O/A 4-10-91 3-3

IN THE SUPREME COURT OF FLORIDA

29

ALBERT J. HLAD, JR.,

Petitioner,

v. CASE NO. 76,623

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Appellant's prior uncounseled misdemeanor conviction was properly used to prove one of three prior convictions for driving under the influence. This issue is not preserved for appellate review. Since the prior conviction was used to prove a substantive element of the crime of felony driving under the influence, Appellant's admissions of three prior convictions for driving under the influence proved that element. Even if the prior conviction was used as a penalty enhancer rather than proof of an element of the crime, the conviction was valid for that purpose. Hlad's sentence did not exceed the penalty for a third driving under the influence conviction. Accordingly, his sentence is not a direct consequence of the use of the prior uncounseled conviction, and therefore, is valid. Finally, Appellant does not qualify for relief because he failed to allege or prove that he was indigent at the time of his uncounseled conviction.

ARGUMENT

APPELLANT'S PRIOR UNCOUNSELED MISDEMEANOR CONVICTION WAS PROPERLY USED TO PROVE ONE OF THREE PRIOR CONVICTIONS FOR DRIVING UNDER THE INFLUENCE.

Petitioner, Albert J. Hlad, Jr. [hereinafter "Hlad"], complains that his 1978 misdemeanor conviction for driving under the influence [hereinafter "DUI"] should not have been used as one of the three DUI's needed to prove his felony DUI conviction under Florida Statutes §316.193(1), (2)(b) (Supp. 1988). His basis for this assertion is his claim that the 1978 conviction is invalid because it was uncounseled.[1] Respondent, the State of Florida [hereinafter "the state"], contends that this issue is not properly before this Court because Hlad has no right to appeal his conviction.

Near the end of his trial for felony DUI, after discussing the matter with his attorney, Hlad decided to, and did, plead guilty to felony DUI. (R 296, 300, 349-350). The law is well settled that: "A defendant may not appeal from a judgment entered upon a plea of guilty." Fla. R. App. P. 9.140(b)(1). Accordingly, this issue is not preserved for appellate review.

The state recognizes that if the subject provision of the felony DUI law is a penalty enhancement provision, as opposed to a substantive element of the crime, the state's preservation argument fails. The provision at issue provides: "Any person

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[1] Hlad first raised the instant issue in a post conviction motion. His plea to, and conviction of, felony DUI were entered on July 14, 1988. (R 298-299, 348-356). His Motion to Strike Prior Conviction was filed more than two months later, on September 20, 1988. (R 314-317).

who is convicted of a fourth or subsequent violation of subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084" [hereinafter "the conviction element"]. § 316.193(2)(b), Fla. Stat. (Supp. 1988). The state asserts that this Honorable Court has recently determined that the subject provision is an element of the crime of felony DUI, and therefore, the preservation argument is valid and dispositive of Hlad's instant appeal.

In *State v. Rodriguez*, 16 F.L.W. 32, 33 (Fla. Jan. 3, 1991), this Court held that "the existence of three or more prior DUI convictions is an essential **fact** constituting the substantive offense of felony DUI." (emphasis added). Further, that "three prior DUI convictions combine as an essential **element** of felony DUI." (emphasis added) *Id.* The conviction element requires proof of three prior convictions. § 316.193(2)(b), Fla. Stat. (Supp. 1988).

The three prior convictions were proved by Hlad's admission to same. Hlad entered his guilty plea to the crime **as charged.** (R 296, 300, 349-350). The charge included that "Hlad having been three times previously convicted of the crime of Driving Under the Influence" was guilty of felony DUI. (R 275). The fact of Hlad's guilty plea precludes his instant challenge to his guilt of felony DUI by attacking an element which he admitted by plea.

Assuming arguendo that Hlad may properly challenge the use of the 1978 conviction to prove the conviction element of the instant crime, he is not entitled to relief. The statute

requires only that the state prove Hlad was **convicted** of three prior DUIs - which would include the subject 1978 conviction. Whether Hlad has been convicted of three prior DUIs is a question of **fact**. *See State v. Rodriguez, supra*. The facts proving the prior convictions consisted of Hlad's testimony that he had been convicted of three prior DUIs, to-wit: a guilty plea to DUI entered in 1978, a DUI in 1983 and one in 1984.[2] (R 253, 255, 353). Also, that Hlad pled guilty to the instant felony DUI **as charged**, thereby admitting that he had the three requisite prior DUI convictions. The state asserts that these facts were sufficient to enable a reasonable factfinder to conclude that the conviction element had been proven.

At trial, Hlad sought to counter this evidence with testimony which he thought would show that the 1978 conviction was invalid. To that end, Hlad testified:

> Defense Attorney: Can you describe for the Court the circumstances as to how the plea came to be entered?
>
> Hlad: I went in the court at that time, and in 1978 I went in front of Judge Stone, and he told me I was being charged with DUI, how did I wished (sic) to plead, and I pleaded guilty. It was an $80 fine and court costs.
>
> Q. Was there any conversation concerning having an attorney?
>
> A. No.

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[2] During the plea colloquy, the state requested, "Can we make one thing clear? That he is pleading to the D. U. I. with three prior D. U. I.'s." (R 353). Thereafter, the court asked Hlad, "Are you pleading having had three prior convictions?" (R 353). Hlad responded, "Yes, sir." (R 353).

> Q. Was there any conversation concerning having an attorney appointed for you?
>
> A. No.
>
> Q. Was there any conversation concerning disadvantages that may occur had you proceeded without counsel on your own?
>
> A. No.
>
> Q. And you had no attorney through any of those proceedings then?
>
> A. No. He explained to me on a guilty plea to a nolo contendere it was an $80 fine, and so I figured being an $80 fine that I will go ahead and pay the $80, and court costs, and that's all there was.
>
> Q. Okay. You were not aware of your right to an attorney?
>
> A. No.

(R 253-254). It is well settled that a trier of fact may believe all or part of a witnesses' testimony, and conversely, that he may reject all or any part of it.

The state asserts that the evidence was sufficient to prove the conviction element. The trial judge was not required to believe Hlad's testimony that the conviction was uncounseled or that he was not aware that he could have an attorney. In fact, the record shows that the trial judge reasonably regarded Hlad to be a liar.[3] (See R 248, 297). As the judge pointed out, Hlad

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[3] During the course of Hlad's trial, the trial judge *sua sponte* entered an order of probable cause to believe that Hlad had committed perjury in the court's presence. (R 297). The trial judge expressed his belief that Hlad had lied throughout his trial and indicated that he considered Hlad's uncorroborated testimony at the subsequent hearings unworthy of belief. *See* R

did not raise this issue when one of his earlier DUI convictions was entered even though the sentence therefor was enhanced based on the 1978 conviction.[4] (R 259). The state asserts that the factfinder reasonably rejected Hlad's testimony regarding the uncounseled nature of his 1978 conviction.

It is well established that it is the factfinder's job to decide which testimony to believe. That decision will not be overturned unless it cannot be said that any reasonable person would have adopted the view taken by the factfinder. It is obvious from the record that the trier of fact, the judge, did not believe Hlad's testimony that he did not have, and did not know he could have, an attorney represent him at the 1978 proceeding. That determination is not reversible on appeal. See *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), *affirmed*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

Assuming arguendo that the issue is one of law as Hlad claims, rather than fact as this Court said in *Rodriguez*, the inquiry is whether Hlad's 1978 conviction is valid.[5] If it is a valid conviction, the conviction element of the felony DUI is

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248. Hlad entered a guilty plea to the perjury charge on March 1, 1989. (Appendix B at 12).

[4] Also, it is interesting to note that the trial judge asked Hlad's attorney, Stuart Hyman, to argue his case in light of State v. Caudle, 504 So.2d 419 (Fla. 5th DCA 1987). Mr. Hyman, who was Caudle's attorney on appeal, pointed out that the reason Caudle's challenge to his prior conviction failed was that he did not testify that "he did not have an attorney, and was not told that he could have an attorney. . .." (R 257). Of course, in the instant case, Hlad testified specifically to those two factors.

[5] A final judgment of conviction is presumed valid. *See* State v. Harris, 356 So.2d 315 (Fla. 1978).

proved. At the trial level, Hlad contended that his 1978 conviction was invalid because it was uncounseled, and because it was invalid, it could not be used to prove the conviction element. (R 314, 257). However, on appeal, he concedes "that he was not incarcerated for the 1978 conviction." *Hlad v. State*, 565 So.2d 762, 764 (Fla. 5th DCA 1990). Therefore, Hlad's 1978 conviction is valid. *See Scott v. Illinois*, 440 U.S. 367, 374, 99 S.Ct. 1158, 1162, 59 L.Ed.2d 383 (1979). The fact of a valid conviction proves the substantive element at issue. The state asserts that since the subject provision is an element of the crime rather than a penalty enhancer, whether the 1978 conviction is valid for purposes of sentence enhancement is irrelevant.[6]

Assuming arguendo that the issue is whether an uncounseled prior conviction can be used to **enhance** a sentence for a subsequent offense, Hlad is not entitled to relief. The Fifth District Court of Appeal sitting *en banc* carefully analyzed the relevant case law on this issue and concluded that Hlad's 1978 DUI conviction could be used because he "had no constitutional right to appointed counsel in 1978 . . .." *Hlad v. State, supra*, at 767. Therefore, even if Hlad did not have appointed counsel in 1978 and/or did not waive such counsel, his 1978 conviction for DUI is valid and may be used as one of the three requisite prior convictions. *See Id.* at 764. Case law well supports the district court's decision.

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[6] The penalty for felony DUI is a separate matter. It is governed by Florida Statutes §775.082, §775.083 or §775.084. *See* § 316.193(2)(b), Fla. Stat. (Supp. 1988).

In *Argersinger v. Hamlin*, 407 U.S. 25, 26, 92 S.Ct. 2006, 2007, 32 L.Ed.2d 530 (1972), an indigent defendant was tried and convicted of a petty offense and sentenced to jail. The Court held that the Sixth Amendment right to counsel extends to petty offenses and unless the right is waived, the accused cannot be incarcerated for the offense if he is tried without an attorney. *Id.* at 407 U.S. 38. Accordingly, Argersinger's conviction was invalid for any purpose.

Seven years later, in *Scott v. Illinois*, *supra*, the Court held that "no indigent criminal defendant" can be incarcerated "unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 440 U.S. 374. The Court adopted "actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 440 U.S. 373. Therefore, a conviction is valid even though counsel is not afforded to the defendant if the defendant is not actually incarcerated.

The following year, the Court decided *Baldasar v. Illinois*, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), *reh'g denied*, 447 U.S. 930, 100 S.Ct. 3030, 65 L.Ed.2d 1125 (1980). In *Baldasar*, the indigent defendant was prosecuted for petty theft. 446 U.S. at 224. Upon conviction, the state sought to have the penalty enhanced based on a state law providing that "[a] second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years."[7] *Id.* Baldasar had a prior uncounseled conviction for petty theft. *Id.*

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[7] Florida's felony DUI statute provides that a person convicted

On the issue of using the prior uncounseled conviction to enhance the penalty, the Court split 4-1-4. The plurality held that Baldasar's "prior conviction was not valid for all purposes. Specifically, under the rule of *Scott* and *Argersinger*, it was invalid for the purpose of depriving petitioner of his liberty." *Id.* at 446 U.S. 226. The dissenters determined that the conviction was valid under *Scott* because Baldasar was not incarcerated, and therefore, it could be used to enhance the penalty. *Id.* at 446 U.S. 1589-1592. Justice Blackmun agreed that the enhancement was unconstitutional, but only because the prior conviction was invalid for any purpose. *Id.* at 446 U.S. 1589.

Justice Blackmun stated:

> "Accordingly, I would hold that an **indigent** defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by **more** than six months' imprisonment . . . or whenever the defendant is convicted of an offense and is **actually** subjected to a term of imprisonment. . . ."

(emphasis added) *Id.* He concluded that Baldasar's prior conviction is invalid because it was punishable by more than six months incarceration. *Id.*

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of a fourth violation of the statute "**is guilty of a felony** . . ." as opposed to "may be treated **as** a felony." *See* §316.193(2)(b), Fla. Stat. (Supp. 1988). The state submits that this difference indicates that the subject provision is a substantive element of the felony DUI statute as this Court said in *Rodriguez*, while the language of the Illinois statute merely made it possible to enhance a sentence.

Under the opinion of the four dissenters, Hlad's 1978 conviction is valid under *Scott* in that no incarceration was imposed.[8] Because it is valid, it may be used to enhance Hlad's sentence. Under Justice Blackmun's opinion, Hlad's conviction is also valid, and therefore, it may be used to enhance his sentence. This is so because Hlad's 1978 conviction was not punishable by **more** than six months' incarceration and Hlad was not **actually** imprisoned.

Accordingly, Hlad's 1978 conviction is valid for purposes of enhancement of his sentence for the felony DUI under the reasoning of five of the nine members of the United States Supreme Court.[9] The Fifth District Court of Appeal's conclusion that Hlad's "1978 conviction was not "constitutionally invalid for enhancement purposes'" is based on that reasoning. 565 So.2d at 764. At least two other district courts of appeal have reached the same conclusion on this issue. *See Allen v. State*, 463 So.2d 351 (Fla. 1st DCA 1985)[reclassification to felony petit theft]; *State v. Hanney*, 571 So.2d 5 (Fla. 2d DCA 1990)["enhancement" to felony DUI]. *But see Harrell v. State*, 469 So.2d 169, 170-172 (Fla. 2d DCA 1985), *rev. denied*, 479 So.2d 118

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[8] Hlad's only penalty was to pay an $80 fine and court costs. (R 254).

[9] The state contends that *Baldasar* is inapplicable unless the subject provision is a penalty enhancement statute which converts a misdemeanor into a felony with a prison term. *See* Moore v. Jarvis, 885 F.2d 1565, 1571 n.14 (11th Cir. 1989)(quoting United States v. Peagler, 847 F.2d 756, 758-59 (11th Cir. 1988)). Of course, the state asserts that the subject provision is a substantive element of the crime of felony DUI, and therefore, *Baldasar* does not control the disposition of the instant case. *See* Appellee's answer brief, *supra*, at 2-7.

(Fla. 1985)[uncounseled misdemeanor conviction cannot be sole basis for revocation of probation and imprisonment].[10]

Further, the reasoning employed by the majority in *Hlad*, has been applied in related contexts. In *Cooper v. State*, 538 So.2d 105, 106 (Fla. 4th DCA 1989), the court held that "points from defendant's previous convictions may be used to enhance the defendant's sentence on this conviction if the defendant did not have a right to counsel in the prior proceedings." *See Hamm v. State*, 521 So.2d 354 (Fla. 2d DCA 1988). In *Leffew v. State*, 518 So.2d 1376 (Fla. 2d DCA 1988), the Second District Court of Appeal followed the *Allen* court's *Baldasar* analysis, concluding that uncounseled convictions can be used to enhance a sentence unless the defendant had a right to counsel and counsel was not provided or waived. The Fourth District Court of Appeal has also applied the "right to counsel" standard to a penalty enhancement pursuant to Florida's Habitual Offender Statute. *See Broderick v. State*, 564 So.2d 622, 623 (Fla. 4th DCA 1990).

Hlad claims that in *McKenney v. State*, 388 So.2d 1232 (Fla. 1980), this Court used the *Baldasar* rationale "to hold that, where counsel had not been waived, an uncounseled conviction to a second degree misdemeanor "cannot be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term" . . .." (Appellant's initial brief at 6-7).

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[10] The district court carefully limited its decision in *Harrell*, as follows: "Our opinion here is directed only to those cases where the state seeks to revoke probation solely on the basis of a valid conviction, and offers no other ground for revocation." 469 So.2d at 171.

The state asserts that this representation is inaccurate.[11] *McKenney* held that where counsel had been waived, the prior uncounseled conviction could be used to enhance a penalty under the habitual offender law. The *McKenney* decision does not analyze the "right to counsel" issue, nor does it prohibit the result reached by the *Hlad* court below.[12]

Assuming arguendo that the *Baldasar* plurality opinion is definitive on the instant issue, the state asserts that Hlad is not entitled to relief. It is well established that a conviction is presumed valid. *See State v. Harris*, 356 So.2d 315 (Fla. 1978). However, under the plurality opinion, a prior uncounseled conviction is not valid for enhancement purposes where an indigent defendant did not have an attorney and did not waive one. 446 U.S. at 226. The state submits that the burden

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[11] In *McKenney*, the defendant was charged with, and convicted of, the misdemeanor, "assignation." 388 So.2d at 1233. At sentencing, the trial judge declared McKenney to be a "habitual misdemeanant." *Id.* The basis of the habitual offender classification was a prior uncounseled conviction for prostitution. *Id.* The issue before this Court was whether the prior conviction could be used for that purpose.

This Court briefly referenced *Baldasar*, noting that: "The Court did not hold that all uncounseled convictions were per se invalid for purposes of imposing a sentence of imprisonment, only those which could not themselves have supported incarceration." *Id.* at 1234-1235. This Court then concluded that since McKenney had waived counsel in the prior case, that conviction could have supported incarceration. Accordingly, the prior uncounseled conviction was properly used as the basis for penalty enhancement under the habitual offender law.

[12] The state contends that *McKenney* does not bar the use of Hlad's 1978 conviction to prove a substantive element of the crime of felony DUI. However, even if the subject conviction is being used under a penalty enhancement provision, *McKenney* does not prohibit the result reached by the *Hlad* court below. *McKenney* is not an exhaustive analysis of the *Baldasar* decision; it deals with only one aspect of the issue - waiver of counsel.

to show that the presumptively valid conviction is in fact invalid for the purpose of sentence enhancement must fall on the one attacking the conviction's validity. *See Moore v. Michigan*, 355 U.S. 155, 162, 78 S.Ct. 191, 195, 2 L.Ed.2d 167 (1957); *Broderick v. State*, *supra*, at 624.

In *Broderick v. State*, *supra*, the court said that any conviction "for which the defendant did not waive his right to counsel" cannot be considered for penalty enhancement. 564 So.2d at 624. To prevent the use of the prior conviction, the defendant must show that he "had a right to counsel . . . and that he did not waive that right." *Id. See also Allen v. State*, *supra*, at 364 [defendant has burden to prove challenged conviction invalid by preponderance of the evidence; his "bald assertion" is insufficient]. In the instant case, Hlad had ample opportunity to show that he had a right to counsel, but he was unable to do so because he was not incarcerated for the prior conviction. Likewise, he failed to show that he did not waive any right to counsel that he might have had.[13] The state contends that Hlad

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[13] In his dissenting opinion, Judge Cowart states several times that Hlad gave sworn testimony that he did not waive counsel in the 1978 proceeding. *See, e.g.*, 565 So.2d at 1, 21, 31 (Cowart, J., dissenting). The state respectfully submits that this characterization of Hlad's testimony is inaccurate. Hlad had at least two opportunities to raise the instant issue below, the plea hearing and the subsequent hearing on the post-conviction motion to strike the 1978 conviction. At the plea hearing, Hlad did not testify that he did not have an attorney or that he did not waive one. (R 348 - 356). At the motion hearing, Hlad testified that he did not have an attorney, but he did **not** testify that he did not waive one. (R 252-256). Hlad was not asked if he read or signed a written waiver of counsel. Rather, his testimony was that there was no **conversation** about an attorney.

failed to carry his burden, and the presumption of validity has not been overcome.[14]

Hlad cites *State v. Troehler*, 546 So.2d 109 (Fla. 4th DCA 1989), for the proposition that the state has the burden to show that he had counsel or that he waived it. In *Troehler*, the state introduced a certified printout of Troehler's driving record, showing three prior convictions for DUI. 546 So.2d at 110. Troehler attacked the validity of one conviction, testifying that he did not have counsel. *Id.* He requested and received a continuance to gather evidence to corroborate his testimony. *Id.* Despite his extensive efforts to find record support for his claim, he was unable to do so. Thereafter, the trial judge "weighed the evidence, finding in favor of the defendant on the issue."[15] *Id.*

In *Troehler*, the district court discussed two cases on the issue of the burden of proof, *Smith v. State*, 498 So.2d 1009 (Fla. 2d DCA 1986) and *Croft v. State*, 513 So.2d 759 (Fla. 2d DCA 1987). 546 So.2d at 110. *Smith* appears to place the burden on the state

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[14] In his dissenting opinion, Judge Cowart acknowledges the presumptive validity of a conviction, however, he argues that "The issue is not whether or not the defendant's 1978 misdemeanor judgment of conviction is "valid.'" 565 So.2d at 770. He contends that the issue is whether Hlad had or waived counsel in his 1978 case. *Id.* The state disagrees and points out that the holding of the plurality opinion is that "[P]etitioner's prior conviction was not valid for all purposes . . .. [I]t was invalid for the purpose of depriving petitioner of his liberty." 446 U.S. at 226. Accordingly, validity is the question, and since the presumption is that all convictions are valid, the burden to prove that a particular conviction is invalid for a particular purpose must fall on the one attacking the conviction's validity.

[15] The trial judge enhanced Troehler's sentence pursuant to Florida Statutes § 316.193(2)(a)2.c. (1987), and sentenced him as a third offender. 546 So.2d at 110.

to show that the defendant had counsel or waived it. *Id.* In *Croft*, the court held, "'A duly entered judgment of conviction and sentence, however, is presumed valid, and a defendant attacking the validity of prior convictions has the burden of proving the alleged grounds by a preponderance of the evidence.'" *Id.*

To resolve this apparent conflict, the *Troehler* court accepted the explanation in *Price v. State*, 519 So.2d 76, 77-78 (Fla. 2d DCA 1988). In *Smith*, the defendant "had **record support** for his prima facie showing of an uncounseled prior conviction, thus shifting the burden to the state to show either, in fact, counseled, or that there had been a valid waiver of counsel." *Id.* (quoting *Price v. State*, *supra*). In *Croft*, "the defendant alleged prior uncounseled convictions, but was not able to prove that allegation." *Id.* The *Troehler* court concluded that the initial burden to show invalidity for enhancement purposes must be placed on the defendant. *Id.* at 111.

In *Troehler*, the court went on to decide that where the record does not indicate that the defendant had counsel or waived it, "there is a presumption that the defendant was denied counsel." *Id.* Since the certified driving record did not indicate that Troehler had counsel or waived it, the court held that his conviction was "void."[16] *Id.* at 111-112.

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[16] As the *Hlad* majority opinion points out, "There is no indication in *Troehler* as to whether or not the 1976 conviction resulted in incarceration. If there was no incarceration imposed for that conviction, then we would disagree with the *Troehler* result." 565 So.2d at 766.

In *Croft v. State*, *supra*, the court also noted that the records regarding the prior convictions were silent on the subject of counsel. 513 So.2d at 761. However, the district court upheld the trial court's decision to use the prior convictions.[17] *Id.* In so doing, the court reasoned:

> [T]he sentencing judge who was in a position not only to **weigh** the **sufficiency** of the evidence presented to her but also to assess the appellant's **credibility**, did not err in finding that the appellant did not meet his burden of proving the invalidity of any of the convictions by a preponderance of the evidence.

(emphasis added) *Id.*

The state asserts that Hlad has utterly failed to carry his burden to show the 1978 conviction was invalid for enhancement purposes. Hlad testified that he had been convicted of three prior DUIs, admitting them and commission of the subject felony DUI. (R 253, 255, 353). In addition to his testimony, he pled guilty to the instant crime "as charged," thereby admitting the requisite prior convictions. (R 296, 300, 349-350). The state contends that this evidence established that Hlad's 1978 conviction was valid for purposes of penalty enhancement.

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[17] The state submits that the apparent conflict in *Troehler* and *Croft* in regard to the evidentiary value of the silent record may be explained based on the presumption of correctness of a lower court's judgment. In *Troehler*, the trial judge ruled in favor of the defendant, and the state appealed. In *Croft*, the trial judge ruled in favor of the state, and the defendant appealed. The state submits that the presumption of correctness and the deference due a factfinder's weighing of the evidence accounts for the different result regarding the silent records.

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(emphasis added) *Id.*

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In *Croft*, the records were produced, but were silent regarding whether counsel had been present or waived by the defendant. The state submits that such records may be a factor to be considered in the weighing process, however, their absence does not compel a finding that the prior conviction is invalid for enhancement purposes. *See Croft v. State, supra.*

Further, where the absence of those records is due to a defendant's lengthy delay in challenging the validity of a prior conviction for enhancement purposes, the state asserts that the doctrine of laches applies to prevent the defendant from using the absence of the records to support his attack on the prior conviction. The trial court and the Fifth District Court of Appeal invoked the doctrine of laches as an alternative basis for upholding the use of the 1978 conviction for penalty enhancement. (R 260); *Hlad v. State, supra*, at 766. In applying the doctrine of laches, both courts relied on *State v. Caudle*, 504 So.2d 419, 423 (Fla. 5th DCA 1987), wherein the court held: "To allow a defendant to delay until state records or witnesses are unavailable and then seek to place an impossible burden of proof on the state is inequitable and unjust."

Without using the absence of the court records, Hlad's evidence of invalidity consists of nothing more than his bald assertion that he had no attorney. An assertion which the trial judge was not required to, and did not, credit. Hlad utterly failed to carry his burden to overcome the presumptive validity of the 1978 conviction. However, even if the presumption of validity was overcome, Hlad's guilty plea "as charged" and his

testimony admitting three prior DUI convictions were sufficient to support an enhanced penalty in this case.

Further, Hlad is not entitled to relief under the *Baldasar* plurality opinion because the sentence he actually received is authorized by statute without any consideration of the 1978 conviction. *See Baldasar v. Illinois*, *supra*, at 446 U.S. 227. Hlad was sentenced to five years probation, conditioned upon his service of 364 days in jail. (R 323-324). This sentence is within the range of Florida Statutes § 316.193(2)(a)2.c. (Supp. 1988) which sets the penalty for a third DUI conviction.[18] *See Hlad v. State*, *supra*, at 767. Accordingly, it cannot be said that Hlad's sentence "was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*." *Baldasar v. Illinois*, *supra*, at 446 U.S. 227. Thus, Hlad cannot prevail even under the plurality opinion on which he expressly relies.

Finally, even if Hlad has carried his burden to show the 1978 conviction is invalid for penalty enhancement purposes under the plurality's reasoning in *Baldasar*, he is not entitled to relief thereunder. *Baldasar* is inapplicable to Hlad's case.

In *Moore v. Jarvis*, 885 F.2d 1565 (11th Cir. 1989), the court considered a claim very similar to Hlad's instant one. Moore had been convicted for a third DUI and was sentenced to three months in jail. 885 F.2d at 1567. Her sentence had been enhanced based

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[18] The Fifth District Court of Appeal cited this as "a collateral reason for our affirmance," noting that "Hlad cannot claim that his prison term was unconstitutionally enhanced resulting in a "greater prison term." 565 So.2d at 767.

on two prior DUI convictions.[19] She had not actually received jail time on either prior conviction, and alleged that she did not "retain counsel or receive the assistance of appointed counsel" at either time. *Id.*

Moore was represented by counsel at the third proceeding, and she filed a motion in limine "to bar consideration of Moore's prior DUI convictions at sentencing." *Id.* at 1568. To support her motion, Moore testified that she had not been "represented by counsel . . . or informed of her rights as an accused person" at the prior proceedings.[20] *Id.* Moore claimed that *Baldasar* precluded the use of her prior convictions to enhance her current sentence.[21] *Id.*

In reaching its decision, the Eleventh Circuit Court of Appeals examined the "concern motivating *Baldasar* and the rationale underlying it," and concluded that the holding of *Baldasar* only applies

> with respect to defendants who were **indigent** at the time of their prior conviction(s), for only in their cases will it have been the state's failure to provide appointed counsel during the prior proceeding that precipitated the defendant's

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[19] Moore had plead nolo contendere to one in June 1982 and guilty to the other in 1985. 885 F.2d at 1567.

[20] She also testified that she had not been sworn nor brought before a judge in either of her prior cases. 885 F.2d at 1568.

[21] Moore also challenged the use of her prior convictions under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) and Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). 885 F.2d at 1568. Hlad has not done so, and therefore, any potential claim based on those cases is procedurally barred.

> incarceration for a term attributable to a conviction for which he received no representation.
>
> . . .
>
> Expressed differently, we do not read *Baldasar* to forbid predication of an enhanced term of imprisonment upon any conviction obtained in a proceeding in which the defendant did not have counsel. Instead, we read *Baldasar* to forbid only the sentencing of a defendant to an increased term of incarceration solely upon consideration of a prior conviction obtained in a proceeding for which, due to the indigence of the defendant or some misconduct of the State, counsel was **unavailable** to the defendant.

(emphasis added) *Id.* at 1572-1573.

The state asserts that this conclusion is compelled by a thorough examination of *Baldasar* and its foundation cases, *Argersinger* and *Scott*. In *Scott*, the Court held:

> [T]hat the Sixth and Fourteenth Amendments to the United States Constitution require only that no **indigent** criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

(emphasis added) 440 U.S. at 373-374.

In *Baldasar*, the plurality opinion makes it clear that its decision applies only to indigent defendants when it states:

> The dissent expresses concern that our decision will impose unacceptable economic burdens on state and local governments. *Post*, at 1592. I do not share that view. Not all misdemeanor defendants, of course, are **indigent**. . . . Where the defendant is **indigent**, counsel

> will be provided in the first trial unless the prosecution does not seek a jail term.

(emphasis added) 446 U.S. at 229 n.3. The plurality opinion also states that:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1963), held that the appointment of counsel for an **indigent** criminal defendant is "fundamental and essential to a fair trial." Therefore, the guarantee of counsel was made applicable to the States through the Fourteenth Amendment.

(emphasis added) *Id.* at 224-225. The plurality opinion continues:

> *Argersinger* rested primarily on the conclusion "that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an **indigent** defendant had been offered appointed counsel to assist in his defense," 440 U.S., at 372-373, 99 S.Ct., at 1162.

(emphasis added) 446 U.S. at 226.

The conclusion reached by the court in *Moore v. Jarvis*, *supra*, is inescapable. *Baldasar* applies only to defendants who have proven that they were indigent at the time of the prior conviction. Hlad has not alleged, much less proven, that he was indigent at the time of his 1978 conviction. In fact, the record indicates that he was not.

As Hlad conceded below, his 1978 conviction had a potential incarceration period of up to six months. *See* 565 So.2d at 764.

At the hearing on his motion to strike the 1978 conviction, Hlad testified that, "I figured being an $80 fine that I will go ahead and pay the $80, and court costs . . .." Clearly, Hlad had the funds on hand with which to pay the fine and costs. The state submits that if he had been indigent, he would have gone to jail.

Hlad has failed to carry his burden to prove that he was indigent; indeed, he has not even alleged indigency! Even the plurality opinion in *Baldasar*, on which Hlad relies, makes it clear that its holding applies only to indigent defendants. Therefore, Hlad is entitled to no relief from this Honorable Court.

CONCLUSION

Based on the arguments and authorities cited herein, the appellee respectfully requests this Honorable Court affirm the decision of the Fifth District Court of Appeal and the judgment and sentence of the trial court. Should this court find that any issues presented are not preserved for appellate review, the state requests a clear and express statement that the judgment rests on a state procedural bar. See *Harris v. Reed*, _____ U.S. _____, 109 S.Ct. 1038, _____ L.Ed.2d _____ (1989).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by hand delivery to the box of the Public Defender at the Fifth District Court of Appeal to James R. Wulchak, Attorney for Appellant, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114 on this 11th day of February, 1991.

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