



IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                              |   |                               |
|------------------------------|---|-------------------------------|
| THEODORE XENIDIS,            | ) |                               |
|                              | ) |                               |
| Defendant Below - Appellant, | ) | Supreme Court No. 279, 2019   |
|                              | ) |                               |
| v.                           | ) | On appeal from Superior Court |
|                              | ) | ID No. N1801011371 &          |
|                              | ) | N1802005270                   |
| THE STATE OF DELAWARE,       | ) |                               |
|                              | ) |                               |
| Plaintiff Below - Appellee.  | ) |                               |

APPELLANT'S CORRECTED OPENING BRIEF

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## NATURE AND STAGE OF PROCEEDINGS

This case relates to whether Defendant's uncounseled 1991 Maryland DUI conviction qualifies as a predicate for enhanced sentencing purposes in ID No. 1801011371 and 1802005270.

Defendant was arrested for DUI on January 21, 2018 in ID No. 1801011371. He was found guilty of the offense in a non-jury trial on July 26, 2018. Sentencing was deferred until after resolution of his subsequent DUI offense. Defendant filed a Motion to Exclude a 1991 Maryland DUI Conviction as a qualified predicate offense because it was an uncounseled guilty plea. Defendant's motion was based upon his right to counsel under the Sixth Amendment to the United States Constitution, as well as Article 1 Section 7 of the Delaware Constitution.<sup>1</sup> Attached to the motion is the Maryland abstract relating to his guilty plea.<sup>2</sup>

In his motion, Defendant asserted that he "*entered an uncounseled DUI guilty plea in Maryland on March 11, 1991 pertaining to his arrest on September 16, 1990.*"

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<sup>1</sup> (A22-27).

<sup>2</sup> (A27)(Maryland DMV administrative records pertaining to his suspension are excluded).

Defendant was arrested for another DUI on February 8, 2018 in ID 1802005270. He was found guilty of the offense in a non-jury trial on November 20, 2018.

Both cases were consolidated for sentencing on December 14, 2018. The trial court addressed Defendant's motion to exclude. The trial court concluded that Defendant's reliance upon *Burgett v. Texas*<sup>3</sup> to support the argument that a prior uncounseled DUI conviction does not qualify as a predicate to enhance a subsequent DUI conviction was misplaced because the United States Supreme Court later determined that there is no Sixth Amendment right to counsel in a misdemeanor case where a prison sentence is not imposed.<sup>4</sup>

Defendant made an oral request to submit briefing in support of his argument that Article 1, §7 of the Delaware Constitution provides greater protection than the Sixth Amendment, including the right to counsel in misdemeanor cases, even when no prison sentence was imposed.<sup>5</sup> The court

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<sup>3</sup> *Burgett v. Texas*, 86 S. Ct. 258 (1967).

<sup>4</sup> T8-13; *Nichols v. United States*, 511 U.S. 738 (1994), citing, *Scott v. Illinois*, 99 S.Ct. 1158 (1979). See also, *State v. Pressley*, 2002 WL 863599 (Del. Super. 2002).

<sup>5</sup> A34-39. *The trial court erroneously characterizes "Xenidis file anew, resorting to the Delaware Constitution." Xenides, at 298. In fact, Defendant also relied upon Article 1, §7 of the Delaware Constitution as a basis for relief in his motion. Admittedly, counsel focused on federal law in his motion and at the oral argument in support of defendant's motion. The trial court afforded Xenidis an opportunity to develop the argument under the Delaware Constitution.)*

rescheduled Defendant's sentencing date in order to give the parties an opportunity to brief the matter.

Following briefing, the trial court issued a decision denying Defendant's Motion to Exclude.<sup>6</sup>

Defendant was sentenced as follows:

1. Felony DUI fourth – ID 1801011371 – effective November 20, 2018, five years L5 suspended after nine months for four years three months L4 (DOC discretion) suspended after six months for 12 months at L3 probation. Hold at L5 for L4 placement. \$1000 fine.
2. Felony DUI fourth – ID 1802005270 - 5 years L5 suspended after six months (concurrent) for 12 months L3 probation (concurrent). \$1000 fine.
3. Breach of Conditions of Release-ID 1802005270 -- 5 years L5 suspended for 12 months L3 probation (concurrent). (Exhibit 2).

Defendant filed this appeal. This is the Defendant's opening brief in support of his Motion to Exclude the 1991 Maryland DUI Conviction as a qualified predicate offense because Article 1, §7 of the Delaware Constitution applies to misdemeanor convictions, even where no prison sentence was imposed.

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<sup>6</sup> *State v. Xenidis*, 212 A.3d 292 (Del. Super. 2019)(Exhibit 1).

## SUMMARY OF ARGUMENT

This claim relates to whether there is a right to counsel in a misdemeanor case (not involving incarceration) under Article 1, §7 of the Delaware Constitution. If the right to counsel in a misdemeanor case exists, then does the use of an uncounseled misdemeanor conviction to enhance the sentence for a subsequent conviction violate due process under Article 1, §7 of the Delaware Constitution. Both are issues of first impression.

There are persuasive reasons demonstrating that Article 1, §7 of the Delaware Constitution provides greater protection with respect to a defendant's right to counsel in misdemeanor offenses than the Sixth Amendment to the United States Constitution. The right to counsel "[i]n all criminal prosecutions" under Article 1, §7 of the Delaware Constitution applies to all misdemeanor cases regardless of whether a defendant receives a jail sentence.

The reason this issue is important is because an uncounseled misdemeanor conviction, especially a DUI conviction, is unreliable. If a defendant's right to counsel under Article I, §7 of the Delaware Constitution is violated, then it is fundamentally unfair under the due process clause of Article I, Section 7 to use that uncounseled conviction to enhance a subsequent offense.

Defendant has asserted that his Maryland conviction was uncounseled. The Maryland record of that conviction does not show that he was afforded his right to counsel, and that he knowingly waived his right. The State has not argued or submitted proof otherwise. Therefore, Defendant's uncounseled Maryland conviction should not qualify as a predicate conviction to enhance his sentence in his subsequent cases.

Delaware should independently interpret its State Constitution to maximize individual protections of its citizens. This includes interpreting Article I, §7 of the Delaware Constitution as providing a defendant with the right to counsel in misdemeanor prosecutions where a prison sentence has not been imposed. Further, the Court is asked to rule that it violates Article I, §7 of the Delaware Constitution to use an uncounseled misdemeanor conviction to enhance the sentence for a subsequent offense.

The Superior Court erred in denying Defendant's motion:

1. By misapprehending the nature of Defendant's claim of a constitutional violation;
2. By concluding that Defendant was resting on a silent record;
3. By suggesting Defendant's claim is waived by the failure to raise it in prior proceedings and is an improper collateral attack on a prior conviction;

4. By interpreting Article I, §7 as being in lock-step with federal law;
5. By its application of the *Parke v. Raley*<sup>7</sup> “presumption of regularity” rule;
6. By applying an improper degree of proof standard for accepting the Maryland conviction as a predicate offense.

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<sup>7</sup> 113 S.Ct. 517 (1992).

## STATEMENT OF FACTS

Defendant was convicted of felony level DUI offenses in ID No. 1801011371 and 1802005270. The State sought to enhance Defendant's felony DUI sentences in this case based upon the following prior convictions;

- a. Maryland 1991 DUI conviction;
- b. Delaware 1991 Superior Court DUI conviction in 91003040DI;
- c. Overlapping 1995 Delaware DUI convictions in JP. Court 7 Case No. 9595999780 and Court of Common Pleas case number 9592016920.

Defendant entered an uncounseled DUI guilty plea in Maryland on March 11, 1991 pertaining to his arrest on September 16, 1990.<sup>8</sup> It appears that Defendant was sentenced to a fine for his Maryland conviction. The only Maryland court record relating to Defendant's conviction is the abstract. There are no other documents, such as the charging document, plea agreement, notice/waiver of constitutional trial rights (including right to counsel) or sentencing order. The Maryland record does not establish that Defendant was afforded his constitutional right to counsel in that

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<sup>8</sup> (A27) (The Maryland court abstract is the only record relating to Defendant's guilty plea. The Maryland record does not contain any indication that Xenidis was represented by counsel, or that he was advised of his right to counsel and waived that right. The State never took a position otherwise.)

prosecution, or that he knowingly waived his constitutional right to counsel.



## ARGUMENT I

**THE SUPERIOR COURT ERRED BY INTERPRETING THAT ARTICLE I, §7 OF THE DELAWARE CONSTITUTION DOES NOT PROVIDE BROADER PROTECTION THAN THE SIXTH AMENDMENT AND BARS THE USE OF AN UNCOUNSELED CONVICTION (WHICH DOES NOT RESULT IN A PRISON SENTENCE) FROM BEING USED TO ENHANCE A SENTENCE FOR A SUBSEQUENT OFFENSE.**

### **1. Questions Presented**

Did the Superior Court err in determining the scope of a criminal defendant's right to counsel under Article I, §7 of the Delaware Constitution concerning the State's use of a prior uncounseled misdemeanor conviction to enhance a sentence for a subsequent offense? Did Superior Court err by finding that the use of an uncounseled misdemeanor conviction to enhance a subsequent offense does not violate the due process clause of Article I, Section 7? The questions were preserved by Defendant's motion to exclude filed in this case,<sup>9</sup> orally at the motion hearing,<sup>10</sup> as well as the briefing submitted in support of the motion.<sup>11</sup>

### **2. Scope of Review**

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<sup>9</sup> (A21-27)

<sup>10</sup> (A34-39)

<sup>11</sup> (A4, DKT 26); (A11, DKT 31).

Constitutional issues are reviewed *de novo*. Additionally, the standard of review is *de novo* where no facts are in dispute and the sentencing issue considered implicates the legal effect of the undisputed facts of prior convictions.<sup>12</sup>

### **3. Merits**

Article I, §7 of the Delaware Constitution provides, in pertinent part, as follows: “*In all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel . . .*” Defendant claims that the right to counsel extends to misdemeanor offenses, even when no prison sentence is involved. As it stands, a Delaware court has never held that a defendant does not have a right to counsel in a misdemeanor case (in the absence of a prison sentence) under Article I, §7 of the Delaware Constitution. This Court is urged to find that Article I, §7 of the Delaware Constitution provides a defendant the right to counsel in a misdemeanor case, regardless of the sentence, and therefore that an uncounseled DUI conviction does not qualify as a predicate offense for felony DUI sentencing purposes.

#### **A. The right to counsel in misdemeanor offenses under the Sixth Amendment.**

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<sup>12</sup> *Butcher v. State*, 171 A.3d 537, 539 (Del. 2017).

At issue is whether Article I, §7 of the Delaware Constitution provides greater protection than the Sixth Amendment to the United States Constitution with respect to a defendant's right to counsel in misdemeanor prosecutions where a prison sentence has not been imposed. If it does, then does the denial of that right violate due process under Article I §7?

The federal right to be represented by counsel arises from the Sixth Amendment to the United States Constitution and is made applicable to the states through the Fourteenth Amendment. Absent a valid waiver, the state must provide trial counsel to an indigent defendant charged with a felony.<sup>13</sup> The Court expanded this holding by declaring that absent a valid waiver, a defendant may not be imprisoned for an offense whether a misdemeanor or a felony unless represented by trial counsel.<sup>14</sup> Thereafter, the Court clarified that an indigent defendant charged with a misdemeanor need not be appointed counsel if a term of imprisonment is not imposed.<sup>15</sup> The Court specifically chose actual imprisonment as the line delimiting the constitutional right to appointment of counsel, reasoning that actual imprisonment is a different breed of penalty than the mere threat of

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<sup>13</sup> *Gideon v Wainwright*, 83 S. Ct. 792, 793–794 (1963).

<sup>14</sup> *Argersinger v. Hamlin*, 92 S. Ct. 2006, 2012 (1972).

<sup>15</sup> *Scott v. Illinois*, 99 S. Ct 1158, 1162 (1979)

imprisonment.<sup>16</sup> In *Scott*, the Court turned its back on core Sixth Amendment values addressed in *Gideon* and *Argersinger* without any meaningful textual analysis of the phrase, “in all criminal prosecutions,” of that amendment.

In *Baldasar v. Illinois*, the United States Supreme Court held, in three concurring opinions, that it violated the Sixth Amendment right to counsel for courts to use a prior uncounseled misdemeanor to enhance a subsequent sentence.<sup>17</sup> In *Nichols v. United States*, the Court overruled *Baldasar* holding that a court could rely on an uncounseled misdemeanor, valid under *Scott*, for enhancing the sentence of a subsequent offense.<sup>18</sup> The *Nichols* decision rests on a shaky foundation to the extent it relies upon *Scott*.

The Supreme Court’s decision in *Scott v. Illinois*<sup>19</sup> is an outlier which was immediately and strongly criticized.<sup>20</sup> First, it reached its conclusion without conducting a textual or historical analysis of the Sixth Amendment’s right to counsel guarantee in “all criminal prosecutions” as applied to a misdemeanor prosecution. The majority’s decision disregards the expansion

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<sup>16</sup> 99 S.Ct. at 1162.

<sup>17</sup> *Baldasar v. Illinois*, 100 S.Ct. 1585, 1586 (1980).

<sup>18</sup> *Nichols v. United States*, 114 S.Ct. 1921 (1994).

<sup>19</sup> *Scott v. Illinois*, 99 S.Ct. 1158(1979).

<sup>20</sup> Note, RIGHT TO COUNSEL WHERE IMPRISONMENT IS POSSIBLE, 93 Harv. L. Rev. 82 (1979).

of the Sixth Amendment's right to counsel evident in its prior decisions and abandons the values embraced in those cases.<sup>21</sup>

Second, the majority opinion reasoned that economic and efficiency considerations supported its conclusion that the right to counsel be limited to those cases which involve the actual loss of liberty. Those considerations are not based upon constitutional text or principles. More importantly, those concerns are non-existent in Delaware as there is already a framework (statutory and court rules) for providing counsel to defendants in misdemeanor cases. As a practical matter, defendants in Delaware are afforded the right to counsel in misdemeanor cases. Therefore, the Court's speculative concern about the costs of providing representation does not apply to Delaware.

Next, the suggestion that a defendant not facing incarceration does not require appointment of counsel disregards the reality that a misdemeanor trial can be complicated, and that a misdemeanor conviction can have life altering consequences.

Finally, the *Scott* holding requires a judge to predict prior to trial whether a defendant is likely to face incarceration in order to determine whether counsel should be appointed.

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<sup>21</sup> See, *Powell v. Alabama*, 287 U.S. 45, 60 (1932); *Gideon v. Wainwright*, 372 U.S.335 (1963), *Argersinger v. Hamlin*, 92 S. Ct. 2006, 2012 (1972).

Since *Scott* is based upon flawed reasoning it should not serve as a basis to define the parameters of the right to counsel under Article I, §7 of the Delaware Constitution. If *Scott* is rejected as determining the right to counsel under Article I, §7 of the Delaware Constitution, then it logically follows that *Nichols* must also be rejected as a precedent to adopt under Article I, §7.

There are persuasive reasons to reject *Nichols*:

“Since *Gideon*, an accused’s right to counsel has firmly been established as fundamental and essential to a fair trial. In the absence of a knowing and intelligent waiver of counsel, an uncounseled conviction is inherently unreliable. (cite omitted). Because of this reality, any conviction obtained without the assistance of counsel should not be used in a subsequent proceeding to impose or enhance imprisonment, as *Baldasar* has held. (cite omitted). When the Supreme Court overruled *Baldasar* in *Nichols*, it shook the foundation of *Gideon* and the accused’s right to counsel. It abruptly departed from Sixth Amendment jurisprudence which had evolved over the years and had reliability of convictions as its central premise. Convictions are only reliable when the proceedings are fair, which in turn depends on the assistance of counsel. Through *Nichols*, defendants may now receive imprisonment or greater prison terms in subsequent proceedings based on prior uncounseled misdemeanor convictions, a situation at odds with *Gideon*. Similarly, the reliability of such sentences is no longer stable. Accused persons can easily be shuffled through the system now without the assistance of counsel, which in turn may result in unfair trial and ultimately unfair sentences. In allowing the use of prior uncounseled misdemeanor convictions without questioning their reliability, the judges are free to use inherently unreliable evidence to fix the length of incarceration, a result without constitutional

safeguards. For these reasons, the Supreme Court was wrong and should be encouraged to revisit the issue and reverse its position.”<sup>22</sup>

Delaware courts have followed the *Nichols* determination that an uncounseled misdemeanor conviction, valid under *Scott*, can be used to enhance the sentence for a later conviction without examining the issue in the context of Article I, §7 of the Delaware Constitution.<sup>23</sup>

Some states have interpreted their state constitutions, or other authority, as providing broader protection than guaranteed by the Sixth Amendment and have ruled that an uncounseled conviction may not be used to enhance the period of incarceration for a subsequent offense.<sup>24</sup> Other states have held that an uncounseled misdemeanor conviction may be used

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<sup>22</sup> *Shaking the Foundation of Gideon: A Critique of Nichols in Overruling Baldasar v. Illinois*, 25 *Hofstra L. R.* 507(Conclusion) (1996).

<sup>23</sup> *State v. Morris*, 2001 WL 893982 (Del Super. 2001); *State v. Pressley*, 2002 WL 863599 (Del. Super. 2002).

<sup>24</sup> *State v. Young*, 863 N.W.2d 249 (Iowa, 2015) (a misdemeanor defendant has a right to counsel when he faces the possibility of incarceration under Iowa constitution); *State v. Kelly*, 999 So. 2d 1029 (Fla. 2008); *State v. Hrycak*, 877 A. 2d 1209 (N.J. 2005) (emphasizing the unreliability of uncounseled convictions); *State v. Deville*, 879 So. 2d 689 (La. 2004)(under article 1, section 13 of the Louisiana Constitution, an indigent individual has the right to appointed counsel if he is charge with an offense punishable by imprisonment. Because the Louisiana Constitution affords a greater right to counsel than the federal Constitution, and individuals prior uncounseled misdemeanor conviction punishable by imprisonment cannot be used to enhance his sentence or reclassify his offense.); *Brisson v. State*, 955 P.2d 888 (Wyo. 1998)(prior uncounseled convictions could not be used to "impose or enhance a subsequent prison sentence." The rationale is that prior uncounseled convictions are unreliable.) (noting the clear invitation in *Nichols* that states were free to implement stricter standards); *State v. Sinagoga*, 918 P.2d 228, 241 (Haw. App. 1996), overruled in part on other grounds by *State v. Veikoso*, 74 P. 3d. 575, 583 n. 8 (2003); *State v. Henes*, 763 N.W.2d 502, 505 (N.D. 2009).

to enhance the period of incarceration for a subsequent offense and does not violate their respective state constitutions.<sup>25</sup>

**B. A defendant has the right to counsel in a misdemeanor case under Article I, §7 of the Delaware Constitution regardless of whether a prison sentence is imposed.**

This Court is urged to extend the protection of Article I, §7 of the Delaware Constitution to misdemeanor defendants regardless of whether incarceration is imposed, and that an uncounseled DUI conviction (not involving a jail sentence) may not be used to enhance the period of incarceration for a subsequent offense. The right to counsel is a fundamental tenet of due process and an essential element of the right to a fair trial, even in misdemeanor cases not involving incarceration. In determining the contours of the protection provided by our state constitution, the Court

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<sup>25</sup> *State v. Cook*, 706 A.2d 603, 605 (Me. 1998); *State ex rel. Webb v. McCarty*, 542 S.E.2d 63, 66-67 (WV. 2000)(citing *State v Hopkins*, 453 S.E.2d 317, 324 (1994)(overruled on other grounds, *State v. Nichols*, 541 S.E.2d 310 (WV. 1999)). *State v. Weeks*, 681 A.2d 86, 88 (1996); *State v. Porter*, 671 A.2d 1280, 1282-84 (Vt. 1996). *State v. Wilson*, 771 N.W.2d 228 (Neb. App. 2009); *People v. Richert*, 548 N.W. 2d 924 (Mich. App. 1996); *People v. Justice*, 550 N.W.2d 562 (Mich. App. 1996); *People v. Reichenbaoch*, 568 N.W. 2d 383 (1997), aff'd, 587 N.W. 2d 1 (Mich. App. 1998); *State v. Thrasher*, 783 So. 2d. 103 (Ala. 2000); *Morphew v. State*, 672 N.E.2d 461 (Ind. App. 1996); *Brown v. State*, 683 N.E. 2d 600 (Ind. App. 1997). See , *Commonwealth v. Hill*, 42 A.2d 1085, 1090 n. 5 (Pa. Super.) appeal granted, 58 A.3d 749 (Pa. 2012) (The “constitutional right to counsel provided under the Sixth Amendment [to]the United States Constitution is coterminous with the right to counsel [in] Article I, Section 9 of the Pennsylvania Constitution); see also, *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa.2012). But see, *Commonwealth v. Thomas*, 507 A.2d 57, 65 (Pa. 1986)( Nix, C.J. dissenting) (“More disturbing is the majority’s implicit premise that Article 1, section 9 is merely a reflection of the minimal constitutional guarantees provided under its federal counterpart.”).



considers one or more of the following non-exclusive criteria: textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.<sup>26</sup> These criteria are examined seriatim.

### **1. Textual Language**

The right to counsel language of Article I, §7 of the Delaware Constitution is substantially similar to the Sixth Amendment.<sup>27</sup> Both provide for the right to counsel in *all* criminal cases although the Supreme Court in *Scott* determined that the right does not apply in *all* criminal cases. The protection provided by the Delaware constitution has been held to be greater

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<sup>26</sup> *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999)(hereinafter, “Jones factors”). See also, *Ortiz v. State*, 869 A.2d 285, 292 n.4 (Del. 2005). *Wallace v. State*, 956 A.2d 630, 637 (Del. 2008).

<sup>27</sup> See Del. Const. Art. I, §7

*“In all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel, to be plainly and fully informed for the nature of the cause of the accusation against him or her, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself or herself, his or her friends or counsel, for obtaining witnesses in his or her favor, and a speedy and public trial by an impartial jury; he or she shall not be compelled to give evidence against himself or herself, nor shall he or she be deprived of life, liberty or property, unless by the judgement of his or her peers or by the law of the land.”*

See U.S.C.A., Amend. 6

*“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”*

than its federal counterpart in many aspects.<sup>28</sup> The Delaware Supreme Court has ruled that the right to counsel under Article I, §7 of the Delaware Constitution is broader than under the Sixth Amendment.”<sup>29</sup> In other words, the constitutional right to counsel provided under Article I, section 7 of the Delaware Constitution is not coterminous with the right to counsel under the Sixth Amendment.

In performing the textual analysis of Article I, §7 in this case, concepts of textualism advanced by the late Justice Antonin Scalia are instructive. Justice Scalia emphasized that textualism “begins and ends with what the text says and fairly implies.”<sup>30</sup> He defined it as “the application of a governing text to given facts on the basis of how a reasonable reader, fully

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<sup>28</sup> See *Dorsey v. State*, 761 A.2d 807 (Del. 2000)(rejecting the “good faith” exception adopted by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) and continuing to recognize that constitutional violations require the exclusion of unlawfully seized evidence); *Jones v. State*, 745 A.2d 856 (Del. 1999)(rejecting the United States Supreme Court’s definition of a “seizure” under the Fourth Amendment to the United States Constitution, as articulated in *California v. Hodari D.*, (499 U.S. 621 (1991) in favor of a broader protection based on Article I, §6 of the Delaware Constitution); *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991)(interpreting the Delaware Constitution as providing greater rights to a trial by jury than the United States Constitution); *Byran v. State*, 571 A.2d 170, 176 (1990) (interpreting the Delaware Constitution as providing greater rights than the United State Constitution regarding the right to counsel); *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989)(interpreting the Delaware Constitution as providing greater rights than the United States Constitution in the preservation of evidence used against a defendant); *Van Ardsall v. State*, 524 U.S. A.2d 3, 6-7 (Del. 1987)(interpreting the Delaware Constitution as providing greater rights than the United States Constitution with respect to confrontation rights); *State v. Heath*, 2006 WL 4701816 (Del. Super. 2006)(holding that pretextual traffic stops violate Article I, §6 of the Delaware Constitution.)

<sup>29</sup> *Bryan v. State*, 571 A.2d 170, 176 (1990).

<sup>30</sup> *Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts*, p. 16 (2012).

competent in the language, would have understood the text at the time it was issued.”<sup>31</sup> He insisted that “[p]urpose sheds light only in deciding which of the various *textually permissible meanings* should be adopted.”<sup>32</sup>

The issue in this case boils down to the meaning of the word “all” as used in Article I, §7. Principles of statutory construction provide that words and phrases should be given their commonly accepted meanings; if those words are clear and unambiguous, the court should apply the language as written.

The word “all” is an unambiguous term.<sup>33</sup> The dictionary definition and common usage of the word “all” do not provide for an exception or exclusion that is not expressly specified.<sup>34</sup> The plain language of Article I, §7 does not support an interpretation that there are any exceptions or limitations to the word “all.”

The Supreme Court’s decision in *Scott* is not helpful in performing a textual evaluation because it did not engage in any analysis of the meaning of the word “all” found in the Sixth Amendment. It did not articulate why the word “all” as used in the Sixth Amendment means less than “all.” The

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<sup>31</sup> *Id.* at 33.

<sup>32</sup> *Id.* at 57.

<sup>33</sup> *City of Grand Junction v. Ute Water Conservancy District*, 900 P.2d 81, 91 (Colo. 1995) (cites omitted).

<sup>34</sup> *Id.*

very first sentence of Justice Brennan’s dissenting opinion calls attention to the disregard of the significance of the word “all” in the majority decision:

“The Sixth Amendment provides: ‘In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’”<sup>35</sup>

The ineluctable conclusion is that the meaning of the text in Article I, §7, providing for the right to counsel in “all criminal prosecutions,” means just that: a defendant has the right to counsel in all misdemeanor prosecutions, regardless of the actual penalty imposed. Conversely, *Scott* and *Nichols* should be rejected as being inconsistent with the plain text of Article I, §7.

It logically follows that the phrase “in all criminal prosecutions” is broader under the Delaware constitution. Support for this proposition is found in an Iowa Supreme Court case which thoroughly addresses many of the *Jones* factors.<sup>36</sup> It concluded that under its state constitution, an accused in a misdemeanor criminal prosecution who faces the possibility of imprisonment under the applicable criminal statute has a right to counsel. Furthermore, when a right to counsel has not been afforded, any subsequent conviction cannot be used as a predicate to increase the length of

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<sup>35</sup> *Scott*, 99 S.Ct. at 1163. (Brennan, J., dissent).

<sup>36</sup> *State v. Young*, 863 N.W.2d 249 (Iowa, 2015).

incarceration for a later crime.<sup>37</sup> The *Young* decision is persuasive authority for the proposition that *Nichols* should not be followed on state law grounds.

The facts of *Young* are as follows: In 2003, the defendant entered an uncounseled guilty plea at her initial appearance for theft and was sentenced to one day with credit for time served after she was returned on a *capias*, and a fine. Over nine years later she was arrested for another theft charge and was charged with theft third degree, an aggravated offense which requires two prior convictions for theft. The State claimed that she was guilty of the aggravated misdemeanor based upon her current crime and two prior theft convictions, including the 2003 uncounseled conviction. Defendant contested the use of the 2003 theft conviction as a predicate to trigger the aggravated misdemeanor because she was not represented when she entered the guilty plea. She argued the 2003 uncounseled conviction was constitutionally defective under the right to counsel provision of the Iowa Constitution.

The Iowa Supreme Court examined whether the text of its right to counsel provision under Iowa Constitution Article I, section 10 provided greater protection than under the Sixth Amendment. Section 10 provides, in

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<sup>37</sup> *Id.* at 281.

pertinent part, that “[i]n all criminal prosecutions, and in cases involving the life, or liberty of an individual, the accused shall have a right . . . to have assistance of counsel.” The Iowa Supreme Court noted that unlike its “[f]ederal counterpart, the Iowa provision is double-breasted: It has an “all criminal prosecutions’ clause and a “cases” clause involving the life or liberty of an individual.”<sup>38</sup>

The Iowa Supreme Court examined the meaning of the term “all criminal prosecutions” contained in the federal and state constitutional provisions. In evaluating this issue, the Court recognized the well-established principle that it is free to follow or reject federal authority in interpreting its state constitution and is not bound by it.

In its textual analysis, the Iowa Supreme Court noted the “force of the plain language of the Iowa Constitution” which provides the right to counsel “in all criminal prosecutions.” The text does not qualify the right by limiting it to *some* criminal prosecutions, or *felonies* only.<sup>39</sup> It says nothing about “actual incarceration.”<sup>40</sup>

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<sup>38</sup> *Young* at 257

<sup>39</sup> *Young* at 277.

<sup>40</sup> *Young* at 278.

The Iowa Court questioned the reasoning of *Scott* and *Nichols* based upon the plain reading of the constitutional text.<sup>41</sup> The text “in all criminal prosecutions” is not an “open-textured phrase” like “privileges and immunities” or “due process of law.”<sup>42</sup> The language is not ambiguous.

It interpreted the language as being directed toward “providing counsel in order to avoid the risk of *conviction*, not the risk of *incarceration*.”<sup>43</sup> It determined that the choice of language made it “difficult to avoid the conclusion that the phrase ‘all criminal prosecutions’ was expressly designed to avoid judicially imposed slicing and dicing of criminal prosecutions into two or more categories.”<sup>44</sup> Finally, it emphasized that the “bill of rights of the Iowa Constitution embraces the notion of ‘inalienable rights,’ not rights that shrink and disappear based upon currently fashionable transient pragmatic assessments.”<sup>45</sup>

The Iowa Supreme Court also determined that its conclusion was “exacerbated by the double-breasted nature of the right to counsel provision. The Court’s analysis on this point does not apply here since Delaware’s right to counsel provision does not have this double-breasted feature.

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<sup>41</sup> *Young*, at 278.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

In rejecting federal right to counsel authority, the Iowa Supreme Court noted that:

“ ... *Scott* was an outlier from the prior right-to-counsel cases that emphasized the role of counsel in ensuring fairness and reliability in criminal prosecutions and that the federalism and pragmatic concerns cited in *Scott* are wholly irrelevant to the interpretation of the Iowa Constitution.<sup>46</sup>”

The textual analysis conducted by the Iowa Supreme Court is persuasive authority supporting a determination that Article I, §7 of the Delaware Constitution provides the right to counsel to misdemeanor defendants “in all cases,” regardless of whether incarceration is imposed.

The Florida Supreme Court employed similar analysis under article I, section 16 of the Florida Constitution, which provides that in “all criminal prosecutions,” the accused has “the right . . . to be heard in person, by counsel or both,” in departing from federal precedent.<sup>47</sup> The *Kelly* court commented that the unreliability of prior uncounseled misdemeanor convictions “does not turn on the length of the prospective term of imprisonment,” but rather “on the fact that even an uncounseled innocent gains little by contesting a ‘petty’ misdemeanor where the prosecuting

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<sup>46</sup> *Id* at 281.

<sup>47</sup> *State v. Kelly*, 999 So. 2d 1029, 1032-33 (Fla. 1992).



attorney is offering a low fine and community service in exchange for a guilty or no-contest plea.”<sup>48</sup>

The ineluctable conclusion is that the meaning of the text in Article I, §7 providing for the right to counsel in “all criminal prosecutions” means just that: a defendant has the right to counsel in all misdemeanor prosecutions, regardless of the actual penalty imposed. *Scott and Nichols* should be rejected as being inconsistent with the plain text of Article I, §7.

## **2. Legislative History**

The evolution of the right to counsel begins with the English common law. English common law provided no absolute right to counsel.<sup>49</sup> An individual accused of a misdemeanor or treason, but not a felony, had a right to retain counsel.<sup>50</sup> Parliament passed a law in 1836 granting all individuals accused of felonies the right to have counsel.<sup>51</sup> Parliament did not grant the right to appointed counsel until 1903.<sup>52</sup>

From the beginning, Delaware recognized the right to assistance of counsel. The Delaware Charter of 1701 granted “all Criminals . . . the same

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<sup>48</sup> *Kelly* at 1051.

<sup>49</sup> *Powell v. Alabama*, 287 U.S. 45, 60 (1932).

<sup>50</sup> *Powell*, at 60.

<sup>51</sup> *Laurie S. Fulton, Note, The Right to Counsel Clause of the Sixth Amendment*, 26 *Am. Crim. L. Rev.* 1599, 1600 (1989).

<sup>52</sup> *Id.*

Privileges of Witnesses and Council as their Prosecutors.”<sup>53</sup> A 1719 Delaware statute mandated the appointment of counsel by the court in capital cases.<sup>54</sup> Delaware adopted its Constitution and Declaration of Rights in September 1776, approximately two months after the Declaration of Independence and fifteen years before the federal Bill of Rights.<sup>55</sup> In Section 14, the 1776 Declaration of Rights provided: “[t]hat in all prosecutions for criminal offences, every man hath a right . . . to be allowed counsel.”<sup>56</sup>

Delaware’s history supporting the assistance of counsel prior to the federal Bill of Rights is significant because it provides a persuasive basis establishing that the right to counsel in Delaware does not derive from the Sixth Amendment. Therefore, it should not be interpreted as being coterminous with federal law. The previous history supports a conclusion that Delaware’s right to counsel should be interpreted as providing different and broader protection than what is guaranteed by the Sixth Amendment. The right to counsel language in the Delaware laws aforesaid are also significant because they do not distinguish between misdemeanors or felonies, or whether or not a jail sentence was likely to be imposed. There is no language about “actual incarceration.”

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<sup>53</sup> Delaware Charter of 1701, §V; *State v. Young*, at 258.

<sup>54</sup> *Holland, Randy J., The Delaware State Constitution, 2<sup>nd</sup> Ed., p. 57. (2017).*

<sup>55</sup> *Dorsey*, 761 A.2d at 815.

<sup>56</sup> *Holland, Randy J., The Delaware State Constitution, 2<sup>nd</sup> Ed., p. 57. (2017).*

Subsequent to the federal Bill of Rights, the Delaware Constitution of 1792 provided that “[i]n all criminal prosecution the accused hath a right to be heard by himself and his counsel.”<sup>57</sup> This provision was continued in the 1831 and 1897 Constitution.<sup>58</sup>

The *Kelly* court found significance in the fact that seven of the early state constitutions provided a right to counsel for “all” prosecutions, or similar language.<sup>59</sup> It concluded that including the “all criminal prosecutions” language was “obviously designed to address the gap in English law refusing to allow the right to counsel for felonies.”<sup>60</sup>

Again, a review of Delaware’s legislative history supports a broader interpretation of the right to counsel than in *Scott* and *Nichols*.

### **3. Preexisting State Law**

The previous section traced the evolution of Delaware’s right to counsel law and constitutional provisions.

With respect to the issue here, previous decisions have followed the *Nichols/Scott* determination that an uncounseled DUI conviction may be used to enhance the period of incarceration for a subsequent offense without

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<sup>57</sup> Del. Const. of 1792, art. I, §7.

<sup>58</sup> *The Delaware State Constitution, 2<sup>nd</sup> Ed., Holland, Randy J., p. 57. (2017).*

<sup>59</sup> *Kelly*, 863 N.W.2d at 259.

<sup>60</sup> *Id.*

examining the issue in the context of Article I, §7 of the Delaware Constitution.<sup>61</sup>

In *Bryan v. State*, the Delaware Supreme Court interpreted the right to counsel provision of Article I, §7 of the Delaware Constitution as affording greater protection than the provision of the federal Constitution.<sup>62</sup> Moreover, in *Krewson v State*, decided after *Scott*, this Court implicitly acknowledged the right to counsel in a misdemeanor DUI case by not rejecting defendant's right to counsel argument on the basis of *Scott*.<sup>63</sup>

#### **4. Structural Differences – Dual Sovereignty**

The United States and Delaware Constitutions work in tandem to protect our right to counsel in criminal cases.<sup>64</sup> The Delaware Supreme Court has consistently recognized that the United States Constitution does not limit constitutional protections within this state. Indeed, “the United States Constitution establishes a system of dual sovereignty: a federal government and state governments.”<sup>65</sup> As noted in *Jones*, the “preservation of diversity in the legal and government systems of each state was expressly contemplated when the United States Constitution was framed and

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<sup>61</sup> *State v. Morris*, 2001 WL 893982 (Del Super. 2001); *State v. Pressley*, 2002 WL 863599 (Del. Super. 2002).

<sup>62</sup> *Bryan v. State*, 571 A.2d 170 (Del. 1990).

<sup>63</sup> *Krewson v. State* 552 A.2d 840 (Del. 1988)

<sup>64</sup> U.S. Const. Amend. VI; Del. Const. art.1 §7.

<sup>65</sup> *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000)(quoting *Jones*, 745 A.2d at 866)

adopted.”<sup>66</sup> Thus, Delaware, as a State in the Union, has the authority to grant or offer its citizens greater protections than those afforded by the United States Constitution.

Delaware’s judges must analyze the individual rights guaranteed to Delaware’s citizens, and not “simply hold that the Declaration of Rights in Article I of the Delaware Constitution are necessarily in ‘lock step’ with the United States Supreme Court’s construction of the federal Bill of Rights.”<sup>67</sup>

In *Sanders v. State*, the State argued that provisions within the Delaware Constitution must mean the same thing as the United States Constitution.<sup>68</sup> The *Sanders* Court, in rejecting the State’s argument, relied on its ability to consider multiple sources when rendering a decision that the United States Supreme Court cannot consider. These sources include Delaware’s constitution, state statutes, and the common law.<sup>69</sup> The Court thoroughly explained the existence – and importance for that matter – of dual sovereignty:

Although Delaware is bound together with the forty-nine other States in an indivisible federal union, it remains a sovereign State, governed by its own laws and shaped by its own unique heritage. An examination of those laws and that heritage may, from time to time, lead to the conclusion that

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<sup>66</sup> *Jones*, at 874, citing Randy J. Holland: *State Constitutions; Purpose and Function*, 69 Temp. L. Rev. 989-99 (1996).

<sup>67</sup> See *Dorsey*, 761 A.2d at 814

<sup>68</sup> *Sanders v. State*, 585 A.2d 117, 144 (Del. 1990).

<sup>69</sup> See *Dorsey*, 761 A.2d at 814

the Delaware citizens enjoy more rights, more constitutional protections, than the Federal Constitution extends to them. If we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty. In a very real sense, Delaware would become less of a State than its sister States who recognize the independent significance of their Constitutions. Subject to the limits of the Supremacy Clause, no one would argue that our General Assembly should not legislate on subjects such as environmental protection merely because Congress has done so. Similarly, this State's judicial branch should not be foreclosed from interpreting our Constitution merely because the United States Supreme Court has interpreted similar provisions of the Federal Constitution.<sup>70</sup>

This passage as well as others like it, have helped to perpetuate Delaware's rich history in this regard.<sup>71</sup>

The Iowa Supreme Court echoed the concepts of dual sovereignty when it questioned the reasoning of *Nichols* and *Scott* as persuasive authority to follow under its state constitution:

“. . . *Scott*, upon which *Nichols* relied, was based upon federalism and pragmatic concerns that had no application in Iowa. The strong emphasis in *Scott* on its federalism concern about a one-size-fits-all rule for the diverse states has no bearing on determining questions of state constitutional law that impact only one state.<sup>72</sup>

The *Young* court found that the speculative fiscal concerns in *Scott* about the burdensome cost of providing counsel for indigents

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<sup>70</sup> *Sanders*, 585 A.2d at 145 (other citations omitted)

<sup>71</sup> See n. 28 herein.

<sup>72</sup> *Young*, 863 N.W.2d at 277.

were misplaced with respect to Iowa as it already provided the right to counsel in misdemeanor cases when there is a “possibility of imprisonment.”<sup>73</sup> The same finding applies to Delaware where there is an even broader right to counsel in misdemeanor cases by statute and court rules.<sup>74</sup> Therefore, *Scott’s* speculative financial concerns are not relevant to the state constitutional analysis in this case.

### **5. Delaware tradition and values regarding the right to counsel.**

Statutory enactments and court rules are consistent with an interpretation that the right to counsel extends to misdemeanor prosecutions regardless of the actual sentence. The right to counsel is provided by statute and court rules.<sup>75</sup> Delaware provides counsel in all criminal cases.<sup>76</sup> Our courts protect an indigent defendant’s right to counsel under Article I, §7.<sup>77</sup>

Delaware Superior Ct. Cr. R. 11 (c)(2) provides that before accepting a guilty plea to a Class A misdemeanor or felony, the court must advise a defendant of the right to counsel and if necessary, the court will appoint one for him. Ct. Com. P. Cr. R. 11 (c)(2) provides the same protection, where appropriate. Justice of the Peace Crim. R. 11 mirrors Delaware Superior Ct.

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<sup>73</sup> *Id.* 277.

<sup>74</sup> 11 Del. C. §5103; *Super. Ct. Cr. R. 44*; *Ct. Com. Pl. Cr. R. 44*

<sup>75</sup> 11 Del. C. §5103; *Super. Ct. Cr. R. 44*; *Ct. Com. Pl. Cr. R. 44*

<sup>76</sup> 29 Del. Code §4602.

<sup>77</sup> *Potter v. State*, 547 A.2d 595, 600 (Del. 1988); *Hales v. State*, 344 A.2d 229, 230 (Del. 1975).

Cr. R. 11 (c)(2). In practice, no guilty plea to any level of criminal offense is accepted by a pro-se defendant without a valid waiver of the right to counsel. The guilty plea forms in each court address whether a defendant understands the right to counsel, and whether there is a knowing waiver of that right. The guilty plea colloquy addresses the same right, and whether it is knowingly waived.

The right to counsel under Article I, §7 is directed toward providing counsel in order to avoid the risk of *conviction*, not just the risk of *incarceration*. It is simplistic and naïve to suggest that misdemeanor prosecutions are less serious if incarceration is not involved. In fact, a misdemeanor conviction can have serious life altering ramifications even if a jail sentence is not imposed. These include, but are not limited to, the following consequences:

1. Use to increase and/or mandate jail sentences in later cases;
2. Deportation;
3. Sex offender registration requirements;
4. Child abuse and adult abuse registration requirements;
5. Professional license preclusion, suspension or revocation;
6. Employment opportunities and consequences;
7. Driver's license/ CDL license suspension or revocation;
8. Violation of probation/parole;
9. Right to possess/own firearms;
10. Education admission and loan opportunities;
11. Housing opportunities.



The right to counsel “in all criminal prosecutions” is important because even minor misdemeanor cases can be complicated from a legal standpoint. This is especially true in DUI cases because they often involve complex search and seizure issues, rules regarding the admissibility of blood and breath tests, admissibility of business records under DRE 803 (6), proper administration of sobriety testing, different levels of criminal and administrative penalties depending upon various factors, etc. One only has to review the labyrinth which is our DUI law to immediately recognize how overwhelming it is for an uncounseled defendant to navigate. Thus, the absence of counsel affects the fairness in many misdemeanor prosecutions, especially DUI prosecutions.

Interpreting the right to counsel under Article I, §7 as applying to all misdemeanor offenses regardless of penalty is reflective of Delaware values. The concerns about extending the right to counsel to all, or virtually all criminal cases are overpowering.

### **Conclusion**

A consideration of the *Jones* factors leads to the conclusion that Delaware provides a broader right to counsel under Article I, §7 of the

Delaware Constitution than provided by the federal courts under the Sixth Amendment.

**C. The right to counsel provision of Article I, §7 of the Delaware Constitution provides broader protection than its federal counterpart; consequently, use of an uncounseled conviction as a predicate to enhance a subsequent offense violates due process under Article I, §7.**

Assuming that Article I, §7 provides the right to counsel in a misdemeanor case where no jail sentence is imposed, then Defendant's uncounseled Maryland conviction should be barred from enhancing his later offense. The denial of the assistance of counsel is a violation of the due process of law guaranteed by Article I, §7 of the Delaware Constitution."<sup>78</sup> Here, the State has failed to rebut Defendant's assertion that his plea was uncounseled, and it is impermissible to presume waiver of the right from a silent record.<sup>79</sup>

In *Baldasar v. Illinois*, the United States Supreme Court held, in three concurring opinions, that it violated the Sixth Amendment right to counsel for courts to use prior uncounseled misdemeanors to enhance a subsequent sentence.<sup>80</sup> The consistent theme that emerged from the three concurring

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<sup>78</sup> *Bryan v. State*, 571 A.2d 170, 176 (1990).

<sup>79</sup> *Carnley v. Cochran*, 82 S.Ct.884 (1962); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Hales v. State*, 344 A.2d 229 (Del. 1975); *Stacey v. State*, 358 A.2d 379,380 (Del. 1976)(per curiam).

<sup>80</sup> *Baldasar v. Illinois*, 100 S.Ct. 1585, 1586 (1980).

opinions is that the use of a prior uncounseled misdemeanor to increase a prison sentence constituted a violation of due process of law and the Sixth Amendment right to counsel.

In *Nichols*, the Court overruled *Baldasar* holding that a court could rely on an uncounseled misdemeanor, valid under *Scott*, for enhancing the sentence of a subsequent offense.<sup>81</sup> It premised its opinion on the need to resolve the confusion created by *Baldasar*, rather than on sound constitutional principles.

*Nichols* determined that misdemeanor representation is only necessary in cases of actual imprisonment reasoning that “the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of liberty.”<sup>82</sup>

However, Justice Blackmun stated directly in his dissent that no uncounseled conviction should ever be the basis for a prison term.<sup>83</sup> Sentence enhancement does nothing more than modify the sentence for a current crime and does not change the prior sentence. However, a defendant under the scheme created by *Nichols* can receive mandatory imprisonment, or an increase in imprisonment, based only on the prior uncounseled

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<sup>81</sup> 114 S.Ct. 1921 (1994).

<sup>82</sup> *Nichols*, 114 S.Ct. at 1921(1994). (Souter, J., concurring in judgement).

<sup>83</sup> 114 S.Ct. 1921 (Blackmun, J., dissenting)(an uncounseled disposition that would have been invalid if prison was imposed directly should not be counted toward imprisonment indirectly by using it to enhance a later sentence).

misdemeanor conviction. Consequently, there is a deprivation of liberty as a direct result of the uncounseled misdemeanor conviction.

In a trilogy of cases, the United States Supreme Court has held that, in general, a defendant may not attack a prior state conviction in the course of a federal sentencing or habeas proceeding.<sup>84</sup> There are two exceptions. The first exception to this rule, based upon *Gideon* and *Burgett*, is where there was a failure to appoint counsel in violation of the Sixth Amendment.<sup>85</sup> However, as noted, *Burgett* does not apply to misdemeanor convictions which do not result in a jail sentence.<sup>86</sup>

Even though the federal authority does not apply to this case because no jail sentence was involved, *Burgett*, and its progeny, are instructive authority supporting the proposition that an uncounseled prior conviction failing to meet constitutional standards may not be used to enhance a sentence for a subsequent offense under Article I, §7 of the Delaware Constitution. This principle applies to preclude Defendant's uncounseled Maryland conviction as a predicate offense to enhance his sentence for these convictions. There is no evidence that Defendant was advised of his right to

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<sup>84</sup> *Custis v. United States*, 511 U.S. 485 (1994), *Daniels v. United States*, 532 U.S. 374 (2001), and *Lackawanna County Dist. Atty. v. Coss*, 532 U.S.394 (2001).

<sup>85</sup> *Daniels*, 532 U.S. at 382.

<sup>86</sup> *Nichols v. United States*, 511 U.S. 738 (1994), citing, *Scott v. Illinois*, 99 S.Ct. 1158(1979). See also, *State v. Pressley*, 2002 WL 863599 (Del. Super. 2002).

counsel, and affirmatively waived that right, in the Maryland case.

Use of an uncounseled conviction to enhance Defendant's sentence is difficult to reconcile with a defendant's right to counsel and due process under Article I, §7.

This Court is asked to rule based upon the force and plain meaning of the "in all criminal prosecutions" language of Article I, §7 of the Delaware Constitution, and reject *Scott* and *Nichols*. As Justice Holland noted in *Dorsey*, in order to "faithfully discharge the responsibilities of their office," Delaware judges must analyze the individual rights guaranteed to Delaware's citizens, and not "simply hold that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in 'lock step' with the United State Supreme Court's construction of the federal Bill of Rights."<sup>87</sup>

Because the Delaware Constitution is not in "lockstep" with the United States Constitution in this area as prior opinions have held,<sup>88</sup> the Court should reject the *Scott* and *Nichols* decisions and extend the constitutional protections of Article I, §7 of the Delaware Constitution to misdemeanor convictions which do not result in actual incarceration. Furthermore, this Court is asked to rule that if a defendant's right to counsel under Article I, §7 of the Delaware Constitution is violated, then it is

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<sup>87</sup> See *Dorsey*, 761 A.2d at 814.

<sup>88</sup> See n. 28.

fundamentally unfair under the due process clause of Article I, Section 7 to use that conviction to enhance a subsequent offense.

**D. Analysis of Superior Court's Ruling: The Court abused its discretion and did not properly apply legal precepts in its consideration of Defendant's claim.**

**1. The Superior Court erred by misapprehending the nature of Defendant's claim of a constitutional violation.**

At the outset, the trial court misstates Defendant's claim when it frames the argument as an assertion that "Delaware's due process clause provides greater protection than the Sixth Amendment of the Federal Constitution with respect to the use of evidence of such a prior out-of-state conviction to enhance the classification of and penalty for a later Delaware conviction." The threshold issue of Defendant's argument is whether a defendant has a right to counsel in a misdemeanor case under Article I, §7 of the Delaware Constitution regardless of whether a prison sentence is imposed. If the answer to that question is yes, then does the use of an uncounseled misdemeanor conviction to enhance a subsequent offense violate the due process clause of Article I, Section 7?

**2. The Superior Court erred by concluding that Defendant was resting on a silent record.**

Next, the trial court misapprehends Defendant's position when it erroneously interprets that he is relying exclusively on the absence of any indication in the Maryland records regarding whether he "had counsel, waived counsel, or the participation of counsel was ever even addressed."<sup>89</sup> In his motion, Defendant affirmatively asserted that he "entered an uncounseled DUI guilty plea in Maryland on March 11, 1991 pertaining to his arrest on September 16, 1990."<sup>90</sup> The Maryland record is evidence supporting Defendant's assertion. Defendant's factual assertion, corroborated by the Maryland record, in conjunction with the State's failure to contradict the claim, is persuasive evidence that his Maryland conviction was uncounseled. Defendant affirmatively asserted that his conviction was uncounseled, and is not merely resting on a silent record. Query: Other than asserting that his plea was uncounseled, what other proof was Xenidis expected to provide to prove a negative?

The trial court's criticism misapprehends the law. Presuming waiver of constitutional rights from a silent record is impermissible.<sup>91</sup> Again, the

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<sup>89</sup> *Xenidis*, at 296. "And unabashedly, he feels, that gives them license to label his Maryland DUI conviction 'uncounseled.' "

<sup>90</sup> A22.

<sup>91</sup> *Carnley v. Cochran*, 82 S.Ct.884 (1962); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Hales v. State*, 344 A.2d 229 (Del. 1975); *Stacey v. State*, 358 A.2d 379, 380 (Del. 1976) (per curiam).

State has never contended that Defendant was afforded his right to counsel in the Maryland proceeding.

**3. The Superior Court erred by suggesting Defendant's claim is waived by the failure to raise it in prior proceedings and is an improper collateral attack on a prior conviction.**

Next, the trial court mistakenly suggests that the issue is moot because defendant's prior conviction has already been used twice to enhance prior sentences he received under Delaware's DUI law. The failure to raise this constitutional issue by counsel in prior cases does not act as a waiver to raise it in this case. There is no indication that prior counsel identified the issue, and knowingly waived the claim in the previous cases.

The trial court then confuses the issue by suggesting that defendant's argument is a collateral attack on prior convictions in violation of 21 Del. C. 4177B(e)(5). Defendant is not contesting the historical fact of his Maryland DUI conviction. He is not seeking to have that conviction vacated. He is contesting its qualification as a predicate offense to enhance the punishment for his current convictions. His claim is that an uncounseled conviction is constitutionally unreliable and should not serve as a qualified predicate offense to enhance a sentence under the right to counsel and due process provisions of Article I, §7 of the Delaware Constitution.



In *Burgett v. Texas*, the Court determined that convictions obtained in violation of *Gideon* could not be used to support guilt or enhance punishment in a later case.<sup>92</sup> Although *Burgett* applies to felonies, it is instructive because the out of state prior convictions in that case were not targeted to be vacated or reversed, only that the convictions could not be used to enhance a sentence in a later case. Defendant's position is based upon the same concept under Article I, §7 of the Delaware Constitution.

**4. The Superior Court erred by interpreting Article I, §7 as being in lock-step with federal law.**

The trial court is correct that the Supreme Court's decisions in *Scott* and *Nichols* stand for the proposition that an uncounseled misdemeanor conviction not resulting in incarceration does not violate the Sixth Amendment right to counsel. However, Defendant has addressed the many persuasive reasons supporting the claim that Article I, §7 of the Delaware Constitution provides greater protection than the Sixth Amendment to the United States Constitution with respect a defendant's right to counsel in misdemeanor prosecutions.

In conducting its constitutional analysis, the trial court performed a cursory "right to counsel" textual analysis. It ignored the plain language that citizens have the right to counsel in "all" cases under Article I, §7 of the

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<sup>92</sup> *Burgett v. Texas*, 389 U.S. 109 (1967).

Delaware Constitution. It was content to accept that Article I, §7 is merely a reflection of the minimal constitutional guarantees provide under its federal counterpart. It disregarded this Court’s decision that the right to counsel under Article I, §7 is broader than under the Sixth Amendment.”<sup>93</sup> It ignored persuasive authority of other states which have interpreted their state constitutions, or other authority, as providing broader protection than guaranteed by the Sixth Amendment and have ruled that an uncounseled conviction may not be used to enhance the period of incarceration for a subsequent offense.<sup>94</sup> For instance, the trial court completely disregarded the thorough analysis of this issue by the Iowa Supreme Court in *State v Young*.<sup>95</sup> It ignored persuasive criticism of the reasoning of *Scott* and *Nichols* based upon the plain reading of constitutional text.<sup>96</sup>

**5. The Superior Court erred by its application of the *Parke v. Raley*<sup>97</sup> “presumption of regularity” rule.**

The Superior Court glossed over the right to counsel claim and skipped to due process analysis.<sup>98</sup> It avoided the constitutional right to counsel issue, and the implications of uncounseled misdemeanor

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<sup>93</sup> *Bryan v. State*, 571 A.2d 170, 176 (1990).

<sup>94</sup> See footnote 24.

<sup>95</sup> *State v. Young*, 863 N.W.2d 249 (Iowa 2015).

<sup>96</sup> *Young*, at 278.

<sup>97</sup> 113 S.Ct. 517 (1992),

<sup>98</sup> *Xenidis* at 301. (“Because it is the state due process right implicated by use of this prior out-of-state conviction that is at issue.”).

convictions. It misapprehends the claim by mischaracterizing it as a collateral attack on a prior conviction, and then disposes of the claim by the application of the “presumption of regularity” rule under *Parke v. Raley*.<sup>99</sup> This Court has never addressed whether the presumption of regularity rule applies to Delaware recidivism statutes under the due process clause of Article I, §7 of the Delaware Constitution.

In *Parke v. Raley*,<sup>100</sup> the Court rejected a challenge to the procedures used by the courts of Kentucky for adjudicating *Boykin*<sup>101</sup> claims where offered for sentence enhancement under state law.<sup>102</sup>

The Court rejected the argument that due process forbids a state to require defendants to produce evidence of an inadequate advisement of rights with respect to a guilty plea, or requires that *Boykin* claims ultimately be decided on a higher standard than preponderance of the evidence. In ruling that the Kentucky scheme did not violate due process, the Court observed that a presumption of regularity attaches to prior convictions, at least where no transcripts or records of the earlier plea colloquies exist.<sup>103</sup>

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<sup>99</sup> *Parke v. Raley*, 113 S.Ct. 517 (1992).

<sup>100</sup> 113 S.Ct. 517 (1992),

<sup>101</sup> *Boykin v. Alabama*. 89 S. Ct. 1166 (1969).

<sup>102</sup> Under *Boykin*, whether a plea is knowing and voluntary involves the waiver of three federal constitutional rights: (1) the privilege against self-incrimination; (2) the right to trial by jury; and (3) the right to confront one’s accusers.

<sup>103</sup> 113 S.Ct. at 523-24.

Of course, that a presumption of regularity applies does not mean that the presumption should be conclusive and un-rebuttable. This is consistent with Delaware law which prohibits conclusive presumptions in criminal proceedings.<sup>104</sup> The presumption of regularity merely makes it appropriate to assign the burden of proof upon the defendant. In fact, the procedures under review in *Parke* permitted the defendant to rebut the presumption of regularity.<sup>105</sup>

*Parke* did not expressly apply the presumption of regularity in the context of the use of an uncounseled conviction to enhance a subsequent offense. The *Parke* presumption of regularity rule has yet to be adopted by this Court, therefore its application in this matter is not settled. It should not be adopted to the extent it permits the trial court to imprison a defendant on the basis of a conviction that is constitutionally invalid. Penal statutes are strictly construed. The presumption of regularity is inconsistent with the strict construction of the operation of this penal statute.

If *Parke* does apply, then Defendant has met his burden by asserting that his Maryland conviction was uncounseled, which was corroborated by the Maryland extract and the absence of any contrary evidence by the State.

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<sup>104</sup> 11 Del. C. §306.

<sup>105</sup> *Id.* at 520.

The trial court's reliance upon the application of the presumption of regularity rule in *State v. Dean*,<sup>106</sup> is misplaced. *Dean* dealt with a different issue: whether a certified Maryland driving record was sufficient to establish a DUI conviction in that state absent the court docket. *Dean* did not involve whether the defendant waived his right to counsel.

**6. The Superior Court erred by applying an improper degree of proof standard for accepting the Maryland offense as a predicate conviction.**

A statute which imposes additional punishment on conviction for a subsequent offense is highly penal and as a consequence such a statute must be strictly construed.<sup>107</sup> The principle of strict construction applies to Delaware's DUI penalty enhancement scheme.<sup>108</sup> The applicable portion of the statute does not address the degree of proof necessary to establish a prior conviction.<sup>109</sup> The DUI statute should be strictly construed to require a higher degree of proof for a qualified predicate offense than the de minimus Maryland abstract accepted by the trial court. Defendant submits that the appropriate degree of proof requires evidence that the predicate conviction was not uncounseled.

Finally, the Superior Court erroneously applied a conclusive

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<sup>106</sup> *State v. Dean*, 2014 WL 3048724 (Del. Super. June 5, 2014)

<sup>107</sup> *Kane v. State*, 327 A.2d 744 (Del. 1974).

<sup>108</sup> 21 Del. C. §4177 (d)(2)-(8).

<sup>109</sup> 21 Del. C. §4177 (e).

presumption of the validity of the Maryland conviction in violation of *II Del. C. §306*.<sup>110</sup>

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<sup>110</sup> *Xenides*, at 306. (“In sum, the Delaware history and tradition has been that when a collateral attack on a final conviction rests on constitutional grounds, the conviction is nonetheless presumed valid due to the ‘presumption of regularity’ that attaches to final judgments.”).

**CONCLUSION**

Defendant respectfully requests this Court reverse the decision of the Superior Court and remand for resentencing;

/s/ Michael W. Modica  
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Dated: 9/20/2019

212 A.3d 292  
Superior Court of Delaware.

STATE of Delaware,  
v.  
Theodore XENIDIS, Defendant.

Submitted: February 21, 2019

Decided: April 26, 2019

Written Decision Issued: June 27, 2019

**Synopsis**

**Background:** Defendant was convicted after two separate trials of two separate felony counts of driving under the influence of alcohol (DUI) that arose from two separate and distinct incidents. Defendant filed motion to exclude use of prior out-of-state DUI conviction for sentencing.

**Holdings:** The Superior Court, Wallace, J., held that:

[1] use of defendant’s prior out-of-state DUI conviction did not violate Federal Constitution, and

[2] the State was not required to prove that defendant had or waived counsel in prior out-of-state DUI conviction.

Motion denied.

West Headnotes (20)

[1] **Automobiles**  
Repeat offenders

Use of defendant’s prior out-of-state conviction of driving under the influence of alcohol (DUI) to enhance his present DUI conviction did not violate Federal Constitution, where defendant’s sentence for the prior out-of-state conviction did not include a term of imprisonment. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[2] **Criminal Law**  
Penalty, potential or actual

Uncounseled misdemeanor convictions that result in a sentence of imprisonment violate the Sixth Amendment right to counsel as applied to the states through the Fourteenth Amendment. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[3] **Criminal Law**  
Penalty, potential or actual

An uncounseled misdemeanor conviction not resulting in incarceration does not violate the Sixth Amendment right to counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[4] **Sentencing and Punishment**  
Defects in prior adjudication

Under the Federal Constitution, an uncounseled misdemeanor conviction that does not result in a sentence of imprisonment may be used to enhance the sentence for a subsequent offense.

Cases that cite this headnote

[5] **Sentencing and Punishment**  
Presumptions

Under the Federal Constitution, the deeply rooted presumption of regularity—even when the question is adherence to the honoring or waiver of constitutional rights—allows a state court to presume that a final judgment of



conviction offered for purposes of sentence enhancement was validly obtained.

Cases that cite this headnote

[6]

**Courts**

☞ Construction of state Constitutions and statutes

While any Delaware state court must follow the United States Supreme Court in matters of federal constitutional law, it is also duty bound to interpret the provisions of Delaware's Constitution so as to avoid rendering the state's individual legal history and grants of rights to her citizens meaningless.

Cases that cite this headnote

[7]

**Courts**

☞ Construction of federal Constitution, statutes, and treaties

When deciding if a particular provision of the Delaware Constitution should be interpreted to provide protections that are greater than the rights accorded by its federal analogue as that has been interpreted by the United States Supreme Court, a court must determine with some precision only whether, and what situations specifically demand differing results.

Cases that cite this headnote

[8]

**Constitutional Law**

☞ Necessity of Determination

A constitutional question will not be decided unless its determination is essential to the disposition of the case.

Cases that cite this headnote

[9]

**Constitutional Law**

☞ Necessity of Determination

The obvious corollary to the rule that a constitutional question will not be decided unless its determination is essential to the disposition of the case is that a court will only decide the narrowly drawn constitutional question that must be determined.

Cases that cite this headnote

[10]

**Courts**

☞ Construction of federal Constitution, statutes, and treaties

While the Superior Court need not be reluctant, where warranted, to show greater sensitivity to Delawareans' individual rights under the state Constitution than the United States Supreme Court accords to their rights under the Federal Constitution, the Superior Court must apply a logical, deductive analytical process to determine whether a state constitutional provision should be given the same interpretation as similar language in the United States Constitution.

Cases that cite this headnote

[11]

**Constitutional Law**

☞ Relation to Constitutions of Other Jurisdictions

The question of state constitutional adjudication is not whether the Superior Court may interpret the state constitution differently than the federal constitution, the issue is whether the Court must.

Cases that cite this headnote

[12] **Constitutional Law**  
☞Relation to Constitutions of Other Jurisdictions

When deciding whether the Delaware Constitution provides some greater protection to criminal recidivists than the Federal Constitution requires, the Superior Court must engage an analysis of one or more of the following from the partial list of non-exclusive criteria: textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.

Cases that cite this headnote

[13] **Automobiles**  
☞Repeat offenders

For use as an enhancement to defendant's present driving under the influence (DUI) conviction, the State was not required to prove that defendant had or waived counsel in prior out-of-state DUI conviction; to exclude offense the Superior Court would have to presume some constitutional invalidity of the prior out-of-state conviction, and due process—as defined by both federal and state constitutions—required no such presumption and no such exclusion under state DUI recidivist statute. U.S. Const. Amend. 14; Del. Const. art. 1, § 7; 21 Del. Code § 4177(d)(4).

Cases that cite this headnote

[14] **Constitutional Law**  
☞Relation to Constitutions of Other Jurisdictions

A state constitution's language may itself provide a basis for reaching a result different from that which could be obtained under federal law.

Cases that cite this headnote

[15] **Criminal Law**  
☞Right of Defendant to Counsel

The language of the state constitution's right-to-counsel clause is significantly different than that found in the Sixth Amendment of the federal constitution. U.S. Const. Amend. 6; Del. Const. art. 1, § 7.

Cases that cite this headnote

[16] **Criminal Law**  
☞Counsel in General

The Fifth Amendment right to counsel is narrower than the state constitution's right to ensure employed counsel is present during custodial interrogation. U.S. Const. Amend. 5; Del. Const. art. 1, § 7.

Cases that cite this headnote

[17] **Constitutional Law**  
☞Relationship to other constitutions

The phrase in the Delaware Constitution “nor shall he or she be deprived of life, liberty, or property, unless by the law of the land” has substantially the same meaning as “nor be deprived of life, liberty, or property without due process of law” in the Federal Constitution. U.S. Const. Amend. 14; Del. Const. art. 1, § 7.

Cases that cite this headnote

[18] **Constitutional Law**  
☞Relation to Constitutions of Other Jurisdictions

Not each factor in the partial list that a court

uses to discern whether a provision in the United States Constitution has a meaning identical to a similar provision on the same subject in the Delaware constitution need be addressed; some, given the subject area, are simply inapplicable, and some, given the subject area, are not so easily disentangled from the others.

Defendant, Theodore **Xenidis**.

Cases that cite this headnote

**OPINION**

WALLACE, J.

[19]

**Constitutional Law**

↻ Relation to Constitutions of Other Jurisdictions

A state’s history and traditions on a given subject may provide a basis for the independent application of its constitution.

**I. INTRODUCTION**

Theodore **Xenidis** was convicted after two separate trials of two separate felony counts of Driving Under the Influence of Alcohol that arose from two separate and distinct 2018 incidents—one occurring on January 21<sup>st</sup> and the other on February 8<sup>th</sup> (the “2018 DUI convictions”). The question presented now is whether each conviction, for sentencing purposes, constitutes a third or a fourth DUI conviction under Delaware’s Motor Vehicle Code. And the answer to that question depends on whether a Maryland DUI conviction **Xenidis** incurred in 1991 can be used as an enhancer under Delaware’s recidivist DUI statute.

Cases that cite this headnote

[20]

**Judgment**

↻ Judgments presumed valid in general

The “presumption of regularity” that attaches to all final judgments implies that every act of a court of competent jurisdiction is presumed to have been rightly done, until evidence of the contrary appears.

**Xenidis** moves to exclude that 1991 conviction from his sentencing’s calculus, arguing that it would violate Article I, § 7 of the Delaware Constitution for the Court to count it as an aggravating prior—because, he says, the Court should deem that conviction “uncounseled.” While he admits his claim would fail under the Sixth Amendment of the Federal Constitution, **Xenidis** urges the Court to declare that Delaware’s due process clause provides greater protection than the Sixth Amendment of the Federal Constitution with respect to the \*295 use of evidence of such a prior out-of-state conviction to enhance the classification of and penalty for a later Delaware conviction.

Cases that cite this headnote

*\*294 Upon Defendant’s Motion to Exclude Use of Prior Maryland DUI Conviction for Sentencing Under 21 Del. C. § 4177(d)(4), DENIED.*

**Attorneys and Law Firms**

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**II. DELAWARE’S RECIDIVIST DUI PROVISIONS**

Twenty-one *Del. C. § 4177(d)*, the statute governing **Xenidis’s** present DUI offense, is a recidivist statute providing for an enhanced severity in charge and sentence if the offender has prior DUI convictions.<sup>1</sup> Under the statute, a third DUI conviction is a class G felony carrying

up to two years imprisonment, three months of which cannot be suspended.<sup>2</sup> By contrast, 21 *Del. C.* § 4177(d)(4) mandates that a fourth-time offender: be guilty of a class E felony; be fined up to \$ 7,000; and, be imprisoned not less than two years nor more than five years.<sup>3</sup> The first six months of a fourth-time offender's sentence cannot be suspended, "but shall be served [in prison] and shall not be subject to any early release, furlough or reduction of any kind."<sup>4</sup>

These provisions leave no discretion to a sentencing judge. Any DUI offender who has been convicted of two previous offenses defined by Delaware's DUI laws must be sentenced as a third offender; when he has three prior convictions, he must be sentenced in accordance with § 4177(d)(4).<sup>5</sup> And our DUI laws expressly state that a "prior or previous conviction or offense" includes:

A conviction or other adjudication of guilt ... pursuant to § 4175(b) or § 4177 of this title, or a similar statute of any state or local jurisdiction, any federal or military reservation or the District of Columbia.<sup>6</sup>

The parties agree that the several prior Delaware DUI convictions **Xenidis** has collected subject him to no less than a felony conviction and sentencing as a third offender. While inclusion of the 1991 Maryland conviction provokes a higher grade felony and minimum sentence.<sup>7</sup>

### III. FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying **Xenidis's** 2018 DUI convictions are truly of no moment to the disposition of the sentencing issue now before the Court, so they won't be detailed here. But the procedural histories of **Xenidis's** \*296 1991 Maryland DUI conviction and his course of attacks launched to avoid sentencing as a fourth DUI offender for each of his 2018 DUI convictions are pivotal, so they are now recounted.

#### A. XENIDIS'S 1991 MARYLAND DUI CONVICTION

It appears that **Xenidis**, in 1991, first faced the charge of

Driving or Attempting to Drive While Intoxicated before Maryland's District Court.<sup>8</sup> But, for some reason absent from the record, either after trial or by plea (which it was, is also unexplained) he was convicted of the lesser charge of Driving Under the Influence—a traffic statute penalized by a fine of not more than \$ 500, a term of not more than two months incarceration, or both.<sup>9</sup> **Xenidis** admits that he was in fact fined \$ 500 but given no jail time.<sup>10</sup>

**Xenidis's** demonstrates a situation regularly faced by our courts in recidivist DUI cases, where repeat offenders regularly cross state lines. Seemingly, the only available Maryland state court record that documents this almost three-decade-old conviction, and is relied upon by the parties says nothing on the issue of counsel's involvement. It is unknown from the record provided there (and developed here) whether **Xenidis** had his DUI trial or plea: without counsel; and, if so, without notice of his entitlement to retain counsel; or, if so and indigent, without notice of his ability to have counsel provided. In short, the only record of **Xenidis's** Maryland DUI conviction now-available is completely silent on whether **Xenidis** had counsel, waived counsel, or the participation of counsel was ever even addressed. And **Xenidis** is perfectly fine with that silence. Because, he suggests, that silence breeds a constitutionally intolerable unreliability. And unabashedly, he feels, that gives him license to label his Maryland DUI conviction "uncounseled."

#### B. XENIDIS'S 2018 CONVICTIONS AND SENTENCING CHALLENGES

**Xenidis's** first and only challenge to his 1991 Maryland DUI conviction has been brought here, in this Court, in these two cases. Interestingly, according to the records provided in these proceedings, that "prior or previous conviction or offense" has already been used twice to enhance prior sentences **Xenidis** received under Delaware's DUI law.<sup>11</sup> That itself is a \*297 problem for **Xenidis**.<sup>12</sup> The second difficulty **Xenidis** faces is that the Delaware DUI statute expressly prohibits collateral attacks on priors during DUI sentencing proceedings;<sup>13</sup> both parties are mute on that bar. Challenging too, is the meandering course **Xenidis's** postulations have run.

#### 1. Xenidis's Initial Challenge Under the United States

## Constitution

<sup>11</sup>As mentioned **Xenidis** has (or had)<sup>14</sup> now pending sentencing for each of his two separate 2018 DUI convictions as fourth offenses. **Xenidis** moved first to exclude use of his Maryland conviction citing mainly the United States Supreme Court decision in *Burgett v. Texas*, but ignoring all subsequent applicable federal case law on the subject.<sup>15</sup>

<sup>12</sup> <sup>13</sup> <sup>14</sup> <sup>15</sup>Perhaps most significant to **Xenidis's** claim is the Supreme Court's decision in *Nichols v. United States*.<sup>16</sup> *Nichols* adopted the previously drawn bright line that divides prior misdemeanor convictions resulting in imprisonment from those that result in a fine or other penalty.<sup>17</sup> Uncounseled misdemeanor convictions that result in a sentence of imprisonment violate the Sixth Amendment right to counsel as applied to the states through the Fourteenth Amendment.<sup>18</sup> But an uncounseled misdemeanor conviction not resulting in incarceration does not violate the Sixth Amendment right to counsel.<sup>19</sup> So, under the Federal Constitution, an uncounseled misdemeanor conviction that does not result in a sentence of imprisonment may be used to enhance the sentence for a subsequent \*298 offense.<sup>20</sup> And, under the Federal Constitution, the deeply rooted presumption of regularity—even when the question is adherence to the honoring or waiver of constitutional rights—allows a state court to presume that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained.<sup>21</sup>

**Xenidis's** sentence for his 1991 Maryland conviction included no term of imprisonment. Rather, he was only fined for the offense. Under *Nichols*, the use of the 1991 Maryland DUI conviction to enhance **Xenidis's** present DUI does not violate the Federal Constitution. **Xenidis** admitted as much at argument, abandoned his federal constitutional claim, and then took up his Article I, Section 7 claim.<sup>22</sup>

### 2. Xenidis's Revised Challenge Under the Delaware Constitution

After his first failed attempt to knock out the Maryland conviction from his sentencing, **Xenidis** filed anew, resorting solely to the Delaware Constitution. The Court now must address **Xenidis's** belated argument under our state constitution.<sup>23</sup> As explained later, the Court must exercise much greater care to identify and resolve the

precise issue extant than **Xenidis** and the State have taken to draw it.

**Xenidis** urges the Court to make broad pronouncements on the Delaware constitutional right to counsel and its reach: pronouncements that would speak to far more than just when a prior conviction might be used in a subsequent prosecution.<sup>24</sup> And the State does no better.<sup>25</sup> But the Court will try.

## IV. THE COURT'S ROLE, DUTY, AND CONSTRAINT WHEN CONSIDERING DECLARATION OF AN INDEPENDENT OR BROADER STATE CONSTITUTIONAL RIGHT

<sup>16</sup>The Delaware Constitution is not a "mirror image" of the Federal Constitution.<sup>26</sup> And while any Delaware state court must follow the United States Supreme Court in matters of federal constitutional law, it is also duty bound to interpret the \*299 provisions of Delaware's Constitution so as to avoid rendering our state's individual legal history and grants of rights to her citizens meaningless.<sup>27</sup> Because Delaware may certainly provide greater protection of individual rights than that required by the United States Constitution.<sup>28</sup>

When deciding if a particular provision of the Delaware Constitution should be interpreted to provide protections that are greater than the rights accorded by its federal analogue as that has been interpreted by the United States Supreme Court, there are certain precepts that must be kept in mind.

<sup>17</sup> <sup>18</sup> <sup>19</sup>First, the Court must determine with some precision only "whether, and what situations" specifically demand differing results.<sup>29</sup> For "it is well-established in Delaware that 'a constitutional question will not be decided unless its determination is essential to the disposition of the case.'"<sup>30</sup> The obvious corollary to this rule is that the Court will only decide the narrowly drawn constitutional question that must be determined. In other words, context controls here.<sup>31</sup>

<sup>10</sup> <sup>11</sup>In the context of determining a criminal defendant's rights, the Delaware Constitution has been oft-seen as "an independent source of rights and relie[d upon] as the fundamental law."<sup>32</sup> Accordingly, our State Constitution may be and, where justified, has been interpreted as providing greater protection of individual rights than that which the Federal Constitution requires.<sup>33</sup> So, while this Court need not be \*300 reluctant, where warranted, to show greater sensitivity to Delawareans' individual rights

under our Constitution than the United States Supreme Court accords to their rights under the Federal Constitution, the Court must “apply a logical, deductive analytical process” to determine whether a state constitutional provision should be given the same interpretation as “*similar* language in the United States Constitution.”<sup>34</sup> As described by one state supreme court, “[t]he question of state constitutional adjudication [ ] is not whether this Court may interpret our constitution differently than the federal constitution, *the issue is whether we must.*”<sup>35</sup>

<sup>112]</sup>When deciding whether the Delaware Constitution provides some greater protection to criminal recidivists than the Federal Constitution requires, the Court must engage an analysis of one or more of the following from the “partial list of ... non-exclusive criteria”<sup>36</sup>: “textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.”<sup>37</sup>

#### V. ANALYSIS OF THE ACTUAL STATE CONSTITUTIONAL QUESTION TO BE RESOLVED

<sup>113]</sup>**Xenidis** can only succeed here if he can convince the Court that use of his 1991 Maryland DUI conviction to enhance his current sentence violates the Due Process Clause of Article I, Section 7 of the Delaware Constitution. **Xenidis** suggests that the Maryland Conviction is constitutionally deficient for enhancement purposes since the State has failed to prove that he had counsel, waived counsel, or the participation of counsel was ever even addressed on that occasion.<sup>38</sup> While trying to convince the Court of that, **Xenidis** seeks a broader blanket declaration of one’s state right to counsel.

Article I, Section 7 of the Delaware Constitution provides that, “in all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel ... nor shall he or she be deprived of life, liberty or property, unless by ... the law of the land.”<sup>39</sup> Thus, this one section contains both *the* single statement of Delaware’s right to counsel and its criminal due process guarantee. To be sure, **Xenidis’s** argument implicates these two separate Delaware constitutional provisions, \*301 the analysis of which in this context tends to merge. But the Court must be precise in framing that actual question posed here:

Must the State, in order to use a

prior DUI misdemeanor conviction to enhance the severity of a defendant’s DUI charge and sentence, prove that in the earlier proceeding the defendant was represented by counsel or knowingly and voluntarily waived counsel?

And in this specific context, a review of the accepted analytical factors leads the Court to find no justification to construe Article I, Sections § 7’s due process protection more broadly than its federal analogue.

#### A. TEXTUAL LANGUAGE

<sup>114]</sup> <sup>115]</sup>As the Delaware Supreme Court observed, “[a] state constitution’s language may itself provide a basis for reaching a result different from that which could be obtained under federal law.”<sup>40</sup> The language of Article I, Section 7’s right-to-counsel clause is significantly different than that found in the Sixth Amendment.

<sup>116]</sup>The Sixth Amendment to the United States Constitution states, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”<sup>41</sup> While the Delaware right-to-counsel provides only that “[i]n all criminal prosecutions, the accused hath a right to be heard by ... his or her counsel.” Were the Court to find that “the phrasing of [that] particular provision in our charter [is] [ ] so significantly different from the language used to address the same subject in the federal Constitution that [the Court] can feel free to interpret our provision on an independent basis,” it would not be to **Xenidis’s** benefit. Article I, § 7’s language itself would suggest a narrower protection. But any difference existing between the right to counsel granted by the Delaware Constitution and the right to counsel granted by the United States Constitution need not be fully resolved here.<sup>42</sup> Because it is the state due process right implicated by use of this prior out-of-state conviction that is at issue.

\*302 <sup>117]</sup>Article I, § 7 of the Delaware Constitution provides also that an individual shall not be “deprived of life, liberty, or property, unless ... by the law of the land.” In similar fashion, the Fourteenth Amendment of the United States Constitution provides that “no person shall be deprived of life, liberty, or property without due process of law.” “It is well established that the phrase ‘nor

shall he or she be deprived of life, liberty, or property, unless by ... the law of the land' in Article I, Section 7 of the Delaware Constitution has substantially the same meaning as 'nor be deprived of life, liberty, or property without due process of law' " in the Federal Constitution.<sup>43</sup> In fact, in a variety of contexts, the Delaware Supreme Court has understood Article I, § 7 as being "similar," "co-extensive" or as having substantially the same meaning as the Federal Constitution's due process provisions.<sup>44</sup> Too, this Court has observed that "in deciding a case of due process under our Constitution we should ordinarily submit our judgment to that of the highest court of the land, if the point at issue has been decided by that Court."<sup>45</sup> And in this context, the federal due process clauses allow for the use **Xenidis's** Maryland conviction—even if truly uncounseled—to enhance the severity in charge and penalty of his current DUI convictions.<sup>46</sup>

## B. LEGISLATIVE HISTORY

Traditionally, there was no right to be represented by counsel.<sup>47</sup> Even so, Delaware rejected this common law principle as early as 1719 by way of a statute requiring the Court to appoint counsel for defendants in capital cases.<sup>48</sup> Thereafter, in 1776, Delaware adopted its Declaration of Rights which provided, in part, that "in all prosecutions for criminal offenses, every man hath a right ... to be allowed Counsel."<sup>49</sup> Enacted in 1792, Article I, § 7 first provided that "[i]n all criminal prosecutions, the accused hath a right to be heard by himself and his counsel."<sup>50</sup> This provision was carried forward into Delaware's 1831 and 1897 Constitutions.<sup>51</sup>

The due process provision of Article I, § 7 first appeared in the Delaware Constitution of 1792 in much the same form as it \*303 exists today.<sup>52</sup> It and its federal due process counterparts share much the same lineage and, as mentioned above, "substantially the same meaning."<sup>53</sup>

While the legislative history of these Article I, § 7 provisions may be somewhat different, those differences in no way "reveal an intention that will support reading the provision independently of federal law" on the use of prior convictions as sentencing enhancers.

## C. RE-EXISTING STATE LAW, STRUCTURAL DIFFERENCES, PARTICULAR STATE OR

## LOCAL INTEREST, DISTINCTIVE PUBLIC ATTITUDES

<sup>[18]</sup>As the Delaware Supreme Court made clear, not each factor in the "partial list" that a court uses to discern whether a provision in the United States Constitution has a meaning identical to a similar provision on the same subject in the Delaware constitution need be addressed.<sup>54</sup> Some, given the subject area, are simply inapplicable. And some, given the subject area, are not so easily disentangled from the others. Just so here.

The only relevant preexisting state law on the right to counsel was addressed with the legislative history above.<sup>55</sup> At times, the Court might find that "[d]ifferences in structure between the federal and state constitutions" provide a basis for interpreting a state constitutional protection differently.<sup>56</sup> But in this context, there is no real difference in state and federal criminal proceedings. And, in sum, **Xenidis** says nothing more on this factor than that Court might be able to grant greater protection here, not that it must.<sup>57</sup> This issue is not one of particular state or local interest as that phrase has been understood or used in these analyses.<sup>58</sup> Nor is it one in which there is some uniquely discernible distinctive attitude of the Delaware citizenry. \*304 <sup>59</sup>

In turn, none of these factors are particularly helpful in determining whether the Court should read Article I, § 7 independently of federal due process law on the use of a prior conviction as an offense or sentencing aggravator.

## D. STATE TRADITIONS

<sup>[19]</sup>A state's history and traditions on a given subject may also provide a basis for the independent application of its constitution.<sup>60</sup> Here, Delaware's history and traditions on the use of prior convictions as aggravators can be established by examining relevant statutory enactments, court rules, and case law.

### 1. Delaware's Court Rules and Procedures Align With the Federal Sixth Amendment Right to Counsel.

There is no question that Delaware has a long history of permitting the unfettered employment of an attorney by a criminal defendant who engages one.<sup>61</sup> And Delaware criminal rules are relatively uniform in providing for the appointment of counsel to an indigent defendant who

requests assistance and requiring an express waiver of counsel from anyone who wishes to forego representation in criminal court.<sup>62</sup> While the one relevant Delaware statute requires appointment of counsel only “to any person on trial for murder, manslaughter or any offense punishable by death, or the offense of being an accomplice or accessory to any such crime, if such person is unable to obtain counsel.”<sup>63</sup> The Office of Defense Services represents “each indigent person who is under arrest or charged with a crime” upon request or appointment.<sup>64</sup> In practice, this means that publically-funded counsel is provided to indigents charged with a crime for which incarceration may be imposed.<sup>65</sup> So, in short, Delaware’s history, traditions, and actual practice regarding the right to counsel implicated here are wholly in line with Sixth Amendment jurisprudence.<sup>66</sup>

## 2. Delaware’s Approach to this Particular Issue and to Collateral Attacks on Priors Used as Enhancers

Delaware’s DUI statute provides that “a person may not challenge the validity of any prior or previous conviction, unless that person first successfully challenges the prior or previous conviction in the \*305 court in which the conviction arose ...”<sup>67</sup> *Xenidis* says that he neither disputes the fact of his Maryland conviction nor is he “collaterally attacking his Maryland DUI conviction.”<sup>68</sup> But the latter is precisely what he is doing.

By now seeking to question the validity of his previous Maryland DUI conviction in this separate recidivism proceeding, *Xenidis*, “by definition collaterally attack[s] his previous conviction[ ]; he s[ee]ks to deprive [it] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment[ ].”<sup>69</sup> He has done so without showing that conviction suffers the “unique constitutional defect” that might allow such a challenge.<sup>70</sup> And when doing so he has attempted to shift the burden the Delaware DUI statute and the courts have said rightly belongs to him.<sup>71</sup>

In *Morris v. State*, the Delaware Supreme Court recognized the rule established under *Nichols*.<sup>72</sup> In *Morris*, the defendant was found guilty in this Court of DUI and received an enhanced sentence as a fourth-offender.<sup>73</sup> *Morris* argued on appeal that this Court erred as a matter of law by using two of his prior misdemeanor DUI convictions to enhance his sentence because he did not have assistance of counsel in those earlier proceedings.<sup>74</sup> The Supreme Court found the sentencing judge correctly applied the rationale in *Nichols* when finding *Morris*’s

sentence was subject to enhancement under § 4177(d)(4).<sup>75</sup> In affirming this Court’s judgment, the Supreme Court held that since only actual imprisonment triggered a Sixth Amendment concern under *Nichols*, an uncounseled misdemeanor conviction may be used under recidivist statutes to enhance punishment for a future conviction.<sup>76</sup>

That same year, in *State v. Pressley*, another DUI recidivist moved this Court to consider his recent DUI conviction as a second offense rather than a fourth.<sup>77</sup> *Pressley* argued that two of his prior DUI convictions could not be used for enhanced penalty consideration because the State could not show that he knowingly and intelligently waived his constitutional right to be represented by counsel.<sup>78</sup> Citing *Nichols*, the Court recognized that “regardless of whether or not defendant was represented by (or waived) counsel in his prior misdemeanor proceedings, any conviction may still be used to enhance the \*306 sentence on a subsequent offense.”<sup>79</sup> Further, in accordance with *Scott*, the Court explained such convictions may be used to enhance a later sentence because the State is under no obligation to appoint counsel for a defendant in a misdemeanor proceeding where he was not sentenced to actual imprisonment. The Court also noted that Delaware’s DUI statute “is very specific in requiring the defendant to first successfully challenge the prior convictions in the Court where the convictions arose.”<sup>80</sup> In denying *Pressley*’s motion, the Court held that it was “constrained” by the requirements of the DUI statute that set forth the procedures for such challenges.

Lastly, in *State v. Dean*, the Court—relying on the United States Supreme Court’s decision in *Parke v. Raley*<sup>81</sup>—held that *Dean*’s prior DUI conviction is presumed valid absent actual evidence to indicate otherwise.<sup>82</sup>

In sum, the Delaware history and tradition has been that when a collateral attack on a final conviction rests on constitutional grounds, the conviction is nonetheless presumed valid due to the “presumption of regularity” that attaches to final judgments.<sup>83</sup>

## 3. There is No Justification for Reading the “Presumption of Regularity” out of the Delaware Due Process Clause

In *Parke*, Ricky Harold Raley moved a Kentucky sentencing court to suppress two of his prior convictions that were the result of guilty pleas. He said the prior convictions were invalid because the records offered



contained no transcripts of those prior pleas and, therefore, did not affirmatively show that the pleas were knowing and voluntary.<sup>84</sup> The United States Supreme Court ultimately held that it was permissible for the Kentucky state court to presume that a final judgment of conviction offered for sentence enhancement was validly obtained<sup>85</sup>

The *Parke* Court observed that statutes punishing repeat offenders more severely have a long tradition dating back to colonial times and continue to exist in all 50 states.<sup>86</sup> States, the Court reasoned, have a valid interest in deterring habitual offenders.<sup>87</sup> And due process does not require state courts to permit challenges to prior convictions used for enhancement purposes.<sup>88</sup>

<sup>[20]</sup>The presumption of regularity that attaches to all final judgments implies \*307 that every act of a court of competent jurisdiction is presumed to have been rightly done, until evidence of the contrary appears.<sup>89</sup> The *Parke* Court remarked: “[t]he circumstances of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old.”<sup>90</sup> But, the Court held, it would defy logic to presume that Raley was not advised of his by-then well-established rights from the unavailability of a years-old transcript of a never before challenged guilty plea.<sup>91</sup>

Here, **Xenidis** challenges the inclusion of his almost three-decade-old Maryland DUI conviction because the only available out-of-state record is completely silent on whether he had counsel, waived counsel, or the participation of counsel was ever even addressed. But his circumstance is emblematic of why there is no good reason to suspend the presumption of regularity through mere incantation of Article I, Section 7.

Maryland courts had, long before **Xenidis’s** prosecution there, recognized both the federal and an independent state constitutional “guarantee [of] a right to counsel, including appointed counsel for an indigent, in a criminal case involving incarceration.”<sup>92</sup> In turn, Maryland trial judges knew well by the time **Xenidis** appeared there that

when one faced prosecution in their courts, they were to: advise the defendant of his rights if he appeared without counsel; conduct a waiver inquiry if he sought to proceed further without counsel; and, make a determination upon proper considerations whether the defendant was eligible to be appointed counsel.<sup>93</sup>

To exclude this offense the Court would have to presume some constitutional invalidity of the Maryland DUI Conviction. Due process—as defined by both the Federal and Delaware Constitutions—requires no such presumption and no such exclusion under Delaware’s DUI recidivist statute.

## VI. CONCLUSION

This Court will not accept **Xenidis’s** invitation to engage in an unnecessary exercise of constructing and pronouncing some broad right to counsel under Article I, Section 7. The specific question of whether the State must—in order to use his prior Maryland DUI misdemeanor conviction to enhance the severity of **Xenidis’s** current DUI—prove that in that earlier proceeding **Xenidis** was represented by counsel or knowingly and voluntarily waived counsel is resolved by application of the Delaware Constitution’s due process guarantees. And in this specific context, federal and state constitutional law are in accord. The State need not. **Xenidis’s** motion to exclude use of his prior Maryland DUI conviction is **DENIED**. He is properly sentenced as a \*308 fourth offender under 21 *Del. C.* § 4177(d)(4).

**IT IS SO ORDERED.**

## All Citations

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## Footnotes

1 See *State v. Laboy*, 117 A.3d 562, 565-66 (Del. 2015).

2 DEL. CODE ANN. tit. 21, § 4177(d)(3) (2017).

3 *Id.*, at § 4177(d)(4).

4 *Id.*

- 5 *Id.*, at § 4177(d)(11) (“If it shall appear to the satisfaction of the court ... that the defendant falls within paragraph (d)(3) [or] (d)(4) ..., the court shall enter an order declaring the offense for which the defendant is being sentenced to be a felony and shall impose a sentence accordingly.”).
- 6 *Id.*, at § 4177B(e)(1)(a).
- 7 Def.’s Mot. to Exclude, at ¶3, *State v. Xenidis*, I.D. No. 1801011371 (Del. Super. Ct. Nov. 13, 2018) (D.I. 20) (“The resolution of this issue determines whether Defendant will be sentenced as a third or fourth time offender.”); State’s Ans. Br. to Amended Mot., at 1, *State v. Xenidis*, I.D. No. 1801011371 (Del. Super. Ct. Feb. 18, 2019) (D.I. 28) (“Defendant filed a Motion to Exclude his 1991 Maryland conviction for sentencing purposes .... In effect, this would render Defendant’s two most recent DUIs as third offenses for sentencing purposes.”).  
The parties also agree that those prior Delaware DUI convictions in truth number three, but by law may only be counted as two “prior or previous conviction[s] or offense[s].” See DEL. CODE ANN. tit. 21, § 4177B(e)(4) (2017) (multiple overlapping DUI convictions count only as one prior for classification and sentencing enhancement under Delaware’s DUI statute).
- 8 Ex. A to Def. Mot. to Exclude (Maryland District Court Extract); MD. CODE ANN., Transportation §§ 21-902(a) and 27-101(k) (West 1990) (In 1991, Driving While Intoxicated was subject to a maximum penalty for a first offense of one year imprisonment or a fine of not more than \$ 1,000 or both).
- 9 MD. CODE ANN., Transportation § 21-902(b) (West 1990); *Kleberg v. State*, 318 Md. 411, 568 A.2d 1123 (1990) (at the time of **Xenidis’s** Maryland prosecution, Driving Under the Influence of Alcohol, a violation of § 21-902(b), was a lesser included offense of Driving While Intoxicated).
- 10 Hrg. Tr., at 3-5, *State v. Xenidis*, I.D. No. 1802005720 (Del. Super. Ct. Dec. 14, 2018) (D.I. 38).
- 11 Ex. B to State’s Resp. to Mot. to Exclude (**Xenidis** pled to “subsequent offense DUI” and sentenced as second offender under then-existing 21 *Del. C.* § 4177(d)(2)); Ex. E to State’s Resp. to Mot. to Exclude (1991 Maryland DUI conviction was only prior at that time); Ex. C to State’s Resp. to Mot. to Exclude (in 1995 **Xenidis** pled to “DUI 3<sup>rd</sup>” and sentenced as subsequent offender under then-existing 21 *Del. C.* § 4177(d)); Ex. D to State’s Resp. to Mot. to Exclude (for overlapping 1995 offense **Xenidis** pled to DUI “3<sup>rd</sup> Off” and sentenced as subsequent offender under then-existing 21 *Del. C.* § 4177(d)).
- 12 See *Laboy*, 117 A.3d at 566.
- 13 See DEL. CODE ANN. tit. 21, § 4177B(e)(5) (2017) (“*Challenges to use of prior offenses.* —In any proceeding under ... § 4177 of this title or this section, a person may not challenge the validity of any prior or previous conviction, unless that person first successfully challenges the prior or previous conviction in the court in which the conviction arose ...”).
- 14 To ensure **Xenidis** could begin the rehabilitative and treatment programming required by Delaware’s DUI statutes while incarcerated, his bail was revoked upon the second of these convictions and his sentence initially imposed via an oral ruling on this motion. Order Revoking Bail, *State v. Xenidis*, I.D. No. 1802005720 (Del. Super. Ct. Nov. 20, 2018) (D.I. 25); Sentencing Order, *State v. Xenidis*, I.D. No. 1802005720 (Del. Super. Ct. Apr. 26, 2019) (D.I. 35). See DEL. CODE ANN. tit. 21, § 4177(d)(9) (2017) (providing that certain portions of a third or fourth offender’s minimum one- or two-year term of incarceration can only be suspended for a program of supervision that includes intensive abstinence and treatment programs normally completed while the inmate is serving the incarcerative or quasi-incarcerative portions of his sentence). The Court’s order of sentence is made final with the issuance of this opinion and the Court’s simultaneous docketing of its modified sentencing order. Mod. Sentencing Order, *State v. Xenidis*, I.D. Nos. 1801011371 and 1802005720 (Del. Super. Ct. June 27, 2019) (D.I. 34; D.I. 39).
- 15 Def.’s Mot. to Exclude, at ¶5; *Burgett v. Texas*, 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) (“The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* [as an aggravator in prosecution for subsequent crime] is inherently prejudicial ...).
- 16 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994).

- 17 *Id.* at 746-47, 749, 114 S.Ct. 1921.
- 18 *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).
- 19 *Scott v. Illinois*, 440 U.S. 367, 373-74, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”).
- 20 *Nichols*, 511 U.S. at 749, 114 S.Ct. 1921 (“[W]e hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.”).
- 21 *Parke v. Raley*, 506 U.S. 20, 29-31, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992).
- 22 Hrg. Tr. (De. 14, 2018), at 6-13.
- 23 *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000) (requiring examination of a state constitutional issue when the asserted right is not protected under analogous provision of federal constitution: “Delaware judges cannot faithfully discharge the responsibilities of their office by simply holding that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in ‘lock step’ with the United States Supreme Court’s construction of the federal Bill of Rights.”).
- 24 See, e.g., Def.’s Amended Mot. to Exclude, at 6, *State v. Xenidis*, I.D. No. 1801011371 (Del. Super. Ct. Jan. 16, 2019) (D.I. 26) (“This Court is urged to find that Article I, § 7 of the Delaware Constitution provides a defendant the right to counsel in a misdemeanor case, regardless of sentence...”); Def.’s Rep. Br., at 2, *State v. Xenidis*, I.D. No. 1801011371 (Del. Super. Ct. Feb. 20, 2019) (D.I. 34) (“The issue in this case is whether the right to counsel provision of Article I, § 7 of the Delaware Constitution provides broader protections than its federal counterpart and includes the right to counsel in misdemeanor prosecutions.”).
- 25 State’s Ans. Br. to Amended Mot., at 4 (“Nowhere does the Delaware Constitution guarantee the right to appointed counsel in any type of case, felony or misdemeanor.”).
- 26 *Claudio v. State*, 585 A.2d 1278, 1289 (Del. 1991); *Dorsey*, 761 A.2d at 814.
- 27 *Dorsey*, 761 A.2d at 814.
- 28 *Id.* (“examination of those laws and that heritage may, from time to time, lead to conclusions that Delaware’s citizens enjoy more rights, more constitutional protections, than the Federal Constitution extends to them”).
- 29 *Jones v. States*, 745 A.2d 856, 860-61 (Del. 1999).
- 30 *Broadmeadow Inv., LLC v. Delaware Health Resources Bd.*, 2012 WL 1408496, at \* (Del. Super. Ct. Mar. 20, 2012) (quoting *New Castle County Council v. BC Development Assoc.*, 567 A.2d 1271, 1278 (Del. 1989)).
- 31 See *Jones*, 745 A.2d at 860-61; see also *Young v. Red Clay Consolidated School District*, 122 A.3d 784, 812 (Del. Ch. 2015) (“Depending on the clauses in question and the situation presented, a Delaware court may well hold that a provision of the Delaware Constitution should be interpreted in lockstep with a similarly worded federal provision.”). And see, *People v. Richert*, 216 Mich.App. 186, 548 N.W.2d 924, 927 (1996) (when determining whether a prior conviction could be used for sentencing augmentation even though it had been obtained without benefit of counsel, the state supreme court “[found] no justification to construe [its right-to-counsel clause], more broadly than its federal analogue in the present context.”) (emphasis added);
- 32 *Young*, 122 A.3d at 810 (quoting Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 Tex. L. Rev. 1025, 1028 (1985)).

- 33 See, e.g., *Dorsey v. State*, 761 A.2d 807 (Del. 2000) (no “good faith exception” to the probable cause requirement under the Delaware Constitution notwithstanding the United States Supreme Court’s decision in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)); *Jones v. State*, 745 A.2d 856, 863, n.29 (Del. 1999) (determination of when an individual is “seized” under Delaware Constitution would not depend upon United States Supreme Court decision on the same issue for Fourth Amendment purposes); *Hammond v. State*, 569 A.2d 81 (Del. 1989) (State’s duty to preserve evidence is broader under Delaware Constitution than Federal Constitution); *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990) (right to counsel during police questioning is broader under the Delaware Constitution than the United States Constitution); *Claudio v. State*, 585 A.2d 1278 (1991) (right to jury trial is broader under the Delaware Constitution than the United States Constitution); *Van Arsdall v. State*, 524 A.2d 3, 6-7 (Del. 1987) (holding that Article I, § 7 of the Delaware Constitution contemplated a greater right of confrontation than the Sixth Amendment of the United States Constitution).
- 34 *Jones*, 745 A.2d at 864 (emphasis in original). See *State v. Benoit*, 417 A.2d 895, 899 (R.I. 1980) (“The decision to depart from minimum [protections afforded by the Federal Constitution] and to increase the level of protection should be made guardedly and should be supported by a principled rationale.”).
- 35 *People v. Pickens*, 446 Mich. 298, 521 N.W.2d 797, 805 (1994) (emphasis added); *People v. Perlos*, 436 Mich. 305, 462 N.W.2d 310, 313 n.7 (1990) (“Unless there is a compelling reason to afford greater protection under the Michigan Constitution, the Michigan and federal provisions will be treated as affording the same protections.”).
- 36 *Jones*, 745 A.2d at 864.
- 37 *Ortiz v. State*, 869 A.2d 285, 291 n. 4 (Del. 2005) (providing a framework for addressing Delaware Constitutional arguments).
- 38 Def.’s Rep. Br., at 8; Def.’s Amended Mot. to Exclude, at 3 (“Since the State has failed to prove that Defendant was afforded his right to counsel in the Maryland case, and that he knowingly waived his right, then his uncounseled convictions cannot serve as a basis to enhance his sentence for his convictions in ID No. 1801011371 and 1802005270.”).
- 39 DEL. CONST. art. I, § 7.
- 40 *Jones*, 745 A.2d at 864.
- 41 U.S. CONST. AMEND. VI. The federal right to counsel actually derives from two different provisions: the Fifth and Sixth Amendments to the United States Constitution both provide criminal defendants with a right to counsel. Their protections, however, differ in various respects. The Fifth Amendment does not expressly set forth a right to counsel. Instead, the Supreme Court inferred such a right in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). That Fifth Amendment right to counsel is narrower than Article I, Section 7’s right to ensure employed counsel is present during custodial interrogation. *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990) (“[W]e clarify the confusion ... as to the difference in the protections afforded by article I, § 7 of the Delaware Constitution and by the fifth amendment to the United States Constitution.”); *id.* at 175 (“[T]he procedural protections afforded by the Delaware Constitution demand that an accused be afforded the unqualified opportunity to consult with counsel prior to custodial interrogation, provided that (i) the lawyer has clearly made a reasonable, diligent and timely attempt to render legal advice or otherwise perform legal services on behalf of his client, the accused, and (ii) the lawyer has been specifically retained or designated to represent the accused.”).
- 42 See *Commonwealth v. Thomas*, 510 Pa. 106, 507 A.2d 57, 59 n.6 (1986) (Pennsylvania Supreme Court faced with a state constitutional claim that a prior conviction entered without assistance of counsel could not be used to enhance the penalty for a subsequent offense observed, “any differences that may exist between the right to counsel granted by the Federal Constitution and the right to counsel granted by the Pennsylvania Constitution are not relevant in this case.”).
- 43 Randy J. Holland, *THE DELAWARE STATE CONSTITUTION* 64 (2<sup>nd</sup> ed. 2017).
- 44 See *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) (“Delaware constitutional due process is coextensive with federal due process.”); *Helman v. State*, 784 A.2d 1058, 1070 (Del. 2001) (“This Court has

previously determined that the due process clause of the Delaware Constitution has 'substantially the same meaning' as the due process clause contained in its federal counterpart.") (citing *Opinion of the Justices*, Del. Supr., 246 A.2d 90, 92 (1968)); see also *Cohen v. State*, 89 A.3d 65, 86 (Del. 2014) ("Delaware constitutional due process is coextensive with federal constitutional due process."); *Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989) (finding the due process right under the Delaware Constitution to be coextensive with the Sixth Amendment).

45 *State v. Fortt*, 1999 WL 1228676, at \*1 (Del. Super. Ct. Oct. 15, 1999) (citing *General Electric Co. v. Klein*, 106 A.2d 206, 209 (Del. 1954)).

46 See *Nichols v. United States*, 511 U.S. 738, 748-49, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994); *Parke v. Raley*, 506 U.S. 20, 31-34, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992).

47 *Lindh v. O'Hara*, 325 A.2d 84, 88 (Del. 1974).

48 *Id.*

49 *Id.*

50 Holland, THE DELAWARE STATE CONSTITUTION, AT 57.

51 DEL. CONST. ART. I, § 7; Holland, THE DELAWARE STATE CONSTITUTION, AT 57.

52 The text of the Delaware Constitution's right-to-counsel and due process provisions has been changed only once, in 1999, to render those provisions gender neutral. See 72 DEL. LAWS, c. 136 (1999).

53 Holland, THE DELAWARE STATE CONSTITUTION, AT 57.

54 *Jones*, 745 A.2d at 864-65 (quoting *State v. Hunt*, 91 N.J. 338, 450 A.2d 952, 962 (1982) (Handler, J., concurring)) ("The enumerated criteria, which are synthesized from a burgeoning body of authority, are essentially illustrative, rather than exhaustive. They share a common thread—that distinctive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights.").

55 In *Jones*, our high court suggested resort to "[p]reviously established bodies of state law," which may "suggest distinctive state constitutional rights" and "can help define the scope of the constitutional right later established." 745 A.2d 856, 864 (Del. 1999).

56 *Jones*, 745 A.2d at 864 ("Structural Differences—Differences in structure between the federal and state constitutions might also provide a basis for rejecting the constraints of federal doctrine at the state level. The United States Constitution is a grant of enumerated powers to the federal government. Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.").

57 Def.'s Amended Mot. to Exclude, at 20-23.

58 *Jones*, 745 A.2d at 865 ("Matters of Particular State Interest or Local Concern—A state constitution may also be employed to address matters of peculiar state interest or local concern. When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law. Moreover, some matters are uniquely appropriate for independent state action ....").

59 *Jones*, 745 A.2d at 865 ("Public Attitudes—Distinctive attitudes of a state's citizenry may also furnish grounds to expand constitutional rights under state charters.").

60 *Jones*, 745 A.2d at 865.

- 61 *Lindh*, 325 A.2d at 88-89.
- 62 See Super. Ct. Crim. R. 44(a) (providing for assigned counsel “when required by law or deemed appropriate by the court” or waiver of counsel); see also Com. Pl. Crim. R. 44(a) (same). Fam. Ct. Crim. R. 44(a) (same).
- 63 DEL. CODE ANN. tit. 11, § 5103 (2018).
- 64 DEL. CODE ANN. tit. 29, § 4602(a) (2018).
- 65 See *How Do I Get an Attorney*, THE OFFICE OF DEFENSE SERVICES, <https://ods.delaware.gov/how-get-attorney/> (last visited June 26, 2019) (“In order for an adult to qualify for legal services, the individual must be charged with a crime in which incarceration may be imposed as a penalty and found to be indigent.”).
- 66 *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).
- 67 DEL. CODE ANN. tit. 21, § 4177B(e)(5) (2017); *Parke*, 506 U.S. at 31-32, 113 S.Ct. 517 (due process not offended by such a scheme).
- 68 Def.’s Rep. Br., at 6-7.
- 69 *Parke*, 506 U.S. at 29-30, 113 S.Ct. 517.
- 70 The United States Supreme Court has recognized “a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect” that might permit one to collaterally attack prior convictions used for sentence enhancement. *Custis v. United States*, 511 U.S. 485, 496, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).
- 71 DEL. CODE ANN. tit. 21, § 4177B(e)(5). See *Parke*, 506 U.S. at 29-32, 113 S.Ct. 517.
- 72 *Morris v. State*, 798 A.2d 1042, 2002 WL 1241270 (Del. 2002), *affg*, 2001 WL 893982 (Del. Super. Ct. July 16, 2001).
- 73 *Id.* at 1042 n.1.
- 74 *Id.* at 1042.
- 75 *Id.*
- 76 *Id.*
- 77 2002 WL 664003, \*1 (Del. Super. Ct. Apr. 8, 2002) (finding that despite the defendant’s pre-sentence memo challenging sentence enhancement, the specific provisions of Delaware’s DUI statute required the court to sentence the defendant for a fourth DUI offense).
- 78 *Id.*
- 79 *Id.*
- 80 *Id.*

81 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992).

82 2014 WL 3048724, at \*2. In referring to the *Parke* holding, the *Dean* Court noted:

While we see no decisions in Delaware specifically addressing the quantum of proof necessary to “find” the prior conviction, defendant here relies upon his ability to “stand mute” and has declined to join the dispute with any specific evidence that the state is incorrect. We note that even if the Delaware Supreme Court were to assign some burden of proving a prior conviction higher than “not demonstrably false,” there is a fair presumption of regularity in final judgments and placing the burden of proof on the defendant to prove some defect suffers from no constitutional infirmity. *Id.* at n.8.

83 See *Parke*, 506 U.S. at 29-30, 113 S.Ct. 517.

84 *Id.* at 23, 113 S.Ct. 517.

85 *Id.* at 34, 113 S.Ct. 517.

86 *Id.* at 26, 113 S.Ct. 517.

87 *Id.* at 27, 113 S.Ct. 517.

88 *Id.* at 28, 113 S.Ct. 517.

89 *Id.* at 30, 113 S.Ct. 517.

90 *Id.*

91 *Id.*

92 *Rutherford v. Rutherford*, 296 Md. 347, 464 A.2d 228, 234 (1983); *Utt v. State*, 293 Md. 271, 443 A.2d 582, 583-85 (1982) (Observing that “the constitutional right to counsel in Maryland is older than that under the Constitution of the United States.” And, that Maryland long-recognized “the procedural right to the appointment of an attorney when a defendant is financially unable to retain private counsel” because in Maryland’s view “ ‘essential fairness is lacking if an accused cannot put his case effectively in court,’ and that the accused most likely will be unable to present an effective defense without the aid of counsel.”).

93 *Thompson v. State*, 284 Md. 113, 394 A.2d 1190 (1978).

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

THEODOROS XENIDIS

Alias: See attached list of alias names.

DOB: 05/05/1964

SBI: 00191813

CASE NUMBER:

N1801011371

N1802005270

(34)

(39)

IN AND FOR NEW CASTLE COUNTY

CRIMINAL ACTION NUMBER:

IN18-03-1262

DUI ALCOHOL-4TH(F)

IN18-02-1325

DUI ALCOHOL-4TH(F)

IN18-03-1263

NONC W/CON BOND(F)

Nolle Prosequi on all remaining charges in this case  
ALL SENTENCES OF CONFINEMENT SHALL RUN CONCURRENT

MODIFIED SENTENCE ORDER

NOW THIS 26TH DAY OF JUNE, 2019, IT IS THE ORDER OF THE  
COURT THAT: THE ORDER DATED April 26, 2019 IS HEREBY  
MODIFIED AS FOLLOWS:

The defendant is adjudged guilty of the offense(s) charged.  
The defendant is to pay the costs of prosecution and all  
statutory surcharges.

AS TO IN18-03-1262- : TIS  
DUI ALCOHOL-4TH

The defendant is to pay a fine in the amount of \$1000.00  
plus all surcharges and fees (see attachment).

Effective November 20, 2018 the defendant is sentenced  
as follows:

- The defendant is placed in the custody of the Department  
of Correction for 5 year(s) at supervision level 5
- Suspended after 9 month(s) at supervision level 5
- For 4 year(s) 3 month(s) supervision level 4 DOC  
DISCRETION
- Suspended after 6 month(s) at supervision level 4 DOC

\*\*APPROVED ORDER\*\* 1 June 27, 2019 15:04



STATE OF DELAWARE  
VS.  
THEODOROS XENIDIS  
DOB: 05/05/1964  
SBI: 00191813

DISCRETION

- For 12 month(s) supervision level 3 TASC
- Hold at supervision level 5
- Until space is available at supervision level 4 DOC

DISCRETION

AS TO IN18-02-1325- : TIS  
DUI ALCOHOL-4TH

The defendant is to pay a fine in the amount of \$1000.00 plus all surcharges and fees (see attachment).

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5
- Suspended after 6 month(s) at supervision level 5
- For 12 month(s) supervision level 3 TASC

Probation is concurrent to criminal action number IN18-02-1262 .

AS TO IN18-03-1263- : TIS  
NONC W/CON BOND

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5
- Suspended for 12 month(s) at supervision level 3

Probation is concurrent to criminal action number IN18-02-1325 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE  
VS.  
THEODOROS XENIDIS  
DOB: 05/05/1964  
SBI: 00191813

CASE NUMBER:  
1801011371  
1802005270

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

The defendant shall complete both a drug and alcohol abstinence program and a drug and alcohol treatment program pursuant to 21 Del. C. 4177(d) (9)

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

Defendant's blood alcohol content was .26

Not drive a motor vehicle unless licensed and insured as required by law.

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

Should the defendant be unable to complete financial obligations during the period of probation ordered, the defendant may enter the work referral program until said obligations are satisfied as determined by the Probation Officer.

NOTES

Placement for the Level IV term imposed shall be at the Department of Correction's discretion. The Department may place the defendant and change that placement at the Department's complete discretion according to offender and institutional needs. The Department may do so without further need to seek approval of the Court for any Level

STATE OF DELAWARE  
VS.  
THEODOROS XENIDIS  
DOB: 05/05/1964  
SBI: 00191813

IV placement or change of placement.

Fifteen months and eighteen months of the two-year minimum terms required for each of IN18-03-1262 and IN18-02-1325 have been suspended upon condition that Mr. Xenidis participate in both a drug and alcohol abstinence program and a drug and alcohol treatment program. See 21 Del. C. 4177(d)(4) and (d)(9).

=====MODIFIED ORDER=====

And now this 26th day of June, 2019, the sentence order dated April 26, 2019 is hereby modified to reflect that, as noted during the sentencing hearing, Mr. Xenidis's motion to exclude a prior DUI conviction and to sentence him under 21 Del. C. 4177(d)(3) was denied. The written opinion setting for the Court's ruling more completely and this modified sentencing are being issued simultaneously. All other terms and conditions previously imposed remain the same.

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JUDGE PAUL R WALLACE

FINANCIAL SUMMARY

STATE OF DELAWARE  
VS.  
THEODOROS XENIDIS  
DOB: 05/05/1964  
SBI: 00191813

CASE NUMBER:  
1801011371  
1802005270

SENTENCE CONTINUED:

|                                      |          |
|--------------------------------------|----------|
| TOTAL DRUG DIVERSION FEE ORDERED     |          |
| TOTAL CIVIL PENALTY ORDERED          |          |
| TOTAL DRUG REHAB. TREAT. ED. ORDERED | 300.00   |
| TOTAL EXTRADITION ORDERED            |          |
| TOTAL FINE AMOUNT ORDERED            | 2000.00  |
| FORENSIC FINE ORDERED                |          |
| RESTITUTION ORDERED                  |          |
| SHERIFF, NCCO ORDERED                | 30.00    |
| SHERIFF, KENT ORDERED                |          |
| SHERIFF, SUSSEX ORDERED              |          |
| PUBLIC DEF, FEE ORDERED              |          |
| PROSECUTION FEE ORDERED              | 200.00   |
| VICTIM'S COM ORDERED                 | 360.00   |
| VIDEOPHONE FEE ORDERED               | 3.00     |
| DELJIS FEE ORDERED                   | 3.00     |
| SECURITY FEE ORDERED                 | 30.00    |
| TRANSPORTATION SURCHARGE ORDERED     | 1000.00  |
| FUND TO COMBAT VIOLENT CRIMES FEE    | 45.00    |
| SENIOR TRUST FUND FEE                |          |
| AMBULANCE FUND FEE                   |          |
| <hr/>                                |          |
| TOTAL                                | 3,971.00 |

\*\*APPROVED ORDER\*\*

5

June 27, 2019 15:04

SURCHARGES

STATE OF DELAWARE  
VS.  
THEODOROS XENIDIS  
DOB: 05/05/1964  
SBI: 00191813

CASE NUMBER:  
1801011371  
1802005270

| <u>CRIM ACTION #</u> | <u>DESCRIPTION</u> | <u>AMOUNT</u> |
|----------------------|--------------------|---------------|
| IN18-03-1262         | DRTE               | 150.00        |
| IN18-03-1262         | TRANSPORTATION     | 500.00        |
| IN18-03-1262         | VCF                | 180.00        |
| IN18-02-1325         | DRTE               | 150.00        |
| IN18-02-1325         | TRANSPORTATION     | 500.00        |
| IN18-02-1325         | VCF                | 180.00        |

LIST OF ALIAS NAMES

STATE OF DELAWARE  
VS.  
THEODOROS XENIDIS  
DOB: 05/05/1964  
SBI: 00191813

CASE NUMBER:  
1801011371  
1802005270

THEODOROS XENDIS  
THEODORES XENIDAS