No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTINEZ ORLANDO BLACK
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During oral argument in *Johnson v United States,* 135 S.Ct. 2551, 192 L.Ed2d 569 (2015), Justice Scalia asked the following rhetorical question: "Have we ever approved that, by the way, kicking it (a misdemeanor) up to the felony category simply because of recidivism?"

Johnson v U. S., No. 06-6935, Oral Argument Transcript, p. 49.

Review is requested to address Justice Scalia's question in the context of the Petitioner's case.

The Question Presented is;

Did the failure of defense counsel to object to the increase in Petitioner's sentence into the "aggravated range" at Felony Class C, by use of a prior juvenile delinquency conviction, constitute Ineffective Assistance of Counsel, because the Petitioner *did not commit* a Class C felony?

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PETITION FOR WRIT OF CERTIORARI

NOW COMES the Petitioner, Martinez Black, and requests that this Court issue a Writ of Certiorari to the Superior Court of Mecklenburg County, to review the Order dated January 11, 2017, denying the Petitioner's Motion for Appropriate Relief. In support of this Petition, the Petitioner shows the following;

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL AUTHORITY INVOLVED

The Sixth Amendment provides in pertinent part, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury… and to have the assistance of counsel for his defense."

The Fourteenth Amendment provides in pertinent part, "…nor shall any state deprive any person of life, liberty or property, without due process of law…"

PROCEDURAL AND FACTUAL BACKGROUND

On February 1, 2008, the Petitioner was convicted of Voluntary Manslaughter, a Class D felony, and Possession of Firearm by Felon, a Class G felony, in the Superior Criminal Court of Mecklenburg County, North Carolina.

The Petitioner stipulated to an "Aggravating Factor" that "the defendant has previously been adjudicated delinquent for an offense that would be a Class A, B, C, D or E felony if committed by an adult". App. 5.

The trial judge found that the Aggravating factor outweighed the Mitigating factor. App. 6.

The Petitioner was found to have three prior non-overlapping felony convictions, which made him an "Habitual Felon", thereby increasing the level of punishment to Felony Class C for both crimes.

Judge Foust imposed two consecutive "aggravated range" sentences of 130 to 165 months in prison, without parole. App. 7.

OPINIONS BELOW

An opinion was filed by the North Carolina Court of Appeals on July 7, 2009 affirming the conviction and sentence, which did not address the federal question herein. App. 11.

On December 16, 2016 the Petitioner filed a Motion for Appropriate Relief, alleging as Claim One that;

> THE IMPOSITION OF TWO AGGRAVATED RANGE SENTENCES VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS, SINCE IT IS CLEARLY ESTABLISHED THAT BEING AN HABITUAL FELON IS A STATUS, NOT A CRIME, AND THEREFORE AN AGGRAVATED RANGE SENTENCE MAY NOT BE IMPOSED ON A CHARGE WHICH HAD ALREADY BEEN ELEVATED BY THE HABITUAL FELON ACT.

Petitioner also alleged in his Motion for Appropriate Relief that his trial and appellate counsel were ineffective for not raising the Claim above.

On January 11, 2017, the Honorable Eric L. Levinson denied the Petitioner's Successor Motion for Appropriate Relief, stating that the claim was not "jurisdictional in nature" and therefore procedurally barred, and that "even if not procedurally barred – are without legal merit and not correct as a matter of law." App. 1.

On the 15th day of May, 2017, the North Carolina Court of Appeals denied, without an opinion, the Petitioner's Petition for Writ of Certiorari, which raised the federal constitutional issue presented here. App. 3.

On November 1, 2017 the North Carolina Supreme Court denied, without an opinion, Petitioner's Petition for Writ of Certiorari. App. 4.

The federal constitutional claim herein was presented to the North Carolina Supreme Court as Reason One and denied.

REASONS FOR REVIEW

Petitioner submits that Justice Scalia's question in *Johnson* touches on the basic nature of a prior conviction. Can a prior conviction be used as an "element" of a substantive crime, or is its use limited to increasing punishment for a crime?

In 1967, North Carolina enacted the Habitual Felon statute, which defines an "habitual felon" as a person who has been convicted of three non-overlapping felonies. That is, the second prior felony was not committed until after the conviction date of the first felony, and the third felony did not occur until after the conviction date of the second felony.

North Carolina employs a "sentencing grid" to set forth the available range of punishments for every crime, depending on severity of the crime, and number and seriousness of any prior convictions. A copy of the grid is attached as App. 22.

Voluntary Manslaughter is classified as a Class D felony and Possession of Firearm by Felon is classified as a Class G felony. Under the version of the Habitual Felon Act in effect at the time of Petitioner's conviction, if a person occupying the status of being an habitual felon commits a Class D offense or a

Class G offense, both offenses are sentenced at the range of punishment specified for Class C crimes.

It is clearly established under the law of North Carolina, and the law determined by this Court, that being an habitual felon is not a crime, it is a status. "The allegation of previous convictions is not a distinct charge of crimes but is necessary to bring the case within the (habitual felon) statute, and *goes to punishment only". McDonald v. Massachusetts,* 180 U.S. 311,313, 21 S.Ct. 389 (1901) (emphasis supplied) "Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an *increased punishment for that crime*." *State v. Allen*, 292 N.C. 431, 435 (1977) (emphasis supplied)

Further, in North Carolina, sentences for all crimes fall under three separate ranges; the Presumptive range, the Aggravated range, and the Mitigated range. Pursuant to this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), under the jury verdict alone, the most severe sentence possible is the top of the Presumptive range. A sentence in the Aggravated, or upper range, is possible only if defendant admits, or a jury finds, the existence of an aggravating factor beyond a reasonable doubt, which thereby convicts a defendant of a greater, separate, aggravated crime. "The core crime and the fact triggering the mandatory minimum sentence together constitute a new

aggravated crime, each element of which must be submitted to the jury." *Alleyne v. United States*, 133 S.Ct. 2151, 2161, 186 L. Ed. 2d (2013)

However, an exception to the Sixth Amendment jury trial right for aggravating factors is the existence of a prior conviction. Indeed, the *Apprendi* Rule states, "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 489, 120 S.Ct. 2348, 2362-63 (2000) (emphasis added)

The Petitioner contends that his trial counsel and appellate counsel were ineffective for not objecting to the imposition of a sentence at the aggravated level of Class C, because the Petitioner *did not commit a Class C felony.* Rather, he committed a Class G and a Class D felony, which were then *sentenced at Class C due to recidivism.*

Petitioner began with a conviction of Possession of Firearm by Felon, which is classified by the North Carolina legislature as a Class G felony. Under a jury verdict alone, the maximum possible sentence for a person convicted of Possession of Firearm by Felon is 13 to 16 months in prison, with 9 months of post-release supervision. (That is, a defendant's release date is calculated at 16 months when he or she enters prison, but "gain time" for good behavior or work in the prison can bring the sentence down to 13 months, but not below.)

However, because the Petitioner had attained the status of being "an habitual felon" the maximum possible sentence was increased to a Felony Class C level of 73 to 100 months in prison, which would be the final result if the Petitioner had no other prior convictions except for the three felonies used to make him an habitual felon.

Because the Petitioner had 7 additional prior record level points, excluding the points for the three "strikes" as habitual felon, the maximum sentence Petitioner faced was increased again to 110 to 144 months in prison, without parole.

The Due Process question presented is whether the punishment can be increased a third time because of the "aggravating factor" that the Petitioner had a juvenile delinquency conviction? The Petitioner says "no", because he did not commit a Class C felony, he committed a Class G felony.

However, the trial judge took into account the delinquency conviction to increase the actual sentence imposed to 130 to 168 months in prison, which is available only in the aggravated range, a ten-fold increase in punishment over what is prescribed for commission of the crime itself. Petitioner contends that the failure of counsel to object to the last increase constitutes ineffective assistance of counsel.

At Appendix 24 a map of the upward path of the Petitioner's sentence is set out to give a visual representation of this rather complicated expansion of the Petitioner's sentence.

The "bottom line" of the Petitioner's position is based on the contention that recidivism can increase punishment for a particular crime, but not serve as an element of a greater crime. In other words, following *Apprendi/Blakely*, there are no "aggravated" sentences, there are only "aggravated crimes". And since being an habitual felon is not a crime, there cannot be a sentence in the aggravated range, following enhancement under the Habitual Felon Act.

An analogy can be drawn to the case of *State v. Vaughn*, 130 N.C.App.456, 503 S.E.2d 110 (1998) decided by the North Carolina Court of Appeals. In *Vaughn*, the issue was whether a conviction for Breaking or Entering as an Habitual Felon was a Class C felony, or a Class H felony, for the purposes of calculating Prior Record Level points for a future offense.

The Court of Appeals held that the prior record points should be calculated for a Class H felony, not Class C. "When defendant was convicted of felonious breaking and entering in 1984, he was convicted of a class H felony. His contemporaneous conviction of being an habitual felon did not reclassify the offense of breaking and entering as a Class C felony. Rather the habitual felon

conviction required that defendant be *sentenced* as a Class C felon." *Vaughn* at 460. (emphasis added)

Therefore, Petitioner contends that, since the aggravated range of sentences at felony Class C is available only to persons convicted of an aggravated Class C felony, the sentences imposed on Petitioner violated Due Process, because they were unauthorized as a matter of law. Petitioner further contends that the rationale set forth with respect to the Possession of Firearm by Felon charge also applies to the Voluntary Manslaughter conviction.

Petitioner's argument is bolstered by statements of Justice Scalia in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), and by Justice Thomas, in his concurring opinion in *Apprendi*.

Justice Scalia, in his concurring opinion in *Ring*, wrote, "While I am, as always, pleased to travel in Justice Breyer's company, the unfortunate fact is that *today's judgment has nothing to do with jury sentencing*." *Id.* at 612, 122 S.Ct. at 2445. (emphasis supplied)

Likewise, Justice Thomas made clear that *Apprendi* is not about giving the jury a role to play in sentencing proceedings. "This case turns on the seemingly simple question of what constitutes a crime". *Apprendi* at 500.

Therefore, Petitioner maintains that a delinquency conviction cannot be part of the definition of Aggravated Voluntary Manslaughter, or Aggravated Possession of Firearm by Felon.

To return to Justice Scalia's question in *Johnson*. "Yes", this Court has decided, in *McDonald* and *Apprendi*, whether a prior conviction can be used as an element of a higher level of crime, rather than a higher level of punishment. The answer is "No".

Since Petitioner was not convicted of an aggravated Class C crime, he argues that he cannot be sentenced in the aggravated range of Class C punishment.

CONCLUSION

Upon the foregoing arguments and authorities, the Petitioner respectfully requests that this Court issue its Writ of Certiorari to the Superior Court of Mecklenburg County to review the Order of the Honorable Eric Levinson, denying the Petitioner's Motion for Appropriate Relief.

Respectfully submitted this the 30th day of January, 2018.

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Counsel for Petitioner

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF MECKLENBURG COUNTY

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached document on all parties to this cause by:

___ Hand delivered a copy hereof to the attorney for each said party addressed as follows:

_X_ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

___ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

___ Telecopying a copy hereof to the attorney for each said party as follows:

Mr. Daniel O'Brien
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919)716-6500

This the 30th day of January, 2018.

Law Office of Bruce T. Cunningham, Jr.

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