

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

PAUL W. KIRBY,

Respondent.

CASE NO. 96,428

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Paul W. Kirby, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of two volumes, the record [R] and the Transcript of proceedings [T] which will be referenced accordingly, followed by the appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

Respondent was found guilty by a jury of felony driving under the influence on December 2, 1997. [T 163]. At sentencing on 7 January 1998, the state presented certified driving record showing that he had three prior DUI convictions. (T-187).

Respondent challenged one of those predicate offenses and signed an affidavit, prepared and presented by his defense counsel, stating that respondent had been arrested in July, 1982 for Driving Under the Influence of Alcohol; that under § 316.193 Fla. Stat. [year omitted], the offense was punishable by more than six month's imprisonment; that he was indigent at the time and was not appointed counsel; and that he had not waived his right to counsel. (R-42-43). The date of the conviction and sentence for the prior offense at issue are not in the affidavit. (R-42-43). Despite that respondent admitted that he had not actually been sentenced to serve any jail time for the challenged prior, [T 172], he claimed that this offense was not a proper predicate pursuant to State v. Beach, 592 So.2d 237, (Fla. 1992).

The state in turn challenged the affidavit by cross examining respondent on the validity of the assertions in the affidavit and

- Q. Mr. Kirby, who was the judge that day?  
A. I don't remember.  
Q. You don't remember who was the judge? How many people were in the courtroom that day?  
A. I don't remember.  
Q. You don't know that either. Do you remember which courthouse or courtroom it was?  
A. No.  
Q. Okay. Do you remember what county it was in?  
A. Leon.

Q. Leon County. But you don't remember what courthouse it was or anything? Do you remember any specifics whatsoever of the day you entered your plea?

A. No.

Q. Okay. Do you remember entering a plea in 1971 for a DUI?

A. Yes.

Q. Okay. And you had counsel at that time?

A. No.

Q. You didn't have counsel at that time?

A. No.

Q. Okay. And in 1988, do you remember entering a plea for a DUI?

A. Yes.

Q. And at that time, did you bring up the fact that you had not had counsel in your prior DUI in 1982.

A. I didn't know I needed to.

Q. Okay. You were aware, however -- you received jail time in 1988; is that correct?

A. Right.

Q. And you had a lawyer in 1988; is that correct?

A. Yes.

(T-184-185).

The trial court also questioned the respondent about the circumstances surrounding his 1982 prior DUI conviction:

Q. ...Mr. Kirby, do you recall whether or not the judge advised you that you would not be subjected to jail time in 1982?

A. (Shaking head.)

Q. You don't recall anything of back then, do you?

A. I don't remember too well. That was a long time ago.

Q. You don't remember anything back then?

A. Yes, I remember some.

Q. What do you remember?

A. I remember I went to court.

(T-186).

The trial court concluded that respondent "doesn't remember anything that happened that day." (T-187) On that basis, the court denied the defense motion to correct the score sheet by excluding the 1982 DUI conviction as a means of enhancing the present DUI conviction to a third degree felony. (T-187).

The First District Court of Appeals reversed the felony conviction on the authority of State v. Beach and directed the lower court to reduce the felony to a misdemeanor conviction. The court found that respondent had fulfilled the requirements laid down in Beach because he had filed a motion and an affidavit avowing that he had been convicted of a prior DUI which had been punishable by more six months of imprisonment; that he had been indigent at the time; and that he did not waive his right to counsel. The district court recognized that its application of Beach was inconsistent with the subsequent United States Supreme Court decision in Nichols v. United States, 511 U.S. 738 (1994), which held that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction in enhancing a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment. Accordingly, the First District Court Kirby v. State, 98-778 (Fla. 1st DCA August 17, 1999), certified the following question to this Honorable Court:

DOES STATE V. BEACH, 592 So.2d 237 (Fla.1992), ARTICLE I, S 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 CONVICTIONS DID NOT RESULT IN INCARCERATION AT THE TIME?

## SUMMARY OF ARGUMENT

### ISSUE I.

The district court misapplied this Court's decision in Beach to the facts of the instant case. It is true that the respondent's affidavit and motion met the threshold requirement of Beach and shifted the burden to the state to respond to the claim. However, an out-of-court affidavit prepared with the assistance of counsel does not end the examination. The state's cross examination, and the trial court's clarifying questions, revealed that respondent did not in fact remember the facts of the 1982 conviction as set out in his affidavit concerning his plea, the advice of the judge concerning sentence, if any, and whether he had waived his right to counsel. **Moreover, it was uncontroverted that respondent was not in fact sentenced to jail for the challenged DUI and was not, as a matter of well-settled law, entitled to the assistance of appointed counsel on the 1982 conviction.** This is strong evidence that the conviction was obtained consistent with all constitutional requirements which respondent did not overcome.

Beach prescribes the procedures and burdens of proof for determining whether a challenged prior offense is a proper predicate but it does not hold that a mere affidavit placing the facts at issue also conclusively resolves the factual question when the defendant/affiant abandons, or is unable to support, the substance of the affidavit when cross examined at the hearing on the motion. When that hearing, as here, conclusively shows that

there was **not** a right to counsel in the challenged (1982) predicate offense, it is absurd to hold, as the district court did, that Beach requires that the completely proper predicate offense, for which there was no right to counsel, be discarded because it was, **arguendo**, uncounseled.

Issue II. The certified question should be answered no. The United States Supreme Court's decision in Nichols, which expressly overruled Baldasar v. Illinois, reinforces the state's position on Issue I above because it is precisely on point. However, with or without Nichols, there is no rational reason to disallow a predicate conviction for which there was no right to counsel on the ground that the conviction was uncounseled.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT MISAPPLY THIS COURT'S  
DECISION IN STATE V. BEACH TO THE FACTS OF THE  
INSTANT CASE?

The First District Court of Appeals reversed respondent's felony DUI conviction on the authority of State v. Beach, 592 So. 2d 237 (Fla.1992), and directed the lower court to reduce the felony to a misdemeanor DUI conviction. The court found that respondent had conclusively met his burden of proof by fulfilling the three-prong test laid down in Beach because he had filed a motion and an affidavit avowing that he had been convicted of a prior DUI which had been punishable by more than six months of imprisonment; that he had been indigent at the time; and that he had not waived his right to counsel. The lower court's decision should be disapproved because the district court misapplied this Court's decision in Beach to the facts of the instant case.

Beach prescribes the procedures and burdens of proof for determining whether a challenged prior offense is a proper predicate. This Court reaffirmed that the defendant bears the initial burden of proof and that in the absence of certified court records, a defendant may meet that initial burden by asserting under oath that:

(1) the offense involved was punishable by more than six months' of imprisonment or that the defendant was actually subjected to a term of imprisonment; (2) that the defendant was indigent and thus, entitled to court-appointed counsel; (3) counsel was not appointed; and (4) the right to counsel was not waived. If the defendant sets forth these facts under oath, the burden

shifts to the State to show either that counsel was provided or the right to counsel was validly waived.

Beach, 592 So.2d at 239.

Beach holds that once the defendant's initial burden of placing the claim at issue is met, the burden then shifts to the State to refute the claim. Nothing in the decision holds or even hints that an untested affidavit placing the predicate facts at issue also conclusively resolves the factual questions.

In the instant case, **it was uncontroverted that respondent was not in fact sentenced to jail for the challenged DUI**, a strong indicator that there was no constitutional right to counsel. Further, based on the cross examination of respondent concerning the plea and its terms, it is apparent that respondent did not recall what happened at the plea hearing, did not know if he had been advised of his right to counsel, did not know whether he had waived his right to counsel, and did not know whether the trial court had stated that no prison or jail sentence would be imposed. Thus, the affidavit was conclusively refuted out of the mouth of the affiant/defendant himself and the state had fully met its burden.

The state's cross examination, and the trial court's clarifying questions, fully support the state's position.

Q. Mr. Kirby, who was the judge that day?

A. I don't remember.

Q. You don't remember who was the judge? How many people were in the courtroom that day?

A. I don't remember.

Q. You don't know that either. Do you remember which courthouse or courtroom it was?

A. No.

Q. Okay. Do you remember what county it was in?

A. Leon.  
Q. Leon County. But you don't remember what courthouse it was or anything? **Do you remember any specifics whatsoever of the day you entered your plea?**  
A. **No.**  
Q. Okay. Do you remember entering a plea in 1971 for a DUI?  
A. Yes.  
Q. Okay. And you had counsel at that time?  
A. No.  
Q. You didn't have counsel at that time?  
A. No.  
Q. Okay. And in 1988, do you remember entering a plea for a DUI?  
A. Yes.  
Q. And at that time, did you bring up the fact that you had not had counsel in your prior DUI in 1982.  
A. I didn't know I needed to.  
Q. Okay. You were aware, however -- you received jail time in 1988; is that correct?  
A. Right.  
Q. And you had a lawyer in 1988; is that correct?  
A. Yes.

(T-184-185). The trial court also questioned the respondent about the circumstances surrounding his prior DUI conviction referred to in the affidavit:

Q. ...**Mr. Kirby, do you recall whether or not the judge advised you that you would not be subjected to jail time in 1982?**  
A. **(Shaking head.)**  
Q. **You don't recall anything of back then, do you?**  
A. I don't remember too well. That was a long time ago.  
Q. You don't remember anything back then?  
A. Yes, I remember some.  
Q. **What do you remember?**  
A. **I remember I went to court.**

(T-186). The trial court concluded that respondent's averments, evinced in his affidavit, had been effectively impeached, because defendant "doesn't remember anything that happened that day."

(T-187). On that basis, the trial court denied the defense motion to correct the score sheet. (T-187).

**In summary, it is uncontroverted that respondent was not in fact sentenced to jail for the challenged misdemeanor DUI and was**

not, as a matter of well-settled law, entitled to the assistance of appointed counsel on the 1982 conviction. See Nichols v. United States, 511 U.S. 738 (1994), *infra*. Moreover, given the fact that respondent/defendant admitted on cross examination that he simply did not know what happened at the 1982 plea hearing, it is obvious that he did not, in the end, meet the threshold tests of Beach. When the hearing, as here, conclusively shows that there was **not** a right to counsel in the challenged (1982) predicate offense, it is absurd to hold, as the district court did, that Beach requires that the completely proper predicate offense, for which there was no right to counsel, be discarded because a defendant's abandoned and unsupported affidavit claimed it was, **arguendo**, uncounseled.

Because the First District Court misapplied the holding in Beach to the facts of this case, that decision should be quashed and the felony DUI conviction affirmed.

ISSUE II

CERTIFIED QUESTION: DOES STATE V. BEACH, 592 So.2d 237 (Fla.1992), ARTICLE I, S 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 CONVICTIONS DID NOT RESULT IN INCARCERATION AT THE TIME?

The First District Court recognized that its application of Beach was inconsistent with the subsequent United States Supreme Court decision in Nichols v. United States, 511 U.S. 738 (1994), which held that a sentencing court may consider a defendant's previous uncounseled misdemeanor DUI conviction in enhancing a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment. Accordingly, the First District Court Kirby v. State, 98-778 (Fla. 1st DCA August 17, 1999), certified the following question to this Honorable Court:

DOES STATE V. BEACH, 592 So.2d 237 (Fla.1992), ARTICLE I, S 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 CONVICTIONS DID NOT RESULT IN INCARCERATION AT THE TIME?

Art. 1, § 16 of the Florida Constitution states in pertinent part:

§ 16. Rights of accused and of victims

(a) 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. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

§ 27.51 Fla. States (1997), which deals with the duties of public defenders, states in pertinent part:

(1) The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in s. 27.52 and who is:

(a) Under arrest for, or is charged with, a felony;

(b) Under arrest for, or is charged with, a misdemeanor, a violation of chapter 316 which is punishable by imprisonment, criminal contempt, or a violation of a municipal or county ordinance in the county court, unless the court, prior to trial, files in the cause an order of no imprisonment which states that the defendant will not be imprisoned if he or she is convicted;

Florida Rule of Criminal Procedure 3.111 states in pertinent part:

Rule 3.111. Providing Counsel to Indigents

(a) When Counsel Provided. A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing magistrate, whichever occurs earliest.

(b) Cases Applicable.

(1) Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by imprisonment (or by incarceration in a juvenile

corrections institution) including appeals from the conviction thereof. 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, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned if convicted.

(2) Counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including postconviction proceedings and appeals therefrom, extradition proceedings, mental competency proceedings, and other proceedings that are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal.

(3) Counsel may be provided to a partially indigent person on request provided that the person shall defray that portion of the cost of such representation and the reasonable costs of investigation as he or she is able without substantial hardship to the person or the person's family, as directed by the court.

(4) "Indigent" as used herein shall mean a person who is unable to pay for the services of an attorney, including costs of investigation, without substantial hardship to the person or the person's family; "partially indigent" as used herein shall mean a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person's family.

None of these provisions of Florida law are inconsistent with the decision in Nichols. Indigent defendants in this state, as in the pivotal Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), *infra*, are not entitled to the appointment of counsel on misdemeanor charges when no jail time is being sought or imposed as in the 1982 conviction at issue here. Therefore, there is no legal bar preventing the adoption of federal precedent in this matter, especially since the previous holdings of this Court regarding the right to counsel issue and valid

predicate offenses have incorporated the federal rulings based on their respective rationales.

Most persuasive is the fact that, in Beach, upon which the lower court based its ruling, this Court relied on federal law in making its determination:

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). 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.

State v. Beach, 592 So.2d 237, 239 (Fla. 1992).

The district court below held that even though **respondent had not actually been sentenced to jail for the predicate offense**, it was not a valid predicate because he could have been sentenced to jail time and because he had produced an affidavit avowing to the four factors laid down in Beach. That reasoning, which the state maintains was inaccurately attributed to Beach, reflects the

faulty rationale in Justice Blackmun's concurring opinion in Baldasar which was expressly overruled by the United States Supreme Court in Nichols v. U.S., 511 U.S. 738, 114 S.Ct. 1921. Baldasar consisted of one per curiam opinion, providing no rationale; and three separate concurring opinions and a dissent. As a result, the federal courts based subsequent decisions on Baldasar on differing concurring opinions. State courts followed suit. Thus, the Nichols court recognized that "[t]he degree of confusion following a splintered decision such as Baldasar is itself a reason for reexamining that decision." Id. at 1927. The Nichols Court renewed its adherence to Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) which held that the Sixth Amendment **right to counsel did not attach where no imprisonment was actually imposed** and overruled Baldasar, and all of its concurrences.

The Nichols court went on to adopt the rationale revealed in Justice Powell's dissent in Baldasar :

[We] agree with the dissent in Baldasar that a logical consequence of the holding is that an uncounseled conviction valid under Scott may be relied [511 U.S. 747] upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in Baldasar, "[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant. E.g., Moore v. Missouri, 159 U.S. 673, 677 [16 S.Ct. 179, 181, 40 L.Ed. 301] (1895); Oyler v. Boles, 368 U.S. 448, 451 [82 S.Ct. 501, 503, 7 L.Ed.2d 446] (1962)." 446 U.S., at 232, 100 S.Ct., at 1590.

Nichols at 1927. The court stressed that sentencing courts are given great discretion in considering enhancement factors, ranging from evidence that need only be proven by a preponderance of the evidence to that which must be proven beyond a reasonable doubt:

Reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt. As a general proposition, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." *Wisconsin v. Mitchell*, 508 U.S. 476, 485, 113 S.Ct. 2194, 2199, 124 L.Ed.2d 436 (1993). One such important factor, as recognized by state recidivism statutes and the criminal history component of the Sentencing Guidelines, is a defendant's prior convictions. Sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). We have also upheld the consideration of such conduct, in connection with the offense presently charged, in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). There we held that [511 U.S. 748] the state could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty.

Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. *Id.*, at 91, 106 S.Ct., at 2418-2419. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor

conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt.

Nichols v. U.S., 511 U.S. 738, 114 S.Ct. 1921, 1928(1994).

The state submits that this is sound legal analysis which should be followed in Florida.

#### CONCLUSION

Petitioner state submits that the district court decision below should be quashed, the certified question answered no, and the felony DUI conviction entered in the trial court affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

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JAMES W. ROGERS  
TALLAHASSEE BUREAU CHIEF,  
CRIMINAL APPEALS  
FLORIDA BAR NO. 325791

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COUNSEL FOR PETITIONER  
[AGO# L99-1-11729]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 8th day of October 1999.

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Sherri Tolar Rollison  
Attorney for the State of Florida

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v.

PAUL W. KIRBY,

Respondent.

CASE NO. 96,428

APPENDIX

United States Supreme Court opinion dated June 6, 1994, Nichols v. United States, 511 U.S. 738, 114 S.Ct. 1921 (1994)

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