No. 06-___ 061327 APR 2 - 2007

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Alabama v. Shelton*, 535 U.S. 654 (2002), this Court held that a person charged with a misdemeanor enjoys a Sixth Amendment right to counsel if his sentence includes suspended jail time. The Court affirmed the judgment of the Alabama Supreme Court, which had invalidated Shelton's suspended jail time, but affirmed his conviction and all other components of his sentence. The question presented is:

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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

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PETITION FOR WRIT OF CERTIORARI

The State of Utah respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS AND ORDERS

The opinion of the Utah Supreme Court is reported at 2007 UT 1, ___ P.3d ___ (App. at 1-22). The opinion of the Utah Court of Appeals is reported at 2005 UT App 144, 111 P.3d 820 (App. at 23-43). The order of the Third Judicial District Court of Utah, Salt Lake County, under review is unreported (App. at 44-47).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The decision of the Utah Supreme Court was entered on 9 January 2007. After deciding that a prior uncounseled misdemeanor conviction imposing a fine and a suspended sentence cannot be used to enhance the current charge, the court remanded for further proceedings to determine whether respondent knowingly waived his right to counsel. App. at 7. Although the decision did not conclude all litigation in the case, it is final for jurisdictional purposes.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified four categories of cases deemed final for jurisdictional purposes even though further proceedings are anticipated in the lower state courts. *Id.* at 478. This case fits within the third *Cox*

category, which encompasses "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The federal issue "would not survive the remand," because "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* at 482, 481.

This is such a case. Despite further lower court proceedings, under applicable Utah law, "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. Utah law permits prosecution appeals only from certain enumerated types of orders. *See* Utah Code Ann. § 77-18a-1 (West 2004). The catch-all category, relevant here, permits the prosecution to "seek discretionary appellate review of any interlocutory order entered before jeopardy attaches." § 77-18a-1(4). Review of interlocutory orders is discretionary. Utah R. App. P. 5. 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).

These procedural rules preclude further review of the federal issue in the state courts. On remand, the district court will rule on the factual question of whether respondent was offered appointed counsel and, if so, whether he declined the appointment. If the State prevails on that issue, "the federal issue will be mooted." *Cox Broadcasting*, 420 U.S. at 481. If the State were to lose, "governing state law would not permit [it] again to present [its] federal claims for review." *Id.* Although the State could seek

discretionary review in the Utah appellate courts, the scope of that review would be limited to matters addressed in trial court orders entered within 20 days of the filing of the petition for interlocutory review. Thus, the State could not again seek review of the district court's 21 January 2004 ruling on the *Shelton* question. Moreover, having already decided the question once in this case, the Utah appellate courts would have no reason to grant a second discretionary appeal. And of course, once jeopardy attaches, petitioner loses its right to appeal all but a narrow category of errors, not relevant here. *See* Utah Code Ann. § 77-18a-1(3). In sum, the instant petition offers this Court its last look at this question.

Accordingly, for purposes of this Court's review, the decision of the Utah Supreme Court is as final as the decision of the Kansas Supreme Court in *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516, 165 L.Ed. 429 (2006), and for the same reason: whatever happens on remand, "there [will] be no opportunity for the State to seek further review . . . ." 126 S. Ct. at 2521.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. **Summary of Facts.** Respondent Michael Von Ferguson lived with Julia Jepson for twenty years. R. 336: 28. Throughout this period, she avers, he mentally, physically, and verbally abused her. R. 336: 29. After a series of particularly violent acts and threats, respondent spent six days in jail, and Jepson obtained a protective order. R. 210-12; 336: 31.

After a telephone conversation with Jepson that ended "with a lot of begging to let him come back," respondent agreed to plead guilty to violating the protective order, a class A misdemeanor. R. 109-11; R. 336: 49. His sentence included a fine of $350 and one year in jail, with credit for time served. R. 110-13. The jail time was suspended, and he was placed on probation. *Id.* Court documents indicate that respondent, who is indigent, was not represented by counsel at the guilty plea hearing. R. 18-19, 109-13. They do not indicate whether he waived counsel. *Id.*

Six days later, respondent was discovered on the roof of a Salt Lake City business overlooking Jepson's place of employment. R. 336: 8-10, 35-36. He fled, leaving behind a rifle wrapped in a jacket. R. 336: 12. The rifle was loaded; one round was chambered. R. 336: 13. Respondent was apprehended and charged with four crimes, including violating the protective order after a prior offense, a felony. R. 20-23.

2. **Trial court proceedings.** Under Utah law, a person subject to a protective order "who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor . . . ." Utah Code Ann. § 76-5-108(1) (Supp. 2006). However, if the offense is committed within five years of a prior domestic violence conviction, the offense may be enhanced to a third degree felony. § 77-36-1.1(2)(c). Respondent fits this category. As noted, however, his prior misdemeanor conviction was entered pursuant to a guilty plea; although he was not represented by counsel, his sentence included a suspended jail term. R. 109-11.

The trial court ruled that, under *Alabama v. Shelton*, 535 U.S. 654 (2002), because respondent's prior uncounseled misdemeanor conviction resulted in a suspended sentence, it "cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel." App. at 47. The court rejected "the State's argument that *Shelton* only invalidates the jail sentence given pursuant to an uncounseled misdemeanor conviction, and does not impact the conviction itself." *Id.*

3. **Utah Court of Appeals decision.** On interlocutory review, the Utah Court of Appeals affirmed in relevant part. App. at 42. It agreed with the trial court that because an indigent defendant facing a misdemeanor charge is entitled to counsel when a suspended jail sentence is imposed, "a conviction achieved in violation of this right to counsel cannot be used to support guilt or enhance punishment for another offense unless the right to counsel was knowingly waived." App. at 34 (affirming in part and reversing in part).

4. **Utah Supreme Court Decision.** On certiorari, the Utah Supreme Court affirmed in relevant part. App. at 21. "Both the procedural history and the plain language of the *Shelton* opinion," the court wrote, "suggest that a conviction obtained in violation of the Sixth Amendment is invalid for all purposes and therefore cannot be used to enhance a subsequent criminal charge." App. at 10. The court continued, "While the Supreme Court did not explicitly address the constitutionality of the specific remedy ordered by the Alabama court, it nevertheless implied that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm." *Id.* The Court concluded, "We are therefore convinced that the validity of an uncounseled criminal conviction is not contingent on whether the offense is classified as a misdemeanor or a felony, but rather on whether the Sixth Amendment attaches." App. at 13. The Utah court did not expressly acknowledge that this Court had left undisturbed Shelton's conviction. The court remanded "for a factual determination" on the question of whether respondent knowingly waived his right to counsel. App. at 6.

REASONS FOR GRANTING THE PETITION

In misdemeanor cases, a defendant's right to appointed counsel hinges on the sentence imposed. The Sixth Amendment guarantees appointed counsel only to misdemeanants who receive jail time, whether served or suspended. The parties agree that, in a misdemeanor case where the defendant was deprived of his Sixth Amendment right to counsel, any jail time is unlawful and therefore invalid. The question presented asks whether the underlying conviction is also invalid.

The question is ripe for review. In *Alabama v. Shelton*, 535 U.S. 654 (2002), this Court affirmed just such a conviction without discussion. Two years later, in *Iowa v. Tovar*, 541 U.S. 77 (2004), the United States, as *amicus curiae*, urged the Court to expressly adopt the rule it had assumed in *Shelton*: that a deprivation of counsel in misdemeanor cases "affords no ground for disturbing the underlying conviction." *Id.* at 88 n.10. The Court decided the case on other grounds. The instant petition offers the Court the opportunity to squarely address this recurrent issue.

The issue has broad application. Within the United States, the practice of enhancing subsequent charges or sentences based on prior misdemeanors is ubiquitous. This Court should clarify for the courts of the states and of the United States the legal consequences of a Sixth Amendment deprivation of counsel in a misdemeanor prosecution.

A. The decision of the Utah Supreme Court directly conflicts with the order of this Court in *Alabama v. Shelton*.

Because in misdemeanor cases the right to counsel is contingent upon the defendant's receiving a jail sentence, denial of counsel should invalidate only the jail sentence, not the underlying conviction.

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently

and competently waived." *Nichols v. United States*, 511 U.S. 738, 743 n.9 (1994) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). A felony conviction obtained in violation of the defendant's Sixth Amendment rights is "void." *Custis v. United States*, 511 U.S. 485, 495 (1994) (quoting *Burgett v. Texas*, 389 U.S. 109, 114 (1967)).

In contrast, a defendant charged with a misdemeanor is entitled to appointed counsel only if the sentence ultimately imposed includes imprisonment. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In other words, the Sixth Amendment is not violated when an uncounseled defendant is merely convicted of a misdemeanor. The Sixth Amendment is violated only when, after that conviction, the misdemeanant is sentenced to jail time. The jail time, not the conviction itself, triggers the Sixth Amendment.

In *Shelton*, this Court extended the Sixth Amendment right to appointed counsel to misdemeanants who receive suspended jail time. A suspended sentence is indistinguishable from a served sentence for purposes of the right to counsel, the majority reasoned, because the defendant is unable to challenge the original judgment at any later probation revocation hearing. *Shelton*, 535 U.S. at 667. Although Shelton neither received nor waived counsel, he was given a suspended sentence. He was thus denied the right to counsel. *Id.* at 674.

However, the Court did not disturb Shelton's conviction. It affirmed the judgment of the Alabama Supreme Court. *Id.* at 674. The Alabama court had "affirm[ed] Shelton's conviction but reverse[d] that aspect of his sentence imposing 30 days of suspended jail time." *Ex parte Lereed Shelton*, 851 So.2d 96, 102 (2000). By

affirming the Alabama court, the Court affirmed not only Shelton's conviction, but also an assessment of court costs, a fine of $500, reparations of $25, and a restitution award of $516.69. *See Shelton*, 535 U.S. at 658. The Court even declined to disturb Shelton's term of probation, expressly leaving to the Alabama court the question of whether, despite the invalidation of Shelton's suspended sentence, his probation term could be "freestanding and independently effective." *Id.* at 673-74.

The Utah Supreme Court misread *Shelton*. In its view, "[n]owhere did the Court indicate that an offending sentence could be severed from an invalid conviction, somehow resurrecting the conviction's validity as the State suggests here." App. at 11. It also read *Shelton* to have "implied that a conviction obtained in violation of the Sixth Amendment, not merely the offending sentence, would be constitutionally infirm." App. at 10.

Far from implying that Shelton's conviction was constitutionally infirm, this Court affirmed it. It is true that the Court did not expressly hold that Shelton's conviction was valid; like Shelton himself, the Court assumed that it was. Nevertheless, the Utah Supreme Court's decision in *Ferguson* cannot be squared with this Court's disposition in *Shelton*. The Utah court reversed Ferguson's conviction; this Court affirmed Shelton's. It also invited the Alabama Supreme Court to determine on remand whether "Shelton's probation term [is] freestanding and independently effective." *Shelton*, 535 U.S. at 673-74. This course cannot be reconciled with the view that Shelton's conviction was "constitutionally infirm."

A writ of certiorari should issue to resolve this conflict.

B. The decision of the Utah Supreme Court directly conflicts with decisions of the United States Court of Appeals for the Tenth Circuit.

The decision of the Utah Supreme Court directly conflicts with the holding and reasoning of decisions of the United States Court of Appeals for the Tenth Circuit.

As stated above, the Utah Supreme Court acknowledged that the Sixth Amendment right to appointed counsel in misdemeanor cases hinges on whether the defendant receives jail time. Nevertheless, it ruled that where actual or suspended jail time is imposed in violation of a misdemeanant's Sixth Amendment rights, the conviction itself, not merely the illegal jail sentence, is invalid. App. at 12

In contrast, in two pre-*Shelton* cases, the Tenth Circuit held that, where a misdemeanant receives a jail sentence in violation of his right to counsel, "[o]nly that portion of the sentence concerning imprisonment is invalid." *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281, 1284 (2000) (citing *United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991)).

In *Reilley*, the Tenth Circuit, anticipating *Shelton*, held that, for purposes of a misdemeanant's right to counsel, a suspended sentence is "equally invalid" as a term of actual imprisonment and thus "should be considered a nullity." *Reilley*, 948 F.2d at 654. Consequently, "a conditionally suspended sentence of imprisonment cannot be imposed on a defendant who has been denied counsel." *Id.* However, the court affirmed Reilley's conviction and the remainder of his sentence. *Id.*

Shayesteh is to the same effect. Shayesteh filed a federal habeas petition challenging a misdemeanor conviction entered against him in a city justice court. *Shayesteh*, 217 F.3d at 1282-83. He claimed a denial of counsel in connection with imposition of a 30-day jail sentence and one year probation. *Id.* at 1284. In reliance upon *Reilley*, the Tenth Circuit held that Shayesteh's uncounseled 30-day sentence and term of probation were invalid, but that the remainder of his sentence and the underlying conviction were valid. *Id.* at 1285.

This direct conflict between the state court of last resort and the federal circuit in which it resides is "significant." *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

Other jurisdictions are likewise in conflict on the question of whether, in misdemeanor cases, the conviction underlying an invalid sentence is valid or invalid. *Compare United States v. Ortega*, 94 F.3d 764, 769 (2d Cir. 1996) ("The appropriate remedy for a *Scott* violation . . . is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself."); *United States v. White*, 529 F.2d 1390, 1394 (8th Cir. 1976) ("Although the conviction is valid, we cannot affirm his 90-day suspended prison term since appellant did not clearly waive his right to counsel."), *with State v. Stott*, 586 N.W.2d 436, 441 (Neb. 1998) (a misdemeanor conviction resulting in imprisonment is invalid when obtained against a defendant denied the right to counsel).

A writ of certiorari should issue to resolve this conflict.

C. Granting certiorari would permit this Court to resolve an issue it was prevented from reaching in *Iowa v. Tovar*.

The Court expressed interest in the instant issue in *Iowa v. Tovar*, 541 U.S. 77 (2004), but was unable to reach it.

Tovar was charged with a felony based on two prior misdemeanor convictions. *Id.* at 85. He contended that one of the prior convictions, for which he had served two days in jail, was invalid because his waiver of counsel at the change of plea hearing had been "insufficiently informed and therefore constitutionally invalid." *Id.* at 88. The Iowa Supreme Court held that a court must give a defendant certain specific warnings before accepting a guilty plea. *Id.* at 81. This Court reversed, holding that "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.*

The United States, as *amicus curiae*, proposed an alternative basis for resolving the case. It argued that "a constitutionally defective waiver of counsel in a misdemeanor prosecution, although warranting vacation of any term of imprisonment, affords no ground for disturbing the underlying conviction." *Id.* at 88 n.10. The Court declined to address this contention because the State of Iowa did "not contest the Iowa Supreme Court's determination that a conviction obtained without an effective waiver of counsel cannot be used to enhance a subsequent charge." *Id.*

The instant petition presents the very contention advanced by the United States in *Tovar*. It therefore offers

the Court an opportunity to examine the issue it was unable to reach there.

D. All 50 States And The United States Permit The Use Of Misdemeanor Convictions To Enhance Subsequent Charges Or Sentences.

The question presented is of national significance. The issue implicates the government's ability to enhance later charges, including felony charges, in reliance upon prior misdemeanor convictions.

Most challenges to uncounseled misdemeanors, like the instant one, are collateral. The challenge is raised, not in the misdemeanor case itself, but in a subsequent proceeding in which the prosecution seeks to use the misdemeanor conviction to enhance a later misdemeanor or felony charge. If the prior misdemeanor conviction is ruled invalid, the enhancement may be lost.

Utah's enhancement scheme is far from unique. Indeed, all 50 states, the District of Columbia, and the federal government permit the use of prior misdemeanor convictions to enhance subsequent charges or sentences. *See, e.g.,* App. at 48-51 (listing statutes).

The spectrum of offenses subject to enhancement based on prior misdemeanor convictions is broad, including domestic violence, sex offender registration, theft, and driving under the influence. *See, e.g.,* Ariz. Rev. Stat. Ann. 13-3601.02 (2006) (aggravated domestic violence statute; prior misdemeanor convictions applicable to this charge, which is a felony); Haw. Rev. Stat. 846E-9 (2006) (failure to comply with sex offender registration; second offense is a felony); Mo. Rev. Stat. § 570.040 (1999) (enhancement to

class D felony for third "stealing related offense," when first two resulted in sentence of ten days or more); N.Y. Veh. & Traf. Law § 1193 (Supp. 2006) (second DUI enhanced to class E felony).

This Court should take this opportunity to erase any lingering doubt about the impact on future prosecutions when a misdemeanant receives jail time in violation of his or her Sixth Amendment right to appointed counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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