California, 453 U.S. 420 (1981), a search and seizure case with no majority decision in which Justice Stewart wrote the plurality opinion. Similarly, *Baldasar*'s result could be reversed if the four dissenters maintain their position and are joined by Justice O'Connor.

88. *See supra* notes 70-71. Fairness to these courts requires pointing out none of them faced a factual situation requiring a decision of whether *Baldasar* applies when the prior misdemeanor conviction was for an offense punishable by six months or less and the defendant was not imprisoned for that offense.

89. 446 U.S. at 222, (Marshall, J., concurring).

90. In some jurisdictions the jury, rather than the judge, might determine the sentence to impose upon the defendant. *E.g.*, TEX. CRIM. PROC. CODE ANN. §§ 27.02(7) (Vernon Supp. 1981) & 37.07 (Vernon 1981). In most cases, however, the judge will determine the sentence. For this reason the text will hereafter only refer to the judge as the sentencing authority.

One reason the Illinois Appellate Court in *Baldasar*[91] refused to bar the enhancement use of the prior uncouseled misdemeanor conviction was to allow trial judges to consider such convictions in sentencing not involving an enhancement provision. The court feared this would have been barred had it reached the opposite decision.[92]

This fear is well founded. It makes little difference whether an enhanced penalty provision mandates an increased term of imprisonment or whether a judge imposes it exercising his sentencing discretion. So long as the prior uncounseled conviction leads to the increased incarceration, the defendant is being deprived of his liberty because of that conviction. To illustrate, assume *Baldasar* did not involve an enhancement provision, but rather the trial judge examined the defendant's prior record, saw he had been previously convicted of theft, and concluded because the defendant was a recidivist a sentence of one year was required. If the judge would not have sentenced the defendant to a term of imprisonment but for the prior uncounseled misdemeanor conviction, the prior uncounseled conviction caused his incarceration. If the judge would have imprisoned the defendant anyway, but imposed a longer sentence because of the prior conviction, the prior uncounseled conviction nonetheless resulted in an extension of the defendant's imprisonment.

Argersinger and *Scott* were premised on the notion that an uncounseled conviction is too unreliable to support a prison sentence. Allowing a trial judge in a subsequent sentencing proceeding to consider a prior uncounseled misdemeanor conviction to impose a longer prison term than he otherwise would have imposed would thus impermissibly deprive the defendant of his liberty on the basis of an unreliable conviction. This is true regardless of whether the prior conviction violated *Argersinger* and *Scott* because the defendant was actually imprisoned upon conviction and regardless of the punishment authorized by the offense.

There may be cases where the sentencing judge will not find the defendant's prior conviction sufficiently significant to affect his sentencing determination. In such cases no imprisonment will result from the prior conviction; therefore, its consideration by the sentencing judge would not violate *Argersinger* and *Scott*. But if the prior conviction would not affect the judge's decision, its exclusion from the sentencing hearing could not prejudice the state in any way. Because of the difficulty in determining beforehand the effect that a prior uncounseled misdemeanor conviction would have on the judge's sentencing determination, it is suggested that all such unreliable convictions be inadmissible at sentencing hearings in order to protect convicted defendants from improper imprisonment.[93]

Despite the logic of this position, however, it is not entirely clear *Baldasar* compels this result. At least one court reaching this issue held, without refer-

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91. People v. Baldasar, 52 Ill. App. 3d 305, 367 N.E.2d 459 (1977), *rev'd per curiam*, 446 U.S. 222 (1980).

92. *Id.* at 310, 367 N.E.2d at 463.

93. *Cf. Argersinger*, 407 U.S. 25 (1972). This rule should be qualified to not include those rare instances where the judge concludes before the hearing he would under no circumstances sentence the accused to an imprisonment term.

ence to *Baldasar*, a prior uncounseled misdemeanor conviction cannot be used to increase the sentence imposed for a subsequent offense.[94] The Fifth Circuit Court of Appeals in *Thompson v. Estelle*,[95] however, ruled a state trial court had not erred[96] in admitting at the punishment stage of the trial evidence of a prior uncounseled misdemeanor conviction resulting only in a fine.[97] The court relied on its own precedent[98] which reasoned that " 'if a con-

94. Bailey v. State, 633 P.2d 1252 (Okla. Crim. App. 1981). In *Bailey* the defendant was validly convicted of a second or subsequent offense of driving while intoxicated. At the penalty stage of his trial two prior uncounseled misdemeanor convictions, as well as a prior valid felony conviction, were introduced into evidence. The defendant was sentenced to serve four years in prison. On appeal he contended the two prior misdemeanor convictions were void due to nonrepresentation by counsel. Although the court's opinion does not indicate whether the defendant had actually been imprisoned for those prior convictions, the court held the trial court erred in admitting evidence of the prior convictions. The court noted, "[p]rior convictions without the presence of counsel or a record reflecting a waiver of the right to counsel may not be used to enhance punishment." *Id.* at 1255. This broad statement indicates that, absent a valid waiver, no prior uncounseled misdemeanor conviction, regardless of the punishment authorized or whether it resulted in imprisonment can be used to increase the term of imprisonment for a subsequent offense. It is possible, however, the prior uncounseled misdemeanor conviction in *Bailey* had directly resulted in the defendant's imprisonment and the court's holding is limited to such situations. *See also* People v. Olah, 409 Mich. 948, 948-49, 298 N.W.2d 422, 422 (1980), *cert. denied*, 450 U.S. 957 (1981) (stating in the probation revocation context: "A court may not enhance punishment at sentencing because of a misdemeanor or ordinance conviction obtained when defendant was not represented by counsel.").

95. 642 F.2d 996 (5th Cir. 1981).

96. *Id.* at 999. In *Thompson*, the habeas corpus petitioner had been convicted in a state court of murder and following a hearing had been sentenced by a jury to life imprisonment. At the punishment stage of the trial the state had introduced evidence showing the petitioner had previously been convicted of six offenses, including a state felony conviction for burglary, a federal felony conviction for burglary, and two misdemeanor convictions for unlawful possession of drugs, one of which resulted in a sentence of 30 days' imprisonment. The last four of these convictions had been obtained at trials at which the petitioner had not been represented by counsel. In seeking habeas corpus relief the petitioner contended that the trial court had erred in admitting evidence of these prior uncounseled convictions. The district court denied relief and the court of appeals affirmed. As to the prior felony convictions, the appellate court held the lower court's finding that the petitioner had been represented by an attorney at his state trial for burglary was not clearly erroneous. Although it was error to admit evidence of the federal burglary conviction, the court found the error harmless beyond a reasonable doubt. *Id.*

97. *Id.* at 998-99. *Accord* Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 912 (1981). In another case decided since *Baldasar*, United States v. Plisek, 657 F.2d 920 (7th Cir. 1981), the court indicated *Baldasar* had not necessarily resolved this issue. The defendant in *Plisek* contended the trial judge erred when sentencing the defendant by considering a prior uncounseled misdemeanor conviction that resulted only in a fine. The court found no evidence in the record that the judge had relied on the prior conviction and even if he had, there was no evidence to support the defendant's "belief" that he had not been represented by counsel. It concluded: "We need not address, therefore, the issue left open by *Baldasar* . . . , whether uncounseled convictions which are in themselves valid under *Scott* . . . may be used to guide sentencing discretion within the statutory maximum in a subsequent conviction . . . ." *Id.* at 925-26 n.1.

Two cases which involved this issue were decided after *Scott* but before *Baldasar*. In one, People v. Buller, 101 Cal. App. 3d 73, 160 Cal. Rptr. 657 (1980), the court held the trial judge should have granted the defendant's motion to strike two prior convictions because they had

been obtained in the absence of counsel. Nevertheless, the court found it unnecessary to remand for resentencing, since "[i]n sentencing defendant, the trial court stated that it did not take the challenged priors into account in imposing sentence." *Id.* at 79, 160 Cal. Rptr. at 660. There is some indication in this case, however, that the defendant had in fact been imprisoned for the two prior misdemeanor convictions, since the court referred to them as being "constitutionally invalid." *Id.* In the other case, People v. Oster, 97 Mich. App. 122, 294 N.W.2d 253 (1980), it is also unclear whether the defendant had been imprisoned as punishment for his prior uncounseled misdemeanor convictions. The *Oster* court refused to remand the case for resentencing because the trial judge, in denying the defendant's motion to vacate the sentence, had noted that although he had considered the prior misdemeanor convictions, "they were not of sufficient weight to change the sentence he would have imposed if he had not considered those convictions." *Id.* at 137, 294 N.W.2d at 260.

Several cases decided before *Scott* involved this issue. All of the cases adopting the "actual imprisonment" standard, which the Supreme Court ultimately adopted in *Scott*, indicated so long as a prior uncounseled misdemeanor conviction was valid under *Argersinger*, it could be considered in a subsequent sentencing proceeding. Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978); United States v. Sawaya, 486 F.2d 890 (1st Cir. 1973) (dictum); People v. Heal, 20 Ill. App. 3d 965, 313 N.E.2d 670 (1974); Aldrighetti v. State, 507 S.W.2d 770 (Tex. Crim. App. 1974) (dictum). In one case, State v. Caruthers, 110 Ariz. 345, 519 P.2d 44 (1974) (en banc), a defendant who had been convicted of second degree murder contended the trial court had erroneously used for sentencing purposes prior invalid misdemeanor convictions for which he had actually been imprisoned. The court rejected that contention, stating:

> Murder in the second degree is punished by imprisonment in the state prison for not less than ten years . . . . And by [statute] the trial court is permitted to set any term of years so long as it is not less than the statute provides. This is not a case where the trial court imposed an increased punishment because of a recidivist statute . . . . Rather, the court was exercising its obvious duty to weigh all factors relative to goals of punishment and through the application of its discretion arrived at an appropriate sentence.

Id. at 347-48, 519 P.2d at 46-47. *Accord* Stonaker v. State, 134 Ga. App. 123, 213 S.E.2d 506 (1975), *overruled* Davis v. State, 136 Ga. App. 749, 222 S.E. 2d 188 (1975). *Contra, Ex parte* Casarez, 508 S.W.2d 620 (Tex. Crim. App. 1974); Baldwin v. State, 499 S.W.2d 7 (Tex. Crim. App. 1973); *cf.* Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975) (prior uncounseled misdemeanor conviction for which the defendant was imprisoned cannot be brought out by state during cross-examination of defendant's character witness at pre-sentence hearing). Several cases decided prior to *Scott* held that an uncounseled misdemeanor conviction could not be used in a subsequent sentencing proceeding on the ground imprisonment was an "authorized" penalty that could not be used for any purpose whatever. *E.g.*, Barnes v. Estelle, 518 F.2d 182 (5th Cir.), *cert. denied*, 423 U.S. 1036 (1975) (but harmless error); Thomas v. Savage, 513 F.2d 536 (5th Cir. 1975), *cert. denied*, 424 U.S. 924 (1976) (but harmless error). Since the Supreme Court rejected the "authorized imprisonment" standard in *Scott*, these cases add little helpful analysis.

98. Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 912 (1981). In *Wilson*, the habeas corpus petitioner was convicted in a state court of murder and, following a hearing, was sentenced by a jury to life imprisonment. At the sentencing hearing the state introduced evidence showing the petitioner had previously been convicted of three offenses: felony theft; carrying a pistol, a misdemeanor for which he received a fine only; and shoplifting, a misdemeanor for which he was sentenced to a fine and three days in jail. A lawyer did not represent the petitioner at either trial resulting in the misdemeanor convictions. In seeking habeas corpus relief the petitioner contended the trial court had erred in admitting evidence of the prior uncounseled misdemeanor convictions. As to the misdemeanor conviction for which the petitioner had actually been imprisoned, the court held that although "[t]here may be some merit" to the petitioner's claim that the trial court

viction is valid for purposes of imposing its own pains and penalties — the 'worst' case — it is valid for all purposes.' "[99] The Fifth Circuit's only reference to *Baldasar* was a "*But cf.*" footnote in the earlier decision.[100] The failure to analyze *Baldasar*'s separate opinions suggests the court reached the wrong result.

In analyzing *Baldasar*'s opinions, it is perhaps easiest to begin with the dissent. Justice Powell concluded the prior uncounseled misdemeanor conviction could properly be used to impose an increased prison term because it was valid under *Argersinger* and *Scott.* The dissenters therefore certainly would allow a similarly valid uncounseled misdemeanor conviction to be used for subsequent sentencing purposes involving no enhanced penalty provision. On the other hand, the negative inference from the dissent is that a judgment violating *Argersinger* and *Scott* because the defendant was actually imprisoned for the prior offense cannot subsequently be used for sentencing.[101] This result conforms to the Court's decision holding a felony conviction obtained in violation of the defendant's right to counsel under *Gideon* cannot be considered in sentencing a defendant for a subsequent offense.[102]

Turning next to the *Baldasar* concurrences, as previously noted, Justice Stewart concluded *Scott* had been violated because the increased imprisonment was imposed only because the defendant had been previously convicted without counsel's assistance.[103] *Scott* would also be violated if a prior uncounseled misdemeanor conviction were used in the sentencing situation described above. This concurring opinion can be read to require that no prior uncounseled misdemeanor conviction be used for subsequent sentencing when it would lead to a prison term that would not otherwise be imposed.

It is more difficult, however, to determine whether Justice Marshall's concurrence in *Baldasar* supports this result. At one point his opinion emphasized that Baldasar's sentence would not have been authorized but for the prior conviction.[104] This of course is not the case when a prior uncounseled misdemeanor conviction is used for sentencing purposes without an enhanced penalty provision. In this situation the total term of imprisonment, including the increased term, could have been imposed without the prior uncounseled misdemeanor conviction. In addition, Justice Marshall apparently limited his decision to cases using the prior conviction for sentence enhancement "under a repeat-offender statute."[105]

Perhaps the most limiting aspect of Justice Marshall's opinion, however, was his footnote response to Justice Powell's contention[106] that the Court's

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erred in allowing it to be considered for sentencing purposes, "such error, if any, was harmless beyond a reasonable doubt." *Id.* at 1159-60.

99. *Id.* at 1159 (quoting Griffin v. Blackburn, 594 F.2d 1044, 1046 (5th Cir. 1979)).

100. The court stated, "But cf. *Baldasar v. Illinois* . . . for placing a special exclusion on the introduction of such evidence at the punishment stage of a trial." 625 F.2d at 1159.

101. *But see supra* note 82.

102. United States v. Tucker, 404 U.S. 443 (1972).

103. 446 U.S. at 224 (Stewart, J., concurring).

104. *Id.* at 227 (Marshall, J., concurring).

105. *Id.* at 228.

106. *See id.* at 234-35 (Powell, J., dissenting).

decision would have a drastic economic impact on state and local governments. Justice Marshall first pointed out not all misdemeanor defendants are indigent and those who are would in any even be provided counsel at their first trial, unless the state did not seek a jail term. He further responded not all subsequent offenses may be enhanced, nor are all prior offenses designated as predicate offenses subject to enhancement. The Justice then concluded, "the number of cases in which the State must decide whether to provide counsel solely to preserve its ability to enhance a subsequent offense will be only a fraction of the total."[107] Clearly this reasoning would not be as responsive to Justice Powell's concerns if Justice Marshall intended his opinion to encompass the situation where a prior uncounseled misdemeanor conviction is sought to be used for sentencing purposes. Otherwise, the state would be required to decide in all cases whether to provide counsel to an indigent misdemeanor defendant, solely to preserve its ability to aggravate a subsequent sentence for another offense.

Despite this evidence of the limited scope of Justice Marshall's *Baldasar* opinion, other portions of the opinion indicate it shuld be read broadly. Justice Marshall recognized the prior uncounseled misdemeanor conviction subsequently used under the enhanced penalty provision directly deprived the accused of his liberty for a longer period than the subsequent crime alone authorized. He reasoned this violated the essence of *Argersinger*, that an uncounseled conviction is too unreliable to support imprisonment. The same can be said, however, when a judge relies upon a prior conviction to extend the defendant's imprisonment for another offense without an enhanced penalty provision. As in *Baldasar*, the defendant must serve additional time solely because of the unreliable prior conviction.[108]

Justice Marshall agreed with Justice Brennan's dissent in *Scott*.[109] In *Scott*, Justice Brennan took the position "an 'authorized imprisonment' standard that would require the appointment of counsel for indigents accused of any offense for which imprisonment for any time is authorized"[110] is superior to the Court's actual imprisonment standard. Given Justice Marshall's statement in *Baldasar*, he likely did not intend his opinion to be restricted to *Baldasar*'s narrow factual setting involving an enhanced penalty provision. Justice Marshall's sweeping conclusion in *Baldasar* that "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases"[111] supports a broad interpretation. His references to the fact that the petitioner's sentence exceeded that which would have been authorized absent the repeat-offender statute was necessary only to show how his broader

107. *Id.* at 229 n.3 (Marshall, J., concurring). The Justice concluded by observing, "[i]n many of those remaining cases, the judgment whether future misconduct is likely, and whether the first offense is serious enough to warrant its use for enhancement, will be a relatively easy exercise of prosecutorial discretion." *Id.*

108. *Id.* at 227.

109. *Id.* at 225.

110. 440 U.S. 367, 382 (1979) (Brennan, J., dissenting).

111. 446 U.S. at 228-29 (Marshall, J., concurring).

rule applied under *Baldasar*'s specific facts.[112] Justice Marshall's opinion thus can be read to preclude the use of a prior uncounseled misdemeanor conviction whenever, as in the sentencing situation, the defendant would be deprived of his liberty because of that prior conviction. The subsequent imprisonment resulting from the prior conviction is the crucial factor; it should make no difference what punishment was authorized for the prior offense or whether the defendant was actually imprisoned.[113]

Justice Blackmun in *Baldasar* made clear that he too would not allow a prior uncounseled misdemeanor conviction that actually resulted in imprisonment to be used for subsequent sentencing purposes. Under his test, however, a prior conviction for an offense punishable by imprisonment for six months or less, for which the defendant was not actually imprisoned, would apparently be valid. Presumably, the conviction could therefore be used for subsequent sentencing even if it increased the accused's term of imprisonment.

At least five,[114] and possibly all nine, justices in *Baldasar* intended to preclude a sentencing authority from using any prior uncounseled misdemeanor conviction for which the defendant was actually imprisoned as a basis for increasing a term of imprisonment. The opinions representing a majority of the Court can also be read to prohibit such use of a prior uncounseled conviction when the offense is punishable by more than six months' imprisonment, even if the accused was not actually imprisoned for that offense.[115] When the accused, however, was not actually imprisoned for the prior offense and the authorized punishment for that offense did not exceed six months' imprisonment,

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112. Undue weight should not be given Justice Marshall's response to Justice Powell's expression of concern about the economic impact of the Court's judgment in *Baldasar*. See *supra* text accompanying notes 106-07. Justice Marshall's remarks, which appeared in a footnote, 446 U.S. at 229 n.3, were not essential to his conclusion. Justice Marshall dismissed any argument based on economic cost, stating: "[I]t cannot outweigh the Sixth Amendment command that no one may be imprisoned as a result of a conviction in which he was denied the assistance of counsel." *Id.*

113. Such imprisonment would, under United States v. Tucker, 404 U.S. 443 (1972), present an even stronger case for prohibiting the subsequent use of the conviction for sentencing purposes.

114. Justices Stewart, Marshall, Brennan, Stevens, and Blackmun, whose bright-line test would clearly prohibit this use.

115. This apparently was the case in Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), and Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981). The court in *Wilson*, discussed *supra* in note 98, did not mention the statutorily authorized penalty for the misdemeanor of unlawfully carrying a pistol, nor did it state when the petitioner had been convicted. Since the successor statute to the one in *Wilson* is a Class A misdemeanor punishable by confinement in jail for up to one year and/or a fine of up to $2,000, *see* TEX. PENAL CODE ANN. §§ 46.02 ("unlawfully carrying weapons") & 12.21 (Vernon 1974) the earlier statute likely provided for an imprisonment term greater than six months. *See* Ruiz v. State, 368 S.W.2d 609 (Tex. Crim. App. 1963) (defendant sentenced to one year in jail upon conviction for offense of unlawfully carrying a pistol).

The court in *Thompson* merely stated the petitioner had been convicted in 1963 of unlawfully possessing dangerous drugs, without specifying the precise section of the Texas Penal Code Thompson had violated. Assuming that it was the predecessor of TEX. ANN. CIV. STAT. art. 4476-14 (Vernon 1976), that provision authorized a first offense fine of up to $3,000 or imprisonment for from 30 days to two years, or both. *Id.*, Historical Note on § 15.

a majority of the *Baldasar* Court[116] would allow this collateral use of the prior uncounseled misdemeanor conviction. This result contradicts the underlying rationale of *Argersinger* and *Scott*. The effect of using prior uncounseled misdemeanor convictions in a subsequent sentence determination is the same as using it under an enhancement statute: the defendant is imprisoned or his length of imprisonment is exacerbated by a constitutionally invalid prior conviction. Accordingly, the suggested prohibition against the use of all such convictions with enhancement statutes may be equally applicable in the sentencing situation.

Impeaching the Defendant's Testimony at Subsequent Trial for Another Offense

As a general rule of evidence, it is permissible to impeach a witness by showing that he has been convicted of a misdemeanor involving dishonesty or false statement.[117] Some jurisdictions go even further and permit the use of any misdemeanor conviction, or at least one involving "moral turpitude," for this purpose.[118] When the prior conviction was uncounseled, however, its validity for impeachment is uncertain.

Prior to *Baldasar*, lower courts addressing this issue unanimously concluded a prior uncounseled misdemeanor conviction actually resulting in imprisonment could not be used to impeach the defendant's credibility at trial for another offense.[119] Courts generally reasoned such convictions were constitutionally tainted under the Supreme Court's decision in *Loper v. Beto*,[120] which prohibited impeachment use of prior uncounseled felony convictions. Most courts reached a contrary result if the accused was not actually imprisoned for the prior misdemeanor, although he was incarcerated for the subsequent offense.[121] These latter cases appear to adopt the *Baldasar* dissent's rationale

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116. The four *Baldasar* dissenters and Justice Blackmun.

117. FED. R. EVID. 609(a); ARIZ. R. EVID. 609(a); FLA. STAT. § 90.610(1) (1981); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 272 (1977). Some jurisdictions, however, allow only felony convictions to be used for impeachment purposes. *E.g.*, CAL. EVID. CODE §§ 787 & 788 (West 1966).

118. C. MCCORMICK, EVIDENCE § 43 (Cleary ed. 1972).

119. Twyman v. Oklahoma, 560 F.2d 422 (10th Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978) (harmless error); Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976); Harrison v. Benton, 430 F. Supp. 717 (W.D. Okla. 1976) (harmless error); People v. Carter, 72 Ill. App. 3d 871, 391 N.E.2d 427 (1979); Commonwelath v. Cook, 371 Mass. 832, 359 N.E.2d 949 (1977). *See also* Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975) (state cannot bring up defendant's prior uncounseled misdemeanor conviction during cross-examination of defendant's character witness at pre-sentence hearing).

120. 405 U.S. 473 (1972).

121. Griffin v. Blackburn, 594 F.2d 1044 (5th Cir. 1979) (permissible); People v. Heal, 20 Ill. App. 3d 965, 313 N.E.2d 670 (1974) (permissible) (dictum); Commonwealth v. Barrett, 3 Mass. App. Ct. 8, 322 N.E.2d 89 (1975) (impermissible); Aldrighetti v. State, 507 S.W.2d 770 (Tex. Crim. App. 1974) (permissible); State v. Meyer, 26 Wash. App. 119, 613 P.2d 132 (1980) (permissible) (dictum).

In Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976), the court held that such prior uncounseled convictions cannot be used for subsequent impeachment purposes. It did so only after adopting the "authorized imprisonment" standard subsequently rejected by the *Scott*

that a prior conviction if constitutionally valid under *Argersinger* is constitutionally valid for *all* purposes. Another explanation for this result is simply that a prior conviction used for impeachment rather than enhancement is less likely to end in imprisonment.[122]

Neither of these rationales is convincing. That the prior uncounseled conviction might be valid under *Argersinger* is irrelevant. The constitutional standard of *Argersinger* and *Scott* recognizes an uncounseled misdemeanor conviction is too unreliable to support the sanction of imprisonment. Thus, such a conviction is only valid for purposes that do not result in the deprivation of liberty. It should make no difference whether the uncounseled misdemeanor conviction immediately leads to imprisonment, as in *Argersinger*, or whether it does so upon conviction for another offense.[123]

The crucial question is whether a prior conviction may have such a sig-

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Court and implicitly concluding the prior uncounseled misdemeanor convictions were invalid. *See also* Agee v. Wyrick, 546 F.2d 1324 (8th Cir. 1976) (unclear whether defendant had been imprisoned for prior conviction; held, if error, harmless); Buford v. State, 515 P.2d 382 (Alaska 1973) (unclear whether court adopted authorized imprisonment standard or defendant had been imprisoned); State v. Bernard, 326 So. 2d 332 (La. 1976) (same unclarity as in *Buford*).

122. The dissenting judge in the lower court's decision in *Baldasar* took this position. People v. Baldasar, 52 Ill. App. 3d 305, 312-14, 367 N.E.2d 459, 465-66 (1977) (dissenting opinion). He felt the prior uncounseled misdemeanor conviction valid under *Argersinger* could not be used under the enhancement provision involved in that case to increase the defendant's period of confinement for the subsequent offense. The dissenting judge attempted to distinguish that situation from one where the prior conviction is used for impeachment purposes:

> [I]n the instant case, two years of (potential) extra imprisonment are the direct result of the earlier conviction. In the *Aldrighetti* case, where the misdemeanor was introduced for impeachment purposes, the link between the prior conviction and the defendant's imprisonment was quite remote, or even speculative; it was impossible to state that "but for" the earlier conviction, the defendant would not have gone to jail, or would have received a lesser sentence . . . . Clearly, in the instant case, imprisonment is a far more direct consequence of the use of the earlier conviction than would be the case in cases involving . . . impeachment.

Id. at 313, 367 N.E.2d at 465 (dissenting opinion). The reference is to Aldrighetti v. State, 507 S.W.2d 770 (Tex. Crim. App. 1974), which the majority of the Illinois Appellate Court in *Baldasar* relied upon. In *Aldrighetti* the defendant was convicted of aggravated assault upon a charge of assault with intent to murder, and was sentenced to serve 18 months in the county jail. On appeal he contended the trial court erred in allowing him to be impeached through cross-examination about a prior misdemeanor conviction that resulted in a $100 fine, which he claimed was obtained absent counsel while he was indigent. The Texas court rejected this claim, stating prior uncounseled convictions are admissible for impeachment purposes in subsequent proceedings "so long as the punishment assessed in the prior convictions did not include imprisonment." *Id.* at 772.

123. As the court stated in Commonwealth v. Barrett, 3 Mass. App. Ct. 8, 322 N.E.2d 89 (1975): "It would subvert the Court's purpose to allow imprisonment to result indirectly from uncounseled misdemeanor trials . . . . Since the Court prohibited imprisonment based upon an unreliable conviction obtained at an unfair trial, the Court would probably not permit unreliable trials to have a delayed impact resulting in imprisonment." *Id.* at 14, 322 N.E.2d at 93, *quoting* Note, 35 OHIO ST. L.J. 168, 183-84 (1974). For a discussion of *Barrett*, see *infra* text accompanying notes 132-33.

nificant impact when used to impeach a defendant's testimony that it results in his imprisonment upon conviction for a subsequent offense.[124] Undoubtedly, the use, or even threatened use,[125] of a prior conviction for impeachment can significantly impact on a trial's outcome. As the *Loper* plurality pointed out, " 'the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt.' "[126] This is true even though the prior conviction really says little about the defendant's credibility because of its inherent unreliability.[127] For example, in one Massachusetts case,[128] the defendant, who had been charged with murder, testified that he acted in self-defense. To rebut this claim the state attempted to establish on cross-examination that the accused had a propensity for fighting. The state introduced evidence showing that on three prior occasions he was convicted of assault and battery. In addition the state sought to impeach his testimony. The appellate court held it was error to allow the impeachment use of these convictions obtained in the absence of counsel, even though the defendant had not been imprisoned for any of them.[129]

Even in a case in which the prior misdemeanor conviction is unrelated to the offense currently charged, it is likely the factfinder will give less weight to the defendant's testimony because of his prior conviction. This is precisely the purpose of impeachment evidence. Moreover, there will be cases in which the factfinder would have believed th defendant's testimony and found in his favor but for the impeaching evidence. If this is true, and the conviction that might not otherwise have occurred results in imprisonment,[130] then the prior uncounseled misdemeanor conviction which did not initially cause imprisonment has subsequently done so.[131]

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124. The dissenting judge in the Illinois Appellate Court's *Baldasar* decision seems to answer this question in the negative. *See supra* note 122.

125. *See infra* note 131.

126. 405 U.S. at 483 (plurality opinion) (quoting Gilday v. Scafati, 428 F.2d 1027, 1029 (1st Cir.), *cert. denied*, 400 U.S. 926 (1970)).

127. *See* Aldrighetti v. State, 507 S.W.2d 770, 775 (Tex. Crim. App. 1975) (opinion concurring in part and dissenting in part).

128. Commonwealth v. Barrett, 3 Mass. App. Ct. 8, 322 N.E.2d 89 (1975).

129. The defendant had been sentenced to fines of $50, $100, and $150, respectively, for these convictions. *Id.* at 9, 322 N.E.2d at 90. The court concluded the introduction of the convictions might have influenced the jury and stated: "The assault and battery convictions indicated a predisposition to violence of the same general nature, though different in degree, as the crime with which the defendant was charged. They clearly struck at the credibility of the defense and contributed to the Commonwealth's contention." *Id.* at 16-18, 322 N.E.2d at 94-95. The court reached this result despite the fact that the defendant had also been impeached by a prior valid conviction for burglary. *Id.* at 9 n.2, 322 N.E.2d at 90 n.2.

130. *Cf.* Carey v. Zayre of Beverly, Inc., 367 Mass. 125, 324 N.E.2d 619 (1975) (prior uncounseled misdemeanor conviction for which the defendant was not imprisoned used to impeach his testimony in a subsequent *civil* trial brought by the criminal defendant deemed harmless error).

131. Note that in addition, a defendant who is afraid of the impact the prior uncounseled conviction may have upon the factfinder may make the tactical decision not to testify, especially where the prior conviction is for the same, or a similar, offense. The defendant, however, may misjudge the degree of harm that the prior conviction would cause to his case and the factfinder may convict him when it would not have done so had it heard his testimony, even considering impeaching evidence of the prior misdemeanor convictions. If

It may be extremely difficult in a particular case to make an after the fact determination of whether the subsequent conviction and imprisonment resulted from using the prior conviction for impeachment.[132] Because it may be even more difficult to make this determination in advance, a per se rule is required. This rule should prohibit the use of a prior uncounseled misdemeanor conviction to impeach the defendant, unless at some time prior to the admission of the conviction the trial judge determines that even if the defendant is convicted, he will not be sentenced to prison.[133] Only with such a rule can courts ensure a defendant will not be imprisoned because of his impeachment by a prior uncounseled conviction.[134]

When analyzed in terms of previous Supreme Court decisions, *Baldasar* indicates that at least when the defendant was actually imprisoned for the prior offense, the uncounseled conviction cannot subsequently be used for impeachment. Such a conviction would clearly be invalid under Justice Blackmun's bright-line test and presumably could not be used collaterally to support guilt by impeaching the defendant's credibility. The *Baldasar* dissent's emphasis upon the validity of the prior uncounseled conviction and sentence under *Argersinger*, in conjunction with *Loper*'s proscription against the use of a prior uncounseled felony conviction for impeachment, would appear to bar the use of a prior uncounseled misdemeanor conviction for which the defendant was imprisoned to impeach a criminal defendant's credibility.[135]

It is more difficult to apply the *Baldasar* opinions of Justice Marshall and Justice Stewart in the impeachment situation because they emphasized the causal connection between the prior conviction and the defendant's ultimate imprisonment. This connection is arguably more remote when the prior conviction is used for impeachment rather than sentence enhancement. Nevertheless, if impeachment use of such prior uncounseled conviction is considered in light of the Court's decisions involving felonies,[136] these concurring opinions might be read to preclude their use.[137]

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this subsequent conviction results in a prison sentence, the prior uncounseled misdemeanor conviction will have contributed to the defendant's imprisonment.

132. *See supra* note 122.

133. *Cf. Argersinger*, 407 U.S. 25 (1972).

134. The very factors that make some uncounseled misdemeanor convictions constitutional exacerbate their unreliability for impeachment use. The convictions *Scott* and *Argersinger* validate are more unreliable as evidence of the defendant's credibility than are invalid convictions. The triviality of the offense, as evidenced by its minimal sanction, rarely provides exhaustive and accurate factfinding, especially when the defendant is uncounseled.

135. *But see supra* note 82.

136. *See* Loper v. Beto, 405 U.S. 473 (1972) (discussed at *supra* note 13 and accompanying text); United States v. Tucker, 404 U.S. 443 (1972) (discussed at *supra* note 12 and accompanying text); Burgett v. Texas, 389 U.S. 109 (1967) (discussed at *supra* note 11 and accompanying text).

137. This was the result reached by the Fifth Circuit in Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980), *cert. denied*, 449 U.S. 996 (1981), apparently the only decision to address the issue since *Baldasar*. Without any mention of *Baldasar*, the court ruled that a prior "void" misdemeanor conviction, one for which the defendant was imprisoned in violation of *Scott*, may not properly be used subsequently for impeachment. The court, however, did not determine whether the habeas corpus petitioner's prior misdemeanor convictions were in fact

On the other hand, when the accused was not actually imprisoned for the prior uncounseled conviction and the authorized punishment for the offense did not exceed six months' imprisonment, both Justice Blackmun's opinion and Justice Powell's opinion for the four dissenters would allow its impeachment use in a subsequent criminal prosecution. The dissenters would allow such a use solely because the prior conviction, albeit uncounseled, was constitutionally valid under *Argersinger* and *Scott,* and Justice Blackmun would permit this use because it was constitutionally valid under his bright-line test. This result, however, is inconsistent with the rationale of *Argersinger* and *Scott* when the use of the prior conviction for impeachment leads to conviction and imprisonment that otherwise might not have occurred.

The result called for by *Baldasar* in cases in which the defendant was not actually imprisoned for the prior offense, but involving authorized imprisonment exceeding six months, is the most difficult to determine. Although Justice Blackmun's bright-line test would prohibit the use of the prior conviction for impeachment, the four *Baldasar* dissenters would clearly allow impeachment because the conviction was valid under *Argersinger* and *Scott.* Justice Marshall's opinion could be read broadly to prohibit such impeachment when it would have such an impact on the defendant's trial that his subsequent conviction and imprisonment would result "[s]olely because of the previous conviction."[138] It is possible, however, that Justice Marshall's opinion is limited to situations in which the causal connection between the uncounseled conviction and the defendant's imprisonment is more direct. Instances involving an enhanced penalty provision or, perhaps, reliance by a judge on the prior conviction in imposing a subsequent sentence seem to fulfill the causal requirement. Because the causal link between evidentiary use of an uncounseled conviction and imprisonment is more remote, however, Justice Marshall might not allow such impeachment use if the defendant was not imprisoned for the prior conviction. In that case, a majority of the Court would favor this result, despite its inconsistency with the rationale of *Argersinger* and *Scott.*

Justice Stewart's concurring opinion gives little indication of how it should apply in the impeachment situation. Justice Stewart concluded in *Baldasar* the increased prison term was imposed "*only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense."[139] Like Justice Marshall's opinion, it is unclear how direct the causal relationship must be before the imprisonment can be said to have resulted only because of the prior uncounseled conviction. Unlike Justice Marshall's opinion, there is no indication Justice Stewart's opinion should be read broadly; in fact, his agreement with *Scott* might indicate his *Baldasar* opinion should be read narrowly. Such a narrow reading would not bar the impeachment use of a prior uncounseled misdemeanor conviction that did not directly cause the defendant's imprisonment. This would mean that regardless

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void because it concluded even if they were, their admission into evidence to impeach the defendant was harmless error. 622 F.2d at 126.

138. 446 U.S. at 222 (Marshall, J., concurring). *See supra* notes 57-59 and accompanying text; *infra* notes 167-70 and accompanying text.

139. 446 U.S. at 224 (Stewart, J., concurring).

of how Marshall's opinion is interpreted, the opinions representing a majority of the Court in *Baldasar*[140] could be read to allow this impeachment use. Nevertheless, the uncertainty created by the opinions of Justices Marshall and Stewart indicate that *Baldasar* is simply not dispositive of the issue in this situation.

Revoking Probation, Parole, or Suspended Sentence

In the American criminal justice system a guilty party often is sentenced to a specified period of probation[141] or is given a suspended sentence[142] as an alternative to confinement. If the convicted defendant is incarcerated, it is not uncommon for him to be released on parole prior to the expiration of his sentence.[143] In each of these situations the sentencing judge or the parole board conditions the defendant's freedom upon his observing specified requirements.[144] One typically imposed condition requires that a probationer[145] or parolee "not violate any criminal statute of any jurisdiction."[146] Violation of this condition may lead to revocation of a defendant's probation, suspended sentence, or parole.[147] The state will frequently prove such a violation by showing that the probationer or parolee was convicted of committing a criminal offense while on probation or parole. Since a misdemeanor conviction can normally be used to revoke probation, parole, or a suspended sentence, it must

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140. The four *Baldasar* dissenters and Justice Stewart.

141. *See, e.g.*, ARK. STAT. ANN. §§ 41-803 (Supp. 1981) & 41-1205 (1977); ILL. REV. STAT. ch. 38, § 1005-5-3(b)(1) (1981); N.J. REV. STAT. ANN. § 2C:43-2(b)(2) & (4) (West Supp. 1981); N.Y. PENAL LAW § 60.01(2)(a)(i) & (c) (McKinney 1977). Some jurisdictions suspend the imposed sentence and substitute a term of probation. *See, e.g.*, ALASKA STAT. § 12.55.085 (1980); FLA. STAT. § 948.01(3) (1981).

142. *See, e.g.*, GA. CODE ANN. § 27-2709(c) (Supp. 1981); N.M. STAT. ANN. § 31-20-3 (1978); OKLA. STAT. ANN. tit. 22, § 991a (West Supp. 1981); S.D. CODIFIED LAWS ANN. § 23A-27-18 (1979). The trial judge in some jurisdictions has discretion to place the defendant on probation during the term of the suspended sentence. *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 991a (West Supp. 1981); N.M. STAT. ANN. § 31-20-5 (1978). In others he is required to do so. *See, e.g.*, ALASKA STAT. § 12.55.080 (1980); MASS. GEN. LAWS ANN. ch. 279, § 1 (West 1981); WIS. STAT. ANN. § 973.09 (West 1971 & Supp. 1981).

143. *See, e.g.*, FLA. STAT. § 947.16 (1981); LA. REV. STAT. ANN. § 15-574.4 (West 1981 & Supp. 1982); MINN. STAT. ANN. § 609.12 (West Supp. 1982).

144. *See, e.g.*, ARK. STAT. ANN. § 41-1203 (1977); GA. CODE ANN. § 27-2711 (1978); ILL. REV. STAT. ch. 38, § 1005-6-3 (1981); N.J. REV. STAT. ANN. § 2C:45-1 (1981 Pamphlet). The Illinois statute, allows the court to require, among other things, that the probationer "work or pursue a course of study or vocational training," that he "undergo medical or psychiatric treatment; or treatment for drug addiction or alcoholism," that he "attend or reside in a facility established for the institution or residence of defendants on probation." ILL. REV. STAT. ch. 38, § 10005-5-3(b)(1) (1981).

145. For convenience, the text will hereafter refer to a defendant who is placed on probation or whose sentence is suspended as a probationer.

146. ILL. REV. STAT. ch. 38, § 1005-6-3(a)(1) (1981). *Accord* ARK. STAT. ANN. § 41-1203(1) (1977) ("not commit an offense punishable by imprisonment during the period of suspension or probation"); GA. CODE ANN. § 27-2711 (1978) ("violate no local, State or Federal laws").

147. *See, e.g.*, ARK. STAT. ANN. § 41-1208 (1977); GA. CODE ANN. § 27-2713 (1978); ILL. REV. STAT. ch. 38, § 1005-6-4 (1981).

be determined whether such use of a prior uncounseled misdemeanor conviction is proper.

As with the collateral uses discussed earlier, in some factual settings using the prior conviction at a hearing to revoke the defendant's probation, suspended sentence, or parole can lead to the defendant's imprisonment. In *People v. McCarty*,[148] for example, the defendant was convicted of felony theft and sentenced to fourteen days in jail, a $300 fine, and thirty months' probation. When charged with shoplifting while on probation, the defendant pled guilty without representation and without waiving that assistance. At an ensuing probation revocation hearing, the state relied solely upon the uncounseled misdemeanor conviction to prove the defendant had violated the terms of his probation. Based on this evidence, the court revoked the defendant's probation and sentenced him to two years' imprisonment for the original felony theft conviction. On appeal, the court accepted the defendant's contention that the state could not use the uncounseled misdemeanor conviction to revoke his probation, because it failed to prove he had waived counsel's assistance. In reversing the order revoking probation, the court cited *Baldasar* and described the state's action as an attempt to convert probation into imprisonment solely because of an uncounseled misdemeanor conviction.[149]

This result is sound. Where the only evidence supporting a finding that the defendant violated the terms of his probation, parole, or suspended sentence is the uncounseled misdemeanor conviction, it is clear the defendant would not have lost his freedom but for that unreliable conviction. But *Argersinger* and *Scott* preclude imprisonment based upon such unreliable convictions.[150] The

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148. 101 Ill. App. 3d 355, 427 N.E.2d 1382 (1981).

149. *Id.* at 358, 427 N.E.2d at 1385. In reaching this result the court stated:

> [T]he State seeks to revoke the defendant's probation solely on the basis of the record of the uncounseled misdemeanor conviction. In essence, the State seeks to increase the penalty imposed for the felony-theft conviction — 30 months probation — to two years in prison, because the defendant was convicted of a misdemeanor in which trial he was unrepresented by an attorney. The fact that the uncounseled conviction occurred after the counseled conviction is not constitutionally significant under the sixth and fourteenth amendments.

Id. This same result was reached in the pre-*Baldasar* cases of State v. Ellison, 26 Ariz. App. 547, 550 P.2d 101 (1976) (revocation of probation); Alexander v. State, 258 Ark. 633, 527 S.W.2d 927 (1975) (revocation of suspended sentence); State v. Harris, 312 So. 2d 643 (La. 1975) (revocation of probation). *See also* People v. Brooks, 16 Mich. App. 759, 168 N.W.2d 658 (1969), a pre-*Argersinger* case in which the defendant had been placed on three years' probation following his conviction for robbery. While on probation he pled guilty to the misdemeanor of malicious destruction of property. At an ensuing probation revocation hearing the defendant pled guilty to the violation and the court revoked his probation and sentenced him to a term of from 10 to 15 years. In holding that the accused was entitled to counsel at his misdemeanor trial because of the conviction's potential collateral use, the court stated: "The defendant in this case was sentenced to a term of 10 to 15 years imprisonment *as a direct result of his misdemeanor conviction* for malicious destruction of property . . . . [Therefore,] the defendant in this case was entitled, if indigent, to the assignment of counsel at his misdemeanor trial." *Id.* at 761, 168 N.W.2d at 659 (emphasis added). *Accord* Clay v. Wainwright, 470 F.2d 478, 481 (5th Cir. 1972).

150. Nor does it matter whether the defendant was imprisoned for the prior offense.

fact that the imprisonment is imposed in a subsequent revocation proceeding at which the defendant's counsel had the opportunity to present defenses and mitigating evidence,[151] does not alter the imprisonment effect of the prior conviction. Although some courts allow a conviction constitutionally valid when rendered, because it did not directly result in imprisonment to be used to revoke probation, parole, or a suspended sentence.[152] Under *Argersinger* and *Scott*, such a conviction is valid only if it does not result in the defendant's imprisonment, contrary to the situation in question.[153] It must be concluded an uncounseled misdemeanor conviction cannot be used as the sole

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Although both *McCarty*, discussed *supra* in the text accompanying notes 148-149, and *Ellison*, 26 Ariz. App. 547, 550 P.2d 101 (1976), involved misdemeanor convictions for which the defendant was imprisoned, neither court based its decision on that fact. Indeed, in State v. Flores, 27 Ariz. App. 202, 552 P.2d 1217 (1976), the court, in discussing *Ellison*, did not indicate it was relevant that the uncounseled misdemeanor conviction had directly resulted in the defendant's imprisonment. Rather, it broadly characterized *Ellison* as holding "revocation of probation and imposition of sentence could not be based solely on the record of conviction in another court when the record did not sufficiently establish a waiver of counsel." *Id.* at 203, 552 P.2d at 1218.

151. In People v. Olah, 90 Mich. App. 403, 282 N.W.2d 335 (1979), *rev'd*, 409 Mich. 948, 298 N.W.2d 422 (1980), *cert. denied*, 450 U.S. 957 (1981), the appellate court conceded that the defendant's uncounseled misdemeanor convictions "were the cause of the revocation of defendant's probation, and the revocation of probation resulted in the sentence of imprisonment." But it then concluded this did not render them infirm because:

> Revocation of defendant's probation was by no means the inevitable result of the misdemeanor convictions. Defendant's probation was revoked only after a hearing at which he was afforded the opportunity to present evidence in his defense or in mitigation of the apparent violation of which he was accused. Defendant was afforded assistance of counsel at this hearing, as well as at his trial on the original felony charge. At every stage of the proceedings at which he could have suffered the penalty of imprisonment, therefore, defendant had his constitutional right to counsel.

Id. at 406-07, 282 N.W.2d at 336. It should be noted that neither a probationer nor a parolee has an absolute constitutional right to counsel at a revocation hearing, Gagnon v. Scarpelli, 411 U.S. 778 (1973), unless it is a combined revocation and deferred sentencing proceeding. Mempa v. Rhay, 389 U.S. 128 (1967).

152. *See* Cottle v. Wainwright, 477 F.2d 269 (5th Cir.), *vacated on other grounds*, 414 U.S. 895 (1973) (revocation of parole); People v. Olah, 90 Mich. App. 403, 282 N.W.2d 335 (1979), *rev'd*, 409 Mich. 948, 298 N.W.2d 422 (1980), *cert. denied*, 450 U.S. 957 (1981); State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (Ct. App. 1980). *See also* People v. Cangelosi, 68 Ill. App. 3d 489, 386 N.E.2d 295 (1979), where the court, after labeling any possible harm caused by the sentencing court's awareness of the uncounseled misdemeanor conviction harmless beyond a reasonable doubt, said: "A proper conviction is not retroactively invalidated because it may have a collateral effect in the future." *Id.* at 496, 386 N.E.2d at 301.

153. In Alexander v. State, 258 Ark. 633, 527 S.W.2d 927 (1975), the court stated:

> [O]ne can syllogistically reason that since a municipal court conviction without counsel and involving only a fine is permitted under *Argersinger v. Hamlin*, then the conviction is valid and can be used collaterally to revoke a suspended sentence, even though the proximate effect of the conviction . . . is to send the indigent to prison for ten years. This line of reasoning, of course, would soon vitiate the theory on the right to counsel as stated in *Argersinger* . . . , and would appear to be contrary to the last paragraph of the opinion . . . .

Id. at 636, 527 S.W.2d at 929.

basis to revoke a defendant's probation, parole, or suspended sentence, as it would then be unconstitutional because of the resulting imprisonment.

This reasoning applies in any case in which such revocation would not have occurred but for the prior conviction. Consequently, the same result should obtain when the revocation is only partly based upon the uncounseled misdemeanor conviction.[154] Since it would be extremely difficult to determine before the revocation hearing what effect the misdemeanor conviction would have if introduced, a per se rule prohibiting the admission of any uncounseled misdemeanor conviction should be adopted.[155] This rule would prevent such a conviction from leading to revocation, hence imprisonment.

Moreover, a per se rule would not unfairly harm the state. The conviction is by definition unreliable. Consequently, if it were used as a basis for revocation, it would be improper. If the revocation is for reasons independent of the prior conviction, its exclusion would not cause the court or parole board to reach a different result than it would otherwise reach.[156] Even in cases involving a condition that the person not violate the criminal law of any jurisdiction,[157] the state would not be disadvantaged, because the state need not prove the person was convicted of a criminal offense, but need only show the person engaged in conduct that constitutes a violation of the criminal law.[158]

The few courts considering this issue since *Baldasar* have done so in the context of probation revocation and have held *Baldasar* prohibits revocation

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154. *See* People v. Olah, 409 Mich. 948, 298 N.W.2d 422 (1980), *cert. denied*, 450 U.S. 957 (1981) (judgment revoking defendant's probation reversed because it had been "based in part" on two uncounseled misdemeanor or ordinance violations). *See also* People v. Powell, 89 Ill. App. 3d 801, 803, 412 N.E.2d 47, 48 (1980) (defendant's probation revoked on the basis of an uncounseled misdemeanor conviction and at least one failure to report to his probation officer; court stated that "defendant has presented a forceful argument . . . for extending the . . . rule of *Baldasar* . . . to a probation revocation hearing," but it declined to do so because it was unnecessary in light of another ground for reversal).

155. *See* People v. Cangelosi, 68 Ill. App. 3d 489, 496, 386 N.E.2d 295, 301 (1979), which arguably held that evidence of the uncounseled misdemeanor conviction should not have been admitted at the defendant's probation revocation hearing, but then found that "[a]ny possible harm caused by the court's awareness of the [conviction] would be harmless beyond a reasonable doubt." The court's opinion is confusing, however, because it went on to state that "[a] proper conviction is not retroactively invalidated because it may have a collateral effect in the future." *Id. But see* United States v. Marron, 564 F.2d 867 (9th Cir. 1977); Nicholson v. State, 56 Ala. App. 3, 318 So. 2d 744 (1975); Young v. State, 539 S.W.2d 850 (Tenn. Crim. App. 1976); and Cork v. State, 488 S.W.2d 83 (Tex. Crim. App. 1972), in which the courts, without any discussion of the issue, failed to adopt a rule such as that suggested in the text.

156. In Young v. State, 539 S.W.2d 850 (Tenn. Crim. App. 1976), for example, the parole board would have revoked parole for violation of the condition that the parolee "not use intoxicants of any kind to excess" even in the absence of the uncounseled misdemeanor conviction. *Id.* at 853.

157. *See supra* note 146.

158. *See* United States v. Marron, 564 F.2d 867, 871 (9th Cir. 1977); Nicholson v. State, 56 Ala. App. 3, 318 So. 2d 744 (1975); Alexander v. State, 258 Ark. 633, 636, 527 S.W.2d 927, 929 (1975); People v. McCarty, 101 Ill. App. 3d 355, 358, 427 N.E.2d 1382, 1385 (1981); People v. Cangelosi, 68 Ill. App. 3d 489, 496, 386 N.E.2d 295, 300 (1979); State v. Harris, 312 So. 2d 643, 644 (La. 1975); People v. Courtney, 104 Mich. App. 454, 457-58, 304 N.W.2d 603, 605 (1981); Cork v. State, 488 S.W.2d 83 (Tex. Crim. App. 1972).

based on an uncounseled misdemeanor conviction.[159] These courts concluded that under *Baldasar* a probation violation resulting in a prison sentence is an increase in the original sentence.[160] Although these courts were clearly correct in concluding *Baldasar* prohibited revocation under the particular facts of each decision, *Baldasar* does not compel this result in all cases.

In two cases[161] the probationer had been imprisoned as punishment for the uncounseled misdemeanor conviction, in violation of *Argersinger* and *Scott.*[162] Under Justice Blackmun's *Baldasar* opinion, such a conviction would be invalid and presumably inadmissible for any purpose that enhances punishment, which it does when used to revoke probation. The *Baldasar* dissent emphasized the validity of the uncounseled misdemeanor conviction which suggests the same conclusion.[163] Justices Stewart and Marshall likewise would probably prohibit this use. Justice Stewart reached his result in *Baldasar* because defendant was subjected to increased prison term only[164] because of the uncounseled misdemeanor conviction. Justice Marshall reached the same result because the increased term of imprisonment was imposed "[s]olely because of"[165] the prior conviction. When an individual is imprisoned because of probation, parole or suspended sentence revocation based upon an uncounseled misdemeanor conviction, the imprisonment occurs only because of, or solely because of, that uncounseled conviction. In addition, using Marshall's reasoning,[166] a conviction invalid for directly imposing a prison term is invalid for collaterally imposing a prison term.

In another post-*Baldasar* decision,[167] the probationer was not imprisoned

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159. *See* People v. McCarty, 101 Ill. App. 3d 355, 427 N.E.2d 1382 (1981); People v. Olah, 409 Mich. 948, 298 N.W.2d 422 (1980), *cert. denied,* 450 U.S. 957 (1981); People v. Courtney, 104 Mich. App. 454, 304 N.W.2d 603 (1981) (defendant "pled guilty" at probation revocation hearing following his uncounseled guilty plea to a misdemeanor). *See also* People v. Powell, 89 Ill. App. 3d 801, 802, 412 N.E.2d 47, 48 (1980) (defendant presented a "forceful argument" for extending *Baldasar* to a probation revocation hearing, but the court reversed the judgment on another ground).

160. People v. McCarty, 101 Ill. App. 3d 355, 358, 427 N.E.2d 1382, 1385 (1981); People v. Olah, 409 Mich. 948, 949, 298 N.W.2d 422 (1980); People v. Courtney, 104 Mich. App. 454, 456, 304 N.W.2d 603, 604 (1981) (relying upon *Olah*).

161. People v. McCarty, 101 Ill. App. 3d 355, 427 N.E.2d 1382 (1981); People v. Courtney, 104 Mich. App. 454, 304 N.W.2d 603 (1981).

162. In *McCarty,* the defendant was sentenced to three days in jail, with credit given for time served in custody, and to a $50 fine. In *Courtney,* the defendant was sentenced to two days' imprisonment. The court in *Courtney* stated that the defendant "pled guilty" at his probation revocation hearing. It could be argued revocation of the defendant's probation therefore was not based upon the uncounseled misdemeanor conviction, but the court did not analyze the case in this way, perhaps on the unstated premise that the defendant's "guilty plea" at the probation revocation hearing was the product of the uncounseled misdemeanor conviction. In neither *McCarty* nor *Courtney,* however, did the decisions turn on the prior imprisonment.

163. *But see supra* note 82.

164. 446 U.S. at 222 (Stewart, J., concurring).

165. *Id.* at 227 (Marshall, J., concurring).

166. *Id.* at 228-29.

167. People v. Olah, 409 Mich. 948, 298 N.W.2d 422 (1980), *cert. denied,* 450 U.S. 957 (1981).

for either the uncounseled misdemeanor conviction or the uncounseled ordinance violation that served as partial bases for his probation revocation. Nevertheless, the authorized penalty for one of those offenses apparently was imprisonment over six months,[168] rendering it invalid and presumably inadmissible for revocation purposes in Justice Blackmun's view. While the four *Baldasar* dissenters would presumably allow a valid uncounseled misdemeanor conviction to be used for collateral purposes that result in imprisonment, Justices Stewart and Marshall, representing the views of four justices, would not. In *Baldasar*, these concurring Justices prohibited the use of an uncounseled misdemeanor conviction for enhancement, even though it did not directly result in the defendant's imprisonment for that offense.[169] Thus, a majority of the Court[170] would prohibit the use of an uncounseled misdemeanor conviction for an offense punishable by more than six months imprisonment as a basis to revoke a defendant's probation, parole, or suspended sentence, regardless of whether the defendant was imprisoned for the prior offense.

Baldasar calls for a different result in cases where the prior offense's authorized penalty did not exceed six months' imprisonment. Here, Justice Blackmun would join the *Baldasar* dissenters in permitting this collateral use, since under his bright-line test the uncounseled conviction would be constitutionally valid and could be used collaterally even for a purpose that results in imprisonment. Thus, contrary to the underlying rationale of *Argersinger* and *Scott*, the opinions representing a majority of the *Baldasar* Court[171] would allow this collateral use of an uncounseled misdemeanor conviction directly resulting in imprisonment.

Revoking a Driver's License

Many states' statutes allow the revocation or suspension[172] of an individual's driver's license based upon a designated number of prior traffic offenses within a prescribed period of time.[173] The question thus arises whether a prior traffic offense conviction can constitutionally be used for such a purpose if it was obtained in a trial at which the defendant did not have the assistance of counsel.[174] Most courts have answered this question affirmatively, without re-

168. The defendant was convicted in 1975 of violating the Michigan Controlled Substances Act. The current version of that Act, which was adopted in 1978, provides penalties of more than six months' imprisonment for almost all violations that constitute misdemeanors. MICH. COMP. LAWS ANN. §§ 333.7403(2)(c) & (d), .7404(2)(a) & (b), .7406, .7410(2) (1980). *But see* MICH. COMP. LAWS ANN. §§ 333.7404(2)(c) & (d), .7411 (1980).

169. *See supra* notes 55-59 and accompanying text.

170. Justices Blackmun, Stewart, Marshall, Brennan, and Stevens.

171. The four *Baldasar* dissenters and Justice Blackmun. The opinions of Justices Stewart and Marshall would seem to require a different result.

172. For convenience, the text will hereafter only discuss the situation involving the revocation of an individual's driver's license. The same principles would apply, however, to the suspension of a person's driver's license.

173. *E.g.*, COLO. REV. STAT. § 42-2-201 (1973 & Supp. 1981); LA. REV. STAT. ANN. § 32:1471 (West Supp. 1982); OR. REV. STAT. § 484.700 (Supp. 1981); VA. CODE § 46.1-387.1 (1980).

174. This question should be distinguished from the question whether a defendant in a

gard to whether the defendant was actually imprisoned for the prior traffic offense conviction.[175] These courts reason that because revocation is a civil penalty resulting at most in the loss of the defendant's driver's license, it is not governed by *Argersinger*.[176] Most of these courts also emphasized the im-

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driver's license revocation proceeding has a constitutional right to counsel. Courts have consistently held no right to counsel exists in this latter situation, reasoning the proceeding can result only in the revocation of the defendant's driver's license, not his imprisonment. They similarly reject the argument that "because the revocation proceedings provide a basis for the subsequent prosecution for the crime of driving without a license or permit, they must be deemed an integral and essential part of that prosecution." Ferguson v. Gathright, 485 F.2d 504, 506 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974). *Accord* Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974); People v. McKnight, 617 P.2d 1178 (Colo. 1980); State v. Rhoades, 54 Or. App. 254, 634 P.2d 806 (1981); State v. Durnell, 16 Wash. App. 500, 558 P.2d 252 (1976).

175. *See* Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) (habeas corpus petitioner had been imprisoned for pre-*Argersinger* traffic offense conviction, held: *Argersinger* does not apply retroactively in this situation); Hensley v. Ranson, 373 F. Supp. 88 (E.D. Va. 1974) (plaintiff had been imprisoned for pre-*Argersinger* traffic offense conviction, held: such an uncounseled conviction, whether pre- or post-*Argersinger*, can be used to revoke driver's license); Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974) (plaintiff had been imprisoned for pre-*Argersinger* traffic offense conviction); Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975) (defendant had been imprisoned for prior traffic offense convictions); State v. Francis, 85 Wash. 2d 894, 540 P.2d 421 (1975) (defendant had apparently been imprisoned for pre-*Argersinger* traffic offense conviction; held: *Argersinger* does not apply retroactively in this situation). In many cases there is no indication whether the defendant had been imprisoned for prior traffic offense convictions. *E.g.*, Linkous v. Jordan, 401 F. Supp. 1175 (W.D. Va. 1975); State v. Sanchez, 110 Ariz. 214, 516, P.2d 1226 (1973); State v. Zaragoza, 21 Ariz. App. 596, 522 P.2d 552 (1974); State v. Stafford, 394 So. 2d 1287 (La. Ct. App. 1981); Berger v. Department of Pub. Safety, 327 So. 2d 705 (La. Ct. App. 1976); State v. Free, 321 So. 2d 50 (La. Ct. App. 1975), *writ denied*, 325 So. 2d 272 (1976); Everhart v. State, 563 S.W.2d 795 (Tenn. Crim. App. 1978); State v. Jackson, 34 Or. App. 587, 579 P.2d 299 (1978). *See also* State v. Love, 312 So. 2d 675 (La. Ct. App. 1975) (defendant had not been imprisoned for prior traffic offense convictions); Merrigan v. Spradling, 564 S.W.2d 615 (Mo. Ct. App. 1978) (although defendant had not been imprisoned for prior traffic offense convictions, court indicated that it would have reached the same result even if he had been).

In State v. Clough, 115 N.H. 7, 332 A.2d 386 (1975), and State v. Ward, 118 N.H. 874, 395 A.2d 511 (1978), the New Hampshire Supreme Court reached the opposite result under the state constitution, which guarantees a misdemeanor defendant the right to counsel whenever imprisonment is an authorized punishment. *See also* State v. Ponce, 93 Wash. 2d 533, 611 P.2d 407 (1980) (Johnson, J., concurring and dissenting).

176. Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) (involving the retroactive application of *Argersinger* to uncounseled convictions obtained prior to that decision); Linkous v. Jordan, 401 F. Supp. 1175 (W.D. Va. 1975); Hensley v. Ranson, 373 F. Supp. 88 (E.D. Va. 1974); Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974); State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973); State v. Zaragoza, 21 Ariz. App. 596, 522 P.2d 552 (1974); State v. Stafford, 394 So. 2d 1287 (La. Ct. App. 1981); Berger v. Department of Pub. Safety, 327 So. 2d 705 (La. Ct. App. 1976); State v. Free, 321 So. 2d 50 (La. Ct. App. 1975), *writ denied*, 325 So. 2d 272 (1976); State v. Love, 312 So. 2d 675 (La. Ct. App. 1975); State v. Jackson, 34 Or. App. 587, 579 P.2d 299 (1978); Everhart v. State, 563 S.W.2d 795 (Tenn. Crim. App. 1978); Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975); State v. Francis, 85 Wash. 2d 894, 540 P.2d 421 (1975) (involving the retroactive application of *Argersinger* to uncounseled convictions obtained prior to that decision).

portant state policy of removing dangerous drivers from the highways and either expressly or impliedly indicated this policy would be frustrated if defendants could contest the validity of the prior traffic offense convictions in revocation proceedings.[177] Many of the prior convictions will have been obtained in recordless proceedings, raising in every case the difficult factual issue whether defendant had or waived counsel.[178] If the defendant was actually imprisoned for the prior uncounseled traffic offense conviction, courts have concluded *Argersinger* merely invalidates the prison sentence, not the conviction. The conviction is still available to support consequential civil disabilities, including the revocation of a driver's license.[179]

These decisions are consistent with *Argersinger* and *Scott*. *Scott* makes it clear the sixth amendment right to appointed counsel does not apply in misdemeanor cases not involving imprisonment. Although the loss of a driver's license may be more serious for some people than brief incarceration,[180] it is not prohibited under *Scott*.[181] The fact that the license revocation occurs in a

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177. *See, e.g.*, State v. Stafford, 394 So. 2d 1287, 1289 (La. Ct. App. 1981) (" 'To extend *Argersinger* . . . would frustrate the legislatively determined state policy of removing hazardous drivers from the highways.' "); Berger v. Department of Pub. Safety, 327 So. 2d 705, 706 (La. Ct. App. 1976) ("The suspension of the driving privileges of those who are serious violators of the traffic laws is . . . a reasonable condition [on the privilege to drive], imposed for the protection of the driving public."); State v. Free, 321 So. 2d 50, 54 (La. Ct. App. 1975) ("The constitutional restriction on the state's imposition of criminal sanctions is not germane to determine the state's right in a civil proceeding to protect its motorists from mayhem on the highways."); State v. Love, 312 So. 2d 675, 678 (La. Ct. App. 1975) ("To extend *Argersinger* . . . would frustrate the legislatively determined state policy of removing hazardous drivers from the highways."); State v. Jackson, 34 Or. App. 587, 590, 579 P.2d 299, 300 (1978) ("legislative determination that the habitual offender should not continue to drive"); Everhart v. State, 563 S.W.2d 795, 796 (Tenn. Crim. App. 1978) ("The purpose of the Act is to promote public safety."); Whorley v. Commonwealth, 215 Va. 740, 745-46, 214 S.E.2d 447, 451, *cert. denied*, 423 U.S. 946 (1975) ("Virginia's Habitual Offender Act declared it to be the policy of the state to provide maximum safety for all persons using the highways; . . . to permit [the defendant] to resume the use of the public highways would represent a serious hazard to the public.").

In addition, the courts in Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), and State v. Francis, 85 Wash. 2d 894, 540 P.2d 421 (1975), relied upon this rationale in holding that *Argersinger* did not apply retroactively in this situation to uncounseled traffic offense convictions obtained prior to that decision.

178. State v. Ponce, 93 Wash. 2d 533, 542, 611 P.2d 407, 411 (1980) (Brachtenbach, J., concurring and dissenting).

179. *See* Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) (involving the retroactive application of *Argersinger* to uncounseled convictions obtained prior to that decision); Hensley v. Ranson, 373 F. Supp. 88 (E.D. Va. 1974); Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974); Merrigan v. Spradling, 564 S.W.2d 615 (Mo. Ct. App. 1978) (dictum); Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975).

180. *Argersinger*, 407 U.S. 25, 48 (1972) (Powell, J., concurring in result). *See also* Bell v. Burson, 402 U.S. 535, 539 (1970) ("possession [of a driver's license] may [be] essential in the pursuit of a livelihood"); Linkous v. Jordan, 401 F. Supp. 1175, 1177-78 n.2 (W.D. Va. 1975) ("In absolute terms, imprisonment may be a greater loss of liberty than the revocation of a driver's license. But if a revocation lasts for 10 years, it could certainly be considered a more serious hardship than, say, a few days in jail.").

181. *See supra* note 54.

subsequent proceeding should not lead to a different result. Since license revocation can be done constitutionally in a single trial,[182] it can also be accomplished in the two-stage process of a criminal prosecution and conviction followed by a revocation proceeding. *Argersinger* and *Scott* allow this enhancement use because the revocation does not involve imprisonment.[183]

Nor would such revocation use be precluded by *Baldasar*. The four dissenters allowed an uncounseled misdemeanor conviction to be used to enhance a defendant's sentence. The *Baldasar* dissent would clearly allow its use in the revocation of the defendant's driver's license, because the subsequent use of the uncounseled misdemeanor conviction does not result in imprisonment. Moreover, the linchpin of both Justice Stewart's and Justice Marshall's concurring opinions, the additional term of imprisonment imposed because of the prior conviction, supports the conclusion such uncounseled convictions can be used for license revocation purposes.[184]

At least one court, however, has drawn a distinction between prior uncounseled traffic convictions that have resulted in imprisonment and those that did not, allowing only the latter to be used to revoke the defendant's driver's license.[185] That court reasoned a defendant who was imprisoned for an un-

182. A restriction of the defendant's driving privileges could conceivably be directly imposed in the criminal proceeding as one of the defendant's probation terms.

183. *See* State v. Francis, 85 Wash. 2d 894, 540 P.2d 421 (1975), where the court, in refusing to apply *Argersinger* retroactively to uncounseled traffic offense convictions incurred prior to that decision, stated:

> Here, . . . any uncounseled conviction in appellant's driving history is too far removed to invalidate the habitual traffic offender proceeding . . . .
>
> [S]uch [license revocation] proceedings, even if termed a collateral consequence of accumulated driving convictions, must be viewed as a consequence that is indirect and removed, both in time and in purpose, from the original driving convictions of the offender.

Id. at 896, 540 P.2d at 422.

184. Under Justice Blackmum's bright-line test, a conviction for a traffic offense for which the defendant was not actually imprisoned and for which the authorized penalty did not exceed six months' imprisonment would be constitutionally valid and presumably could be used for driver's license revocation purposes. If, on the other hand, the offense was punishable by more than six months' imprisonment, but the defendant was not actually imprisoned, the conviction would be invalid under Justice Blackmun's test. Nevertheless, this does not necessarily mean he would not allow it to be used collaterally in a civil proceeding that could result only in a civil disability. In *Baldasar*, he merely concluded an invalid conviction "may not be used to support enhancement" of a criminal sentence of imprisonment. 446 U.S. at 230 (Blackmun, J., concurring). Additionally, in *Lewis*, he authored the Court's opinion holding that a felony conviction, invalid under *Gideon*, could constitutionally be used "as the basis for imposing a civil firearms disability, enforceable by a criminal sanction . . . ." 445 U.S. at 67.

185. State v. Ponce, 93 Wash. 2d 533, 611 P.2d 407 (1980). In State v. Clough, 115 N.H. 7, 332 A.2d 386 (1975), the court held two allegedly uncounseled traffic offense convictions that the state sought to rely upon to revoke the defendant's driver's license were "immune to direct or collateral *Argersinger* attack since they did not result in imprisonment . . . ." *Id.* at 10, 332 A.2d at 388. The court indicated, however, that it would have reached a different result if the defendant had been imprisoned for the prior convictions. This same inference can also be drawn from Johnston v. State, 236 Ga. 370, 223 S.E.2d 808 (1976).

counseled misdemeanor conviction was denied his right to counsel. The conviction was therefore void and subject to collateral attack at the driver's license revocation proceeding. This reasoning is flawed, because as noted by the Supreme Court in *Lewis*, the Court "has never suggested that an uncounseled conviction is invalid for all purposes."[186] In the misdemeanor arena, *Argersinger* and *Scott* make this point clear. Those decisions only prohibit an uncounseled misdemeanor conviction from being used to impose the sanction of imprisonment, but they do not preclude the imposition of non-imprisonment sanctions, such as revocation of driver's license. Apparently even an uncounseled traffic conviction that actually resulted in the defendant's imprisonment can later be used to revoke the defendant's driver's license.

This conclusion is consistent with *Baldasar*. Although the dissent focused on the prior uncounseled conviction's validity, it did note that *Lewis* allowed an uncounseled, and thus invalid, felony conviction to be used as a predicate under the federal firearm statute because the conviction was not used to support guilt or enhance punishment.[187] This indicates the dissenters would permit the use of an uncounseled misdemeanor conviction for a collateral purpose that neither actually results in the defendant's imprisonment, nor enhances punishment.[188] The concurrences of Justices Stewart and Marshall call for the same result. They both focused not on whether the defendant was imprisoned for the prior conviction, but on whether the uncounseled conviction was being used collaterally as a basis for imprisonment.[189]

Once an individual's driver's license has been revoked, he is prohibited from driving and generally is subject to criminal penalties, including imprisonment, for violating that prohibition.[190] In the interim between *Argersinger* and *Baldasar*, most courts held even if the defendant's driver's license had been revoked on the basis of an uncounseled traffic conviction for which the defendant was imprisoned, he could be convicted and imprisoned for driving under that prohibition.[191] Courts advanced two lines of reasoning to

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186. 445 U.S. at 66-67.

187. 446 U.S. at 234 n.3 (1980) (Powell, J., dissenting).

188. *Argersinger*, 407 U.S. 25 (1972), compels the interpretation of "enhances punishment" in the misdemeanor arena to mean an increase in the term of imprisonment. *See supra* note 54.

189. Justice Stewart joined the Court's opinions in both *Scott* and *Lewis*, and Justice Stevens joined the Court's opinion in *Lewis*. And though a traffic offense conviction that actually resulted in imprisonment would be invalid under Justice Blackmun's bright line test, this does not mean that he would not allow it to be used in a civil proceeding to impose a civil disability. *See supra* note 184. Thus, it seems clear the opinions representing the views of a majority of the justices in *Baldasar* support the conclusion stated in the text.

190. *E.g.*, COLO. REV. STAT. § 42-2-206 (Supp. 1981); LA. REV. STAT. ANN. § 32:1480 (West Supp. 1982); OR. REV. STAT. §§ 484.740 & .990 (1981); VA. CODE § 46.1-387.8 (1980).

191. *See* Mays v. Harris, 523 F.2d 1258 (4th Cir. 1975), *rev'g* 369 F. Supp. 1348 (E.D. Va. 1973) (habeas corpus petitioner had been imprisoned for prior uncounseled traffic offense convictions); Hensley v. Ranson, 373 F. Supp. 88 (E.D. Va. 1974) (plaintiff had been imprisoned for prior traffic offense conviction) (dictum); Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974) (plaintiff had been imprisoned for prior traffic offense convictions); Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975) (defendant had been imprisoned for prior traffic offense conviction). See also Linkous v. Jordan, 401

support this result. One rationale suggested that because the initial revocation was valid even if based upon an uncounseled traffic conviction, the subsequent conviction for driving on a revoked license must also be valid.[192] The other rationale stressed that the nexus between the original conviction and the imprisonment for driving on a revoked license was either too remote[193] or was broken by the defendant's unilateral decision to drive without a valid permit.[194]

F. Supp. 1175 (W.D. Va. 1975) (no indication whether petitioner had been imprisoned for prior traffic offense convictions) (dictum); State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973) (no indication whether defendant had been imprisoned for prior traffic offense convictions); State v. Zaragoza, 21 Ariz. App. 596, 522 P.2d 552 (1974) (no indication whether defendant had been imprisoned for prior traffic offense convictions).

The few courts reaching the opposite result dealt primarily with prior convictions for which the defendant was imprisoned. Mays v. Harris, 369 F. Supp. 1348 (W.D. Va. 1973), *rev'd*, 523 F.2d 1258 (4th Cir. 1975) (habeas corpus petitioner had been imprisoned for prior traffic offense convictions); State v. Woodard, 387 So. 2d 1066 (La. 1980) (apparently reaching this result, but holding the defendant had validly waived counsel at his prior traffic offense trial; no indication whether defendant had been imprisoned for the prior traffic offense conviction). State v. Free, 321 So. 2d 50 (La. Ct. App. 1975) (dictum).

In addition, in State v. Ponce, 93 Wash. 2d 533, 611 P.2d 407 (1980), a habitual traffic offender proceeding, the court held that, although an uncounseled traffic offense conviction for which the defendant was not imprisoned can be used as a basis to revoke his driver's license, one for which he was imprisoned cannot. Because the defendant was denied his sixth amendment right to counsel in the latter situation, the resultant conviction was therefore void and subject to collateral attack. Presumably this collateral attack could also come in a subsequent prosecution for driving under a revoked license. Although *Ponce* actually was decided 23 days after the Supreme Court's decision in *Baldasar*, the *Ponce* court did not mention that case, probably because it was too recent. *See also* Johnston v. State, 236 Ga. 370, 223 S.E.2d 808 (1976), and State v. Clough, 115 N.H. 7, 332 A.2d 386 (1975), also habitual traffic offender proceedings, where the courts relied upon the fact that the defendants had not been imprisoned for the prior uncounseled traffic offense convictions. The courts held that under the federal Constitution such a conviction can be used to revoke a defendant's driver's license, thereby implying that they might reach a different result in a case in which the defendant had been imprisoned for the prior traffic offense conviction thereby indicating such a defendant could also challenge the revocation in a subsequent criminal prosecution for driving under a revoked license. In *Clough*, the court went on to hold that under the state constitution an uncounseled traffic conviction for an offense punishable by imprisonment cannot be used in a habitual traffic offender proceeding as a basis to revoke the defendant's driver's license. *Accord* State v. Ward, 118 N.H. 874, 395 A.2d 511 (1978). In State v. Robinson, 117 N.H. 496, 374 A.2d 953 (1973), the court held that under the state constitution a defendant charged with operating a motor vehicle after being decreed a habitual traffic offender could attack the revocation of his license on the ground that it was based on an uncounseled traffic offense conviction for which imprisonment was an authorized penalty.

192. *See* Mosby v. Superintendent, Va. State Penitentiary, 381 F. Supp. 5 (W.D. Va. 1974) (implied); Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974); State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973); State v. Zaragoza, 21 Ariz. App. 596, 522 P.2d 552 (1974); Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975).

193. Hensley v. Ranson, 373 F. Supp. 88, 91 (E.D. Va. 1974).

194. Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975); Whorley v. Brillhart, 373 F. Supp. 83, 87 (E.D. Va. 1974), *cert. denied*, 415 U.S. 933 (1974). In Mays v. Harris, 523 F.2d 1258 (4th Cir. 1975), the court elucidated this reasoning:

> [T]he sentence about which Mays complains does not depend on the validity of his underlying convictions.
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> The 1973 convictions [for operating a motor vehicle while classified as an habitual

Since *Baldasar*, the two courts deciding this issue have reached opposite conclusions. Before *Baldasar*, the Supreme Court of Virginia held an uncounseled traffic conviction could serve as the basis for revoking a defendant's driver's license and supporting his subsequent criminal conviction and imprisonment for driving under a revoked license.[195] The court subsequently reexamined the issue in *McClure v. Commonwealth*[196] and concluded *Baldasar* did not compel a different result.[197] In reaching this conclusion the court reasoned that like the federal firearms statute in *Lewis*,[198] the Virginia law was concerned with the mere fact of conviction, rather than the reliability of the former adjudication.[199]

In a series of cases beginning with *People v. Roybal*,[200] the Supreme Court of Colorado reached the opposite interpretation of *Baldasar* and *Lewis*. The defendant in *Roybal* was convicted of driving after his license had been revoked, a felony[201] punishable by up to five years' imprisonment.[202] On appeal, the Colorado Supreme Court held the defendant could collaterally attack his prior traffic convictions upon which the initial revocation was premised, and need only make a prima facie showing that those convictions were invalid. The burden then shifted to the state to establish the convictions were constitutionally obtained. The court stated *Baldasar* compelled it to interpret the statute to prohibit the use of an uncounseled conviction as the basis for imprisonment,[203] regardless of whether the defendant had been imprisoned for the prior conviction.

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offender] that Mays now attacks did not follow directly and inexorably from the earlier adjudication [as an habitual traffic offender]: a new element was essential — that he drive a motor vehicle in the face of an order forbidding that he do so . . . . Mays was convicted and sentenced . . . not because he was an adjudged habitual offender, but because he wilfully and flagrantly violated an extant court order.

Id. at 1259.

195. Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447, *cert. denied*, 423 U.S. 946 (1975).

196. 283 S.E.2d 224 (Va. 1981).

197. *Id.* at 225.

198. *See supra* notes 15-21 and accompanying text.

199. 283 S.E.2d at 225-26. The court stated:

> Our Habitual Offender Act falls into the same category as the statute at issue in *Lewis*. The carnage on Virginia's highways is a matter of common knowledge. The General Assembly enacted the Habitual Offender Act "[t]o provide maximum safety for all persons who travel or otherwise use the public highways of the State . . . ." Code § 46.1-387.1. Its judgment that certain persons, because of their past driving records, be denied the privilege of driving on our highways is a rational one.

Id.

200. 618 P.2d 1121 (Colo. 1980).

201. COLO. REV. STAT. § 42-2-206 (1973).

202. *Id.* § 18-1-105 (1973). The minimum sentence authorized by this statute was one day in jail or a $1,000 fine, and the maximum was five years' imprisonment or a $15,000 fine, or both.

203. 618 P.2d at 1126. The court stated: "Any other construction of the statute would render it fundamentally inconsistent with the constitutional requirements of *Baldasar v. Illinois* . . . ." *Accord* People v. Hampton, 619 P.2d 48 (Colo. 1980); People v. DeLeon, 625

The *Roybal* court cited Justice Marshall's *Baldasar* concurrence to support the conclusion that the prior conviction obtained in the absence of counsel was not sufficiently reliable to warrant imprisonment for a subsequent offense.[204] The court concluded the prior conviction led to the defendant's imprisonment following his subsequent conviction and that *Baldasar* prohibited this practice because of the prior conviction's unreliability. The Colorado court's only attempt to distinguish *Lewis* was its statement that "[a]lthough the lesson of *Baldasar* and *Lewis* is not free from doubt, it appears . . . that only in the clearest of cases will a statute be construed to permit [collateral use of uncounseled convictions to increase the penalty for subsequent criminal misconduct] . . . ."[205] The *Roybal* opinion is flawed because it fails to explain why *Baldasar* rather than *Lewis* is controlling. Whatever the merits of the court's conclusion that *Baldasar* and *Argersinger* prohibited the defendant's ultimate imprisonment,[206] those cases cannot be read in isolation; *Lewis* must be accounted for.

The *Lewis* Court concluded enforcement of an essentially civil disability through a criminal sanction does not "support guilt or enhance punishment" on the basis of an unreliable conviction.[207] Despite *Lewis*, a state court could interpret an habitual traffic offender statute as not allowing an uncounseled traffic conviction to serve as the basis for the revocation of an individual's driver's license and his subsequent conviction for driving while his license was revoked. *Lewis*, however, does not constitutionally compel this interpretation. Revocation of an individual's driver's license, like prohibition against an individual possessing a firearm, is a civil disability. The criminal sanction merely serves to enforce the civil disability.

Moreover, due to the extensive personal and property damage caused by automobile accidents, a state legislature could rationally conclude that any conviction for specified traffic offenses, even an allegedly invalid one, provides a sufficient basis on which to prohibit a person from operating a motor vehicle. Such an approach recognizes as the relevant factor the mere fact of the prior traffic conviction, not its reliability. As in *Lewis*, therefore, this enforcement of

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P.2d 1010 (Colo. 1981) (but held defendant had waived his right to counsel); People v. Shaver, 630 P.2d 600 (Colo. 1981); People v. Mascarenas, 632 P.2d 1028 (Colo. 1981) (but held defendant failed to make prima facie showing that he had been denied his right to counsel).

204. 618 P.2d at 1126.

205. *Id.* at 1125. The court added the following in a footnote: "Further development of the law will be necessary to determine whether *Baldasar* and *Lewis* can truly be reconciled. The four dissenters in *Baldasar* state that '[t]he conflict between the two holdings could scarcely be more violent.' *Baldasar v. Illinois* . . . ." *Id.* at 1125 n.5.

206. One could legitimately conclude that the prior uncounseled traffic offense conviction "end[s] up in the actual deprivation of [the defendant's] liberty," *Argersinger*, 407 U.S. at 40, when he is imprisoned following his conviction for driving while his license was revoked. Although an additional event, the revocation of his driver's license, intervened between the original uncounseled conviction and the conviction for which he was eventually sentenced to jail, that intervening event was itself based upon the initial uncounseled traffic offense conviction. Because of this fact it could be concluded that the nexus between the original uncounseled conviction and the defendant's imprisonment is neither too remote, nor broken by the intervening license revocation.

207. 445 U.S. at 67.

a civil penalty through a criminal sanction would not support guilt or enhance punishment on the basis of an unreliable conviction.[208] It must be concluded that under *Lewis* a prior uncounseled traffic conviction, regardless of the punishment imposed upon the defendant can be used to revoke an individual's driver's license and subsequently to convict and incarcerate him for driving with a revoked license.[209] *McClure*, rather than *Roybal*, therefore, reaches the correct result.[210]

CONCLUSION

The Supreme Court's decision in *Scott*, interpreting *Argersinger* as fixing the constitutional line for the appointment of counsel in misdemeanor cases at actual imprisonment, has led the Court into an unanticipated thicket. *Scott* merely succeeded in further complicating the difficult questions concerning permissible collateral uses of uncounseled misdemeanor convictions. *Baldasar*, the Court's only attempt to date to resolve any of these questions, illustrates the difficulty of the area: five justices concluded the defendant's prior uncounseled misdemeanor conviction could not be used to enhance his prison term for a subsequent conviction, but were unable to agree upon an opinion articulating the reasons for that result.

This article has attempted to answer the questions raised by *Scott* through examination of the various collateral uses of uncounseled misdemeanor convictions. In analyzing collateral uses of uncounseled misdemeanor convictions, the four *Baldasar* theories must be applied in conjunction with the Court's other decisions in the area. These opinions require isolating whether the defendant was actually imprisoned or the penalty authorized imprisonment for over six months, whether the collateral use is demonstrably causally connected to imprisonment and whether the subsequent use involves civil or criminal penalties. Each collateral use discussed suggests additional factors, not considered in *Baldasar*, that should be relevant to the Court's future analyses. Since *Argersinger*, the right to counsel in misdemeanor cases has been constitutionally protected, yet the limited case law does not guide the lower courts in implementing this right. Until the Supreme Court clarifies these issues lower courts address daily, the inconsistent application will continue. Such inconsistency suggests the confusion in the area is compromising the constitutional right to counsel.

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208. Had the court in *Roybal* not based its decision on the fact that "[a]ny other construction of the statute would render it fundamentally inconsistent with the constitutional requirements of *Baldasar v. Illinois* . . . ," 618 P.2d at 1126, its decision could not be criticized on the ground that it misinterpreted federal constitutional law.

209. *See supra* notes 15-21 and accompanying text.

210. This conclusion is, of course, premised on the Supreme Court's decision in *Lewis*. That decision, however, can be criticized both as to its interpretation of the federal firearms statute and as to its interpretation of the sixth amendment right to counsel. *See supra* note 21.