

III SUMMARY OF ARGUMENT

Issue I: Felony DUI requires 3 prior convictions. Kirby contended that one prior could not be used for enhancement because it was uncounseled and he did not waive counsel. He properly raised this claim under Beach, *infra*, in a sworn affidavit. The district court held that Kirby had complied with Beach and ordered the conviction reduced to a misdemeanor. The state's argument is not completely clear, but appears to be that Kirby was required to do more than Beach requires, or that his claim could be denied because he could not answer 16 years later questions such as who was the judge and how many people were in the courtroom.

The state's argument ignores the real question, which is which party bears the burden of producing evidence concerning prior convictions when the court's records have been destroyed? Because the records have been destroyed, no extrinsic evidence is available to prove or disprove Kirby's sworn statement that his prior conviction was uncounseled and he did not waive counsel.

Even assuming *arguendo* the defendant bears the burden of producing records where they exist, on due process and policy grounds, the state must bear the burden where the records cannot be produced. In a related situation, a defendant is entitled to new trial in the event a complete appellate record cannot be produced.

Issue II: Beach, *infra*, relied in part on Baldasar v. Illinois on the issue of right to counsel. Subsequent to Beach, the U.S. Supreme Court receded from Baldasar in Nichols. The question before the court is whether Beach survives the demise of Baldasar.

Respondent contends that it does because the Florida right to counsel is broader than what Nichols requires. Nichols allows right to counsel to be

determined **after** sentence is imposed. Since 1980, Florida has granted right to counsel in every case, including misdemeanors, unless the trial court enters an order of no imprisonment (ONI) before trial or plea. § 27.51, Fla.Stat. (1999). This rule applies to Kirby's 1982 DUI conviction. Kirby swore, as required by Beach, that he did not have counsel and did not waive counsel. The state produced no waiver or ONI to refute his contention.

To put it another way, Nichols allows the previous conviction to be used for enhancement **because** the previous conviction is valid under Nichols. But Kirby's conviction is invalid under Florida law. Nichols does not stand for the proposition that an **invalid** previous conviction can be used to enhance a subsequent sentence, but that is the state's position here.

IV ARGUMENT

ISSUE I

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

In Issue I, the state presumes that State v. Beach, 592 So.2d 237 (Fla. 1992), controls this issue but argues that respondent, Paul Kirby, did not sufficiently meet his burden of proof under Beach. In Issue II, addressing the certified question, the state argues Beach has been superseded by Nichols v. United States, 511 U.S. 738, 750, 114 S.Ct. 1921, 1929, 128 L.Ed.2d 745 (1994). Respondent agrees that Beach controls his case, contends he complied with Beach, and that Beach has not been superseded by Nichols.

Before arguing the facts of this case, respondent would set out two preliminary matters to provide a necessary context for those facts. The first concerns Justice Souter's concurrence in Nichols, and most especially, a cite therein to Arger-singer v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). The second, on which the state's brief is utterly silent, is the destruction of all court records of Kirby's 1982 DUI conviction.

Justice Souter's concurrence in Nichols discusses two sub-jects relevant here - 1) the volume of misdemeanors which leads to an obsession with speedy disposition, without regard to the consequences for defendants, and 2) he would be more concerned about those consequences except that the issue then before the court was using an uncounseled state misdemeanor DUI as a prior conviction on Nichols' federal guidelines scoresheet, which the defendant has an opportunity to refute, as opposed to a manda-tory sentencing-enhancement scheme, such as Kirby's conviction here.

Justice Souter noted that

The Court in Scott, relying on Argersinger [supra], drew a bright line between imprisonment and lesser criminal penalties, on the theory, as I understand it, that the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty.

Nichols, 511 U.S. at 750, 114 S.Ct. at 1929 (Souter, J., concurring), citing Scott v. Illinois, 440 U.S. 367, 372-373, 99 S.Ct. 1158, 1161-62, 59 L.Ed.2d 383 (1979). Justice Souter particularly noted a portion of Argersinger:

discussing studies showing that "the volume of misdemeanor cases ... may create an obsession for speedy dispositions, regardless of the fairness of the result" (foot-note omitted). [Argersinger], 407 U.S. at 34-37, 92 S.Ct. at 2011-2013.

Nichols, 511 U.S. at 750. The concurrence continued:

There is an obvious and serious argument that the line drawn in Scott is crossed when, as Justice Stewart put it in Baldasar, a defendant is "sentenced to an increased term of imprisonment only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his defense." Id., 511 U.S. at 750-51. Justice Souter concluded that the court need not reach these difficult questions because Nichols involved using an uncounseled state DUI conviction as a prior conviction on a federal sentencing guidelines scoresheet, which the defendant had an opportunity to refute, and not a mandatory sentence-enhancement scheme, as in Baldasar and the instant case. 511 U.S. at 751.

The second preliminary point is that the court's records of Kirby's 1982 DUI conviction - the one at issue here - have been destroyed. Respondent moved to supplement the record with a memorandum to this effect from the clerk's office (Appendix) which the First District treated as a motion to take judicial notice, which it granted. It is in this context - no extrinsic evidence is available to either prove or disprove Kirby's sworn statement that his prior conviction was uncounseled and he did not waive counsel (assuming *arguendo* that court records would refute rather than support his claim) - that this court must evaluate the

events in the trial court.

The state's argument on appeal tacitly concedes that Kirby complied with Beach. Given that concession, the state is necessarily arguing that Kirby had to do more, or that Beach does not apply because he was not sentenced to incarceration. Respondent contends, to the contrary, that he met his burden under Beach and was not obliged to do more. Moreover, Florida grants right to counsel whenever a person **risks** imprisonment and does not depend on the sentence actually imposed.

Kirby filed a sworn affidavit which alleged, per the requirements of Beach, that:

- 1) his 1982 DUI conviction was punishable by more than six months in jail;
- 2) he was indigent and could not afford private counsel and was entitled to court-appointed counsel;
- 3) counsel was not appointed, and he did not waive counsel

(R 42-43). Kirby explained his employment and income at the time. He attached a copy of section 316.193, Florida Statutes (1982), which provided that a second DUI offense was punishable by nine months in jail (R 45). These allegations were sufficient to satisfy Beach.

Trial counsel acknowledged that Kirby was represented by counsel in the 1986 conviction. While he was also not represented by counsel in 1971, he was not subject to a term of incarceration in excess of 6 months for a first DUI, so the 1971 conviction was not at issue, either (T 168). Defense counsel further asserted that, when Kirby appeared on the 1982 offense

there was no mention made that he would not be imprisoned if convicted, he was not told about his right to counsel, he did not waive his right to counsel, there was a small fine paid, and that was the end of the case.

(T 169-70). Defense counsel argued this was sufficient to shift the burden to the

state to prove either that counsel was provided, or validly waived (T 170).

The state argues it met its burden because, on questioning by the prosecutor and judge, Kirby could not remember as to his 1982 conviction who the judge was,¹ how many people were in the courtroom, or which courthouse or courtroom it was in² (T 183-86). Defense counsel pointed out that he remembered what he swore to in the affidavit (T 187). The judge denied Kirby's claim that one of his priors was uncounseled because of his lack of memory, but this conclusion is not valid and constitutes an abuse of discretion.

The propriety of the court's ruling depends heavily on who bears the burden of proof, and partly on what is fair and reasonable to demand that defendants recall of misdemeanor convictions from long ago.

Kirby swore under oath that he was subject to imprisonment, was indigent, did not have counsel, and did not waive counsel. That is sufficient under Beach to shift the burden to the state to refute his claim. He cannot produce court records to prove it, because the records have been destroyed.

Moreover, this is the only reasonable conclusion, not only under Beach, but on due process and policy grounds. If it were not the only possible conclusion, then a defendant, who has absolutely no control over the retention of

¹Undersigned doubts that in 1982 anyone had thought of this innovation, but in recent years, at least one Leon County judge - perhaps more - is not even present in the courtroom during the majority of misdemeanor dispositions. If the defendant accepts the state's plea offer, the plea and sentence are recorded by the clerk, without the judge even being present in the courtroom, in some version of a "plea in absentia." This is not true of all county judges, but imagine that years from now, a claim of an uncounseled prior would be denied for not remembering the judge's name, when the judge was never in the courtroom!

²Undersigned's expertise on this is limited, but this last question may pertain to the fact that in the past, and possibly even today, traffic court in Leon County was/is held at a facility on Thomasville Road, not at the county courthouse.

court records, and who could hardly be expected to retain his own records - assum-ing arguendo he ever received any - of a 16-year-old misde-meanor conviction, bears the burden of the state's failure to retain the records!

In a typical case, court records are available to more or less definitively answer the question of whether the defendant had counsel, or waived counsel. Undersigned counsel might go so far as to say that it is almost quibbling to fight over who has to go to the trouble of producing the records. At least, it may not be unreasonable to place on the defendant the burden to produce the records.

The question here, however, is what happens when there are no court records? The Fourth District pondered this question pre-Beach in Troehler and concluded that the defendant's sworn claim that he did not have counsel and did not waive counsel is sufficient to shift the burden to the state, and the state bore the burden of producing the court records. State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989), disapp'd to the extent inconsistent, Beach, supra (for omitting some of the require-ments set out in Beach).³ Respondent contends that is, like-wise, the only reasonable conclusion here.

This conclusion would accord with the rule of law in another situation where court records are unavailable. This court has held that remand for new trial is required where a full transcript of the proceedings is unavailable for appeal. Delap v. State, 350 So.2d 462 (Fla. 1977); see also, J.W. v. State, 667 So.2d 207 (Fla. 1st DCA 1995). Otherwise, the burden would be on the hapless defendant to produce records which are impossible to produce. The unreasonableness of such a burden would also constitute a due process violation under the state and federal constitutions.

³Post-Beach, a defendant further has to allege that he was indigent, and that he was either incarcerated, or risked incarceration in excess of 6 months.

As a practical matter, this situation appears to present a culture clash or a failure to plan: the circuit court clerk's offices have a schedule for destroying records, which does not require retaining misdemeanor records for very long. This may not have been much of an issue before the legislature created felony DUI, with no time limit on the prior convictions. It has become an issue now that a 16-year-old, or a 30-year-old, DUI conviction could be used to enhance a present conviction.

Again, this is hardly a situation over which a defendant has any control. If a state agency's destruction of records make it impossible for the prosecutor to dispute or the trial court to determine claims of uncounseled prior convictions, then the clerks and the state attorneys need to solve their record retention problems, but this burden cannot reasonably be placed on defendants.

With all due respect to any former trial judge who may read this, it would be no easy matter for Kirby to recall the judge's name 16 years later. He probably appeared before the judge only once, probably for a few minutes or less - since the facts insofar as they are known suggest he pleaded at arraignment. Perhaps he never heard or understood the judge's name. Any judge on this court can imagine the difficulty - for any party, the defendant, prosecutor or judge - of remembering the particulars of an ordinary, typical misdemeanor DUI plea which took place 16 years ago.

Kirby was also asked how many people were in the court-room and which courthouse or courtroom the hearing was in. No judge would recall the answer to the first question. If the judge could recall the answer to the second, it would only be because he or she was assigned to a particular courtroom over a long period of time, rather than being able to recall that on November 3, 1982, he or she was in a specific place.

Kirby recalled that he had counsel and was sentenced to jail in his 1986 conviction. He also recalled not having counsel in 1971. (No claim was made as to that conviction, because he was not subject to more than six months' incarceration.) He swore to the matters on the affidavit, including that he did not have counsel and did not waive counsel. After he failed to answer several questions, the judge asked if he recalled being advised in 1982 that he would not "be subjected to jail time"; Kirby could not recall. For not recalling this point, the judge denied his objection to the uncounseled prior conviction.

Respondent wishes to make two points about this ruling. First, Beach requires the defendant to swear that he was subject to jail time in excess of six months, which Kirby did, and which is provable by reference to the applicable statute, see Hlad v. State, 585 So.2d 928 (Fla.1991), so he has met the requirement of Beach. That is, he made a prima facie case, which shifted the burden to the state. The fact that this element of Beach might be overcome were the trial court to have entered an Order of No Imprisonment is - in the weird world of burden-shifting - akin to an affirmative defense for the state, which the state failed to prove.

Second, on due process grounds, it is not reasonable or fair to ask questions that no one - including the judge - could answer 16 years later and decide on the basis of unanswerable questions that the defendant is not worthy of belief.

As to the destruction of the clerk's records, which makes documentary proof by either party impossible, the state makes no comment, although it is the heart of the issue. Perhaps there is a hypothetical defendant so unworthy of belief that his claims regarding whether he had counsel or waived counsel as to prior convictions could be disregarded, but generally a defendant cannot be held to an

unreasonable burden of proof.

In the context where the state has destroyed all records of a conviction, “proof” will mean that a court will baldly pass judgment on the defendant’s credibility without any objective or extrinsic basis therefor. Such a proceeding would be intolerable and violate due process. Moreover, the situation is caused by the state’s short-sightedness in allowing records to be destroyed, which are crucial to determine the validity of prior DUI convictions vis-a-vis right to counsel.

Respondent met his initial burden under Beach, thus the burden shifted to the state. The state having failed to prove the requisite prior convictions, the trial court could not lawfully enhance the conviction to a felony, thus the First District’s decision, that the conviction must be reduced to a misdemeanor, must be affirmed.

Even assuming arguendo this court were to recede from Beach - which respondent argues in Issue II it should not - such a change in the law could not lawfully be applied to Kirby.

ISSUE II

CERTIFIED QUESTION: 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 CONVICTIONS DID NOT RESULT IN INCARCERATION AT THE TIME?

This court has held that prior uncounseled convictions may not be used to enhance a misdemeanor to a felony, because, if there was a right to counsel, absent a waiver, denial of counsel renders the convictions constitutionally infirm. Hlad v. State, 585 So.2d 928 (Fla. 1991).

In State v. Beach, supra, this court reiterated that holding and established the burdens of proof - initially the defendant's to show a right to counsel, which if met, shifted the burden to the state to refute the claim. Beach turns on the right to counsel, which in Florida is determined before trial or plea and does not depend on whether a sentence of incarceration is actually imposed.

Inter alia, Beach relied on Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980). Then the United States Supreme Court overruled Baldasar in Nichols, supra. So, the question before the court is, does Beach survive the demise of Baldasar? Respondent contends that it does, based on state constitutional right to counsel as embodied in section 27.51, Florida Statutes.

Although it is arguably illogical or unchronological, Nichols allows the right to counsel - most useful if employed before the trial or plea - to be determined after sentence is imposed, that is, after the trial or the plea. States are free, however, to determine right to counsel before trial or plea. As the Supreme Court noted:

Of course States may decide, based on their own constitutions or public policy, that counsel should be available for all indi-gent

defendants charged with misdemeanors. Indeed, many, if not a majority, of States guarantee the right to counsel whenever imprisonment is authorized by statute, rather than actually imposed.

Nichols, 511 U.S. at 749, n.12, 114 S.Ct. at 1928.

Florida did exactly this in 1980, when the legislature enacted Chapter 80-376, Laws of Florida, codified as section 27.51, Florida Statutes. Section 27.51 requires the public defender to represent any indigent person charged with 1) a felony; or 2) a misdemeanor, criminal traffic offense, criminal contempt, or violation of municipal or county ordinance

unless the court, prior to trial, files . . .an order of no imprisonment which states that the defendant will not be imprisoned if he or she is convicted.

See also 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); Rule 3.111, Fla.R. Crim.P.

Before this amendment, section 27.51 provided for right to counsel only when a person was charged with a felony. Providing counsel to juveniles or persons charged with misdemeanors was discretionary. The staff analysis says the purpose of the amendment was to update the statute, which was little changed from the original enactment in 1963. Although the staff analysis makes no express reference to Scott v. Illinois, supra, which also involved the right to counsel for misdemeanors, this amendment passed in 1980, apparently, in the first legislative session after Scott was decided.

This court has not before expressly considered what impact, if any, Nichols has on Beach, thus the First District Court certified the question.

Respondent would draw the court's attention to the fact that, at least since the 1980 amendment to section 27.51, Florida has diverged from the rule set out

in Nichols. Nichols allows the right to counsel at trial or plea to be determined after sentence is imposed - and therefor known - without regard to the defendant's risk of imprisonment before the sentence becomes known. The state relies heavily on this point, putting it in boldface on two pages of its brief (State's Brief, pp. 14-15). The error in this argument is that it is contrary to Florida law. Unlike Nichols, Florida grants a right to counsel whenever the defendant **risks** imprisonment, without regard to whether incarceration is actually imposed, unless the judge enters an order of no imprisonment before the trial or plea. This statute was in force at the time Kirby entered his plea in 1982.

As argued previously, Kirby met his initial burden as set out in Beach. Because he was not sentenced to a term of incarceration, it appears that Nichols might find he had no right to counsel and, thus, might allow his uncounseled conviction to be used to enhance his subsequent sentence, a point with which the state agrees. **But that is not the law of Florida**, before or after Nichols.

Unlike Nichols, Florida gives Kirby a right to counsel because he risked imprisonment, even if none was imposed, unless the judge had entered an order of no imprisonment, or he validly waived counsel, before he pleaded. As there was no proof of either circumstance in the record, Kirby's uncounseled conviction was invalid under Florida law.

Nichols allows the previous conviction to be used for enhancement **because** the previous conviction is valid under Nichols. Nichols does not stand for the proposition that an **invalid** previous conviction can be used to enhance a subsequent sentence, but that is the state's position here.

The late Judge Zehmer's concurrence in the district court opinion on this court's mandate in Beach addressed this issue, which the concurrence found this court had left unclear. His comments included the following:

Reading the statutory provision in pari materia with the cited rules, **the extent of the right to counsel under the Florida Constitution is significantly broader than the right guaranteed under the United States Constitution** as defined in Baldasar, in that Florida law guarantees counsel to a criminal defendant in every misdemeanor case regardless of the authorized period of imprisonment unless the court certifies prior to trial that the defendant will not be imprisoned. Unlike the federal right, under Florida law the defendant need not be at risk of more than six months' imprisonment; any risk of imprisonment triggers the right to counsel unless the trial court makes the required certificate. (emphasis added)

Beach v. State, 600 So.2d 1212, 1214 (Fla. 1st DCA 1992)(*opinion on remand*)(Zehmer, J. concurring).

While no case has discussed the impact, if any, of Nichols on Beach, respondent contends that Kirby's 1982 DUI conviction - which was entered, contrary to state law, without counsel or waiver of counsel - cannot in fairness and under state constitutional due process be used to enhance his 1997 DUI conviction 16 years later.

Beach did not have to address this issue under Florida constitutional law, because it had Baldasar and could not have predicted Baldasar's relatively short life. As Judge Zehmer's concurrence in the Beach remand opinion notes, Florida's right to counsel is broader than that provided in Nichols. Nichols allowed a valid uncounseled previous conviction to be used for a subsequent sentence enhancement, but the instant conviction is **invalid** under Florida law. Nichols provides no support for using an invalid uncounseled prior conviction to enhance a subsequent conviction and sentence.

Respondent contends that section 27.51 contains a clear statement of legislative intent regarding right to counsel. Even though the statute does not expressly address subsequent use of an uncounseled prior, this court should rule consistently with the expressed legislative intent - that a conviction invalid because counsel was denied under section 27.51 is also invalid to enhance a

subsequent conviction or sentence.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent respectfully requests that this court answer the certified question in the affirmative and affirm the district court opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sherri Tolar Rollison, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Paul W. Kirby, at his last known address, this _____ day of November, 1999.

KATHLEEN STOVER

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
v. : CASE NO. 96,428
PAUL W. KIRBY, :
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B. Memorandum to Kathleen Stover from Brian P. Murphy,
Supervisor, Clerk of the Circuit Court, Leon County, October 5, 1998

