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# 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]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, we return to the issue that splintered the Court in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980): Whether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense.

In 1990, petitioner Nichols pleaded guilty to conspiracy to possess cocaine with intent to distribute, in violation of 21 U. S. C. §846. Pursuant to the United States Federal Sentencing Guidelines (Sentencing Guidelines), petitioner was assessed three criminal history points for a 1983 federal felony drug conviction. An additional criminal history point was assessed for petitioner's 1983 state misdemeanor conviction for driving under the influence (DUI), for which petitioner was fined $250 but was not incarcerated.[1] This additional criminal

[1]At the time of his conviction, petitioner faced a maximum punishment of one year imprisonment and a $1,000.00 fine. Georgia law provided that a person convicted of driving under the influence of alcohol "shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00

history point increased petitioner's Criminal History Category from category II to category III.[2] As a result, petitioner's sentencing range under the Sentencing Guidelines increased from 168–210 months (under Criminal History Category II) to 188–235 months (under Category III).[3]

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nor more than $1,000.00, or by both such fine and imprisonment." Ga. Code Ann. §40.6–391(c) (1982).

[2]There are six criminal history categories under the Sentencing Guidelines. United States Sentencing Commission, Guidelines Manual ch. 5, pt. A (Nov. 1993) (Sentencing Table). A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. *Id.*, ch. 4, p. A.

[3]The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the intersection of the defendant's offense level and his criminal history category. *Id.,* ch. 5, pt. A (Sentencing Table).

Petitioner objected to the inclusion of his DUI misdemeanor conviction in his criminal history score because he was not represented by counsel at that proceeding. He maintained that consideration of that uncounseled misdemeanor conviction in establishing his sentence would violate the Sixth Amendment as construed in *Baldasar*, *supra*. The United States District Court for the Eastern District of Tennessee found that petitioner's misdemeanor conviction was uncounseled and that, based on the record before it, petitioner had not waived his right to counsel.[4] 763 F. Supp. 277 (1991). But the District Court rejected petitioner's *Baldasar* argument, explaining that in the absence of a majority opinion, *Baldasar* "stands only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." 763 F. Supp, at 279. Because petitioner's offense was already defined as a felony, the District Court ruled that *Baldasar* was inapplicable to the facts of this case; thus, petitioner's constitutional rights were not violated by using his 1983 DUI conviction to enhance his sentence.[5] It sentenced petitioner to the maximum

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[4]Respondent contends that, even if *Baldasar* prohibits using the prior uncounseled misdemeanor conviction to enhance petitioner's sentence, the District Court applied the wrong legal standard in finding no valid waiver of the right to counsel. Based on *Johnson* v. *Zerbst*, 304 U. S. 458, 467–469 (1938) and *Parke* v. *Raley*, 506 U. S. ___, ___ (slip op., at 9), (1993), respondent argues that petitioner failed to carry his burden to establish the absence of a valid waiver of counsel. We need not address this contention due to our resolution of the *Baldasar* issue.

[5]Petitioner's instant felony conviction was punishable under statute by not less than 10 years' imprisonment and not more than life imprisonment. See 21 U. S. C. §841(b)(1)(B); 979 F. 2d 402, 413–414, 417–418 (CA6 1992).

term allowed by the Sentencing Guidelines under its interpretation of *Baldasar*, a term 25 months longer than if the misdemeanor conviction had not been considered in calculating petitioner's criminal history score.

A divided panel of the Court of Appeals for the Sixth Circuit affirmed. 979 F. 2d 402 (1992). After reviewing the fractured decision in *Baldasar* and the opinions from other Courts of Appeals that had considered the issue, the court held that *Baldasar* limits the collateral use at sentencing of a prior uncounseled misdemeanor conviction only when the effect of such consideration is to convert a misdemeanor into a felony.[6] The dissent, while recognizing that "numerous courts have questioned whether *[Baldasar]* expresses *any* single holding, and, accordingly, have largely limited *Baldasar* to its facts," nevertheless concluded that *Baldasar* proscribed the use of petitioner's prior uncounseled DUI conviction to enhance his sentence under the Sentencing Guidelines. 979 F. 2d, at 407–408 (citations omitted).

We granted certiorari 509 U. S. ___ (1993), to address this important question of Sixth Amendment law, and to thereby resolve a conflict among state

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[6]The court also stated that its decision was "logically compelled" by *Charles* v. *Foltz*, 741 F. 2d 834, 837 (CA6 1984), cert. denied, 469 U. S. 1193 (1985), 979 F. 2d, at 415–416, 418 ("`[E]vidence of prior uncounselled misdemeanor convictions for which imprisonment was not imposed [] may be used for impeachment purposes'").

courts[7] as well as Federal Courts of Appeals.[8] We now affirm.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), we held that where no sentence of imprisonment was imposed, a defendant charged with a misdemeanor had no constitutional right to counsel.[9] Our decision in *Scott* was dictated by *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), but we stated that "[e]ven were the

[7]Compare, *Lovell* v. *State*, 283 Ark. 425, 428, 678 S. W. 2d 318, 320 (1984) (*Baldasar* bars any prior uncounseled misdemeanor conviction from enhancing a term of imprisonment following a second conviction); *State* v. *Vares*, 71 Haw. 617, 620, 801 P. 2d 555, 557 (1990) (same); *State* v. *Laurick*, 120 N. J. 1, 16, 575 A. 2d 1340, 1347 (*Baldasar* bars an enhanced penalty only when it is greater than that authorized in the absence of the prior offense or converts a misdemeanor into a felony), cert. denied, 498 U. S. 967 (1990); *Hlad* v. *State*, 565 So. 2d 762, 764–766 (Fla. App. 1990) (following the approach of JUSTICE BLACKMUN, thereby limiting enhancement to situations where the prior uncounseled misdemeanor was punishable by six months' imprisonment or less), aff'd, 585 So. 2d 928, 930 (Fla. 1991); *Sheffield* v. *Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990) (*Baldasar* establishes no barrier to the collateral use of valid, uncounseled misdemeanor convictions).

[8]The Sixth Circuit expressly joined the Fifth and Second Circuits in essentially limiting *Baldasar* to its facts. See *Wilson* v. *Estelle*, 625 F. 2d 1158, 1159, and n. 1 (CA5 1980) (a prior uncounseled misdemeanor conviction cannot be used under a sentence enhancement statute to convert a subsequent misdemeanor into a felony with a prison term), cert. denied, 451 U. S. 912 (1981); *United States* v. *Castro-Vega*, 945 F. 2d 496, 500 (CA2 1991) (*Baldasar* does not apply where "the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony"), cert. denied *sub nom. Cintron-*

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." *Scott, supra,* at 373.

One year later, in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980), a majority of the Court held that a prior uncounseled misdemeanor conviction, constitutional under *Scott*, could nevertheless *not* be collaterally used to convert a second misdemeanor conviction into a felony under the applicable Illinois sentencing enhancement statute. The *per curiam* opinion in *Baldasar* provided no rationale for the result; instead, it referred to the "reasons stated in the concurring opinions." 446 U. S., at 224. There were three different opinions supporting the result. Justice Stewart, who was joined by JUSTICES Brennan and STEVENS, stated simply that the defendant "was sentenced to an increased term of imprisonment *only*

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*Rodriguez* v. *United States,* 507 U. S. ___ (1992). But see, *e. g.*, *United States* v. *Brady*, 928 F. 2d 844, 854 (CA9 1991) (*Baldasar* and the Sixth Amendment bar any imprisonment in a subsequent case imposed because of an uncounseled conviction in which the right to counsel was not waived).

[9]In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). We have held that convictions gained in violation of *Gideon* cannot be used "either to support guilt or enhance punishment for another offense," *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967), and that a subsequent sentence that was based in part on a prior invalid conviction must be set aside, *United States* v. *Tucker*, 404 U. S. 443, 447–449 (1972).

because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense," and that "this prison sentence violated the constitutional rule of *Scott* . . . ." *Ibid*. Justice Marshall, who was also joined by JUSTICES Brennan and STEVENS, rested his opinion on the proposition that an uncounseled misdemeanor conviction is "not sufficiently reliable" to support imprisonment under *Argersinger*, and that it "does not become more reliable merely because the accused has been validly convicted of a subsequent offense." *Id.*, at 227–228. JUSTICE BLACKMUN, who provided the fifth vote, advanced the same rationale expressed in his dissent in *Scott*—that the Constitution requires appointment of counsel for an indigent defendant whenever he is charged with a "nonpetty" offense (an offense punishable by more than 6 months' imprisonment) or when the defendant is actually sentenced to imprisonment. *Id.*, at 229–230. Under this rationale, Baldasar's prior misdemeanor conviction was invalid and could not be used for enhancement purposes because the initial misdemeanor was punishable by a prison term of more than six months.

Justice Powell authored the dissent, in which the remaining three Members of the Court joined. The dissent criticized the majority's holding as one that "undermines the rationale of *Scott* and *Argersinger* and leaves no coherent rationale in its place." *Id.*, at 231. The dissent opined that the majority's result misapprehended the nature of enhancement statutes which "do not alter or enlarge a prior sentence," ignored the significance of the constitutional validity of the first conviction under *Scott*, and created a "hybrid" conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution. *Id.*, at 232–233. Finally—and quite presciently—the dissent predicted that the Court's decision would create confusion in the lower

courts. *Id.*, at 234.

In *Marks* v. *United States*, 430 U. S. 188 (1977), we stated 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 . . . .'" *Id.,* at 193, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976). This test is more easily stated than applied to the various opinions supporting the result in *Baldasar*. A number of Courts of Appeals have decided that there is no lowest common denominator or "narrowest grounds" that represents the Court's holding. See, *e. g.*, *United States* v. *Castro-Vega*, 945 F. 2d 496, 499–500 (CA2 1991); *United States* v. *Eckford*, 910 F. 2d 216, 219, n. 8 (CA5 1990); *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 345 (CA7 1983), cert. denied, 465 U. S. 1068 (1984). Another Court of Appeals has concluded that the holding in *Baldasar* is JUSTICE BLACKMUN's rationale, *Santillanes* v. *United States Parole Comm'n*, 754 F. 2d 887, 889 (CA10 1985); yet another has concluded that the "consensus" of the *Baldasar* concurrences is roughly that expressed by Justice Marshall's concurring opinion. *United States* v. *Williams*, 891 F. 2d 212, 214 (CA9 1989). State courts have similarly divided.[10] The Sentencing Guidelines have also reflected uncertainty over *Baldasar*.[11] We

[10]See n. 7, *supra*.

[11]The 1989 version of the Sentencing Guidelines stated that, in determining a defendant's criminal history score, an uncounseled misdemeanor conviction should be excluded only if it "would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution." USSG §4A1.2, Application Note 6 (Nov. 1989). Effective November 1, 1990, the Commission amended §4A1.2 by deleting the above quoted phrase and adding the

think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts which have considered it. This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision. *Payne* v. *Tennessee*, 501 U. S. ___, ___ (1991) (slip op., at 18–19); *Miller* v. *California*, 413 U. S. 15, 24–25 (1973).

Five Members of the Court in *Baldasar*—the four dissenters and Justice Stewart—expressed continued adherence to *Scott* v. *Illinois*, 440 U. S. 367 (1979). There the defendant was convicted of shoplifting under a criminal statute which provided that the penalty for the offense should be a fine of not more than $500, a term of not more than one year in jail, or both. The defendant was in fact fined $50, but he contended that since imprisonment for the offense was authorized by statute, the Sixth and Fourteenth Amendments to the United States Constitution required Illinois to provide trial counsel. We rejected that contention, holding that so long as no imprisonment was actually imposed, the Sixth Amendment right to counsel did not obtain. *Id.*, at 373–374. We reasoned that the Court, in a number of decisions, had already expanded the language of the Sixth Amendment well beyond its obvious meaning,

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following statement as background commentary: "Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." USSG App. C, amend. 353 (Nov. 1993). When the Commission initially published the amendment for notice and comment, it included the following explanation: "The 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*, 446 U. S. 222 (1980)." 55 Fed. Reg. 5741 (1990).

and that the line should be drawn between criminal proceedings which resulted in imprisonment, and those which did not. *Id.*, at 372.

We adhere to that holding today, but agree with the dissent in *Baldasar* that a logical consequence of the holding is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in *Baldasar*, "[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant. *E. g.*, *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962)." 446 U. S., at 232.

Reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt. As a general proposition, a sentencing 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." *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence of guilt in determining what sentence to impose on a convicted defendant." *Wisconsin* v. *Mitchell*, 508 U. S. ___, ___ (1993) (slip op., at 6). One such important factor, as recognized by state recidivism statutes and the criminal history component of the Sentencing Guidelines, is a defendant's prior convictions. Sentencing courts have not only taken into consideration a defendant's

prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct in *Williams* v. *New York*, 337 U. S. 241 (1949). We have also upheld the consideration of such conduct, in connection with the offense presently charged, in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986). There we held that the state could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty.

Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct which gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. *Id.,* at 91. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proven beyond a reasonable doubt.

Petitioner contends that, at a minimum, due process requires a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime. No such requirement was suggested in *Scott*, and we believe with good reason. In the first place, a large number of misdemeanor convictions take place in police or justice courts which are not courts of record. Without a drastic change in the procedures of these courts, there would be no way to memorialize any such warning. Nor is it at all clear exactly how expansive the warning would have to be; would a Georgia court have to warn the defendant about permutations and commutations of recidivist statutes in 49 other states, as well as the criminal history provision of the Sentencing Guidelines applicable in federal courts?

And a warning at the completely general level—that if he is brought back into court on another criminal charge, a defendant such as Nichols will be treated more harshly—would merely tell him what he must surely already know.

Today we adhere to *Scott* v. *Illinois*, *supra*, and overrule *Baldasar*.[12] Accordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.

The judgment of the Court of Appeals is therefore

*Affirmed.*

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[12]Of course States may decide, based on their own constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors. Indeed, many if not a majority of States guarantee the right to counsel whenever imprisonment is authorized by statute, rather than actually imposed. See, *e. g.*, Alaska Stat. Ann. §18.85.100 (1991) ("serious" crime means any crime where imprisonment authorized); Ariz. Rule of Crim. Proc. 6.1(b) (indigent defendant shall be entitled to have attorney appointed in any criminal proceeding which may result in punishment by loss of liberty, or where court concludes that appointment satisfies the ends of justice); Cal. Penal Ann. Code § 15 (West 1988), Cal. Penal Code Ann. §858 (West 1985); *Brunson* v. *State*, 182 Ind. App. 146, 394 N. E. 2d 229 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, §13); N. H. Rev. Stat. Ann. §604–A:2 (1986 and Supp. 1992).