ORIGINAL

In the

Supreme Court of the United States

THOMAS BALDASAR,

Petitioner,

--vs--

STATE OF ILLINOIS,

Respondent.

Number: 77-6219

Washington, D. C.
November 26, 1979

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v. : No. 77-6219

ILLINOIS,

Respondent.

Washington, D. C.,

Monday, November 26, 1979.

The above-entitled matter came on for oral argument at 11:27 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MICHAEL MULDER, ESQ., Assistant Defender, Office of of the State Appellate Defender, First Judicial District, 130 North Wells Street, Chicago, Illinois 60606; on behalf of the Petitioner

MICHAEL B. WEINSTEIN, ESQ., Assistant Attorneys General, 188 W. Randolph Street, Chicago, Illinois 60601; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-6219, Baldasar v. Illinois.

Mr. Mulder, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL MULDER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case concerns an Illinois conviction of a petitioner sentenced for theft under an enhanced penalty statute. The charge that the petitioner was facing was the theft of a dial massage shower head, having a value of less than $150. He was charged with taking that from Montgomery Ward on November 13, 1975.

Now, this information also charged as an additional element that this was his second theft conviction, the first occurring in May of 1975. Ordinarily, under Illinois, had there only been one theft conviction charged in the statute, the punishment would have been classified as a misdemeanor and he would have been punished by up to less than one year with no parole and the incarceration could have taken place in other than a penitentiary.

However, in Illinois, under this enhanced penalty statute, upon a second conviction the penalty would be classified as a felony punishable one to three years, with two

years of automatic parole followed, and that also the incarceration would occur in a penitentiary as opposed to a jail or another institution.

QUESTION: Has that sentence that was actually imposed been served as yet?

MR. MULDER: Yes, it has been served and the parole term has also been served, Mr. Justice. We are arguing for a -- here we are attacking the conviction and I believe that the Court has held that even though a sentence has been served we can still attack the felony conviction.

QUESTION: You feel that the case is not moot?

MR. MULDER: I do feel that the case is not moot. There are ramifications of the case. For example, under the Illinois statute, the new sentencing statute, the petitioner could be exposed to an extended term upon conviction of the same class felony on the basis of his prior felony, and this statute involved there is chapter 38, section 1005-5(3)(2)(b), and also 1005-8-2(a).

There may also be ramifications with regard to the petitioner's future employment on the basis of this felony. Under Illinois law, a license may be refused to issue on the basis of this felony, and as an example of that the sections for dentists --

QUESTION: Is that the sort of thing that this Court has taken into account in determining whether or not a

case is moot?

MR. MULDER: I think that the case in the past base on these ramifications would be Ginsberg v. New York, which is found at 390 U.S. 629, possible ineligibility into employ ment was looked at by the Court there.

QUESTION: Well, is Baldasar a dentist?

MR. MULDER: No, he is not a dentist. What I am trying to make a point here, Your Honor, is that it may affect his future employment, that it does have a ramification for future employment.

QUESTION: How about voting, can felons vote in Illinois?

MR. MULDER: I believe in Illinois that they can vote after the sentence has been imposed.

QUESTION: Or served?

MR. MULDER: Or served, yes, I'm sorry, after it has been served.

QUESTION: What about a tax driver's license, would he be barred from getting a tax driver's license?

MR. MULDER: I think there are a number of licenses where he may not be barred but where it may be taken into consideration. That is a general wording of the statute in Illinois, that it may be taken into consideration.

QUESTION: Don't some Illinois statutes take into consideration the fact that whether or not you were indicted

for a crime, whether you were convicted or not?

MR. MULDER: Not to my knowledge. I think that --

QUESTION: Or convicted of a misdemeanor?

MR. MULDER: Not to my knowledge on that either. I think most of them read conviction of a felony.

QUESTION: What is Mr. Baldasar's vocation?

MR. MULDER: Mr. Baldasar is a semi-skilled worker and I believe at this time he is working in a factory but I am not sure exactly what his employment in the factory is.

Your Honors, at trial there was an objection to the entry of this prior misdemeanor conviction which was uncounseled. The basis of the objection was Burgett v. Texas, and defense counsel made the objection stating that she felt that the evidence would show that he was not represented by counsel at the prior misdemeanor proceedings, but that the state had an affirmative showing to show that he was represented.

What happened was that the court overruled the objection and said that this did not apply to felony proceedings. On appeal, the conviction was affirmed over the dissent of one judge. Our petition for leave to appeal to the Illinois Supreme Court was denied, and this Court granted certiorari on the question of whether the Sixth and Fourteenth Amendments prohibit the use of the prior uncounseled misdemeanor conviction which did not result in imprisonment to increase the sentence of imprisonment on a subsequent conviction under an

enhanced penalty statute.

QUESTION: Is there any question but what the original misdemeanor conviction which did not result in imprisonment was proper under the United States Constitution?

MR. MULDER: There is no question that under Scott v. Illinois that it was proper and a valid conviction, Your Honor.

I think in sum our argument is that the prior uncounseled conviction, even though valid for purposes of a fine, is not valid for purposes of incarceration.

QUESTION: Would you contend that if a judge in his sentencing had a range in the indeterminate sentence approach and the pre-sentence report excludes all the facts that are disclosed in this case, that he was constitutionally barred from taking that into account in fixing a sentence?

MR. MULDER: I think that the Sixth Amendment would prohibit that under Tucker v. United States. I think that that is much closer a question than our case at bar now because in our case at bar the imprisonment flows as a "but for" consequence. In other words, when you face the enhanced penalty situation in Illinois, upon that second conviction being proved up, the judge has a whole new range of options. Instead of less than one year, he now imposes one to three, with the parole to follow. But I think the problem with your -- with that argument, which I believe the amicus makes, that

if hearsay statements can come into the presentence report and if arrest reports can come into the presentence report, why can't we use these uncounseled convictions which are at least as reliable as that.

Ordinarily, when counsel approaches the bench at such a sentencing hearing, he can argue that the hearsay isn't worth very much or that the arrest record doesn't mean very much. But the problem with the amicus argument is that they want to use that conviction for full value, they want to treat it like any other conviction with counsel, and I think that is the real danger involved. So I think the better approach -- and again I think the analogy can be made to Tucker v. United States -- is that that shouldn't flow from the conviction.

QUESTION: Does the jury sentence in Illinois or does the judge?

MR. MULDER: The judge does, Your Honor.

QUESTION: Well, how do you distinguish Williams v. New York?

MR. MULDER: Well, I think in the same manner that Tucker v. United States distinguished Williams, and that was that where there was no counsel at that prior conviction, the court would look at it in a different manner and therefore it could not be used at the sentencing hearing. And I think what our argument is that it is not reliable to impose

imprisonment and therefore should not be looked at at the sentencing hearing.

QUESTION: Even though at the sentencing hearing the judge can look at all sorts of hearsay that wasn't put to nearly the test that this uncounseled conviction was at the time of trial?

MR. MULDER: That's true, and admittedly it is a closer case. But I think if we can say from the sentencing hearing that the additional imprisonment resulted from that prior uncounseled conviction, that the better approach would be not to use it. But again I say that the consequence, the collateral consequence in our case is a lot more direct. It is the "but for" causation. And I think the analogy to Burgett can be made.

In Burgett, it was reversed on the basis of an invalid conviction under Gideon v. Wainwright. Admittedly, as I spoke before, the conviction here is valid but the defect in Burgett was the lack of counsel, and that is the same defect that existed here. And our argument is that the fact that imprisonment was imposed on Burgett does not add any reliability to that conviction. In Burgett, the court found that Burgett was suffering anew from that uncounseled conviction. And although petitioner Baldasar did not suffer initially imprisonment, he is in a sense suffering imprisonment for the first time at the subsequent proceeding, so

that he too suffers anew from the uncounseled conviction.

QUESTION: Well, there is a difference between this case and Burgett, isn't there?

MR. MULDER: Clearly, there is a difference in that in Burgett the conviction was invalid and here the conviction is valid. But our point is that the defect underlying the reasoning in Burgett was lack of counsel, and he has no counsel at that prior uncounseled misdemeanor conviction.

The amicus and the respondent seem to take the argument that the central premise of Argersinger was imprisonment, and I believe that it is true but it can't be looked at out of the context. I think what has to be taken into accoun- here is that it was not only imprisonment but it was a decision involving the right to counsel, and that when counsel was provided the assurance of reliability and the degree necessary to impose imprisonment would be available upon that.

More simply, I think what we can say is that where a fine is acceptable, it is acceptable because a worse consequence has been removed. A counselless conviction for a fine, the worse consequence of imprisonment has been removed. And I think what has happened here is that the imprisonment has been imposed at a later date, but that doesn't make the conviction any more reliable by the mere fact that it has occurred some place down the road.

QUESTION: But what it is being imposed for, what the new imprisonment is being imposed for is the fact of a prior conviction which was legal.

MR. MULDER: That's true, but under Illinois -- and I don't think you can get away from the fact that part of the charge -- and I think the state's argument that he is being punished only for the second offense is perhaps correct, but you have to look at the element, and part of the elements charged in this offense is the first one, is the first prior uncounseled conviction.

QUESTION: Which was perfectly constitutional.

MR. MULDER: Perfectly valid for only the purpose of fine, not for the purpose of imprisonment. If so, like in Burgett, the defendant suffers anew from that uncounseled conviction. The only difference is here he is suffering for the first time.

The contributions, of course, that counsel can make in --

QUESTION: Well, would he be suffering in any different sequence if the sentencing judge were taking this into account in the hypothetical we discussed earlier?

MR. MULDER: Going back to the hypothetical?

QUESTION: Yes.

MR. MULDER: I think he would be -- if we could say that --

QUESTION: Would he be suffering then for the first time in your terms for what you consider his first conviction which you concede is valid?

MR. MULDER: Yes, I think he would be suffering for the first time if you could say in your example, Mr. Chief Justice, that additional imprisonment arose from that prior uncounseled conviction. It is a harder --

QUESTION: But I thought you conceded that the judge could take that into account under Williams v. New York and cases since then.

MR. MULDER: We don't concede that, Your Honor.

QUESTION: I thought you had.

QUESTION: Well, the reason you would give for saying that the uncounseled conviction in this case couldn't be used to enhance is that although valid it was -- there was sufficient unreliability about it, that it shouldn't be used.

MR. MULDER: That's correct.

QUESTION: And there was sufficient unreliability because counsel wasn't there.

MR. MULDER: That's correct.

QUESTION: And you say that although valid it was unreliable.

MR. MULDER: I think it was reliable enough for purposes of a fine.

QUESTION: So you say it is unreliable.

MR. MULDER: Yes. Correct.

QUESTION: Unreliable to prevent its use to enhance.

MR. MULDER: That's correct, and I think that goes back to the reasons that Gideon and Argersinger were based on and that is the contributions that counsel can make at those proceedings. He can assess the terms of the statute's constitutionality, he can move to suppress unconstitutionally seized evidence, he can help the defendant determine whether a jury --

QUESTION: What would you say if there had been a waiver of counsel at this prior --

MR. MULDER: I think reliability can be waived and I think that is what the cases hold, Your Honor.

QUESTION: By reliability, you mean counsel can be waived.

MR. MULDER: Yes.

QUESTION: It doesn't make the conviction -- it makes the conviction valid, but it doesn't make it any more reliable.

MR. MULDER: Correct.

QUESTION: But you would still say you could use it.

MR. MULDER: I would say it could still be used if a waiver was shown, but I would again argue that under Burgett that is the state's affirmative burden, to show any waiver, and that the record shows here that he was not represented by

counsel.

The respondent in the amicus claim that is the petitioner prevails in this case, that there will be confusion. I would suggest to the Court that a rule could be easily applied here and simply applied: If the state seeks to enhance imprisonment, they must show that the prior conviction that the defendant was either represented by counsel or waived counsel.

Further, they claim that it is very difficult for the prosecutor or the trial court judge to predict whether or not this conviction would be used sometime down the road. I would suggest to the Court that it is not a hard decision to make that prediction and it is based on some of the same things that they predict initially on whether to grant the petitioner counsel or not, and that is the nature of the offense, the circumstances involved, whether there was violence or injury to any person, and whether a pattern of criminal conduct is developing.

If those things appear, then the tate can keep their option open to use this at a later enhancement, to use this as later enhancing the sentence by providing counsel.

Finally, I would like to address the Court on the matter of cost. First of all, I would say that if it is true that the Sixth Amendment prohibits the use of these convictions, then cost may be irrelevant. But the amicus and

the respondent argue it, so I would like to address it.

I think one thing that is clear if the Court agrees with our position, and that would be that the same option that was left open in Argersinger and Scott still exists. That is that if the state chooses not to provide counsel, it doesn't have to. It can simply forego the option of imprisonment so that no cost would result to the state in that situation.

The other thing that I would point out with regard to --

QUESTION: Well, from the cost point of view, though, the reason for the state foregoing the cost in the initial round where there isn't any threat of imprisonment is that it is just a great big three-million square-mile country where it isn't always that easy in lots of non-metropolitan areas to obtain counsel. So that if you are going to have a trial at all, even on the misdemeanor, you may well have to have it, if you are going to have a speedy trial, without counsel.

MR. MULDER: Well, that is true but it doesn't add any additional cost to the state to continue to maintain that system. Even under Argersinger --

QUESTION: But it does add a cost to the state if you are going to say that, sure, you can maintain this system but you can't have a recidivist statute based on it,

or you can't ever take that conviction into account in a second sentencing of what is clearly a felony.

MR. MULDER: Two points I think with regard to that. First, we are not saying here that the state can't have a recidivist statute. We are merely saying that if they do, on the basis of misdemeanors, they have to provide counsel at that first proceeding.

And my second point with regard to that is I think we are talking about a problem here that is a lot smaller in scope than in Scott. We are not asking that counsel be supplied in every misdemeanor conviction. For one thing, there are many of them that don't have an enhancement provision attached. So I think we are really talking about a much smaller --

QUESTION: But isn't one of the concerns of criminal justice experts in the country now this problem of the repeater, and isn't that why states have responded with enhancement statutes?

MR. MULDER: Oh, I think that is a definite problem. But I think if we are going to penalize the repeat offender, we ought to provide counsel to make sure that that conviction has the necessary degree of reliability to result in this case in two extra years of imprisonment.

QUESTION: Well, if you prevail I suppose you would also argue that in any case like this, even if there was

counsel provided in the prior misdemeanor case, you should be able to litigate whether counsel was adequate in the later enhancement proceeding.

MR. MULDER: I don't believe that is true. I don't think that Burgett v. Texas and Loper v. Beto go that far, Your Honor. I think that --

QUESTION: It sounds to me like yours does, though.

MR. MULDER: No.

QUESTION: You are arguing reliability. If the reliability rather than a seemingly valid conviction is the test, I would think you would say this conviction is invalid because counsel was inadequate.

MR. MULDER: Well, I don't think the cases go that far so that that would be permitted. But why I think that at least a facial showing that counsel was there is required under those cases is because the right to counsel makes the other rights, the other due process rights that a defendant has meaningful.

Your Honors, we would request that the Appellate Court of Illinois be reversed in this case.

Thank you. I would like to reserve the remaining portion of my time.

MR.CHIEF JUSTICE BURGER: Very well.

Mr. Weinstein.

ORAL ARGUMENT OF MICHAEL B. WEINSTEIN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

At the outset, I wish to stress that this case does not involve situations where "but for" the counselless conviction the petition would not have been incarcerated, for even if he were tried in this case without the use of that first conviction, he would have been subject to incarceration for up to 364 days. Thus the case really involves an increase in the length of incarceration and not the fact of incarceration itself.

With regard to Mr. Justice Blackmun's question as to whether or not the sentence had been served, I had contacted the Illinois Department of Corrections just last week, they did advise that the sentence had been served. Mr. Baldasar served a total of one year and six months and one day incarceration.

Your Honors, the petitioner has never challenged the reliability of the first conviction --

QUESTION: Would he have served a sentence that long if there had not been a prior conviction?

MR. WEINSTEIN: If there had not been a prior conviction, Mr. Justice Stevens, and we were talking simply about the misdemeanor theft conviction, he could have served

up to 364 days.

QUESTION: So the answer is no.

MR. WEINSTEIN: That's correct.

QUESTION: I understand the parole period has also expired?

MR. WEINSTEIN: The parole period has also expired, Your Honor.

QUESTION: Was that true in the Argersinger case, do you know?

MR. WEINSTEIN: I really do not know, Your Honor.

QUESTION: Or in other cases that were vacated and remanded under our decision in Argersinger?

MR. WEINSTEIN: I really don't know.

QUESTION: Why isn't the case moot?

MR. WEINSTEIN: That is an interesting question, Your Honor. I really --

QUESTION: I would think you would be arguing that it was.

MR. WEINSTEIN: Your Honor, I had not frankly considered the question of mootness because I did not know that the petitioner had even served his total period of time until just last week.

QUESTION: The conviction was some time ago, it would seem to me to stand right out on the papers.

MR. WEINSTEIN: Well, the conviction was I believe

late in '76. If he served the full three years, we would be talking about him possibly being released now. He would still be serving the mandatory parole term of two years. So in theory it could have gone on for two years from now.

QUESTION: Well, under the applicable law there is still some consequences of his conviction, some civil consequences?

MR. WEINSTEIN: The only possible consequences would have to do with possibly the licneses, the occupations he might be barred from. I believe Justice Burger asked about the taxi license. I think in Chicago they are barred from having a tax license.

QUESTION: We had that case.

QUESTION: Well, are you now urging mootness as we suggested it to you?

MR. WEINSTEIN: Well, Your Honor, I am really not sure.

QUESTION: Would you not have to argue that a convicted felon has no interest in clearing his name?

MR. WEINSTEIN: I agree, Your Honor.

QUESTION: He probably does have some interest.

MR. WEINSTEIN: I think there is some interest. I think there is a great question involved here that this Court if it didn't face today would in fact face at a later date.

QUESTION: But that has never been deemed as

sufficient answer in this Court to the case in controversy requirement article three, that you have a live case or controversy between the people, even though it is perfectly obvious that it is going to be back in another form with other parties two or three years from now. That does not give this Court jurisdiction to decide a moot case now.

MR. WEINSTEIN: I understand that, Your Honor. If in fact this Court feels the case is moot then clearly it should not be decided.

The petitioners never challenged the reliability of his first conviction other than his general arguments as to the question of reliability. In other words, in the Illinois Appellate Court he did not even raise any question of reliability. He has never talked about this first conviction having been factually inaccurate. Perhaps the defendant did a poor job of examining witnesses, that type of question.

He has simply stated today or in the briefs filed in this Court that their first conviction lacks reliability. However, the petitioner has always conceded the validity of that first conviction, and in fact he conceded that validity even prior to this Court's decision in Scott v. Illinois or he conceded it in the Illinois Appellate Court.

QUESTION: Mr. Weinstein, on that point, of course, he concedes it for purposes of the fine. He doesn't say that it is one of the bases for imprisonment. Supposing he

-- as I remember the facts, he was tried both in DuPage County and Cook County. The two misdemeanors were in different counties. Suppoing the two complaints had been filed close together in point of time and the second complaint had already been filed before he was tried on the first complaint, so that it was a matter of public record that he was subject to possible enhancement if he were found guilty on both occasions. In the first trial, would there have been a duty to provide counsel?

MR. WEINSTEIN: Well, Your Honor, if the complaint had already been filed, the complaint itself would have had to have alleged the prior conviction.

QUESTION: That's right, but he would still be presumptively innocent, of course.

MR. WEINSTEIN: Exactly. Therefore, I would assume that the complaint could not later be amended, assuming, for example, that he is convicted on the first case without counsel or with counsel, that it could be later amended to charge that first conviction.

QUESTION: Do you mean if there were a conviction on the first complaint but before the second complaint were tried, you couldn't amend the second complaint to add the additional fact?

MR. WEINSTEIN: Well, I would imagine it would depend upon how close we were to trial because to include it

would change the entire crime involved from a misdemeanor, as we have on its face, to a felony where the person could be incarcerated for a longer length of time.

QUESTION: Well, what is your answer to my question? Do you think the state would be under a constitutional obligation to provide him with counsel in the first trial, knowing that a second misdemeanor charge is pending?

MR. WEINSTEIN: No. Our --

QUESTION: Your position is that it would still not --

MR. WEINSTEIN: Exactly, Your Honor.

Thus, the entire argument that the petitioners made simply stated is that his uncounseled conviction, his first uncounseled conviction has now ended up in incarceration and thus Argersinger has been violated.

However, it is our position that an uncounseled misdemeanor conviction which is valid under Scott, clearly valid under Scott, like any other valid conviction, can be used for certain collateral purposes, one of which is sentence enhancement.

We believe that any other conclusion would substantially undercut this Court's opinion in Scott and would create untold confusion among state and federal courts as to the possible collateral uses of valid convictions. For example, as the Chief Justice indicated, we believe that a

ruling in petitioner's favor would lead to similar challenges as to whether or not a prior counselless conviction could be used in a presentence report, whether it could be used for purposes of impeachment, the same type of situation that did arise after this Court's decisions after Burgett and Loper and United States v. Tucker.

Furthermore, we believe that the predictive evaluation by the trial judge would become an administrative nightmare for the judge would have to evaluate not only the aspects of the case beforehim, that is the particular aspects of that case, but he would also have to keep in mind the possibility of preserving enhancement possibilities in future cases.

I suggest that a judge would in effect have to have a prophecy to make that determination. I think it is quite possible even that a conservative judge might appoint counsel in all cases.

QUESTION: Would that be terrible?

MR. WEINSTEIN: No, I don't necessarily believe it is terrible, but I don't think it is required by this Court's decision in Scott.

QUESTION: What if that would be the result, would that influence you?

MR. WEINSTEIN: Then we are back into the arguments of --

QUESTION: Many states do precisely that, you know.

MR. WEINSTEIN: Many states do. However, we felt both in Scott and in this case that counsel was not required at this first indemeanor conviction as long as incarceration did not result.

Therefore, we believe that a decision in favor of the petitioner could well lead to appointment of counsel in all cases due to either cautious judges or perhaps cautious prosecutors, a result which this Court rejected in Argersinger and specifically in Scott.

With regard to the amount of sentences that might be involved here, the Illinois Supreme Court noted at least thirty enhancement sentences in Illinois that would be relevant. The amicus has done a brief survey of those sentences around the United States as well as in the federal system, and I think we are talking about more than just a minor amount of sentences.

Thus there would be substantial costs to the state and to the judicial system, the same types of costs which a majority of this Court recognized in Scott, and therefore chose not to require counsel at misdemeanor convictions not leading to imprisonment.

The instant sentence therefore is a direct result only of a second conviction. It is not a delayed or additional punishment for the first uncounseled conviction.

Additionally, it is the petitioner's voluntary act of committing the second theft that most directly led to his incarceration for one to three years.

As to reliability, Burgett and the later cases of Loper and United States v. Tucker dealt with convictions which were presumptively void under Gideon v. Wainwright. There is no question but that a void conviction is clearly unreliable. However, here the petitioner could have attacked his first conviction via direct appeal, a post-hearing act, a quorum novis petition, or perhaps federal habeas corpus.

The fact that he chose not to is further indication, indeed possibly a presumption of its correctness.

The respondents believe that under the facts presented herein, the counselless conviction is no less reliable from a conviction obtained after perhaps a waiver of counsel or a Faretta situation where defendant insisted upon his personal right to represent himself.

QUESTION: Well, that would involve a waiver, too, wouldn't it?

MR. WEINSTEIN: Pardon me?

QUESTION: That would involve a waiver also.

MR. WEINSTEIN: Yes, that would involve a waiver. I simply say that in the positive way because that is the way it was stated in Faretta, where the opposite term, simply waiver.

To insist that a conviction is valid yet unreliable simply does not make any sense.

In summary, Your Honors, the respondents believe that a ruling in favor of the petitioner would only open up a "pandora's box" at substantial costs to the criminal justice system and to society in general. Moreover, we believe that it would completely abrogate this Court's previous decisions in Argersinger and Scott.

Therefore, Your Honors, we respectfully urge that this Honorable Court affirm the judgments of the Illinois courts.

Thank you.

MR. CHIEF JUSTICE BURGER: We will resume here at 1:00 o'clock, if you have any rebuttal.

(Whereupon, at 12:00 o'clock noon, the Court was in recess, to reconvene at 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Mulder, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL MULDER, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

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

I wish to respond to two points. First, the Attorney General has claimed that his position has not changed since the argument in Scott. As pointed out in our reply brief at page two, at that time the Attorney General said in Scott, when prosecuting an offense the prosecution knows that by not requesting that counsel be appointed for the defendant he will be precluded from enhancing subsequent offenses. I think the --

QUESTION: Who said that, Mr. Mulder?

MR. MULDER: The Attorney General of the State of Illinois said that in Scott v. Illinois.

QUESTION: You don't suggest that binds any other litigant here or binds this Court, do you?

MR. MULDER: No, I do not suggest that it binds this Court, but I think for the respondent to claim that it takes a gift of prophecy to apply the requested rule is seriously undermined by that statement which recognized that it could be easily applied in a previous case.

QUESTION: The Attorney General of Illinois or any other state when he has a case here is out to win that case and not some other case, isn't that the usual procedure?

MR. MULDER: That is the usual procedure, Your Honor.

QUESTION: And he can hardly bind his own court either.

MR. MULDER: No, he cannot.

Your Honors, the second thing I wish to point out is that the Attorney General has also argued the cost factor to the court but no figures have been cited, and we would ask this Court not to speculate on this issue. Where liberty is at issue, we don't believe that cost is a relevant factor to be concerned with.

We are asking this Court to preclude the use of uncounseled prior misdemeanor convictions for enhancement purposes and reverse this case for a new trial.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:02 o'clock p.m., the case in the above-entitled matter was submitted.)

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