The Burger Court Opinion Writing Database

Baldasar v. Illinois

446 U.S. 222 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 7, 1979

Re: 77-6219 - Baldasar v. Illinois

MEMORANDUM TO THE CONFERENCE:

Record my vote to affirm in this case.

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

RE: No. 77-6219 - Baldasar v. Illinois

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1980

Re: 77-6219 - Baldasar v. Illinois

Dear Lewis:

Your February 14 memo correctly describes the situation. I assume Bill Brennan will now proceed.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 20, 1980

Re: 77-6219 - Baldasar v. Illinois

Dear Lewis:

Please join my name to your dissent.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 10, 1979

RE: No. 77-6219 Baldasar v. Illinois

Dear Thurgood:

Potter, John, you and I are in dissent in the above. Would you care to undertake the dissent?

Sincerely,

Bill

Mr. Justice Marshall

cc: Mr. Justice Stewart
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 18, 1980

RE: No. 77-6219 Baldasar v. Illinois

Dear John:

Please join me.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 21, 1980

RE: No. 77-6219 Baldasar v. Illinois

Dear Potter:

Since John has withdrawn his separate opinion in the above, please also join me in your concurring opinion, joining the opinion and judgment of the Court. I support John's suggestion regarding the paragraph from the Illinois brief in Scott. If you adopt that suggestion, I would appreciate your adding a sentence following the citation to Scott reading, "Mr. Justice Brennan adheres to his dissent in Scott v. Illinois, 440 U.S. 367, 375."

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 8, 1980

RE: No. 77-6219 Baldasar v. Illinois

Dear Thurgood:

Please join me.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Join the Dissent

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 8 JAN 1980

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE STEWART, dissenting.

In *Scott* v. *Illinois*, 440 U. S. 367, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution . . . require 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." *Id.*, at 373–374.

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term in prison *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott* v. *Illinois*, *supra*, and I, therefore, respectfully dissent from the opinion and judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 19, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 77-6219, Baldasar v. Illinois

This proposed per curiam is circulated in the realization that there appears no possibility whatever of achieving a Court opinion in this case.

As you will note, I have simply lifted the first part of the Lewis Powell's previous circulation.

P.S.

P.S.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 19 FEB 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[February —, 1980]

PER CURIAM.

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), the Court held that an uncounselled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year in prison and a fine of not more than $1,000. Ill. Rev. Stat., 1975, ch. 38, § 16–1 (e)(1); *Id.,* §§ 1005–8–3 (a)(1), 1005–9–1 (a)(2). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. *Id.,* § 1005–8–1 (b)(5).

Thomas Baldasar, the petitioner, was convicted of misdemeanor theft in Cook County Circuit Court in May 1975. The record of that proceeding indicates that he was not represented by a lawyer and did not formally waive any right to counsel. Baldasar was fined $159 and sentenced to one year of probation. In November 1975 the State charged him with stealing a shower head worth $29 from a department store. The case was tried to a jury in DuPage County Circuit Court in August 1976. The prosecution introduced evidence of the prior conviction and asked that Baldasar be punished as a felon under the Illinois enhancement statute. Defense coun-

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 19 FEB 1980

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE STEWART, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution . . . require 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." *Id.*, at 373–374.

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term in prison *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott* v. *Illinois, supra,* and I, therefore, join the opinion and judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 21, 1980

Re: 77-6219 - Baldasar v. Illinois

Dear Bill and John:

Enclosed to each of you is a copy of the changes I have made in this concurring opinion in conformity with my understanding of your letters. Unless I hear from either of you to the contrary, I shall send these changes to the print shop tomorrow morning.

Sincerely yours,

P.S.

Mr. Justice Brennan

Mr. Justice Stevens

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart
22 FEB 1980

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[February —, 1980]

PER CURIAM.

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), the Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year in prison and a fine of not more than $1,000. Ill. Rev. Stat.. 1975, ch. 38, § 16–1 (e)(1); *Id.,* §§ 1005–8–3 (a)(1), 1005–9–1 (a)(2). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. *Id.,* § 1005–8–1 (b)(5).

Thomas Baldasar, the petitioner, was convicted of misdemeanor theft in Cook County Circuit Court in May 1975. The record of that proceeding indicates that he was not represented by a lawyer and did not formally waive any right to counsel. Baldasar was fined $159 and sentenced to one year of probation. In November 1975 the State charged him with stealing a shower head worth $29 from a department store. The case was tried to a jury in DuPage County Circuit Court in August 1976. The prosecution introduced evidence of the prior conviction and asked that Baldasar be punished as a felon under the Illinois enhancement statute. Defense coun-

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

22 FEB 1980

Circulated:

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution . . . require 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." *Id.*, at 373–374.

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term in prison *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott* v. *Illinois, supra,* and I, therefore, join the opinion and judgment of the Court.*

*It is noteworthy that the brief filed by the State of Illinois in *Scott* expressly anticipated the result in this case:

"When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from enhancing subsequent offenses.* To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion."

Brief for Respondent in *Scott* v. *Illinois*, O. T. 1977, No. 77-1177, p. 20 (emphasis added).

MR. JUSTICE BRENNAN adheres to his dissent in *Scott* v. *Illinois*, 440 U. S. 367, 375.

p. 1

From: Mr. Justice Stewart

Circulated:

Recirculated: 18 APR 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[February —, 1980]

PER CURIAM.

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), the Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year of imprisonment and a fine of not more than $1,000. Ill. Rev. Stat., 1975, ch. 38, § 16–1 (e)(1); *Id.,* §§ 1005–8–3 (a)(1), 1005–9–1 (a)(2). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. *Id.,* § 1005–8–1 (b)(5).

Thomas Baldasar, the petitioner, was convicted of misdemeanor theft in Cook County Circuit Court in May 1975. The record of that proceeding indicates that he was not represented by a lawyer and did not formally waive any right to counsel. Baldasar was fined $159 and sentenced to one year of probation. In November 1975 the State charged him with stealing a shower head worth $29 from a department store. The case was tried to a jury in DuPage County Circuit Court in August 1976. The prosecution introduced evidence of the prior conviction and asked that Baldasar be punished as a felon under the Illinois enhancement statute. Defense coun-

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution . . . require 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." *Id.*, at 373–374.

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott* v. *Illinois*, *supra*, and I, therefore, join the opinion and judgment of the Court.*

*It is noteworthy that the brief filed by the State of Illinois in *Scott* expressly anticipated the result in this case:

"When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from enhancing subsequent offenses*. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion."

Brief for Respondent in *Scott* v. *Illinois*, O. T. 1977, No. 77-1177, p. 20 (emphasis added).

MR. JUSTICE BRENNAN adheres to his dissent in *Scott* v. *Illinois*, 440 U. S. 367, 375.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 6, 1980

MEMORANDUM TO THE CONFERENCE

Re: Case held for 77-6219, Baldasar v. Illinois

In Williams v. North Carolina, No. 77-6595, a case held for Baldasar, the petitioner, represented by counsel, was convicted by a jury in the Superior Court for Durham County, North Carolina of his third offense of driving under the influence of intoxicating liquor, and sentenced to a year of imprisonment. The punishments authorized for driving under the influence of intoxicating liquor include a maximum term of imprisonment of six months for the first and second offense, and of two years for the third offense. The petitioner was not imprisoned for either of his first two offenses. At trial and on appeal in the present case, the petitioner argued that since the records of his first two convictions indicated that he had not been represented by counsel and had not waived his right to counsel, the prosecution was not permitted under the Sixth and Fourteenth Amendments to rely on the prior convictions for purposes either of enhancement or impeachment. The Superior Court rejected this argument, and the North Carolina Court of Appeals affirmed.

The petitioner here renews his argument that the use of the prior uncounseled convictions for either enhancement or impeachment violates the Sixth and Fourteenth Amendments. With regard to the issue of enhancement, this case is for me indistinguishable from Baldasar, for here, as in Baldasar, the petitioner "was sentenced to an increased term in prison only because he had been convicted in ... previous prosecution[s] in which he had not had the assistance of appointed counsel in his defense."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 7, 1980

Re: 77-6219 - Baldasar v. Illinois

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 13, 1980

Re: No. 77-6219 - Baldasar v. Illinois

Dear Lewis,

Please join me in your dissent in this case.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 11, 1979

Re: No. 77-6219 - Baldasar v. Illinois

Dear Bill:

I will be happy to undertake the dissent in this case.

Sincerely,

TM.

Mr. Justice Brennan

cc: Mr. Justice Stewart
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 10, 1980

Re: No. 77-6219 - Baldasar v. Illinois

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

2,3,4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

HAB

From: Mr. Justice Marshall
7 APR 1980

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[April —, 1980]

MR. JUSTICE MARSHALL, concurring.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Gideon* v. *Wainwright* held that the appointment of counsel for an indigent criminal defendant is "fundamental and essential to a fair trial," 372 U. S. 335, 342 (1963). Therefore, the guarantee of counsel was made applicable to the States through the Fourteenth Amendment. *Gideon*, of course, involved a felony prosecution, but nothing in the opinion suggests that its reasoning was not, like the words of the Sixth Amendment itself, applicable to "all criminal prosecutions." In *Argersinger* v. *Hamlin* we rejected the suggestion that the right to counsel applied only to nonpetty offenses where the accused had a right to a jury trial, and held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." 407 U. S. 25, 37 (1972).

Seven years later, in *Scott* v. *Illinois*, 440 U. S. 367 (1979), we considered a question expressly reserved in *Argersinger*, whether counsel must be provided if imprisonment was an authorized punishment but had not actually been imposed. See *Argersinger* v. *Hamlin*, *supra*, at 37. The Court "conclude[d] . . . that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings" and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott* v. *Illinois*, *supra*, at 373. For the reasons stated

PP. 2, 3, 4

8 APR 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, v. State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[April —, 1980]

MR. JUSTICE MARSHALL, concurring.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Gideon* v. *Wainwright* held that the appointment of counsel for an indigent criminal defendant is "fundamental and essential to a fair trial," 372 U. S. 335, 342 (1963). Therefore, the guarantee of counsel was made applicable to the States through the Fourteenth Amendment. *Gideon*, of course, involved a felony prosecution, but nothing in the opinion suggests that its reasoning was not, like the words of the Sixth Amendment itself, applicable to "all criminal prosecutions." In *Argersinger* v. *Hamlin* we rejected the suggestion that the right to counsel applied only to nonpetty offenses where the accused had a right to a jury trial, and held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." 407 U. S. 25, 37 (1972).

Seven years later, in *Scott* v. *Illinois*, 440 U. S. 367 (1979), we considered a question expressly reserved in *Argersinger*, whether counsel must be provided if imprisonment was an authorized punishment but had not actually been imposed. See *Argersinger* v. *Hamlin*, *supra*, at 37. The Court "conclude[d] . . . that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings" and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott* v. *Illinois*, *supra*, at 373. For the reasons stated

11 APR 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[April —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Gideon* v. *Wainwright* held that the appointment of counsel for an indigent criminal defendant is "fundamental and essential to a fair trial," 372 U. S. 335, 342 (1963). Therefore, the guarantee of counsel was made applicable to the States through the Fourteenth Amendment. *Gideon,* of course, involved a felony prosecution, but nothing in the opinion suggests that its reasoning was not, like the words of the Sixth Amendment itself, applicable to "all criminal prosecutions." In *Argersinger* v. *Hamlin* we rejected the suggestion that the right to counsel applied only to nonpetty offenses where the accused had a right to a jury trial, and held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." 407 U. S. 25, 37 (1972).

Seven years later, in *Scott* v. *Illinois,* 440 U. S. 367 (1979), we considered a question expressly reserved in *Argersinger,* whether counsel must be provided if imprisonment was an authorized punishment but had not actually been imposed. See *Argersinger* v. *Hamlin, supra,* at 37. The Court "conclude[d] . . . that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings" and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott* v. *Illinois, supra,* at 373. For the reasons stated

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JAN 4 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, v. State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE BLACKMUN, concurring in the result.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), I stated in dissent:

> "Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).
>
> "This resolution, I feel, would provide the 'bright line' that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan*, *Baldwin*, and *Argersinger*." 440 U. S., at 389-390.

I still am of the view that this "bright line" approach would best preserve constitutional values and do so with a measure of clarity for all concerned.

Had the Court in *Scott* v. *Illinois* adopted that approach, the present litigation, in all probability, would not have reached us. The Court chose to go the other way in *Scott*, and I must accept that decision as the law despite the presence of what appears to me to be an element of tension between the validity of petitioner's uncounseled prior mis-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 6, 1980

Re: No. 77-6219 - Baldasar v. Illinois

Dear Chief:

Now that all the votes are in, it appears that there is no Court in this case for the proposed per curiam opinion. My comments, concurring in what I mistakenly assumed would be an affirmance, were prepared in advance of the circulation of the per curiam and, in fact, were sent out on the same day (January 4).

It will be recalled that I dissented in Scott v. Illinois, 440 U.S., at 389. Under these developed circumstances, with no Court for the per curiam's proposed disposition, I feel no obligation to regard Scott v. Illinois as a binding precedent for Baldasar. Potter reaches the same conclusion on the merits, for he was in the majority in Scott and dissents here. I therefore must now cast my vote to reverse in Baldasar, for its facts do not fit my "bright line approach" set forth in my dissent in Scott and repeated in my proposed concurrence in Baldasar.

I give you this information with the regret we all feel when a supposed disposition of a case goes astray. Whether the per curiam is revised or reassigned, I personally shall adhere to my bright line approach, for I feel that it would solve much of the difficulty in this area that has arisen since Duncan, Baldwin, and Argersinger, and would provide a standard that all can understand and observe.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 25, 1980

Re: No. 77-6219 - Baldasar v. Illinois

Dear Potter:

Please join me in the per curiam you circulated on 22 February. I, of course, am recasting my separate concurrence and am sending it to the printer.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

2nd DRAFT Recirculated: FEB 26 1980

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[March —, 1980]

MR. JUSTICE BLACKMUN, concurring.

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), I stated in dissent:

> "Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a non-petty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Baldwin* v. *New York,* 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).
>
> "This resolution, I feel, would provide the 'bright line' that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan, Baldwin,* and *Argersinger.*" 440 U. S., at 389–390.

I still am of the view that this "bright line" approach would best preserve constitutional values and do so with a measure of clarity for all concerned. Had the Court in *Scott* v. *Illinois* adopted that approach, the present litigation, in all probability, would not have reached us. Petitioner Baldasar was prosecuted for an offense punishable by more than six months' imprisonment, and, under my test, was entitled to counsel at the prior misdemeanor proceeding. Since he was

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1-4-80

From: Mr. Justice Powell

Circulated: JAN 4 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

PER CURIAM.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), the Court held that an uncounselled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

I

Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year in prison and a fine of not more than $1,000. Ill. Rev. Stat., 1975, ch. 38, § 16-1 (e)(1); *Id.*, §§ 1005-8-3 (a)(1), 1005-9-1 (a)(2). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. *Id.*, § 1005-8-1 (b)(5).

Thomas Baldasar, the petitioner, was convicted of misdemeanor theft in Cook County Circuit Court in May 1975. The record of that proceeding indicates that he was not represented by a lawyer and did not formally waive any right to counsel. Baldasar was fined $159 and sentenced to one year of probation. In November 1975 the State charged him with stealing a shower head worth $29 from a department store. The case was tried to a jury in DuPage County Circuit Court in August 1976. The prosecution introduced evidence of the

1,34

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2-1-80

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT Recirculated: FEB 4 1980

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), the Court held that an uncounselled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 14, 1980

77-6219 Baldasar v. Illinois

Dear Chief:

As you assigned this case to me, I write to relinquish my responsibility. In view of Harry's letter to you of February 6, there are not five votes to affirm.

I assume, therefore, that Bill Brennan now will assign the case.

According to my notes, there never were five firm votes to affirm. I had understood (and therefore undertook to draft a Court opinion) that Harry would consider affirming - at least joining in the judgment - to make a Court.

I did understand, of course, that Harry was not committed.

I will convert my opinion into a dissent after a Court opinion has been circulated.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

No. 77-6219, Baldasar v. Illinois

3/12/80

Mr. Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAR 12 1980

Recirculated: _____

POWELL, J., dissenting:

This case centers on petitioner's second conviction for misdemeanor theft. Because petitioner did not have an attorney when he first was convicted for misdemeanor theft in 1976, the Court overturns the application in this case of an enhanced punishment provision for repeat offenders The Court does not suggest that the first conviction was unconstitutional, but holds that it may not be used to enhance sentence for a later misdemeanor.

This decision undercuts our ruling only last Term in Scott v. Illinois, 440 U.S. 367 (1979), that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed. In so doing, the Court offers no coherent rationale for its position. Instead, the Court plunges this murky area of the law into even deeper darkness. I dissent both because the courts of our nation are entitled, at a minimum, to a clear rule on this important question, and because I believe Scott dictates a contrary result.

I

Scott held that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." 440 U.S., at 373. Petitioner Baldasar concedes the validity under Scott of his

124

Chief Justice
Brennan
Stewart
White
Marshall
Blackmun
Rehnquist
Justice Stevens

3-14-80

Printed

From: Mr. Justice Powell

Circulated: MAR 17 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[March —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

This case centers on petitioner's second conviction for misdemeanor theft. Because petitioner did not have an attorney when he first was convicted for misdemeanor theft in 1976, the Court overturns the application in this case of an enhanced punishment provision for repeat offenders. The Court does not suggest that the first conviction was unconstitutional, but holds that it may not be used to enhance sentence for a later misdemeanor.

This decision undercuts our ruling only last Term in *Scott* v. *Illinois,* 440 U. S. 367 (1979), that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed. In so doing, the Court offers no coherent rationale for its position. Instead, the Court plunges this murky area of the law into even deeper darkness. I dissent both because the courts of our Nation are entitled, at a minimum, to a clear rule on this important question, and because I believe *Scott* dictates a contrary result.

I

Scott held that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." 440 U. S., at 373. Petitioner Baldasar concedes the validity under *Scott* of his uncounseled theft conviction in 1976. He argues, nevertheless, that the enhanced sentence imposed for the second offense included an element of imprisonment for the first conviction. Consequently, he continues, the enhance-

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

3,4

From: Mr. Justice Powell

4-8-80

Circulated: APR 8 1980

2nd DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[March —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join, dissenting.

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This decision undercuts our ruling only last Term in *Scott* v. *Illinois,* 440 U. S. 367 (1979), that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed. In so doing, the Court offers no coherent rationale for its position. Instead, the Court plunges this murky area of the law into even deeper darkness. I dissent both because the courts of our Nation are entitled, at a minimum, to a clear rule on this important question, and because I believe *Scott* dictates a contrary result.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1-6

From: Mr. Justice Powell

4-11-80

Circulated: _____

3rd DRAFT

Recirculated: APR 11 1980

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, v. State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[March —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join, dissenting.

Last Term in *Scott* v. *Illinois,* 440 U. S. 367 (1979), we rejected the claim that *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), requires the appointment of counsel for an indigent charged with a misdemeanor punishable by imprisonment, regardless of whether the defendant actually is sentenced to jail. We held explicitly that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed.

In 1975, the petitioner in this case was tried without the appointment of counsel and convicted of a misdemeanor theft. Although the statute authorized imprisonment, petitioner only was fined. The circumstances of that conviction, therefore, were precisely like those of the petitioner in *Scott* v. *Illinois,* and the conviction was constitutionally valid.

The question presented today is different from that decided in *Scott.* This case concerns the enhanced sentence imposed on petitioner Baldasar for a subsequent conviction for misdemeanor theft. Petitioner, who was represented by counsel at the second trial, concedes that he could have been sentenced to one year in jail for the second offense. He challenges only the addition of two years to his sentence, an enhancement that was based on his record as a recidivist. The Court holds that, even though the first conviction was valid, the State cannot rely upon it for enhancement purposes following a subsequent valid conviction. This holding undermines the ra-

Chief Justice
Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: APR 16 1980

4-16-80

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[March —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join, dissenting.

Last Term in *Scott* v. *Illinois,* 440 U. S. 367 (1979), we rejected the claim that *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), requires the appointment of counsel for an indigent charged with a misdemeanor punishable by imprisonment, regardless of whether the defendant actually is sentenced to jail. We held explicitly that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 7, 1980

Re: No. 77-6219 - Baldasar v. Illinois

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 13, 1980

Re: No. 77-6219 - Baldasar v. Illinois

Dear Lewis:

Please join me in your dissent.

Sincerely,

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

JAN 17 '80

Circulated: _____

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-6219

Thomas Baldasar, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois for the Second District.

[January —, 1980]

MR. JUSTICE STEVENS, dissenting.

As MR. JUSTICE STEWART has succinctly explained, the Court's holding in *Scott* v. *Illinois*, 440 U. S. 367, does not require affirmance in this case.[1] But my disagreement with the Court is more fundamental. I have no doubt that the

[1] It is noteworthy that the brief filed by the State of Illinois in *Scott* expressly recognized that a different result would be appropriate in this case:

"When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from enhancing subsequent offenses*. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion."

Brief for Respondent in *Scott* v. *Illinois*, O. T. 1977, No. 77-1177, p. 20 (emphasis added).

If either the risk of error or considerations of fairness preclude imprisonment immediately after a defendant has been tried and convicted without the benefit of counsel, it is equally improper for that conviction to provide the basis for imprisonment at a subsequent point in time. If there were any merit to the Court's suggestion that an uncounseled misdemeanor conviction can be accepted as reliable even though an uncounseled felony conviction is not, see *ante*, at 4, *Argersinger* v. *Hamlin*, 407 U. S. 25, should have been decided the other way. In fact, the importance of counsel is a function of the complexity of the issues, the character of the testimony, and the defendant's unfamiliarity with rules of procedure and rules of evidence—matters that generally bear no relation to the severity of the charge, and which are surely unaffected by the labels "felony" and "misdemeanor."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1980

Re: 77-6219 - Baldasar v. Illinois

Dear Potter:

Please join me in your circulation. After reviewing the first writings, I have decided to withdraw my separate opinion. Bill Brennan, who had previously joined me, agrees with this withdrawal.

I would like to suggest that you consider including in your circulation the paragraph from the Illinois brief in Scott which I had quoted in footnote 1 to my dissent.

Respectfully,

John

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 8, 1980

Re: 77-6219 - Baldasar v. Illinois

Dear Thurgood:

Please join me in your concurring opinion.

Respectfully,

Mr. Justice Marshall

Copies to the Conference