



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEODORE XENIDIS,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 279, 2019
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On January 21, 2018, a Delaware State Police officer arrested Theodore Xenidis for driving under the influence (“DUI”) of alcohol in violation of 21 *Del. C.* § 4177. A1 at DI01 1.¹ As a condition of his bail, Xenidis was prohibited from possessing and consuming alcohol. A1 at DI01 1. A New Castle County grand jury indicted Xenidis on March 26, 2018 for the single charge of DUI. A1 at DI01 1. Xenidis, with the approval of the court and the consent of the State, waived trial by jury and, on July 26, 2018, a Superior Court judge found him guilty of DUI. A3 at DI01 14. The trial court ordered a presentence investigation and scheduled sentencing for a future date. A3 at DI01 14.

On February 8, 2018, a Delaware State Police officer arrested Xenidis for DUI and other traffic offenses. A7 at DI02 1.² A New Castle County grand jury indicted Xenidis on March 26, 2018. A7 at DI02 4. Xenidis, with the approval of the court and the consent of the State, waived trial by jury and, on November 20, 2018, a Superior Court judge found him guilty of DUI and non-compliance with bail (for possessing and consuming alcohol in violation of the bail set after his January 2018

¹ “DI01 ___” refers to item numbers on the Superior Court Docket in *State v. Xenidis*, I.D. No. 1801011371. A1-6.

² “DI02 ___” refers to item numbers on the Superior Court Docket in *State v. Xenidis*, I.D. No. 1802005270. A7-13.

DUI arrest). A10 at DI02 25. The trial court scheduled sentencing to be held on a future date. A10 at DI02 25.

The State requested the Court sentence Xenidis as a fourth offender based on his prior convictions, including his 1991 Maryland DUI. Xenidis moved to exclude his “Maryland 1991 DUI conviction as a basis to enhance his sentence pursuant to 4177(d).” A3 at DI01 20; A21-26. The Superior Court considered Xenidis’s motion in the context of both cases pending sentencing. The parties’ briefing on the issue was thereafter docketed in both cases. A4-5 at DI01 21, 22, 25-29; A11-12 at DI02 29-34. The Superior Court rescheduled Xenidis’s December sentencing to allow him to explore whether Delaware constitutional law differs from federal law. A4 at DI01 23; A11 at DI02 29; A40. On April 26, 2019, the Superior Court denied Xenidis’s motion to exclude his 1991 Maryland conviction and sentenced him as a fourth offender on both convictions.³ A5 at DI01 30; A12 at DI02 35; B67. On June 27, 2019, the Superior Court issued a modified sentence order (A5 at DI01 34; A12

³ “The State sought to enhance [Xenidis’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; and c. [o]verlapping 1995 Delaware DUI convictions in JP Court Case No. 9595999780 and Court of Common Pleas Case number 9592016290.” Op. Br. at 7. “The parties agree that the several prior DUI convictions Xenidis has collected subject him to no less than a felony conviction and sentencing as a third offender. *State v. Xenidis*, 212 A.3d 292, 295 (Del. Super. Ct. 2019). On appeal, Xenidis only challenges the Superior Court’s consideration of his 1991 Maryland DUI conviction.

at DI02 39),⁴ and a written opinion addressing Xenidis's motion to exclude his 1991 Maryland conviction.⁵ A5 at DI01 35; A12 at DI02 40.

Xenidis appealed and filed a timely opening brief. This is the State's answering brief.

⁴ The parties agreed to the Superior Court issuing a modified sentence order to preserve Xenidis's right to appeal. A5 at DI01 32; A12 at DI02 37. *Xenidis*, 212 A.3d at 297, n.14.

⁵ *Xenidis*, 212 A.3d 292.

SUMMARY OF THE ARGUMENT

- I. DENIED. The Superior Court did not err by considering Xenidis's 1991 Maryland misdemeanor DUI conviction when sentencing him as a fourth offender under 21 *Del. C.* § 4177(d)(4) for his 2018 Delaware DUI convictions. Consideration of the Maryland offense, for which Xenidis did not receive a sentence of incarceration, and which Xenidis did not challenge in a Maryland Court, is consistent with established Delaware law. Article I, Section 7 of the Delaware Constitution does not require the State to prove Xenidis had the assistance of counsel in Maryland in 1991, nor does it require the assistance of counsel for misdemeanors where incarceration is not imposed. The text, history, and local interests associated with Delaware's right to counsel and due process guarantees establish that, in this specific context, federal and state constitutional law are in accord.

STATEMENT OF FACTS⁶

On January 21, 2018, Delaware State Police Corporal Huynh found Xenidis in the driver's seat of a blue Ford Expedition sport utility vehicle ("SUV") in a residential driveway; the vehicle's engine was running. B3. Based on his initial observations of Xenidis, Xenidis's performance on standardized field sobriety tests ("SFSTs"), and Xenidis's admission to consuming alcohol, Corporal Huynh arrested Xenidis for DUI of alcohol. B4. Xenidis posted secured bail and, as a condition of his release, was prohibited from possessing and consuming alcohol. A1 at DI01 1.

On February 8, 2018, Delaware State Police Corporal McBean found Xenidis in a disabled teal Ford Mustang on the right shoulder of a public roadway. B8. Corporal McBean determined the vehicle had struck a curb. B8. Xenidis admitted to driving the vehicle. B8. Based on his observations of Xenidis and Xenidis's performance on SFSTs, Corporal McBean arrested Xenidis for DUI and breach of the conditions of bail imposed following his January 21, 2018 arrest. B9.

⁶ The Superior Court found, and the parties largely agree, that "[t]he facts underlying Xenidis's 2018 DUI convictions are truly of no moment to the disposition of the sentencing issue." *Xenidis*, 212 A.3d at 295. The State offers a brief factual summary drawn from the affidavits of probable cause associated with Xenidis's arrests.

I. THE SUPERIOR COURT DID NOT ERR BY CONSIDERING XENIDIS’S 1991 MARYLAND DUI CONVICTION AS A PREDICATE OFFENSE WHEN SENTENCING HIM AS A FOURTH OFFENDER UNDER 21 *Del. C.* § 4177(d)(4) FOR HIS 2018 DELAWARE DUI CONVICTIONS.

Question Presented

Whether the Superior Court erred by considering Xenidis’s 1991 Maryland DUI conviction as a sentence-enhancing predicate offense under Delaware’s recidivist DUI statute.

Standard and Scope of Review

Where, as here, there are no facts in dispute, the Supreme Court reviews questions of law and constitutional claims *de novo*.⁷

Merits of the Argument

Xenidis argues that the Superior Court erred by declining to interpret Article I, § 7 of the Delaware Constitution to preclude a sentencing court from considering a prior “uncounseled”⁸ misdemeanor conviction to enhance his sentence for subsequent offenses.⁹ Xenidis acknowledges that the due process protections of the

⁷ *Burrell v. State*, 207 A.3d 137, 141 (Del. 2019); *Jones v. State*, 745 A.2d 856, 861 (Del. 1999).

⁸ Xenidis, through counsel, proffers that he was not represented by counsel when convicted of Driving While Intoxicated in Maryland in 1991. The Superior Court found the record to be “silent on whether Xenidis had counsel, waived counsel, or the participation of counsel was ever even addressed.” *Xenidis*, 212 A.3d at 296.

⁹ Op. Br. at 9.

United States Constitution do not support his argument and, thus, seeks to expand the protections of the Delaware Constitution.¹⁰ The Superior Court correctly rejected his argument, finding “in this specific context, federal and state constitutional law are in accord.”¹¹ The Superior Court’s well-reasoned opinion should be affirmed.

A. Delaware’s DUI Sentencing Paradigm

1. Delaware DUI Law

The Delaware General Assembly established a stepwise framework for sentencing repeat DUI offenders.¹² This framework provides a sentencing court discretion to craft an appropriate sentence for an offender and, where the requisite predicate offenses are found to exist, the Superior Court is required to impose the statutory minimum penalty.¹³ Under Delaware law, “[w]hoever is convicted of a violation of subsection (a) of this section shall . . . [, f]or a fourth offense occurring any time after 3 prior offenses, be guilty of a class E felony, be fined not more than

¹⁰ Op. Br. at 16.

¹¹ *Xenidis*, 212 A.3d at 308.

¹² *State v. Laboy*, 117 A.3d 562, 563 (Del. 2015).

¹³ *Id.*

\$7,000, and imprisoned not less than 2 years nor more than 5 years.”¹⁴ The first six months of any sentence imposed for a fourth offense DUI may not be suspended.¹⁵

Delaware law requires a sentencing court to consider an individual’s prior conduct from both within and without the state: prior offenses include “[a] conviction or other adjudication of guilty or delinquency 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.”¹⁶ Prior offenses must be separate and distinct: “each must be successive to the other with some period of time having elapsed between sentencing or adjudication for an earlier offense or conviction and the commission of the offense resulting in a subsequent conviction.”¹⁷ “[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”¹⁸

2. Superior Court’s Application of Delaware DUI Law

The Superior Court found, and Xenidis does not contest on appeal, that “[t]he parties agree that the several prior Delaware DUI convictions Xenidis has collected

¹⁴ 21 *Del. C.* § 4177(d)(4).

¹⁵ *Id.*

¹⁶ 21 *Del. C.* § 4177B(e)(1)a.

¹⁷ 21 *Del. C.* § 4177B(e)(4).

¹⁸ 21 *Del. C.* § 4177B(e)(5).

subject him to no less than a felony conviction and sentencing as a third offender.”¹⁹ In fact, his prior Delaware DUI convictions *and* the 1991 Maryland conviction at issue here have “already been used twice to enhance prior sentences Xenidis received under Delaware’s DUI law.”²⁰ Citing to *Laboy*, the Superior Court commented that the prior use of the Maryland conviction to enhance his sentence “itself is a problem for Xenidis.”²¹ In *Laboy*, this Court recognized the use of a prior Maryland conviction by a Delaware court to enhance that defendant’s sentence, and explained that, “[u]nder the DUI statute, Laboy was not permitted to challenge the validity of that earlier conviction in these proceedings.”²² Xenidis does not contest “the historical fact of his Maryland DUI conviction.”²³ The Superior Court sentenced Xenidis as a fourth offender under Delaware law.

¹⁹ *Xenidis*, 212 A.3d at 295.

²⁰ *Xenidis*, 212 A.3d at 296. The State included copies of court records supporting each of Xenidis’s prior convictions in its December 3, 2018 “State’s Response to Defendant’s Motion to Exclude.” A4 at DI01 21; A11 at DI02 29, B11-65.

²¹ *Xenidis*, 212 A.3d at 296-97 (citing *Laboy*, 117 A.3d at 566); 21 *Del. C.* § 4177(c)(5) (prohibiting collateral challenges to prior or previous convictions).

²² *Laboy*, 117 A.3d at 566.

²³ *Op. Br.* at 40. To the extent the Superior Court declined to expressly apply the statutory bar on collateral attacks to prior convictions in the Delaware DUI sentence scheme, it is well established that this Court may affirm a trial court’s opinion for different reasons than expressed in the opinion. *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

Xenidis challenges the Superior Court’s consideration of his 1991 Maryland DUI conviction. Because his claim is foreclosed under Delaware’s DUI sentencing scheme and the Federal Constitution, he argues that the due process protections of the Article I, Section 7 of the Delaware Constitution exceed those provided by its federal counterpart. Xenidis agrees that he was not sentenced to incarceration for his 1991 Maryland conviction and does not dispute that this conviction was previously used by Delaware courts to enhance his sentence. Nonetheless, Xenidis argues the Superior Court erred by considering this Maryland misdemeanor conviction because neither party could successfully produce evidence Xenidis was represented by counsel or intelligently waived his right to counsel for that proceeding. Thus, he contends, his Maryland conviction was “uncounseled.” The Superior Court did not err in rejecting his argument.

B. Xenidis’s Challenge Under the United States Constitution.

The United States Supreme Court, in *Nichols v. United States*,²⁴ held “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.”²⁵ The Court acknowledged confusion following its “splintered

²⁴ 511 U.S. 738 (1994).

²⁵ 511 U.S. at 748-749.

decision” in *Baldasar v. Illinois*²⁶ and explicitly overruled that decision.²⁷ Because a sentencing court is afforded wide latitude in what it considers when sentencing an offender, “it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction . . . where that conduct must be proved beyond a reasonable doubt.”²⁸ And so, under the United States Constitution, it is.

In 2002, both this Court and the Delaware Superior Court had occasion to consider the impact of *Nichols* on Delaware’s sentencing scheme.²⁹ In *Pressley*, the Superior Court held:

Because of the specific language in *Nichols* that *Baldasar* was “overruled,” and because of the rationale of the *Nichols* Court, this Court finds that under current law a prior uncounseled misdemeanor conviction may be used to enhance the defendant’s current fourth conviction to a felony. *Morris*, the current case before the Delaware Supreme Court, only seeks to reinstate some of the confusion left by

²⁶ 446 U.S. 222 (1980). *Baldasar* addressed the use of an uncounseled misdemeanor conviction to convert a subsequent misdemeanor into a felony with incarceration. 446 U.S. at 222. The Court’s *per curiam* opinion, accompanied by three concurring opinions and a dissent, failed to provide clear guidance and “frustrated its own effort in *Scott* to provide effective guidance to the local courts that try misdemeanor cases every day.” *Id.* at 235 (Powell, J. dissenting).

²⁷ 511 U.S. at 748.

²⁸ *Id.*

²⁹ *Morris v. State*, 2002 WL 1241270 (Del. June 4, 2002); *State v. Pressley*, 2002 WL 863599 (Del. Super. Ct. Apr. 19, 2002). The Delaware Court of Common Pleas, too, had occasion to address this issue in 1998 where, in *James v. State*, 1998 WL 1543574, *4 (Del. Ct. Comm. Pl. Sept. 16, 1998), that court recognized *Nichols* changed the rule with respect to using uncounseled prior convictions to enhance subsequent sentences. “Therefore, uncounseled misdemeanor convictions that did not result in imprisonment may be used to enhance sentences.” *Id.* at *4 n.15.

Baldasar; and later resolved by *Nichols*. Until the Delaware Supreme Court rules otherwise, the Court will follow the holding of *Nichols*.³⁰

Just weeks after *Pressley*, the Delaware Supreme Court affirmed the Superior Court in *Morris*, finding a prior uncounseled misdemeanor conviction may be used to enhance a sentence under 21 *Del. C.* § 4177(d)(4).

Xenidis now acknowledges his argument is meritless under the federal constitution.³¹ But he contends *Nichols* “rests on a shaky foundation,” and, thus, should be “rejected as a precedent to adopt under Article 1, § 7” of the Delaware Constitution.³² The Superior Court correctly rejected this contention.

C. Article I, Section 7 of the Delaware Constitution Should Not Be Interpreted More Broadly.

Xenidis urges this Court to reject the Superior Court’s well-reasoned opinion and “extend the protection of Article I, § 7 of the Delaware Constitution to misdemeanor defendants regardless of whether incarceration is imposed, and [find] that an uncounseled DUI conviction (not involving a jail sentence) may not be used to enhance the period of incarceration for a subsequent offense.”³³ Xenidis argument rests on challenging the foundation of now well-established federal constitutional

³⁰ *Pressley*, 2002 WL 863599 at *2.

³¹ Op. Br. at 12.

³² Op. Br. at 12, 14.

³³ Op. Br. at 16.

jurisprudence.³⁴ “The Delaware Constitution, like the constitutions of certain other states, may provide individuals with greater rights than those afforded by the United States Constitution.”³⁵ The Superior Court recognized this bedrock principle of American government and correctly applied an established paradigm for assessing the coverage of the Delaware Constitution vis-à-vis its federal counterpart. Under this established analytical framework the Superior Court correctly rejected Xenidis’s “invitation to engage in an unnecessary exercise of constructing and pronouncing some broad right to counsel under Article I, Section 7” of the Delaware Constitution.³⁶

To assess “whether a provision of the United States Constitution has a meaning identical to a similar provision on the same subject” in the Delaware Constitution, this Court has employed the illustrative, non-exhaustive criteria “synthesized from a burgeoning body of authority” set forth in *Jones*.³⁷ These criteria include: textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and

³⁴ Op. Br. at 10-16.

³⁵ *Jones v. State*, 745 A.2d 856, 863 (Del. 1999) (listing circumstances where the Delaware Constitution provides greater individual rights).

³⁶ *Xenidis*, 212 A.3d at 307.

³⁷ *Jones*, 745 A.2d at 864-65. (citing *State v. Hunt*, 450 A.2d 952, 967 (N.J. 1982) (Handler, J., concurring)).

public attitudes.³⁸ These criteria address both the “vertical federalism” and “horizontal federalism” embodied in the United States Constitution,³⁹ and they afford reviewing courts 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.’”⁴⁰ The Superior Court applied these criteria here and correctly found “no justification to construe Article I, § 7’s due process protection more broadly than its federal analogue.”⁴¹

1. Textual Language

A State constitution may contain distinct provisions recognizing rights not identified in the federal constitution, or the language may be so significantly different that it must be independently interpreted.⁴² Such a textual comparison here does not give Xenidis the broader protection he seeks. The Superior Court compared Article I, Section 7 of the Delaware Constitution to the Sixth Amendment to the

³⁸ *Xenidis*, 212 A.3d at 300 (citing *Ortiz v. State*, 869 A.2d 285, 391 n.4 (Del. 2005)); *Jones v. State*, 745 A.2d at 864-865.

³⁹ *Jones*, 745 A.2d at 866-67. “Vertical federalism binds the states to the will of the federal sovereign government with regard to the enumerated powers that have been surrendered. Horizontal federalism permits the states to look to the jurisprudence of sister states in defining the sovereign powers that have been reserved for state governments.” *Id.*

⁴⁰ *Xenidis*, 212 A.3d at 300.

⁴¹ *Id.* at 301.

⁴² *Jones*, 745 A.2d. at 864 (citing *Hunt*, 450 A.2d 965-66).

United States Constitution and found, if anything, the language of the Delaware Constitution “would suggest a narrower protection.”⁴³ Thus, an independent interpretation of Delaware’s provision “would not be to Xenidis’s benefit.”⁴⁴

The Sixth Amendment to the United States constitution provides:

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 defense.

Article I, Section 7 of the Delaware Constitution provides:

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 of the nature and 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 judgment of his or her peers or by the law of the land.

This provision, the Superior Court notes, “contains both *the* single statement of Delaware’s right to counsel and its criminal due process guarantee.”⁴⁵ The Superior Court then reviewed the accepted analytical factors and found “no justification to

⁴³ *Xenidis*, 212 A.3d at 301.

⁴⁴ *Id.*

⁴⁵ *Id.*

construe Article I, Section 7's due process protection more broadly than its federal analogue."⁴⁶

Xenidis acknowledges that the language of the Delaware Constitution is "substantially similar to the Sixth Amendment."⁴⁷ Rather than engaging in a textual comparison, he seems to argue that Delaware Courts should flatly ignore or reject federal courts' interpretation of similar language. But, Delaware Courts apply the principle 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."⁴⁸ Xenidis's claim invokes both the right to counsel and the due process guarantees embedded in the Delaware Constitution. The Superior Court found "in a variety of contexts, the Delaware Supreme Court has understood Article 1, § 7 as being 'similar,' 'co-extensive' or as having substantially the same meaning as the Federal Constitution's due process provisions."⁴⁹ The United States Supreme Court, in *Nichols*, found the federal due process clause to

⁴⁶ *Id.*

⁴⁷ Op. Br. at 17.

⁴⁸ *Xenidis*, 212 A.3d at 302 (quoting *State v. Fortt*, 1999 WL 1228676, at *1 (Del. Super. Ct. Oct. 15, 1999)).

⁴⁹ *Id.* (citing *Sheehan v. Oblates of St. Frances de Sales*, 15 A.3d 1247, 1259 (Del. 2011); *Cohen v. State*, 89 A.3d 65, 86 (Del. 2014); *Helman v. State*, 794 A.2d 1058, 1070 (Del. 2001); *Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989); Randy J. Holland, *The Delaware State Constitution* 64 2nd ed. 2017).

permit consideration of uncounseled misdemeanor convictions to enhance the severity for a current conviction. Thus, like its federal counterparts, State due process guarantees support the Superior Court’s consideration of Xenidis’s prior DUI conviction for purposes of recidivist sentencing.

Considerations of horizontal federalism also support the Superior Court’s conclusion. As Xenidis candidly concedes, Pennsylvania has “held that an uncounseled misdemeanor conviction may be used to enhance the period of incarceration for a subsequent offense and does not violate [its] respective state constitution[.]”⁵⁰ The Pennsylvania Supreme Court has found that Article I, Section 9 of the Pennsylvania Constitution is “coterminous with the Sixth Amendment.”⁵¹ Article I, Section 7 of the Delaware Constitution is nearly identical to Article I, Section 9 of the Pennsylvania Constitution.⁵²

⁵⁰ Op. Br. at 15-16.

⁵¹ *Commonwealth v. McCoy*, 975 A.2d 586, 588-89 (Pa. 2009).

⁵² See Randy J. Holland, *The Delaware State Constitution* 55 2nd ed. 2017. In fact, with respect to the right to counsel, the Delaware and Pennsylvania constitutions are identical. Article I, Section 9 of the Pennsylvania Constitution provides:

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to

Delaware and Pennsylvania, and “other states tracing their roots to the thirteen original colonies, share venerable origins that precede the adoption” of the Bill of Rights.⁵³ “Delaware based its Bill of Rights in the 1792 Constitution on English common law and Pennsylvania’s Constitution.”⁵⁴ Article I, Section 7 of the Delaware Constitution “first appeared in the Delaware Constitution of 1792 in much the same form as it exists today.”⁵⁵ Thus, principles of both vertical and horizontal federalism compel interpreting both the due process and right to counsel provisions of the Delaware Constitution in accord with its federal and Pennsylvania analogues.

Xenidis’s reliance on jurisprudence from Iowa and Florida is misplaced.⁵⁶ These states, and others that have forged a separate path from *Nichols*, have emphasized “fundamental fairness” over “the federalism and practicality concerns of *Scott* and *Nichols*.”⁵⁷ Delaware courts, of course, in recognizing principles of

impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

⁵³ *Jones*, 745 A.2d at 867.

⁵⁴ *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 671 (Del. 2017) (Strine, C.J., dissenting). “John Dickinson was President of the 1792 Convention and no stranger to English and Pennsylvania Law, having studied in England as a contemporary of William Blackstone and having served as Governor of Pennsylvania from 1782 to 1785.” *Id.* (citing Holland, *The Delaware State Constitution* 76).

⁵⁵ *Xenidis*, 212 A.3d at 303-04.

⁵⁶ Op. Br. at 20-24 (citing *State v. Young*, 863 N.W. 2d 249 (Iowa 2015); *State v. Kelly*, 999 So. 2d 1028, 1032-33 (Fla. 1992)).

⁵⁷ *Young*, 863 N.W. 2d at 274.

both vertical and horizontal federalism in our system of government, submit judgment to the United States Supreme Court on issues of due process.⁵⁸ The substantial similarity, and more limiting, language of Article I, Section 7 of the Delaware Constitution relative to the Sixth Amendment supports the Superior Court’s conclusion here.

2. Legislative History

This Court recognizes that available legislative history may support reading the State constitutional provision independently of its federal analogue.⁵⁹ This is not the case here. The Superior Court commented that Article I, Section 7 “and its federal due process counterparts share much the same lineage and, as mentioned above, ‘substantially the same meaning.’”⁶⁰ Further, while the legislative history of these 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.”⁶¹

To be sure, where the Delaware Constitution is found to diverge from its federal counterpart, there are often striking variations in textual language and

⁵⁸ *Xenidis*, 212 A.3d at 302.

⁵⁹ *Jones*, 745 A.2d. at 864 (citing *Hunt*, 450 A.2d 965-966).

⁶⁰ *Xenidis*, 212 A.3d at 303 (quoting Holland, *The Delaware State Constitution*, at 57).

⁶¹ *Id.*

legislative history.⁶² The Delaware Supreme Court found it “untenable to conclude that the right to trial by jury in the Delaware Constitution means exactly the same thing as that right in the United States Constitution.”⁶³ “Delaware’s unambiguous commitment to the preservation of the common law right to trial by jury was evidenced with a ‘simplicity of style.’”⁶⁴ Similarly, a historical and textual analysis of the search and seizure provision of the Delaware Constitution compelled this Court to find greater protections in Article I, Section 6. Here, as the Superior Court found, the shared lineage of the state and federal due process provisions does not support an independent reading of the meaning of those provisions.

3. Preexisting State Law and Structural Differences

Previously established state law may support providing more broad protections.⁶⁵ Xenidis notes that “[w]ith 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

⁶² See, e.g., *Claudio v. State*, 585 A.2d 1278, 1290 (Del. 1991) (comparing the State and federal right to trial by jury and noting “significant substantive difference in that historic right, as it has been preserved for Delaware’s citizens.”)

⁶³ *Id.* (citing *Sanders v. State*, 585 A.2d 117 (Del. 1990)).

⁶⁴ *Id.* at 1296. Article I, Section 4 of the Delaware Constitution provides, simply, “Trial by jury shall be as heretofore.” This provision was incorporated in the 1792 constitution and carries through to today.

⁶⁵ *Jones*, 745 A.2d. at 864 (citing *Hunt*, 450 A.2d 965-66).

examining the issue in the context of Article I, § 7 of the Delaware Constitution.”⁶⁶ He is right. The Superior Court noted that the factors provided by this Court in *Jones* is a “partial list” used “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.”⁶⁷ Not all may apply in a particular assessment, some may be inapplicable, and others may not be disentangled from others.⁶⁸ The Superior Court found, and the State agrees, that is the case here.

Delaware Courts, as Xenidis concedes, have consistently held that a sentencing court may use prior uncounseled misdemeanor convictions (for which a sentence of imprisonment was not imposed) to enhance a recidivist sentence. Xenidis argues that this Court’s opinion in *Bryan v. State*⁶⁹ provides guidance here. Not so. In *Bryan*, this Court clarified that the Article I, Section 7 right to counsel provides different (and greater) protections than the fifth amendment to the United States Constitution.⁷⁰ That holding is inapposite here where, as the Superior Court correctly determined, the Delaware constitutional provision at issue is similar to, and more circumscribed than, its federal counterpart.

⁶⁶ Op. Br. at 28.

⁶⁷ *Xenidis*, 212 A.3d at 303.

⁶⁸ *Id.*

⁶⁹ 571 A.2d 170 (Del. 1990).

⁷⁰ *Id.* at 176-77.

4. Matters of Particular State interest or Local Concern, State Traditions, Public Attitudes

The final factors set forth in *Jones* – matters of particular state interest or local concern, state traditions, and public attitudes – may also be considered together as they overlap substantially. The Superior Court correctly concluded that “Delaware’s history and tradition on the use of prior convictions as aggravators can be established by examining relevant statutory enactments, court rules, and case law.”⁷¹ Additionally, legislative enactments seeking to address, and curb, the dangers posed by impaired drivers are particularly enlightening. While these concerns may not be unique to Delaware, they evidence the strong desire of this State’s legislative body, the representatives of its people, to properly punish and rehabilitate DUI recidivists.

The Superior Court found, in accord with Xenidis’s argument, “[t]here is no question that Delaware has a long history of permitting the unfettered employment of an attorney by a criminal defendant who engages one.”⁷² And, this right includes the appointment of counsel for indigent offenders.⁷³ The right to counsel provided in Delaware is “wholly in line with Sixth Amendment jurisprudence.”⁷⁴ This

⁷¹ *Xenidis*, 212 A.3d at 304.

⁷² *Xenidis*, 212 A.3d at 304; Op. Br. at 31.

⁷³ *Id.*

⁷⁴ *Xenidis*, 212 A.3d at 304.

alignment, though, does not support an expansion of State protections that would frustrate legislative efforts to protect Delaware citizens.

Prior to 1995, DUIs in Delaware “were unclassified misdemeanor offenses.”⁷⁵ “In 1995, the General Assembly amended § 4177 to create felony DUI offenses. The maximum penalties for felony offenses were increased in 2009, and the minimum penalties for felony DUI offenses were increased in 2012.”⁷⁶ The 2012 amendments, the most recent substantive changes to DUI sentencing procedure, strengthened criminal penalties for DUI, expanded the “lookback” provisions for recidivist offenders, and provided more intensive treatment programs for recidivist offenders.⁷⁷ To address the danger posed by impaired drivers, the Delaware General Assembly injected a treatment-focused paradigm for curbing recidivist offenders into the DUI sentencing scheme. The ability of a sentencing court to rely on adjudications from Delaware and its sister states is essential to meeting this objective.⁷⁸

⁷⁵ *State v. Barnes*, 116 A.3d 883, 885 (Del. 2015).

⁷⁶ *Id.*

⁷⁷ Synopsis to 78 Del. Laws Ch. 167.

⁷⁸ As recognized in *Parke v. Raley*, 506 U.S. 20, 27 (1992), “[s]tatutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times.” Further, “[t]olerance for a spectrum of state procedures dealing with recidivism is especially appropriate’ given the high rate of recidivism and diversity of approaches that States have developed for addressing it.” *Id.* (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)). Delaware’s DUI laws

Companion provisions of Delaware’s DUI law further evidence Delaware’s interest in upholding the integrity of prior convictions. As previously noted, a prior DUI conviction may not be collaterally attacked in an unrelated proceeding.⁷⁹ Rather, the validity of the prior conviction must be challenged “in the court in which the conviction arose.”⁸⁰ Despite his claims to the contrary,⁸¹ Xenidis seeks to diminish the effect of his 1991 Maryland DUI conviction to circumvent otherwise mandatory statutory penalties. The Superior Court properly rejected Xenidis’s efforts and, in so doing, maintained the integrity of his prior Maryland conviction and fulfilled Delaware’s interest in treating recidivist offenders more aggressively.

The Superior Court concluded its assessment of local interests by considering the “presumption of regularity” that attaches to a validly obtained conviction.⁸² “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 to the contrary appears.”⁸³ The Delaware Supreme Court has recognized

reflect this States’ approach for dealing with DUI recidivism through a stepwise increase in penalties and concomitant treatment for repeat offenders.

⁷⁹ 21 *Del. C.* § 4177B(e)(5).

⁸⁰ *Id.*

⁸¹ Op. Br. at 40.

⁸² *Xenidis*, 212 A.3d at 306-07.

⁸³ *Id.* (citing *Parke*, 506 U.S. at 30).

and applied this presumption of regularity.⁸⁴ The United States Supreme Court, in *Parke*, recognized that the absence of documentation surrounding a several-years-old conviction is not atypical.⁸⁵ For this reason, it is appropriate to presume a court of competent jurisdiction acted properly.⁸⁶

Xenidis argues that “the presumption of regularity merely makes it appropriate to assign the burden of proof upon the defendant[, and that i]f *Parke* does apply, then [Xenidis] 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.”⁸⁷ Not so. This Court affords official court records a presumption of regularity, and “unsupported allegations of irregularity are insufficient to overcome that presumption.”⁸⁸

The Superior Court concluded that Xenidis’s “circumstance is emblematic of why there is no good reason to suspend the presumption of regularity through mere incantation of Article I, Section 7.”⁸⁹ Xenidis offers no allegation of irregularity or constitutional infirmity in his prior conviction. At the time of Xenidis’s 1991

⁸⁴ *Weaver v. State*, 2005 WL 3028268, at *1 (Del. Nov. 8, 2005) (citing *Johnson v. State*, 2002 WL 1038831 (Del. May 20, 2002)).

⁸⁵ *Parke*, 506 U.S. at 30.

⁸⁶ *Id.*

⁸⁷ Op. Br. at 44.

⁸⁸ *Johnson*, 2002 WL 1038831, at *2.

⁸⁹ *Xenidis*, 212 A.3d at 307.

conviction, Maryland courts were aware of his right to counsel and equipped to conduct a constitutionally sound colloquy.⁹⁰ To the extent that Xenidis’s arguments present more than the “mere incantation” suggested by the Superior Court, the text, history, and tradition of Article 1, Section 7 compel finding that provision in accord with its federal counterpart.

D. Claims Not Raised Below are Waived on Appeal

Xenidis concludes his brief by arguing, for the first time on appeal, that “[t]he Superior Court erred by applying an improper degree of proof standard for accepting the Maryland offense as a predicate conviction.”⁹¹ This Court will not consider claims on appeal that were not raised below unless required in the interests of justice.⁹² Nonetheless, his argument on appeal is unavailing. Xenidis contends “[t]he DUI statute should be strictly construed to require a higher degree of proof for a qualified predicate offense than the *de minimis* Maryland abstract accepted by the trial court.”⁹³ To the contrary, this Court has held that the State need only prove an offender had been “convicted, pled guilty, or participated in a DUI course of

⁹⁰ *Id.* (citing *Rutherford v. Rutherford*, 464 A.2d 228, 234 (Md. 1983); *Utt v. State*, 443 A.2d 582, 583-85 (Md. 1982); *Thompson v. State*, 394 A.2d 1190 (Md. 1978)).

⁹¹ Op. Br. at 45-46.

⁹² Supr. Ct. R. 8.

⁹³ Op. Br. at 45.

rehabilitation under § 4177 or ‘a similar statute of any state.’”⁹⁴ “[C]ertified court records from Maryland and Delaware [are] sufficient to meet this burden.”⁹⁵ The State met this burden here.⁹⁶

⁹⁴ *Laboy*, 117 A.3d at 568 (citing 21 *Del. C.* § 4177(e)).

⁹⁵ *Id.*

⁹⁶ B11-65.

CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's well-reasoned opinion.

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Dated: October 23, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEODORE XENIDIS,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 279, 2019
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

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Dated: October 23, 2019

/s/ Sean P. Lugg