

# NICHOLS V. UNITED STATES AND THE COLLATERAL USE OF UNCOUNSELED MISDEMEANORS IN SENTENCE ENHANCEMENT

## INTRODUCTION

Central to the concept of criminal justice in American society is the accused's right to a fair trial and the guarantee of due process of law.<sup>1</sup> This concept is meaningful in part through the constitutional guarantee of the right to effective assistance of counsel.<sup>2</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>3</sup> Although the right to counsel seems essential to modern American criminal justice, that right stems from a questionable beginning under English common law and now faces a questionable future.<sup>4</sup>

English common law provided no absolute right to counsel.<sup>5</sup> An individual accused of a misdemeanor or treason or involved in civil litigation had a right to retain counsel.<sup>6</sup> It was not until 1836 that Parliament passed a law granting all individuals accused of felonies the right to have counsel in the presentation of their defense.<sup>7</sup> Further, it was not until the Poor Prisoner's Defense Act of 1903 that Parliament granted the right, albeit discretionary, to appointed counsel.<sup>8</sup>

---

<sup>1</sup> Laurie S. Fulton, Note, *The Right to Counsel Clause of the Sixth Amendment*, 26 AM. CRIM. L. REV. 1599, 1599 (1989); see also Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030-31 (1964); Kevin T. Kerr, Note, *United States v. Henry: The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations*, 8 PERS. L. REV. 451, 453-57 (1981); Paula Waborsky, Note, *Recruited Government Informants: When Does the Right to Counsel Attach?*—*United States v. Henry*, 100 S. Ct. 2183 (1989), 8 FLA. ST. U. L. REV. 797, 799-800 (1980).

<sup>2</sup> See U.S. CONST. amend. VI; Fulton, *supra* note 1, at 1599.

<sup>3</sup> U.S. CONST. amend. VI.

<sup>4</sup> See *Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994); Fulton, *supra* note 1, at 1599-1600.

<sup>5</sup> *Powell v. Alabama*, 287 U.S. 45, 60 (1932); Fulton, *supra* note 1, at 1599-1600.

<sup>6</sup> See *Powell*, 287 U.S. at 60; Fulton, *supra* note 1, at 1599-1600. In 1695, Parliament passed the Treason Act which established the right to counsel in treason cases and also provided for the appointment of counsel to indigent defendants. Fulton, *supra* note 1, at 1600. Even though this was the English rule, it was highly criticized, as evidenced by Blackstone's remark: "For upon what face of reason, can the assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" *Powell*, 287 U.S. at 60-61 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*355).

<sup>7</sup> Fulton, *supra* note 1, at 1600.

<sup>8</sup> *Id.*

As English common law did not recognize a right to counsel at the time of the drafting of the Constitution and the Bill of Rights, the American roots of the right to counsel arise from doctrine developed in the colonies.<sup>9</sup> From the beginning, the American colonies recognized an accused's right to counsel.<sup>10</sup> Indeed, twelve of the thirteen original colonies rejected the English rule of granting counsel only in misdemeanor and treason cases.<sup>11</sup> Several states included the right to counsel in their own state constitutions.<sup>12</sup> When James Madison introduced the Sixth Amendment on the House and Senate floors of the First Congress, little debate occurred over the validity of including the right to counsel in the Bill of Rights, presumably because of its widespread acceptance in colonial American society.<sup>13</sup>

At the time of the passage of the Sixth Amendment, the right to counsel at a minimum was the right to retain counsel for one's defense.<sup>14</sup> This right eventually grew through judicial interpretation to include the right to appointed counsel for indigent defendants.<sup>15</sup> Until recently, a criminal defendant's right to counsel seemed firmly established in modern American jurisprudence.<sup>16</sup>

The mood in American culture, however, has recently shifted away from protecting the due process rights of criminal defendants to focusing on issues of crime control.<sup>17</sup> In large measure, this is a response to the epidemic of violence that currently plagues American streets.<sup>18</sup> This shift of concerns in the American psyche has affected the criminal justice system.<sup>19</sup> Many constitutional protections are now vulnerable to

---

<sup>9</sup> See *Powell*, 287 U.S. at 64-65; *Fulton*, *supra* note 1, at 1603-04.

<sup>10</sup> See *Powell*, 287 U.S. at 61-65; *Fulton*, *supra* note 1, at 1603-04.

<sup>11</sup> *Powell*, 287 U.S. at 64.

<sup>12</sup> *Id.* at 61; *Fulton*, *supra* note 1, at 1603-04.

<sup>13</sup> See *Fulton*, *supra* note 1, at 1604.

<sup>14</sup> *Id.* at 1605.

<sup>15</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>16</sup> See *Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994).

<sup>17</sup> See, e.g., Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1352 (1993); Lisa P. Taylor, Note, *Illinois v. Perkins: Balancing the Need for Effective Law Enforcement Against a Suspect's Constitutional Rights*, 1991 WIS. L. REV. 989, 1015-16; Linda Chavez & Chris Gersten, *Tough Bills Pose Dilemma for President*, LEGAL TIMES, Mar. 27, 1995, at 25. Congress has increasingly been "getting tough on crime" through crime bills and other efforts, such as limiting habeas corpus. See, e.g., Chavez & Gersten, *supra*, at 25, 26. In the states, there is a renewed movement to bring back the death penalty. See, e.g., Mitchell Krapes & Jay Lippman, *Constitutionality of New York's Proposed Death Penalty Statute*, N.Y. L.J., Feb. 24, 1995, at 1, 11. The popular political rhetoric of the day focuses on the need to get tough on crime. See Chavez & Gersten, *supra*, at 25-26; Gail D. Cox, *Voters Tough on Criminals*, NAT'L L.J., November 21, 1994, at A6; Krapes & Lippman, *supra*, at 1, 11.

<sup>18</sup> See, e.g., Dreier, *supra* note 17, at 1352.

<sup>19</sup> See *Nichols*, 114 S. Ct. at 1927.

limitations in this environment.<sup>20</sup> This vulnerability is highlighted in the area of the Sixth Amendment right to counsel.<sup>21</sup> Although the Sixth Amendment right to counsel has historically protected the fundamental right to a fair trial, the United States Supreme Court has recently curtailed that right in a potentially serious manner.<sup>22</sup>

This Note argues that the recent United States Supreme Court decision of *Nichols v. United States* seriously curtails the previous protections afforded a criminal defendant under the Sixth Amendment.<sup>23</sup> In addition, this Note contends that the Court reached its decision in *Nichols* for reasons of administrative ease rather than out of loyalty to constitutional principles. Section I discusses the background and development of the constitutional right to counsel in both felony and misdemeanor cases.<sup>24</sup> Section II examines *Baldasar v. Illinois*, and the Supreme Court's first attempt at resolving the issue of the collateral use of prior uncounseled misdemeanors in determining criminal sentences.<sup>25</sup> Section III examines the Supreme Court's decision and reasoning in *Nichols v. United States*, which overruled *Baldasar*.<sup>26</sup> Finally, Section IV considers the implications of the *Nichols* decision on the Sixth Amendment right to counsel.<sup>27</sup>

## I. THE RIGHT TO COUNSEL

### A. *The Foundation of the Right to Counsel*

The constitutional right to counsel has evolved over time through judicial interpretation.<sup>28</sup> For many years, the right to counsel clause of the Sixth Amendment implied only that an individual defendant had the right to retain counsel.<sup>29</sup> It was not until 1932, in the landmark case of *Powell v. Alabama*, that the right to counsel began to evolve into a significant constitutional doctrine.<sup>30</sup> Interestingly, *Powell* involved the

---

<sup>20</sup> See *id.* Similarly, Congress has attempted to limit habeas corpus. See Chavez & Gersten, *supra* note 17, at 26.

<sup>21</sup> See *Nichols*, 114 S. Ct. at 1927.

<sup>22</sup> Compare *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (recognizing the fundamental right to counsel) with *Nichols*, 114 S. Ct. at 1927, 1928 (curtailing the right to counsel).

<sup>23</sup> 114 S. Ct. 1921 (1994).

<sup>24</sup> See *infra* notes 28–109 and accompanying text.

<sup>25</sup> 446 U.S. 222 (1980); see *infra* notes 110–76 and accompanying text.

<sup>26</sup> See *infra* notes 177–220 and accompanying text.

<sup>27</sup> See *infra* notes 221–311 and accompanying text.

<sup>28</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 339–40, 344–45 (1963); *Powell v. Alabama*, 287 U.S. 45, 68–70, 71 (1932).

<sup>29</sup> *Fulton*, *supra* note 1, at 1605.

<sup>30</sup> See *Powell*, 287 U.S. at 71; *Fulton*, *supra* note 1, at 1605.

right to counsel found in the Due Process Clause of the Fourteenth Amendment rather than the Right to Counsel Clause of the Sixth Amendment.<sup>31</sup>

In *Powell*, the United States Supreme Court held that a state trial court had denied the defendants due process of law under the Fourteenth Amendment by failing to provide meaningful assistance of counsel in a capital case.<sup>32</sup> In *Powell*, four African-Americans were charged with the rape of two white girls, a potential capital offense under Alabama law.<sup>33</sup> The trial court first failed to provide the defendants with the time necessary to secure counsel, and then failed to allow that counsel time to prepare for the rather speedy trial.<sup>34</sup> The Supreme Court declared the right to effective assistance of counsel in a capital case a fundamental right contained within the meaning of the Due Process Clause of the Fourteenth Amendment.<sup>35</sup> As such, the Court held that due process of law required all courts, state and federal, to assign counsel to an indigent defendant in a capital case.<sup>36</sup> The Court did not reach any decision on the implications of the Sixth Amendment right to counsel clause.<sup>37</sup>

In 1938, in *Johnson v. Zerbst*, the United States Supreme Court first examined the right to counsel clause of the Sixth Amendment.<sup>38</sup> In *Johnson*, the Court held that the Sixth Amendment required federal courts to provide counsel for indigent defendants in all criminal proceedings.<sup>39</sup> The trial court convicted the defendant in this case, without the benefit of counsel, of "possessing and uttering" counterfeit money.<sup>40</sup> The defendant filed a petition for habeas corpus that eventually reached the Supreme Court.<sup>41</sup> The Supreme Court reasoned that the Sixth Amendment implicitly recognized that the average defendant lacks the professional legal skills necessary to protect himself or herself when faced with a conviction that may result in the loss of life or

---

<sup>31</sup> 287 U.S. at 71.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 49, 50.

<sup>34</sup> *Id.* at 53, 71. The trial began on April 6, one week after the indictment was returned and the arraignment occurred. *Id.* at 53.

<sup>35</sup> *Id.* at 71. The Court stated that this right was contained within the Fourteenth Amendment and applied to the states. *See id.* at 67. Therefore, there was no need to incorporate the Sixth Amendment through the Fourteenth Amendment. *See id.*

<sup>36</sup> *Powell*, 287 U.S. at 71.

<sup>37</sup> *See id.* at 67, 71.

<sup>38</sup> 304 U.S. 458, 462-63 (1938).

<sup>39</sup> *Id.* at 463.

<sup>40</sup> *Id.* at 459.

<sup>41</sup> *Id.*

liberty.<sup>42</sup> Therefore, the Court concluded that in all criminal cases in federal court, the Sixth Amendment mandated the appointment of counsel for indigent defendants.<sup>43</sup>

Nevertheless, the Supreme Court in 1942 in *Betts v. Brady* held that the Due Process Clause of the Fourteenth Amendment did not guarantee the same right to counsel to criminal defendants in state court as the Sixth Amendment guaranteed to criminal defendants in federal court.<sup>44</sup> In *Betts*, a Maryland state court tried and convicted the defendant of robbery without providing the defendant the assistance of counsel.<sup>45</sup> The United States Supreme Court reasoned that the denial of counsel in *Betts* was not so offensive to common and fundamental ideas of fairness as to constitute a violation of due process.<sup>46</sup> The Court concluded, therefore, that the refusal to appoint counsel to an indigent defendant in state court did not necessarily violate the Fourteenth Amendment and due process of law.<sup>47</sup>

In 1963, in the landmark decision of *Gideon v. Wainwright*, the Supreme Court overruled *Betts*.<sup>48</sup> In *Gideon*, the Court held that an individual's Sixth Amendment right to counsel also applied in state court through incorporation of the Sixth Amendment right to counsel into the Due Process Clause of the Fourteenth Amendment.<sup>49</sup> In *Gideon*, a Florida state court convicted the defendant of felony breaking and entering into a poolroom.<sup>50</sup> The Florida trial court denied Gideon's request for counsel, and thus, he acted pro se in his own defense.<sup>51</sup> The trial court convicted Gideon and the Florida Supreme Court upheld that conviction.<sup>52</sup>

---

<sup>42</sup> *Id.* at 462-63.

<sup>43</sup> *Johnson*, 304 U.S. at 463. The Supreme Court has also recognized that the Sixth Amendment right to counsel applies to the critical stages of a criminal proceeding. *See, e.g.*, *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986) (right to counsel violated by deliberate elicitation by police or informant); *Coleman v. Alabama*, 399 U.S. 1, 3, 9 (1970) (right to counsel at preliminary hearing); *United States v. Wade*, 388 U.S. 218, 221, 236-37 (1967) (right to counsel at post-indictment line-ups); *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (right to counsel at arraignment).

<sup>44</sup> 316 U.S. 455, 471, 473 (1942); *Johnson*, 304 U.S. at 463.

<sup>45</sup> *Betts*, 316 U.S. at 456-57.

<sup>46</sup> *See id.* at 473.

<sup>47</sup> *Id.*

<sup>48</sup> 372 U.S. 335, 345 (1963).

<sup>49</sup> *Id.* at 340, 342.

<sup>50</sup> *Id.* at 336-37. Gideon broke into the poolroom for the purpose of committing a misdemeanor once inside. *Id.* at 336. This was a felony under Florida law. *Id.* at 336-37.

<sup>51</sup> *Id.* at 337.

<sup>52</sup> *Id.*

The United States Supreme Court, overruling *Betts*, held that the Florida state court had denied Gideon his Sixth Amendment right to counsel.<sup>53</sup> The Court determined that a criminal defendant's Sixth Amendment right to counsel is fundamental and essential to a fair trial.<sup>54</sup> Therefore, the Court reasoned, incorporation of the Sixth Amendment right to counsel into the Due Process Clause of the Fourteenth Amendment guaranteed this right.<sup>55</sup> The Sixth Amendment right to counsel consequently applied to those defendants charged with crimes in state courts.<sup>56</sup> For that reason, the Court concluded that all indigent defendants had a right to appointed counsel under the Sixth and Fourteenth Amendments.<sup>57</sup>

### B. *Right to Counsel in Misdemeanor Cases*

*Gideon* established that, at least in felony cases, state and federal courts had to provide indigent criminal defendants with counsel for their defense.<sup>58</sup> In 1972, the Supreme Court addressed the issue of the right to counsel in misdemeanor cases.<sup>59</sup> In that year, in *Argersinger v. Hamlin*, the United States Supreme Court held that indigent defendants have a right to counsel under the Sixth and Fourteenth Amendments in any type of criminal case.<sup>60</sup>

In *Argersinger*, the trial court convicted the defendant, without the benefit of counsel, of carrying a concealed weapon.<sup>61</sup> He was then sentenced to ninety days imprisonment.<sup>62</sup> The Florida Supreme Court upheld the uncounseled conviction, reasoning that the right to counsel existed only for non-petty offenses punishable by more than six months imprisonment.<sup>63</sup>

The United States Supreme Court reversed the Florida Supreme Court decision, holding that a defendant could not be deprived of liberty, regardless of the classification of the crime, without the repre-

---

<sup>53</sup> *Gideon*, 372 U.S. at 344-45.

<sup>54</sup> *Id.* at 344.

<sup>55</sup> *See id.* 340, 342.

<sup>56</sup> *Id.* at 344-45.

<sup>57</sup> *Id.*

<sup>58</sup> *See Gideon*, 372 U.S. at 344-45.

<sup>59</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). There is no cohesive definition distinguishing misdemeanors and felonies. *See* JOHN H. LINDQUIST, MISDEMEANOR CRIME, TRIVIAL CRIMINAL PURSUIT 16-18 (1988). Typically, the jurisdiction defines the distinction between the two by the length of the potential sentence for the crime. *Id.*

<sup>60</sup> *See* 407 U.S. at 37.

<sup>61</sup> *Id.* at 26.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 26-27.

sentation of counsel.<sup>64</sup> The Court reasoned that the complexities and implications associated with misdemeanor convictions often equally require effective counsel.<sup>65</sup> The Court gave several reasons why a misdemeanor conviction was, in many ways, just as serious as a felony conviction and thus warranted the same type of constitutional protections.<sup>66</sup> First, the Court stated that the legal and constitutional questions raised in a case that leads to brief imprisonment are not necessarily less complex than a case that *may* send a person to prison for six months or more.<sup>67</sup> Second, the Court stated that defendants often need counsel to advise them on all possible ramifications of a guilty plea in both felony and misdemeanor cases.<sup>68</sup> Finally, the Court illuminated the point that misdemeanor court is characterized by "assembly-line justice," and that reports indicated that those defendants with counsel are five times as likely to have all charges dismissed than those without.<sup>69</sup> Recognizing that these peculiar problems accompany misdemeanor and petty offense convictions, the Court concluded that the defendant needed counsel to ensure due process of law.<sup>70</sup> The United States Supreme Court held, therefore, that a court could not deprive a person of his or her liberty, regardless of the classification of the charge as a felony or a misdemeanor, unless that person was represented by counsel at trial.<sup>71</sup>

Chief Justice Burger wrote a concurring opinion in *Argersinger* in which he asserted that the majority opinion would create practical difficulties for judges and lawyers.<sup>72</sup> He anticipated that judges and prosecutors would engage in "predictive evaluation" to determine the likelihood of a jail sentence for a specific misdemeanor conviction in order to determine whether to provide counsel.<sup>73</sup> Burger believed that the courts would appoint counsel only upon a likelihood of a deprivation of liberty through a prison sentence.<sup>74</sup> Even with the practical difficulties of determining when counsel was needed, however, Burger believed that, in the long run, the decision moved the Court

---

<sup>64</sup> *Id.* at 37.

<sup>65</sup> *Argersinger*, 407 U.S. at 36-37.

<sup>66</sup> *Id.* at 33-36.

<sup>67</sup> *Id.* at 33.

<sup>68</sup> *Id.* at 34.

<sup>69</sup> *Id.* at 36.

<sup>70</sup> *Argersinger*, 407 U.S. at 37, 40.

<sup>71</sup> *Id.* at 37.

<sup>72</sup> *Id.* at 42-43 (Burger, C.J., concurring).

<sup>73</sup> *Id.* at 42 (Burger, C.J., concurring).

<sup>74</sup> *See id.* (Burger, C.J., concurring).

in the proper direction for Sixth Amendment jurisprudence.<sup>75</sup> Justice Burger stated that despite the potential administrative difficulties of the Court's opinion, "the dynamics of the profession have a way of rising to the burdens placed on it."<sup>76</sup> Justice Burger also pointed out, however, that a clear rule drawing the line for the right to counsel for charges with potential penalties in excess of six months imprisonment would be better than the majority rule.<sup>77</sup>

Justice Powell also concurred in the *Argersinger* judgment, but reasoned that the approach of the majority created a rigid rule and that a rule centering on the right to a fair trial and giving judges more leeway in determining when counsel was needed would make more sense.<sup>78</sup> Justice Powell cautioned against a rule requiring counsel in all non-felony cases as that would create large costs and burden the criminal justice systems of the states.<sup>79</sup> In addition, he felt that the rule announced by the majority in *Argersinger* would create administrative and systemic problems making the application of the right to counsel impractical, unreasonable and unfair.<sup>80</sup> Justice Powell asserted that courts should determine the existence of a right to counsel for misdemeanor charges on a case by case basis based on judicial discretion.<sup>81</sup> He believed that a discretionary rule would maintain the right to counsel in cases where it was necessary to guarantee a fair trial.<sup>82</sup> At the same time, the rule would prevent some of the systemic and institutional problems that he identified in the application of the majority opinion.<sup>83</sup>

In an attempt to clarify its *Argersinger* decision, the United States Supreme Court, in 1978, held in *Scott v. Illinois* that the right to counsel for indigent defendants in misdemeanor cases applied only in the case

---

<sup>75</sup> *Argersinger*, 407 U.S. at 41, 42 (Burger, C.J., concurring).

<sup>76</sup> *Id.* at 44 (Burger, C.J., concurring).

<sup>77</sup> *Id.* at 41 (Burger, C.J., concurring). Justice Burger, however, recognized that any deprivation of liberty, no matter how slight, could be a very serious matter. *Id.* (Burger, C.J., concurring).

<sup>78</sup> *Id.* at 47, 63 (Powell, J., concurring).

<sup>79</sup> *Id.* at 52 (Powell, J., concurring).

<sup>80</sup> See *Argersinger*, 407 U.S. at 54-55 (Powell, J., concurring). Justice Powell raised concerns about equal protection problems that may result from limited sentencing options, the likelihood that counsel will be appointed in almost all cases, and the significant burden the rule imposed on "already overburdened local courts." *Id.* (Powell, J., concurring).

<sup>81</sup> *Id.* at 63 (Powell, J., concurring). Justice Powell recommended three factors that judges should consider in determining whether the right to counsel existed. *Id.* at 64 (Powell, J., concurring). These were, (1) the complexity of the offense, (2) the likely sentence, and (3) the specific factors of that case. *Id.* (Powell, J., concurring).

<sup>82</sup> See *id.* at 65-66 (Powell, J., concurring).

<sup>83</sup> See *id.* at 65, 65-66 (Powell, J., concurring). Justice Brennan, joined by Justice Douglas and Justice Stewart, also wrote a brief concurring opinion. *Id.* at 40-41 (Brennan, J., concurring). Brennan advocated the use of law students and legal aid bureaus as a way of addressing the new need for lawyers created by the Court's decision. *Id.* (Brennan, J., concurring).

of an actual sentence of imprisonment.<sup>84</sup> In *Scott*, the trial court convicted the defendant of shoplifting.<sup>85</sup> The state court imposed a fine but no imprisonment even though the statute under which the court sentenced the defendant authorized imprisonment.<sup>86</sup> Both the conviction and sentence occurred without the assistance of counsel.<sup>87</sup> The defendant argued that he had a right to counsel for this misdemeanor conviction because the statute authorized imprisonment.<sup>88</sup>

The Supreme Court rejected the defendant's arguments, reasoning that the rationale underlying the decision in *Argersinger* was that the protection afforded by the Sixth Amendment right to counsel should extend only to the threat of the loss of liberty.<sup>89</sup> Therefore, the Court reasoned that the actual imposition of imprisonment was central to the right to counsel in misdemeanor cases.<sup>90</sup> On this basis, the Court refused to extend the right to counsel to the defendant in *Scott*, holding instead that the right existed only in cases where the court actually imposed imprisonment for a misdemeanor.<sup>91</sup>

Justice Powell wrote a concurring opinion, stating that consistent with his concurrence in *Argersinger*, he would adopt a more flexible rule.<sup>92</sup> Although Powell did not believe that the Constitution required the rule in *Argersinger*, he was mindful of *stare decisis* and therefore asserted what he believed was a better approach in this case.<sup>93</sup> Specifically, Justice Powell noted the Court's imprisonment threshold imposed an arbitrary standard that would preclude the right to counsel "in other types of cases in which conviction can have more serious consequences."<sup>94</sup> Rejecting the Court's bright-line test, he advocated giving courts more flexibility in assessing whether the right to counsel should exist.<sup>95</sup> Recognizing that hundreds of busy courts would confront this problem daily, Justice Powell stated that he "hoped" the Court would provide more guidance in the future and eventually adopt a more flexible rule.<sup>96</sup>

---

<sup>84</sup> 440 U.S. 367, 373-74 (1979).

<sup>85</sup> *Id.* at 368.

<sup>86</sup> *Id.* The statute set a maximum penalty at one year in jail or a \$500 fine, or both. *Id.*

<sup>87</sup> *See id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Scott*, 440 U.S. at 373.

<sup>90</sup> *Id.* at 373-74.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 374-75 (Powell, J., concurring).

<sup>93</sup> *Id.* (Powell, J., concurring).

<sup>94</sup> *Scott*, 440 U.S. at 374 (Powell, J., concurring).

<sup>95</sup> *Id.* at 375 (Powell, J., concurring).

<sup>96</sup> *Id.* at 374-75 (Powell, J., concurring).

In a dissenting opinion, Justice Brennan objected to the majority's restriction of the Sixth Amendment right to counsel.<sup>97</sup> He stated that the majority ignored the relevant precedent and principles under the Court's Sixth Amendment right to counsel jurisprudence in adopting the "actual imprisonment" rule.<sup>98</sup> Brennan believed that a sounder constitutional rule would require counsel if imprisonment were statutorily authorized for the offense.<sup>99</sup> Brennan concluded by stating that the Court's decision in *Scott* resembled the Court's decision in *Betts v. Brady*, which the Court later declared an "'anachronism when handed down' [and a case] that 'made an abrupt break with its well-considered precedents.'"<sup>100</sup>

Justice Blackmun, also in dissent, asserted that the right to counsel should extend to cases where a statute authorizes imprisonment of six months.<sup>101</sup> Noting that the right to a jury trial attached at this point, Blackmun believed the right to counsel should similarly extend as far.<sup>102</sup> Therefore, he advocated a rule where the right to counsel attached whenever the defendant was prosecuted for a non-petty offense punishable by more than six months imprisonment.<sup>103</sup> In accord with Justice Brennan, Justice Blackmun stated that this bright-line rule would be truer to the constitutional principles and considerations underlying the Sixth Amendment right to counsel.<sup>104</sup>

This line of cases established a general right to counsel that has since been narrowed.<sup>105</sup> The rule of *Gideon*, that the Sixth and Fourteenth Amendments required the right to counsel in criminal cases, was a broad rule that the Court later refined.<sup>106</sup> First, in *Argersinger*, the

---

<sup>97</sup> *Id.* at 389 (Brennan, J., dissenting).

<sup>98</sup> *See id.* (Brennan, J., dissenting). Brennan focused on the language of the Sixth Amendment and on the Court's reasoning in *Gideon* and *Argersinger*. *See id.* at 379 (Brennan, J., dissenting).

<sup>99</sup> *Scott*, 440 U.S. at 382 (Brennan, J., dissenting). Brennan called this the "authorized imprisonment" rule. *Id.* (Brennan, J., dissenting). Brennan rejected the arguments that the "authorized imprisonment" rule would create havoc in the criminal justice system. *Id.* at 385-88 (Brennan, J., dissenting). He believed that states were adequately equipped to handle that rule. *Id.* (Brennan, J., dissenting).

<sup>100</sup> *Id.* at 389 (Brennan, J., dissenting) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963)).

<sup>101</sup> *Scott*, 440 U.S. at 389-90 (Blackmun, J., dissenting).

<sup>102</sup> *Id.* at 389 (Blackmun, J., dissenting). The constitutional right to trial by jury extends to cases where the potential imprisonment may exceed six months. *Duncan v. Louisiana*, 391 U.S. 145, 159, 161 (1968).

<sup>103</sup> *Scott*, 440 U.S. at 389-90 (Blackmun, J., dissenting).

<sup>104</sup> *See id.* at 390 (Blackmun, J., dissenting) (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

<sup>105</sup> *See Scott*, 440 U.S. at 373-74; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1962).

<sup>106</sup> *See Scott*, 440 U.S. at 373-74 (right to counsel in misdemeanor cases only when sentence of imprisonment); *Gideon*, 372 U.S. at 344-45 (right to counsel in any felony case).

Court clarified the broad rule of *Gideon* and applied the right to counsel in misdemeanor cases.<sup>107</sup> *Scott* then announced a rule more limited than *Argersinger* and required that counsel be appointed only when the defendant's conviction actually resulted in a prison sentence.<sup>108</sup> Based on these cases and consistent with the constitutional protections against the deprivation of liberty, the right to counsel existed only when a court imposed a term of incarceration for the conviction of a misdemeanor.<sup>109</sup>

## II. COLLATERAL USE OF UNCOUNSELED MISDEMEANORS

### A. *Baldasar v. Illinois*

Given the status of the law after *Argersinger* and *Scott*, a difficulty arose when a court used a valid misdemeanor conviction obtained without counsel to enhance a subsequent sentence for another crime under a recidivist statute.<sup>110</sup> This problem existed because an uncounseled misdemeanor that did not result in a prison sentence could enhance a later sentence and effectively result in imprisonment.<sup>111</sup> In 1980, in *Baldasar v. Illinois*, the United States Supreme Court held that it violated the Sixth Amendment right to counsel for courts to use prior uncounseled misdemeanors to enhance a subsequent sentence.<sup>112</sup>

In *Baldasar*, the defendant was convicted of misdemeanor theft in 1975 without the assistance of counsel and sentenced to a fine and probation.<sup>113</sup> Later that year, he was charged for a subsequent theft and the state used the prior uncounseled misdemeanor conviction to convert the theft to a felony, which resulted in jail time.<sup>114</sup> The Illinois Appellate Court held that the Sixth and Fourteenth Amendments did not bar the imposition of an enhanced sentence of a prison term based on the uncounseled misdemeanor.<sup>115</sup>

---

<sup>107</sup> See *Argersinger*, 407 U.S. at 37, 40.

<sup>108</sup> See *Scott*, 440 U.S. at 373-74.

<sup>109</sup> See *id.* at 373.

<sup>110</sup> See *Baldasar v. Illinois*, 446 U.S. 222, 227-28 (1980) (Marshall, J., concurring); David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar*, 34 U. FLA. L. REV. 517, 527 (1982); Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment*, *Baldasar and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 165, 172 (1992).

<sup>111</sup> See *Baldasar*, 446 U.S. at 227-28 (Marshall, J., concurring); Fu, *supra* note 110, at 172.

<sup>112</sup> *Baldasar*, 446 U.S. at 224 (per curiam); *id.* at 228 (Marshall, J., concurring).

<sup>113</sup> *Id.* at 223 (per curiam).

<sup>114</sup> *Id.* (per curiam). The applicable Illinois statute provided that a second conviction for the same offense of theft of property worth less than \$150 may be treated as a felony and punishable by a term of imprisonment of one to three years. *Id.* (per curiam).

<sup>115</sup> *Id.* (per curiam).

The United States Supreme Court granted certiorari and then reversed the state court's decision in a per curiam opinion.<sup>116</sup> The Court, however, failed to issue a majority opinion.<sup>117</sup> Rather, the per curiam opinion referred to the reasons set forth in the three concurring opinions and reversed the Illinois Appellate Court's judgment.<sup>118</sup> The Court therefore implicitly concluded that the state court had improperly used the prior uncounseled misdemeanor to convert the defendant's subsequent misdemeanor into a felony and thereby enhance the sentence for the subsequent crime.<sup>119</sup>

Justice Stewart concurred and stated simply that "it seems clear to me" that this prison sentence violated the constitutional rule of *Scott v. Illinois*.<sup>120</sup> Justice Blackmun also wrote a separate concurring opinion in which he stated that he still favored the six month authorized imprisonment bright-line rule that he advocated in his dissent in *Scott*.<sup>121</sup> He nonetheless considered the result in this case consistent with that rule based on the facts of the case, and he therefore concurred.<sup>122</sup>

Justice Marshall, in a separate concurring opinion, stated that the court did not appropriately use the prior uncounseled misdemeanor in sentence enhancement.<sup>123</sup> Justice Marshall asserted that the central issue under *Argersinger* and *Scott* was whether the court denied the defendants of their liberty without the assistance of counsel.<sup>124</sup> In this case, Marshall contended, the defendant would not have received a prison term but for the uncounseled conviction.<sup>125</sup> Marshall concluded that *Scott* and *Argersinger* directly prohibited such a use of an uncounseled misdemeanor in the imposition of a sentence of imprisonment.<sup>126</sup> Therefore, according to Justice Marshall, the sentencing court could

---

<sup>116</sup> *Id.* at 222, 224 (per curiam).

<sup>117</sup> See *Baldasar*, 446 U.S. at 222 (per curiam); *id.* at 224 (Stewart, J., concurring); *id.* at 224 (Marshall, J., concurring); *id.* at 229 (Blackmun, J., concurring).

<sup>118</sup> *Id.* at 224 (per curiam).

<sup>119</sup> See *id.* (per curiam). The Court stated simply, "[f]or the reasons stated in the concurring opinions, the judgment is reversed, and the case is remanded to the Appellate Court of Illinois, Second District, for further proceedings." *Id.* (per curiam).

<sup>120</sup> *Id.* at 224 (Stewart, J., concurring).

<sup>121</sup> *Id.* at 229-30 (Blackmun, J., concurring).

<sup>122</sup> See *Baldasar*, 446 U.S. at 229-30 (Blackmun, J., concurring). Justice Blackmun's dissent in *Scott* advocated the adoption of a rule requiring the appointment of counsel in all cases where the defendant faced a possible jail term of six months or more. *Scott v. Illinois*, 440 U.S. 367, 389-90 (1979) (Blackmun, J., dissenting).

<sup>123</sup> *Baldasar*, 446 U.S. at 226, 227-28 (Marshall, J., concurring).

<sup>124</sup> *Id.* at 226 (Marshall, J., concurring). Marshall maintained, however, that he believed *Scott v. Illinois* was wrongly decided. *Baldasar*, 446 U.S. at 225 (Marshall, J., concurring).

<sup>125</sup> *Id.* at 227 (Marshall, J., concurring).

<sup>126</sup> *Id.* (Marshall, J., concurring).

not use the defendant's prior uncounseled misdemeanor conviction to enhance his subsequent sentence.<sup>127</sup>

In the sole dissenting opinion, Justice Powell asserted that the result reached by the Court created practical problems for courts in deciding misdemeanor cases and was inconsistent with the Court's holding in *Scott*.<sup>128</sup> Justice Powell reasoned that sentence enhancement penalizes only the offense for which the defendant is being punished at that time, and does not affect the validity of the original conviction.<sup>129</sup> As such, Justice Powell asserted that a court should be able to use a valid conviction to enhance a subsequent sentence.<sup>130</sup> Indeed, Justice Powell asserted that the logical consequence of the right to counsel jurisprudence would permit courts to use prior valid uncounseled misdemeanor convictions in sentence enhancement because the Supreme Court had recognized the constitutional validity of those convictions.<sup>131</sup> Justice Powell concluded by predicting that the Court's decision would result in a great deal of confusion and difficulty for lower courts.<sup>132</sup>

Thus, after *Baldasar*, it appeared that a court could not use a prior uncounseled misdemeanor in enhancing the sentence of a subsequent conviction.<sup>133</sup> *Scott* and *Argersinger* had created and defined the right to counsel in misdemeanor cases involving actual imprisonment.<sup>134</sup> As a commentator stated, these cases left open the question of whether a court could impose a sentence of imprisonment based on a prior uncounseled misdemeanor conviction.<sup>135</sup> *Baldasar* seemed to answer in the negative.<sup>136</sup>

---

<sup>127</sup> *Id.* at 227-28 (Marshall, J., concurring).

<sup>128</sup> *Id.* at 231, 234, 235 (Powell, J., dissenting).

<sup>129</sup> *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting).

<sup>130</sup> *See id.* at 231 (Powell, J., dissenting).

<sup>131</sup> *See id.* at 232-33 (Powell, J., dissenting). Justice Powell argued that although the Court had found that courts could not rely on uncounseled felonies for sentence enhancement, misdemeanors had been treated differently. *Id.* (Powell, J., dissenting). After *Gideon*, the case law on felonies and misdemeanors with respect to the right to counsel took separate routes. *Baldasar*, 446 U.S. at 232-33 (Powell, J., dissenting). An uncounseled felony is an invalid conviction, while an uncounseled misdemeanor is valid if no term of imprisonment is imposed. *Id.* (Powell, J., dissenting). Therefore, according to Justice Powell, consistent with the case law on misdemeanors as expressed in *Argersinger* and *Scott*, a valid misdemeanor conviction should be available to enhance a subsequent sentence. *See Baldasar*, 446 U.S. at 233 (Powell, J., dissenting).

<sup>132</sup> *Id.* at 234-35 (Powell, J., dissenting).

<sup>133</sup> *Id.* at 224 (per curiam); *id.* at 228 (Marshall, J., concurring).

<sup>134</sup> *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972).

<sup>135</sup> *See* Fu, *supra* note 110, at 172.

<sup>136</sup> *See Baldasar*, 446 U.S. at 224 (per curiam); *id.* at 228 (Marshall, J., concurring); *see also* Fu, *supra* note 110, at 175, 180.

## B. *The Application of Baldasar*

The Supreme Court has held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"<sup>137</sup> Because *Baldasar* is such a case where no one opinion represented a majority, courts and legislatures have employed this technique in interpreting its meaning.<sup>138</sup> In the case of *Baldasar*, however, the attempts to apply the narrowest grounds test have produced a myriad of results.<sup>139</sup>

### 1. Lower Court Application

Several courts, both state and federal, have held that Justice Marshall's concurrence in *Baldasar* constitutes the proper rationale in the case and have barred any subsequent use of an uncounseled misdemeanor.<sup>140</sup> For example, the United States Court of Appeals for the Ninth Circuit in *United States v. Williams* reasoned that *Baldasar* barred the use of prior uncounseled misdemeanors for enhancing a sentence of imprisonment.<sup>141</sup> In *Williams*, a juvenile challenged the use of prior, nonjury juvenile adjudications under the reasoning of *Baldasar*.<sup>142</sup> The Ninth Circuit, as well as other courts that have adopted this rationale, found that the consensus of the opinions in *Baldasar* was that an uncounseled conviction, although valid, was invalid to impose a prison sentence.<sup>143</sup> As such, this court, and others, have applied *Baldasar* to

---

<sup>137</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977).

<sup>138</sup> See, e.g., *United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990); *Santillanes v. United States Parole Comm'n*, 754 F.2d 887, 889 (10th Cir. 1985). See generally Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 769-74 (1980).

<sup>139</sup> See *infra* notes 140-56 and accompanying text for a discussion of the application and inconsistent results of the narrowest ground test.

<sup>140</sup> See, e.g., *United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991); *United States v. Williams*, 891 F.2d 212, 214 (9th Cir. 1989), cert. denied, 494 U.S. 1037 (1990); *Pananen v. State*, 711 P.2d 528, 531, 532 (Alaska Ct. App. 1985); *Lovell v. State*, 678 S.W.2d 318, 320 (Ark. 1984); *State v. Vares*, 801 P.2d 555, 557 (Haw. 1990); *State v. Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State v. Oehm*, 680 P.2d 309, 311-12 (Kan. Ct. App. 1984); *State v. Ulibarri*, 632 P.2d 746, 747 (N.M. Ct. App. 1981); *City of Pendleton v. Standerfer*, 688 P.2d 68, 70 (Or. 1984); *Sargent v. Commonwealth*, 360 S.E.2d 895, 899-901 (Va. Ct. App. 1987); *State v. Armstrong*, 332 S.E.2d 837, 840-41 (W. Va. 1985).

<sup>141</sup> *Williams*, 891 F.2d at 214.

<sup>142</sup> *Id.*

<sup>143</sup> See *id.*; accord *Brady*, 928 F.3d at 854; *Sargent*, 360 S.E.2d at 899-901.

preclude the imposition of an increased sentence based on an uncounseled misdemeanor.<sup>144</sup>

Other courts have adopted, and modified Justice Blackmun's theory of the bright-line rule.<sup>145</sup> For example, in 1985, in *Santillanes v. United States Parole Commissioner*, the United States Court of Appeals for the Tenth Circuit adopted Justice Blackmun's reasoning and held that *Baldasar* barred only an invalid prior uncounseled misdemeanor from use in sentence enhancement.<sup>146</sup> Justice Blackmun's concurrence in *Baldasar* asserted that a prior uncounseled misdemeanor was valid only if the statute authorized a maximum prison sentence of less than six months.<sup>147</sup> Because *Baldasar* presented a case where the statute authorized imprisonment of greater than six months, Blackmun concurred on the ground that his six month authorized imprisonment rule barred the sentence enhancement and rendered the sentence invalid.<sup>148</sup> The Tenth Circuit, and other courts that follow this reasoning, have held, therefore, that if the original conviction is invalid, a court may not use it to enhance a subsequent sentence.<sup>149</sup> Conversely, if the original conviction is valid, it may be used for enhancement.<sup>150</sup> Some courts have even gone so far as to hold that enhancement can occur only when the prior misdemeanor was punishable by more than six months imprisonment.<sup>151</sup>

Still other courts have held that the *Baldasar* opinion does not in any respect bar the use of prior uncounseled misdemeanors in sentence enhancement.<sup>152</sup> For example, in 1990, in *United States v. Eckford*,

---

<sup>144</sup> See *Williams*, 891 F.2d at 214; accord *Brady*, 928 F.2d at 854.

<sup>145</sup> See, e.g., *Santillanes v. United States Parole Comm'n*, 754 F.2d 887, 889 (10th Cir. 1985); *Hlad v. State*, 565 So. 2d 762, 764-67 (Fla. Dist. Ct. App. 1990); *State v. Orr*, 375 N.W.2d 171, 175-76 (N.D. 1985); *Commonwealth v. Thomas*, 507 A.2d 57, 60-61 & n.11 (Pa. 1986); *State v. Novak*, 318 N.W.2d 364, 368-69 (Wis. 1982).

<sup>146</sup> 754 F.2d at 889.

<sup>147</sup> See *Baldasar v. Illinois*, 446 U.S. 222, 229-30 (1980) (Blackmun, J., concurring).

<sup>148</sup> See *id.* (Blackmun, J., concurring).

<sup>149</sup> See *Santillanes*, 754 F.2d at 889; *Hlad*, 565 So. 2d at 764-67.

<sup>150</sup> See *Santillanes*, 754 F.2d at 889; *Hlad*, 565 So. 2d at 764-67.

<sup>151</sup> See, e.g., *Hlad*, 565 So. 2d at 764-67; *State v. Orr*, 375 N.W.2d 171, 176 (N.D. 1985); *Commonwealth v. Thomas*, 507 A.2d 57, 60-61 (Pa. 1986); *State v. Novak*, 318 N.W.2d 364, 368-69 (Wis. 1982). Justice Blackmun concurred in *Baldasar* because the decision was consistent with the six month bright-line rule he advocated in *Scott and Argersinger*. *Baldasar*, 446 U.S. at 229-30 (Blackmun, J., concurring). That rule, however, was never adopted by the Court. See *Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994). Therefore, it seems odd for these courts to adopt his reasoning as it rests on a rule that is not and never was the constitutional standard. See *id.*

<sup>152</sup> See, e.g., *United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991), *cert. denied sub nom. Clinton-Rodriguez v. United States*, 113 S. Ct. 1250 (1993); *United States v. Eckford*, 910 F.2d 216, 220 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 346-47 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 &

the United States Court of Appeals for the Fifth Circuit held that *Baldasar* did not bar the use of a prior uncounseled misdemeanor in sentence enhancement.<sup>153</sup> *Eckford* involved a valid uncounseled misdemeanor conviction that the trial court subsequently used to enhance a sentence for attempted robbery.<sup>154</sup> The Fifth Circuit, as well as other courts that have adopted similar reasoning, focused on the splintering of the Supreme Court in *Baldasar* and the absence of a common rationale in the concurrences.<sup>155</sup> Due to the great deal of confusion in interpreting *Baldasar*, this court, and others, have essentially ignored the holding of *Baldasar* and found that it does not bar the subsequent use of a prior uncounseled misdemeanor in sentence enhancement in any case.<sup>156</sup>

## 2. The United States Sentencing Guidelines

Lower courts, both state and federal, are not alone in their inconsistent application of *Baldasar*.<sup>157</sup> In 1990, the United States Sentencing Commission<sup>158</sup> (the "Commission") amended the United States Sentencing Guidelines (the "Guidelines") to permit the use of uncounseled misdemeanors in sentence enhancement.<sup>159</sup> The Commission

n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981); *Sheffield v. City of Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990).

<sup>153</sup> *Eckford*, 910 F.2d at 220.

<sup>154</sup> *Id.* at 217-18.

<sup>155</sup> *Id.* at 219-20; *see Castro-Vega*, 945 F.2d at 499-500.

<sup>156</sup> *Eckford*, 910 F.2d at 220; *see Castro-Vega*, 945 F.2d at 500; *Schindler*, 715 F.2d at 346-47. Still other courts, unclear that there is a narrowest ground in *Baldasar* or that the case stands for a specific proposition, have invented their own standards for the use of uncounseled misdemeanors in sentence enhancement. *See, e.g., Wilson v. Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981) (*Baldasar* bars converting subsequent misdemeanor to felony with prison term); *Moore v. State*, 352 S.E.2d 821, 822 (Ga. Ct. App.), *cert. denied*, 484 U.S. 904 (1987) (*Baldasar* bars enhancement only when ultimate sentence is greater than that authorized under the statute or if enhancement converts a misdemeanor to felony); *State v. Laurick*, 575 A.2d 1340, 1347 (N.J.), *cert. denied*, 498 U.S. 967 (1990) (*Baldasar* bars enhancement when ultimate sentence is greater than that authorized in absence of prior uncounseled misdemeanor or enhancement converts misdemeanor to felony).

<sup>157</sup> *See UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES* § 4A1.2 (1994) [hereinafter USSG]; *Fu, supra* note 110, at 175-77.

<sup>158</sup> The Commission is an independent agency of the judicial branch and is composed of seven voting and two nonvoting members. THOMAS W. HUTCHINSON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* 1 (2d ed. 1994).

<sup>159</sup> *See* USSG, *supra* note 157, § 4A1.2 & Commentary, Background; *Fu, supra* note 110, at 176-77. Previously, there was ambiguity as to what *Baldasar* required under the Guidelines. *Fu, supra* note 110, at 177. The old Guidelines stated, "if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score." *Id.*

passed this amendment despite the Supreme Court's holding in *Baldasar*.<sup>160</sup>

The Guidelines were developed after Congress passed the Sentencing Reform Act of 1984 (the "Act").<sup>161</sup> The Act authorizes the United States Sentencing Commission to create guidelines for achieving honesty, uniformity and proportionality in sentencing.<sup>162</sup> Under the Guidelines, a defendant is placed in a criminal history category based on the number of criminal history points that are calculated by a formula established in the Guidelines.<sup>163</sup> A range for sentencing is then calculated based on the criminal history category.<sup>164</sup> The Guidelines require judges to sentence a defendant within the calculated range, with some exceptions.<sup>165</sup> The Guidelines permit judicial discretion to "downward depart" from the calculated range if the factual circumstances indicate that the criminal history category does not accurately reflect the seriousness of the defendant's crimes.<sup>166</sup>

After *Baldasar*, the Guidelines permitted courts to use prior uncounseled misdemeanors in the calculation of criminal history categories.<sup>167</sup> In the background commentary of section 4A1.2, the Guidelines explicitly state, contrary to *Baldasar*, "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, *including uncounseled misdemeanor sentences where imprisonment was not imposed*."<sup>168</sup> Based on the clear language of the Guidelines, its drafters apparently believed that if a conviction was valid under *Scott* and *Argersinger*, then a court could use the uncounseled misdemeanor sentence for enhancement of a subsequent sentence.<sup>169</sup> Indeed, in 1992, the Commission implied in a publication that it did not believe *Baldasar* viable.<sup>170</sup> In addition, the Commission stated explicitly that as

---

<sup>160</sup> See Fu, *supra* note 110, at 176-77.

<sup>161</sup> See HUTCHINSON, *supra* note 158, at 2.

<sup>162</sup> *Id.*

<sup>163</sup> See Fu, *supra* note 110, at 176 n.66.

<sup>164</sup> See *id.*

<sup>165</sup> See USSG, *supra* note 157, § 4A1.3; Fu, *supra* note 110, at 176 n.66.

<sup>166</sup> See USSG, *supra* note 157, § 4A1.3; see also *Nichols v. United States*, 114 S. Ct. 1921, 1930 (1994) (Souter, J., concurring).

<sup>167</sup> See USSG, *supra* note 157, § 4A1.2 & Commentary, Background. Section 4A1.2 is entitled "Definitions and Instructions for Computing Criminal History." *Id.*

<sup>168</sup> USSG, *supra* note 157, § 4A1.2 & Commentary, Background (emphasis added); see also *Baldasar v. Illinois*, 446 U.S. 222, 224 (1980) (per curiam); *Baldasar*, 446 U.S. at 227-28 (Marshall, J., concurring).

<sup>169</sup> See USSG, *supra* note 157, § 4A1.2 & Commentary, Background; UNITED STATES SENTENCING COMMISSION, MOST FREQUENTLY ASKED QUESTIONS ABOUT THE SENTENCING GUIDELINES 24 (6th ed. 1992) [hereinafter MOST FREQUENTLY ASKED QUESTIONS].

<sup>170</sup> See MOST FREQUENTLY ASKED QUESTIONS, *supra* note 169, at 24.

long as counsel was not constitutionally required,<sup>171</sup> a court could use the conviction of a prior uncounseled misdemeanor to calculate the defendant's criminal history.<sup>172</sup>

In sum, the Supreme Court's opinion in *Baldasar* resulted in inconsistent lower court application.<sup>173</sup> Given the lack of a majority opinion, courts adopted piecemeal reasoning on the use of prior uncounseled misdemeanors.<sup>174</sup> In addition, the United States Sentencing Guidelines rejected the holding of *Baldasar*.<sup>175</sup> As a commentator stated, the confusion and rejection of the *Baldasar* opinion made a Supreme Court clarification on the use of prior uncounseled misdemeanors imminent.<sup>176</sup>

### III. NICHOLS V. UNITED STATES

In 1994, in *Nichols v. United States* the United States Supreme Court overruled *Baldasar*.<sup>177</sup> The Court held that a court could rely on an uncounseled misdemeanor, valid under *Scott*, for enhancing the sentence of a subsequent offense.<sup>178</sup> The defendant in *Nichols*, without the assistance of counsel, had been convicted in 1983 of a state misdemeanor for driving under the influence and fined \$250.<sup>179</sup> Subsequently, in 1990, the defendant pleaded guilty in federal court to possessing cocaine with intent to distribute.<sup>180</sup> Under the United States

---

<sup>171</sup> See *id.* The Commission was referring to the rule of *Scott* which requires counsel only in cases of actual imprisonment. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

<sup>172</sup> See MOST FREQUENTLY ASKED QUESTIONS, *supra* note 169, at 24. The Commission stated: [T]he fact that a conviction was uncounseled does not automatically mean that the conviction was constitutionally invalid. In the case of a felony or misdemeanor, for example, the defendant may have waived counsel. Or, in the case of a misdemeanor, a term of imprisonment may not have been imposed and thus provision of counsel would not have been constitutionally required. The Background Commentary to § 4A1.2 expressly states the Commission's intent that prior sentences not otherwise excluded are to be counted in the calculation of the defendant's criminal history score, including uncounseled misdemeanors where imprisonment was not imposed.

*Id.* (citing *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990)).

<sup>173</sup> See *supra* notes 140-56 and accompanying text for a discussion of inconsistent lower court application of *Baldasar*.

<sup>174</sup> See *id.*

<sup>175</sup> See *supra* notes 157-72 and accompanying text for a discussion of the United States Sentencing Guidelines.

<sup>176</sup> See *Fu*, *supra* note 110, at 193-94.

<sup>177</sup> *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994).

<sup>178</sup> *Id.* at 1927.

<sup>179</sup> *Id.* at 1924. *Nichols* pleaded nolo contendere to the driving under the influence charge. *Id.* at 1931 (Blackmun, J., dissenting). The applicable Georgia statute at the time of the conviction provided for a maximum punishment of one year imprisonment and a \$1,000 fine. *Id.* at 1924 n.1 (citing GA. CODE ANN. § 40.6-391(c) (1982)).

<sup>180</sup> *Nichols*, 114 S. Ct. at 1924.

Sentencing Guidelines, the defendant was assessed a criminal history point for the 1983 uncounseled misdemeanor conviction.<sup>181</sup> The inclusion of the uncounseled misdemeanor conviction in the calculation of the sentencing range increased Nichols's possible range of imprisonment from 168–210 months to 188–235 months.<sup>182</sup>

The defendant in *Nichols* challenged the inclusion of the prior uncounseled conviction in the calculation of his criminal history category for the purpose of imposing the sentence on the possession charge.<sup>183</sup> Nichols argued that inclusion of the misdemeanor conviction violated his Sixth Amendment right to counsel and specifically contradicted the Supreme Court's holding in *Baldasar*.<sup>184</sup> The United States District Court for the Eastern District of Tennessee rejected the defendant's arguments and stated that the *Baldasar* opinion only prohibited a court's use of a prior uncounseled misdemeanor to "create" a felony with a prison term.<sup>185</sup> That is, the court limited *Baldasar* to its facts and held that a court could not convert a subsequent misdemeanor into a felony that required jail time by using a prior uncounseled misdemeanor.<sup>186</sup> The district court concluded that *Baldasar* did not bar the use of the prior uncounseled misdemeanor for enhancement of the sentence in this case, as the charge was already a felony and was not being converted from a misdemeanor to a felony.<sup>187</sup> The district court sentenced the defendant to the maximum sentence under the enhanced range, 235 months.<sup>188</sup>

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court.<sup>189</sup> The Sixth Circuit agreed with the district court's reasoning that *Baldasar* barred the use of an uncounseled misdemeanor only if it converted a misdemeanor to a felony.<sup>190</sup> Therefore, the Court of Appeals held that *Baldasar* permitted the use of the valid prior uncounseled misdemeanor to enhance the defendant's current sentence.<sup>191</sup>

---

<sup>181</sup> *Id.* at 1924. See *supra* notes 161–66 and accompanying text for a discussion of the calculation of sentencing range under the United States Sentencing Guidelines.

<sup>182</sup> *Nichols*, 114 S. Ct. at 1924.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *United States v. Nichols*, 763 F. Supp. 277, 279–80 (E.D. Tenn. 1991), *aff'd*, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> *Id.* at 281. This sentence was 25 months longer than the maximum sentence would have been if the district court did not use the uncounseled misdemeanor in calculating the criminal history category. *Nichols*, 114 S. Ct. at 1925.

<sup>189</sup> *United States v. Nichols*, 979 F.2d 402, 414 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

<sup>190</sup> *Id.* at 417–18.

<sup>191</sup> *Id.*

The United States Supreme Court granted certiorari<sup>192</sup> and held that a court properly could use a prior uncounseled misdemeanor to enhance a subsequent sentence.<sup>193</sup> Nichols argued that, under *Baldasar* and related cases, an individual could not be imprisoned without the representation of counsel.<sup>194</sup> As Nichols's sentence was enhanced by his prior uncounseled conviction by fifteen months, he argued that the district court had imposed imprisonment without the benefit of counsel.<sup>195</sup> Nichols argued that in order to maintain the integrity of the Court's Sixth Amendment jurisprudence, the Court should bar the use of the prior uncounseled misdemeanors in sentence enhancement.<sup>196</sup> In the alternative, if the Court felt compelled to clarify the rule of *Baldasar*, Nichols argued that the "authorized imprisonment" rule as set forth in Justice Blackmun's concurrence in *Baldasar* provided a clear and consistent rule that the Court should adopt.<sup>197</sup>

The United States, as respondent, attempted to distinguish *Baldasar* from the present case and also argued that the opinion itself had resulted in a great deal of problems in application.<sup>198</sup> The government argued that because the *Baldasar* opinion seemed contrary to current policy and sentencing practice, the Court should reassess its position on the use of prior uncounseled misdemeanors for sentence enhancement.<sup>199</sup> The government advocated the Court's overruling *Baldasar* and permitting the use of prior uncounseled misdemeanors for sentence enhancement purposes.<sup>200</sup>

The United States Supreme Court agreed with the government and overruled *Baldasar* in a six to three decision.<sup>201</sup> The Court recognized the problems and uncertainties created by the *Baldasar* opinion.<sup>202</sup> The Court reasoned that enhancement statutes do not change the actual penalty imposed for the prior conviction and that enhancement is consistent with generally accepted principles of sentencing standards and procedures.<sup>203</sup> Therefore, the Court concluded that a

---

<sup>192</sup> *Nichols v. United States*, 114 S. Ct. 1921, 1925 (1994).

<sup>193</sup> *Id.* at 1927.

<sup>194</sup> Brief of the Petitioner, *Nichols v. United States*, 114 S. Ct. 1921 (1994) (No. 92-8556).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Brief for the United States, *Nichols v. United States*, 114 S. Ct. 1921 (1994) (No. 92-8556).

<sup>199</sup> *Id.*

<sup>200</sup> *See id.*

<sup>201</sup> *Nichols*, 114 S. Ct. at 1928.

<sup>202</sup> *Id.* at 1926-27.

<sup>203</sup> *Id.* at 1927-28. The Court stated that sentencing requires less exacting standards than convictions. *Id.* at 1927. The Court further stated that there is no requirement under the Due

court properly could use a valid uncounseled misdemeanor to enhance the sentence of a subsequent conviction.<sup>204</sup>

Justice Souter, in a concurring opinion, asserted that although he agreed with the outcome in this case, he was uneasy about the Court's broad language in overruling *Baldasar* given the scheme of the Sentencing Guidelines.<sup>205</sup> According to Justice Souter, sentence enhancement was valid in this case because the Guidelines explicitly permit federal judges to consider the unreliability of the prior uncounseled conviction.<sup>206</sup> Thus, he reasoned, if the judge does not believe that the Criminal History Category accurately represents the seriousness of the crimes, the judge may "downward depart" from the calculated range under the Guidelines.<sup>207</sup> Because the Guidelines contained built-in safeguards, Justice Souter asserted that they adequately protect the Sixth Amendment right to counsel.<sup>208</sup> Justice Souter hesitated, however, to endorse the constitutionality of the use of uncounseled misdemeanors in *all* sentencing schemes.<sup>209</sup> According to Justice Souter, other schemes, unlike the Guidelines, may not contain adequate safeguards against constitutional violations of the right to a fair trial through the assistance of counsel.<sup>210</sup>

Justice Blackmun, joined by Justice Stevens and Justice Ginsburg, dissented on the grounds that the Court's Sixth Amendment jurisprudence had primarily concerned itself with the fact that no defendant should be deprived of liberty without the representation of counsel.<sup>211</sup> Based on this jurisprudence, Justice Blackmun proposed a rule whereby courts could never use prior uncounseled misdemeanors in sentence enhancement.<sup>212</sup> Because of the inherent unreliability in all types of uncounseled convictions, Justice Blackmun asserted that the Court should not distinguish between prior uncounseled felonies and misdemeanors in sentence enhancement.<sup>213</sup> Justice Blackmun rea-

---

Process Clause that an individual be warned that a conviction may be used in the future. *Id.* at 1928.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1931 (Souter, J., concurring).

<sup>206</sup> *Nichols*, 114 S. Ct. at 1930-31 (Souter J., concurring).

<sup>207</sup> *Id.* at 1930 (Souter, J., concurring).

<sup>208</sup> *See id.* at 1931 (Souter, J., concurring).

<sup>209</sup> *Id.* (Souter, J., concurring).

<sup>210</sup> *See id.* (Souter, J., concurring). Justice Souter stated, "Because I prefer not to risk offending the principle that '[t]he Court will not 'anticipate a question of constitutional law in advance of necessity of deciding it,' I concur only in the judgment." *Id.* (Souter, J., concurring) (quoting *Aswander v. TVA*, 297 U.S. 288, 346 (1936)) (citation omitted).

<sup>211</sup> *Nichols*, 114 S. Ct. at 1931 (Blackmun, J., dissenting).

<sup>212</sup> *Id.* at 1935 (Blackmun, J., dissenting).

<sup>213</sup> *Id.* at 1935-36 (Blackmun, J., dissenting).

soned that the prohibition on the use of uncounseled felonies in sentence enhancement should similarly extend to uncounseled misdemeanors.<sup>214</sup> This bright-line rule of barring the use of prior uncounseled misdemeanors in sentence enhancement would also provide, according to Justice Blackmun, a workable rule for lower courts.<sup>215</sup> He reasoned that the rule was workable because lower courts would not need to interpret and second guess the Supreme Court's decision and reasoning.<sup>216</sup> Justice Blackmun asserted that the Court's holding in this case, on the other hand, would create confusion and inadequate protection of a fundamental constitutional right.<sup>217</sup>

After *Nichols*, courts could enhance a sentence through the use of a prior uncounseled misdemeanor without running afoul of the Sixth Amendment and related jurisprudence.<sup>218</sup> The Supreme Court in *Nichols* expressed concern with the rule of *Baldasar* and the inability of lower courts to apply the meaning of that case with any consistency.<sup>219</sup> For this reason, the Court overruled *Baldasar* and announced a rule, for the sake of consistency, that permits courts to enhance sentences, without limitation, based on prior uncounseled misdemeanors.<sup>220</sup>

#### IV. *NICHOLS* AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

The United States Supreme Court's decision in *Nichols*, although appearing to promote consistency and predictability in its application, is troubling in several respects.<sup>221</sup> First, the opinion was written in

---

<sup>214</sup> See *id.* at 1935-36 (Blackmun, J., dissenting). The subsequent use of uncounseled felonies is prohibited by *Burgett v. Texas*, 389 U.S. 109, 115-16 (1967).

<sup>215</sup> *Nichols*, 114 S. Ct. at 1936 (Blackmun, J., dissenting). Justice Blackmun recognized that as a consequence of this rule courts would have to appoint more counsel for misdemeanor cases. *Id.* (Blackmun, J., dissenting). He concluded, however, that this was a slight cost in order to safeguard the Sixth Amendment. *Id.* (Blackmun, J., dissenting).

<sup>216</sup> See *id.* at 1936 (Blackmun, J., dissenting).

<sup>217</sup> See *id.* at 1936-37 (Blackmun, J., dissenting). Justice Ginsburg also wrote a separate dissenting opinion. *Nichols*, 114 S. Ct. at 1937 (Ginsburg, J., dissenting). She asserted that the Court's opinion in *Nichols* "turns what was a disposition allowing no jail time—a disposition made for one day and case alone—into a judgment of far heavier weight." *Id.* (Ginsburg, J., dissenting). She also stated that the issue in this case was different from the issue in *Custis v. United States*, 114 S. Ct. 1732 (1994), where the Supreme Court held that a criminal defendant had no right to collaterally attack a prior state conviction used to enhance the current sentence. *Nichols*, 114 S. Ct. at 1937 (Ginsburg, J., dissenting).

<sup>218</sup> See *Nichols*, 114 S. Ct. at 1927, 1928.

<sup>219</sup> *Id.* at 1926-27.

<sup>220</sup> See *id.* at 1927-28.

<sup>221</sup> See *infra* notes 226-311 and accompanying text for a discussion of the problems with the *Nichols* decision.

response to an administrative problem of inconsistent application of the Court's *Baldasar* opinion, rather than on the basis of sound constitutional principles.<sup>222</sup> Second, the decision in *Nichols* itself is inconsistent with the Court's well-reasoned precedent on the Sixth Amendment right to counsel.<sup>223</sup> As such, individuals may now receive a prison term without the assistance of counsel contrary to the Court's long-standing Sixth Amendment jurisprudence.<sup>224</sup> Third, the variety of applications of *Baldasar* indicate that the Court, in resolving the problem created by *Baldasar*, ignored alternatives that would have provided greater constitutional protections to criminal defendants than its holding in *Nichols*.<sup>225</sup>

#### A. *Nichols*: A Response to the Confusion Created by *Baldasar*

The United States Supreme Court's opinion in *Nichols* was premised on the need to resolve the confusion created by *Baldasar* rather than on sound constitutional principles.<sup>226</sup> Justice Powell's prediction in *Baldasar* that the opinion would create a great deal of difficulty and confusion for lower courts was accurate.<sup>227</sup> *Baldasar*'s lack of a majority opinion created a great deal of inconsistent case law at both the federal and state levels.<sup>228</sup>

In addition, section 4A1.2 of the United States Sentencing Guidelines seemed to support a result contrary to the holding in *Baldasar*.<sup>229</sup> The Guidelines's endorsement of the validity of the use of prior uncounseled misdemeanors undoubtedly played a role in the Supreme Court's decision in *Nichols*.<sup>230</sup> Indeed, the Court referred to the Guidelines as reflective of the confusion over the *Baldasar* decision.<sup>231</sup>

---

<sup>222</sup> See *infra* notes 226–36 and accompanying text for a discussion of the *Nichols* decision as a response to the confusion created by *Baldasar*.

<sup>223</sup> See *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

<sup>224</sup> See *Nichols v. United States*, 114 S. Ct. 1921, 1927, 1928 (1994); *Scott*, 440 U.S. at 373–74; *Argersinger*, 407 U.S. at 37, 40.

<sup>225</sup> See *infra* notes 277–311 and accompanying text for a discussion of the alternatives to the Supreme Court's holding in *Nichols*.

<sup>226</sup> *Nichols*, 114 S. Ct. at 1926–27.

<sup>227</sup> See *Baldasar v. Illinois*, 446 U.S. 222, 234 (1980) (Powell, J., dissenting); Fu, *supra* note 110, at 175.

<sup>228</sup> See *supra* notes 140–56 and accompanying text for a discussion of inconsistent lower court application of *Baldasar*. See also, Novak, *supra* note 138, at 769–74 for a general discussion of the problems associated with plurality opinions.

<sup>229</sup> See USSC, *supra* note 157, § 4A1.2 & Commentary, Background. See *supra* notes 157–72 and accompanying text for a discussion of the United States Sentencing Guidelines.

<sup>230</sup> See 114 S. Ct. at 1927 n.11.

<sup>231</sup> *Id.* at 1927. The Court referred to a publication by the Commission which stated, "The

The splintering of the Court in *Baldasar*, in addition to the confusion and lack of consistency in lower courts and the Guidelines, made the issue ripe for review.<sup>232</sup> As the Supreme Court stated in *Nichols*, "[t]his degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision."<sup>233</sup> The fact that the Guidelines, and indeed other courts, were confused by *Baldasar* and chose to ignore its holding, however, seems a tenuous reason for the Court's rejection of a constitutional right.<sup>234</sup> Indeed, it seems that the central reason for the Court's holding in *Nichols* was pressure from external sources such as the Guidelines.<sup>235</sup> In its haste to clarify the rule of *Baldasar*, however, the Supreme Court may have taken away an important constitutional right once found in the Sixth Amendment.<sup>236</sup> Arguably, the cost of consistency in clarifying the issue was high.

### B. Nichols's Inconsistency with Sixth Amendment Precedent

Despite the strong need to remedy the inconsistent application of *Baldasar*, the United States Supreme Court's opinion in *Nichols* appears inconsistent with its own Sixth Amendment jurisprudence.<sup>237</sup> At first blush, the majority opinion in *Nichols* seems to address and solve the problem created by *Baldasar*.<sup>238</sup> It supplies a clear-cut rule: A court may subsequently enhance a later sentence with a valid uncounseled misdemeanor conviction.<sup>239</sup> Even though this rule is clear and straightforward, it is inconsistent with the Court's long-standing Sixth Amendment right to counsel jurisprudence.<sup>240</sup>

Under *Scott* and *Argersinger*, the Court's concern was whether a court deprived an individual of his or her liberty without due process of the law.<sup>241</sup> To prevent the deprivation of liberty without due process

---

Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar v. Illinois* . . . ." *Id.* at n.11.

<sup>232</sup> See *id.* at 1927.

<sup>233</sup> *Id.*

<sup>234</sup> See *supra* notes 140-56, 157-72 and accompanying text for a discussion of inconsistent lower court application of *Baldasar* and the Sentencing Guidelines.

<sup>235</sup> See *Nichols*, 114 S. Ct. at 1926, 1927 & n.11.

<sup>236</sup> See *id.* at 1931 (Blackmun, J., dissenting).

<sup>237</sup> See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

<sup>238</sup> See *Nichols*, 114 S. Ct. at 1926-27.

<sup>239</sup> *Id.* at 1928.

<sup>240</sup> See *Baldasar v. Illinois*, 446 U.S. 222, 227-28 (1980) (Marshall, J., concurring); *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40.

<sup>241</sup> *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40.

of law, the Court fashioned a rule whereby the right to counsel existed if imprisonment resulted.<sup>242</sup> The rule of *Scott* and *Argersinger* provided an adequate safeguard against the denial of due process of law in misdemeanor cases by protecting the right to counsel when the defendant was actually sentenced to imprisonment.<sup>243</sup>

The *Baldasar* decision extended Sixth Amendment protection to cases where a subsequent proceeding deprived a defendant of his or her liberty through the use of a valid conviction obtained without the assistance of counsel.<sup>244</sup> Although no single opinion in *Baldasar* commanded the assent of a majority of the justices, one theme emerges from the three concurring opinions.<sup>245</sup> The subsequent use of a prior uncounseled misdemeanor to increase a prison sentence, at least in the facts of *Baldasar*, constituted a violation of due process of law and the Sixth Amendment right to counsel.<sup>246</sup>

This consistent theme runs through the concurrences in *Baldasar* and the cases dealing with the Sixth Amendment right to counsel.<sup>247</sup> Justice Marshall's concurrence in *Baldasar* focused on the reasoning of *Scott* and *Argersinger*.<sup>248</sup> These cases emphasized that a deprivation of liberty without the benefit of the right to counsel violated due process.<sup>249</sup> Justice Stewart stated that it was clear to him, based on prior jurisprudence, that the result in *Baldasar* was correct.<sup>250</sup> Justice Stewart therefore implicitly adopted the reasoning that a deprivation of liberty cannot exist without counsel.<sup>251</sup> Further, Justice Blackmun, whose concurrence advocated the six month authorized imprisonment bright-line rule, stated that the result in *Baldasar* nonetheless was consistent with that rule.<sup>252</sup> Therefore, even though Justice Blackmun preferred the more stringent six month rule to protect the right to counsel, he too recognized, at a minimum, the importance of protecting the right to counsel at some level.<sup>253</sup>

---

<sup>242</sup> See *Scott*, 440 U.S. at 373-74.

<sup>243</sup> See *id.*; *Argersinger*, 407 U.S. at 37, 40; accord *Nichols*, 114 S. Ct. at 1931 (Blackmun, J., dissenting).

<sup>244</sup> *Baldasar*, 446 U.S. at 224 (per curiam); *id.* at 228 (Marshall, J., concurring).

<sup>245</sup> See *id.* at 224 (Stewart, J., concurring); *id.* at 228 (Marshall, J., concurring); *id.* at 230 (Blackmun, J., concurring).

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*; *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40.

<sup>248</sup> *Baldasar*, 446 U.S. at 225-26 (Marshall, J., concurring).

<sup>249</sup> *Id.* (Marshall, J., concurring).

<sup>250</sup> *Id.* at 224 (Stewart, J., concurring).

<sup>251</sup> See *id.* (Stewart, J., concurring).

<sup>252</sup> *Id.* at 230 (Blackmun, J., concurring).

<sup>253</sup> See *Baldasar*, 446 U.S. at 229-30 (Blackmun, J., concurring).

*Baldasar* lacked a majority opinion, and yet, a consistent theme or principle emerged from the three concurring opinions.<sup>254</sup> The Supreme Court has indicated that in the absence of a majority, the concurrence with the narrowest reasoning should be adopted.<sup>255</sup> All three concurring opinions in *Baldasar* share one common and narrow reasoning:<sup>256</sup> the deprivation of liberty cannot occur without the right to counsel.<sup>257</sup> Arguably, the Court should have maintained this rationale in clarifying the issue of the collateral use of uncounseled misdemeanors in sentence enhancement in *Nichols*.<sup>258</sup>

*Nichols* does not overrule the Sixth Amendment jurisprudence of *Scott* and *Argersinger*.<sup>259</sup> The opinion does not suggest that those cases are no longer valued in evaluating the Sixth Amendment right to counsel.<sup>260</sup> The Court in *Nichols* did, however, reverse *Baldasar*—not on the theory that the cases underlying the decision were faulty in their reasoning, but rather for the sake of consistency in application.<sup>261</sup>

Based on the fact that the prior precedent in the area of the Sixth Amendment right to counsel focused on the deprivation of liberty without the benefit of counsel, *Nichols* is inconsistent with that case law.<sup>262</sup> The Court has consistently recognized that sentence enhancement does nothing more than modify the sentence for a current crime and does not change the prior sentence.<sup>263</sup> Even given this understanding, a defendant under the scheme created by *Nichols* can receive a term of imprisonment based only on the prior uncounseled misdemeanor conviction.<sup>264</sup> For example, if a maximum sentence for a crime is one year, but with enhancement by a prior uncounseled misdemeanor that sentence increases to one and one-half years, a court is imposing a sentence of six months for no reason other than the prior

---

<sup>254</sup> See *supra* notes 244–53 and accompanying text for a discussion of common reasoning in concurring opinions in *Baldasar*.

<sup>255</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977).

<sup>256</sup> See *supra* notes 244–53 and accompanying text for a discussion of common reasoning in concurring opinions in *Baldasar*.

<sup>257</sup> See *Baldasar*, 446 U.S. at 224 (Stewart, J., concurring); *id.* at 228 (Marshall, J., concurring); *id.* at 230 (Blackmun, J., concurring).

<sup>258</sup> See *infra* notes 259–76 and accompanying text for a discussion of the inconsistency of *Nichols* with Sixth Amendment jurisprudence.

<sup>259</sup> See *Nichols*, 114 S. Ct. at 1926–27.

<sup>260</sup> See *id.* at 1925, 1927.

<sup>261</sup> See *id.* at 1926–27.

<sup>262</sup> See *id.* at 1927, 1928 (majority); *id.* at 1931 (Blackmun, J., dissenting); *Baldasar*, 446 U.S. at 224 (Stewart, J., concurring); *id.* at 228 (Marshall, J., concurring); *id.* at 230 (Blackmun, J., concurring).

<sup>263</sup> See, e.g., *Oyler v. Boles*, 368 U.S. 448, 451 & n.5 (1962).

<sup>264</sup> See *Nichols*, 114 S. Ct. at 1927.

conviction. In that case, the individual would not face the additional six months imprisonment but for the prior uncounseled misdemeanor. Logically, the deprivation of liberty, specifically the addition of six months imprisonment, is a direct result of the uncounseled misdemeanor conviction.

This result is difficult to reconcile with the Supreme Court precedents of *Scott* and *Argersinger* and the rationale underlying the Sixth Amendment right to counsel.<sup>265</sup> The result, though permissible under *Nichols*, is clearly inconsistent with the Sixth Amendment jurisprudence on which the *Nichols* Court based its opinion.<sup>266</sup> Insofar as the Court's decision in *Nichols* permits this type of deprivation of liberty without the benefit of counsel, it is contrary to Sixth Amendment precedent.<sup>267</sup>

Permitting the use of uncounseled misdemeanors for sentence enhancement across the board seriously undermines the right to be free from the deprivation of liberty without the assistance of counsel.<sup>268</sup> The problems with misdemeanor convictions, as addressed in *Scott* and *Argersinger*, are still realistic concerns in our criminal justice system.<sup>269</sup> If individuals are rushed through misdemeanor court without counsel, they will not know the potential impact of a guilty plea.<sup>270</sup> Their right, under the Sixth and Fourteenth Amendments, to effective assistance of counsel is denied as they are not aware of the potential implications of their act.<sup>271</sup> An individual may plead guilty to avoid jail while unaware that in the future, that plea may be used to increase a sentence and result in jail time.<sup>272</sup> Under *Nichols*, a misdemeanor defendant's ignorance in representing him or herself may ultimately lead to a sentence of imprisonment through an enhancement statute for a subsequent crime.<sup>273</sup>

In the Court's haste to solve the problem of inconsistency created by *Baldasar*, it rushed to a decision that exacts a high toll on constitu-

---

<sup>265</sup> See *Baldasar*, 446 U.S. at 227-28 (Marshall, J., concurring); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972).

<sup>266</sup> See *Nichols*, 114 S. Ct. at 1927; *supra* notes 201-04, 237-64 and accompanying text (discussing the Court's reasoning in *Nichols* and its inconsistency with Sixth Amendment precedent).

<sup>267</sup> See *supra* notes 237-64 and accompanying text for a discussion of the inconsistency of *Nichols* with Sixth Amendment precedent.

<sup>268</sup> See *Nichols*, 114 S. Ct. at 1927 (majority); *id.* at 1931 (Blackmun, J., dissenting).

<sup>269</sup> See Gerald R. Wheeler, *The Benefits of Legal Representation in Misdemeanor Court*, 19 CRIM. L. BULL. 221, 230-32 (1983).

<sup>270</sup> See *Argersinger*, 407 U.S. 47-48, 63 & n.32 (Powell, J., concurring).

<sup>271</sup> See *id.* (Powell, J., concurring).

<sup>272</sup> See *Nichols*, 114 S. Ct. at 1935-36 (Blackmun, J., dissenting).

<sup>273</sup> See *id.* at 1927, 1928.

tional rights.<sup>274</sup> Under the scheme announced by *Nichols*, the Court has ignored the concerns that formed the center of analysis under the Sixth Amendment.<sup>275</sup> An individual in misdemeanor court is now left without adequate procedural safeguards to protect the right not to be sent to prison without the assistance of counsel.<sup>276</sup>

### C. *Alternatives to the Court's Holding in Nichols*

*Nichols's* inconsistency with Sixth Amendment jurisprudence is especially disturbing given the many other options available to the Supreme Court that would have been more protective of the Sixth Amendment right to counsel.<sup>277</sup> The Court in *Nichols*, forced by external pressures, opted for administrative ease at the expense of constitutional jurisprudence.<sup>278</sup> The Court was not compelled, however, to permit the unmitigated use of prior uncounseled misdemeanors in its attempt to clarify the confusion created by *Baldasar* as it had other options more protective of the constitutional right to counsel.<sup>279</sup>

First, the Court easily could have limited its precise holding in *Nichols* to the facts of the case presented for review.<sup>280</sup> Specifically, the Court could have permitted federal courts, which are covered by the scheme of the Sentencing Guidelines, and other jurisdictions with similar safeguards to use uncounseled misdemeanors in sentence enhancement, but prohibited their use in all other jurisdictions.<sup>281</sup> That is, the Court could have given judges the discretion, under appropriate recidivist schemes, to decide whether the prior uncounseled misdemeanor adequately reflected the severity of the prior crime before using it to enhance a sentence.<sup>282</sup> Justice Souter advanced this position

---

<sup>274</sup> See *id.* at 1926–27 (majority); *id.* at 1931 (Blackmun, J., dissenting).

<sup>275</sup> See *id.* at 1931 (Blackmun, J., dissenting); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *Argersinger*, 407 U.S. at 37, 40.

<sup>276</sup> See *Nichols*, 114 S. Ct. at 1927, 1928; *Scott*, 440 U.S. at 373–74; *Argersinger*, 407 U.S. at 37, 40.

<sup>277</sup> See *infra* notes 280–307 and accompanying text for a discussion of alternatives to the Supreme Court's decision in *Nichols*.

<sup>278</sup> See *Nichols*, 114 S. Ct. at 1926–27. See *supra* notes 226–76 and accompanying text for a discussion of problems with the *Baldasar* decision.

<sup>279</sup> See *infra* notes 280–307 and accompanying text for a discussion of alternatives to the Supreme Court's decision in *Nichols*.

<sup>280</sup> See *Nichols*, 114 S. Ct. at 1931 (Souter, J., concurring).

<sup>281</sup> See *id.* at 1930–31 (Souter, J., concurring).

<sup>282</sup> See *id.* at 1930 (Souter, J., concurring) (discussing the constitutional safeguards found within the Sentencing Guidelines). In order to effectuate this scheme, the Court could have required that states incorporate safeguards into their own recidivist statutes to lower the risk of offending due process if their courts use prior uncounseled misdemeanors in sentence enhancement. This decision also would have overruled *Baldasar* and its related problems; however, due

in his concurrence in *Nichols*.<sup>283</sup> Had the Court limited the holding in this way, the Sixth Amendment would have been protected by ensuring that individuals were not unfairly deprived of their liberty without counsel, while also permitting the use of uncounseled misdemeanors in many enhancement schemes.<sup>284</sup>

In addition, the Supreme Court could have adhered to its holding in *Baldasar* and clarified the rule of that opinion through the adoption of a cohesive rule and rationale based on the reasoning in *Scott* and *Argersinger*.<sup>285</sup> Specifically, the Court could have promulgated several rules that would have both eliminated the confusion in lower courts with respect to the use of prior uncounseled misdemeanors in sentence enhancement and remained true to the constitutional right to counsel.<sup>286</sup> Given that other courts had already adopted different rules on the issue, the Supreme Court could have looked for a rule that provided both administrative efficiency and constitutional protection of the right to counsel.<sup>287</sup>

First, the Court could have adopted the six month authorized imprisonment bright-line rule as advocated by Justice Blackmun and thereby provided a minimum protection under the Sixth Amendment to those who faced potential imprisonment of six months or more.<sup>288</sup> This standard would have been clear and unequivocal: A court could use a prior uncounseled misdemeanor to enhance a subsequent sentence only if the authorized imprisonment for the uncounseled misdemeanor conviction was six months or less.<sup>289</sup> Six months authorized imprisonment was already the bench mark for other constitutional rules such as the right to a jury trial.<sup>290</sup> Also, since *Argersinger*, the six month rule had been suggested as a viable alternative in determining when the right to counsel should attach in criminal cases.<sup>291</sup> Given that

---

process of law and the right to counsel would have been protected by the constitutional requirements in the enhancement statutes. See *id.* at 1930-31 (Souter, J., concurring).

<sup>283</sup> See *id.* (Souter, J., concurring).

<sup>284</sup> See *id.* (Souter, J., concurring).

<sup>285</sup> See *supra* notes 59-109 and accompanying text for a discussion of *Scott* and *Argersinger*.

<sup>286</sup> See *infra* notes 140-56 and accompanying text for a discussion of inconsistent lower court application of *Baldasar*.

<sup>287</sup> See *Nichols*, 114 S. Ct. at 1931 (Souter, J., concurring); *supra* notes 140-56 and accompanying text (discussing inconsistent lower court application of *Baldasar*).

<sup>288</sup> See *Scott v. Illinois*, 440 U.S. 367, 389-90 (1979) (Blackmun, J. dissenting).

<sup>289</sup> See *id.* (Blackmun, J., dissenting).

<sup>290</sup> See *Scott*, 440 U.S. at 390 (Blackmun, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 159, 161 (1968).

<sup>291</sup> See *Baldasar v. Illinois*, 446 U.S. 222, 230 (1980) (Blackmun, J., concurring); *Scott*, 440 U.S. at 389-90 (Blackmun, J., dissenting); *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring).

this bright-line rule would have clarified the confusion of *Baldasar* while retaining a minimum level of Sixth Amendment protection, it appears a better approach than the approach of the Supreme Court in *Nichols*, which permits the unequivocal use of prior uncounseled misdemeanors in sentence enhancement.<sup>292</sup>

Second, the Court could have adopted the "conversion rule" as an alternative to permitting enhancement based on prior uncounseled convictions without limitation.<sup>293</sup> The conversion rule would prohibit a court from using a prior uncounseled misdemeanor to convert a subsequent misdemeanor into a felony.<sup>294</sup> This standard would have been a strict application of the facts of *Baldasar*.<sup>295</sup> In fact, the district court and the Sixth Circuit in the *Nichols* case adopted the conversion standard.<sup>296</sup> The conversion rule adheres to *Baldasar* and ensures the protection of the Sixth Amendment right to counsel in a class of cases where the imposition of a sentence through enhancement based on a prior uncounseled misdemeanor is especially violative of the Court's Sixth Amendment jurisprudence.<sup>297</sup> In this situation, a misdemeanor is "raised" to a felony, a type of crime in which the Court has been unwilling to weaken its requirements of the right to counsel.<sup>298</sup> This clear, bright-line rule remains faithful to the rationale underlying *Scott* and *Argersinger* and is therefore a better approach than the one adopted by the Court in *Nichols*.<sup>299</sup>

Similarly, the Court could have adopted the "absolute bar rule" and provided the greatest amount of Sixth Amendment protection.<sup>300</sup> The absolute bar rule, similar to the rationale of Justice Marshall's concurrence in *Baldasar*, would prohibit the use of all prior uncounseled misdemeanors in sentence enhancement.<sup>301</sup> This bright-line rule would have clarified the confusion of *Baldasar* and thereby eased the

---

<sup>292</sup> See *Nichols*, 114 S. Ct. at 1927, 1928.

<sup>293</sup> See, e.g., *Wilson v. Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980).

<sup>294</sup> See *id.*

<sup>295</sup> See *Baldasar*, 446 U.S. at 223.

<sup>296</sup> See *supra* notes 185-91 and accompanying text for a discussion of lower court opinions in *Nichols*.

<sup>297</sup> See *supra* notes 59-109, 111-27 and accompanying text for a discussion of *Scott*, *Argersinger* and *Baldasar's* Sixth Amendment protections.

<sup>298</sup> See *supra* notes 213-14 and accompanying text for a discussion of the prohibition on the use of uncounseled felony convictions in sentence enhancement.

<sup>299</sup> See *supra* notes 59-109, 201-04 and accompanying text for a discussion of *Scott* and *Argersinger* and the Supreme Court's reasoning in *Nichols*.

<sup>300</sup> See *supra* notes 140-44 and accompanying text for a discussion of those courts that apply the absolute bar rule.

<sup>301</sup> See *Baldasar*, 446 U.S. at 228 (Marshall, J., concurring).

Court's administrative concerns in *Nichols*.<sup>302</sup> At the same time, this approach would have provided the most comprehensive protection against the deprivation of liberty without due process of the law under the Sixth Amendment by prohibiting the imposition of an enhanced sentence based on a prior uncounseled misdemeanor conviction.<sup>303</sup>

Finally, the Court could have adopted a rule that permitted a sentencing court to use a prior uncounseled misdemeanor conviction for enhancement unless enhancement resulted in a sentence greater than what was originally permissible under the statute.<sup>304</sup> This standard is most consistent with *Scott* and *Argersinger* where the Court required counsel only in cases of actual imprisonment.<sup>305</sup> This standard, also a bright-line rule, would permit judges to move to the higher end of the sentencing range for the current crime based on their knowledge of the prior conviction, but no higher.<sup>306</sup> This rule would ensure that no sentence of imprisonment was imposed *solely* because of the prior uncounseled conviction and therefore provide greater protection of the Sixth Amendment right to counsel than the rule adopted by the Court in *Nichols*.<sup>307</sup>

Given the options available to the Court and the fact that they would have been less restrictive on the Sixth Amendment right to counsel, it seems that the *Nichols* Court was more concerned with clarifying the rule of *Baldasar* than with the protection of the Constitution.<sup>308</sup> In the Court's haste to clarify *Baldasar*, it drastically curtailed the Sixth Amendment right to counsel.<sup>309</sup> The rule announced by *Nichols* raises a real threat that due process of the law will be denied

---

<sup>302</sup> See *Nichols*, 114 S. Ct. at 1926-27.

<sup>303</sup> See *supra* notes 59-109 and accompanying text for a discussion of *Scott* and *Argersinger*. This rule would have eased all the constitutional concerns expressed in the concurring opinions in *Baldasar*. See 446 U.S. at 224 (Stewart, J., concurring); *id.* at 228 (Marshall, J., concurring); *id.* at 230 (Blackmun, J., concurring).

<sup>304</sup> See, e.g., *Moore v. State*, 352 S.E.2d 821, 822 (Ga. Ct. App.), *cert. denied*, 484 U.S. 904 (1987); *State v. Laurick*, 575 A.2d 1340, 1347 (N.J.), *cert. denied*, 498 U.S. 967 (1990).

<sup>305</sup> See *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40.

<sup>306</sup> See *Moore v. State*, 352 S.E.2d 821, 822 (Ga. Ct. App.), *cert. denied*, 484 U.S. 904 (1987); *State v. Laurick*, 575 A.2d 1340, 1347 (N.J.), *cert. denied*, 498 U.S. 967 (1990). This rule is also consistent with the safeguards of the United States Sentencing Guidelines pointed out by Justice Souter in his concurring opinion in *Nichols*. See 114 S. Ct. at 1930 (Souter, J., concurring).

<sup>307</sup> See *Nichols*, 114 S. Ct. at 1927, 1928; *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40.

<sup>308</sup> See *supra* notes 226-36 and accompanying text for a discussion of *Nichols* as a response to the confusion created by *Baldasar*.

<sup>309</sup> See *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *supra* notes 261-76 and accompanying text (discussing why the Court's haste to clarify *Baldasar* undermined Sixth Amendment jurisprudence).

in systems that do not provide the same procedural safeguards as the United States Sentencing Guidelines.<sup>310</sup> This is very troubling in light of the available, less restrictive alternatives to the Court's holding in *Nichols*.<sup>311</sup>

### CONCLUSION

The right to counsel is a fundamental tenet of due process and an essential element of the right to a fair trial.<sup>312</sup> Whenever a defendant is deprived of liberty, through a sentence of imprisonment, the right to counsel attaches regardless of the classification of the crime.<sup>313</sup> Influenced by the hostility of certain courts and the Sentencing Guidelines to the prohibition of the use of these uncounseled convictions in sentence enhancement, the Supreme Court now permits the enhancement of a prison sentence based on an uncounseled conviction.<sup>314</sup> This result is difficult to reconcile with Sixth Amendment jurisprudence.<sup>315</sup>

Especially disturbing about the Court's decision in *Nichols* is that there were alternatives that would have clarified the rule, yet provided adequate safeguards to the Sixth Amendment.<sup>316</sup> The Court seems to have been inspired, either consciously or otherwise, by the "anti-defendants rights" movement that is sweeping the nation.<sup>317</sup> In responding to the nation's great fear of the epidemic of violence, the Court has undermined a fundamental doctrine of the Constitution.<sup>318</sup> The shift of focus away from protecting the due process rights of defendants to the need to control crime and criminals carries a very high expense in the area of constitutional jurisprudence. Important historical doctrines may now be undermined as a result of the near hysterical national reaction to crime control issues.<sup>319</sup> As the Supreme Court's

---

<sup>310</sup> See *Nichols*, 114 S. Ct. at 1929-31 (Souter, J., concurring).

<sup>311</sup> See *supra* notes 277-307 and accompanying text for a discussion of the alternatives to the Court's holding in *Nichols*.

<sup>312</sup> See *Gideon*, 372 U.S. at 344-45; *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

<sup>313</sup> See *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40.

<sup>314</sup> See *supra* notes 226-36 and accompanying text for a discussion of *Nichols* as a response to the confusion created by *Baldasar*.

<sup>315</sup> See *Scott*, 440 U.S. at 373-74; *Argersinger*, 407 U.S. at 37, 40; *Gideon*, 372 U.S. at 344-45; *Powell*, 287 U.S. at 71.

<sup>316</sup> See *supra* notes 277-307 and accompanying text for a discussion of the alternatives to the Court's holding in *Nichols*.

<sup>317</sup> See *supra* notes 17-23 and accompanying text for a discussion of the anti-due-process-rights movement.

<sup>318</sup> See *supra* notes 261-76 and accompanying text for a discussion of why the Court's haste to clarify *Baldasar* undermined Sixth Amendment jurisprudence.

<sup>319</sup> See *supra* notes 5-16, 261-76 and accompanying text for a discussion of the historical

decision in *Nichols* demonstrates, the Court is not immune from the shift in the national psyche on matters concerning criminals.<sup>320</sup> Even though there were alternatives that were less restrictive on the Constitution, the Court in *Nichols* adopted the approach that was most harsh on the criminal defendant.<sup>321</sup> The result of this decision and others that may be inspired by the national mood bears a high cost in terms of our constitutional protections under the Bill of Rights.

KIRSTEN M. NELSON

---

development of the right to counsel and why the Court's haste to clarify *Baldasar* undermined Sixth Amendment jurisprudence.

<sup>320</sup> See *Nichols*, 114 S. Ct. at 1927, 1928.

<sup>321</sup> See *supra* notes 277-307 and accompanying text for a discussion of the alternatives to the Court's holding in *Nichols*.