IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC 07-95

STATE OF FLORIDA,

(*L. T. Case No.: 4D06-1039*)

Petitioner,

vs.

GLENN KELLY,

Respondent.

_____/

ON APPEAL FROM FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution and Respondent was the Defendant in the trial court, the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except that Petitioner may also be referred to as the State and Respondent as the Defendant.

The following symbols will be used:

R= Record

T=Transcript

STATEMENT OF THE CASE AND FACTS

On or about January 18, 2003, the Defendant, GLENN KELLY, was arrested for the offense of Driving Under the Influence of Alcohol. [R. 1] On or about February 14, 2003, the State filed an Information in County Court charging the Defendant with one Count of Driving Under the Influence of Alcohol. [R. 152]

A year later, the State entered a nolle prosse on the misdemeanor case and on April 26, 2004, refiled in Circuit Court alleging a Felony DUI. [R. 4, 152]

The Felony Driving Under the Influence count alleged that the defendant had been thrice previously convicted of Driving Under the Influence of Alcohol; on October 27, 1987, on March 2, 1995, and on September 18, 1997, all in Broward County, Florida. [R. 4]

On October 21, 2005, the Defendant filed a Motion to Dismiss for Lack of Jurisdiction of the Circuit Court, arguing that his 1995 and 1997 convictions for DUI could not be used to enhance the pending DUI charge to a felony. Attached to the Motion was an affidavit, executed by the Defendant establishing that at the time he pled to those two DUIs, the charges were punishable by more than six months imprisonment, he was

indigent, counsel was not appointed and he did not validly waive his right to counsel. [R. 152-157]

An evidentiary hearing was held on February 24, 2006, at which time it was established that at an arraignment on March 2, 1995, the Defendant pled no contest in Broward County Court to a charge of Driving Under the Influence of Alcohol. [T. 21] This was his second conviction for DUI and thus this charge was punishable by more than six months imprisonment. The Defendant was indigent at the time of the plea, counsel was not appointed and the defendant did not validly waive his right to counsel. The Defendant signed a plea form which incorrectly advised him that he was entitled to a court appointed attorney if he could not afford one **and** if the Judge is considering a jail sentence on this charge. (*emphasis added*) [T. 24]

It was also established that at his arraignment on September 18, 1997, the Defendant pled no contest in Broward County Court to a charge of Driving Under the Influence of Alcohol. This was his third conviction for DUI and thus this charge was punishable by more than six months imprisonment. The Defendant was indigent at the time of the plea, counsel was not appointed and the defendant did not validly waive his right to counsel. The Defendant again signed a plea form which again incorrectly

advised him that he was entitled to a court appointed attorney if he could not afford one **and** if the Judge is considering a jail sentence on this charge. (*emphasis added)* [T. 26] He had received a similar admonition in 1987 when he pled to his first DUI uncounselled and at arraignment. [T. 29] On February 24, 2006, after hearing argument of counsel and reviewing the case law submitted, [T. 41] the trial court entered a written order granting the Defendant's Motion to Dismiss. [R. 181] The State appealed.

On appeal, the Fourth District affirmed based on this Court's decisions in Hlad v. State, 585 So.2d 928, (Fla. 1991) and State v. Beach, 592 So.2d 237 (Fla. 1992), but did note that those decisions had relied in large part upon the United States Supreme Court's decision in Baldasar v. Illinois, 446 U.S. 222 (1980). The Fourth District recognized that Baldasar was overruled by the United States Supreme Court in Nichols v. United States, 511 U.S. 738, 114 S. Ct. 1921 (1994), but that Nichols explicitly left the states free to guarantee a right to counsel for indigent defendants charged with misdemeanors who are not imprisoned, and held that the trial court was correct to follow Hlad. Accordingly, the Fourth District affirmed the trial court's ruling granting the Defendant's Motion to Dismiss, and certified the issue to this Court.

SUMMARY OF THE ARGUMENT

The certified question must be answered in the negative. Florida has granted to its citizens greater protections under its Constitution and by statute than the United States does under the Sixth Amendment. Florida cases recognize a distinct guarantee in the Florida Constitution of appointed counsel under certain circumstances. Florida has decided based on the Constitution and public policy that counsel should be available for all indigent defendants charged with misdemeanors.

ARGUMENT

THE QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL MUST BE ANSWERED IN THE NEGATIVE. UNDER ESTABLISHED FLORIDA LAW AN UNCOUSELED PRIOR CONVICTION IN WHICH THE DEFENDANT COULD HAVE BEEN INCARCERATED FOR MORE THAN SIX MONTHS, BUT WAS NOT INCARCERATED FOR ANY PERIOD, CANNOT BE USED TO ENHANCE A CURRENT CHARGE FROM A MISDEMEANOR TO A FELONY

In relevant part, Article I, Section 16 of the Florida Constitution, entitled "Rights of accused and of victims," grants to the citizens of Florida the right to counsel in all criminal prosecutions.

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed . . .

Furthermore, in Florida Rule of Criminal Procedure 3.111(b)(1), the legislature has mandated that,

> "Counsel *shall* be provided to indigent persons in *all* prosecutions for offenses punishable by incarceration including appeals from the conviction thereof. In the discretion of the court, counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor or violation of a municipal ordinance if the judge, at least 15 days prior to trial, files in the cause a written order of no incarceration certifying that the defendant will not be incarcerated in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation

> revocation. This 15-day requirement may be waived by the defendant or defense counsel." (*emphasis added*).

And in Florida Rule of Criminal Procedure 3.160(e) the legislature has provided that,

> "**(e) Defendant Not Represented by Counsel.** Prior to arraignment of any person charged with the commission of a crime, if he or she is not represented by counsel, the court *shall* advise the person of the right to counsel and, if he or she is financially unable to obtain counsel, of the right to be assigned court-appointed counsel to represent him or her at the arraignment and at all subsequent proceedings. The person shall execute an affidavit that he or she is unable financially or otherwise to obtain counsel, and if the court shall determine the reason to be true, the court *shall* appoint counsel to represent the person. (*emphasis added*).
>
> If the defendant, however, understandingly waives representation by counsel, he or she shall execute a written waiver of such representation, which shall be filed in the case. If counsel is appointed, a reasonable time shall be accorded to counsel before the defendant shall be required to plead to the indictment or information on which he or she is to be arraigned or tried, or otherwise to proceed further.

Pursuant to these statutes, the appointment of counsel is a compulsory act in all misdemeanor cases, an act which the trial court must perform and which can only be waived in a misdemeanor case upon the filing of either a written certification by the Judge that the Defendant shall never be incarcerated in the case, or if after a thorough colloquy by the Court and a finding that the Defendant understands his rights, the Defendant executes a written waiver of his rights. *See, e.g.* Perry v. State,

900 So. 2d 755 (Fla. 4th DCA 2005); Perriello v. State, 684 So.2d 258, 260 (Fla. 4th DCA 1996) "the language of rule 3.172(c) is mandatory. The rule does not permit a written plea agreement to substitute for an on-the-record plea colloquy."

Obviously, a waiver form which misinforms a criminal defendant of his right to counsel, cannot provide the basis for an understanding waiver of that right.

Finally, Florida Statute Section 27.51 provides that:

> (1) The public defender shall represent, without additional compensation, any person determined to be indigent under s. 27.52 and:
> (a) Under arrest for, or charged with, a felony;
> (b) Under arrest for, or charged with:
> 1. A misdemeanor authorized for prosecution by the state attorney;
> 2. A violation of chapter 316 punishable by imprisonment;
> 3. Criminal contempt; or
> 4. A violation of a special law or county or municipal ordinance ancillary to a state charge, or if not ancillary to a state charge, only if the public defender contracts with the county or municipality to provide representation pursuant to ss. 27.54 and 125.69.
> The public defender shall not provide representation pursuant to this paragraph if the court, prior to trial, files in the cause an order of no imprisonment as provided in s. 27.512.

Interestingly, and perhaps in acknowledgement of the particular complexity of DUI cases, section 27.51 specifically mandates that the

Public Defender shall represent persons facing imprisonment under chapter 316, Florida Statutes.

In Kirby v. State, 765 So. 2d 723 (Fla. 1st DCA 1999), *rev granted* in State v. Kirby, 761 So. 2d 332 (Fla. Feb. 11, 2000), *rev. denied* by State v. Kirby, 767 So. 2d 461 (Fla. June 21, 2000), the Defendant appealed his felony conviction for Driving Under the Influence. He filed a Motion to Dismiss in the Circuit Court, accompanied by an Affidavit that asserted that his 1982 misdemeanor conviction met the criteria enunciated in State v. Beach, 592 So.2d 237 (Fla. 1992). See Kirby at 724.

In Kirby, the First District considered Beach's continued viability after the United States Supreme Court's decision in Nichols v. United States, 511 U.S. 738, 114 S. Ct. 1921 (1994). Id. at 723. In Kirby, the State contended that Kirby's allegation that the offense in question was punishable by more than six (6) months of imprisonment was insufficient, and that actual incarceration must be imposed to meet the appropriate criteria.

The Kirby Court agreed with the State's premise that Nichols expressly overruled Baldasar v. Illinois, 446 U.S. 222 (1980) to remove "any Federal constitutional impediment to using Mr. Kirby's 1982 conviction as a predicate for the conviction under review." Id. at 724. The

Kirby Court pointed out, however, that Nichols made it clear that, "States may decide based on their own constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors," Nichols at 748, n. 12, and went on to elucidate that,

> cases recognize a distinct guarantee in the Florida Constitution of appointed counsel under certain circumstances. *See* Traylor v. State, 596 So.2d 957, 967 (Fla.1992) ("In all criminal prosecutions, the defendant may choose to be heard either by himself or through counsel.") (paraphrasing article 1, section 16 of the Florida Constitution); State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984).

Id. at 725.

Ultimately the Kirby Court held that, "we do not read the decision in Nichols as authority to disregard our own Supreme Court's decision in Beach" but did certify the following question to this Court:

> DOES STATE V. BEACH, 592 So.2d 237 (Fla. 1992), ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, SECTION 27.51 FLORIDA STATUTES (1997), FLORIDA RULE OF CRIMINAL PROCEDURE 3.111, OR ANY COMBINATION THEREOF PRECLUDE USING UNCOUNSELED CONVICTIONS AS PREDICATES FOR A FELONY CONVICTION EVEN THOUGH THE UNCOUNSELED CONVICTION DID NOT RESULT IN INCARCERATION AT THAT TIME?

This Court initially accepted review of Kirby but then subsequently denied review, letting stand the holding in Kirby that Florida Courts were not free to disregard Beach and Hlad, even after Nichols.

Respondent reiterates the Kirby Court's analysis that individual States confer greater protection in regards to these issues in their State Constitutions than those contained in the Federal Constitution and that Florida's Constitution protects those who meet the Beach criteria regardless of the issue of actual incarceration. Nichols itself acknowledged that "many, if not a majority, of States guarantee the right to counsel whenever imprisonment is authorized by Statute, rather than [only when] actually imposed." Nichols at 748.

The issue as to when an indigent accused may be convicted of a criminal offense without counsel was revisited when the United States Supreme Court decided Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764 (2002).

> After representing himself at a bench trial in the District Court of Etowah County, Alabama, Shelton was convicted of third-degree assault, a class A misdemeanor carrying a maximum punishment of one year imprisonment and a $2,000 fine, Ala.Code §§ 13A-6-22, 13A-5-7(a)(1), 13A-5-12(a)(1) (1994). He invoked his right to a new trial before a jury in Circuit Court, Ala.Code § 12-12-71 (1995), where he again appeared without a lawyer and was again convicted. The court repeatedly warned Shelton about the problems self-representation entailed, see App. 9, but at no time offered him assistance of counsel at state expense.
>
> The Circuit Court sentenced Shelton to serve 30 days in the county prison. As authorized by Alabama law, however, Ala.Code § 15-22-50 (1995), the court suspended that sentence and placed Shelton on two years' unsupervised probation, conditioned on his payment of

court costs, a $500 fine, reparations of $25, and restitution in the amount of $516.69.

Justice Ginsburg, writing for the majority in Shelton noted that the particular question the Court had decided in Nichols was:

> whether the Sixth Amendment barred consideration of a defendant's prior uncounseled misdemeanor conviction in determining his sentence for a subsequent felony offense. 511 U.S., at 740, 114 S.Ct. 1921. Nichols pleaded guilty to federal felony drug charges. Several years earlier, unrepresented by counsel, he was fined but not incarcerated for the state misdemeanor of driving under the influence (DUI). Including the DUI conviction in the federal Sentencing Guidelines calculation allowed the trial court to impose a sentence for the felony drug conviction "25 months longer than if the misdemeanor conviction had not been considered." *Id.,* at 741, 114 S.Ct. 1921. We upheld this result, concluding that "an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."

Justice Ginsburg continued that:

> *Nichols* is further distinguishable for the related reason that the Court there applied a "less exacting" standard "consistent with the traditional understanding of the sentencing process." 511 U.S., at 747, 114 S.Ct. 1921. Once guilt has been established, we noted in *Nichols,* sentencing courts may take into account not only "a defendant's prior convictions, but ... also [his] past criminal behavior, even if no conviction resulted from that behavior." *Ibid.* Thus, in accord with due process, Nichols "could have been sentenced more severely based simply on *evidence* of the underlying conduct that gave rise" to his previous conviction, *id.,* at 748, 114 S.Ct. 1921 (emphasis added), even if he had never been charged with that conduct, *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), and even if he had been acquitted of the misdemeanor with the aid of appointed counsel, *United States v. Watts,* 519 U.S. 148, 157, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) *(per curiam)*

> That relaxed standard has no application in this case, where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to "the guiding hand of counsel," Argersinger, 407 U.S., at 40, 92 S.Ct. 2006 (internal quotation marks omitted).

The fact pattern which led to the result in Nichols, is therefore framed entirely as an issue of sentencing, and Federal sentencing at that. The prior uncounseled conviction at issue in Nichols did not become relevant in the case until Nichols was convicted for his current charge. At that point the sentencing Court was free to consider that conviction, just as the Court would have been free to consider uncharged or non-criminal conduct relevant in any sentencing proceeding.

In the case at bar, however, Kelly's prior uncounseled convictions become relevant at the time the instant charges are filed, by conferring jurisdiction on the Circuit Court, and turning a misdemeanor into a felony.

As this Court wrote in State v. Woodruff, 676 So. 2d 975 (Fla. 1996),

> "We reject the district court of appeal's determination that the only difference between the two offenses is the severity of punishment. Felony DUI requires proof of an additional element that misdemeanor DUI does not: the existence of three or more prior misdemeanor DUI convictions. § 316.192(2)(b), Fla.Stat. (1991) (sic); *see also State v. Rodriguez*, 575 So.2d 1262, 1264-65 (Fla.1991) . . .
>
> ***"Felony DUI is therefore a completely separate offense from misdemeanor DUI, not simply a penalty enhancement."***

Id. at 977. ***(emphasis added).***

Thus, there can be no such "relaxed standard" for the consideration of Kelly's priors as there was for consideration of the Defendant's priors in Nichols.

In the Petitioner's brief, Petitioner claims that since Nichols, the trend has been for other states to follow Nichols, however as Justice Ginsburg noted in Shelton,

> "[m]ost jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution." All but 16 States, for example, would provide counsel to a defendant in Shelton's circumstances, either because he received a substantial fine [FN7] or because state law authorized incarceration for the charged offense [FN8] or provided for a maximum prison term of one year."
>
> FN7. See N.J. Stat. Ann. § 2A:158A-5.2 (1985); *State v. Hermanns*, 278 N.J.Super. 19, 29, 650 A.2d 360, 366 (1994); N.C. Gen.Stat. § 7A-451(a)(1) (1999); Vt. Stat. Ann., Tit. 13, § 5201 (1998).
>
> FN8. See *Alexander v. Anchorage*, 490 P.2d 910, 913 (Alaska 1971) (interpreting Alaska Const., Art. I, § 11, to provide counsel when punishment may involve incarceration); *Tracy v. Municipal Court for Glendale Judicial Dist.*, 22 Cal.3d 760, 766, 150 Cal.Rptr. 785, 587 P.2d 227, 230 (1978) (Cal.Penal Code Ann. § 686 (West 1985) affords counsel to misdemeanor defendants); Del.Code Ann., Tit. 29, § 4602 (1997); D.C.Code Ann. § 11-2602 (West 2001); Haw.Rev.Stat. § 802-1 (1999); Ill. Comp. Stat., ch. 725, § 113-3 (1992); *Brunson v. State*, 182 Ind.App. 146, 149, 394 N.E.2d 229, 231 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, § 13); Ky.Rev.Stat. Ann. §§ 31.100(4)(b), 31.110(1) (West 1999); La. Const., Art. I, § 13; Mass. Rule Crim. Proc. 8 (2001); Minn. Rule Crim. Proc. 5.02(1) (2001); Neb.Rev.Stat. § 29-3902 (1995); N.Y.Crim. Proc. Law §

> 170.10(3)(c) (West 1993); Okla. Stat., Tit. 22, § 1355.6.A (West Supp.2002); Ore.Rev.Stat. Ann. § 135.050(4) (Supp.1998); Tenn. Sup.Ct. Rule 13(d)(1) (2001); Tex.Code Crim. Proc. Ann., Art. 26.04(b)(3) (Vernon Supp.2002); Va.Code Ann. §§ 19.2-159, 19.2-160 (2000); Wash.Super. Ct.Crim. Rule 3.1(a) (2002); W. Va.Code § 50-4-3 (2000); Wis. Stat. § 967.06 (1998); Wyo. Stat. Ann. § 7-6-102 (2001).

Thus, more recently, the Supreme Court of New Jersey declined to follow Nichols on State law grounds:

> To be sure, the United States Supreme Court has made it clear that federal law does not prohibit the use of a prior uncounseled conviction for enhancement of a subsequent conviction. Nichols, *supra* 511U.S at 747-48, 114 S. Ct. at 1927. Despite the Nichols holding, we continue to adhere to our position set forth in Rodriquez that an uncounseled "indigent defend[a]nt should [not] be subjected to a conviction entailing imprisonment in fact or other consequence[s] of magnitude [.] *Supra*, 58 N.J. at 295, 277 A.2d 216.

New Jersey State v. Hrycak, 184 N.J. 351, 362-63, 877 A.2d 1209 (N.J. Jul 20, 2005).

Florida Courts have addressed the scope of the right to counsel under Florida law post-Nichols and Shelton.

The defendant in Case v. State, 865 So.2d 557 (Fla. 1st DCA 2003), was charged with first time DUI carrying a possible sentence of six months in jail. The trial judge accepted the defendant's plea without signing an order of no incarceration and imposed a term of probation. Subsequently, the defendant argued he was entitled to withdraw his plea, because the trial judge did not secure a waiver of the right to counsel. In reviewing the trial

court's denial of the motion to withdraw, the circuit court held (like the State's argument at bar) that there was no need to establish a waiver because the defendant had no right to counsel since he was not sentenced to an actual jail term.

On appeal, the district court reversed, holding: "A defendant who is charged with a misdemeanor punishable by possible imprisonment is entitled to counsel unless the judge timely issues a written order guaranteeing that the defendant will never be incarcerated as a result of the conviction. *See* Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002); *see also* Fla. R.Crim. P. 3.111(a) & (b); 3.160(e)." Id. at 558.

Courts have held a criminal defense attorney's failure to object based upon the fact that his or her client's prior misdemeanor DUI convictions were uncounseled and could not be used to enhance the current DUI to a felony, if true, would constitute ineffective assistance of counsel. Andres v. State, 898 So.2d 256 (Fla. 4th DCA 2005). See also, Parson v. State, 913 So.2d 1270 (Fla. 4th DCA 2005) (Failure to investigate and advise defendant that prior convictions could not be used to enhance sentence constituted ineffective assistance of counsel).

The case at bar presents a perfect example of the reason why prior uncounseled convictions should not be used to enhance subsequent offenses. The rights waiver forms Kelly signed on all three occasions affirmatively misadvised him about his right to counsel. The plea forms state that he is entitled to court appointed counsel if he is indigent and if the Judge is considering jail in his case. He was entitled to court appointed counsel if he was indigent, regardless of whether the Judge was considering incarceration in his case.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the decision of the Fourth District Court of Appeals should be AFFIRMED and the certified question answered in the negative.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Respondent was sent by U.S. Mail, postage prepaid to Mitchell Egber, Esq, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida, 33401, this _____ day of June, 2007.

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CERTIFICATE OF TYPE SIZE AND FONT

I hereby certify that in accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d) Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the respondent hereby certifies that the foregoing brief has been prepared with 14-point Times New Roman type, a font that is not spaced proportionally.

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