ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KENNETH O. NICHOLS, Petitioner v.

UNITED STATES

CASE NO: No. 92-8556

PLACE: Washington, D.C.

DATE: Monday, January 10, 1994

PAGES: 1-53

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IN THE SUPREME COURT OF THE UNITED STATES

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KENNETH O. NICHOLS, :

Petitioner :

v. : No. 92-8556

UNITED STATES :

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Washington, D.C.

Monday, January 10, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

WILLIAM B. M. CARTER, ESQ., Chattanooga, Tennessee; on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-8556, Kenneth O. Nichols v. the United States.

Mr. Carter.

ORAL ARGUMENT OF WILLIAM B. M. CARTER

ON BEHALF OF THE PETITIONER

MR. CARTER: Mr. Chief Justice, and may it please the Court:

Kenneth Nichols, the petitioner in this case, was convicted in 1990 in the Eastern District of Tennessee with conspiracy to distribute cocaine. He was sentenced under the Federal Sentencing Guidelines. When the presentence report was prepared, his prior criminal history indicated that he was to receive three points for a 1983 conviction that was late in 1983, in December, for a drug-related offense.

In additional to that criminal history point, he received one criminal history point for an uncounseled prior misdemeanor conviction for DUI. He received in that DUI sentence a sentence of a $250 fine, DUI school, and no term of imprisonment. He faced in that case a term of imprisonment of up to 11 months and 29 days in jail.

The probation officer's report, which was

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presented to the court and on which the district court relied, indicated that there was no information available from the court record in Georgia whether the defendant was represented by an attorney. The defendant, or petitioner Nichols, also told the presentence officer that he had gone to see some lawyer. The lawyer told him that if you're just going to plead nolo contendere in that Georgia misdemeanor case, you don't need a lawyer.

The district judge found, as a matter of fact, that there was no counsel at the 1983 DUI conviction, noting that there was no evidence to the contrary other than the testimony of Mr. Nichols. It was not contested that there was no counsel. The district judge further found on the basis of the evidence in the record, that is the presentence report, that there was no valid waiver of counsel shown on the Georgia DUI conviction. On the basis of his experience with -- dealing with the presentence officers and his confidence in him he, as a matter of fact, found that this was an uncounseled DUI conviction for which --

QUESTION: Well, assuming that is so, for the original DWI conviction there was no jail sentence imposed, right?

MR. CARTER: That is correct, Your Honor.

QUESTION: So that that sentence, under our

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holding in the Scott case, is not unconstitutional.

MR. CARTER: That is --

QUESTION: The conviction and sentence for the DWI are not unconstitutional, right?

MR. CARTER: Under the holding of Scott, Your Honor, that DUI conviction was not unconstitutional at the time it was imposed --

QUESTION: Right, and you accept that.

MR. CARTER: And I accept that, but for the limited reason that there was no fine, or rather no term of imprisonment or incarceration.

QUESTION: Now, I suppose that at most sentencings it is possible for the sentencing authority to consider even prior acts for which there is not even a conviction in terms of determining a sentence?

MR. CARTER: Your Honor, it is true that under the Guidelines a judge is entitled -- a district judge is entitled and required to consider, to hear, and to weigh such evidence to determine what impact it should have. The thing that I believe is --

QUESTION: I mean, what makes this particular prior conviction less reliable than that kind of evidence?

MR. CARTER: Your Honor, I believe that the thing that makes this conviction more unreliable -- it's really not a question of making it quite more unreliable,

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as it is making it more improper to use -- is the fact that under the Federal Sentencing Guide --

QUESTION: Well, but now it's not unconstitutional.

MR. CARTER: It isn't initially.

QUESTION: There's nothing unlawful about it.

MR. CARTER: No, Your Honor, not initially for the limited purpose of giving him a money fine.

QUESTION: Well, you say -- you talk as though there's some sort of a springing use concept, that the conviction wasn't unconstitutional initially. Are you suggesting that it later becomes unconstitutional?

MR. CARTER: I am, Your Honor. And I recognize that this Court in the dissent in Baldasar was concerned that this was creating or might create or does create, and I think it does, a hybrid conviction that might be valid for some purposes and yet invalid for another. And today what I want to try to convince the Court is -- is that there is a very good reason, based on the Sixth Amendment of the United States, why that is a very good and appropriate rule.

And not only a good and appropriate rule, but a rule that will be easy for our Federal district courts to apply, that will give the weight and deference the Sixth Amendment deserves and yet not upset our system of law,

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which I understand this Court is very concerned with, the effect of holding that a conviction might be valid for one purpose and not for another. Let me say --

QUESTION: May I just ask you those purposes for which you agree it is valid? It's valid in giving the individual a criminal status in the first place; you have no quarrel with that.

MR. CARTER: So long as there is no term of imprisonment, yes, Your Honor.

QUESTION: That's right, just criminal status, he's got a record.

MR. CARTER: Yes, Your Honor. Yes, Your Honor.

QUESTION: And it's valid for purposes of a fine.

MR. CARTER: Yes, Your Honor.

QUESTION: A substantial one. It's valid, I assume, a conviction like this, for purposes of license revocation or declarations of ineligibility to drive?

MR. CARTER: Yes, Your Honor.

QUESTION: Why isn't it valid -- why shouldn't it be valid, why isn't it reliable enough to be used to identify a class of individuals who are going to be subject to a heavier penalty in the future? Because the Government's argument is that the use -- that the direct use that's being made of the conviction is simply to

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identify the class which is subject to a more onerous sentencing scheme for later offenses. Why is it unreliable for that purpose?

MR. CARTER: I think the reason why it is un -- it is improper is because of its unreliability. The history of --

QUESTION: Well, but where -- where -- where does the relative unreliability -- how do you draw the line on relative unreliability? If it's reliable enough to identify him as a criminal with certain consequences short of incarceration, why is it unreliable enough to identify him as a member of a class which is on notice that the class members face a heavier penalty scheme if they commit further offenses?

MR. CARTER: Well, frankly, Your Honor, I think that the distinction is -- is that of incarceration. I think they're all unreliable, I think we're just willing to accept the unreliable -- unreliability in some circumstances. Here --

QUESTION: Well, would your answer -- would your answer be different if the individual had an opportunity before he was sentenced, as giving -- giving weight to the first conviction, to prove that, in fact, he didn't do what, on the record, he appears to have been convicted of? Would your answer be different if he had that opportunity?

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MR. CARTER: Your Honor, if the judge had a weighing and sentencing -- in the sentencing determination was able to himself weigh something then yes, I think an argument could be made that even though it's initially unreliable, that the judge, since he has some discretion, could decide how much weight to give.

QUESTION: Well, doesn't -- doesn't the judge have that discretion under the Guidelines, because he can depart downward if the criminal -- if he is satisfied that the criminal history does not give an adequate or accurate indication of the -- of the individual's past culpability?

MR. CARTER: I think it is true that under the Sentencing Guidelines the judge does -- if he finds a reason which he articulates and which will stand on appeal, that he can depart. However, there is an automatic --

QUESTION: Well, you could -- you could give him that reason, couldn't you, if you said, look, this was an unreliable conviction because, in fact, I didn't do it?

MR. CARTER: Well, Your Honor --

QUESTION: And I'll -- I'll bring in a couple of witnesses to show that I didn't. Now, the judge has the -- has the option to hear that evidence and to consider that request, doesn't he?

MR. CARTER: Except that the judge does not have

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an option to determine what sentencing range it is within which he is to be sentenced. He automatically -- there was an automatic increase from range two to range three because of this one criminal history point, and that meant Nichols was sentenced at the very top of category three criminal history score for his offense. He got 25 months --

QUESTION: Yeah, but the judge -- the judge can then -- if the judge is satisfied that the -- that the criminal history is not sufficient -- is not adequately revealing of the facts, he can then depart downwards so that a person in your client's position would come out the same way as if it hadn't been considered in the first place. Isn't that correct?

MR. CARTER: Only if there is an adequate justification for that.

QUESTION: Well, that's right. And if there is an adequate justification, the judge can do it. If there isn't an adequate justification, there's no indication that the original sentence is or the original conviction is unreliable.

MR. CARTER: Well, I think it is true there can be a downward departure. I do think that there is a very basic reason why these kinds of convictions are unreliable, and I'd like to speak to it, if I could.

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QUESTION: But you -- do you agree with me that there is an opportunity to show the unreliability, and if that unreliability is shown the judge has an opportunity to consider that in a downward departure?

MR. CARTER: Yes, Your Honor, I do.

QUESTION: Okay.

MR. CARTER: Subject to, of course, being reversed if he gave undue deference or weight to it. But I think that the important distinction in this case is that the Sentencing Guidelines have brought a new dimension to sentencing. There are certain things where there is no discretion, and one of them is the Guideline range. The Guideline range does automatically increase when there is -- when there is the use, for instance, of this prior uncounseled misdemeanor.

Now, why should the court be concerned about an uncounseled misdemeanor where there is only a money fine? The reason for that is, I think, found in the history of Gideon v. Wainwright, Argersinger, where the Court found first that, from its previous decisions, the right to counsel is very important. Even an educated person in a court is not able to follow all the rules of the court, is not able to understand the processes of the court.

Now, what happened was after Argersinger, the Scott v. Illinois decision gave the line, the clear line

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that if incarceration was involved, then the conviction was unconstitutional if there was no counsel. If there was incarceration, there simply had to be counsel.

Now, that court -- in my view, the case recognizes the fact that an uncounseled misdemeanor is inherently unreliable. Day in and day out in the counties where -- in the county where I practice, and I think all over the country, the lower courts, the sessions courts, the municipal courts, hear thousands and thousands of cases. They have crowded dockets. They're trying to move their cases along.

What's happened with Scott v. Illinois is that we have created a type of case where an individual faced with an offense is likely to opt not to pay for a lawyer, if they're able to hire one, because of the expense of doing so, because all they've got to do to avoid this problem is to enter a plea of guilty.

The initial conviction is constitutional. There aren't any rights waived.

QUESTION: Well, they've have a right -- would they have a right to appointed counsel if they chose to contest the thing across the board and not simply agree to pay a fine?

MR. CARTER: If they were indigent, they would have the right to find appointed counsel. But even then,

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Your Honor, Mr. Chief Justice, I think that there are people, because they fear the process, because they find that there's an easy way to resolve this case just by paying a little fine, will be lulled into believing that there's no significance to it.

They won't have been read their rights, they won't have been made to understand that what they're doing is something significant. Now, the grave danger that I think appears here is that we will be allowing, if we accept that once it's unconstitutional -- I mean rather once it's constitutional because there's only a money fine, if we do not say that it later becomes unconstitutional if we're trying to impose incarceration, is that we will be relying upon thousands of convictions which are inherently unreliable because of the reality of life out there in the court system.

QUESTION: Well, you say they're unreliable and therefore that the person not only chose to pay the fine, but chose to pay the fine when he could have defended -- successfully defended the action?

MR. CARTER: That's right, Your Honor, and that can happen.

QUESTION: Well, what reason do you have for thinking that?

MR. CARTER: Well, Your Honor, experience. I've

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seen it in people in juvenile courts --

QUESTION: Well, but anything -- anything other than your own personal experience?

MR. CARTER: Well, Your Honor, I think my personal experience and I think the Court's decisions that have -- in Gideon, in Argersinger, and in Scott that have noted that the process -- we're all human with all of our frailties in the system. We have to run it with humans, and we're always trying to make it as reliable as possible. And I think those cases recognize that the enhanced reliability is needed if we're going to impose imprisonment on someone.

QUESTION: Do you think that the basis for Gideon and Argersinger and Scott was reliability?

MR. CARTER: Well, I think that's one of the things that the Court --

QUESTION: Well, do you think they were heavily relied on, say, in Gideon?

MR. CARTER: Well, perhaps not. I'm not -- I can't tell the Court that I recall --

QUESTION: I mean in the opinion. I don't mean in the --

MR. CARTER: Right.

QUESTION: -- Unspoken minds of the justices.

MR. CARTER: I believe that reliability is

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essentially the key to why we want to have counsel, is that counsel makes the system more reliable by making certain that the accused is aware of the significance of what they're doing.

QUESTION: Suppose that the accused was advised that one of the consequences of the conviction that could be entered if he proceeded without counsel and entered a plea of nolo contendere, was that the sentence could later be escalated based on a previous conviction?

MR. CARTER: If Your Honor --

QUESTION: Would that resolve your problem?

MR. CARTER: Your Honor, I believe it would resolve my problem. And what I'm trying to do --

QUESTION: Would that make the conviction more reliable?

MR. CARTER: If there is a facially valid waiver of counsel indicating on the face of the document that the rights were read, that the defendant waived the right, then I think that that does enhance the reliability of the conviction, yes.

QUESTION: Why does it enhance reliability as opposed simply to making it fair to stick the defendant with the conviction? What's it got to do with reliability?

MR. CARTER: I'm sorry, Your Honor, I did not

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hear --

QUESTION: I mean if -- you're saying that the waiver of counsel makes the conviction without counsel more reliable, and my question is why does it make it more reliable as opposed merely to making it more fair to charge him with it, reliable or not?

MR. CARTER: Well, it makes it more reliable --

QUESTION: Isn't the only difference --

MR. CARTER: -- Because at least we know that what has been explained to the man is that -- or the woman who faced the lower court, that the judge took the time to explain that they did have a right to a trial, that they did have a right to confront the witnesses. It's one of those things where we are --

QUESTION: No, but -- that goes to waiver, but why does it make the resulting uncounseled conviction more reliable as to -- I assume as to the facts which it imports?

MR. CARTER: Well, I suppose the answer to that is perhaps it doesn't, but because there was still no counsel. But we have long recognized that a person has a right, the Supreme Court has, to waive counsel, and, for instance, to defend themselves. We don't -- we will -- once the individual -- it has been explained to the

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individual that they have that right, if they chose to do it then they have the right to do it.

And I suppose in that case Your Honor is probably correct, that that is --since there's no counsel, perhaps it isn't unreliable in a factual sense. But at least the right has been read to the person, they are aware that it is a matter of consequence, what they're doing when they're in the lower court when they're entering that plea of guilty.

QUESTION: Mr. Carter, do I understand that what you're saying is what is needed here is something comparable to a Rule 11 plea that this is a piece of information that the judge should have told the defendant the possible consequences? So just as the -- before a judge takes a plea in an ordinary case, he has to spell out what the consequences are, and the defendant says, yes, I know, I know, and here there was an essential piece of information the defendant didn't know. Is that --

MR. CARTER: That's correct, Your Honor. What I'm trying to do is espouse or advance a rule that will simply say that when the Federal district court looks at a prior conviction, a prior misdemeanor conviction, and determines there was no term of imprisonment given, that that judge then looks to the record -- which is, I believe, consistent with the Sentencing Guidelines which

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tries to look to the conviction record, the record of conviction to see what the person's criminal history score is -- just look to determine if, one, there was a lawyer, or if there was a lawyer waived, that the rights were read to the individual.

And all that needs to do is to show that on the record. Now, Georgia didn't do that.

QUESTION: But you're saying it could not be a valid waiver without an explanation of this collateral consequences --

MR. CARTER: Your Honor, all there needs to be is a facially valid waiver. It is true, even if there is a facially valid waiver, that a defendant could mount a collateral attack and establish enough evidence to show that even though it says that it wasn't valid -- but we don't have to do that in this case.

QUESTION: Well, that would be contrary to Scott if you allowed that, would it not?

MR. CARTER: Well, that would require that that be done prior and in a prior event. I would -- it would not be -- it would not be invalid for this purpose, you're right, Your Honor, I think that's absolutely correct. Under Scott it is initially a valid -- a valid conviction. Now, this Court --

QUESTION: The one part of your presentation

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that puzzled me, you said in your reply brief that underlying conduct could be taken into account. You said you're not -- you didn't ask the court below and you're asking this Court to immunize him from consideration of his prior conduct.

MR. CARTER: Well, I think that under the Guidelines that you can, within the sentencing range, take into account conduct to determine where in that particular range that it can fall because of conduct. But what we're talking about --

QUESTION: Conduct that's unrelated to the present offense we're talking about.

MR. CARTER: Right, right.

QUESTION: But you're saying that the judge could have considered this very conduct, the DUI conduct, could consider the conduct but not the sentence, is that it?

MR. CARTER: If it was -- if it was -- if it turned out that the judge, in his discretion, felt that it was reliable after hearing evidence about the conduct, yes. But in this case it was an automatic enhancement of sentencing range based on the fact that there was this uncounseled misdemeanor.

QUESTION: Mr. Carter, would you allow the judge to receive evidence of the uncounseled conviction as proof

of the underlying facts, but not automatically add the point to the criminal history score?

MR. CARTER: Could the Court repeat the question? I'm sorry.

QUESTION: Your position is that the conviction does not automatically -- should not automatically add another point to the criminal history score.

MR. CARTER: Right, should not, that's correct.

QUESTION: In your view, in the judge's review, to the extent he has discretion under the Guidelines, could he receive the conviction in evidence for the purpose of understanding what, in fact, happened, but without giving it the automatic triggering effect?

MR. CARTER: I think that he could, Your Honor. I think that would be -- I think that that would be within his discretion under the Guidelines. What's happened here, though, is there was an automatic --

QUESTION: And then he would decide whether or not to increase the criminal history score.

MR. CARTER: Yes, Your Honor, but he -- well, no, I don't think he would be deciding whether to increase the criminal history score. I think his decision would be where in the lower Guideline range.

QUESTION: That's --

MR. CARTER: I would espouse a rule that says

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you don't change the Guideline range if there is no lawyer or if there's no waiver of counsel.

Now, we're basing our argument on Baldasar. Baldasar, as the Court is well aware, was a case that had some striking similarities to this case. Baldasar had stolen a showerhead. Under Illinois law it was a misdemeanor. It would become, under their statute, a felony if there had been another misdemeanor. Baldasar had a prior misdemeanor conviction. It was uncounseled, there was only a money fine. Same situation. The Court there held that --

QUESTION: But when you say the Court held, there was no Court opinion in Baldasar, was there?

MR. CARTER: That is correct. There were concurring opinions, Mr. Justice -- Mr. Chief Justice.

QUESTION: And was there any lowest common denominator that represented the views of five justices?

MR. CARTER: Your Honor, I believe that the view that represents the views of the five justices is that if the prior misdemeanor conviction was uncounseled, even though there was only a money fine, that if that prior misdemeanor conviction was for an offense of more than 6 months, more than a petty offense as Justice Blackmun said, then I think that that is unconstitutional and cannot be used to change the -- automatically change the

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Sentencing Guideline range in this case.

QUESTION: Well, were there -- was there a line of reasoning supported by a majority of the justices?

MR. CARTER: Your Honor, I have to combine the reasoning, as the Court knows.

QUESTION: So the case is not -- is not binding precedent.

MR. CARTER: Your Honor, I think not only -- I think it should be binding precedent.

QUESTION: Well, but under our decisions is it or is it not binding?

MR. CARTER: Your Honor, I think that that is the lowest common denominator that, under Marks, could be found to be binding precedent, but I'm -- I will leave that to the decision of the Court.

QUESTION: What do you mean by binding precedent? Can't be overruled even --

MR. CARTER: Well, Your Honor, I have finally reached the court where you can always overrule, so I certainly know that it can be overruled.

QUESTION: We are never totally bound, are we?

MR. CARTER: No, Your Honor, you're not ever totally bound. But I think that the case is a good case because I think that it recognizes that there is an inherent unreliability if we allow all these petty

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offenses where no rights had to be read by anybody -- they don't have to be told anything.

What we're allowing to happen is to allow convictions to occur that are unreliable.

QUESTION: Maybe this is same --

MR. CARTER: And why should it become more reliable later?

QUESTION: Why does the waiver of it make the result more reliable? I mean, I can see how the waiver of it may -- the failure to waive it properly may render that particular proceeding without a lawyer unconstitutional, but I don't see how the waiving of it makes the result more reliable. All it proves is that you have a foolish defendant.

MR. CARTER: The reason it doesn't make it unconstitutional is because under Scott it wasn't unconstitutional, even though there was no lawyer.

QUESTION: We're not talking about unconstitutionality here. I don't know -- you seem to accept that what we're talking about is making this retroactively unconstitutional. We don't have to do that. We say it was constitutional when rendered, it remains constitutional but it simply cannot constitutionally be used as the basis for a later sentence. That is not retroactively making it unconstitutional.

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MR. CARTER: Your Honor, I'll certainly accept that interpretation. That -- I certainly would agree with that.

QUESTION: Oh, don't do it, except for the reason that it's true. We're not saying it's retroactively unconstitutional. It was valid --

MR. CARTER: Well, that's correct, Your Honor, and I'm not arguing it is.

QUESTION: But in that case why is it that you're willing to accept a waiver? It seems to me the logic of your position is that even with a waiver it's not reliable.

MR. CARTER: Well, I mean Boykin --

QUESTION: Why does the waiver make it reliable?

MR. CARTER: Boykin v. Alabama talked about the fact that there needs to be a knowing and intelligent waiver. I think we have our --

QUESTION: That's for purposes of the constitutionality of the original proceeding, not for purposes of deciding whether the result of that proceeding is reliable. That's a totally different question we have before us. Now, I don't see how the waiver bears at all upon whether the result is reliable.

MR. CARTER: I think --

QUESTION: You have an idiotic defendant who

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waives counsel, says I waive it, yes, I --

MR. CARTER: I don't disagree with Your Honor that the reliability is enhanced when there's a lawyer. I think that that's right. And what Your Honor is pointing out to me is, well, what difference does it make if there's a waiver? Well, what I guess I'm doing is saying -- is saying the reality of it is we cannot force a person to have a lawyer; this Court has said you don't have to.

And so what we're saying is that what we're offering as a court system is to make it reliable. But if you, a defendant, ultimately, after being advised of your right, want to waive it and want to proceed without counsel, then we as a system have done all that we can. And what I am espousing or advancing is a rule that simply follows Baldasar, that says here is a minor offense for which there was a plea of guilty with no lawyer, inherently unreliable, and that's what I feel that it is.

QUESTION: Do you have any authority, social science authority or otherwise for the proposition that uncounseled misdemeanor convictions are unreliable in general?

MR. CARTER: Your Honor, the only authority that I can recall from my reading is -- I believe I am recalling correctly that in Argersinger and in Scott there

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were discussions of the fact that it is --

QUESTION: Of a speculative nature. I mean, are there any studies that show that uncounseled convictions are inherently unreliable?

MR. CARTER: Your Honor, I do not presently, as I stand here, have such. I was persuaded much by the language of the Courts there, that it is unreliable, that it increases the reliability. I don't want it to -- I don't think it's a fiction. That is I think it is -- is really true that sometimes people, in order to avoid prison sentence, in order to do the easy thing, might well pay a fine and go their way, and years later we would have to go back and be looking at these things.

The advantage of the rule espoused here, the bright line rule that all you do is go and look at the record, is the Federal Courts then don't have to hold extensive hearings to determine what happened 8 or 9 years ago.

QUESTION: Well, why wouldn't be an equally bright line rule to say that uncounseled misdemeanor offenses that are not unconstitutional may be used in subsequent sentencing for a subsequent offense?

MR. CARTER: Your Honor, it would be an equally bright line rule for you to say that, but it would be an equally bright line rule that ignores the inherent

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unreliability of uncounseled misdemeanors.

QUESTION: You insist on talking in terms of reliability instead of in terms of fair notice to the defendant of the consequences going in. Why do you take that line, that it's a question of reliability and not of fair notice to the defendant of the consequences of his plea?

MR. CARTER: Because I'm a little bit fearful as to whether this Court would go so far as to say that we ought to have fair notice. But, Your Honor, I must tell you, I think that would be -- fair notice would be appropriate. That is that personally I believe that it would be appropriate, when waiver is read, to say this little conviction here can also be used later.

I think this Court -- I don't know if this Court would be -- wants to go that far, but I think that that is a -- I think that that would also enhance reliability of the conviction, I think that would also protect the interests of the Sixth Amendment, and I think that would also still be a clear bright line rule, easy to apply. The Federal Courts wouldn't be bogged down trying to find out what happened 8, 10, 15 years ago in a prior conviction.

It would be a clear rule and, I think, consistent with the Constitution. And I don't think the

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fact that there is a hybrid offense created is a problem. If the Court -- juvenile adjudications, for instance. For years in my practice I was used to the fact that juvenile adjudications were available, you know, in juvenile court, but you couldn't use them later in adult court. Now I know the rules changes sometimes, but all I'm saying is that there has been a long time where we worked with that. The States are working with this rule.

I think basically the States have interpreted Baldasar in a broad way. They're working with it all right. Will it really hurt much? In most convictions like DUI's all over the country, a lot of States have imposed imprisonment for the first offense. Well, of course --

QUESTION: There's quite a difference of opinion among the State courts on the Baldasar point. To say the State courts are working with it certainly -- I hope you're not trying to suggest that they've come out unanimously.

MR. CARTER: Oh, heaven's no, Your Honor, I'm not. I'm trying --

QUESTION: They've split quite dramatically.

MR. CARTER: I think that they've split less than the Federal courts have, is really what I guess I would have to say.

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QUESTION: Well --

MR. CARTER: If I may reserve my -- any remaining time I have, unless the Court has more questions.

QUESTION: Very well, Mr. Carter.

Mr. Bryson, we'll hear from you.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Yes, Mr. Chief Justice, and may it please the Court:

Our position in this case is that a valid uncounseled misdemeanor conviction can be used for sentence enhancement even if it could not support a sentence of imprisonment in its own right. And we base this contention on three positions.

First, a particular factor does not need to be sufficient to support a criminal conviction and imprisonment in order to be used at sentencing. Second, there is nothing so inherently unreliable about a valid uncounseled misdemeanor conviction that would bar its use in a later sentencing proceeding. And third, an enhanced sentence for a second offense is not simply an additional sentence for a first offense. Instead, it's a sentence for the second offense that is imposed on a person who has a criminal record, that takes account of the fact that the

person has a criminal record.

Now, let me address each of these three points in more detail. First, it's a well-settled principle of sentencing law that this Court has reiterated again and again, that the Court in sentencing may consider a very broad range of factors. Just because a particular factor would not have supported, in itself, a sentence of imprisonment, doesn't mean it can't be used at sentencing. And this --

QUESTION: Mr. Bryson, isn't there a difference between using a factor at sentencing when the judge has broad discretion, on the one hand, and having an automatic enhancement by adding to the criminal history score and making him -- perhaps making him eligible for imprisonment for the first time?

MR. BRYSON: Your Honor, constitutionally I don't think it makes a difference. And for this reason, because it -- suppose a judge were to say I would have let you -- I would have given you probation, but I see that you have this on your record and therefore I'm going to give you 2 years; that's a discretionary call by the judge. It's exactly the same, we submit, as having a guidelines system or some other system of guided discretion that tells the judge that for a first offense you should give an extra 2 years.

QUESTION: Yes, but you have to acknowledge that here there's a difference that if you didn't have the automatic addition of the point and the judge took evidence and found that there was this bad conduct committed in the form of a misdemeanor, whether a valid conviction or not, he would have discretion as to whether to enhance or not, but under the Guidelines he doesn't.

MR. BRYSON: Well, he doesn't have discretion under the Guidelines to do that, that's true. But as this Court said in Dunnigan --

QUESTION: And most of your cases where you talk about using prior history have been in the discretionary context.

MR. BRYSON: Yes. But, Your Honor, this is precisely the point that the Court addressed in the Dunnigan opinion, in which it said there can't be a difference between a decision that's made within the discretionary system and a decision that is made as a result of a guided discretion direction to take a particular factor into account. And that -- that's what the Court said with respect to a perjury enhancement that was required by the Guidelines.

QUESTION: Even if we were to leave that aside, was I correct in my suggestion to opposing counsel that the judge would have discretion, in effect, to -- by means

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of downward departure to mitigate this automatic character, if the defendant came in and offered evidence to the effect that this history of his conviction was not a reliable guide to what he had actually done, because for whatever reason he could show that he had not committed the offense. The judge could take that into consideration in the downward departure, couldn't he?

MR. BRYSON: Your Honor, I'm doubtful that the Guidelines' provision for departure, which is section 4A1.3, was designed to permit a hearing in every case over whether the particular prior convictions were in fact convictions that result -- that --

QUESTION: Would it be the Government's position that that would be improper, that the Court should not entertain a request to present evidence for that purpose?

MR. BRYSON: Your Honor, there may be extreme cases in which that would be a permissible application of 4A1.3. Not, I think, a routine practice of coming in and saying I didn't do any of these, I just didn't do them and I was railroaded in every single case. That would, I think, be an improper application of that departure.

There may be extreme cases where somebody comes in and says that, look, there was a sheriff there who produced all of these traffic warrants against me, and they were all adjudicated against me without my notice and

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they were adjudicated as default judgments, and none of them are any good because it was done purely as a matter of spite. That sort of thing, yes.

QUESTION: So you're saying there's got to be some kind of a high initial showing.

MR. BRYSON: Yes.

QUESTION: And offer to prove something extraordinary.

MR. BRYSON: Yes.

QUESTION: Yeah.

MR. BRYSON: At least.

QUESTION: Well, in this very case, for example, if you have just one that makes all the difference between one category and another, would the judge have heard evidence if he wanted to get on the stand and say it was cheaper to plead guilty than it was to hire a lawyer and I really wasn't drunk that night when I was driving, but I decided I'd take a plea? Would he listen to that evidence?

MR. BRYSON: I don't think that, in the typical case, would be admissable.

QUESTION: I wouldn't -- in this very case I wouldn't think so.

MR. BRYSON: And, in any event, there was no such suggestion here. There was -- this material was

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in --

QUESTION: No, I understand. But we're concerned with the case where we think maybe the presence or absence of a lawyer might have made a difference.

MR. BRYSON: I'm doubtful that that would support a departure. Now, in this case --

QUESTION: But on the other side of the coin, if we rule for the other side, the Government could nevertheless put in the conviction as evidence supporting some additional bad characteristics of the individual, I would think.

MR. BRYSON: Within the Guidelines range, as counsel has --

QUESTION: No, just as factors to be considered in total history.

MR. BRYSON: Oh, I doubt it, Your Honor.

QUESTION: You do.

MR. BRYSON: I suspect -- at least if the Court adopted the position of the concurring justices in Baldasar, the conviction would be out of bounds for any purpose that could result in an enhancement of the term of imprisonment. And, of course, a decision to increase the range or increase the sentence within the Guidelines range would be such an enhancement of imprisonment. So I don't think there can be a distinction drawn between adding one

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point that throws you into a new offense level --

QUESTION: And allowing it to be admitted into evidence.

MR. BRYSON: Or criminal history level, and just allowing it to be considered within the Guidelines range.

QUESTION: I hadn't thought of that as being the same. You may be right.

MR. BRYSON: The Guidelines range is 25 months, so the judge -- if the one impermissible misdemeanor conviction throws you up by 25 months it's exactly the same outcome that occurred here by changing the criminal history, so I don't think there could be a distinction on that ground.

QUESTION: Just to make sure I understand your answer to Justice Stevens, is it your position that it would not only be improper to introduce the conviction, but that it would be improper for the Government to attempt to introduce evidence of the underlying fact?

MR. BRYSON: No, Your Honor. It is -- the answer is that it would be improper to introduce the conviction if the conviction could result in an enhancement of the time of imprisonment. But it would not -- and it would never, in any event, be improper to introduce evidence of the underlying activity. So that's the distinction.

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Now, to go back to the points that I think really point the way here for how an uncounseled by valid misdemeanor conviction should be regarded, it is something that this Court has said in a number of different contexts, that there are a variety of considerations for sentencing that are perfectly inbounds to be considered and that can result in enhancement of sentence, even though they could not possibly have supported a term of imprisonment, or for that matter even a criminal conviction, standing by themselves.

In this Court's own cases, in cases such as the Williams case involving uncharged conduct, cases involving the failure to cooperate with the authorities, cases involving perjury that is found by a judge by a preponderance of the evidence, and cases involving say the use of a weapon during the course of the commission of a felony, all --

QUESTION: But those are -- are they not, Mr. Bryson, all conduct relating to the offense before the court? The perjury, the related conduct, the acquitted conduct, the dismissed charge, all have to do in relation to conduct -- in relation to the offense of conviction.

MR. BRYSON: You Honor, the uncharged conduct referred to in Williams of course referred to uncharged other activities of the defendant that had nothing to do

with the particular conduct that's at issue in the case on trial, so the answer would be in some cases yes, in other cases no.

And we think it makes no difference, because what we're looking here at constitutionally is the authority of a judge to make a determination not only with respect to the kind of offense, all the circumstances of the offense, but the kind of person the judge has before him. And the -- that person may be someone who his a first-time offender and therefore the kind of person that we typically extend leniency to, or that person may be a person who has been convicted on other occasions and as to whom we don't extend leniency.

QUESTION: But isn't there a difference between related conduct -- conduct related to the offense that the judge must take into account and that can throw you into a higher range and any kind of conduct that ever -- that this defendant was every involved in that is part of the defendant's background?

MR. BRYSON: Your Honor, I don't think there's a difference for constitutional purposes. Again, I come back to the answer that I gave referring to the Dunnigan case, and again repeated in the McMillan case, McMillan against Pennsylvania, that if the judge is saying I see on this -- based on this factor, I am going to give you a

higher sentence, there can't be a constitutional difference between that determination, even though made as a discretionary matter, and a determination that a person who has that factor will get a higher sentence made as a matter of the Sentencing Commission's determination or Congress'. It's the same thing for constitutional purposes, we submit.

QUESTION: Mr. Bryson, can I ask you another question? I'm just curious if you know the answer. What about plea -- a plea of nolo contendere supporting a conviction? Are they treated the same as a guilty plea or a regular conviction?

MR. BRYSON: They are in the Guidelines. The Guidelines makes it quite clear that a plea of nolo contendere is the same.

QUESTION: Yes.

MR. BRYSON: And, in fact, in Georgia where, of course, this plea was entered.

QUESTION: Yes.

MR. BRYSON: There's a specific statute that provides that the nolo contendere plea can be used in aggravation of later sentences, and the court -- Georgia courts have held that it may be used in recidivism proceedings. So it's --

QUESTION: It's kind of contrary to the theory

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of nolo contendere plea. But that's interesting, I didn't --

MR. BRYSON: Well, the theory, Your Honor, is that you can't use it in a civil proceeding. And, in fact, the reason that you have nolo contendere pleas in Georgia in these kinds of cases is because it can't be used to revoke your driver's license, which is often a matter of great concern. But there -- it is quite clear in Georgia law that as liberal as Georgia is in granting relief to someone who has pled nolo contendere, the -- it does not give them protection against the use for aggravation or in recidivism proceedings.

Now, let me turn next to the reliability point. We submit that there is nothing that is so unreliable about a valid misdemeanor conviction that makes it unusable at a sentencing proceeding.

QUESTION: But, Mr. Bryson, what about the fair notice consideration, the Rule 11 question, where judges are cautioned to be meticulous when they take a plea that the defendant is fully informed of consequences of that plea? And this is a pretty important consequence.

MR. BRYSON: Your Honor, it is my understanding that there is no requirement under Rule 11 that a defendant be notified. And this is even in Federal court under the Rule, never mind the constitutional

requirements. But there's no requirement that the defendant be advised that one of the consequences of his plea may be that down the line, if he should commit another crime, he will be subject to a higher sentence based on either a recidivism statute or some kind of aggravation system such as the Sentencing Guidelines. That is not in the Rule 11 colloquy requirements.

And there's a reason for that, Your Honor, and this goes to notice. Not only --

QUESTION: Mr. Bryson, I'm not talking about the general -- the run of the mill case where the defendant knows when he takes a plea that he is subject to a term of imprisonment. But this is -- when the judge takes this plea without counsel, the judge has, in effect, decided that there's going to be no incarceration.

MR. BRYSON: That's right.

QUESTION: Because if the judge thinks incarceration is within the ballpark, the judge has to afford counsel.

MR. BRYSON: That's correct.

QUESTION: So --

MR. BRYSON: But, Your Honor, in this kind of setting it is -- it is probably the most basic principle of -- I think of sentencing that is understood by every 16-year-old that has ever stood before a juvenile court

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judge or justice of the peace, where the court says I'm going to give you a break this time, but I never want to see you back here and if I do I'm going to throw the book at you.

People understand that if you do it once you might get off lightly; if you do it again, they're going to hit you harder. And the reason is they're going to say -- they're going to look back and they say a-ha, you were here before, now we're going to hit you harder. That isn't something that most people need to be told in order to understand.

QUESTION: Well, Mr. Bryson --

MR. BRYSON: That's part of our legal culture.

QUESTION: The risk that an uncounseled conviction might be used in a later recidivist proceeding was not discussed in Scott. I mean if this is such a well-understood principle, perhaps then we should have discussed that as one of the risks that we were assessing in Scott.

MR. BRYSON: Well, Your Honor, I just think it is -- it is just something that is -- is so familiar to us that you -- there are any number of different risk --

QUESTION: So familiar to us that we missed it in Scott.

MR. BRYSON: Well, but you also didn't refer,

for example, to the possible effect of a conviction on employment, on other -- sorry, on whether you could be a public official. There certainly are lots of collateral consequences of even a misdemeanor conviction which -- all of which are valid save one, which is you may not send somebody to prison for an uncounseled valid misdemeanor conviction. You just can't -- that's the one thing you can't do.

Now, included in all of the things you can do, we submit, are that you may consider the valid uncounseled misdemeanor conviction as indicating that the person has a criminal history. And let me give you a hypothetical case that I think makes this point.

The -- suppose you have a case where someone is running a fraudulent boiler room operation and the State gets onto them and catches them at it and they decide, well, this is the first time so we're just going to proceed against you civilly. And they get a civil -- they bring a civil action and they get a civil judgment with an injunction. The person isn't entitled to a lawyer and decides not to have a lawyer at that proceeding. So he has a civil -- a civil judgment against him for this.

The second time -- he goes right out and he does it again. The second time the State catches him and says this time we're not going to be so nice, we're going to

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prosecute you. He goes before a court and the judge says I would have given you probation for this criminal act, but I'm not going to do it now because I see -- based on this civil judgment for which the defendant did not have a lawyer, I regard that as a reliable indication that you are effectively a second-time offender in this -- in this activity and therefore I'm going to give you jail time.

There's nothing conceivably wrong with that. There's no Sixth Amendment violation, there's no unreliability concern. This is the kind of thing that no one would blink at considering. Now, this case follow a fortiori from that case, because in this case there was even more to be said for the reliability, if you will, of the misdemeanor conviction since it had to be established beyond a reasonable doubt, the defendant was entitled to a jury trial, he was entitled to confrontation rights, and he was entitled to compulsory process.

QUESTION: Well, then do you -- then you disagree with Burgett and Texas?

MR. BRYSON: No, Your Honor. I think Burgett is fundamentally different, and that is because there was a constitutional violation in Burgett. The Court said there are two reasons that you can't consider this prior uncounseled felony conviction for enhancement purposes. One, it just -- it would eviscerate the rule of Gideon,

which means -- which is that you cannot have a valid felony conviction without a lawyer or waiver of lawyer. Plus, it would work an additional violation of the Sixth Amendment to use this void conviction in an enhancement proceeding. Neither of those factors is present here.

QUESTION: Well, I suppose we could use that same reasoning to distinguish your boiler room civil conviction hypothetical and an uncounseled criminal conviction. We could say, well, it's undercutting Gideon.

MR. BRYSON: Well, I don't think so, Your Honor, because there's no violation of the Sixth Amendment in my misdemeanor case, just as there's no violation of the Sixth Amendment in the civil case. The conviction is as valid. The misdemeanor conviction is as valid as that civil judgment. And once it's determined that it's valid, there's no reason not to apply it, there's no reason not to say this is good enough to establish the fact of a criminal history, which is all we're using it for.

QUESTION: But, Mr. Bryson, in your hypothetical it's not really the conviction -- it's the conduct that the judge would be taking into conduct, because the -- because there's no instruction to the judge to take into account an adverse civil judgment. And I think that Mr. Carter conceded that the judge in this situation could take into account the conduct, that is the driving under

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the influence, but could not -- what he can't do, according to Mr. Carter, is ratchet it up -- he can't -- you don't get into a new Guidelines category, but the conduct can be considered just as the civil -- the conduct in the civil case could be considered.

MR. BRYSON: Your Honor, in my hypothetical I'm positing that the judge is looking at the judgment, not at the conduct. Not looking behind the judgment, but simply saying I see you have a judgment here for fraud based on the boiler room activities that you engaged in. Never mind going back and reintroducing evidence of all of that; it's enough that there is such a judgment on the books and that the judge can rely on it. And that would not, we submit, create any constitutional problem.

QUESTION: Now --

QUESTION: Do the Guidelines provide for enhancement based on civil judgments?

MR. BRYSON: The Guidelines provide for using civil adjudications as a basis for departure. I think that's in 4A1.3.

QUESTION: Do they have any automatic increase in points where you go from one bracket to another based on civil --

MR. BRYSON: No, it's limited to convictions. But --

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QUESTION: So it's always a matter for the discretion of the judge.

MR. BRYSON: Well, that's right. It can certainly -- it can certainly lead to a change of the sentence within the Guidelines range, and it can even lead to a departure in an appropriate case. And there is the specific provision in the departure Guideline on that point, authorizing the use of an adjudication; not simply conduct, but an actual adjudication.

QUESTION: If you're making an analogy to civil cases, there certainly are civil judgments that are good for one purpose but not for another, are there not?

MR. BRYSON: Certainly, Your Honor. And yet we submit that in the average case it's very hard to find a constitutional principle that would say you simply may not use a civil judgment that is perfectly valid in all respects, that we understand the typical civil judgment to be, that you simply can't use it for this one purpose of enhancement of sentence.

Because all we're doing here -- and I think this is really important to focus on --

QUESTION: There are civil judgments that, at least in the old days, constitutionally were good for only one case only, the old quasi in rem jurisdiction where you were using the property and not the person.

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MR. BRYSON: Certainly.

QUESTION: That was a good judgment for that case, couldn't be used in any other.

MR. BRYSON: Well, that's right, because it wouldn't say anything about the person, presumably. But where you have an in personam judgment that -- the basis of which is -- the essence of the ultimate judgment order is that this person has been found to have engaged in this conduct, that is, we submit, sufficiently reliable for constitutional purposes to justify the conclusion on the part of the sentencing court that this person has a background of this kind of activity and for that reason is not the kind of person who is entitled to lenient treatment at the hands of the courts.

QUESTION: Is it clear that -- under the Guidelines it refers to civil adjudications?

MR. BRYSON: Yes.

QUESTION: Is it clear that a default judgment would be considered an adjudication?

MR. BRYSON: I think a default judgment -- I'm not sure of the answer to that, Your Honor. And --

QUESTION: Well, you ought to be, because otherwise it's really not germane, is it? Isn't this -- what happened here the equivalent of a default judgment?

MR. BRYSON: Well, no, Your Honor.

QUESTION: Nolo contendere.

MR. BRYSON: No, he was there. I mean he walked in and effectively admitted -- or at least indicated that he was not going to contest the State's proof in this case. This is very different from a situation where he did not --

QUESTION: It's very different from admitting --

MR. BRYSON: Have actual notice.

QUESTION: Yes.

MR. BRYSON: Well, Your Honor, it's not, we submit, very different from admitting.

QUESTION: No, I had notice, I just chose not to appear and a default judgment was taken against me.

MR. BRYSON: Well, in this case he had full notice and we know from the presentence report, in fact, on the facts of this case, that he actually consulted a lawyer who suggested that since he really wasn't going to contest the case and the arrangement sounded acceptable, no reason to bring a lawyer with him.

Now, the final point that I think is worth making on this score is that it has to be emphasized that the penalty for -- in an enhanced setting, in an enhanced sentence setting, the penalty is for the second offense, not the first. Now, Justice Marshall in his concurrence conceded as much, but then went on to argue in a -- make

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an argument that has some intuitive appeal that --

QUESTION: In his concurrence in what case?

MR. BRYSON: I'm sorry, in Baldasar.

QUESTION: In Baldasar.

MR. BRYSON: I'm sorry, Your Honor -- made the argument that the fact that you can't directly impose an extra term of -- a term of imprisonment for a misdemeanor conviction is inconsistent with allowing you indirectly to impose it by using that misdemeanor conviction at sentencing for another crime. And if you can't do it directly, you can't do it directly.

But that I think overlooks the fundamental difference between sentencing somebody for a crime and sentencing somebody for a later crime in which you are using the fact of the prior conviction, not to give them extra time because of -- as a means -- as a mode of punishing them for the first conviction, but rather to use as a fact the fact that this person has a criminal history.

And let me just use another hypothetical, if I may, to try to demonstrate that point. Suppose you have someone who is convicted of rape. And under Coker against Georgia, that could not lead to a sentence of death, we know that. Suppose that subsequently that person commits murder and the determination of the sentencer is based on

the fact of the murder and, as an aggravating circumstance, the fact of the rape, you are going to get the death penalty.

Now, in that setting it could be said -- to follow Justice Marshall's analysis, it could be said that the rape, in effect, resulted in the death penalty. And yet we know that that isn't a punishment for the rape. That is a punishment for the murder, which is authorized -- the death penalty is authorized because the person has a history of violent crime.

QUESTION: Well, another way of looking at it is that we don't really care whether it's for the first or the second or some combination, because both have been counseled convictions.

MR. BRYSON: Well, Your Honor, I'm getting away from the question of counsel here and just asking -- addressing right now the question of whether there is force to the logic that was at the base of the concurring opinions in -- of Justice Marshall and Justice --

QUESTION: Well, I think you can argue about whether or not you're being punished for some combination of the first crime and the second. I think that's open to argument in that case that you put.

MR. BRYSON: Well, yes, but it's clear -- the one thing that is quite clear is that you may do, with

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respect to the second penal -- punishment proceeding, something that you could not have done with respect only to the first. And that's my only point with respect to the hypothetical. It does, I think, demonstrate that point.

Finally, I think to look at the question of the importance of this issue. Counsel suggests that this really isn't all that important and that the States can live with it. Well, of course the States can live with it. If you tell them they have to live with it, they will.

But I think it's -- it's, in fact, very important that the States be able to conduct recidivism programs, and to the extent that we do, that the United States be able to do that, in which you do give leniency to someone who is a first-time offender, in which you do take account of the fact that the person has a criminal record when they come back and they do it again, and that you do sentence those people much more harshly than you would the first offenders.

What, in effect, the rule of Baldasar, if extended to this case, would do is to say that everyone, at least everyone who didn't bring a lawyer with them to a misdemeanor -- a prior misdemeanor proceeding, or who didn't have the State appoint them a lawyer for every

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misdemeanor -- everyone is to be treated as a first offender every time.

And drunk driving is a perfect example of where we say, well, first time a fine, second time a heavier fine, third time jail. And yet if you follow the theory of Baldasar into this setting, what you're saying is there's never a second time and there's never a third time unless, of course, the State decides to provide everybody with a lawyer, even if they're only going to have a $250 fine, as in this case. And we think the Sixth Amendment does not require that.

Thank you.

QUESTION: Thank you, Mr. Bryson.

Mr. Carter, you have a minute remaining.

REBUTTAL ARGUMENT OF WILLIAM B. M. CARTER

ON BEHALF OF PETITIONER

MR. CARTER: Thank you, Your Honor.

Your Honor, the structure of the Sentencing Guidelines have made convictions very different from prior conduct. Prior conduct can be used to change the sentence within the range, but not to automatically enhance to a different range, and that is a distinct -- the distinction of this case. This case is like Baldasar in that sense; it increased automatically to a higher range.

Now, original convictions -- the original

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conviction in Georgia was constitutional, but it wasn't constitutional for all purposes. That's so even under Scott. And we think that there are examples -- I mentioned that the criminal -- the juvenile adjudication is an example of that, where an offense was valid for one purpose and not for another.

I believe it was Lewis, Lewis v. United States, where the Court had a situation where someone had a prior felony uncounseled which clearly would have been not useable for many purposes, but it was used for the limited purpose of preventing somebody the status of not possessing a pistol or not possessing a weapon of some kind. That is an obvious example also of offenses being used for different purposes.

I believe that in this case a rule that recognizes that this offense is not reliable and perhaps not fair, perhaps fairness is another -- another element of this -- to be used by someone who unsuspectingly is led to believe that this is of little consequence. Later on it's used to impose imprisonment; I suggest that's inappropriate.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Carter.

The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Mari Federico

(REPORTER)