IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 07-95

STATE OF FLORIDA,

Petitioner,

vs.

GLENN KELLY,

Respondent.

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts the Respondent's Statement of Facts set forth in his Answer Brief and further relies on the Statement of Facts contained in Petitioner's initial brief on the merits.

SUMMARY OF THE ARGUMENT

The certified question must be answered in the affirmative. The United States Supreme Court's decision in Nichols v. United States, 571 U.S. 738 expressly overruled Baldasar v. Illinois,446 U.S. 222 (1980) which this Court relied upon in Hlad v. State,585 So.2d 928 (Fla. 1991) and reaffirmed in State v. Beach, 592 So.2d 237 (Fla. 1992). Accordingly, this Court has already held that an uncounseled prior misdemeanor conviction wherein a defendant could have been incarcerated for up to six months, but was not incarcerated for any period, could be used to enhance a current charge from a misdemeanor to a felony. Therefore, the only question before this Court is time-oriented, and this Court should follow Nichols, in light of the affirmative rulings in Hlad and Beach, as well as recognizing the need to uphold recidivism statutes.

ARGUMENT

THE QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL MUST BE ANSWERED IN THE AFFIRMATIVE. UNDER PREVAILING FLORIDA LAW A PRIOR UNCOUNSELED CONVICTION IN WHICH A DEFENDANT COULD RECEIVE A SENTENCE OF UP TO SIX-MONTHS CAN BE USED TO ENHANCE A CURRENT CHARGE FROM A MISDEMEANOR TO A FELONY. UNDER PREVAILING UNITED STATES SUPREME COURT LAW, NICHOLS V. UNITED STATES, AN UNCOUNSELED PRIOR MISDEMEANOR CONVICTION CAN BE USED FOR THE SAME PURPOSE IF A DEFENDANT COULD HAVE BEEN INCARCERATED FOR A PERIOD EXCEEDING SIX MONTHS.

In his Answer Brief, Respondent contends that the certified question before this court should be answered in the negative as he argues that appointment of counsel in misdemeanor cases is sacrosanct, unless the there is a written certification by the trial judge that he would not impose incarceration or the defendant executes a written waiver of his right to counsel. He further cites, which the State would acknowledge, that Article 1, Section 16 of the Florida Constitution grants to the citizens of Florida the right to counsel in all prosecutions. However, while the Florida Constitution may grant this right to counsel, the implications of Respondent's position as to the *compulsory* aspect of the right to counsel in Florida is negated by his reference to Florida R. Crim. P. 3.111(b)(1) wherein an indigent person does not have to be provided counsel, in the court's discretion, if the trial court signs a written order at least

fifteen (15) days prior to trial that the defendant will not be incarcerated. Further, the fifteen (15) day notice requirement can be waived by the defendant.[1] Accordingly, contrary to Respondent's position, Florida does not provide a complete, impenetrable principle of the right to counsel in misdemeanor cases.[2]

In terms of the certified question before this Court as to whether "an uncounseled prior misdemeanor conviction, in which the defendant could have been incarcerated for more than six months, but was not incarcerated for any period, [could] be used to enhance a current charge from a misdemeanor to a felony", this Court has already "crossed the rubicon" as to the threshold issue of whether an uncounseled prior misdemeanor conviction can be used to enhance a current charge. Hlad, 585 So.2d 928 (Fla.

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[1]Furthermore, Florida R. Crim. P. 3.111(b)(1)is a compelling example as to both the legal and public policy reasons for the certified question to be answered affirmatively. When a trial judge is required to give fifteen days notice in a written order that he will not incarcerate the defendant on a misdemeanor charge, there is not distinction as to time limit. Accordingly, the written order could be on a charge where a defendant is facing one-year incarceration. In that this Court approved and adopted Florida R. Crim. P. 3.111(b)(1), in effect, a consistant public policy would dictate that the use of an uncounseled prior misdemeanor conviction over six-months would be within the constitutional parameters established by this Court.

[2]An *amicus* brief was filed by the Florida Association of Criminal Defense Lawyers in support of the Respondent. The *amicus* brief generally echoes the arguments of Respondent.

1991).

The "road" leading to the Hlad decision is instructive. Hlad was decided in accordance with the holding in Baldasar, 446 U.S. 222 (1980) which in turn, was based on the earlier United States Supreme Court decision in Scott v. Illinois, 440 U.S. 367 (1979) wherein the Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. Baldasar re-affirmed the decision in Scott by a plurality decision, and in his concurrence, Justice Blackmun provided the following "bright-line rule"-that any prior, uncounseled conviction which could not result in a sentence of more than six months or where there was no actual incarceration, could be used to enhance a sentence.

Finally, this Court in Hlad agreed with the "bright-line" rule articulated in Baldasar. Thereafter, this Court reaffirmed it's holding in Hlad in Beach, 592 So.2d 237 (Fla.,1992). Moreover, in contrast to Respondent's argument that this Court should not follow Nichols, 511 U.S. 738 (1994) because [Florida] confers greater protection in regards to this issue than the Federal Constitution, the Hlad majority did not cite the Florida Constitution nor discuss Baldasar to counsel. Most interestingly, in Beach which affirmed Hlad, this Court

noted the Florida Constitution and stated as follows:

> The underlying issue in this case is whether Beach was entitled to counsel in those previous convictions which he challenges as improperly included on the guidelines sheet. *The Florida Constitution provides that "[i]n all criminal prosecutions the accused ... shall have the right ... to be heard in person, by counsel or both."* Art. I, § 16, Fla. Const. To secure this constitutional right, Florida Rule of Criminal Procedure 3.160 requires the court to advise any person charged with the commission of a crime of a right to counsel and, if financially unable to obtain counsel, of a right to be assigned court-appointed counsel. The United States Supreme Court has also ruled that an indigent defendant cannot be imprisoned for any offense unless the defendant either is represented by counsel or knowingly and intelligently waives the right to counsel. See Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).
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> The United States Supreme Court further defined the right to counsel in Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980). In Baldasar, the Court addressed the issue of whether a sentencing court could use an earlier uncounseled conviction as a predicate to enhance a subsequent conviction. Justice Blackmun's concurrence cast the deciding vote by following a bright line rule that a defendant is entitled to counsel for any " '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.' " Id. at 229, 100 S.Ct. at 1589 (Blackmun, J., concurring) (citations omitted) (quoting Scott v. Illinois, 440 U.S.

> 367, 389-390, 99 S.Ct. 1158, 1170, 59 L.Ed.2d 383 (1979) (Blackmun, J., dissenting)). Accordingly, Justice Blackmun voted to prohibit enhancement of Baldasar's sentence because his prior uncounseled conviction was punishable by more than six months' imprisonment and thus invalid. Id. 446 U.S. at 230, 100 S.Ct. at 1589.
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> In Hlad v. State, 585 So.2d 928, 930 (Fla.1991), this Court applied Justice Blackmun's bright-line rule to determine that a defendant's prior uncounseled DUI conviction was valid for enhancement "because he did not receive imprisonment nor could he have been imprisoned for more than six months as a result of the uncounseled conviction." *Following the reasoning in Hlad and Baldasar, if Beach was entitled to counsel for the offenses included on his guidelines scoresheet, then these uncounseled convictions would be invalid for purposes of scoring.*

Beach, 592 So.2d at 238-39(emphasis added) [3].

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[3]In Kirby v. State, 765 So.2d 723 (Fla. 1st DCA) cited by both Petitioner and Respondent in their respective Initial and Answer Briefs, the First District on this point stated as follows:

> The 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). The Florida and federal constitutions are not precisely coextensive in this area. See Almeida v. State, 24 Fla. L. Weekly S331, 737 So.2d 520

> (Fla.1999); Phillips v. State, 612 So.2d 557, 558 (Fla.1992); Traylor, 596 So.2d at 968. But we can point to no clear articulation by our supreme court of an independent state constitutional guarantee of counsel applicable in Mr. Kirby's case. See State v. Ull, 642 So.2d 721 (Fla.1994) (holding counsel may be discharged where trial judge certifies incarceration will not result from misdemeanor prosecution, so long as defendant is not substantially disadvantaged). See generally Beach, 592 So.2d at 240 (Barkett, J., concurring); Hlad, 585 So.2d at 930-32 (Barkett & Kogan, JJ., dissenting).
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> The decision in Hlad-holding that "Hlad's prior DUI conviction would have been valid for enhancement because he did not receive imprisonment nor could he have been imprisoned for more than six months as a result of the uncounseled conviction," 585 So.2d at 930-can be distinguished because the offense with which Mr. Kirby was charged in 1982, his second for driving under the influence of alcohol, could have resulted in nine months' incarceration. § 316.193(2)(b) 2., Fla. Stat. (Supp.1982). *The* Hlad *majority did not, moreover, discuss the right to counsel under state law*. 765 So.2d at 725.

While Respondent appears to cite Kirby for the proposition that the Florida Constitution affords greater rights to a defendant than the Federal Constitution and, accordingly, this Court should not follow Nichols, Petitioner would contend that Kirby, in light of Hlad and Beach (which allowed for the six-month time limit on an uncounseled prior conviction), only certified the question for guidance from this Court as to whether a period exceedubg six-months could be used, not whether an uncounseled prior misdemeanor conviction could be used at all and was looking for guidance from this Court because Nichols had changed the "legal landscape" in this area. Kirby, 765 So. 2d at 725.

Respondent further argues that Florida Statute Section 27.51, which specifically provides for representation by the Public Defender on a DUI charge, is compelling as further dispositive of his argument regarding the absolute necessity of counsel in misdemeanor cases. However, it is noteworthy that Hlad involved the same circumstances as here in that the state was using Hlad's prior DUI conviction for the purpose of enhancing the crime of misdemeanor DUI to a felony. Further, Florida R. Crim. P. 3.111(b)(1) does not discriminate as to the type or severity of the misdemeanor charged.

Case v. State, 865 So. 2d 557 (Fla. 1st DCA 2003), cited by Respondent is relevant only as to the machinations of whether a defendant, who is facing imprisonment on a misdemeanor charge, has properly waived counsel. As the First District noted in Case, Fla. R.Crim. P. 3.111(a) & (b) provides that 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. Case, 865 So.2d at 558. Case is irrelevant to the question before this Court and has no impact on whether a prior uncounseled misdemeanor conviction over six months can be used to enhance a current charge of misdemeanor to a felony.

Respondent further cites Alabama v. Shelton, 535 U.S. 654 (2002) as a case which has revisited the right to counsel issue in light of Nichols and moreover, highlights Shelton for the argument that Nichols was a sentencing issue and the instant case involves an element of the crime, which he contends is subject to a higher standard of review.

As to the first point, Shelton did not overturn Nichols. Shelton held that that a suspended sentence of imprisonment is more akin to a "sentence of actual imprisonment" than a fine. The Court further observed that,"[o]nce the [suspended] prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense," and thus ends up having his or her liberty deprived as a result of an uncounseled conviction--"precisely what the Sixth Amendment, as interpreted by Argersinger and Scott, does not allow." Shelton, 535 U.S. 654, 662. In Shelton, the state argued that Nichols should apply in that "sequential proceedings must be analyzed separately for Sixth Amendment purposes, and only those proceedings "result[ing] in immediate actual imprisonment" trigger the right to state-appointed counsel." Shelton, 535 U.S. at 663. However the Court observed:

> "Gagnon and Nichols do not stand for the broad proposition amicus [state] would extract from them. The dispositive factor in those cases was not whether incarceration

> occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned. See Nichols, 511 U.S., at 743, n. 9, 114 S.Ct. 1921 (absent waiver, right to appointed counsel in felony cases is absolute). Unlike this case, in which revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel, the sentences imposed in Nichols and Gagnon were for felony convictions-a federal drug conviction in Nichols, and a state armed robbery conviction in Gagnon -for which the right to counsel is unquestioned. See Nichols, 511 U.S., at 747, 114 S.Ct. 1921 (relevant sentencing provisions punished only "the last offense committed by the defendant," and did not constitute or "change the penalty imposed for the earlier" uncounseled misdemeanor)..."
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> "...Far from supporting amicus ' position, Gagnon and Nichols simply highlight that the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to Shelton's Circuit Court trial, where his guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined."

Shelton, 535 U.S. at 663-664.

Here, as the Court noted in Nichols, "enhancement statutes...do not change the penalty imposed for the earlier conviction." Id., at 747-748.

As to his second point, Respondent suggests that this Court not follow Nichols, in light of dicta in Shelton, that Nichols was further distinguished from the facts in the Shelton case

because the [Nichols] Court applied a "less exacting" standard "consistent with the traditional understanding of the sentencing process". Shelton, 535 U.S. 665, citing Nichols, 511 U.S., at 747. However, again the Shelton court did not disapprove of Nichols and these comments by Justice Ginsburg were in light of the fact that the defendant in Shelton was being incarcerated as a result of his original suspended sentence where he did not have the benefit of counsel, prior to his probation violation.

Moreover, Respondent's attempt to argue that this is not a sentencing issue as in Nichols because felony DUI requires an additional element of proof as opposed to misdemeanor DUI is not correct and, at best, is a distinction without a difference. As stated above, the prior misdemeanor convictions only are relevant as to whether jurisdiction exists in county (misdemeanor) or circuit court. The prior convictions have no direct impact on the guilt or innocence in a court or jury trial. Further, the state is still held to the same burden of proof in either county or circuit court, *see below*, and, in fact, the prior DUI convictions are only relevant to the extent they impact a defendant's present sentence, should he be found guilty.

Respondent cites New Jersey State v. Hrycak, 184 N.J. 351, 877 A.2d 1209 (N.J. 2005) as a recent case which has declined to

follow Nichols on state law grounds. However, Respondent fails to note that the New Jersey Supreme Court, unlike this Court, failed to follow the threshold question in Baldasar. Accordingly, it would stand to reason that the New Jersey Supreme Court would not, subsequently, follow Nichols.

Lastly, Respondent argues that "the case at bar presents [a] perfect example of the reason why prior uncounseled convictions should not be used to enhance subsequent offences" as he contends Respondent was mis-advised as to his right to counsel. Whether Respondent made a knowing and voluntary waiver of his right to counsel, as to his prior convictions, is not the subject of the certified question currently before this Court. Accordingly, the knowing and voluntary waiver of his right to counsel is irrelevant to the issue now presented to the Court. The only issue for this Court to consider is whether an uncounseled prior conviction can be used later to enhance a sentence or change it from a misdemeanor to a felony if the defendant faced a sentence beyond six months on his prior uncounseled conviction.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests the decision of the Fourth District Court of Appeal should be QUASHED and the certified question answered in the affirmative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Mitchell A. Egber, certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Frank Maister, Esq. 315 SE 7th Street, Suite 302, Fort Lauderdale, Fl. 33301 and Garrett Ellsinger, Esq. 633 Southeast 3rd Avenue/Ste. 4F, Fort Lauderdale, Fl. 33301 this _____ day of _____, 2007.

_____
Mitchell A. Egber

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

_____
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