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 BLACKMUN, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In 1983, petitioner Kenneth O. Nichols pleaded *nolo contendere* to driving under the influence of alcohol (DUI) and paid a $250 fine. He was not represented by counsel. Under *Scott* v. *Illinois*, 440 U. S. 367 (1979), this uncounseled misdemeanor could not have been used as the basis for any incarceration, not even a 1-day jail sentence. Seven years later, when Nichols pleaded guilty to a federal drug charge, this uncounseled misdemeanor, used to enhance his sentence, led directly to his imprisonment for over two years. The majority's holding that this enhancement does not violate the Sixth Amendment is neither compelled by *Scott* nor faithful to the concern for reliability that lies at the heart of our Sixth Amendment cases since *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Accordingly, I dissent.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *Gideon* v. *Wainwright*, this Court recognized the "Sixth Amendment's guarantee of counsel" as "fundamental and essential to a fair trial," 372 U. S., at 342, because

"`[e]ven the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him.'" *Id.*, at 345, quoting *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932).

Both the plain wording of the Amendment and the reasoning in *Gideon* would support the guarantee of counsel in "all" criminal prosecutions, petty or serious, whatever their consequences. See *Scott* v. *Illinois*, 440 U. S., at 376, 379 (Brennan, J., dissenting). Although the Court never has read the guarantee of counsel that broadly, one principle has been clear, at least until today: no imprisonment may be imposed on the basis of an uncounseled conviction. Thus, in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court rejected a formalistic distinction between petty and non-petty offenses and applied *Gideon* to "any criminal trial, where an accused is deprived of his liberty." *Id.*, at 32; *id.*, at 41, 42 (Burger, C. J., concurring in the result) (because "any deprivation of liberty is a serious matter," no individual "can be imprisoned unless he is represented by counsel").

A year later, *Scott* confirmed that any deprivation of liberty, no matter how brief, triggers the Sixth Amendment's right to counsel:

> "Even were the matter *res nova*, we believe that the central premise of *Argersinger* that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. . . . We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U. S., at 373–374.

Finally, although the *Baldasar* Court, in one sense,

was "splintered," *ante*, at 1, a majority of the Court concluded that an uncounseled conviction could not be used to support a prison term, either initially, to punish the misdemeanor, or later, to lengthen the jail time for a subsequent conviction. See *Baldasar* v. *Illinois*, 446 U. S. 222, 224 (1980) (Stewart, J., concurring) (sentencing an indigent "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" violated *Scott*); *id.*, at 226 (Marshall, J., concurring) (even on *Scott*'s terms, a "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction"); *id.*, at 230 (BLACKMUN, J., concurring) (adhering to dissenting position in *Scott* that an uncounseled conviction is invalid not only where the defendant is sentenced to any actual incarceration but also where the defendant is convicted of an offense punishable by more than six months in prison).[1]

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[1]I dissented in *Scott*, in which five members of the Court held that the Sixth Amendment required counsel only for convictions that were *punished* by actual imprisonment, and not for offenses that were *punishable* by imprisonment, but where imprisonment was not imposed. Believing that the line the Court drew did not protect indigent defendants adequately or keep faith with our Sixth Amendment principles, I argued for a right to counsel not only where the defendant was convicted and sentenced to jail time, but also where the defendant was convicted of any offense punishable by more than six months' imprisonment, regardless of the punishment actually imposed. 440 U. S., at 389–390.

A year later, when the Court decided *Baldasar* v. *Illinois*, 446 U. S. 222 (1980), I adhered to this position, concurring in the Court's per curiam opinion

Thus, the animating concern in the Court's Sixth Amendment jurisprudence has been to ensure that no indigent is deprived of his liberty as a result of a proceeding in which he lacked the guiding hand of counsel. While the Court has grappled with and sometimes divided over extending this constitutional guarantee beyond convictions that lead to actual incarceration, it has never permitted, before now, an uncounseled conviction to serve as the basis for any jail time.

Although the Court now expressly overrules *Baldasar* v. *Illinois*, *ante*, at 11, it purports to adhere to *Scott*, describing its holding as a "logical consequence" of *Scott*. This logic is not unassailable. To the contrary, as Justice Marshall stated in *Baldasar*, "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases." 446 U. S., at 228–229 (concurring opinion). It is more

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and its judgment that the uncounseled conviction could not be used to justify increasing Baldasar's jail time. Although I based my decision on my belief that the uncounseled conviction was invalid in the first instance because Baldasar was charged with an offense punishable by more than six months in prison, I expressed no disagreement, and indeed had none, with the premise that an uncounseled conviction that was valid under *Scott* was invalid for purposes of imposing increased incarceration for a subsequent offense. *Id.*, at 229–230. Obviously, logic dictates that, where the threat of imprisonment is enough to trigger the Sixth Amendment's guarantee of counsel, the actual imposition of imprisonment through an enhancement statute also requires the appointment of counsel.

logical, and more consistent with the reasoning in *Scott*, to hold that a conviction that is invalid for imposing a sentence for the offense itself remains invalid for increasing the term of imprisonment imposed for a subsequent conviction.

The Court skirts *Scott*'s actual imprisonment standard by asserting that enhancement statutes "do not change the penalty imposed for the earlier conviction," *ante*, at 9, because they punish only the later offense. Although it is undeniable that recidivist statutes do not impose a second punishment for the first offense in violation of the Double Jeopardy Clause, *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895), it also is undeniable that Nichols' DUI conviction directly resulted in more than two years' imprisonment. In any event, our concern here is not with multiple punishments, but with reliability. Specifically, is a prior uncounseled misdemeanor conviction sufficiently reliable to justify additional jail time imposed under an enhancement statute? Because imprisonment is a punishment "different in kind" from fines or the threat of imprisonment, *Scott*, 440 U. S., at 374, we consistently have read the Sixth Amendment to require that courts decrease the risk of unreliability, through the provision of counsel, where a conviction results in imprisonment. That the sentence in *Scott* was imposed in the first instance and the sentence here was the result of an enhancement statute is a distinction without a constitutional difference.

The Court also defends its position by arguing that the process of sentencing traditionally is "less exacting" than the process of establishing guilt. *Ante*, at 9. This may be true as a general proposition,[2] but it does not establish that an

[2]In support of its position, the majority cites several cases that refer to a sentencing judge's traditional discretion. The cases provide scant, if any, support

uncounseled conviction is reliable enough for Sixth Amendment purposes to justify the imposition of imprisonment, even in the sentencing context. Nor does it follow that, because the State may attempt to prove at sentencing conduct justifying greater punishment, it also may rely on a prior uncounseled conviction. In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), for example, the State was permitted to prove

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for the majority's rule sanctioning the use of prior uncounseled convictions as the basis for increased terms of imprisonment. None even addresses the Sixth Amendment guarantee of counsel.

In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), the Court held 5–4 that a state statute defining visible possession of a firearm as a sentencing consideration that could be proved by a preponderance of the evidence, rather than as an element of the crime that must be proved beyond a reasonable doubt, did not violate due process. *McMillan* did not involve the use of a prior conviction in a subsequent proceeding. Additionally, *McMillan* involved only felony convictions, in which the defendants were entitled to counsel at every step of the proceedings to assist in proving or disproving the facts to be relied on in sentencing. The Court also noted that the "risk of error" in the challenged proceeding was "comparatively slight" because visible possession was "a simple, straightforward issue susceptible of objective proof." *Id.*, at 84. The same cannot be said for the reliability of prior uncounseled misdemeanors. See *Argersinger*, 407 U. S., at 34 (observing that the volume of misdemeanor cases "may create an obsession for speedy dispositions, regardless of the fairness of the result"); *id.*, at 35 (noting that "`[t]he misdemeanor trial is characterized by insufficient and frequently irresponsible preparation,'" quoting Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal, 28 The Legal Aid Brief Case 151,

at sentencing that the defendant visibly possessed a firearm during the commission of the felonies of which he was convicted.[3] Where, as in *McMillan*, the State sets out to prove actual conduct rather than the fact of conviction in a sentencing proceeding at which the defendant is represented by counsel, counsel can put the State to its proof, examining its witnesses, rebutting its evidence, and testing the reliability of its

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152 (1970)). Moreover, a finding of visible possession did not expose a defendant to a greater or additional punishment than otherwise authorized, *McMillan*, 477 U. S., at 88, while the prior conviction at issue here exposed petitioner to two additional years in prison.

Wisconsin v. *Mitchell*, ___ U. S. ___ (1993), in which the Court rejected a First Amendment challenge to a state statute that enhanced a penalty based on the defendant's motive, is no more helpful to the majority's position. The Court simply observed that the defendant's motive was a factor traditionally considered by sentencing judges; it said nothing about the validity of prior convictions or even about the standard required to prove the motive. Similarly, although *Tucker* v. *United States*, 404 U. S. 443, 446 (1972), made passing reference to a sentencing judge's broad inquiry, it held only that *Gideon* required resentencing where the sentencing court had considered prior felony convictions that later were found to have been uncounseled.

Finally, *Williams* v. *New York*, 337 U. S. 241 (1949), was a Confrontation Clause challenge to a sentencing judge's consideration of evidence obtained through a presentence investigation. The court did not rely on any prior convictions; the defendant, who was represented by counsel, did not challenge the accuracy of the information the judge considered, ask the judge to disregard it, or seek to refute or discredit it; and the consideration of this information did not expose the defendant to a greater or additional

allegations. See *Argersinger*, 407 U. S., at 31 (the accused "`requires the guiding hand of counsel *at every step in the proceedings* against him'") (quoting *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932)) (emphasis added). In contrast, where the State simply submits a record of a conviction obtained in a proceeding in which the defendant lacked the assistance of counsel, we lack similar confidence that

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punishment.

[3]*McMillan*, of course, was a due process case. Curiously, the Court appears to rest its holding as much on the Due Process Clause as on the Sixth Amendment. See *ante*, at 10. But even if the use of a prior uncounseled conviction does not violate due process, that does not conclusively resolve the Sixth Amendment question. Compare *Betts* v. *Brady*, 316 U. S. 445, 462 (1942) (holding that the right to counsel was not required under the Due Process Clause of the Fourteenth Amendment and recognizing due process as a "concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights"), with *Gideon* v. *Wainwright*, 372 U. S. 335, 339 (1963) (holding that the Sixth Amendment requires counsel in all state felony prosecutions).

Nor do I read the majority's reliance on due process to reflect an understanding that due process requires only partial incorporation of the Sixth Amendment right to counsel in state courts. This Court long has recognized the "Sixth Amendment's guarantee of counsel" as "fundamental and essential to a fair trial" and therefore "made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963); see also *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938) (the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty"); *Grosjean* v. *American Press*

the conviction reliably reflects the defendant's conduct.

Moreover, as a practical matter, introduction of a record of conviction generally carries greater weight than other evidence of prior conduct. Indeed, the Sentencing Guidelines *require* a district court to assess criminal history points for prior convictions, and to impose a sentence within the range authorized by the defendant's criminal history, unless it concludes that a defendant's "criminal history category significantly overrepresents the seriousness of a defendant's criminal history or the likelihood that a defendant will commit further crimes." United States Sentencing Commission, Guidelines Manual, §4A1.3 (Nov. 1992). Realistically, then, the conclusion that a State may prove prior conduct in a sentencing proceeding at which the defendant is aided by counsel does not support, much less compel, a conclusion that the state may, in lieu of proving directly the prior conduct, rely on a conviction obtained against an uncounseled defendant.[4]

Co., 397 U. S. 233, 243–244 (1936) ("the fundamental right of the accused to the aid of counsel in a criminal prosecution" is "safeguarded against state action by the due process of law clause of the Fourteenth Amendment"). No decision of this Court even has intimated that the Sixth Amendment right to counsel somehow is diluted or truncated in state proceedings.

[4]JUSTICE SOUTER concludes that this provision passes Sixth Amendment muster by providing the defendant a "reasonable opportunity" to disprove the accuracy of the prior conviction. *Ante*, at 4. Even assuming that the Guidelines would permit a sentencing court to depart downward in response to a defendant's claim that his conviction resulted from his lack of sophistication or his calculation that it was cheaper to plead and pay a low fine than to retain counsel and

Contrary to the rule set forth by the Court, a rule that an uncounseled misdemeanor conviction *never* can form the basis for a term of imprisonment is faithful to the principle born of *Gideon* and announced in *Argersinger* that an uncounseled misdemeanor, like an uncounseled felony, is not

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litigate the charge, such a safety valve still does not accommodate reliability concerns sufficiently. As Chief Justice Burger recognized in *Argersinger*, "[a]ppeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record." 407 U. S., at 41 (concurring opinion). A collateral proceeding holds forth no greater promise of relief. The uncounseled misdemeanor convictions that are considered inherently unreliable under *Argersinger* and *Scott* are presumptively valid under most sentence enhancement schemes, see *e.g.*, *Custis* v. *United States*, ___ U. S. ___ (1994) (limiting a defendant's right to attack as unconstitutional a prior conviction used to enhance a sentence under the Armed Career Criminals Act, 18 U. S. C. §924(e)); *Parke* v. *Raley*, ___ U. S. ___ (1992) (presumption of validity that attaches to final judgments properly extended to prior convictions used for sentence enhancement under a state recidivism statute), and are presumptively reflected in a defendant's criminal history score—and sentence—under the Sentencing Guidelines, see United States Sentencing Commission, Guidelines Manual App. C, amend. 353 (November 1993) ("[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed").

Moreover, although it might be salutary for courts

reliable enough to form the basis for the severe sanction of incarceration. This Court in *Gideon* stated that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U. S., at 344. *Gideon* involved a felony, but we recognized in *Argersinger*, 407 U. S., at 31, that counsel was "often a requisite to the very existence of a fair trial" in misdemeanor cases, as well. In the absence of this "assurance" of or "requisite" to a fair trial, we cannot have confidence in the reliability of the conviction and, therefore, cannot impose a prison term based on it.

These reliability concerns have prompted this Court to hold that an uncounseled *felony* conviction cannot later be used to increase a prison term under a state recidivist statute, *Burgett* v. *Texas*, 389 U. S. 100

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to consider under the Sentencing Guidelines a defendant's reasons other than culpability for pleading *nolo contendere* to a prior misdemeanor conviction, I do not share JUSTICE SOUTER's confidence that such a benevolent review of a defendant's circumstances is occurring now. Even if it were, a district court, after the most probing review, generally may depart downward only in "atypical" cases, outside the "heartland" carved by each guideline, United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A, comment 4(b) (November 1991). This does not alleviate our concern in *Argersinger* that the "typical" misdemeanor case presents pressures to plead guilty or *nolo contendere*, regardless of the fairness or accuracy of that plea. 407 U. S., at 34–36. Accordingly, I find the district court's authority to depart downward too tenuous a check on the use of unreliable misdemeanor convictions to salvage a sentencing scheme that is, in my view, a violation of *Scott*.

(1967), nor even be considered by a court in sentencing for a subsequent conviction, *United States* v. *Tucker*, 404 U. S. 443 (1972). The Court offers no reason and I can think of none why the same rules should not apply with regard to uncounseled *misdemeanor* convictions. Counsel can have a profound effect in misdemeanor cases, where both the volume of cases and the pressure to plead are great. See *Argersinger*, 407 U. S., at 36 ("`[m]isdemeanants represented by attorney are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel'") (quoting American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970)); *Baldasar*, 446 U. S., at 228, n. 2 (Marshall, J., concurring) (recognizing that misdemeanor convictions may be less reliable than felony convictions because they are obtained through "assembly-line justice" and because jurors may be less scrupulous in applying the reasonable-doubt standard to a minor offense). Given the utility of counsel in these cases, the inherent risk of unreliability in the absence of counsel, and the severe sanction of incarceration that can result directly or indirectly from an uncounseled misdemeanor,

there is no reason in law or policy to construe the Sixth Amendment to exclude the guarantee of counsel where the conviction subsequently results in an increased term of incarceration.

Moreover, the rule that an uncounseled misdemeanor conviction can never be used to increase a prison term is eminently logical, as Justice Marshall made clear in *Baldasar*:

> "An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent misdemeanor. For this reason, a conviction which is invalid for purposes of imposing a sentence for

> the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." 446 U. S., at 227–228 (concurring opinion).[5]

Finally, this rule is workable. As the Court has engaged in "constitutional line drawing" to determine the "precise limits and . . . ramifications" of *Gideon*'s principles, *Scott*, 440 U. S., at 372, it has sought to draw a clear line, one that adequately informs judges, prosecutors, and defendants of the consequences of their actions and decisions. Under the clear rule that an uncounseled misdemeanor conviction can never justify any term of imprisonment, the judge and the parties will know, at the beginning of a misdemeanor trial, that no imprisonment may be imposed, directly

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[5]From another perspective, the prior uncounseled conviction can be viewed as a "hybrid" conviction: valid for the purpose of imposing a sentence, but invalid for the purpose of depriving the accused of his liberty. See *Baldasar*, 446 U. S., at 232 (Powell, J., dissenting). There is nothing intuitively offensive about a "hybrid." See *Baldasar*, 446 U. S., at 226 (Marshall, J., concurring) (noting and accepting that Baldasar's conviction was not valid for all purposes); see also 15 U. S. C. §16 (a) (1988) (certain consent decrees or consent judgments in favor of the Government in a civil or criminal antitrust actions shall not be prima facie evidence in a subsequent proceeding brought by another party); §16(h) (district court proceedings leading to a consent judgment proposed by the Government are inadmissible as evidence in subsequent proceedings); 10 Von Kalinowski, Antitrust Laws and Trade Regulation §105.02[10], p. 108 (1993) ("allegations based on pleas of *nolo contendere* in government suits, and the judgments entered thereon, should *not* be included in the complaint" in a subsequent action).

or collaterally, based on that proceeding, unless counsel is appointed to represent the indigent accused. See *Argersinger*, 407 U. S., at 42 (Burger, C.J., concurring). Admittedly, this rule might cause the State to seek and judges to grant appointed counsel for more indigent defendants, in order to preserve the right to use the conviction later for enhancement purposes. The Sixth Amendment guarantee of counsel should not be subordinated to these costs. See *Argersinger*, 407 U. S., at 43, 44) (Burger, C. J., concurring in result) (accepting that the Court's holding would require the appointment of more defense counsel). In any event, the majority's rule, which exposes indigent defendants to substantial sentence enhancements on the basis of minor offenses, may well have the same result by encouraging more indigent defendants to seek counsel and to litigate offenses to which they otherwise might have pleaded. This case is illustrative. When charged with driving under the influence, petitioner sought out an attorney, who told him that he didn't need a lawyer if he was pleading *nolo contendere*. This advice made sense if a $250 fine was the only consequence of the plea. Its soundness is less apparent where the consequences can include a two-year increase in a prison sentence down the road.

With scant discussion of Sixth Amendment case law or principles, the Court today approves the imposition of two years of incarceration as the consequence of an uncounseled misdemeanor conviction. Because uncounseled misdemeanor convictions lack the reliability this Court has always considered a prerequisite for the imposition of any term of incarceration, I dissent.