IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC07-95**

GLENN KELLY,

Respondent.
_____/

AMICUS BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

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IN SUPPORT OF RESPONDENT

I PRELIMINARY STATEMENT

This brief is being filed by the Florida Association of Criminal Defense Lawyers [AFACDL@] in support of the Respondent, Glenn Kelly.

FACDL is a statewide organization representing over 1600 members, all of whom are criminal defense practitioners. FACDL has an interest in the issue before the Court as it involves a recurring issue and potentially affects numerous criminal prosecutions throughout the state. This brief is filed by leave of Court.

II SUMMARY OF THE ARGUMENT

In *Hlad v. State*, *infra*, this Court held that a trial court may use a defendant=s prior uncounseled DUI conviction to enhance that defendant=s subsequent conviction, provided the state neither imprisoned, nor could have imprisoned, the defendant for more than six months for the uncounseled conviction. In *Nichols v. United States*, *infra*, the Supreme Court held that only actual imprisonment would preclude a prior uncounseled misdemeanor conviction from being used to enhance a subsequent conviction.

Florida=s right to counsel is broader than that guaranteed under the Sixth Amendment. In Florida, there is an absolute right to counsel for a misdemeanor or a violation of chapter 316 which is punishable by imprisonment, unless the judge certifies, prior to trial, that the defendant will not be imprisoned if convicted. Thus, counsel must be provided for misdemeanors and traffic offenses unless counsel is waived. In the absence of a knowing and voluntary waiver, an uncounseled conviction is inherently unreliable. Where proof of the prior conviction is a requisite element of a felony, Florida has established a procedure to challenge the prior conviction as obtained in violation of the right to appointed counsel. If the prior conviction was uncounseled and there is not proof of a knowing

and voluntary waiver, that conviction should not be used to extend the term of imprisonment or enhance a subsequent offense. FACDL urges this Court to rule as a matter of state law, that a prior uncounseled conviction which is an essential element of a subsequent felony conviction may never be used absent proof of a valid waiver of counsel.

III ARGUMENT

ISSUE PRESENTED

CAN AN UNCOUNSELED PRIOR MISDEMEANOR CONVICTION, IN WHICH THE DEFENDANT COULD HAVE BEEN INCARCERTED FOR MORE THAN SIX MONTHS, BUT WAS NOT INCARCERATED FOR ANY PERIOD, BE USED TO ENHANCE A CURRENT CHARGE FROM A MISDEMEANOR TO A FELONY?

This case is before the Court on a certified question from the Fourth District Court of Appeal in *State v. Kelly*, 946 So.2d 1152 (Fla. 4th DCA 2006). The Court in *Kelly* held, consistent with this Court=s opinion in *Hlad v. State*, 585 So.2d 928 (Fla. 1991), that Kelly=s uncounseled DUI convictions from 1995 and 1997 could not be used to enhance his present DUI offense to a felony. However, because the *Hlad* opinion primarily relied on *Baldasar v. Illinois*, 446 U.S. 222 (1980), which was subsequently overturned by the United States Supreme Court in *Nichols v. United States*, 571 U.S. 738 (1994), the *Kelly* Court certified the issue as one of great public importance. As the District Court noted, the answer to this question depends on whether this Court adheres to *Hlad* or recedes from *Hlad* and follows *Nichols*.

In *Hlad*, this Court held that a trial court may use a defendant=s prior uncounseled DUI conviction to enhance that defendant=s subsequent conviction, if the state neither imprisoned, nor could have imprisoned, the defendant for more

than six months for the uncounseled conviction. In *Nichols*, the Supreme Court held that only actual imprisonment would preclude a prior uncounseled misdemeanor conviction from being used to enhance a subsequent conviction. The *Nichols* Court, however, in footnote 12 of its opinion, left the states free to guarantee a right to counsel for indigent defendants charged with a misdemeanor where there is no prison term imposed, if prison is a possibility. 511 U.S. at 748, n. 12.

Florida=s right to counsel is broader than that guaranteed under the federal constitution. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972)(Sixth Amendment right to counsel applies to misdemeanor and felony offenses, and no sentence involving loss of liberty can be imposed for a misdemeanor where there has been a denial of counsel), and *Scott v. Illinois*, 440 U.S. 367 (1979)(right to counsel in misdemeanor cases limited to those cases where defendant actually receives sentence of imprisonment). In Florida, there is an absolute right to counsel for a misdemeanor or a violation of chapter 316 which is punishable by imprisonment, unless the judge certifies, prior to trial, that the defendant will not be imprisoned if convicted. Section 27.51(1)(b), Fla. Stat.; Fla. R. Crim. P. 3.111; *State v.*

***Ull*, 642 So.2d 721 (Fla. 1994).**[1]

Other state courts with a broader protection than that guaranteed under the Sixth Amendment have declined to follow *Nichols*. Louisiana, for example, has ruled that an uncounseled misdemeanor DWI conviction may not serve as a predicate for enhancement for a subsequent DWI offense in the absence of a valid waiver of counsel under a state law which guarantees the right to counsel in any case in which the defendant is charged with an offense punishable by imprisonment, without regard to whether imprisonment is actually imposed. *See State v. Deville*, 879 So.2d 689 (La. 2004). In New Jersey, the state supreme court expressly declined to follow *Nichols* and barred the use of an uncounseled misdemeanor conviction, without a valid waiver of counsel, to enhance the term of incarceration for a subsequent offense. *See State v. Hrycak*, 877 A.2d 1209 (N.J. 2005). The court in *Hrycak* noted that under state law, every indigent person charged with a non-indictable offense is entitled to appointed

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[1]**Previously this Court has recognized instances where state law extends more protection to Floridians than that provided under federal law. *See generally, Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992) (noting that, A[i]n any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling@), *and Burr v. State*, 576 So.2d 278, 280 (Fla. 1991) (A[*State v.*] *Perkins*[, 349 So. 2d 161 (Fla. 1977),] rests entirely on Florida law.@).**

counsel without cost and concluded that a prior uncounseled DWI conviction of an indigent is not sufficiently reliable to permit increased jail sanctions under the state=s enhancement statute. Similarly, the courts in Alabama and Hawaii have expressly declined to adopt *Nichols*. *See*

***Terry v. State*, 719 So.2d 263 (Alabama 1997)(uncounseled felony convictions may not be used to enhance a sentence under the state=s habitual felony offender law); *State v. Sinagoga*, 918 P.2d 228 (Hawaii 1996)(court declined to follow *Nichols* and held that prior uncounseled conviction may not be used to enhance a subsequent term of imprisonment); *see also*, *State v. LeGrand*, 541 N.W.2d 380 (Neb. 1995)(under state law, defendant has right to collaterally attack an allegedly invalid prior conviction being used for sentence enhancement), *rev=d on other grounds, State v. Louthan*, 595 N.W.2d 917 (Neb. 1999).**

In *Hlad*, this Court held that a prior uncounseled DUI conviction, if valid, could be used to enhance that defendant=s subsequent conviction to a felony. This necessarily assumes a valid waiver of counsel. In the absence of a knowing and voluntary waiver, an uncounseled conviction is inherently unreliable. An uncounseled conviction, without evidence of a

knowing and voluntary waiver of counsel, is invalid. *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *State v. Beach*, 592 So.2d 237 (Fla. 1992), this Court adopted a procedure by which a defendant can challenge the use of prior uncounseled convictions which the state seeks to use to reclassify or increase the penalty for a subsequent offense. Where proof of the prior convictions is a requisite element of a felony, the procedure in *Beach* is essential to guarantee that such prior convictions are reliable and were not obtained in violation of the right to appointed counsel. Under *Nichols*, however, an uncounseled misdemeanor conviction can come back to haunt an accused by enhancing the degree of a crime or by extending the duration of imprisonment for a subsequent offense, despite the absence of a valid waiver of counsel. This is so even though the sentencing court at the time of the uncounseled conviction was not required to warn the defendant of the collateral consequences of such conviction.[2] Florida can and should accord the right to challenge an

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[2] **In her dissenting opinion in *Hlad*, Justice Barkett urged that Aconcepts of equal justice and due process prohibit enhancement of a subsequent conviction based upon a criminal conviction, by plea or otherwise, unless the defendant at the prior proceeding had the benefit of counsel and understood *all* the possible ramifications or specifically waived the right.@ *Hlad v. State*, 585 So.2d at 931 (Barkett, J., dissenting). Judges in Florida are not required to advise defendants of collateral consequences of a conviction, *State v. Partlow*, 840 So.2d 1040 (Fla. 2003), even when the defendant is not represented by counsel.**

uncounseled conviction before it is used for enhancement.

Unfortunately, DUI offenses are too frequent events, and all too often, first- and second-time offenders have pled without the benefit of counsel at arraignment, not knowing the collateral consequences of their convictions. And the consequences of a DUI conviction have increased in severity over the past decade and a half. In 1993, for example, a first conviction carried a maximum penalty of six months, a second conviction carried a maximum penalty of nine months, and a third conviction carried a maximum term of 12 months. A fourth or subsequent conviction was classified as a felony of the third degree. ' 316.193(2)(a), Fla. Stat. (1993). In 1995, the Legislature enacted a mandatory minimum term of 10 days in jail for a second conviction committed within five years of a prior DUI conviction. '316.193 (6)(b), Fla. Stat. (1995). In 1997, mandatory probation for a period not to exceed one year for a first conviction became law,[3] and a

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[3] **When probation is imposed that may lead to incarceration, counsel must be appointed. *See Alabama v. Shelton*, 535 U.S. 654 (2002). In *Shelton*, the Supreme Court held that a person is entitled to counsel, even though he received a suspended sentence and was placed on probation but not incarcerated, where the suspended sentence could lead to an actual deprivation of liberty. Shelton was charged with a misdemeanor punishable by imprisonment, fine or both. He was convicted and sentenced to a jail term of 30 days, which the court immediately suspended, placing Shelton on probation for two years. The Court answered affirmatively the question**

third or subsequent offense committed within 10 years of a prior violation required a mandatory minumum sentence of 30 days. ' 316.193(6), Fla. Stat. (1997). A third or subsequent conviction committed within 10 years of a prior conviction for a violation of Section 316 became a third degree felony in 2002, punishable by a maximum term of five years in prison. ' 316.193(3)(b), Fla. Stat. (2002).

Given the increased mandatory penalties for subsequent DUI offenses, a defendant who pled without the benefit of counsel, without a valid waiver of counsel, and without knowing and understanding the possible ramifications of a DUI conviction should not be penalized with an enhanced sentence for a subsequent conviction. At the very least, defendants who plead without the guiding hand of counsel should be warned of the collateral consequences of a misdemeanor conviction.

The ruling in *Hlad* was premised on the notion that there was no absolute right to counsel for a first DUI, which at the time carried a maximum jail term of six months. The majority, however, did not discuss the right to counsel under state law. FACDL urges this Court to rule as a matter of state law, that a

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whether Shelton was entitled to appointed counsel, as delineated in Argersinger and Scott.

prior uncounseled conviction which is an essential element of a subsequent felony conviction may not be used absent proof of a valid waiver of counsel. This Court should, therefore, affirm the decision of the Court below, adhere to its ruling in *Hlad*, and hold that a defendant=s uncounseled conviction, absent a valid waiver of counsel, cannot be used to enhance a sentence for a subsequent offense.

IV CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, FACDL respectfully requests that this Court affirm the District Court=s decision in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amicus Brief has been furnished by U.S. Mail to Mitchell Egber, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and to Frank A. Maister, Esq., 315 Southeast 7th Street, Suite 302, Fort Lauderdale, FL 33301 and Garrett Elsinger, Esq. 633 Southeast 3rd Ave., Suite 4F, Fort Lauderdale, FL 33301, on this 18th day of June, 2007.

CERTIFICATE OF COMPLIANCE

Pursuant to the Florida Supreme Court=s Administrative Order dated June 18, 2007, this brief has been printed in Courier New (12 point) proportionately spaced.

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PAULA S. SAUNDERS