No. 06-1327

In The
Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

MICHAEL VON FERGUSON,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

REPLY BRIEF

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Respondent has provided no persuasive reason for this Court to deny the petition for a writ of certiorari. He does not dispute that all 50 states and the federal government use prior misdemeanor convictions to enhance subsequent offenses. Nor does he dispute that the petition offers the Court an opportunity to address the issue it was unable to reach in *Iowa v. Tovar*, 541 U.S. 77 (2004). And as explained below, his responses to petitioner's remaining points provide no reason to deny the petition for a writ of certiorari.

A. This Court has jurisdiction because the petition offers the Court its last look at the question presented.

Respondent contends that "[t]his Court lacks jurisdiction to review the interlocutory order at issue in this case because the order of the Utah Supreme Court is not final as required by 28 U.S.C. § 1257(a)." Br. Opp. at 4. He acknowledges that "the federal issue would be mooted" if, on remand, the district court rules that he duly waived his Sixth Amendment right to counsel. *Id.* at 5. However, respondent contends that if the district court rules that he did not duly waive his Sixth Amendment rights, petitioner may again seek appellate review. *Id.* at 5-6. This argument ignores controlling Utah law.

Respondent claims that, after the district court rules, petitioner may apply for discretionary review of the court's interlocutory order. *Id.* at 5-6 (citing Utah Code Ann. § 77-18a-1(4) (Supp. 2006); Utah R. App. P. 5). This argument ignores crucial state filing deadlines described in the petition. As explained there, a petition seeking review of an interlocutory order must be filed "within 20 days after the entry of the order of the trial court." Utah R. App. P.

5(a). Accordingly, the scope of a second interlocutory appeal would be limited to issues determined by the district court within the preceding 20 days. The district court ruled on the *Shelton* question in January 2004. Consequently, no further state court review of that ruling is possible.

Respondent also dangles the possibility that petitioner may have an appeal of right from a future order of the district court on the ground that the district court's ruling would constitute a judgment of dismissal. Br. Opp. at 6. He suggests that petitioner "would be in a position to argue" that it has the right to appeal because "the State has an appeal of right from a dismissal, 'including a dismissal of a felony information following a refusal to bind the defendant over for trial.'" *Id.* (quoting Utah Code Ann. § 77-18a-1(3)(a) (Supp. 2006)).

This argument is refuted by the portion of the statute omitted from respondent's quotation. The Utah criminal appeals statute does not grant the State the right to appeal from any "dismissal of a felony information," as respondent's incomplete quotation might suggest, but only from a "*final judgment* of dismissal, including a dismissal of a felony information . . . " § 77-18a-1(3)(a) (emphasis added). Even respondent does not claim that the ruling of the district court on remand would be a final judgment. Indeed, he calls it an "interlocutory order." Br. Opp. at 6. Therefore, any future district court ruling on this issue will not be appealable under section 77-18a-1(3)(a).

In sum, the petition presents the Court with its last look at the question presented; the constitutional issue will "not survive the remand." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482 (1975).

B. This case factually frames the question presented in the petition.

Respondent contends that certiorari should be denied "because Petitioner's argument that a suspended jail sentence can be excised, leaving a fine-only sentence and valid conviction that can be used for enhancement, does not apply to the facts in this case." Br. Opp. at 7.

The question presented in the petition is framed by the facts of this case. The petition asks, "If an uncounseled misdemeanant is fined and sentenced to suspended jail time in violation of *Shelton*, is the underlying conviction valid for purposes of enhancing a subsequent criminal charge?" Pet. at i. Respondent does not deny that he was "fined and sentenced to suspended jail time." Thus, the question fits the facts.

Respondent counters that he also served a portion of his jail sentence. After pleading guilty to misdemeanor violation of a protective order, respondent received a sentence that included a suspended one year in jail with credit for time served. R. 109-13; R. 336: 49. This unspecified amount of time served, respondent reasons, equates to actual imprisonment. He thus concludes that, "since a jail sentence was imposed in violation of the Sixth Amendment," his conviction is invalid under *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972). Br. Opp. at 7.

This argument fails because it relies on the obsolete distinction between served and suspended jail time. *Alabama v. Shelton*, 535 U.S. 654 (2002), abolished this distinction when it held that "[a] suspended sentence *is* a prison term" for purposes of the Sixth Amendment. *Id.* at 662 (emphasis added). Thus, whether respondent's jail

time was served or suspended – whether he served some, all, or none of it – is immaterial.

Nor does *Argersinger* resolve the question presented in the petition. The *Argersinger* Court grappled with what Chief Justice Burger termed the "evolving concept" of the right to counsel. *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring in result). Having announced in 1963 that "an indigent in a state trial had a right to appointed counsel in felony cases," *id.* at 46 (Powell, J., concurring in result) (referencing *Gideon v. Wainwright*, 316 U.S. 455 (1963)), the Court was faced with the prospect of extending this rule to as many as 55 million misdemeanor and traffic cases annually. *Id.* at 34 n.4. It thus sought a principled basis to extend the right to appointed counsel to some, but not all, misdemeanor cases.

Because Argersinger "was in fact sentenced to jail," the Court drew the constitutional line at the prison door: "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. Otherwise stated, "The denial of the assistance of counsel will preclude the imposition of a jail sentence." *Id.* at 38 (quoting *Stevenson v. Holzman*, 458 P.2d 414, 418 (Ore. 1969)).

Argersinger does not aid respondent. The parties agree that the denial of the assistance of counsel will preclude the imposition of a jail sentence, whether served or suspended. The relevant question is whether it will also invalidate the conviction, a question this Court has yet to decide.

C. Courts are in conflict on the core issue of this case: whether a misdemeanor conviction obtained in violation of the Sixth Amendment is valid.

Respondent disputes that the conflict among jurisdictions identified in the petition exists. He acknowledges that the Tenth Circuit and other courts have "remedied a Sixth Amendment violation by excising an offensive suspended jail sentence," while leaving the conviction undisturbed. Br. Opp. at 7, 8-10. However, he argues that these cases "are not inconsistent with the decision of the Utah Supreme Court," because they "do not go a step further and allow the use of uncounseled convictions taken in violation of *Shelton* to enhance a subsequent charge." *Id.* at 7-8.

These cases need not go a step further to conflict. A valid prior conviction may be used to enhance a subsequent offense; an invalid one may not. Accordingly, the core issue of the instant case is whether a misdemeanor conviction obtained in violation of the Sixth Amendment is valid. The Utah Supreme Court understood this. Point I of its opinion is entitled, "A MISDEMEANOR CONVICTION OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT IS INVALID." App. 6. The court could not sidestep the question of validity because, as it correctly noted, "any valid misdemeanor conviction can be used to enhance a subsequent sentence." App. at 11-12.

Consequently, the split of authority identified in the petition is relevant and weighs in favor of granting the petition for a writ of certiorari.

D. This Court has already rejected respondent's reliability argument.

Respondent contends that "the Utah Supreme Court correctly concluded that a prior misdemeanor conviction obtained in violation of the Sixth Amendment . . . is not sufficiently reliable to enhance a subsequent charge to a felony." Br. Opp. at 10.

Respondent's focus on reliability finds scant support in the opinions of the Utah courts. The Utah Supreme Court's opinion mentions *reliable* or its variants only once, in a quotation. *See* App. 10 (quoting *Shelton*, 535 U.S. at 665). The Utah Court of Appeals' opinion never uses the term. *See* App. 23-43. These courts recognized that the touchstone of their analysis had to be the validity of the prior conviction, not its reliability.

This Court rejected respondent's reliability analysis in *Nichols v. United States*, 511 U.S. 738 (1994). Writing in dissent, Justice Blackmun argued that if a conviction is not sufficiently reliable to support a jail sentence for the offense itself, then it is not sufficiently reliable to enhance a jail sentence for a subsequent offense: "[O]ur concern here is not with multiple punishments, but with reliability. Specifically, is a prior uncounseled misdemeanor conviction sufficiently reliable to justify additional jail time imposed under an enhancement statute?" *Id.* at 757-58 (Blackmun, J., dissenting).

The *Nichols* majority answered that it is. The Court held that a valid – albeit uncounseled – misdemeanor conviction, though it may not be relied upon to support a jail sentence, "may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 746-47.

Again, the salient question in this case is whether respondent's prior uncounseled misdemeanor is valid. As noted above, the Utah Supreme Court correctly grasped this point. What it failed to do was correctly decide it.

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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