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Criminal Law - Wyoming Recidivist Statutes: Leniency for Criminals - Brisson v. State

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Case Notes

CRIMINAL LAW–Wyoming Recidivist Statutes: Leniency for Criminals? *Brisson v. State*, 955 P.2d 888 (Wyo. 1998).

INTRODUCTION

Michael Brisson was charged with felony battery upon a household member pursuant to Wyoming Statute section 6-2-501(b)[1] in January of 1997.[2] If his first or second offense, Brisson's charge would have been a misdemeanor. However, the charge was elevated to a felony because Brisson had been convicted of misdemeanor battery against a household member twice within the ten years prior to this most recent charge.[3]

Brisson filed a motion to dismiss the felony charge, claiming his prior misdemeanor convictions could not be used to elevate his current charge to felony level because, despite his requests, the past convictions were obtained without the benefit of counsel.[4] In response to his motion, the district court certified the following two questions to the Wyoming Supreme Court, pursuant to Wyoming Rule of Appellate Procedure 11:[5]

> (1) Does a county court conviction, without benefit of counsel, for spousal battery expose the person so convicted to a 'practical possibility' of incarceration?
> (2) If the answer to the first question is 'yes,' may such an uncounseled misdemeanor conviction be used to enhance the penalty for battery under Wyo. Stat. § 6-2-501(b) under circumstances wherein the defendant did not knowingly or intentionally waive counsel and, in fact, requested counsel?[6]

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1. Wyo. Stat. Ann. § 6-2-501(b) (Michie 1997). "A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily harm to another." *Id.*
2. Brisson v. State, 955 P.2d 888, 889 (Wyo. 1998).
3. *Id.* at 889-90. In all three occasions within the ten-year period, Brisson was charged with "spousal battery," misdemeanor battery against a household member. *Id.* at 890.
4. *Id.*
5. WYO. R. APP. P. 11.01 states:

> The supreme court may answer questions of law certified to it by a federal court or a state district court . . . if there is involved any proceeding before the certifying court or agency a question of law which may be determinative of the cause then pending in the certifying court or agency and concerning which it appears there is no controlling precedent in the decisions of the supreme court.

Id.
6. *Brisson*, 955 P.2d at 889.

The Wyoming Supreme Court conducted a thorough examination of United States Supreme Court precedent on the issues of the right to counsel and the collateral ability to use prior convictions to elevate a current charge. Despite Supreme Court decisions "staunchly to the contrary,"[7] the Wyoming court answered the two certified questions in Brisson's favor.[8] The court chose to depart from the Supreme Court's reasoning by exercising the right of a state to provide its citizenry with greater protection than that provided by the federal government.[9]

Crucial to its position, the Wyoming court noted that Wyoming Statute section 7-6-104(a)(i) provides that counsel "shall" be appointed to represent a needy person who is under arrest for or charged with a serious crime.[10] A "serious crime" is defined as "any felony or misdemeanor under the laws of the United States or Wyoming for which incarceration as a punishment is a practical possibility."[11] Thus, the Wyoming Supreme Court determined that the legislature's intent in including the necessity of representation when incarceration is a "practical possibility" was to expand protection offered to Wyoming citizens beyond federal protection.[12] Incarceration is a "practical possibility" if the applicable criminal statute allows for incarceration among its range of potential punishments.[13] Therefore, counsel must be provided for all charges for which a sentence of imprisonment may be imposed.[14] As a consequence, the court held a prior uncounseled misdemeanor conviction cannot be used collaterally to elevate a current charge as part of an enhancement statute.[15]

This case note will examine current Wyoming law regarding the right to counsel and its application to enhancement statutes. Additionally, this note will analyze similar United States Supreme Court decisions, various state approaches to the issues, and Wyoming's divergence from the current Supreme Court rationale. Finally, this note will critique the Wyoming decision

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7. *Wyoming Supreme Court Decisions–Civil.* THE COFFEE-HOUSE, (Wyoming Trial Lawyers Association, Wyoming), Spring 1998, at 13.

8. *Brisson*, 955 P.2d at 889-91.

9. Nichols v. United States, 511 U.S. 738, 748 n.2 (1994); Houston Chronicle Pub. Co. v. Crapitto, 907 S.W.2d 99 (Tex. App. 1995). Although state courts may not circumscribe rights guaranteed by the federal constitution, they may interpret their own laws to supplement or expand them. Rourke v. New York State Dept. of Correctional Servs., 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 201 A.D.2d 179 (N.Y. App. Div. 1994).

10. *Brisson*, 955 P.2d at 891. The statute states: "[t]he public defender shall represent as counsel any needy person who is under arrest for or formally charged with having committed a serious crime." WYO. STAT. ANN. § 7-6-104(a) (Michie 1997).

11. WYO. STAT. ANN. § 7-6-102(a)(v) (Michie 1997); Brisson, 955 P.2d at 891 (citing WYO. STAT. ANN. § 7-6-102(a)(v) (Michie 1997)).

12. *Brisson*, 955 P.2d at 889-91.

13. *Id.* at 891.

14. *Id.*

15. *Id.*

by theorizing on the potential consequences of *Brisson* for Wyoming practitioners.

BACKGROUND

The Constitutional Standard

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[16] The right to counsel was extended from federal courts to state courts via the Fourteenth Amendment, which states, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."[17] These brief statements have caused considerable confusion among various courts. Despite a constitution that is well-established and significantly unchanged, "[t]he right to counsel has historically been an evolving concept."[18] Some scholars feel the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, did not contemplate any guarantee other than a defendant's narrow right to *employ* a lawyer to assist in his defense when accused of a *crime* in *federal* court.[19]

The United States Supreme Court rejected this view in *Gideon v. Wainwright,* holding that the right of an indigent defendant in a criminal trial to the assistance of counsel, as guaranteed by the Sixth Amendment was, indeed, made applicable to the states by the Fourteenth Amendment.[20] A later case determined this right was not governed either by the classification of the offense or by whether or not a jury trial was required.[21] Earlier, Wyoming incorporated the right to counsel into the Wyoming Constitution, which states that in "all criminal prosecutions the accused shall have the right to defend in person and by counsel."[22]

The Five Approaches to Right to Counsel

Accepting the view that the right to counsel extends to both state and federal courts, the dilemma of constitutional applicability only seems to increase. Different courts apply at least five different methods to decide

16. U.S. CONST. amend. VI.
17. U.S. CONST. amend. XIV.
18. Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, J., concurring).
19. Scott v. Illinois, 440 U.S. 367, 369 (1979) (citing W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955)).
20. Gideon v. Wainwright, 372 U.S. 335 (1963).
21. *Argersinger*, 407 U.S. at 30-31.
22. WYO. CONST. art. 1, § 10.

whether or not the right to counsel extends to various cases. These methods are outlined below.

1. Six Months

In some states, courts draw a bright line and say the right to counsel applies only to those cases where the crime is punishable by more than six months imprisonment, the same standard as is used in determining when a jury trial is required.[23] For example, before *Argersinger v. Hamlin* reached the United States Supreme Court, the Supreme Court of Florida agreed that indigents charged with "serious misdemeanors" were entitled to appointed counsel; however, the court limited that right to offenses punishable by more than six months imprisonment.[24]

2. Always

A second bright line approach is to decide that the right to counsel should be applied in all cases, regardless of possible incarceration:

> The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided.[25]

This option includes a distinct rejection of the application of the right to counsel only in cases where a jury trial is required. Despite the ability to constitutionally prosecute an individual for crimes punishable by less than sixth months without a jury trial, the same is not true for the presence of counsel.[26] Indeed, "[d]espite its overbreadth, the easiest solution would be a prophylactic rule that would require the appointment of counsel to indigents in all criminal cases."[27]

3. Discretion of the Court

As a counter to bright line rules, other courts firmly believe that the

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23. *See generally* Frank v. United States, 396 U.S. 147 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966); Betts v. Brady, 316 U.S. 455 (1942).

24. Argersinger v. Hamlin, 236 So.2d 442, 444 (Fla. 1970), *rev'd*, 407 U.S. 25 (1972). The United States Supreme Court, however, invoked the actual imprisonment theory upon certiorari. *Argersinger*, 407 U.S. at 33.

25. *Argersinger*, 407 U.S. at 30.

26. *Id.* at 30-31.

27. *Id.* at 50 (Powell, J., concurring).

choice should be left to the discretion of the trial court.[28] Proponents of this position base their approach on the fact that serious consequences also may result from convictions not punishable by imprisonment.[29]

Indeed, in support of their contention, "discretion" supporters state that due process, as required via the Constitution, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial.[30] According to supporting courts, only on a case-by-case basis can the Constitution be upheld and applied as thoroughly as necessary.[31] Historically, misdemeanor convictions did not necessarily invoke the right to counsel.[32] However, while the right to counsel in petty-offense cases is not necessarily absolute, it must be determined by the trial courts exercising judicial discretion based on the circumstances of the individual case.[33] Discretion's greatest rationale lies in the thought that it is impossible, as well as unwise, to create a precise and detailed set of guidelines for judges to follow in determining whether the appointment of counsel is necessary to assure a fair trial.[34]

4. Authorized Imprisonment

The "authorized imprisonment" concept is not mentioned frequently, perhaps because it is akin to the position that the right to counsel must be applied in all cases. Most crimes contain at least the *authorization* of imprisonment as a part of punishment, which is commonly used as the true measure of the seriousness of the offense.[35] Proponents of this position state that the "authorized imprisonment" standard "more faithfully implements the principles of the Sixth Amendment identified in *Gideon*."[36] Additionally, they claim the "authorized imprisonment" test presents no problems of administration, as it is a clear-cut, easy-to-follow guideline, requiring appointment of counsel in any case in which imprisonment is an authorized

28. *See* James v. Headley, 410 F.2d 325 (5th Cir. 1969); Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

29. *Argersinger*, 407 U.S. at 48 (Powell, J., concurring). "Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail." *Id.*

30. *Id.* at 49 (Powell, J., concurring).

31. *Id.* (Powell, J., concurring). *See also James*, 410 F.2d 325; State *ex rel.* Stinger v. Krueger, 217 S.W. 310 (Mo. 1919).

32. State v. Sinagoga, 918 P.2d 228, 238 (Haw. 1996) (citing Scott v. Illinois, 400 U.S. 367 (1979)).

33. *Argersinger*, 407 U.S. at 63 (Powell, J., concurring).

34. *Id.* at 64 (Powell, J., concurring).

35. *See* Frank v. United States, 395 U.S. 147 (1969); United States v. Moreland, 258 U.S. 433 (1922); Baldwin v. New York, 399 U.S. 66 (1888).

36. Scott v. Illinois, 440 U.S. 367, 382 (1979) (Brennan, J., dissenting). *See infra* notes 53-61 and accompanying text.

punishment.[37] Finally, according to these courts, the "authorized imprisonment" test ensures that courts will not abrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense.[38] Under this approach, if incarceration lies within the realm of possible punishments for a crime, counsel must be appointed.

5. Actual Imprisonment

Finally, "actual imprisonment" is the approach presently taken by the United States Supreme Court and is based on the theory that actual imprisonment is a penalty "different in kind from fines or the mere threat of imprisonment."[39] Supporters state that the right to counsel stands when an accused is actually deprived of his liberty.[40] The "actual imprisonment" approach differs from the "six months" approach in the belief that the requirement of counsel may be necessary for a fair trial even in a petty-offense prosecution.[41] Legal and constitutional questions involved in any case that actually leads to imprisonment (even for brief periods) are equally as complex as a case where a person can be incarcerated for six months or more.[42] "The seriousness of a criminal conviction bears no necessary relation to the length of the sentence. A single day is one day too many if an innocent person is convicted. . . ."[43] However, opponents of this approach feel this rule dictates the punishment before the trial begins.[44] When a defendant is tried for a misdemeanor, every judge and prosecutor knows the defendant may only be imprisoned if represented by counsel, unless he validly waives counsel.[45] With the five varying methods in mind, all commentators agree on one crucial point: whenever and wherever the right-to-counsel line is drawn, it must be drawn in a manner which ensures that defendants are afforded their constitutional right to due process in all cases.[46]

Felony vs. Misdemeanor and "The Conversion Rule"

Inherent in the above applications of the right to counsel is a fundamental disagreement about the appropriate disparity of treatment between felonies and misdemeanors. Some courts would treat the two equally, espe-

37. *Scott*, 440 U.S. at 383 (Brennan, J., dissenting).
38. *Id.* (Brennan, J., dissenting). Abrogation of the range of penalties for an offense is possibly the greatest concern of opponents with the "actual imprisonment" standard. *See infra* notes 39-46 and accompanying text.
39. *Scott*, 440 U.S. at 373.
40. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972).
41 *Id.*
42. *Id.*
43. James v. Headley, 410 F.2d 325, 329 (5th Cir. 1969).
44. *Argersinger*, 407 U.S. at 40.
45. *Id.*
46. *Id.* at 45-46 (Powell, J., concurring).

cially where imprisonment may be authorized or actual; others would not.[47] Long before questions of the use of uncounseled misdemeanors for enhancement purposes arose, various courts held that an uncounseled felony conviction could not be used collaterally in a later trial to enhance punishment under a recidivist statute.[48] As expected, similar challenges regarding the availability of uncounseled misdemeanor convictions for punishment enhancement soon arose.[49] Because courts previously rejected prior uncounseled felony convictions as a basis for enhancing punishment, they later undertook to "examine whether there is a similar bar to the use of uncounseled misdemeanor and petty misdemeanor convictions."[50] Courts even went so far as to distinguish between cases elevating a charge from misdemeanor to felony level, holding that under the "Conversion Rule," a court is prohibited from using a prior uncounseled misdemeanor to convert a subsequent misdemeanor into a felony.[51] For example, the *Baldasar* Court limited collateral use of a prior uncounseled misdemeanor conviction at sentencing *only* when the effect of such consideration was to convert a misdemeanor into a felony.[52] Thus, the nationwide split in opinion continued over the applicability of the right to counsel in various situations. With an historical approach in mind, the following cases are the six prominent decisions that have established the current United States Supreme Court view and serve as the framework for Wyoming and various state views of the issues.

Gideon v. Wainwright (1963)

Clarence Earl Gideon was charged with breaking and entering with intent to commit a misdemeanor, a felony offense under Florida law.[53] He later attacked the trial court's failure to appoint him counsel through habeas corpus[54] proceedings.[55] Upon certiorari, the United States Supreme Court held that the Sixth Amendment required that "in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."[56] The Court held this interpretation ap-

47. See *infra* notes 48-52 and accompanying text.

48. Baldasar v. Illinois, 446 U.S. 222, 233 (1980) (per curiam) (Powell, J., dissenting) (citing Burgett v. Texas, 389 U.S. 109 (1967)), *overruled by* Nichols v. United States, 511 U.S. 738 (1994); Burgett v. Texas, 389 U.S. 109, 114 (1967); United States v. Tucker, 404 U.S. 443 (1972).

49. State v. Sinagoga, 918 P.2d 228, 238 (Haw. 1996). *See also* Nichols v. United States, 511 U.S. 738 (1994).

50. *Sinagoga*, 918 P.2d at 239.

51. Kirsten M. Nelson, Note, Nichols v. United States *and the Collateral Use of Uncounseled Misdemeanors in Sentence Enhancement*, 37 B.C. L. REV. 557, 586 (May 1996).

52. *Nichols*, 511 U.S. at 740.

53. Gideon v. Wainwright, 372 U.S. 335, 336-37 (1963).

54. A writ of habeas corpus, under 28 U.S.C. §§ 2241-55, provides a federal forum in which defendants who have been convicted of crimes in state court may litigate constitutional claims arising out of their prosecutions. JOHN J. COUND ET. AL., CIVIL PROCEDURE 1272 (7th ed. 1997).

55. *Gideon*, 372 U.S. at 336-37.

56. *Id.* at 340. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938).

plied equally to state courts and based its decision on the theory that certain fundamental rights established by the first eight amendments were safeguarded against state action by the Due Process Clause of the Fourteenth Amendment.[57] According to the Court, the assistance of counsel was one of the safeguards of the Sixth Amendment deemed necessary to ensure fundamental human rights of life and liberty.[58]

Thus, *Gideon v. Wainwright* established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the states by virtue of the Fourteenth Amendment.[59] After *Gideon*, it was unconstitutional to try a person for a felony[60] in a state court unless he was represented by counsel or had validly waived representation.[61]

Burgett v. Texas (1967)

The defendant in *Burgett* was convicted of assault with malice aforethought with intent to murder.[62] After the Texas Court of Appeals affirmed the conviction, certiorari was granted.[63] The United States Supreme Court held that where certified records of prior convictions did not show that the defendant was represented by counsel or that he validly waived counsel, the records raised a presumption that defendant was denied his right to counsel in violation of the Sixth Amendment.[64] Following prior Court precedent, the United States Supreme Court stated that "[t]he admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial."[65] Thus, convictions gained in violation of the "*Gideon* Rule" could not be used either to support guilt or to enhance punishment for another offense.[66]

Argersinger v. Hamlin (1972)

In *Argersinger*, the defendant was charged with carrying a concealed

57. *Gideon*, 372 U.S. at 342.
58. *Id.* at 343.
59. *See id.*
60. The Court in *Gideon* specifically addressed the application of the right to counsel in state and federal courts. Although the court did not specifically address the felony-misdemeanor issue, other courts later interpreted the *Gideon* decision by inferring the right to counsel arose only in felony situations because Gideon was so charged. *Gideon*, 372 U.S. at 335-37. *See also* Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994); Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).
61. Burgett v. Texas, 389 U.S. 109, 114 (1967) (following Gideon v. Wainwright, 372 U.S. 335 (1963)). *See also* Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright 375 U.S. 2 (1963).
62. *Burgett*, 389 U.S. at 110.
63. *Id.*
64. *Id.* at 114.
65. *Id.* at 115.
66. *Id.* at 116.

weapon and imprisoned for ninety days.[67] He brought a federal habeas corpus action.[68] The Florida Supreme Court denied the action and held in accordance with a prior decision that the Constitution only required the appointment of counsel for crimes punishable by more than six months of incarceration.[69] On certiorari, the United States Supreme Court held that, absent a knowing and intelligent waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."[70] However, the Court also clarified that it did not serve as an "ombudsman" to direct state courts how to manage their affairs; rather, its purpose was only to make clear the federal constitutional requirements.[71]

Scott v. Illinois (1979)

Scott, an indigent, was convicted of theft and fined $50 after a bench trial in the county court.[72] His conviction was affirmed by the appellate court and then by the Illinois Supreme Court despite the defendant's contention that the Sixth and Fourteenth Amendments required that Illinois provide counsel to him at the state's expense.[73] The United States Supreme Court rejected Scott's argument, holding that the Sixth and Fourteenth Amendments require only that no indigent criminal defendant be sentenced to a term of incarceration, unless he has been afforded the right to counsel.[74] *Scott* firmly established the "actual imprisonment" rule, still in use as the federal constitutional standard today.[75] In fact, the Court used *Scott* to clarify the proper application of its earlier decision in *Argersinger v. Hamlin.*[76]

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67. Argersinger v. Hamlin, 407 U.S. 25, 26 (1972).

68. *See supra* note 53.

69. Argersinger v. Hamlin, 236 So.2d 442, 443 (Fla. 1970), *rev'd* 407 U.S. 25 (1972). The Florida Supreme Court analogized to *Duncan v. Louisiana*, which held that the United States Constitution only required a jury trial for crimes punishable by more than six months imprisonment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

70. *Argersinger*, 407 U.S. at 37.

71. *Id.* at 38.

72. Scott v. Illinois, 440 U.S. 367, 368 (1979).

73. *Id.*

74. *Id.* at 373.

75. *Id.*

76. *Id.* at 368. The conflict between state and lower federal courts dealt with the proper application of the United States Supreme Court decision in *Argersinger v. Hamlin*. Some courts felt the decision required the appointment of counsel when imprisonment was authorized while others felt counsel needed to be appointed only when the defendant was actually imprisoned. *Compare* Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976); State *ex rel.* Winnie v. Harris, 249 N.W.2d 791 (Wis. 1977), *with* Sweeten v. Sneddon, 463 F.2d 713 (10th Cir. 1972); Rollins v. State, 299 So.2d 586 (Fla. 1974), *cert. denied*, 419 U.S. 1009 (1974). The *Scott* Court clarified the law by agreeing with the Supreme Court of Illinois that appointment of counsel was not mandated by the United States Constitution in cases where incarceration was merely authorized. *See Scott*, 440 U.S. 367; *Argersinger*, 407 U.S. 25; *supra* notes 67-71 and accompanying text.

Baldasar v. Illinois (1980)

Thomas Baldasar was convicted of theft of property not exceeding $150 in value as a second offense, a felony charge.[77] He appealed, and the appellate court affirmed.[78] After further leave to appeal was denied by the Supreme Court of Illinois, certiorari was granted. In its first consideration of the collateral use of uncounseled misdemeanors, the United States Supreme Court held that an uncounseled conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.[79] However, *Baldasar* received a rocky reception by the state courts[80] and did not enunciate a clear-cut test for determining the limits to be placed on the future use of uncounseled misdemeanor convictions.[81] The decision was later overruled by the United States Supreme Court in *Nichols v. United States*.[82]

Nichols v. United States (1994)

Convicted of conspiracy to distribute cocaine, Nichols pled guilty and was assessed criminal history points under the United States Sentencing Guidelines.[83] Included in his assessment were points for a prior state misdemeanor conviction for driving while under the influence (DUI), for which he was fined but not incarcerated.[84] Based upon the total accumulation of points, defendant was sentenced to 235 months in prison.[85] Nichols appealed, and the court of appeals affirmed.[86] The Supreme Court granted certiorari and held that, consistent with the Sixth and Fourteenth Amendments, an uncounseled misdemeanor conviction, valid under the "actual imprison-

77. Baldasar v. Illinois, 446 U.S. 222, 222-23 (1980) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

78. *Id.* at 223.

79. *Id.*

80. Joel W. L. Millar, Note, Nichols v. United States, *The Right to Counsel, and Collateral Sentence Enhancement: In Search of a Rationale*, 144 U. PA. L. REV. 1189, 1209 (1996).

81. Roger L. Bates, *The Effect of Uncounseled Misdemeanor Convictions on Enhancement Statutes*, 4 AM. J. TRIAL ADVOC. 757, 760 (1981).

82. 511 U.S. 738, 748 (1994).

83. *Id.* at 738. "There are six criminal history categories under the Sentencing Guidelines. United States Sentencing Commission, Guidelines Manual (USSG) ch. 5, pt. A (Nov. 1993) (Sentencing Table). A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. *Id.*, ch. 4, p. A." *Id.* at 740 n.2.

> The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the intersection of the defendant's offense level and his criminal history category.

Id., ch. 5, pt. A (Sentencing Table). *Id.* at 740 n.3.

84. *Id.* at 740.

85. *Id.* at 741.

86. *Id.*

ment" theory of *Scott* due to the absence of a prison term, is also valid when used to enhance punishment of a subsequent conviction.[87] Thus, in the most recent applicable United States Supreme Court decision, prior uncounseled misdemeanor convictions are constitutionally valid and are soundly used under recidivist statutes to enhance the penalty for a later conviction.

Development of Wyoming Law

Contrary to the many United States Supreme Court opinions, Wyoming, prior to *Brisson*, had far fewer opinions on the issues at hand. Consider, by analogy, the right to a jury trial in determining the admissibility of a prior conviction: the Wyoming Supreme Court, in *Munoz v. Maschner*, stated that "[t]he prior conviction is not relevant to the issue of guilt for the crime but goes only to the issue of punishment."[88] With this view, the court refused to acknowledge a "constitutional right to a jury trial on the issue of a second offense, where a hearing is for the purposes of sentencing only."[89] The *Munoz* opinion suggested that constitutional rights, such as the right to counsel, were inapplicable to enhancement, where the prior conviction was relevant only for punishment and not guilt in the current charge.[90]

Similarly, in a subsequent case the Wyoming court applied such constitutional rights only when the subsequent results depended upon the prior conviction's reliability.[91] Thus, in *Small v. State*, the court allowed consideration of a prior, uncounseled misdemeanor for conviction and punishment in the current crime.[92] The court affirmed, however, that a subsequent conviction may violate "'the Sixth Amendment [if] it depend[s] upon the reliability of a past uncounseled conviction.'"[93] The statute at issue in *Small*, "'however, do[es] not focus on reliability, but on the mere fact of conviction, or even indictment.'"[94] Thus, the court upheld the validity of a prior uncounseled felony conviction for purposes of a statute prohibiting the possession of firearms by a previously convicted and unpardoned felon.[95] Here, the Wyoming court established a standard of imposing the right to counsel on a statute-by-statute basis.[96]

Later Wyoming decisions seem to represent an inconsistency as to the

87. *Id.* at 748-49.
88. Munoz v. Maschner, 590 P.2d 1352, 1358 (Wyo. 1979) (citing Block v. State, 163 N.W.2d 196 (Wis. 1968)).
89. *Id.* (citing State v. Losieau, 166 N.W.2d 406 (Neb. 1969)).
90 *See Munoz*, 590 P.2d 1352.
91. Small v. State, 623 P.2d 1200 (Wyo. 1981).
92. *Id.*
93. *Id.* at 1204 (quoting Lewis v. United States, 445 U.S. 55, 66-67 (1980)).
94. *Id.* (quoting Lewis v. United States, 445 U.S. 55, 66-67 (1980)).
95. *Id.*
96. *Id.*

right to counsel. In one view:

> A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.[97]

In *Zanetti v. State*, the Wyoming court suggested that guilty pleas, at least, were allowed absent defense counsel and served as the "breaking point" for claims regarding the infringement of constitutional rights.[98] Prosecutors and courts could infer that prior uncounseled misdemeanors could be used for sentence enhancement when the defendant pleaded guilty to the prior offense.[99]

However, in *Duffy v. State*, the court approached the dilemma from a different standpoint.[100] The *Duffy* court applied a "critical nature" test to analyze the contact between the defendant (without counsel) and the court: "the confrontation between the Court and a defendant, without counsel, must be analyzed to determine whether it creates 'potential substantial prejudice to defendant's rights.'"[101] The court held that if the nature of the proceedings was critical and the defendant's rights may be prejudiced, the right to counsel must be satisfied.[102] The *Duffy* opinion seemed contrary to the *Zanetti* decision and required a much stricter approach to the right to counsel.

Finally, with regard to Wyoming statute section 6-2-501(f)(ii), under which Brisson was convicted, the Wyoming court has held that the statute "is merely a sentence enhancement provision rather than being a new independent battery against a household member."[103] Here again, courts might infer that prior, uncounseled convictions may be used under this specific statute, because the legislature intended its adoption merely for recidivism purposes,[104] similar to the federal gun law at issue in *Small*.[105] *Fall*, however, was decided post-*Brisson*, indicating that the Wyoming court still is not

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97. Zanetti v. State 783 P.2d 134, 138 (Wyo. 1989) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).
98. *Id.*
99. *Id.*
100. Duffy v. State, 837 P.2d 1047 (Wyo. 1992).
101. *Id.* at 1052 (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).
102. *Id.*
103. Fall v. State, 963 P.2d 981, 984 (Wyo. 1998). *Fall* was decided four months after *Brisson*.
104. *Id.*
105. *See supra* notes 87-92 and accompanying text.

uniform in its approach to the right to counsel, much less in the right to collateral use of a past uncounseled conviction for enhancement.

PRINCIPAL CASE

In *Brisson*, the Wyoming Supreme Court decided that the defendant should have been provided counsel for his prior convictions for misdemeanor battery against a household member; therefore, those convictions could not be used to enhance his current misdemeanor charge of spousal battery to a felony.[106] The court approached the subject from two different directions in order to reach its decision.

First, the court analyzed the United States Supreme Court's approach to the topic. The Court discussed *Argersinger*, *Scott*, *Baldasar*, and *Nichols* in its analysis.[107] The court also addressed the "actual imprisonment" theory that "[u]ncounseled convictions which do not result in incarceration are considered to be valid convictions"[108] in both the initial appropriateness of the conviction and the use of the conviction for future sentence enhancement.[109] Likewise, the court analyzed the most recent United States Supreme Court decision, stating that "[a] prior uncounseled misdemeanor conviction could indeed be used as a basis for increasing a prison term under a recidivist statute."[110] In light of these Supreme Court decisions, the Wyoming court relied heavily upon the accompanying Supreme Court statement that states are free to provide their citizens greater protection than that given by the federal government.[111] The Wyoming court decidedly refused to be limited by United States Supreme Court precedent on the issues and placed more emphasis on the applicable Wyoming Statutes.

The Wyoming court secondly undertook to interpret the meaning of the Wyoming recidivist language within Wyoming statute section 6-2-501 and glean the legislature's intent: "In deciding what Wyoming's approach to these issues should be, this Court must interpret the language of the relevant Wyoming statutes."[112] With Wyoming statutes in mind, the court adhered to the age-old concept that if the statute is clear and unambiguous, the court

106. Brisson v. State, 955 P.2d 888, 892 (Wyo. 1998).
107. *Id.* at 890-91.
108. *Id.* at 890 (citing Scott v. Illinois, 440 U.S. 367, 373 (1979)).
109. *Id.* at 890-91.
110. *Id.* (citing Nichols v. United States, 511 U.S. 738, 747 (1994)).
111. *Id.* at 891 (citing *Nichols*, 511 U.S. at 748 n.12).
112. *Id.* The statute states: "[a] person convicted of a third or subsequent offense under this subsection within ten (10) years following the first conviction is guilty of a felony punishable by imprisonment for not more than two (2) years, a fine of not more than two thousand dollars ($2,000.00), or both." WYO. STAT. ANN. § 6-2-501(f)(ii) (Michie 1997).

must give effect to the plain language of the statute.[113] Because Wyoming statute section 7-6-104(a)(i) states that a public defender "shall" be appointed to indigents charged with a "serious crime," the court turned to the statutory definition of "serious crime."[114] "A 'serious crime' is defined as 'any felony or misdemeanor under the laws of the State of Wyoming for which incarceration as a punishment is a practical possibility.'"[115] However, because the legislature failed to define the term "practical possibility," the court then turned to Webster's Third New International Dictionary.[116] Based on the definitions of "practical," "possible," and "possibility" within the dictionary,[117] the court concluded "this unambiguous term means something that is capable of occurring."[118] Under the court-imposed definition of practical possibility, the Wyoming Supreme Court concluded that the legislature intended to afford Wyoming citizens greater protection than that afforded under the United States Constitution with respect to the right to counsel.[119] In light of that interpretation, the Wyoming court declined "to follow the United States Supreme Court's actual incarceration approach [and declined] to follow the United States Supreme Court's holding that an uncounseled conviction can be used to enhance a subsequent offense."[120]

The court concluded that, in the absence of a valid waiver of counsel, an uncounseled conviction may not be reliable and, thus, should not be used to enhance a subsequent prison sentence.[121] The Wyoming court, similar to other courts,[122] expressed the concern that if an uncounseled misdemeanor conviction cannot result in imprisonment because of its initial unreliability, then it is logically inconsistent to rely on the prior conviction as a basis to enhance a prison term on a subsequent conviction.[123] Indeed, a rule that an uncounseled misdemeanor conviction can never form the basis for a term of imprisonment is faithful to the principle founded in *Gideon* and announced in *Argersinger* that an uncounseled misdemeanor, like an uncounseled felony, is not reliable enough to form the basis for the severe sanction of incar-

113. *Brisson*, 955 P.2d at 891.
114. *Id.*
115. *Id.* (quoting WYO. STAT. ANN. § 7-6-104(a)(i) (Michie 1997)).
116. *Brisson*, 955 P.2d at 891.
117. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1780 (1961). "Practical" is defined as "available, usable, or valuable in practice or action: capable of being turned to use or account." *Id.* "Possible" is defined as being something "that may or may not occur: that may chance: dependent on contingency: neither probable nor impossible." *Id.* at 1771. "Possibility" is defined as "something that is possible." *Id.*
118. *Brisson*, 955 P.2d at 891.
119. *Id.*
120. *Id.*
121. *Id.*
122. *See* Custis v. United States, 511 U.S. 485 (1994); Johnson v. Zerbst, 304 U.S. 458 (1938); State v. Sinagoga, 918 P.2d 228, 241 (Haw. 1996).
123. *Brisson*, 955 P.2d at 891.

ceration.[124]

ANALYSIS

Brisson represents one issue, better phrased in two sub-parts: 1) to what extent does the Wyoming Constitution dictate the right to counsel, and 2) how does the right to counsel influence courts' collateral abilities to utilize prior uncounseled misdemeanor convictions to enhance current sentences under recidivist statutes?[125] The answers to these questions, historically, were based on concepts of reliability, court precedent, the content of the United States' and state constitutions, and applicable statutes.[126]

The Wyoming court has a valid basis upon which to draw its conclusion in *Brisson*. Other courts have reached similar results.[127] Divergent opinions on the right to counsel with respect to enhancement statutes are founded in different core beliefs. Some courts, like the *Brisson* court, feel that the deprivation of liberty actually results from the first criminal trial—had it not been for the prior conviction, the defendant could not be sentenced to incarceration for the present offense.[128] Therefore, the Wyoming court concludes that, in a sense, the "actual imprisonment" rule does apply, and the defendant cannot and shall not be imprisoned without having been represented by counsel—even if he pleads guilty.[129]

In arriving at its conclusion, the *Brisson* court enmeshed itself in the "unreliability" of prior uncounseled convictions. The court reached its decision based on its opinion that an uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense.[130] Here the court makes a valid point: With the volume of misdemeanor cases and the obsession for speedy dispositions, misdemeanor convictions actually may be less reliable than felony convictions.[131]

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124. Nichols v. United States, 511 U.S. 738, 762 (1994) (Blackmun, J., dissenting). *See supra* notes 52-59, 65-68 and accompanying text.

125. *See supra* note 6 and accompanying text.

126. *Brisson*, 955 P.2d at 888-91.

127. *See* United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991) (holding that sentence enhancement based on uncounseled misdemeanor convictions is prohibited); Lovell v. State, 678 S.W.2d 318, 320 (Ark. 1984) (holding that prior uncounseled misdemeanor convictions are barred from enhancing a term of imprisonment following a second conviction).

128. Baldasar v. Illinois, 446 U.S. 222, 226 (1980) (Marshall, J., concurring), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

129. *Brisson*, 955 P.2d at 888-91.

130. *Id.* at 890 (following the reasoning in *Baldasar*, 446 U.S. at 227-28 (Marshall, J., concurring), *overruled by* Nichols v. United States, 511 U.S. 738 (1994)).

131. *Id.* at 229 n.2.

> The volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result. . . . The misdemeanor trial is charac-

According to United States Supreme Court decisions, an uncounseled misdemeanor conviction is not sufficiently reliable to support actual imprisonment.[132] Should it, then, be sufficiently reliable to justify additional jail time imposed under an enhancement statute?[133]

The Nature of Enhancement, Recidivist, and Habitual Criminal Statutes

However, the above line of argument misapprehends the nature of enhancement statutes. Sentence-enhancement statutes have been upheld by the United States Supreme Court against a variety of constitutional challenges, including double jeopardy, due process, equal protection, ex post facto laws, privileges and immunities, and cruel and unusual punishment claims.[134] Recidivist laws, commonplace in Wyoming and the entire criminal justice system, do not alter or enlarge a prior sentence.[135] In fact, the United States Supreme Court consistently sustains repeat-offender laws as penalizing only the last offense committed by the defendant.[136] The Court has recognized the states' legitimate interest in deterring habitual criminals by singling them out for additional punishment through recidivist statutes.[137] An increased prison sentence is not an enlargement of the sentence for the original offense. The defendant is sentenced to imprisonment for his second conviction only and not re-sentenced for the first conviction.[138] If enhancement statutes did impose additional punishments, such sentencing would be a case of double jeopardy, and the courts would have an entirely different dilemma on their hands.[139]

The court in *Brisson* essentially holds that, although Brisson's prior convictions were valid under the guidelines of the United States Supreme Court (as the defendant was not previously incarcerated), the state cannot rely upon them for enhancement purposes following a subsequent valid conviction.[140] Brisson pled guilty to two similar charges within the ten years

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> terized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush. . . . There is evidence of the prejudice which results to misdemeanor defendants from this "assembly-line justice."

Id. (quoting Argersinger v. Hamlin, 407 U.S. 25, 34-36 (1972)).

132. *See* Scott v. Illinois, 440 U.S. 367 (1979) (Blackmun, J., dissenting).

133. Nichols v. United States, 511 U.S. 738, 757 (1994).

134. Millar, *supra* note 80, at 1193-94.

135. *Id.*

136. *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting), *overruled by* Nichols v. United States, 511 U.S. 738 (1994); Oyler v. Boles, 368 U.S. 448, 451 (1962); Moore v. Missouri, 159 U.S. 673, 677 (1895).

137. Millar, *supra* note 80, at 1194.

138. *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

139. *Id.* at 227 (Marshall, J., concurring).

140. *See* Brisson v. State, 955 P.2d 888 (Wyo. 1998). *See also Baldasar*, 446 U.S. at 231 (Powell, J.,

prior to his current charge for spousal battery.[141] Surely, "it must be constitutionally permissible to consider prior uncounseled misdemeanor convictions based on the same conduct where the previous conduct was proven beyond a reasonable doubt"[142] because due process requirements were fulfilled in the prior criminal proceedings.

In *Brisson*, the court seems to contradict the prior Wyoming decision in *Green v. State* regarding the habitual criminal statute, which held, "[t]he statute does not require that a crime be previously committed, only that there be previous convictions."[143] If the statute can apply to a crime occurring *after* the one for which the defendant is being sentenced as an habitual criminal, the *Brisson* court takes a drastically different stance by requiring *prior* representation by counsel. The court relaxes constitutional requirements with regard to the former standard, but then inconsistently tightens the "constitutional belt" with the latter.

The Consequences of Brisson v. State

In addition to these apparent and confusing contradictions in Wyoming decisions, *Brisson* will have direct, specific consequences for Wyoming practitioners.

1. The Effects on Criminal Law

The *Brisson* court potentially altered Wyoming's approach not only to enhancement statutes but to criminal law as a whole by analyzing the specific language of the applicable Wyoming statute. Based on its definition of "practical possibility," the court held that for any crime in which incarceration is "capable of occurring"[144] as penalization, regardless of whether or not it does occur, counsel must be appointed for indigent defendants.[145] Consider the logical results: for all cases in which imprisonment is among the possible punishments, courts in Wyoming shall mandate appointment of counsel, regardless of enhancement or recidivism issues. Without this precaution or a valid waiver of counsel, courts risk having their decisions invalidated. Hence, the *Brisson* implications will reach far beyond the enhancement statute controversy at hand. *Brisson* suggests that, in Wyoming, virtually all criminal cases now require the appointment of counsel to maintain their

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dissenting), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

141. *Brisson*, 955 P.2d at 892.

142. Nichols, 511 U.S. at 748.

143. Green v. State, 784 P.2d 1360, 1365 (Wyo. 1989). In *Green*, the defendant was convicted as an habitual criminal based on the prior conviction of a crime that actually occurred subsequent to the one for which he received habitual criminal status. *Id.*

144. *Brisson*, 955 P.2d at 891.

145. *Id.* at 891.

legitimacy. Thus, to ensure conviction validity and to allow for effective application of Wyoming recidivist statutes, prosecutors and judges now must demand counsel for defendants—misdemeanor or felony, guilty or not guilty plea alike.

Additionally, the ruling will likely incite further litigation from defendants claiming that uncounseled misdemeanor convictions cannot be used to impeach a defendant's testimony or that judges should ignore such convictions in sentencing determination.[146] After *Brisson*, Wyoming practicing attorneys can rely on neither Wyoming nor United States Supreme Court precedent for help, as the Wyoming Supreme Court drastically altered the former and rejected the latter. Furthermore, the complications inherent in *Brisson* have far-reaching impact in several other arenas. Added complexities include: the shifting burden of proof and presumption of regularity, issues of time and expense, the potential conflict with the right to a speedy trial, and the traditional understanding of the sentencing process.

2. The Effects on the Burden of Proof

With regard to the burden of proof and presumption of regularity,[147] *Brisson* incites confusion as to where the burden lies. Does the defendant have the burden of proving his constitutional right to counsel was breached, or does the state bear the burden of proving the opposite?[148] This burden may be difficult to bear either way, because a large number of misdemeanor convictions take place in municipal or county courts, which are not courts of record. Without a drastic change in procedures of these courts, there is no way to memorialize any form of record.[149]

If the burden lies with the defendant, the defense counsel must determine in a presentence report on prior criminal convictions whether or not any of those convictions was uncounseled. Such a requirement places the burden on the defendant to make a good faith challenge, anticipating the use of a prior criminal conviction in sentencing.[150] Many courts and commentators alike feel the defendant is the one best situated to know, and often the only one situated to know, whether his Sixth Amendment right was infringed upon in earlier proceedings; therefore, it is appropriate to presume that the right to counsel has been observed unless the defendant contends

146. Baldasar v. Illinois, 446 U.S. 222, 235 (1980) (Powell, J., dissenting), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

147. The presumption of regularity refers to the presumption that attends any judgment that has not been appealed from, as having fulfilled the Defendant's due process rights in the "usual" manner. *See* State v. Triptow, 770 P.2d 146, 148 (Utah 1989).

148. *Id.*

149. *Nichols*, 511 U.S. at 748.

150. State v. Sinagoga, 918 P.2d 228, 242 (Haw. 1996) (Acoba, J., dissenting).

the contrary.[151] However, courts indicate that lay persons are generally unaware of the nature and import of court procedures.[152] It would be ironic to place such a heavy burden on a defendant who may be vaguely aware of the violation but ignorant of his rights or abilities in remedying it.[153]

A contrary possibility requires the state to prove the defendant was represented by counsel when previously convicted.[154] This argument also incorporates a court's view of the presumption of regularity.[155] Accordingly, courts have three different options. Some courts are of the opinion that after the state proves that the defendant has a prior conviction, the presumption of regularity requires that the defendant prove that "there was an actual lack of representation without a knowing waiver of counsel in the earlier proceeding."[156] A second group of courts takes the position frequently argued by defendants, which is "to effectively disregard the presumption of regularity and require as an initial matter that the state affirmatively prove" that the defendant was either represented by counsel or that he knowingly waived counsel.[157] A third group of courts takes a middle position; "[t]hey acknowledge the presumption of regularity but allow the defendant to rebut that presumption merely by raising the issue and producing some evidence that counsel was not present and not waived."[158] Once the defendant presents some evidence, the state must then affirmatively prove either representation or waiver by at least a preponderance of the evidence.[159]

Prior persuasive precedent establishes that Wyoming courts place the burden of proving the unconstitutionality of a prior conviction with the defendant.[160] In *United States v. Windle*, the Tenth Circuit Court of Appeals firmly established that the defendant bears the burden by stating that "[o]nce the prosecution establishes the existence of a conviction, the defendant must prove by a preponderance of the evidence that the conviction was constitutionally infirm."[161] In so stating, the court determined the defendant carried

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151. *Triptow*, 770 P.2d at 149; *See also Sinagoga*, 918 P.2d 228; State v. Branch, 743 P.2d 1187 (Utah 1987).

152. *See Triptow*, 770 P.2d 146; *Sinagoga*, 918 P.2d 228.

153. *Sinagoga*, 918 P.2d at 244 (Acoba, J., dissenting).

154. *Triptow*, 770 P. 2d at 148.

155. *Id. See also supra* note 142.

156. *Triptow*, 770 P. 2d at 148. *See also* Croft v. State, 513 So.2d 759, 761 (Fla. Dist. Ct. App. 1987); State v. Laurick, 537 A.2d 792 (N.J. 1987); *In re* Kean, 520 A.2d 1271, 1278 (R.I. 1987).

157. *Triptow*, 770 P. 2d at 148. *See also* State v. Morishige, 652 P.2d 1119, 1129 (Haw. 1982); State v. Hicks, 714 P.2d 105, 113-15 (Kan. 1986); State v. Elling, 463 N.E.2d 668 (Ohio 1983).

158. *Triptow*, 770 P.2d at 148. *See also* Smith v. State, 477 N.E.2d 857, 865 (Ind. 1985); Middleton v. State, 506 A.2d 1191, 1200 (Md. 1985); State v. Smith, 312 S.E.2d 222, 227 (N.C. 1984).

159. *Triptow*, 770 P.2d at 148.

160. Johnston v. State, 829 P.2d 1179, 1180 (Wyo. 1992) (citing Evans v. State, 655 P.2d 1214 (Wyo. 1982)).

161. United States v. Windle, 74 F.3d 997, 1001 (10th Cir. 1996). Although *Windle* is not binding precedent as a Tenth Circuit case, it serves as persuasive precedent and an example of a possible Wyo-

the responsibility of alleging any inaccuracies in the presentence report.[162] Furthermore, the court allowed the use of Mr. Windle's prior uncounseled convictions to enhance his sentence, interpreting *Nichols* to mean, "'prior uncounseled misdemeanor convictions that are themselves constitutional convictions may be used to enhance punishment for subsequent convictions.'"[163]

Brisson muddies the waters in terms of shifting the burden of proof, as well as Wyoming's stance on the presumption of regularity. Accepting the burden of proof is nothing new to defense counsel, as they already carry the burden of proving all affirmative defenses. The concept that the defendant best knows when his rights have been violated and must, therefore, bear the burden of so proving when violations occur seems inherently unfair, however. As Judge Acoba stated in his dissent in *State v. Sinagoga*: "I question the fairness of requiring a defendant, in effect, to disprove the State's sentencing case."[164] The *Brisson* court's attempt at greater protection for Wyoming residents may result in abolishing the age-old adage "innocent until proven guilty" by requiring the defendant to effectively prove he lacked counsel.

3. The Effects on Wyoming Courts and Other Resources

Another consequence and dilemma caused by *Brisson* calls into play the very real problem of overburdened courts. Although misdemeanors often are resolved in courts of no record,[165] the *Brisson* court essentially held that all uncounseled convictions decided in these courts are invalid and void for any future use. While true that inexcusable delay in the enforcement of criminal law is one of the "grave evils of our time,"[166] such delay seems to go hand-in-hand with the mandatory appointment of counsel to every charge, felony and misdemeanor alike–the very rule *Brisson* promotes. On one hand, the prompt disposition of criminal cases is to be commended and encouraged. The volume of misdemeanor cases is far greater in number than felony prosecutions, creating an obsession in courts for speedy results.[167] On

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ming stance on the burden of proof.

162. *Id.*

163. *Id.* (quoting United States v. Lockhart, 37 F.3d 1451, 1454 (10th Cir. 1994)).

164. State v. Sinagoga, 918 P.2d 228, 243 (Haw. 1996) (Acoba, J., dissenting).

165. Nichols v. United States, 511 U.S. 738, 748 (1994).

166. Powell v. Alabama, 287 U.S. 45, 59 (1932).

167. 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. . . . Exclusive of traffic offenses, however, it is estimated that there are annually between four and five million court cases involving misdemeanors, [and] there are probably between 40.8 and 50 million traffic offenses each year.

Id. (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force

the other hand, the United States Constitution must be duly upheld and a defendant must not be stripped of his right to counsel, even in attempting prompt disposition.[168] Indeed, misdemeanants represented by counsel are five times as likely to emerge from court with all charges dismissed, as are defendants who face similar charges without lawyers.[169] Despite the need for balance, the *Brisson* decision will have a huge impact on these "speedy dispositions," possibly even to the point of infringing upon the equally substantial Sixth Amendment right to a speedy trial.

Brisson creates not only a need for more prosecutorial resources but also employment opportunities for defense counsel. This suggests problems with practical aspects: creating adequate desire among attorneys, finding sufficient monetary resources to compensate for representation, and implementing a recruiting procedure or alternative method to ensure representation. *Brisson* will cause an increase in court-appointed counsel and will also require better court and law enforcement facilities. These additional expenses will be necessary to secure information about the accused as it bears on the possibility of incarceration.[170] Hopefully Wyoming citizens will readily support such increased expenses for criminal convictions. Perhaps the most serious potential consequence of the *Brisson* holding for Wyoming will be on Wyoming taxpayers.[171] As the numbers of counsel and the demand for better facilities rise, the public will pay twice—first for the defense challenge and second, for the verification of whether or not prior convictions were counseled.[172]

4. The Effects on the Range of Punishments

A further consequence of *Brisson* is the abrogation of the range of punishments due criminals based on the availability of counsel. Because uncounseled misdemeanors cannot be used to enhance future sentences that lead to imprisonment, the trial judge and the prosecutor will need to engage in a predictive evaluation of each case to determine whether there is a sig-

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Report: The Courts 55, The Challenge of Crime in a Free Society, 128 (1967)). As of July 1, 1996, the Federal Bureau of Investigation did not estimate the number of misdemeanors charged per year in the United Sates due to their overwhelming magnitude, diverse classification schemes amongst states, and inconsistencies in the state-by-state calculations. However, based on a United States population of over 265 million, estimated annual felonies totaled close to 13.5 million for 1996. The FBI further dissected total felonies into the following approximations: 19,645 murders; 95,769 forcible rapes; 537,050 robberies; 1,029,814 aggravated assaults; 2,501,524 burglaries; 7,894,620 larceny-thefts; and 1,395,192 motor vehicle thefts. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1996 63 (1997).

168. *Argersinger*, 407 U.S. at 34.

169. *Id.* at 36.

170. *Id.* at 43 (Burger, J., concurring).

171. *Id.* at 58 (Powell, J., concurring).

172. State v. Sinagoga, 918 P.2d 228, 242 (Haw. 1996) (Acoba, J., dissenting).

nificant likelihood that the accused will be a repeat offender and require imprisonment at some future date.[173] Thus, counsel and courts now need to foresee the future and so appoint counsel not only when imprisonment is currently possible but also when it may be possible punishment upon repeat future offenses. Such an ultimatum takes crime prevention and control to unheard of levels of absurdity.

5. The Effects on the Sentencing Process

As a final complication, the *Brisson* approach is at war with the sentencing process. Reliance on a prior conviction, both counseled as well as uncounseled, is consistent with the traditional understanding of the sentencing process.[174] One important factor in determining what sentence to impose, as recognized by state recidivism statutes and the criminal history component of the sentencing guidelines, is a defendant's prior convictions.[175] The United States Sentencing Guidelines themselves allow for the consideration of prior *uncounseled* convictions: "[p]rior sentences . . . are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed."[176] In fact, if the listed criminal history categories do not accurately reflect the seriousness of a defendant's past conduct, the court may consider departing from otherwise applicable guidelines in imposing an appropriate sentence.[177]

The current sentencing system in vogue in Wyoming vests a substantial degree of discretion in the trial court. The trial judge must weigh the severity of each individual's involvement in the crime, his or her criminal history, and the defendant's needs with respect to rehabilitation.[178] Rule 32 of the Wyoming Rules of Criminal Procedure states that "[t]he report of the presentence investigation shall contain . . . information about the history and characteristics of the defendant, including prior criminal record."[179] Thus, Rule 32(a) specifically permits information about the defendant's prior criminal record and his characteristics to be considered by the trial court before imposing sentence. The trial court, in exercising its discretion, may consider a broad range of reports and information in evaluating the defen-

173. *Argersinger*, 407 U.S. at 42 (Burger, J., concurring). "The option of not imposing a jail sentence on an uncounseled misdemeanant . . . no longer exists unless the court is willing prospectively to preclude enhancement of future convictions." Baldasar v. Illinois, 446 U.S. 222, 231 (1980) (Powell, J., dissenting), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

174. *Nichols*, 511 U.S. at 747.

175. *Id.*

176. U. S. SENTENCING GUIDELINES MANUAL, § 4A1.2, cmt. (backg'd) (Nov. 1995).

177. *Id.* § 4A1.3, p.s.

178. Duffy v. State, 837 P.2d 1047, 1053 (Wyo. 1992).

179. W. R. CRIM. P. 32 (a)(2)(A).

dant's character.[180]

Nationwide, as well as in Wyoming, the trial court is traditionally permitted to go beyond the record and consider the defendant's past conduct, including evidence of crimes for which a defendant was charged but not convicted, in order to impose an appropriate sentence.[181] Such evidence of prior criminal activity is "highly relevant to the sentencing decision" and may be considered by the court despite the fact that no prosecution or conviction resulted.[182] Indeed, even a defendant's juvenile record, as well as his adult record, both of which contain convictions and dismissed charges, provide the court with evidence of a pattern of criminal behavior which, in turn, is an index of the defendant's character—a critical factor in sentencing when determining the potential for recidivism.[183] The United States Supreme Court has frequently acknowledged that the sentencing courts have discretion to consider a broad and mostly unlimited spectrum of information.[184] Yet, despite the strong evidence of the discretion of sentencing courts, the *Brisson* court seeks to curtail such discretion, albeit under the guise of allowing greater protection to its citizens, but effectively allowing greater leniency to its habitual criminals.

Advice to Wyoming Practitioners and Courts

1. For Prosecutors

In every case, before proceeding with the disposition, demand either a valid waiver or mandatory presence of defense counsel, if only to cover the possibility that this misdemeanant may eventually re-enter the courtroom as an habitual criminal. Be ready and willing to accept the burden of proving the defendant was adequately represented (or validly waived that right) in all prior convictions for any case in which you hope to implement enhancement statutes.

2. For Defense Counsel

Clear your calendars and be prepared to defend a much greater number of misdemeanors. Additionally, be open to accepting the burden of proving your client's prior convictions were obtained without valid counsel or waiver. As Wyoming law stands right now, your client can avoid enhanced sentences for any prior uncounseled misdemeanor convictions. Ask your client about the details of previous court appearances and utilize this key

180. Mehring v. State, 860 P.2d 1101, 1116 (Wyo. 1993).
181. *Id.* at 1117.
182. *Id.*
183. *Id.*
184. State v. Sinagoga, 918 P.2d 228, 238 (Haw. 1996).

decision to reduce incarceration time and "conversion" from misdemeanor to felony status

3. For Judges

Similar to prosecutors, require either a valid waiver or the presence of defense counsel in all criminal actions, felony and misdemeanor alike–do not accept so much as a guilty plea without one or the other. Additionally, if defense counsel is not present, be absolutely certain the waiver from the defendant is valid; this may mean developing a new, written waiver form to ensure adequate record keeping.

CONCLUSION

The *Brisson* court took a strong stance—not one in which it serves as an isolated activist, for several other states[185] have felt the same[186]—but a firm one, nonetheless. The court has uncategorically and undeniably stated that, without valid waiver of counsel, prior uncounseled convictions cannot be used to enhance later convictions under Wyoming recidivist statutes. For a state historically known to be as conservative, *Brisson* is an unusual approach to criminal law. The Wyoming Supreme Court essentially reversed its historical attitude of not being over-enthusiastic in protecting the right to counsel under Wyoming Constitution article 1, section 10.[187]

While the approach is a concerted divergence from precedent laid down by the United States Supreme Court allowing for the use of prior uncounseled convictions in enhancement situations, the court bases its decision on an interpretation of the plain language of Wyoming law and a grave fear of the unreliability of uncounseled convictions; the former being the justification behind the right to counsel in all Wyoming criminal charges, and the latter being the rationale behind the court's refusal to allow effective Wyoming recidivism law. However, the decision brings with it a plethora of problems, confusions, and consequences in the expansion of the "practical possibility" definition to all criminal cases regardless of recidivist statute applicability, the appropriate allocation of the burden of proof, increased

185. *See* United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991) (holding that sentence enhancement based on uncounseled misdemeanor convictions is prohibited); Lovell v. State, 678 S.W.2d 318, 320 (Ark. 1984) (holding that prior uncounseled misdemeanor convictions are barred from enhancing a term of imprisonment following a second conviction).

186. *Sinagoga*, 918 P.2d at 241. In *Sinagoga*, the Hawaiian Supreme Court decided not to follow the rationale in *Nichols* and held that a prior uncounseled misdemeanor conviction could not be used to enhance a later sentence primarily due to the unreliability of the prior conviction, the potential breach of the defendant's constitutional right to due process, and the Hawai'i court's prior decisions to afford greater protection of a defendant's right to assistance of counsel. *Id.*

187. Duffy v. State, 837 P.2d 1047, 1059 (Wyo. 1992) (Urbigkit, J., dissenting).

time and expenses associated with each case, and conflicting standards compared to sentencing guidelines.

Indeed, while all judges have the obligation to protect individual rights and uphold the Constitution, judges must not lose sight of the common good of all humankind.[188] Is this decision one that will fulfill the Court's goal of providing greater protection to its citizenry or one which will accomplish the devastating consequences associated with what may be an unexpected and unwelcome approach to criminal leniency in Wyoming? It remains to be seen.

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188. *Mehring*, 860 P.2d at 1117.