SUPREME COURT OF THE UNITED STATES

No. 92–8556

KENNETH O. NICHOLS, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 6, 1994]

JUSTICE SOUTER, concurring in the judgment.

I write separately because I do not share the Court's view that *Baldasar* v. *Illinois*, 446 U. S. 222 (1980), has a holding that can be "overrule[d]," *ante*, at 11, and because I wish to be clear about the narrow ground on which I think this case is properly decided. *Baldasar* is an unusual case, not because no single opinion enlisted a majority, but because no common ground united any five Justices. As I read the various opinions, eight Members of the *Baldasar* Court divided, four to four, over whether an uncounseled misdemeanor conviction that is valid because no prison sentence was imposed, see *Scott* v. *Illinois*, 440 U. S. 367 (1979), may be used for automatic enhancement of the prison sentence attached to a subsequent conviction. See *Baldasar*, 446 U. S., at 224 (Stewart, J., concurring, joined by Brennan and STEVENS, JJ.); *id*., at 224–229 (Marshall, J., concurring, joined by Brennan and STEVENS, JJ.); *id*., at 230–235 (Powell, J., dissenting, joined by Burger, C. J., and White and REHNQUIST, JJ.). Instead of breaking the tie, the ninth Justice, JUSTICE BLACKMUN, declined to accept the premise on which the others proceeded (that the prior uncounseled conviction was valid under *Scott*), adhering to his earlier position that an uncounseled conviction of the sort involved in *Baldasar* was not valid

for any purpose. See 446 U. S., at 229–230 (BLACKMUN, J., concurring) (discussing *Scott*, *supra*, at 389–390 (BLACKMUN, J., dissenting)). Significantly for present purposes, JUSTICE BLACKMUN gave no indication of his view on whether an uncounseled conviction, if valid under *Scott*, could subsequently be used for automatic sentence enhancement. On the question addressed by the other eight Justices, then, the *Baldasar* Court was in equipoise, leaving a decision in the same posture as an affirmance by an equally divided Court, entitled to no precedential value, see *United States* v. *Pink*, 315 U. S. 210, 216 (1942). Compare *Waters* v. *Churchill*, __ U. S. __ (1994); *id*., at __ (slip op., at 4) (SOUTER, J., concurring); *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413 (1966) (discussed in *Marks* v. *United States*, 430 U. S. 188, 193–194 (1977)).

Setting *Baldasar* aside as controlling precedent (but retaining the case's even split as evidence), it seems safe to say that the question debated there is a difficult one. The Court in *Scott*, relying on *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), drew a bright line between imprisonment and lesser criminal penalties, on the theory, as I understand it, that the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty. See *Scott*, *supra*, at 372–373; see also *Argersinger*, 407 U. S., at 34–37 (discussing studies showing that "the volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result"). There is an obvious and serious argument that the line drawn in *Scott* is crossed when, as Justice Stewart put it in *Baldasar*, a defendant is "sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." 446 U. S., at 224

(concurring opinion) (emphasis in original); see also *id*., at 227 (Marshall, J., concurring) (petitioner's prison sentence "was imposed as a direct consequence of [the previous] uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*").

Fortunately, the difficult constitutional question that argument raises need not be answered in deciding this case, cf. *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring), for unlike the sentence-enhancement scheme involved in *Baldasar*, the Sentencing Guidelines do not provide for automatic enhancement based on prior uncounseled convictions. Prior convictions, as the Court explains, serve under the Guidelines to place the defendant in one of six "criminal history" categories; the greater the number of prior convictions, the higher the category. See *ante*, at 2, and n. 2. But the Guidelines seek to punish those who exhibit a pattern of "criminal conduct," not a pattern of prior convictions as such, see USSG Ch. 4, pt. A (Nov. 1993) (Introductory Commentary), and accordingly do not bind a district court to the category into which simple addition places the defendant. Thus while the Guidelines require that "uncounseled misdemeanor sentences where imprisonment was not imposed" are "to be counted in the criminal history score," United States Sentencing Commission, Guidelines Manual App. C, amend. 353 (Nov. 1993), they also expressly empower the district court to depart from the range of sentences prescribed for a criminal-history category that inaccurately captures the defendant's actual history of criminal conduct. See *id*., §4A1.3 In particular, the Guidelines authorize downward departure "where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further

crimes." *Ibid*.[1]

Under the Guidelines, then, the role prior convictions play in sentencing is presumptive, not conclusive, and a defendant has the chance to convince the sentencing court of the unreliability of any prior valid but uncounseled convictions in reflecting the seriousness of his past criminal conduct or predicting the likelihood of recidivism. A defendant may show, for example, that his prior conviction resulted from railroading an unsophisticated indigent, from a frugal preference for a low fine with no counsel fee, or from a desire to put the matter behind him instead of investing the time to fight the charges.

Because the Guidelines allow a defendant to rebut the negative implication to which a prior uncounseled conviction gives rise, they do not ignore the risk of

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[1]"Congress gave the Sentencing Commission authority to `maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' 28 U. S. C. §991(b)(1)(B). The Commission used this authority in adopting §4A1.3, which it said was designed to `recogniz[e] that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur.' USSG §4A1.3 (commentary)." *United States* v. *Beckham*, 968 F.2d 47, 54 (CADC 1992); see also *United States* v. *Shoupe*, 988 F.2d 440, 445 (CA3 1993) ("[I]n Guidelines §4A1.3, the Comission specifically provided district courts with flexibility to adjust the criminal history category calculated through . . . rigid formulae"). Cf. Broderick and Wolf, Honoring Judicial Discretion Under the Sentencing Reform Act, 3 Fed. Sen. Rep. 235, 238 (1991) (discussing "Congress' desire to leave substantial sentencing discretion in the hands of the sentencing judge").

unreliability associated with such a conviction. Moreover, as the Court observes, permitting a court to consider (in contrast to giving conclusive weight to) a prior uncounseled conviction is "consistent with the traditional understanding of the sentencing process," under which a "judge `may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come,'" at least as long as the defendant is given a reasonable opportunity to disprove the accuracy of information on which the judge may rely, and to contest the relevancy of that information to sentencing. *Ante*, at 9 (quoting *United States* v. *Tucker*, 404 U. S. 443, 446 (1972)). Where concern for reliability is accommodated, as it is under the Sentencing Guidelines, nothing in the Sixth Amendment or our cases requires a sentencing court to ignore the fact of a valid uncounseled conviction, even if that conviction is a less confident indicator of guilt than a counseled one would be. Cf. United States Sentencing Commission, Sentencing Guidelines for United States Courts, 55 Fed. Reg. 5741 (1990) (explaining that valid, uncounseled convictions should be counted in determining a defendant's criminal history category because the alternative would "deprive the [sentencing] court of significant information relevant to the purposes of sentencing").

I therefore agree with the Court that it is "constitutionally permissible" for a federal court to "consider a prior uncounseled misdemeanor conviction" in sentencing a defendant under the Sentencing Guidelines. *Ante*, at 10; see also *ante*, at 1. That is enough to answer the constitutional question this case presents, whether "[t]he District Court should . . . have considered [petitioner's] previous uncounseled misdemeanor in computing [his] criminal history score" under the Sentencing Guidelines. Pet. for Cert. i; see also Brief for United

States I (stating question presented as "[w]hether it violated the Constitution for the sentencing court to consider petitioner's prior uncounseled misdemeanor conviction in determining his criminal history score under the Sentencing Guidelines"). And because petitioner did not below, and does not here, contend that counting his 1983 uncounseled conviction for driving under the influence placed him in a criminal-history category that "significantly over-represents the seriousness of [his] criminal history or the likelihood that [he] will commit further crimes," USSG §4A1.3, the Court properly rejects petitioner's challenge to his sentence.

I am shy, however, of endorsing language in the Court's opinion that may be taken as addressing the constitutional validity of a sentencing scheme that automatically requires enhancement for prior uncounseled convictions, a scheme not now before us. Because I prefer not to risk offending the principle that "[t]he Court will not `anticipate a question of constitutional law in advance of the necessity of deciding it,'" *Ashwander*, *supra*, at 346 (citation omitted), I concur only in the judgment.