DEFENDANT'S RIGHT TO PROTECTION FROM PRIOR UNCOUNSELED CONVICTIONS

One objective of the criminal justice system is to attain an accurate determination of guilt or innocence. In pursuit of this objective, the Supreme Court in *Gideon v. Wainwright*[1] recognized that a defendant in a state felony trial has an unqualified right to counsel. Recently the Court held in *Argersinger v. Hamlin*[2] that this right extends to all defendants who face incarceration if convicted. This note will discuss certain rules fashioned by the Supreme Court subsequent to *Gideon* and designed to protect a defendant from the prejudicial use of his earlier uncounseled convictions.[3]

1. 372 U.S. 335 (1963). *Gideon* overruled Betts v. Brady, 316 U.S. 455 (1942), which held that a refusal to appoint counsel for an indigent defendant charged with a felony did not violate due process unless the crime charged was a capital offense or "special circumstances" were involved. Prior to *Gideon*, felony convictions were overturned in several cases because of "special circumstances." *See* Carnley v. Cochran, 369 U.S. 506 (1962) (illiteracy); Chewning v. Cunningham, 368 U.S. 443 (1962) (habitual criminal); McNeal v. Culver, 365 U.S. 109 (1961) (complexity of statute and nature of the offense charged); Hudson v. North Carolina, 363 U.S. 697 (1960) (youth); Moore v. Michigan, 355 U.S. 155 (1957) (youth, race, and minimal education); State *ex rel.* Herman v. Cloudy, 350 U.S. 116 (1956) (limited educational background); Massey v. Moore, 348 U.S. 105 (1954) (mental retardation); Palmer v. Ashe, 342 U.S. 134 (1951) (mentally abnormal); Uveges v. Pennsylvania, 335 U.S. 437 (1948) (youth); Townsend v. Burke, 334 U.S. 736 (1948) (misconduct by court officials); Wade v. Mayo, 334 U.S. 672 (1948) (extent of defendant's prior experience with criminal proceedings); Gayes v. New York, 332 U.S. 145 (1947) (youth); DeMeerler v. Michigan, 329 U.S. 663 (1947) (youth); Rice v. Olson, 324 U.S. 786 (1945) (complex legal questions).

For a comprehensive survey of state interpretation of the right to counsel provided by *Gideon, see* Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

2. In *Argersinger*, 407 U.S. 25, 37 (1972), the Supreme 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 trial judge must determine before trial if he will impose a jail term on the defendant if he is found guilty of the offense charged.

3. It is possible that some pre-*Gideon* uncounseled convictions are not infirm. For instance, Wisconsin provided counsel to felony defendants prior to *Gideon*, but a counseled defendant could waive his right to counsel. If the Wisconsin waiver standard passes muster under currently recognized constitutional standards, then those convictions, although obtained without counsel, would stand. Also included in the class would be all uncounseled convictions occurring after *Gideon* that can be collaterally attacked, such as those in which the defendant invalidly waived his right to counsel.

PROTECTION FROM UNCOUNSELED CONVICTIONS IN SUBSEQUENT PROCEEDINGS

The issue of whether convictions which are infirm under *Gideon* could be used in subsequent proceedings first came before the Supreme Court in *Burgett v. Texas*.[4] The judge had read a five-count indictment to the jury at the beginning of the trial.[5] The first count charged assault with intent to murder; the other counts, alleging four prior convictions, charged a violation of the Texas recidivist statutes. The prosecution offered two different records of one of the convictions—the first indicated that Burgett was not represented by counsel, but the second omitted any reference to counsel. The trial court admitted the second record into evidence, but subsequently instructed the jury not to consider it or the other convictions for any purpose. Noting the overwhelming effect a prior conviction has upon the minds of the jurors, the Supreme Court found that the admission of the prior uncounseled conviction was inherently prejudicial. The instructions to the jury to disregard the uncounseled conviction had not made the error of its admission "harmless beyond reasonable doubt."[6] The Court prohibited use of uncounseled convictions either to "support guilt" or "enhance punishment"[7] because such use of uncounseled convictions caused the defendant to "suffer anew" from the earlier denial of his right to counsel.

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4. 389 U.S. 109 (1967).

5. The Texas procedure of introducing evidence of past convictions to the jury by reading the indictment was first embodied in TEXAS CODE CRIM. PRO. ANN. art. 642 (1925), and modified by TEXAS CODE CRIM. PRO. ANN. art. 36.01 (1966):

> The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held. . . .

No other state follows the previous Texas procedure.

6. Since Chapman v. California, 386 U.S. 18 (1967), an error of constitutional magnitude may be regarded "harmless" if the court can determine that the error was "harmless beyond reasonable doubt." The court must conclude that the error did not contribute to the verdict obtained, *see* Coleman v. Alabama, 399 U.S. 1 (1970). In Harrington v. California, 395 U.S. 250 (1969), the Court found that the use of confessions by co-defendants who did not testify amounted to denial of petitioner's right of confrontation. However, the evidence supplied by the confessions was merely cumulative, and the other evidence was so overwhelming that the Court could conclude beyond reasonable doubt that denial of petitioner's right to confrontation was harmless error. *Accord*, Schneble v. Florida, 405 U.S. 427 (1972).

7. Burgett v. Texas, 389 U.S. 109, 115 (1967).

Burgett began a line of cases which extended the impact of the *Gideon* decision. While *Gideon* involved the custodial consequences of an uncounseled conviction,[8] *Burgett*, on the other hand, provides a form of post-custody relief to a defendant who faces possible recurring adverse consequences from a record of uncounseled convictions.[9] In this sense the relief is derived from a retroactive application of *Gideon*, but it is provided after release from custody for the uncounseled conviction. An important question that arises from *Burgett* is to what extent the Supreme Court meant to provide a rule against the use of a record of uncounseled convictions in subsequent criminal proceedings. This question has two aspects: first, what limitations exist on the use of uncounseled convictions in subsequent proceedings; secondly, if an uncounseled conviction is improperly used, may that use be harmless error. Cases after *Burgett* have dealt with these questions.

THE USE OF UNCOUNSELED CONVICTIONS TO ENHANCE PUNISHMENT

United States v. Tucker,[10] the first Supreme Court case after *Burgett* to deal with the use of a prior uncounseled conviction at a subsequent trial, specifically involved that branch of *Burgett* which prohibited the use of uncounseled convictions to enhance punishment. *Tucker* involved the use of uncounseled convictions by a sentencing judge. To understand the implications of this use it is necessary to review the task of the judge in sentencing proceedings.

The object of the sentencing judge is to arrive at a sentence that will "fit the offender, not merely the crime."[11] The judge is given broad discretion[12] and must consider many factors,[13] such as the defendant's

8. Gideon began his plea to the Supreme Court by filing a habeas corpus petition apparently prepared by himself. Gideon v. Wainwright, 372 U.S. 335, 337 n.1 (1963).

9. For a general discussion of post-custody relief, see Note, *The Development of Independent Jurisdictional Significance for Civil Disabilities: The Post-Custody Petition*, 1969 WASH. U.L.Q. 436. An interesting view, expressed by Judge Friendly, is that collateral attack of convictions at any time should be heard only when the attack casts some doubt on the guilt of the defendant. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

10. 404 U.S. 443 (1972).

11. Williams v. New York, 337 U.S. 241 (1949). *See generally* R. DAWSON, SENTENCING: DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 62, 385-87 (1969) [hereinafter cited as DAWSON]; S. RUBIN, THE LAW OF CRIMINAL CORRECTION 646 (1963) [hereinafter cited as RUBIN].

12. "[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which

potential for rehabilitation and the need to protect society from further crimes by the defendant, deterring others from similar crimes, and punishing the defendant for his wrong.[14] In analyzing these factors, judges give much weight to the defendant's prior criminal record.[15] Consequently, the information considered by the judge must be accurate and reliable in order to achieve the desired result of meting out a sentence which fits the offender.[16]

Since the Supreme Court condemned sentencing on an erroneous record in *Townsend v. Burke*,[17] a due process argument has existed

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it may come." United States v. Tucker, 404 U.S. 443, 446 (1972). *See* North Carolina v. Pearce, 395 U.S. 711, 723 (1969); Williams v. New York, 337 U.S. 241 (1949); United States v. Trigg, 392 F.2d 860, 864 (7th Cir. 1968); Davis v. United States, 376 F.2d 535, 538 (5th Cir. 1967); Cross v. United States, 354 F.2d 512, 514 (D.C. Cir. 1965); United States v. Doyle, 348 F.2d 715, 721 (2d Cir. 1965).

13. DAWSON, *supra* note 11, at 38, 81. Rule 32 of the Federal Rules of Criminal Procedure states that the presentence report shall include for consideration by the sentencing judge "any prior criminal record of the defendant . . . and such other information as may be required by the court." FED. R. CRIM. P. 32. The Model Penal Code provides a more specific description of the material considered during a presentence investigation. MODEL PENAL CODE § 7.07(3) states:

> The pre-sentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits and any other matters that the probation officer deems relevant or the Court directs to be included.

The Missouri Rules of Criminal Procedure provide that the presentence report must include defendant's prior criminal record and, when practical, a physical and mental examination. MO. SUP. CT. (CRIM.) R. 27.07(b). For a general discussion of presentence reports in Missouri, see Note, *Use of Pre-Sentence Investigation in Missouri*, 1964 WASH. U.L.Q. 396.

14. *See* RUBIN, *supra* note 11, at 646 *et seq.*

15. Except upon conviction of a serious crime, a defendant with no prior convictions is almost always given probation. *See* DAWSON, *supra* note 11, at 81:

> Attention is directed primarily at prior felony convictions. A defendant who has several misdemeanor convictions on his record or several arrests not followed by conviction is regarded as a first offender for these purposes.

16. Authorities have criticized existing legal standards concerning the trial judge's responsibility for assuring accuracy of presentence information as being absent or at best uncertain. Greater control could be accomplished, it is argued, if appellate courts would adopt a more active role in reviewing discretion employed in sentencing. Appellate courts have traditionally refused to review sentences that are within statutory limits. *See* DAWSON, *supra* note 11, at 62, 385-87; D'Esposito, *Sentencing Disparity: Causes and Cures*, 60 J. CRIM. L.C. & P.S. 182, 191 (1969).

17. 334 U.S. 736 (1948). In *Townsend*, the Court held that the absence of counsel during sentencing after a guilty plea, coupled with erroneous interpretation of defendant's prior criminal record, deprived the defendant of due process of law. Counsel would have been under a duty to prevent the court from proceeding on false assumptions.

that one cannot be sentenced on a criminal record which is "materially untrue."[18] The unreliability present in the record condemned in *Townsend* is similarly present when a sentencing judge relies on uncounseled convictions in determining sentence.[19] Although the Court in *Burgett* condemned the use of uncounseled convictions to impose a more severe sentence under a Texas recidivist statute, the Court did not determine whether the use of prior uncounseled convictions in determining sentence was prejudicial error in the absence of a recidivist statute. The Court in *Tucker*[20] reviewed a sentence that was not based on a recidivist statute nor in excess of statutory limits. The alleged irregularity was that prior to sentencing the trial judge had heard evidence of prior convictions. Thus, it was possible that the judge had considered the convictions in arriving at the sentence imposed on Tucker.

The majority of the Court concluded that resentencing was required on the basis of two constitutional principles. First, the Court returned to the statement of *Townsend* that a prisoner should not be sentenced on a record "materially untrue." Assuming that the sentencing judge considered the uncounseled convictions, the majority found the resulting sentence based "at least in part upon misinformation of constitutional magnitude."[21] Secondly, the majority noted that the *Burgett* decision held that the use of uncounseled convictions to "support guilt" or to "enhance punishment" was to "erode the principle of [*Gideon*]."[22]

18. Some authorities regard the absence of counsel essential to the holding in *Townsend*. Others maintain that *Townsend* establishes the right to be sentenced on the basis of accurate information, and that this right can only be enforced by provision for not only counsel but also disclosure of the facts relied upon in sentencing. *See generally* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 826 (1968).

19. United States v. Tucker, 404 U.S. 443, 447 (1972): "As in *Townsend v. Burke* . . . 'this prisoner was sentenced on the basis of assumptions concerning his criminal record [of prior uncounseled convictions] which were materially untrue.'"

20. Tucker was convicted of robbery in 1953. He testified on his own behalf during the trial and admitted three prior felony convictions on cross-examination. Tucker flatly stated that he had stolen a car and broken into a jewelry store at night—the activities which led to the challenged convictions. The court of appeals affirmed the determination of the district court that the admission of the uncounseled convictions for impeachment was harmless error, Tucker v. United States, 431 F.2d 1292 (9th Cir. 1970), but remanded for resentencing due to the reasonable probability that the uncounseled convictions led the sentencing judge to impose a more severe sentence than if the judge had not known about the convictions. The United States then petitioned for certiorari, seeking reversal of the decision of the court of appeals insofar as it remanded the case for resentencing.

21. United States v. Tucker, 404 U.S. 443, 447 (1972).

22. *Id.* at 449.

To prevent that erosion in *Tucker,* the Court remanded for resentencing.

The dissenting Justices argued that Tucker's admission of the underlying criminal activity would probably have led the sentencing judge to impose the maximum term provided by statute without giving any consideration to the invalid convictions.[23] However, the dissenting Justices did not dispute the general rule that resentencing is required when the judge relies on uncounseled convictions in determining sentence.[24]

The import of the *Tucker* decision lies in its applying the "principle of *Gideon*," as extended in *Burgett,* that the accused should not suffer from the unconstitutional denial of his right to counsel. *Tucker* prohibits a trial judge from considering previous uncounseled convictions when determining a defendant's sentence.[25] In this regard, the *Tucker*

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23. *Id.* at 452 (Blackmun, J., and Burger, C.J., dissenting).

24. Speculation by both the majority and dissent in *Tucker* concerning the facts relied upon by the sentencing judge demonstrates the need for disclosure of those facts relied upon. Prior to the adoption of the 1970 amendments to the Federal Rules of Criminal Procedure, Rule 32 provided that the judge may disclose any part or all of the facts contained in the presentence report.

Rule 32.2 of the Proposed Amendment to Federal Rules of Criminal Procedure requires full disclosure of the presentence report unless the court finds that the information would be harmful to the defendant or others. If harmful, the court would be required to summarize the facts relied on in sentencing. Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts,* 48 F.R.D. 547, 614 (1970). Statement of facts relied upon in sentencing is not a new idea. Opinions were required in California until 1970, when the legislature left the decision to file an opinion to the trial judge's discretion. However, a copy of the presentence report is still made part of the record of the case. CAL. PENAL CODE § 1203.01 (Deering Supp. 1971).

No state has a statute that flatly forbids disclosure of the presentence report, but most states have no statute concerning disclosure. This is usually interpreted as leaving the decision to the discretion of the court. For a fuller discussion of this topic, see Lehrich, *The Use and Disclosure of Presentence Reports in the United States,* 47 F.R.D. 225 (1969).

25. Lower courts have had no difficulty in giving effect to the *Tucker* decision, ordering resentencing for those prisoners who present satisfactory evidence of uncounseled convictions used to enhance punishment, and ordering evidentiary hearings for those unable to meet their burden of proof. *See* Davis v. Wainwright, 462 F.2d 1359 (5th Cir. 1972) (hearing granted to petitioner who claimed uncounseled convictions were considered in sentencing); Garrett v. Swenson, 459 F.2d 464 (8th Cir. 1972) (evidentiary hearing granted when petitioner claimed that one of three prior convictions considered by sentencing judge was uncounseled); United States *ex rel.* Miscanage v. Howard County District Court, 339 F. Supp. 292 (D.N.J. 1972) (resentencing ordered

prohibition extends to every sentencing situation, whereas *Burgett* might have reached only those situations dealing with sentencing under a recidivist statute.

THE USE OF UNCOUNSELED CONVICTIONS TO SUPPORT GUILT

The Court in *Burgett* also announced a prohibition against the use of an uncounseled conviction to "support guilt." Here, the question is whether the defendant committed the alleged offense, not what his punishment should be. Since the procedure by which the uncounseled conviction evidence was placed before the *Burgett* jury is no longer followed in any jurisdiction,[26] uncounseled convictions used to support guilt now appear before juries as impeachment evidence[27] either to attack the general credibility of the defendant as a witness or to impeach a specific statement made by the defendant from the witness stand.

In confronting the problem of whether the use of uncounseled convictions for impeachment purposes was reversible error, lower courts

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for petitioner sentenced as a fourth offender because prior record of conviction had the words "his counsel being present" stricken with asterisks).

26. *See* note 5 *supra.*

27. The use of prior criminal convictions as impeachment evidence is a conventional trial tactic. *See* 3A J. WIGMORE, EVIDENCE §§ 890-91 (Chadbourn rev. ed. 1970) [hereinafter cited as WIGMORE]. The tactic is often employed because of the natural and inevitable tendency of the judge or jury "to give excessive weight to the vicious record of crime thus exhibited." 1 WIGMORE § 194. Courts disagree as to what crimes may be used for impeachment. Proposed Federal Rule of Evidence 6-09 limits the use of convictions for purposes of attacking the credibility of the witness to crimes punishable by death or imprisonment in excess of one year, or involving dishonesty or a false statement regardless of punishment. Convictions of any type are inadmissible if more than ten years have passed since the date of release from prison or expiration of parole. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates,* 46 F.R.D. 161, 295 *et seq.* (1969). The states have treated convictions as impeachment evidence in diverse ways. For example, California limits convictions used for impeachment to felonies alone. CAL. EVID. CODE § 788 (Deering 1966); Maine permits felonies and misdemeanors involving "moral turpitude" to be used for impeachment, State v. Jenness, 143 Me. 380, 62 A.2d 867 (1948); and Oklahoma admits convictions of any crimes, Coslow v. State, 83 Okla. Crim. 378, 177 P.2d 518 (1947).

Commentators suggest that the best approach is to permit the use of any prior convictions for impeachment only if the defendant puts his character in issue by first introducing evidence to support his credibility. *See* 3A WIGMORE §§ 890-91. This is the position taken in the Uniform Rules of Evidence. *See* UNIFORM RULE OF EVIDENCE 21.

reached inconsistent results.[28] Some courts took the view that prior uncounseled convictions so taint the impeachment effort as to preclude any possibility of harmless error.[29] These decisions appear consistent with the statement in *Burgett* that the introduction of prior uncounseled convictions is "inherently prejudicial."[30] Other decisions evinced the rationale that evidence other than the convictions permitted a finding that the introduction of the convictions was harmless error.[31] Courts adopting this latter view interpreted the *Burgett* statement that such convictions are "inherently prejudicial" to mean that instructions to disregard the convictions were not enough to permit a finding of harmless error. Such instructions in the presence of other evidence, however,

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28. On the federal level, *compare* United States *ex rel.* Walker v. Follette, 443 F.2d 167 (2d Cir. 1971) (prior uncounseled convictions may be introduced to impeach a specific statement made by the defendant as a witness), *with* Subilosky v. Moore, 443 F.2d 334 (1st Cir. 1971) (use of prior uncounseled convictions to impeach general credibility of defendant is harmless error), *and* Howard v. Craven, 446 F.2d 586 (9th Cir. 1971) (use of prior uncounseled convictions to impeach credibility of defendant is prejudicial error).

On the state level, *compare* Spaulding v. State, 451 P.2d 389 (Alas. 1971) (prejudicial error), *with* Johnson v. State, 9 Md. App. 166, 263 A.2d 232 (1970) (harmless error).

29. *See* Howard v. Craven, 446 F.2d 586 (9th Cir. 1971). Two prior felony convictions were introduced to impeach the credibility of the defendant. One of the convictions was invalid by *Gideon.* The prosecutor asserted to the jury that because defendant had been twice convicted of felonies, his testimony under oath could be equated to "Grimm's Fairy Tales." The court found that such error could not be termed harmless, and distinguished the situation from that of Harris v. New York, 401 U.S. 222 (1971), and United States *ex rel.* Walker v. Follette, 311 F. Supp. 490 (S.D.N.Y. 1970), on the basis that both *Harris* and *Walker* involved rebuttal of a specific statement and *Harris* involved a violation of *Miranda.*

30. Burgett v. Texas, 389 U.S. 109, 115 (1967):

> The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error "harmless beyond reasonable doubt" within the meaning of *Chapman v. California* . . . .

31. Subilosky v. Moore, 443 F.2d 334 (1st Cir. 1971) (when defendant admitted on direct examination that he was a habitual criminal, the introduction of an uncounseled conviction to impeach his credibility was harmless error); Tucker v. United States, 431 F.2d 1292 (9th Cir. 1970), *rev'd on other grounds,* 404 U.S. 443 (1972) (defendant's admission of the underlying criminal activity which led to the uncounseled convictions made their introduction to impeach his credibility harmless error); Gilday v. Scafati, 428 F.2d 1027 (1st Cir. 1970) (uncounseled conviction as evidence was harmless error when three eyewitnesses identified defendant as perpetrator of the crime); Johnson v. State, 9 Md. App. 166, 263 A.2d 232 (1970) (uncounseled conviction used for impeachment of general credibility when uncounseled conviction was for a misdemeanor and was admitted with valid felony convictions).

may permit a finding of harmless error.[32] Finally, some courts held that *Burgett* did not reach guilt determinations, but rather was limited to sentence enhancement.[33]

Considering the uncertainty as to what extent, if any, *Burgett* was intended to reach the guilt determination question, the Supreme Court granted certiorari in a guilt determination case and established the rule to be followed. The case, *Loper v. Beto*,[34] involved the use of uncounseled convictions to impeach a defendant's general credibility as a witness.[35] At Loper's trial the prosecutor had introduced evidence of four prior convictions to impeach Loper. The issue of credibility was

32. The California Supreme Court presented this rationale in the case *In re* Dabney, 71 Cal. 2d 1, 452 P.2d 924, 76 Cal. Rptr. 636 (1969), but awarded Dabney a new trial on his claim that both his conviction and augmented penalty as a second narcotics offender were obtained by means of an uncounseled conviction. The court indicated that a prior conviction of the same offense for which the defendant is being tried is so prejudicial that it cannot be termed harmless error. The First Circuit Court of Appeals adopted similar logic on the harmless error rationale in Gilday v. Scafati, 428 F.2d 1027, 1029 (1st Cir. 1970).

33. *See* Simmons v. State, 456 S.W.2d 66 (Tex. Crim. App. 1970) (*Burgett* did not reach the situation in which uncounseled convictions were used to impeach credibility). It is not always clear whether the uncounseled conviction is supporting guilt or enhancing punishment. If, for example, the defendant is charged with possession of a firearm by a convicted felon and the prior conviction is uncounseled, that prior conviction may be both supporting guilt and enhancing punishment. Courts faced with this question have reversed the convictions for possession of firearms in such situations, citing but not analyzing *Burgett*. *See* United States v. Lufman, 457 F.2d 165 (7th Cir. 1972); United States v. DuShane, 435 F.2d 187 (2d Cir. 1970). *See also* Tucker v. Craven, 421 F.2d 139 (9th Cir. 1969); Oswald v. Crouse, 420 F.2d 373 (10th Cir. 1969); United States v. Martinez, 413 F.2d 61 (7th Cir. 1969); Beto v. Sacks, 408 F.2d 313 (5th Cir. 1969); Losieau v. Sigler, 406 F.2d 795 (8th Cir. 1969); Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968).

34. 405 U.S. 473 (1972). Four prior convictions were introduced at Loper's trial for rape to impeach his testimony. All four convictions were for burglary, three in Mississippi in the years 1931, 1932, and 1935, one in Tennessee in 1940. Loper testified that he could not afford an attorney at the 1931 and 1940 convictions. A record of the 1931 conviction made no reference to whether Loper had counsel. The 1940 conviction record stated that Loper appeared "in his own proper person." The record of the 1935 conviction stated that Loper appeared "in Person" and that the court heard "arguments of Counsel." No record or testimony was introduced with respect to the 1932 conviction. The plurality of the Court assumed that Loper's testimony and the records of the convictions presented established absence of the counsel. The dissenting Justices disputed whether petitioner, in seeking habeas corpus relief, had shown the absence of counsel. The district court, in denying relief of habeas corpus, placed "little or no credence" in Loper's oral testimony.

35. The *Loper* decision did not deal with the question of whether uncounseled prior convictions can be used to impeach a specific statement made by the defendant from the witness stand. *Id.* at 482 n.11.

critical, since the prosecution had only one eyewitness, the victim of Loper's alleged attack. Loper was convicted. Later, he sought habeas corpus relief, alleging that the use of the earlier convictions was reversible error since he had not been represented by counsel during the trials which led to the convictions. The district court's denial of relief was affirmed by the Fifth Circuit Court of Appeals.[36] The Supreme Court vacated the judgment and remanded the case to the court of appeals.

In reaching their decision, four Justices held the instant use of uncounseled convictions to be a denial of due process and prejudicial error.[37] Justice White concurred, but indicated two reservations.[38] First, he seemed dissatisfied with the evidence the petitioner presented as to the infirmity of his previous convictions.[39] This can only be taken as a warning to future defendants that they must present more convincing evidence. Secondly, Justice White indicated that the use of uncounseled convictions to impeach could be harmless error in some cases.[40] Four Justices dissented on other grounds.[41]

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36. Loper v. Beto, 440 F.2d 934 (5th Cir. 1971).

37. Mr. Justice Stewart, joined by Justices Douglas, Brennan and Marshall, delivered the majority opinion of the Court, 405 U.S. 473 (1972).

38. *Id.* at 485.

39. The Court divided on the issue of the burden of proof upon a petitioner who collaterally attacks a judgment by habeas corpus. The plurality of the Court assumed Loper's testimony regarding the absence of counsel and the records of the convictions established the fact that he was uncounseled at the proceedings which led to the convictions. Mr. Justice Rehnquist, joined by the other dissenting Justices, disputed this conclusion. Justice Rehnquist would limit the application of the rule established in Carnley v. Cochran, 369 U.S. 506 (1962), that there was a presumption against waiver of the right to counsel in the face of a silent record, to *Carnley*-type situations—refusals by state courts to vacate recent judgments of lower state courts. In habeas corpus proceedings dealing with the question of whether defendant was denied his right to counsel under *Gideon*, such as the *Loper* situation, Justice Rehnquist would apply a "presumption of regularity" to the challenged convictions on the basis of Johnson v. Zerbst, 304 U.S. 458, 468 (1937).

40. 405 U.S. at 485 (1972).

41. Chief Justice Burger felt that the Court should not extend the *Loper* rule to petitioner's conviction because it occurred prior to *Gideon*. While the Chief Justice expressed no difficulty with the application of *Gideon* to invalidate a conviction obtained without presence of counsel, he did not feel that *Gideon* retroactivity should be expressed to the extent that it was in *Loper*. *Id.* at 485-94.

Justice Blackmun would not have reversed on various practical grounds. *Id.* at 494-96.

Justice Rehnquist argued that the Court had improvidently granted certiorari in this case. He felt Loper had failed to sustain the burden of proof necessary to raise the issue before the Court. *Id.* at 497-503. *See* note 39 *supra.*

The breadth of the *Loper* holding is uncertain. It is possible that the rationale reaches no further than those situations in which the defendant's credibility is a critical matter and the impeachment evidence consists almost entirely of uncounseled convictions.[42] A broader reading would extend the rationale along two possible lines. First, *Loper* may extend to those cases in which more than one witness testifies against the defendant.[43] Secondly, the decision may reach cases in which the uncounseled convictions provide only a minimal contribution to the impeachment evidence.[44] In this regard, the impact of the uncounseled convictions could reach a point of de minimis significance.

It is impossible to determine from the *Loper* opinion whether the rule announced will extend along either of these lines. Several decisions which anticipated *Loper* from *Burgett* seemed to consider the critical character of the defendant's testimony and the presence of impeachment evidence other than the convictions in determining whether the error was harmless.[45] If *Loper* does not lay down a per se rule for all

42. In *Loper* there was only one eyewitness who could identify defendant as the perpetrator. Thus, since Loper took the stand to deny guilt, the jury had to make its decision on the basis of credibility. The prosecutor relied solely upon Loper's convictions for impeachment purposes. *Id.* at 474.

43. It would appear that as the number of eyewitnesses testifying against a defendant increased, the likelihood that a jury would believe a defendant's denial would decrease, even without impeachment evidence. Thus, a court may be willing to find in such cases, where there are numerous eyewitnesses, that the admission of uncounseled convictions to impeach constitutes harmless error. The problem lies in drawing a limit in this regard. *See* Gilday v. Scafati, 428 F.2d 1027 (1st Cir. 1970). *But see* Spaulding v. State, 481 P.2d 389 (Alas. 1971).

44. Often valid as well as invalid convictions form the basis of the prosecutor's impeachment evidence. *See, e.g.*, Subilosky v. Moore, 443 F.2d 334 (1st Cir. 1971). It would seem that, if the valid convictions were for serious offenses and the invalid convictions were not, then the likelihood of finding harmless error is greater. *See* Commonwealth v. Boudreau, — Mass. —, 285 N.E.2d 915 (1972) (assault conviction valid, traffic violation conviction invalid: no reversible error); Johnson v. Maryland, 265 A.2d 281 (Md. 1970) (felony convictions valid, misdemeanor conviction invalid: harmless error). When there is no disparity in the seriousness of the crimes for which defendant was convicted, the problem is more difficult. *See* Howard v. Craven, 446 F.2d 586 (9th Cir. 1971) (one valid and one invalid conviction, no disparity in seriousness of crimes: reversible error). If the invalid convictions were for serious offenses and the valid convictions for minor offenses, the likelihood of a harmless error ruling is slight in the absence of other evidence properly attacking defendant's credibility. The effect that the impeachment evidence other than the convictions would have in the presence of an uncounseled conviction is also uncertain.

45. *See* Howard v. Craven, 446 F.2d 586 (9th Cir. 1971) (reversing conviction); Subilosky v. Moore, 443 F.2d 334 (1st Cir. 1971) (affirming); Gilday v. Scafati, 428

cases in which uncounseled convictions were admitted into evidence, then lower courts will probably determine the limits of harmless error by the same balancing technique employed in the pre-*Loper* decisions which considered the issue.[46]

As noted above the *Loper* court explicitly refused to decide whether an uncounseled felony conviction could be used to impeach a specific statement made by a defendant from the witness stand. Since *Loper* two courts have considered this question in the context of a statement made on direct examination. In *United States ex rel. Walker v. Follette*[47] the Second Circuit Court of Appeals held that the prosecution could elicit testimony of previous uncounseled convictions from a defendant who had on direct examination denied that he had been convicted of a crime. The court argued that the rule established in *Harris v. New York*[48] permitted the use of "illegal evidence" to rebut a defendant's lies. Furthermore, the court expressly rejected any distinction between illegal evidence under *Miranda* and *Gideon*. In the second case, *United States v. Nadaline*,[49] the Fifth Circuit Court of Appeals affirmed

F.2d 1027 (1st Cir. 1970) (affirming); Spaulding v. State, 481 P.2d 389 (Alas. 1971) (reversing); People v. Coffey, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967) (reversing in part); Johnson v. State, 9 Md. App. 436, 265 A.2d 281 (1970) (affirming); Subilosky v. Commonwealth, — Mass. —, 265 N.E.2d 80 (1970) (affirming); Gilday v. Commonwealth, 355 Mass. 799, 247 N.E.2d 396 (1969) (affirming); Simmons v. State, 456 S.W.2d 66 (Texas 1970) (affirming).

For a post-*Loper* case in which a state court divided over the question of harmless error, *see* Wood v. Texas, 478 S.W.2d 513 (Texas 1972).

One state court felt the *Loper* opinion might be extended by *Argersinger* to include uncounseled misdemeanor convictions, but only when those convictions resulted in the imposition of a jail sentence. *See* Commonwealth v. Boudreau, — Mass. —, 285 N.E.2d 915 (1972).

46. Factors considered by courts were: the number of witnesses testifying against the defendant; the amount of all direct evidence presented against the defendant; whether the defendant introduced his criminal activity in his direct testimony; and evidence other than the invalid convictions introduced for impeachment purposes. *See* note 45 *supra* and accompanying text.

47. 443 F.2d 767 (2d Cir. 1971).

48. 401 U.S. 222 (1971). The Court in *Harris* allowed the admission of statements made by the defendant during an uncounseled interrogation to contradict the defendant on the witness stand. Although the evidence was constitutionally invalid because of the absence of counsel, the Court reasoned that the violation of the defendant's constitutional rights in obtaining the evidence should not be a license to commit perjury. For discussions of *Harris, see* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Note, *Impeachment by Unconstitutionally Obtained Evidence: The Rule of Harris v. New York*, 1971 WASH. U.L.Q. 441.

49. 471 F.2d 340 (5th Cir. 1973).

the conviction of a defendant whose statement on direct examination that he was not a violent person was impeached on cross-examination by the prosecutor eliciting testimony from the defendant about a prior conviction for breaking and entering. The court justified its holding on two grounds. First, the court read the *Loper* disclaimer as authorizing the use of invalid convictions to contradict false testimony by a defendant. Secondly, the court held the introduction of the evidence to be harmless error.

The reasoning of the two courts seems inconsistent with *Harris* and at odds with the *Loper* rationale. The impeachment exception authorized in *Harris* extended only to otherwise trustworthy evidence. Under *Gideon* the conviction and thus its factual basis are rejected as untrustworthy and unreliable because of the absence of counsel.[50] Furthermore, the courts' reading of the *Loper* exception merely allows a prosecutor to introduce evidence of uncounseled convictions on a pretext.[51] For instance, breaking and entering is not a crime of violence.

Perhaps the Supreme Court in *Loper* refused to consider the question because they wanted to observe the result in the lower federal courts of permitting such an exception. The one instance in which evidence of a defendant's past conviction could be used consistent with the rules in *Loper* and *Harris* to rebut a defendant's direct testimony is if he testified that he was in one place when actually he was in jail, but it is doubtful that the court left the question open for such a narrow use.

THE RETROACTIVITY OF GIDEON IN LOPER

The *Gideon* decision has been applied retroactively to allow prisoners incarcerated under an uncounseled conviction obtained prior to *Gideon* to attack the validity of that conviction. Although no one on the present Court objects to this retroactive application, four Justices dissented strongly over the type of retroactivity allowed in *Loper*,[52] in which the Court allowed the defendant to use the *Gideon* rationale to attack

50. The Court in *Gideon* stated that an uncounseled defendant might well be convicted by incompetent, irrelevant or otherwise inadmissible evidence. This possibility, among others, caused the court to hold that in all felony cases an indigent defendant had a right to appointed counsel. 372 U.S. at 345.

51. *See* note 27 *supra*.

52. The Chief Justice, one of the dissenters, pointed out that the issue in *Loper* involved a trial which occurred prior to *Gideon*. At Loper's trial in 1947, the presiding judge could not have imagined that evidence of an uncounseled conviction was in any way tainted, since no judge could have anticipated the *Gideon* decision of 1963.

a counseled conviction obtained prior to *Gideon* in which uncounseled convictions were used to undermine the defendant's credibility.[53]

The Supreme Court had four alternatives open to it in deciding the retroactivity issue in *Loper*.[54] First, it could have decided that the *Loper* decision would be applied only prospectively.[55] Secondly, the Court could have applied *Loper* retroactively to all convictions similar to *Loper* obtained subsequent to *Burgett*, since that was the first case to apply *Gideon* to evidentiary matters. Thirdly, the Court could have declared all *Loper*-type convictions obtained after *Gideon* to be subject to attack, an alternative apparently accepted by the *Burgett* court.[56] Finally, the Court could apply the *Loper* decision to all similar cases,

53. While there is a similar retroactivity question in regard to *Tucker*, the problem is not as significant, since the resentencing required by *Tucker* has a much less burdensome impact on the courts than providing a new trial as might be required by *Loper*.

54. As summarized by the Court in Stovall v. Denno, 388 U.S. 293, 297 (1967), three factors are considered in determining whether retroactivity is to be given a decision: (1) the purpose served by the new standards; (2) the extent of reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. The *Stovall* decision denied retroactivity to United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), which require the exclusion of identification evidence tainted by exhibiting the accused to the identifying witness before trial in the absence of counsel. The Court found that giving retroactive effect to *Wade* and *Gilbert* would disrupt the administration of criminal justice. Likewise, the consideration of the effect on the administration of criminal justice appears to be the key consideration in determining whether to give a *Loper*-like application to *Argersinger*.

55. Not all decisions concerning the sixth amendment are applied retroactively. In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that any charge carrying a possible sentence in excess of six months was subject to jury trial provisions of the sixth amendment. In United States *ex rel.* Farmer v. Kosan, 440 F.2d 1256 (2d Cir. 1971), the court gave only prospective application to *Baldwin*. Considering the criteria set out in *Stovall* regarding retroactivity, the court stated, "The possibility of collateral attacks by large numbers of persons convicted without a jury trial would pose an administrative burden on the criminal court in New York City already dangerously close to total collapse, as this court is well aware, such as to persuade us that justice would not be served by holding *Baldwin* retroactive." 440 F.2d at 1259. *See also* United States *ex rel.* Butler v. Thomas, 440 F.2d 992 (2d Cir. 1971). *But see* Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968): "The right to counsel at trial . . . ; on appeal . . . ; and at other 'critical' stages of the criminal proceedings . . . have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.'"

56. *Burgett* involved review of a post-*Gideon* conviction. The viewpoint in that case is easily justified, since after *Gideon* every judge could be expected to realize that persons charged with a felony had a constitutional right to counsel. Use of the fruits of an uncounseled proceeding, the conviction, should be impermissible in order to give full effect to the constitutional protection established by *Gideon* and to avoid the defendant suffering further for an earlier violation of his constitutional rights.

regardless of the date when the conviction was obtained. It was this last alternative which the *Loper* Court accepted.

As a practical matter, full retroactivity of *Loper* might not result in a heavy administrative burden on the courts. Most prisoners convicted before *Gideon* who could have raised such a *Gideon* retroactivity issue as Loper did in his case have already been released in the period between the *Gideon* and *Loper* decisions.[57] On the other hand, whether a retroactive application of *Gideon* in the *Loper* manner will create an administrative burden for the courts depends primarily on how much litigation is created on behalf of prisoners currently incarcerated under counseled convictions, with uncounseled convictions as evidence, obtained after *Gideon* but prior to *Loper*. It is easier to justify an application of *Loper* to post-*Burgett* cases than to pre-*Burgett* convictions because *Loper* is considered by the Court to be a clarification of the decision in *Burgett*.

It is uncertain whether the Supreme Court will apply *Argersinger* in a manner similar to the way *Loper* has applied retroactivity to *Gideon*. Not only must the Court decide that *Argersinger* should be applied to render invalid prior uncounseled misdemeanor convictions, but the Court must also decide that the *Loper* rationale applies to counseled convictions in which uncounseled misdemeanor convictions were used to impeach the defendant's testimony. There are two factors which militate against a retroactive application of *Argersinger* in a fashion similar to that allowed *Gideon* in *Loper*. The Supreme Court may decide that in fact misdemeanor convictions do not create a sufficient impression upon the jurors or judge to justify the practical difficulties which may arise from a retroactive application of *Argersinger* in a *Loper*-type situation.[58] Secondly, the number of prisoners who would be

57. Brief for respondent at 25, United States v. Tucker, 404 U.S. 443 (1972):

> Among federal prisoners only 12 to 14 percent have received sentences of five years or more. Appellate Review of Sentences, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 2722, 89th Cong. 2d Sess. p. 12 (March 1966). The average prisoner serves only 61 percent of his sentence. Id. at 52. More than 91 percent of federal prisoners are released from prison within five years. Among state prisoners an even greater percentage are released within five years (99 percent in some states, such as Wisconsin). Advisory Council of Judges of the National Council on Crime and Delinquency, Model Sentencing Act 24-25 (1963).

58. There is no empirical data on the adverse effect of misdemeanor convictions on the minds of jurors or judges. It is debatable whether jurors actually distinguish between a prior conviction for a felony and a conviction for a misdemeanor. Cer-

in a position to attack a conviction might overwhelm the court system,[59] although this administrative burden could be minimized if judges were to anticipate a future Supreme Court opinion applying *Argersinger* in the *Loper* situation.[60]

CONCLUSION

The decisions by the Supreme Court in *Tucker* and *Loper*, that prior felony convictions invalid because of the denial of the defendant's constitutional right to counsel may not be used in subsequent criminal proceedings to either enhance punishment or impeach the general credibility of the defendant as a witness, are consistent extensions of the right to counsel announced in *Gideon* and further developed by *Burgett*. That *Burgett, Tucker* and *Loper* are all based on the rationale of preserving the principle of *Gideon* that one should not suffer from denial of his constitutional right to counsel makes ripe the question of whether use of prior convictions resulting from proceedings in which the defendant was denied his *Argersinger* right to counsel is reversible error. The vast number of persons with misdemeanor convictions indicates that a defendant placed in a *Tucker*- or *Loper*-type situation by use of convictions uncounseled under the *Argersinger* rule may soon appear before the Supreme Court.

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tainly if the prior conviction is for the same crime with which the defendant is charged, the effect of the introduction of the prior conviction is highly prejudicial, regardless of whether it is for a felony or a misdemeanor.

59. Argersinger v. Hamlin, 407 U.S. 25, 34 n.4 (1972):

> In 1965, 314,000 defendants were charged with felonies in state courts, and 24,000 were charged with felonies in federal courts. President's Commission of Law Enforcement and Administration of Justice, Task Force Report: The Courts 55 (1967). Exclusive of traffic offenses, however, it is estimated that there are annually between four and five million court cases involving misdemeanors.

60. Judges might now be expected to connect the rationale of *Loper* with *Argersinger* to conclude that the use of convictions in which defendant was deprived of his right to counsel as established by *Argersinger* is error. If so, then the practical problem of the amount of litigation which a *Loper*-like application of *Argersinger* would create will be diminished. Another factor which would affect the number of persons seeking relief is the time lag between *Argersinger* and a decision applying *Loper* to uncounseled misdemeanors. If the lag is small, then the number of post-*Argersinger* convictions which might then be infirm would be smaller in comparison to the number of persons who, though aided by counsel, were convicted prior to *Argersinger* on evidence which includes, in part, the use of uncounseled misdemeanor convictions. As this time lag increases, this proportion would change to the point, such as perhaps existed in *Loper*, where there are so few prisoners still in jails under pre-*Argersinger* convictions that they present no practical barrier to full retroactivity.