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"Strike Three, Yer Out!?": Examining the Constitutional Limits on the Use of Prior Uncounseled DWI Convictions to Impose Mandatory Prison Sentences on Repeat DWI Offenders*

INTRODUCTION

In response to public outcry over accidents involving drunk drivers, most states have strengthened their drunk driving laws.1 Increased penalties for driving while intoxicated (DWI)2 include imprisonment, fines, loss of driving privileges and community service.3 As the penalties have become more severe, questions have arisen concerning the application of the Bill of Rights in DWI cases. Con-
stitutional guarantees including the right to trial by jury,⁴ protection against self-incrimination,⁵ and an indigent's right to court-appointed counsel⁶ have been held inapplicable in many DWI cases.

To further deter drunk driving, most states have enacted mandatory incarceration sentences for repeat offenders. An indigent's right to court-appointed counsel at repeat offender trials has been recognized because of the possibility of incarceration.⁷ However, repeat DWI offenders often receive actual incarceration sentences based solely upon prior convictions. Because there has been an increase in guilty pleas by first time offenders,⁸ the constitutionality of using uncounseled convictions to impose mandatory minimum prison sentences has been questioned. Courts differ in permitting the use of these convictions.

This Comment examines the constitutional implications of using prior uncounseled DWI convictions to incarcerate repeat DWI offenders. Part I reviews the Supreme Court decisions which established the right to court-appointed counsel for the indigent accused. Part II examines the federal constitutional limitations on the collateral use of prior uncounseled convictions. Part III analyzes state court decisions involving the collateral use of prior uncounseled DWI convictions. Part IV critically evaluates these decisions. This Comment concludes that, because an uncounseled conviction is inherently unreliable, it should not be used to mandatorily incarcerate a DWI

⁴ See Comment, The Federal Constitutional Right to Trial by Jury for the Offense of Driving While Intoxicated, 73 MINN. L. REV. 122 (1988) (concluding that in most cases DWI is a serious offense requiring a jury trial). But see, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989). The Court presumed that, for purposes of the sixth amendment, any offense carrying a maximum prison sentence of six months or less was viewed by society to be “petty.” Id. at 543. Because the maximum authorized prison sentence for first-time DWI offenders in Nevada did not exceed six months, the Court held that the defendant was not entitled to a jury trial. Id. at 545.

⁵ See, e.g., Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990). In Muniz, decided on June 18, 1990, the Court considered the scope of the fifth amendment privilege against self-incrimination when Muniz was questioned after an arrest for DWI. Muniz had not been given Miranda warnings. Id. at 2641-42.

The Court held that slurred speech exhibited by Muniz and videotaped at the police booking facility was not testimonial information, and thus was not protected by the fifth amendment's privilege against compelled self-incrimination. Id. at 2645. However, Muniz' answer to a question that required him to calculate the date of his sixth birthday was considered compelled testimony and thus violated his fifth amendment right. Id. at 2646-47.

⁶ The Supreme Court has developed a “bright-line” approach (actual incarceration) that establishes when an indigent's right to court-appointed counsel attaches. See infra notes 38-40 and accompanying text. Because states often do not appoint counsel for minor offenses, including first DWI offenses, convictions are often obtained without counsel.

⁷ See supra note 6.

⁸ See, e.g., Bellamy, Study Says Safe Roads Act Effective, United Press International, May 24, 1984 (about 80% of those charged with DWI pled guilty in 1984 versus 60% in past years).
repeat offender.

I. INDIGENT'S RIGHT TO APPOINTMENT OF COUNSEL - SUPREME COURT DECISIONS

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."\(^9\) The rule that in some circumstances indigent criminal defendants require the assistance of court-appointed counsel dates back to the famous "Scottsboro Boys" case of *Powell v. Alabama*.\(^{10}\) In *Powell*, seven uneducated, illiterate, and apparently indigent black defendants, convicted of raping two white women, were sentenced to death.\(^{11}\) Because of the hostile atmosphere surrounding the trial and the indigent defendants' inability to adequately defend themselves, the Supreme Court reversed.\(^{12}\) The Court held that the defendants had been denied due process of law by the trial court's failure to appoint effective counsel to assist them at their trials.\(^{13}\)

Although the indigent defendants' due process rights were held to have been violated in *Powell*, the Court did not require court-appointed counsel in all state prosecutions.\(^{14}\) Ten years later, the Court reaffirmed its position in *Betts v. Brady*.\(^{15}\) The Court expressly held that the due process clause of the fourteenth amendment does not demand "that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant."\(^{16}\) The *Betts*

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9. U.S. Const. amend. VI.
10. 287 U.S. 45 (1932).
11. Id. at 45-49.
12. Id. at 71. The Court took note of the following factors in deciding that a fair trial required the appointment of counsel: the hostile atmosphere in which the trial took place; the fact that the defendants were constantly under military guard; the ignorance and illiteracy of the defendants; the fact that the defendants were residents of other states; and the youth of the defendants. Id.
13. Id. at 71. Justice Sutherland's majority opinion stated that because the assistance of counsel is of such a fundamental character, lack of counsel can impair a defendant's due process rights to a hearing guaranteed by the due process clauses of the fifth and fourteenth amendments. Although the Court noted the question of whether due process required the appointment of counsel to represent defendants in other state criminal prosecutions, or under other circumstances, the Court limited its holding to the facts of *Powell*. Id.
14. Id.
16. Id. at 464. A previous Supreme Court decision held that the sixth amendment required appointment of counsel to indigents in all federal trials. Johnson v. Zerbst, 304 U.S. 458 (1938). However, the *Betts* Court held that the fourteenth amendment's due
Court endorsed a case-by-case analysis of the proceedings to determine whether a trial without counsel is fundamentally fair and right. For the next twenty-one years, the Betts decision was heavily criticized. Determination of when an indigent criminal defendant required the appointment of counsel proved unworkable. Finally, in Gideon v. Wainwright the Court formally overruled Betts by holding that the sixth amendment right to counsel was "fundamental and essential to fair trials."

Gideon, an indigent defendant accused of a felony, was convicted after being refused the aid of court-appointed counsel. The Supreme Court reversed and held that an indigent defendant "cannot be assured a fair trial" without the assistance of court-appointed counsel. Through the Due Process Clause of the fourteenth amendment, Gideon requires that states provide a court-appointed counsel process clause was not necessarily violated when a state failed to appoint counsel for an indigent defendant. Betts, 316 U.S. at 461-63.

17. Betts, 316 U.S. at 473.
18. In 1945 the Court held that in some circumstances due process may require the appointment of counsel to defend an indigent accused in non-capital state cases. Rice v. Olson, 324 U.S. 786 (1945). Three years later, the Court held that due process requires the appointment of counsel in non-capital state felony cases only when there were "special circumstances." Bute v. Illinois, 333 U.S. 640 (1948). However, the Court often found "special circumstances" requiring the appointment of counsel. Annotation, Constitutionally Protected Right of Indigent Accused to Appointment of Counsel in State Court Prosecution, 93 A.L.R.2d 747 (1964 & Supp. 1990).
20. Id. at 345.
21. Id. at 344. The indigent defendant, Gideon, was charged with a felony and subsequently denied appointment of counsel at trial. Gideon presented his defense to the best of his ability as a layman and was subsequently convicted and sentenced to a five year prison term. On appeal, Gideon argued that failure to appoint counsel denied him his sixth amendment right to counsel. The state supreme court rejected Gideon's argument. The United States Supreme Court granted certiorari. Id. at 336-37.
22. Id. at 336-37.
23. Id. at 344. In support, the Court noted that both the government and monied defendants hire the best lawyers possible to prepare and present their cases. The Court noted a "widespread belief that lawyers in criminal courts are necessities, not luxuries." Id.
24. Id. at 342. The fourteenth amendment to the United States Constitution denies the States the power to "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1. Thus, the sixth amendment's right to counsel was incorporated through the fourteenth amendment.

Other rights guaranteed by the first eight amendments have been incorporated and held to be binding on the states by the Due Process Clause of the fourteenth amendment. These incorporated rights include the rights of speech, press, and religion covered by the first amendment, see, e.g., Fiske v. Kansas, 274 U.S. 380 (1927), the fourth amendment rights to be free from unreasonable searches and seizures, see Mapp v. Ohio, 367 U.S. 643 (1961), and the fifth amendment right to be free from compelled self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964). In addition to the right to counsel, other sixth amendment rights have been incorporated, including the right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), the right to a public trial, In re Oliver, 333 U.S. 257 (1948), and the right to confront opposing witnesses, Pointer v. Texas, 380 U.S. 400
to indigent accused. Although the *Gideon* rationale is not limited to felony cases, the Supreme Court did not indicate the extent of the indigent’s right to court-appointed counsel until it decided *Argersinger v. Hamlin* in 1972.

*Argersinger*, an uncounseled indigent defendant, was convicted of a misdemeanor offense and given a three month jail sentence. The Florida Supreme Court, in a four-to-three decision, rejected *Argersinger*’s argument that he was denied his sixth amendment right to counsel. The Supreme Court granted certiorari. The Court considered whether the right to court-appointed counsel should be treated similarly to the right to trial by jury. Although the Court had previously limited the right to jury for trials where potential imprisonment is greater than six months, the Court refused to similarly limit the right to assistance of counsel.

The Court held that *Gideon*’s rationale extended beyond criminal felony prosecutions. The Court wrote that counsel is necessary for a fair trial, even in trials for petty offenses. Because the problems associated with misdemeanors and petty offenses often require the presence of counsel to ensure the accused a fair trial, the Court held that “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”

The Court extended *Argersinger* the right to court-appointed counsel. (1965).

26. *Id.* *Argersinger* was charged in Florida state court with carrying a concealed weapon, a misdemeanor offense punishable by imprisonment up to six months, a $1,000 fine, or both. After representing himself at trial, he was convicted and given a three month jail sentence. He then brought a habeas corpus action in the Florida Supreme Court, alleging that he had been deprived of his sixth amendment right to counsel. *Id.* at 26.
27. *Id.* The Florida Supreme Court followed the rule announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that right to jury trial attaches only for trials for non-petty offenses punishable by more than six months imprisonment). *Id.* at 27. Because *Argersinger* could only be imprisoned up to six months, and not more, his right to court-appointed counsel was held not to attach. *Id.*
29. *Id.* at 32.
30. *Id.* at 33.
31. *Id.*
32. *Id.* at 37 (emphasis added). The Court allows indigent defendants to make a “knowing and intelligent waiver” of their right to counsel. *Id.* Many disputes concerning the collateral use of uncounseled convictions examine the validity of such waivers. There are no restrictions on the collateral use of uncounseled convictions when a valid waiver is given. This Comment does not address cases involving valid waivers of the right to counsel.
counsel because he was imprisoned for his offense. However, it was not until *Scott v. Illinois*, 3 decided seven years later, that the Court clarified the extent of the right it announced in *Argersinger*. In *Scott*, the Court considered whether the right to court-appointed counsel extended to a defendant who was only fined for an offense which was punishable by either fine or imprisonment.

Scott, an uncounseled indigent defendant, was convicted of shoplifting and fined. 34 Scott faced a possible jail sentence for the offense. 35 At trial, Scott contended that, according to the Court’s rationale in *Argersinger*, he should have been provided counsel because imprisonment was a possible penalty. 36 The Supreme Court disagreed. 37

The Court interpreted *Argersinger* as stating “that incarceration was so severe a sanction” that an indigent defendant could not be imprisoned unless the defendant had been offered court-appointed counsel at trial. 38 However, the *Scott* Court limited the *Argersinger* rule to indigents actually imprisoned. The right to court-appointed counsel is unavailable to an indigent defendant for which prison is but a mere possibility. Because Scott had not been imprisoned for his offense, the Court held that he was not entitled to court-appointed counsel. 39 Therefore, under *Scott* and *Argersinger*, a trial court may constitutionally deny an indigent court-appointed counsel and obtain a conviction, providing the defendant is not actually imprisoned as a result. 40

II. LIMITATIONS ON THE COLLATERAL USE OF PRIOR UNCOUNSELED CONVICTIONS

*Scott* and *Argersinger* did not address the issue of whether an uncounseled conviction which did not result in imprisonment may be used collaterally. 41 The Court considered this issue for the first time

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34. *Id.* at 368.
35. *Id.* See ILL. REV. STAT. ch. 38, § 16-1.
37. *Id.* at 374.
38. *Id.* at 372-73.
39. *Id.* at 374.
40. *Id.* Justice Powell concurred although he preferred a more flexible approach to the appointment of counsel. *Id.* at 374-75 (Powell, J., concurring).

Justice Brennan, joined by Justices Marshall and Stevens, dissented. *Id.* at 375-89 (Brennan, Marshall & Stevens, JJ., dissenting). The dissenters argued that counsel should be appointed, not only when the defendant was actually imprisoned, but whenever imprisonment was an authorized sentence for the offense. *Id.* at 381-89. They noted that many states required counsel where any imprisonment was authorized. *Id.* at 388.

Justice Blackmun also dissented. *Id.* at 389-90 (Blackmun, J., dissenting). He would have extended the right to court-appointed counsel to an indigent criminal defendant whose offense was punishable by more than six months imprisonment. *Id.* at 389-90.

41. In general, any issue raised in a subsequent proceeding that is not directly
in 1980 when it decided *Baldasar v. Illinois*.*42* Baldasar, an indigent defendant, was convicted of misdemeanor theft. At trial, he was not represented by counsel.*43* Under Illinois law, a first offense for misdemeanor theft is punishable by fine or imprisonment up to one year, while a second conviction for the same offense may be treated as a felony with a prison term of one to three years.*44* Baldasar was only fined for the first offense.*46* Within a year he was charged with a second similar offense.*46* At trial, defense counsel unsuccessfully argued that the prior uncounseled conviction was too unreliable to support enhancing the second offense to a felony. Baldasar was convicted of a felony and sentenced to prison. The Supreme Court reversed.*47*

Justice Stewart wrote that *Scott* was violated because the sentence was increased based upon a previously uncounseled conviction.*49* Justice Marshall agreed that a prior uncounseled misdemeanor conviction was invalid for the purposes of enhancing Baldasar’s prison sentence.*50* He argued that convictions obtained without counsel were inherently unreliable and did not “become more reliable merely because the accused has been validly convicted of a subsequent offense.”*51*

However, Justice Blackmun’s concurring opinion reversed
Baldasar's conviction for different reasons. He would require court-appointed counsel whenever an indigent defendant is prosecuted for an offense punishable by more than six months imprisonment. Under this approach, Baldasar was entitled to counsel at his first trial. Because "he was not represented by an attorney, that conviction . . . is invalid and may not be used to support enhancement." Justice Blackmun therefore did not endorse the plurality's reasoning. However, his vote was necessary to achieve a majority. Because the majority failed to agree upon a rationale for its result, the scope of the decision is questionable. At the very least, Baldasar established that prior uncounseled convictions, punishable by more than a six month imprisonment, cannot be used to increase a maximum prison term under enhanced penalty statutes. The applicability of the Baldasar rule to subsequent DWI convictions is unclear. Specifically, the question remains whether prior uncounseled convictions may be used to impose mandatory minimum prison sentences for repeat DWI offenders. The Supreme Court declined to answer that question when, in 1987, it denied certiorari in Moore v. Georgia.

III. THE COLLATERAL USE OF PRIOR UNCOUNSELED CONVICTIONS TO IMPOSE MANDATORY MINIMUM PRISON SENTENCES ON REPEAT DWI OFFENDERS

A. The Application of Baldasar in the Supreme Court

In Scott, the Supreme Court held that an uncounseled misdemeanor conviction is constitutionally valid as long as the indigent defendant is not actually incarcerated. Baldasar held that such a conviction could not be used under an enhanced penalty statute to increase the maximum prison sentence for a subsequent misdemeanor conviction. In Moore, the Supreme Court denied certiorari

52. Id. at 229-30 (Blackmun, J., concurring).
53. Id. Justice Blackmun's deciding vote was premised on his dissent in Scott, 440 U.S. 367 (1979) (Blackmun, J., dissenting). See supra note 40.
54. Baldasar, 446 U.S. at 230. Baldasar's first conviction was punishable by a maximum of one year imprisonment and a fine of not more than one thousand dollars. See supra note 44 and accompanying text.
55. Baldasar, 446 U.S. at 230.
57. Id. The Baldasar Court did not address the question of using prior uncounseled convictions collaterally to increase mandatory minimum penalties. However, because uncounseled convictions, according to sixth amendment precedent, are presumably unreliable, this Comment suggests that they should not be used collaterally to increase any penalty, either maximum or minimum. See infra text accompanying notes 162-63.
60. Baldasar v. Illinois, 446 U.S. 222, 224 (1980). See supra notes 48-57 and ac-
when asked whether an indigent defendant’s two prior uncounseled DWI convictions could be used to increase the minimum prison sentence for a subsequent DWI conviction.61

Both on the streets and in the courts, Linda Moore was a three-time loser. In 1982, she pled no contest to a DWI charge and was fined. In 1985, she pled guilty to another DWI charge, was ordered to pay a fine, perform eighty hours of community service, and surrender her driver’s license. Moore, an apparent indigent, had neither retained nor obtained court-appointed counsel for either conviction.

Four months later, Moore again was arrested for DWI. Georgia law imposes a mandatory minimum sentence on defendants convicted of DWI three or more times.62 Moore’s court-appointed lawyer contended that Baldasar prohibited the court from using her two previous uncounseled convictions to impose a mandatory minimum prison term for a third DWI conviction. The trial court rejected that contention, Moore pled guilty, and the court sentenced her to three months in jail.

On appeal, the Georgia Court of Appeals determined that Baldasar was inapposite because the third conviction merely imposed a minimum prison term based on Moore’s prior convictions and did not “increas[e] the maximum confinement authorized [or] conver[t] a misdemeanor offense into a felony.”63 Both the Supreme Court of Georgia and the Supreme Court of the United States de-

61. Moore v. Georgia, 484 U.S. 904 (1987). There is no apparent basis for distinguishing between enhancement of maximum jail sentencing and enhancement of minimum jail sentencing. Both enhancements result in increased incarceration time, presumably prohibited by Baldasar and prior sixth amendment precedent. See supra notes 32-57 and accompanying text.

However, because Baldasar was a 5-4 plurality decision, the scope of the decision is questionable. See supra notes 48-56 and accompanying text. Changes in public attitude toward drunk driving and changes in Court membership since 1980 might explain why certiorari was denied in Moore.

62. GA. CODE ANN. § 40-6-391(c)(1)-(3) (1985). Section 40-6-391(c)(3) provides in part that:

(c) Every person convicted of violating this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as follows:

... (3) For the third or subsequent conviction within a five-year period of time

(A) A fine of $1,000.00, ... and

(B)(i) A mandatory period of imprisonment of not less than 120 days nor more than one year. ... 

Id. at § 40-6-391(c)(3) (emphasis added).

nied certiorari. In his dissent, Justice White observed that the state courts were in conflict over whether Baldasar applied to these or similar facts. Because of the uneven application of Baldasar’s holding in the state courts, he would have granted certiorari “to answer the outstanding questions concerning Baldasar’s scope and proper application.” Since 1980, courts have applied Baldasar in DWI repeat offender cases with differing results. Some states, as Georgia did in Moore, have narrowed the application of Baldasar and have allowed the use of prior uncounseled convictions to impose a mandatory minimum prison term in repeat DWI offender cases. Others have read Baldasar more broadly and have not allowed the use of prior uncounseled convictions in similar circumstances. A survey of the application of Baldasar in sentencing repeat DWI offenders may illuminate the differing results.

B. Decisions Allowing the Use of Prior Uncounseled Convictions to Impose Mandatory Minimum Prison Sentences on Subsequent DWI Offenders

The rationale for allowing the use of prior uncounseled convictions to impose mandatory minimum prison terms on repeat DWI offenders is typified in State v. Novak. Frank Novak was convicted as a second-time DWI offender and sentenced to five days in jail. On appeal, Novak’s court-appointed counsel argued that it was improper to impose the mandatory minimum jail sentence required under Wisconsin law for second DWI convictions. His counsel contended that because the first conviction was obtained without counsel, it could not be used as a basis for subjecting Novak to incarceration as a repeat offender. The Supreme Court of Wisconsin rejected that contention.

The court read Baldasar as holding that some uncounseled convictions, valid under Argersinger and Scott because they did not result in incarceration, “may be used as the basis for sentencing . . . a repeat offender upon a subsequent conviction.” The court noted that, under Wisconsin law, a first-time DWI offender is not incarcerated but is merely subject to a civil forfeiture. Because Novak was

64. Moore, 484 U.S. at 904.
65. Id. at 905 (White, J., dissenting).
66. Id. Justice White stated that “[p]ossibly because this Court was sharply divided in Baldasar, with no opinion for reversal gaining more than three votes, courts attempting to apply that decision have come to different conclusions concerning its meaning.” Id.
67. 107 Wis. 2d 31, 318 N.W.2d 364 (1982).
68. Id. at 35, 318 N.W.2d at 366.
69. Id. at 40, 318 N.W.2d at 369.
70. Id. at 41-42, 318 N.W.2d at 369.
71. Id. at 35, 318 N.W.2d at 366.
not exposed to imprisonment in his initial conviction, the court found that *Baldasar* did not apply.\textsuperscript{72}

The court considered the consequences of applying a broader interpretation of *Baldasar* in cases where subsequent DWI offenses impose mandatory minimum jail terms. It noted that a broader interpretation of *Baldasar* would require that "every indigent person accused of first offense drunk driving" be appointed counsel at public expense.\textsuperscript{73} On balance, the court held that the increased costs of providing counsel would "far outweigh any possible ‘benefits’ [that] such [a] requirement would produce."\textsuperscript{74} The court concluded by holding that "under *Baldasar*, . . . the United States Constitution do[es] not preclude imposing incarceration upon a second [D]WI conviction where the defendant was not represented by counsel in the proceedings leading to the first conviction."\textsuperscript{75}

A year later, the Wisconsin court’s rationale was embraced by the United States Court of Appeals for the Seventh Circuit in *Schindler v. Clerk of Circuit Court*.\textsuperscript{76} Schindler, an apparent indigent, was charged with his third DWI offense within a five year period.\textsuperscript{77} Under the statute, a second DWI offense within a five year period requires the imposition of a five-day minimum jail sentence; a third DWI offense within the same period requires the imposition of a thirty-day minimum jail sentence.\textsuperscript{78} Schindler’s two prior DWI convictions were obtained without counsel.

At trial, Schindler’s counsel argued that *Baldasar* prohibited the

\textsuperscript{72} *Id.* at 39, 318 N.W.2d at 368.

\textsuperscript{73} *Id.* at 42, 318 N.W.2d at 370.

\textsuperscript{74} *Id.*.

\textsuperscript{75} *Id.* at 40, 318 N.W.2d at 369.

\textsuperscript{76} 715 F.2d 341 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).

\textsuperscript{77} *Id.* at 342.

\textsuperscript{78} *Id.* at the time of Schindler’s trial the DWI statute provided in part: (2)(a) Any person violating s. 346.63(1) [operating a motor vehicle under the influence of an intoxicant]:

1. Shall forfeit not less than $100 nor more than $500, except as provided in subd. 2 or 3.

2. Shall be fined not less than $250 nor more than $1,000 and *imprisoned not less than* 5 days nor more than 6 months if the total of revocations under s. 343.305 and convictions for violation of s. 346.63(1) or local ordinances in conformity therewith equals 2 *within a 5-year period* . . .

3. Shall be fined not less than $500 nor more than $2,000 and *imprisoned for not less than* 30 days nor more than one year in the county jail if the total of revocations under s. 343.305 and convictions for violation of s. 346.63(1) or local ordinances in conformity therewith equals 3 or more *within a 5-year period* . . .

*Id.* n.1 (emphasis added) (citing Wis. Stat. § 346.65(2)(a) (1979-80)).
imposition of the enhanced sentence predicated upon the earlier uncounseled conviction. The trial court found Baldasar inapplicable and sentenced Schindler to jail for the mandatory minimum period imposed on third-time DWI offenders under the Wisconsin statute. Relying on Baldasar, the district court reversed. The district court held that, under Baldasar, an uncounseled civil forfeiture may not be used to enhance a jail sentence imposed by a later conviction.79

The Court of Appeals for the Seventh Circuit reversed.80 It decided that Baldasar did not apply because of "the failure of the Baldasar majority to agree upon a rationale for its result."81 The court reasoned that Schindler's prior uncounseled DWI conviction was not used to support guilt or enhance punishment for his subsequent conviction, and thus did not violate the Baldasar rule.82 Rather, the prior uncounseled conviction "had the effect of specifically putting Schindler on notice" of the consequences of repeated offenses and warned him that future DWI "violations would subject him to criminal sanctions."83 The initial conviction was merely used to "establish his deviant conduct and classification for future drunk driving violations."84 The court questioned the wisdom of applying the Baldasar rule in these specific circumstances. It asserted that requiring court-appointed counsel for DWI first-offense trials "would prove burdensome, exorbitantly expensive, and in many cases completely unnecessary."85 Based on these public policy reasons, the court held that an uncounseled DWI conviction may be used to establish the status of the defendant. Once established, the mandatory minimum prison sentence is then merely "predicated on the defendant's status as an adjudicated offender, not on the reliability of the" prior uncounseled conviction.86 Thus, the court held that Baldasar was not violated and that the prior uncounseled conviction "may provide a basis" for subjecting a defendant to a mandatory minimum prison sentence.

Schindler, and other decisions that interpret Baldasar narrowly,87

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79. Id.
80. Id. at 347.
81. Id. at 344.
82. Id. at 345.
83. Id. at 346.
84. Id.
85. Id. at 347 (emphasis added).
86. Id.
87. See, e.g., United States v. Robles-Sandoval, 637 F.2d 692 (9th Cir. 1981) (uncounseled deportation conviction may be used to create the status of deportee for the defendant and was not invalid for the purpose of supporting guilt or enhancing punishment in subsequent criminal proceeding for illegally reentering the United States after deportation); State v. O'Neil, 473 A.2d 415 (Me. 1984) (uncounseled DWI conviction may be used to classify defendant as a habitual offender and subject the defendant to criminal sanctions for operating vehicle after revocation of license); and Commonwealth v. Thomas, 510 Pa. 106, 507 A.2d 57 (Pa. 1986) (uncounseled retail theft summary
rely on both public policy and the classification rationale discussed above. The rationale that uncounseled convictions may be used to place defendants into a status which may subsequently be used to impose longer jail sentences was derived from the Supreme Court’s decision in *Lewis v. United States*. 88

In 1961, George Lewis, Jr., without counsel, pled guilty to a felony in a Florida state court and served a term of imprisonment. 89 In 1977, sixteen years later, Lewis was charged with knowingly receiving and possessing a firearm in violation of the Omnibus Crime Control and Safe Streets Act. 90 The Act makes it a federal criminal offense for a person who “has been convicted by a court of the United States or of a State . . . of a felony” to receive, possess, or transport a firearm. 91

At trial, Lewis contended that, under *Gideon*, a violation of the statute could not be predicated on a prior conviction obtained in the absence of defense counsel. The trial court rejected that contention and ruled that the constitutionality of the prior conviction was immaterial when used to establish Lewis’ status as a previously convicted felon. 92 The decision was affirmed on appeal and the Supreme Court granted certiorari. 93

The Court focused on the statutory language and legislative history of the Act. 94 The Court found that Congress could rationally classify a person as a felon without requiring proof of “the validity of the predicate conviction.” 95 Accordingly, Congress could rationally use any prior felony conviction, “even an allegedly invalid one,” as a basis on which to prohibit possession of a firearm. 96 The convicted felon is “presumptively dangerous” 97 and prohibited from transport-
ing or receiving firearms. Therefore, the Court held that a prior un-
counseled felony conviction resulting in imprisonment, although pre-
sumptively unreliable, could be used as a basis for imposing criminal
sanctions for violations of the Act. Because “[e]nforcement of that
essentially civil disability through criminal sanctions does not ‘support
guilt or enhance punishment’,” it is permissible.

Many of the decisions permitting the use of prior uncounseled con-
victions for imposing mandatory minimum prison sentences for sub-
sequent DWI convictions cite Lewis to support their holdings. For
example, the Schindler court found the civil firearms disability im-
posed on Lewis analogous to the civil forfeiture conviction imposed
on Schindler. Similar to the Lewis “status” rationale, the Schin-
dler court interpreted the Wisconsin statute as creating a status of
convicted DWI offenders. Once established in that category, an
individual is subject to criminal sanctions such as mandatory mini-
imum prison terms.

Although Lewis was decided two months before Baldasar, it
was mentioned only once in a footnote appended to the dissent’s opinion. Lewis was neither overruled nor narrowed by Baldasar.
Because of the conflicting results, the Court sent a confusing mes-
sage to the state courts, which responded with diverse holdings.

Court that a person could be placed in this category via an unconstitutional, and there-
fore invalid conviction. Id. at 63.

98. Id. at 67. The Court observed that Congress was focusing on the nexus be-
tween violent crime and the possession of firearms by people with criminal records. Id. at
66. The statute was enacted in response to an increase in political assassinations and
violent crime. Id. at 63. Because the mere fact of conviction would classify a person as a
convicted felon, its validity was immaterial with regard to the classification. Id. at 62.

99. Id. at 67 (quoting Burgett v. Texas 389 U.S. 109, 115 (1967)).

100. Id. The Court relied on two premises in reaching its conclusion: First, the
Court stated that they had repeatedly “recognized . . . that a legislature constitutionally
may prohibit a convicted felon from engaging in activities far more fundamental than the
possession of a firearm.” Id. at 66. Second, the Court found that “it [was] important to
note that a convicted felon may challenge the validity of a prior conviction, or otherwise
remove his disability, before obtaining a firearm.” Id. at 67. Because a convicted felon
could have challenged the prior uncounseled conviction in order to remove the firearm
disability, the Court held that the firearms prosecution did not “open the predicate con-
viction to a new form of collateral attack.” Id.


102. Id. at 347. See supra notes 82-86 and accompanying text.

103. Schindler, 715 F.2d at 347.

104. Lewis was decided on February 27, 1980. Lewis v. United States, 445 U.S. 55
(1980). Interestingly, Baldasar was argued before Lewis. Baldasar was argued on No-
vember 26, 1979; Lewis was argued on January 7, 1980.

105. Baldasar, 446 U.S. at 234 n.3 (Burger, C.J., Powell, White & Rehnquist, JJ.,
dissenting). The dissenters argued that the Baldasar “decision is all the more puzzling in
view” of the decision in Lewis. Id.

106. For a critical analysis of the two decisions, see generally Case Comment,
 Constitutional Law; Sixth Amendment; Right to Counsel; Use of Prior Uncounseled
To this point, this Comment has investigated the line of decisions that have narrowly interpreted the *Baldasar* rule. A survey of decisions which have interpreted *Baldasar* more broadly follows. These decisions disallow the use of uncounseled convictions to impose mandatory minimum prison terms on repeat DWI offenders.

C. Decisions Disallowing the Use of Prior Uncounseled Convictions to Impose Mandatory Minimum Prison Sentences on Subsequent DWI Offenders

The rationale for disallowing the use of prior uncounseled convictions to impose mandatory minimum prison terms on repeat DWI offenders is typified in *State v. Dowd.*

Kirk Dowd was charged with operating a motor vehicle with a suspended license. His license had been suspended as a result of a prior uncounseled DWI conviction. At trial, Dowd stipulated to having operated a vehicle with a suspended license. However, Dowd's counsel argued that the court could not impose the mandatory jail sentence for driving with a suspended license. Dowd's counsel contended that, because the DWI conviction had been obtained without counsel, it could not be used as a predicate for the subsequent suspended license offense. The court rejected that contention and sentenced Dowd to a seven day jail term. The Superior Court affirmed.

The Supreme Court of Maine vacated the sentence. In comparing the *Lewis* and *Baldasar* rationale, the court concluded that they could be distinguished by analyzing the statutes involved in those cases. "The distinction . . . is whether the statute considered enhances punishment, or punishes criminally a civil disability which has been imposed by" the legislature. In analyzing the DWI statute, the court found that imprisonment is mandatory only when the underlying license suspension is a result of a conviction for DWI or failure to submit to a blood-alcohol test. Because a prior uncounseled conviction is obtained in violation of due process, the court concluded that the conviction could not be used as a predicate for the subsequent suspension.
seled conviction directly results in enhancement of a prison sentence in this case, the “result is contrary to the teaching of Baldasar. . . .”116 The court held that “no mandatory penalty could be imposed” for driving with a suspended license where the license is suspended because of an unconsuleed conviction.117

In similar circumstances, the Supreme Court of North Dakota compared the Lewis and Baldasar decisions when it decided State v. Orr.118 Kenneth Orr was convicted of DWI. He appealed after being sentenced as a second offender. The supreme court held that Orr could not be sentenced to mandatory imprisonment as a second DWI offender when his first DWI conviction resulted from an unconsuleed guilty plea.119

On appeal, the state argued that the DWI statute, like the statute in Lewis, did not enhance punishment due to a past conviction. Rather, the state argued that “the focus of the increased punishment provided by [the DWI statute] is not on the reliability of the previous unconsuleed conviction, but on the mere fact of conviction.”1121

The supreme court disagreed.122 It found the DWI statute distinguishable from the federal gun disability statute of Lewis for two major reasons: (1) “[a] first DWI conviction may result in incarceration and is therefore not an essentially civil disability,” and (2) the DWI statute, unlike the federal statute in Lewis, does not permit a DWI offender to expunge or limit the effect of a DWI conviction.123 Consequently, the court concluded that it was “clearly an enhancement statute that necessarily focuses on the reliability of the first conviction, and not on the mere fact of its occurrence.”124

Guided by the sixth amendment decisions of the Supreme Court, especially Argersinger and Scott, the court explained the rationale for its decision:

[w]hether the imprisonment is a result of a first conviction, as in Scott, or because of a conviction for a subsequent offense, as in Orr’s case, makes no difference. Merely because Orr was validly convicted of a second offense does not confer reliability on his earlier unconsuleed conviction. Furthermore, because the defect in Orr’s prior conviction was the denial of counsel, he would, in effect, “suffer anew” the deprivation of his right to counsel if he were subsequently imprisoned solely because of the previous unconsuleed

116. Id.
117. Id.
118. 375 N.W.2d 171 (N.D. 1985).
119. Id. at 178-79.
120. The DWI statute provides that the sentence for a second DWI conviction within five years must include at least four-days’ imprisonment, of which 48 hours must be served consecutively, or ten-days’ community service, at least a $500.00 fine and referral for addiction evaluation. N.D. CENT. CODE § 39-08-01(4)(b) (1985 & Supp. 1991).
121. Orr, 375 N.W.2d at 177.
122. Id.
123. Id.
124. Id.
Accordingly, the Supreme Court reversed the lower court’s decision and remanded with instructions that Orr be sentenced as if he had no prior conviction.128

The Orr court recognized the practical consequences of its decision. Courts following it would need to obtain a valid waiver of counsel or appoint counsel for an indigent DWI defendant “regardless of the penalty to be imposed, if enhancement of punishment for a subsequent conviction is not to be precluded.”127 While this may impose an economic burden on the state, the Orr court emphasized that the “constitution must prevail.”128 The court held that the constitutional rights of DWI indigent defendants that commit subsequent DWI offenses cannot be dependent upon a theory that it is less expensive to deny them their rights rather than to afford them.129

Under similar circumstances, a 1987 Virginia Court of Appeals decision, Sargent v. Commonwealth,130 applied Baldasar broadly when it prohibited a mandatory minimum jail sentence for a third DWI offense, because it was predicated on an uncounseled DWI conviction.131 At trial, Timmy Joe Sargent was convicted of DWI, his third offense within five years. Sargent, an apparent indigent, was not represented by counsel at his two earlier convictions. Despite Sargent’s argument that the uncounseled convictions could not be constitutionally used to enhance his sentence for a third offense, the trial court imposed a three-month jail sentence.132

On appeal, the court of appeal considered the question whether the two misdemeanor convictions for DWI could be used to enhance punishment for a third DWI offense.133 The state argued that because the predicate convictions did not result in Sargent’s incarceration, they were not prohibited by Baldasar and were properly used to convict and sentence him as a third offender under the DWI stat-
The court of appeal disagreed. Although the court agreed that the two prior convictions were constitutionally "valid convictions since no jail time was imposed," it held that they "cannot be used under an enhanced penalty statute" such as the one involved here. The court disagreed with the state's contention that Baldasar should be narrowly applied. It stated that Baldasar rests on the "fact of the prison term rather than the classification of the offense as a felony or misdemeanor."

The court noted that, although Sargent's sentence was within the range permissible for a first offense, he was in fact tried and sentenced for a third DWI offense. The court concluded that imposing a mandatory minimum jail sentence based on prior uncounseled convictions was enhancement of sentencing and was not "in keeping with the teaching of Baldasar . . . ." The court reversed Sargent's conviction holding that:

Sargent could not constitutionally have been imprisoned for either one of his previous convictions unless he was represented by counsel or waived his right to such representation. The Supreme Court's decision in Baldasar prohibits the Commonwealth now from doing indirectly what it could not accomplish directly in the case of either of Sargent's two prior convictions.

Because the Supreme Court denied certiorari in Moore, and because the Baldasar majority did not agree upon a rationale for its results, the state courts have applied the rule announced in Baldasar with differing and confusing results. Lewis v. United States merely amplified the confusion, as witnessed by the decisions discussed above. When courts have construed Baldasar narrowly, allowing the use of uncounseled convictions for imposing mandatory minimum prison sentences on repeat DWI offenders, they have typically used one of the following three approaches.

First, by distinguishing the facts in their cases from the facts of Baldasar, some courts, such as State v. Novak, hold that Baldasar

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134. Id. at 147, 360 S.E.2d at 898. When the first two DWI convictions occurred in 1982, the statute provided in part that upon conviction of a first DWI offense, the defendant may be fined and jailed for not more than twelve months. VA. CODE ANN. § 18.2-270 (1950 & Supp. 1991).

135. Sargent, 5 Va. App. at 149, 360 S.E.2d at 899.

136. Id.

137. Id. at 150, 360 S.E.2d at 899.

138. Id. at 153, 360 S.E.2d at 901.

139. Id. at 155, 360 S.E.2d at 902 (emphasis added).

140. See supra notes 64-66 and accompanying text.

141. See supra notes 48-57 and accompanying text.

does not apply. Second, by using the "status" rationale of Lewis to hold that an uncounseled conviction could validly place a defendant into a status as a "convicted offender," other courts, such as Schindler v. Clerk of Circuit Court, hold that Baldasar does not apply. Third, by balancing the costs with the benefits, some courts, such as Schindler, hold that Baldasar should not apply. Conversely, when courts construe Baldasar broadly, disallowing the use of uncounseled convictions for imposing mandatory minimum prison sentences on repeat DWI offenders, they reject these approaches. Sargent v. Commonwealth, for example, held that the essential Baldasar fact inquiry is whether incarceration is based upon an uncounseled conviction. If incarceration is based solely upon an uncounseled conviction, these courts apply the Baldasar rule and do not distinguish the facts of their cases from the facts of Baldasar.

Some courts, such as State v. Orr, reject the Lewis "status" approach. These courts hold the Lewis statute distinguishable from DWI statutes and prohibit the use of uncounseled convictions to impose mandatory minimum jail terms based upon a defendant's status as a "convicted offender." Finally, some courts, similar to the court in Orr, have recognized the economic burden of appointing counsel for indigent DWI offenders. Although it may impose an economic burden on the state, these courts hold that the appointment of counsel is required by the constitution.

The following is a critical analysis of the different rationales used by the courts in their application of Baldasar to repeat DWI cases.

IV. CRITICAL ANALYSIS OF THE APPLICATION OF BALDASAR IN REPEAT DWI OFFENDER DECISIONS

Decisions that interpret Baldasar narrowly, allowing the use of prior uncounseled DWI convictions, employ rationales which can be classified as: (1) factual distinctions; (2) status; and (3) public policy

143. Novak, 107 Wis. 2d at 39, 318 N.W.2d at 368 (1982). See supra notes 67-75 and accompanying text.
145. Schindler, 715 F.2d at 344. See supra notes 82-84, 101-03 and accompanying text.
146. Schindler, 715 F.2d at 347. See supra note 85 and accompanying text.
147. See, e.g., Sargent, 5 Va. App. at 150-51, 360 S.E.2d at 899. See supra notes 136-38 and accompanying text.
149. Orr, 375 N.W.2d at 177.
150. Id. at 179. See supra text accompanying notes 128-29.
151. Orr, 375 N.W.2d at 179. See supra text accompanying note 129.
arguments. The analysis below demonstrates why these arguments do not pass muster in light of the Supreme Court's sixth amendment decisions.\textsuperscript{162}

\textbf{A. Factual Distinctions}

As noted above, some courts distinguish the facts in their cases from the facts in \textit{Baldasar} to hold \textit{Baldasar} inapplicable.\textsuperscript{153} The \textit{Moore v. Georgia} court determined that \textit{Baldasar} was inapposite because Moore's third conviction merely imposed a minimum prison term based on prior uncounseled convictions and did not enhance the maximum prison term.\textsuperscript{154} The \textit{State v. Novak} court found \textit{Baldasar} inapposite because Novak had not been exposed to incarceration at his initial DWI conviction.\textsuperscript{155} Although factual distinctions can be made between \textit{Baldasar} and most DWI repeat offender cases, the importance of these distinctions fades when one considers \textit{Baldasar}'s underlying rationale.

\textit{Baldasar} is the culmination of the Supreme Court's sixth amendment decisions starting with \textit{Powell v. Alabama}.\textsuperscript{156} Underlying the holding of \textit{Baldasar} is the strong belief that lawyers are essential to ensure fair trials with accurate and reliable results.\textsuperscript{157} The right to counsel is considered to be more essential to a fair trial than the right to a jury trial.\textsuperscript{158} Because uncounseled convictions are considered to be inherently unreliable,\textsuperscript{159} they may not be used for "incarceration" purposes.\textsuperscript{160}

\textsuperscript{152} See supra notes 9-40 and accompanying text.

\textsuperscript{153} See, e.g., Commonwealth v. Thomas, 510 Pa. 106, 507 A.2d 57 (1986) (holding that convictions for summary offense of retail theft entered without the assistance of counsel or valid waiver did not prohibit enhancement for second offense of retail theft from summary offense to misdemeanor).

The concurring opinion distinguished the facts of \textit{Baldasar} from the facts in \textit{Thomas}. Because the possible sentence for the defendant's first offense was the same as the second, which enhanced the offense from summary offense to a misdemeanor, the concurring opinion stated that although the "grading of the offense was affected, there [was] no evidence that the sentence" had been enhanced. \textit{Id.} at 112, 507 A.2d at 64 (emphasis in original).

\textsuperscript{154} Moore, 181 Ga. App. at 549, 353 S.E.2d at 822. See supra note 63 and accompanying text.


\textsuperscript{156} 287 U.S. 45 (1932). See supra notes 10-13 and accompanying text.

\textsuperscript{157} See supra notes 13, 21, 23, 24, 30, 31 and accompanying text.


\textsuperscript{159} Baldasar v. Illinois, 446 U.S. 222, 227-28 (1980). See supra note 50 and accompanying text. Justice Marshall believed that uncounseled convictions were inherently unreliable and did not "become more reliable merely because the accused has been validly convicted of a subsequent offense." \textit{Baldasar}, 446 U.S. at 227-28.

Although the facts of Baldasar may differ from most DWI repeat offender cases, the Baldasar rationale applies to these cases. The idea that incarceration is too serious a penalty to impose on an uncounseled defendant transcends Baldasar's fact pattern. Uncounseled convictions are presumptively unreliable. This presumption has never been seriously questioned by either the Supreme Court or any of the courts surveyed. Unless the assumption underlying the Court's sixth amendment decisions is erroneous, courts which attempt to factually distinguish DWI repeat offender cases from Baldasar are misguided.

In order for Baldasar to apply, the only factual determination necessary is whether a defendant's prison sentence is enhanced by an uncounseled conviction. If it is, Baldasar prohibits it. The applicability of Baldasar does not depend upon the label the state affixes to the enhancement. "Minimum" and "maximum" prison term enhancements both result in increasing a defendant's prison term based on an inherently unreliable uncounseled conviction. In fact, using an uncounseled conviction to impose a mandatory minimum prison term might actually be more repugnant than using it to increase the maximum prison term. A judge has discretion in the latter circumstance while no discretion is allowed in the former.

Nor should the applicability of Baldasar depend upon the nomenclature of the enhanced sentence. Whether a sentence is changed from a "misdemeanor" to a "gross misdemeanor" or to a "felony" is unimportant, so long as the prison term is not increased.

In summary, when the underlying rationale of Baldasar is remembered, the factual distinctions fade in importance. It is not the type of offense or the possibility of incarceration that is important. Rather, the crucial factual determination required by Baldasar is whether an uncounseled conviction has been used to enhance a de-
fendant’s prison term. If it has, *Baldasar* applies to prohibit it.

### B. Status

The *Schindler* court reasoned that an uncounseled DWI conviction had the effect of putting a defendant on “notice” and validly served as a warning that future DWI violations would result in imprisonment.\(^{164}\) The Supreme Court used similar rationale in *Lewis v. United States*.\(^{165}\)

Relying heavily on the statutory language involved in *Lewis*, the Court concluded that a prior felony conviction, even an inherently unreliable one, could be used to classify individuals into the status of “convicted felon.”\(^{166}\) Once the defendant was so classified, the Court held that it was constitutional to enforce the civil disability (firearms prohibition) with criminal sanctions (including incarceration).\(^{167}\) Because the statute relied upon the mere *fact* of a conviction, not the *reliability* of a conviction, the Court concluded that a defendant could be incarcerated even though his or her class status was predicated on an inherently unreliable conviction.\(^{168}\) Because this rationale is questionable and inconsistent with previous sixth amendment law, it should be scrutinized when applied in cases including repeat DWI offenders.

*Lewis* is distinguishable from *Baldasar*. *Lewis* does not permit sentence enhancement based upon prior uncounseled convictions.\(^{169}\) Rather, *Lewis* merely permits *placement* into a civil status which is criminally punishable. Conversely, courts which allow the collateral use of prior uncounseled convictions directly *enhance* sentencing of repeat DWI offenders. Attempting to apply the *Lewis* holding, those courts maintain that a DWI offender, once convicted, is placed into the status of convicted DWI offender.\(^{170}\) Once placed in that status, the convicted DWI offender is subject to mandatory incarceration for subsequent offenses. Although this approach is clever, it undermines sixth amendment precedent through *Baldasar*.

Using the *Lewis* “status” rationale, courts find that legislatures may use a conviction, “even an allegedly invalid one,”\(^{171}\) to classify a

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167. Id. at 67. See supra notes 94-100 and accompanying text.


169. See supra notes 94-100 and accompanying text.


defendant as a convicted offender. However, it is unreasonable to assume that legislatures intend to impose mandatory minimum prison sentences for repeat DWI offenses predicated upon constitutionally invalid and inherently unreliable DWI convictions.

In fact, because of the assumed inherent lack of reliability of uncounseled convictions to enhance sentencing, it would be unconstitutional for statutes to be enacted which explicitly allowed their use. Because legislatures are constitutionally prohibited from enacting statutes which would explicitly allow the use of uncounseled convictions to enhance sentencing, courts should not interpret statutes to implicitly allow their use. Apparently, the courts using the Lewis rationale are persuaded that legislatures may constitutionally enact statutes which deny a defendant's right to counsel. This is inconsistent with sixth amendment precedent from Powell through Baldasar.

In addition, superimposing the Lewis rationale onto DWI repeat offender cases is somewhat misguided. The Lewis Court gave great deference to Congress and its goals in enacting the firearms disability act. The Court held that a firearms disability, as opposed to enhanced criminal sentencing, could be predicated upon an uncounseled felony conviction. The Court further recognized that the statute allowed a defendant to challenge his conviction and remove the disability. Finally, the Court recognized that a legislature may prohibit convicted felons from engaging in activities far more fundamental to personal freedom than possession of firearms. Obviously, there are important public safety reasons for ridding the highways of drunken drivers. However, the analogy between a federal statute, which prohibits convicted felons from possessing firearms and committing assassinations, and state DWI statutes, is stretched. As the court in State v. Orr found, DWI statutes, unlike the federal statute involved in Lewis, do not permit a DWI offender to expunge or limit the effect of his uncounseled DWI conviction. Nor will an indigent likely challenge such a conviction until charged with a subsequent offense. Presumably, an indigent will plead guilty to a first offense

172. See, e.g., Schindler, 715 F.2d at 341. See, e.g., supra text accompanying note 86.
173. See supra note 98.
175. See supra note 100.
176. Id. at 66. See supra note 100.
because the penalty is small compared to the cost of retaining counsel. Thereafter, motivation for challenging the conviction dissipates.

Finally, while legislatures may prohibit convicted felons from engaging in activities far more fundamental than possession of firearms, it may not prohibit indigents from exercising their constitutional rights. However, courts which permit mandatory minimum prison sentences, predicated upon prior uncounseled DWI convictions, allow legislatures to do what they could not otherwise constitutionally accomplish. As the court in Sargent v. Commonwealth declared, Baldasar prohibits a legislature from “doing indirectly what it could not accomplish directly.”\textsuperscript{178} Baldasar is not concerned with exactly how a prison term is enhanced by a prior uncounseled conviction. Rather, Baldasar is concerned with when a prison term is enhanced, either directly or indirectly, by a prior uncounseled conviction. Baldasar prohibits such enhancement, whether accomplished indirectly by placing the indigent into a “status” or through a more direct approach.

C. Public Policy Arguments

Both the Novak and Schindler courts weighed the desirability of repeat DWI offender statutes with the costs of appointing counsel to ensure the reliability of first offense convictions.\textsuperscript{179} The Novak court observed that applying the Baldasar rule would require that all indigent defendants accused of a first DWI offense be appointed counsel. It found this requirement too costly and held that the increased costs of such a requirement would far outweigh any possible benefits.\textsuperscript{180}

The Schindler court was similarly fearful of the economic effects of applying Baldasar under these circumstances.\textsuperscript{181} It feared that requiring a court appointed counsel for indigents charged with a first DWI offense would “impose severe burdens on the State . . . [which] would prove burdensome, exorbitantly expensive, and in many cases completely unnecessary.”\textsuperscript{182}

Although these are valid concerns, constitutional rights cannot be dependent upon a theory that it is more economical to deny them than to afford them.\textsuperscript{183} Economic considerations realize diminished relevance when constitutional guarantees are involved.\textsuperscript{184} Because an

\textsuperscript{179} See supra text accompanying note 139.
\textsuperscript{180} Novak, 107 Wis. 2d at 42, 318 N.W.2d at 370 (1982). See supra text accompanying note 74.
\textsuperscript{181} Schindler, 715 F.2d at 347.
\textsuperscript{182} Id.
\textsuperscript{183} Watson v. City of Memphis, 373 U.S. 526, 537 (1963). See also supra text accompanying note 129.
\textsuperscript{184} Scott v. Illinois, 440 U.S. 367, 384-88 (Brennan, J., dissenting).
indigent defendant “cannot be assured a fair trial unless counsel is provided,” a state deprives the defendant’s liberty without due process when it denies counsel due to economic considerations.

Although it could be argued that the constitution forbids deprivation of any liberty interest without due process, Argersinger v. Hamlin and Scott v. Illinois drew the line at incarceration. Appointing indigents counsel in first offense DWI trials may be costly, but it is required if the state imposes mandatory minimum prison sentences for subsequent offenses. As the State v. Orr court declared, the constitution “must prevail.” The Orr court noted that not all DWI defendants are indigent, and not all DWI violations recur. The economic burden of requiring court-appointed counsel might not be as severe as the Schindler court suggested.

Finally, there was concern in both the Novak and Schindler decisions that the costs of providing court-appointed counsel would far outweigh any possible “benefits.” The Schindler court stated that in many cases such appointment would be completely unnecessary. While this may be true, it is difficult to verify. The Supreme Court assumes that uncounseled convictions are inherently unreliable. Therefore, the benefit derived from court-appointed counsel is the knowledge that justice in an American court is not dependent upon a defendant’s ability to afford counsel. Although in some cases appointment of counsel may actually make no difference to the outcome of a trial and, in reality, be completely unnecessary, the sixth and fourteenth amendments, and related case law, deem it completely necessary.

CONCLUSION

Federal and state courts are divided as to whether uncounseled DWI convictions may be used to impose mandatory minimum prison sentences on repeat DWI offenders. The Supreme Court’s decision in Scott interprets Argersinger as establishing the line for appointment

187. Orr, 375 N.W.2d at 179. See supra text accompanying note 128.
188. Id.
189. See, Novak, 107 Wis. 2d at 42, 318 N.W.2d at 370; Schindler, 715 F.2d at 347. See supra text accompanying notes 74 and 85.
190. Schindler, 715 F.2d at 347. See supra text accompanying note 85.
of counsel at actual incarceration. However, neither Scott nor Argersinger answered the question whether a constitutionally valid uncounseled DWI conviction, not resulting in incarceration, could be used for collateral purposes. Baldasar held that such a conviction may not be used to enhance prison terms for subsequent convictions.

However, because the justices in Baldasar were unable to agree upon a rationale for their decision, the courts apply Baldasar in DWI repeat offender cases with differing results. Some courts narrow the application of Baldasar by permitting the use of prior uncounseled convictions to impose mandatory minimum prison terms in repeat DWI offender cases. Using factual distinctions, "status" rationale, and public policy arguments, these courts hold Baldasar inapplicable in repeat DWI offender cases.

Other courts interpret Baldasar broadly to disallow the use of uncounseled convictions for imposing mandatory minimum prison terms in repeat DWI offender cases. These courts hold that the essential Baldasar inquiry is whether incarceration is based solely upon an uncounseled conviction. If it is, they apply Baldasar to prohibit the incarceration. These courts reject the "status" rationale and public policy arguments and hold that Baldasar is applicable in repeat DWI offender cases.

Because the rationale used by courts that interpret Baldasar narrowly do not pass muster in light of the Supreme Court's sixth amendment decisions, that rationale should be rejected. When the underlying rationale of Baldasar is remembered, that uncounseled convictions are inherently unreliable and should not be used to enhance prison terms for subsequent offenses, factual distinctions fade in importance. Also unconvincing are the attempts to superimpose the "status" rationale of Lewis onto DWI repeat offender cases. Finally, although the appointment of counsel in DWI cases may impose an economic burden on the states, the sixth and fourteenth amendments, and related case law, require it. Accordingly, uncounseled convictions should not be used to impose mandatory prison sentences on repeat DWI offenders.

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