No. 18-8280

ORIGINAL

Supreme Court, U.S.
FILED
FEB 28 2019
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Darrell Williams — PETITIONER
(Your Name)

vs.

Cecilia Reynolds, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court Of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Darrell Williams # 219730
(Your Name)

Lieber Correction Institution / 136 Wilborn Drive
(Address)

Ridgeville, South Carolina 29472 / Edisto A-19
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Question One:

Was Court Of Appeals ruling Sentence Disparity claim not addressed in State Collateral order was Procedurally Barred error, or are, the Federal Court Of Appeals decisions in conflict, and if so, what is Proper standard for Court Of Appeals in deferring to that which does not exist under 28 U.S.C.A. Sec. 2254(d) when addressing silent state court opinions?

Question Two:

Does the Due Process standard of Jackson v. Virginia require a court to consider evidence in deciding whether a reasonable factfinder could have found Guilt beyond a reasonable doubt, as this court held in Jackson and the 1st, 5th, 7th, circuits have likewise held or may a conviction based entirely on circumstantial evidence be upheld under Jackson, by considering only the evidence consistent with Guilt and ignoring all other evidence refuting Guilt as Fourth Circuit held in this case?

Question Three:

Was Court Of Appeals ruling legislative decision to treat recidivism, in Particular, as a element of the crime rather than sentencing factor exceed constitutional limits on legislative Power to define elements of offense error, or is, South Carolina Code Ann. Sec. 16-11-311(a)(2) exceeding constitutional limits under Blakely v. Washington, Apprendi v. New Jersey, when court and not Jury imposed sentence, or does, this court have a tradition of treating recidivism as an element of the related crime?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

Other cont'd

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INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the General Sessions Court court appears at Appendix C to the petition and is

[ ] reported at ____________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was OCTOBER 19, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 11th, 2018, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ________ (date) on ________ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ________. A copy of that decision appears at Appendix ____.

[ ] A timely petition for rehearing was thereafter denied on the following date: ________, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ________ (date) on ________ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

South Carolina Code Ann. Sec. 16-11-311(a)(2) {Cum. Supp. 18}

South Carolina Code Ann. Sec. 17-25-45(a) {Cum. Supp. 18}

28 U. S. C. Sec. 2254(d) {Cum. Supp. 18}

United States Constitution 14th Amendment

United States Constitution 6th Amendment

STATEMENT OF THE CASE

In September 2008, Petitioner Proceeded to trial on First degree burglary, Petit larceny. At the end of trial, Petitioner moved for a directed verdict Arguing state failed to Prove beyond a reasonable doubt all elements of the offense charged, trial court denied motion, and Jury found Petitioner Guilty. Trial court sentenced Petitioner to life w/parole on Burglary Pursuant to recidivist Provision, thirty (30) days on Petit larceny

Subsequently thereafter, a motion for new trial was filed in General Sessions Court, and after a hearing on issues (Appendix C) court denied motion. Petitioner filed a timely Notice Of Appeal in South Carolina Court Of Appeals.

On appeal, Appellate Counsel filed an anders brief raising only one issue regarding admission of written statement. A Pro Se brief was filed raising three issues (1) Use of Prior convictions to enhance was unconstitutional; (2) failure To Bifurcate was unconstitutional; (3) Submission of indictments implicated confrontation clause Protections; no Grounds addressed in directed verdict or new trial motion was raised on appeal to State Court Of Appeals, and court affirmed appeal.

Following denial of appeal, a timely application for Post Conviction relief was filed in Richland County Court Of Common Pleas. During hearing, Petitioner argued (1) Ineffective Assistance Of Appellate Counsel; (2) South Carolina Code Ann. Sec. 17-25-45 is unconstitutional. Pcr court in a written order denied relief on Ineffective Assistance Of Appellate Counsel, court did not address statistical data or constitutionality of Statute in order.

On appeal from denial of Post conviction relief, Appellate counsel filed a Johnson Petition raising; Pcr Court denial of Ineffective Assistance Of Appellate Counsel. In Pro Se brief, Petitioner addressed constitutionality of Sec. 17-25-45, State Supreme Court denied writ.

A Petition Pursuant to 28 U.S.C. Sec 2254 was filed in Federal District Court raising three issues for relief (See Appendix B) The Court Of Appeals ruled that "a rational trier of fact could have found Petitioner Guilty beyond a reasonable doubt of First Degree Burglary" based on evidence at trial. Petitioner asserted, court did not consider material evidence, constitutional violations and key arguments addressing Circumstantial evidence. Moreover, that Prosecution at end of trial conceded nighttime element evidence was circumstantial. Court ruled evidence regarding Nighttime, consent was sufficient.

Court Of Appeals in addressing issue of constitutionality of Sec. 17-25-45, found issue was defaulted since it was not addressed at trial or direct appeal and as such was defaulted. On Appeal, Petitioner rejected this, by showing cases cited by court do not support ruling that constitutionality of recidivist Provision could not be raised at collateral Proceeding. Court Of Appeals, ruled state Precedents required issue to be raised at trial and appeal. The Court in light of this conceded two crucial Points; (1) it was addressed at hearing and on appeal; (2) issue was not addressed in order denying Post conviction relief; Petitioner argued Court Of Appeals ruling issue was defaulted, was error when collateral Proceedings order did not address it, and was therefore not defaulted, inter alia, despite Petitioner assertions other sister circuits have decided issue differently, and that it conflicts with other circuits. The Court denied Request for Rehearing and Rehearing En Banc. This Writ follows

REASONS FOR GRANTING THE PETITION

Question One:

Was Court Of Appeals Ruling Sentence Disparity Claim not addressed in State Collateral order was Procedurrally defaulted ERROR, OR are, the Federal Court Of Appeals decisions in conflict, and if so, what is Proper Standard for Court Of Appeals in deferring to that which does not exist under 28 U.S.C.A. Sec. 2254(d) when addressing silent state court opinions

Regarding the final Ground raised by Petitioner, that South Carolina Code Ann. Sec. 17-25-45 is unconstitutional "When it comes to blacks receiving life sentences more than whites" the court ruled this Ground is defaulted. While Petitioner raised this issue during Pcr hearing, he admitted at hearing he did not raise issue at trial

"The disparity of sentencing when it comes to life without Parole Sentences. That was never raised"
(Appendix C PG line

Because Petitioner did not raise issue at trial, court ruled it was not Preserved for appellate review and not considered on appeal. In support of its decision, court string cites cases of state Precedents which did not address question before court. Despite this, court ruled Ground was not exhausted and Procedurally barred.

Petitioner objected, citing state Precedent in support, renewing his request for discovery on this Point, and arguing merits of the issue. Petitioner argued the Pcr court did not address his argument on this issue and state Precedent cited "is directly on Point."

As explained by court, in denying appeal of court order previously denying discovery, issue is defaulted and Petitioner has not shown good cause and actual prejudice or a miscarriage of justice as required to excuse the default. In footnote 4 (Appendix B PG 9) court noted application list as an allegation "Prior conviction used to enhance unconstitutional". But ruled that:

> "However, challenging the constitutionality of the statute as it was applied in Petitioner's criminal case is different from alleging racial disparity in sentencing, as he does in the instant Petition.
>
> (District Court Order Appendix B)

or as respondent stated in Summary Judgment motion that:

> "The PCR Judge did not directly address the statistics. However, he did find that Petitioner had an opportunity to present arguments on the constitutionality of the statute on the trial level, and that Post-conviction relief was not a substitute for raising a claim at trial and on direct appeal."
>
> (Resp. Mo. Sum. Jud. PG 31)

While Petitioner conceded "there is no state court analysis of the issue", the adhered to circuit precedent in stating "this is further evidence this ground is procedurally defaulted." (App. B)

The question of how to address a silent state court opinion has fractured the circuit courts. Nevertheless, some clear decisions have emerged centering around two main questions (1) Whether a silent state court opinion counts as an "Adjudication on the merits" for

Purposes of Sec. 2254(d); (2) And whether federal courts should make an independent determination of the merits of Petitioner claim;

Because AEDPA statutory text is unclear as applied to silent state court opinions, we must look to Congress intent insofar as Congress had any discernable intent. MY analysis begins by addressing four (4) ways sister circuits have done so as follows:

1. De Novo Approach:

The 1st, 3rd circuits conduct De Novo review of silent state court opinions, because they have decided that a silent state court opinion is not an "Adjudication On The Merits" for Purposes of Sec. 2254(d). See, Di Benedetto v. Hall, 272 F.3d 1 (1st. Cir. 2001); Hameen v. Delaware, 212 F.3d 226 (3d. Cir. 2000)

First circuit has Provided the clearest statement of the rationale behind the approach it determined as "Critical Point" of sec. 2254 is the "adjudication on the merits" clause and ruled it should be applied separately to each individual claim and holding that:

> "If state court has not addressed the federal constitutional claim even by reference to state court decisions dealing with federal constitutional issues then we can not say that the constitutional claim was adjudicated on the merits within the meaning of sec. 2254 and therefore entitled to deferential review."
>
> Di Benedetto, id..

Driving this approach, is an admission of the frustrating impossibility of the situation "AEDPA" imposes on habeas courts. Requiring courts to defer to state court opinions, but habeas courts can hardly defer to the state court opinion on an issue that the state court did not address.

2. Split Approach:

Tenth, Eleventh circuits distinguish between types of silent opinions, engaging in De Novo review when the state court addresses a federal constitutional issue solely in state law terms, but conducting deferential review of summary denials. The rationale for distinguishing between the two kinds of silence is that, in the absence of countervailing evidence a federal court has no reason to assume the state court failed to apply governing law. See, Neil v. Gibson, 278 F.3d 1044 (10th Cir. 2001); Romine v. Head, 253 F.3d 1349 (11th Cir. 2001)

In addition, these circuits argue that federal courts should not insult state courts by telling them how to write their opinions. These arguments, however, do not outweigh a state prisoner important interest in reviewing federal constitutional claim.

There is inherent reason to believe that a state court issuing a summary denial has actually decided every factual issue properly presented by Petitioner. Even when state courts issue full opinions, they frequently deny federal constitutional claims on state law grounds without alluding to federal law. The reasons for ommissions are varied. Some state Judges may not understand some federal constitutional issues, and some might simply prefer to spend their time wrestling with difficult constitutional questions. Nearly all face political pressure, making it highly undesireable for them to grant relief on a federal constitutional claim.

More importantly, from the prospective of the federal habeas court whose duty is to determine the questions presented to it in accordance with AEDPA and the constitution, the problems posed by the summary denials and other silent opinions are the same. First, in the absence of a reasoned state court opinion, the federal court has no point of reference from which to make the reasonableness determination. Second, federal habeas requires that every prisoner get one full review of their properly presented claims, if this review does not take place in state court, then federal courts must provide it. But without a reasoned state court opinion, the federal court can have no assurance that state court ever reviewed the federal claim at all.

In two important respects, then, the distinction between different kinds of silence is ultimately a distinction without a difference.

3. Results-Not-Reasoning:

At the opposite end of the spectrum is the "Results-Not-Reasoning" approach of the Fourth circuit which accords extreme deference to a silent state court opinion. In Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2001), the Fourth circuit held that federal courts faced with a silent state court opinion should not make an independent determination of the merits of the claim before deciding whether state court result is reasonable. Bell, relied heavily on the contention that the "resulted in a decision" language of sec. 2254(d) signifies that a federal habeas court need not, and indeed should not, inquire into the reasonableness of the state courts reasoning, the Bell court contends that making an independent determination was essentially indistinguishable from conducting pre-AEDPA de novo review and therefore inconsistent with sec. 2254(d) and the Supreme Court opinion in Williams v. Taylor, 529 U.S. 362 (2000)

The Bell court reasoned, that when reviewing a summary state court decision a federal court must "independently review the record and applicable law" but it should not make an independent determination of whether a constitutional violation occurred first, further it must "Remain always mindful of the limited nature of its inquiry" Bell, id..

This approach is unsound in several important respects.

First, the Fourth circuit is wrong to imply that Williams stands for the Proposition that De Novo review is inappropriate in every case. Williams interpreted sec. 2254(d)(1) as applied to a Prisoner who Received a complete review and detailed opinions from the state courts. Williams does not foreclose, and in fact Provides support for De Novo approach when state court is silent with respect to federal claim.

Second, the "results-not-reasoning" logic on which the Fourth circuit Grounds its approach has serious flaws. The Fourth circuit logic has its Genesis in a 7th circuit decision written by Judge Posner in Hennon v. Cooper, 130 F.3d 330 (7th Cir. 1997) ruling that:

> "In order to avoid 'Placing the federal court in Just the kind of tutelary relation to the state courts that recent amendments were designed to end' federal court in habeas corpus Proceedings can not remand the case to the state appellate court for a clarification of that courts opinion, all that it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but but merely a failure of Judicial articulateness"
>
> Hennon, id..

This theory has captivated the circuit courts, many follow Hennon in at least some circumstances. The Hennon court decision suggest, all things being equal, that a federal habeas has no option but to defer blindly to the state court decision or else Grant habeas relief, but of course the court has another option: It can make an independent determination of the merits of the Prisoner constitutional claim. when the state does not Provide reasoning in support of its decision, an independent determination of the merits of the claim is crucial and at a minimum, necessary to Provide a benchmark for evaluating the reasonableness of the state court result at some Point in the Judicial Process. even a Person convicted of heinous crimes deserves rigorous and complete analysis of his constitutional claims. This is so because in many cases a thorough review exposes clear and unreasonable constitutional error in decisions that may appear reasonable upon cursory evaluation.

Courts employing this approach do not directly assess whether constitutional violations occurred. instead, they search the record for any Plausible factual and legal theory that could Justify a holding that the state court was reasonable, even though incorrect. However, it is the Job of the State's Attorney General not a federal habeas court, to invent arguments in support of upholding a state courts unexplained decision. Congress did not intend on the federal courts to apply such extreme deference to state court results.

4. <u>Intermediate Approach:</u>

The approach of 2nd, 9th circuits is more defensible than current circuit solutions, and is characterized by an intermediate level of deference. Although their approaches are somewhat different, both circuits first Perform an independent analysis to determine whether constitutional violations occurred, if so, these circuits Go on to decide sec. 2254(d)(1) deferential standard to Grant habeas relief. See. Morris v. Reynolds, 264 F.3d 38 (2nd Cir. 2001); DelGado v. Gail, 223 F.3d 976 (9th. Cir. 2000)

This approach avoids some of the serious Problems caused by the approaches of other circuits. unlike the 1st, 3ed circuits in Hameen, DiBenedetto, this approach does not involve a complicated

This approach avoids some of the serious Problems caused by the approaches of other circuits, unlike the Hameen. DiBenedetto of 1st. 3rd circuits. this approach does not involve a complicated interpretation of "adjudication on the merits" nor does it step outside the "Clearly established federal law" requirement. Unlike that of Bell in the fourth circuit. this approach retains a baseline from which to make the reasonableness decision. and unlike Neil. Romine of 10th. 11th circuits this approach does not involve making unjustified distinctions between different kinds of summary opinions. The DelGado court in Particular has spent much energy in mapping out middle Ground to accomodate both the intent of the Prisoner in obtaining one complete review of his federal constitutional claim and the federalism and comity concerns animating AEDPA.

In federal habeas litigation the Phrase "adjudicated on the merits" arises regularly in Procedural default doctrine. which ordinarily divides cases into two classes. Adjudication on the merits and dismissals on Procedural Grounds. at least in absence of countervailing evidence. Current Supreme court doctrine favors a Presumption that by employing the term "adjudicated on the merits". Congress intended to capture all decisions except denials on Procedural Grounds.

The DiBenedetto. Hameen in 1st. 3rd circuits. interpreted "adjudication on the merits" which conflicts with Supreme Court doctrine in the closely related area of exhaustion. In the exhaustion context. federal courts routinely deal with silent state court decisions and thus construe those decisions as denials on the merits. even in the face of strong evidence that a state court did not decide a federal claim at all. It is true that in other context. the Supreme Court has not always characterized a silent state court decision as an adjudication on the merits.

Nevertheless. because the exhaustion and silent state court opinion Problems are so similar. it makes sense to borrow from exhaustion doctrine and construe silent state court decisions as adjudicated on merits for Purposes of sec. 2254. There is also a Practical reason for rejecting the app-interpretation of "adjudication on the merits" nor does it step outside the "clearly established federal law" requirement. Unlike that of the fourth circuit in Bell, this approach retains a baseline from which to make the reasonableness decision, and unlike the 10th, 11th circuits in Neil, Romine. This approach does not involve making unjustified distinctions between different kinds of summary opinions. The Delgado court in particular has spent much energy in mapping out middle ground to accomodate both the intent of the prisoner in obtaining one complete review of his federal constitutional claim and the federalism and comity concerns animating AEDPA.

In federal habeas litigation the phrase "adjudicated on the merits" arises regularly in procedural default doctrine, which ordinarily divides cases into two classes (1) Adjudication on the merits; and (2) dismissals on procedural grounds; at least in absence in countervailing evidence. Current Supreme Court doctrine favors a presumption that employing the term "adjudicated on the merits", congress intended to capture all decisions except denials on procedural grounds.

Question Two:

Does the Due Process standard of Jackson v. Virginia require a court to consider evidence in deciding whether a reasonable fact finder could have found guilt beyond a reasonable doubt, as this court held in Jackson and the 1st, 5th, 7th circuits have likewise held or may a conviction based entirely on circumstantial evidence be upheld under Jackson, by considering only the evidence consistent with guilt and ignoring all other evidence refuting guilt as fourth circuit held in this case?

Petitioner constitutional claim for relief based on insufficient evidence should be evaluated in this case. In criminal cases, the trial is Paramount for determining defendant's Guilt or innocence. Where, as here, defendant has been afforded a fair trial and convicted of the offense for which he was charged, the constitutional Presumption of innocence disappears. Federal habeas courts do not sit to correct errors of fact, but to ensure that individuals are not imprisoned in violation of the constitution. See, Generally, Newman "Beyond Reasonable Doubt" 68 N.Y.U.L. Rev. 979(1993)

Petitioner seeks relief from Procedural errors so that he may bring constitutional claims challenging both conviction and sentence, but argues that he is entitled to habeas relief because evidence shows that his conviction is factually incorrect. Moreover, that the fourteenth Amendment due Process Guarantee supports Petitioner sufficiency of evidence claim entitles him to a new trial, or at least to a vacation of conviction or sentence, is Persuasive.

Because state legislative Judgments are entitled to substantial deference in the criminal Procedure area, criminal Process will be found lacking only where it offends some Principle of Justice so rooted in tradition and conscience as to be ranked as fundamental. See, Patterson v. New York, 432 U.S. 197(1977)

The Jackson v. Virginia, 443 U.S. 307(1979) constitutional rule is no longer tenable in habeas Jurisprudence. Moreover, I believe it is an unwise act of lawmaking. Despite its chimerical appeal as a counterPart to the venerable Principle recognized in In Re Windship, 397 U.S. 358(1970) Based on the circuit court of appeals decision, I am Persuaded that its Precipitous adoption has adversely affected the quality of Justice administered by habeas Judges. For that reason I shall analyze this Jackson brainchild with some care.

I shall begin by examining Jackson subjective and objective approach, by explaining why neither the record in this case, nor General experience with challenges to the sufficiency of the evidence supporting criminal convictions, supports, much less compels, the continued need for this subjective constitutional precept. Jackson, id. at 320 n.13..

1. Subjective Test:

In this case, the Jackson analysis fails on this count. The Jackson court portrays its rule as the logical corollary of the principle recognized in Windship regarding the subjective state of mind that persons charged with the responsibility of evaluating the credibility of evidence must posses before they find defendant guilty in a criminal case. But an examination of Windship reveals that it has nothing to do with appellate review, much less habeas corpus, review standards, that the reasoning used in that case to reach its conclusion with respect to the trier of fact does not support, and indeed counsels against, the court's conclusion with respect to federal judges in habeas court; and that there is no connection between Windship and the rule in Jackson decision.

In distinct contrast to the circumstances of this case, the facts of Windship presented "a case where the choice of the standard of proof has made a difference, the trial judge below forthrightly acknowledged that he believed by a preponderance of the evidence in, but was not convinced beyond a reasonable doubt" of the juvenile's guilt. Windship, id. at 369.. Because the trier of fact entertained such a doubt, this Court held that the juvenile was constitutionally entitled to the same verdict as adult defendants in a criminal case would receive. In so holding, the Court merely extended to juveniles a protection that had traditionally been available to defendants in criminal trials in this Nation. Windship, id. at 361..

But nothing in the Windship opinion suggests, all things being equal, that it also bore on appellate or habeas corpus procedures. Although it repeatedly emphasized the function of the reasonable-doubt standard as describing the requisite "subjective state of certitude" of the factfinder, it never mentioned the question of how appellate Judges are to know whether the trier of fact really was convinced beyond a reasonable doubt, or indeed, whether the factfinder was a "rational" Person or Group of Persons.

Moreover, the analysis employed in Windship finds no counterPart in Jackson opinion. For example, in Windship, the court Pointed out the breadth of both the historical and the current acceptance of the reasonable doubt standard. In Jackson, by contrast, the court candidly recognizes that the "Federal Count Of Appeals have "Generally" rejected the habeas standard it adopted in Jackson. id, at 317-18).

Windship relied on nine Prior opinions of this court that bore directly on the issue Presented. Windship, id, at 362. The Jackson court Purportedly relies on two Prior decisions, but as it Pointed out, neither of these cases itself applied a "reasonable doubt" standard on appeal to overturn conviction on appeal, neither Purported to be interpreting the Constitution, and neither expressed any view whatsoever on the appropriate standard in collateral Proceedings such as are involved in this case. As the Jackson Court noted, that it has repeatedly endorsed the "no evidence" test, and continues to do so after Windship was decided.

Having failed to identify the evil against which the rule is directed, and having failed to demonstrate how it follows from the analysis typically used in due Process cases of this character, the court Placed all of its reliance on a dry, and in my view incorrect syllogism. If Windship requires the factfinder to apply a reasonable doubt standard, then logic requires a reviewing Judge to apply a like standard.

It is true that in Practice there may be little or no difference between a record that does not contain at least some evidence tending to Prove every element of the offense charged and a record containing so little evidence that no rational trier of fact could be Persuaded of Guilt beyond a reasonable doubt

In my view this task is inconsistent with the Prohibition added by Congress to habeas statutes Pre-AEDPA in order to forestall undue federal interference with state Proceedings. It seems to me that if "logic" allows this choice after Windship it should also allow the Presumption that the Court has Rejected that trial Judges and Juries will act rationally and honestly in applying the reasonable-doubt standard, at least so long as the trial is free of Procedural error and the record contains evidence tending to Prove each of the elements of the offense. See, Foy v. Donnelly, 959 F.2d 1307 (5th Cir. 1992) Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995) Morgan v. Dickhaut, 677 F.3d 39 (1st Cir. 2012)

But the Jackson opinion should not obscure the fact that its rule is not logically compelled by the analysis or the holding in Windship or in any other Precedent, or the fact that rule Reflects a Policy choice rather than application of Pre-existing rule of law.

2. <u>Objective Test:</u>

Ultimately, the Jackson standard is the objective standard for testing the overall evidence, direct and circumstantial, for reasonable doubt. See, Knox v. Butler, 884 F.2d 849 (5th Cir. 1989)

The adoption of this novel constitutional rule is necessary for the decision of this case. It is of course, Part of this court's tradition that new rules of law emerge from the Process of case-by-case adjudication of constitutional issues. Widespread concern that existing constitutional doctrine is unjust often Provides the occasion, and is sometimes even Relied upon as a Justification, for the excercise of such lawmaking authority by the court. Without entering the debate over the legitimacy of this Justification for Judicial action, it at least certain that it should not be the basis for dramatic, indeed, for any constitutional lawmaking efforts unless (1) those efforts are necessary to the decision of the case at hand and (2) Powerful reasons favor a change in the law. See, Ashwander v. TVA, 297 U.S. 288 (1935)

The question is what showing should be required to obtain relief on the merits of a fourteenth Amendment claim of sufficiency of evidence. I agree with Jackson majority that

> "in state criminal Proceedings the trial is Paramount event for determining the Guilt or innocence of the defendant"
> Jackson, id, at 314 ..

I also think that a truly Persuasive demonstration of "Sufficiency Of Evidence" made after trial would render the conviction of a defendant unconstitutional. Thus, question is what "A truly Persuasive demonstration entails"? a question this court is being called upon to answer.

In articulating the "Sufficiency Of Evidence" exception in habeas Jurisprudence, two of this courts standards in Sawyer v. Whitley, 505 U.S. 333 (1992); Murray v. Carrier, 477 U.S. 478 (1986) requiring the Petitioner to show a "fair Probability that, in light of all the evidence, the trier of the facts would have entertained a reasonable doubt" Murray, id, at 496.. In other words, the habeas Petitioner must show that there Probably would be a reasonable doubt. Thus, considering whether a Prisoner is entitled to relief on an sufficiency of Evidence claim, a court should take all the evidence into account, Giving due regard to its reliability. Sawyer, id, at 339

Petitioner constitutional claims are based on (1) Prosecution Attacking His Credibility; (2) Failure Of trial court to charge Mistake Of Law And Facts; (3) Submission Of Indictments To Prove Elements Of the Offense; denied him the full Panoply of Protections afforded to criminal defendants by the Constitution.

This Court has repeatedly noted the interplay between statutory language and Judicially managed equitable considerations in developing this habeas corpus Jurisprudence. This analysis begins as follows:

For example, in Sawyer this court held that a Petitioner otherwise subject to the defenses of abusive or succesive use of the writ may have his federal constitutional claim considered on the merits if he makes a Proper showing of actual innocence.

This rule, or fundamental miscarrige of Justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

But this body of habeas Jurisprudence makes clear that a claim of "actual innocence" is not itself a constitutional claim, but instead a gateway through which a habeas Petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Sawyer examined the miscarrige of Justice standard as applied to a Petitioner who claimed he was "actually innocent of the death Penalty". In that opinion, the Court struggled to define "actual innocence" in the context of a Petitioner's claim that his death sentence was inappropiate. The Court concluded that such actual innocence "must focus on those elements which render a defendant eligible for the death Penalty" Sawyer, id. at 347..

However, in addition to defining what it means to be "innocent" of the death Penalty, the court departed from Carrier's use of "Probably" and adopted a more exacting standard of Proof to govern these claims. This Court held that a habeas Petitioner

> "must show by clear and convincing evidence that but for constitutional error, no reasonable Juror would have found the Petitioner eligible for the death Penalty"
> id. at 336..

Therefore, Sawyer has no application to a Petitioner who claims that he is actually innocent of the crime. Even the high standard of Proof set forth in Sawyer falls short of the Jackson standard governing habeas review of claims of insufficiency of the evidence.

Carrier for example, the Court stated that the Petitioner must show that the constitutional error "Probably" resulted in the conviction of one who was actually innocent. Similarly, writing for the court in Carrier, Justice O'Conner observed that the court adopted the cause and Prejudice standard in Part because of its confidence that that would Provide adequate Protection to "victims of a fundamental miscarrige of Justice." Carrier, id. at 495-96..

For that reason, " in appropiate cases" the Principles of comity and finality that inform the concepts of cause and Prejudice must Yield to the imperative of correcting a fundamentally unjust incarceration. id. at 495.. The overriding importance of this Greater individual interest merits Protection by imposing a somewhat less exacting standard of Proof on a habeas Petitioner alleging a fundamental due Process violation than one alleging that his sentence is too severe. As this court has noted

> " A standard of Proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a Particular type of adjudication."
>
> Windship, id. at 370..

This standard of Proof thus reflects, the relative importance attached to the ultimate decision. Though the Sawyer standard was fashioned to reflect the relative importance of a claim of an erroneous sentence, application of that standard to Petitioner's case would Give insufficient weight to the correspondingly Greater injustice that is implicated by an insufficiency of evidence claim.

Carrier requires the habeas Petitioner to show that "a constitutional violation has Probably resulted in the conviction of one who is actually innocent". Carrier, id. at 496.. To establish the requisite Probability, Petitioners must show that it is more likely than not that no reasonable Juror would have convicted based on circumstantial evidence.

Hence, Petitioner's are required to make a stronger showing than that needed to establish Prejudice. At the sametime, the showing of "more likely than not" imposes a lower burden of Proof than the "clear and convincing" standard required under Sawyer. The Carrier standard thus ensures that Petitioner's case is truly extraordinary, while still Providing a meaningful avenue by which to avoid a manifest injustice.

Carrier requires a Petitioner to show that he is "actually innocent". As used in Carrier, actual innocence is closely related to the definition set forth by this court in Jackson. Sev-erable observations about this standard are in order.

Carries is intended to focus the inquiry on actual innocence. In assessing the ad-equacy of Petitioner's showing, therefore, the district court is not bound by the rules of ad-missibility that would Govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the Probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the Carrier standard, Judge Friendly's description of the inquiry is appropiate. The habeas court must make its deter-mination concerning the Petitioner's innocence.

> "In light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unre-liability to it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."
>
> Friendly, Is Innocence Irrelevant? Collateral Attack On Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970)

Therefore, Carrier reflects the Proposition firmly established in our legal system, that the line between innocence and Guilt is drawn with reference to a reasonable doubt. Thus, whether a court is assessing eligibility for the death Penalty under Sawyer, or is deciding whether a Petitioner has made the requisite showing of innocence under Carrier, the analysis must incorporate the understanding that Proof beyond a reasonable doubt marks the legal boundary between Guilt and innocence.

The meaning of actual innocence as formulated by Sawyer and Carrier, does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable Juror would have found the defendant Guilty. It is not the district courts independent Judgment as to whether reasonable doubt exists that the standard addresses, rather the standard requires the district court to make a Probabilistic determination about what reasonable Properly instructed Jurors would do. Thus, a Petitioner does not meet the threshold requirement unless he Persuades the district court that, in light of the evidence, no Juror, acting reasonably, would have voted to find him Guilty beyond a reasonable doubt.

Finally, the Carrier standard requires a Petitioner to show that it is more likely than not that "no reasonable Juror" would have convicted him. The word "reasonable" in that formulation is not without meaning. It must be Presumed that a reasonable Juror would consider fairly all of the evidence Presented. It must also be Presumed that such a Juror would conscientiously obey the instructions of the trial court requiring Proof beyond a reasonable doubt.

Though the Carrier standard requires a substantial showing, it is by no means equivalent to the Jackson standard that Governs review of claims of insufficient of evidence.

Jackson standard focuses on whether any rational trier of fact could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The Jackson standard thus differs in at least two important ways from the Carrier standard. First, under Jackson the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the Gateway standard described today, the evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments.

Second, and more fundamentally, the focus of the inquiry is different under Jackson than under Carrier. Under Jackson, the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion. Under Carrier, the use of the word "would" focuses the inquiry on the likely behavior of the trier of fact.

Indeed, adoption of the phrase "more likely than not" reflects this distinction. Under Jackson, the question whether the trier of fact has power to make a finding of guilt requires a binary response. Either the trier of fact has the power as a matter of law or it does not.

Under Carrier, in contrast, the habeas court must consider what reasonable triers of fact are likely to do. Under this probabilistic inquiry, it makes sense to have a probabilistic standard such as "more likely than not". Thus, though under Jackson the mere existence of sufficient evidence to convict would be determinative of Petitioner's claim, that is not true under Carrier.

I would hold that, to obtain relief on a claim of insufficiency of evidence, the Petitioner must show that he is probably innocent. The standard is supported by several considerations. First, it requires a showing of constitutional error in the trial process, which for reasons already explained, is appropriate when Petitioner makes a substantive claim of insufficiency-of-evidence. Second, it draws its "no reasonable Juror" from the standard enunciated in Jackson. Third, reference to Windship is intended merely to demonstrate that is quite consistent with court Jurisprudence to give content through a burden of proof to the understanding that fundamental injustice would result from the erroneous conviction of an innocent Person. Fourth, the question of "objective unreasonableness" is one of federal law.

As such, Carrier "Probably Resulted" standard rather than the more stringent Sawyer must Govern habeas insufficiency-of-evidence inquiries.

<u>Question Three:</u> -

<u>Was Court Of Appeals ruling legislature's decision to treat recidivism, in Particular, as a element of the crime rather than Sentencing factor exceed constitutional limits on legislature's Power to define elements of an offense error, or is, South Carolina Code Ann. Sec. 16-11-311(a)(2) exceeding Constitutional limits under Blakely v. Washington, Apprendi v. New Jersey when court and not Jury imposed Sentence, or does, this court have a tradition of treating recidivism as an element of the related crime</u>

Court of Appeals ruled, that Petitioner claim regarding use of Prior conviction fails on the merits. Petitioner argued two Prior convictions had no relevance to the question of Guilt, court ruled this was error, and that one of the ways Prosecution can establish first degree burglary in South Carolina is if the burglary is committed by a Person with a "Prior record of two or more convictions for burglary or housebreaking or a combination of both" South Carolina Code Ann. Sec. 16-11-311(a)(2)

The court further ruled, such evidence is relevant in the Guilt Innocence Phase of a trial for this offense, since Prior convictions are an element of first degree burglary.

An indictment must set forth each element of the crime it charges. See, Hamling v. United States, 418 U.S. 87 (1974). But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime within limits McMillan v. Pennsylvania, 477 U.S. 79 (1986). the question of which factors are which is normally a matter for legislature. See, Staples v. United States, 511 U.S. 600 (1994)

We therefore look to the statute before us and ask what state legislature intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to statute's language, structure, subject matter, context, and history - factors that typically help courts determine a statute's objectives and thereby illuminate its text. See, United States v. Wells, 519 U.S. 482 (1997)

Although the statute's language forces a close reading of the text, as well as consideration of other interpretive circumstances Wells supra, we believe that the answer to the question presented, whether legislature intended subsection (a)(2) to set forth a sentencing factor or a separate crime is reasonably clear. At the outset, we note that the relevant statutory subject matter is recidivism. That subject matter - prior commission of a serious crime is as typical a sentencing factor as one might imagine.

Perhaps reflecting this fact, the state court in State v. Washington, 526 S.E.2d 709 (2000) has uniformly interpreted statute as setting forth sentencing factors, not as creating an element of offense.

We must also consider several additional arguments that have been or might be made for a contrary interpretation of the statute. Before analyzing statute, two Prefatory comments must be made.

First, one might try to derive legislature's intent to establish a separate element of crime from the magnitude of the increase in the maximum authorized sentence. The magnitude of the change that General Assembly made in 1985, however, Proves little.

Second; Respondent and court Point, in Part, to statutory language that existed when Petitioner was convicted in 2008. This statute does not reflect any direct focus by General Assembly upon the meaning of the earlier enacted statute. See, Federal Housing Administration v. Darlington, Inc. 358 U.S. 84 (1958) Consequently, one can not find in them any forward looking legislative mandate, Guidance, or direct suggestion about how courts should interpret Provision. Regardless, it is not obvious that subsection (2) to which Petitioner Points created an element of substantive offense, a matter on which views will be expressed later herein, nor, in aiding them, did legislature do more than leave the legal question here where it found it.

Finally, the contrary interpretation a substantive criminal offense risks unfairness. If subsection (a)(2) sets forth an element of crime, the State would be required to Prove to the Jury that the defendant was Previously convicted for "two or (more) Prior burglary".

As this court has long recognized, the introduction of evidence of a defendant's Prior crimes risks significant Prejudice. See, Spencer v. Texas, 385 U.S. 554 (1967) {evidence of Prior crimes is Generally recognized to have Potentiality for Prejudice}. Even if a defendant's stipulation were to keep the name and details of the Previous offense from the Jury, Old Chief v. United States, 519 U.S. 172 (1997) Jurors would still learn from the indictment, the Judge, or the Prosecutor, that the defendant had committed a Prior burglary. And, as this court held in Old Chief that:

"there can be no question that evidence of the ... nature of the Prior offense, here, that it was aggravated or serious carries a risk of unfair Prejudice to the defendant"

Old Chief, id, at 185..

Like several Federal Court Of Appeals, opinions suggest, other things being equal, that General Assembly would have created this kind of unfairness in respect to facts that are almost never contested. See, Lane v. Warden, 320 F.2d 179 (4th Cir. 1963); United States ex rel. Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962); United States v. Lurz, 666 F.2d 69 (4th Cir. 1981)

Although the 1985 amendment did have the effect of creating a new element in subsection (A)(2) which Provides for enhanced sentence, that did not exist before 1985 amendment Parallel with its counterparts later enacted subsections. Neither the amendments language, nor legislative history of the 1985 act, suggest, other things being equal, that in this housekeeping measure, General Assembly intended to clarify the fundamental relation between the subsections. Washington, id,.

Invoking several of the courts Precedents, respondent and court claim that the Constitution Justified, treating recidivism as an element of the offense irrespective of General Assembly contrary intent. Doing so, respondent and court suggest, other things being equal, this requirement carries with it three subsidiary requirements that the Constitution mandates in respect to ordinary, legislatively intended, elements of crimes (1) indictment must state the element; (2) Government must Prove that element to a Jury; (3) Government must Prove the element beyond a reasonable doubt; Hamling, id, at 117;. No sufficient support, however, in this courts Precedents or elsewhere can be found supporting respondent or court.

This Court has explicitly held that Constitution's Due Process Clause "Protects the accused against conviction except upon Proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Windship, id. But Windship, the case in which the Court set forth this Proposition of constitutional law, does not decide this case. It said that the Constitution entitles Juveniles, like adults, to the benefit of Proof beyond a reasonable doubt in respect to the elements of the crime. It did not consider whether, or when, the Constitution requires the State to treat a Particular fact as an element, as a fact necessary to constitute the crime, even where the crime-defining statute does not do so.

A reading of this court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), appears to support Petitioner. The Mullaney court struck down a state homicide statute under which the state Presumed that all homicides were committed with "malice" Punishable by life imprisonment, unless the defendant Proved that he acted in the heat of Passion. Mullaney, id. at 688,.

This court's later case, Patterson v. New York, supra, however, makes absolutely clear that such a reading of Mullaney is wrong. The Court, in Patterson, Pointed out that the State in Mullaney made the critical fact the absence of "heat of Passion" not simply a Potential sentencing factor, but also a critical Part of the definition of "malice aforethought" which was itself in turn Part of the statute's definition of the homicide the crime in question. Patterson, id. at 215-16,.

But that basis for dispensing with the Protections of Jury trial and findings beyond a reasonable doubt was explicitly Rejected in Mullaney, which accorded these Protections to facts that were not

> General elements of the crime of felonious homicide
> ....[but bore] only on the appropiate Punishment category"
> Mullaney, id. at 699,.

Whatever else Mullaney stands for, it certainly stands for the Proposition that what Graham v. West Virginia, 224 U.S. 616 (1912) used as the line of demarcation for double

Jeopardy and some due Process Purposes (the matter "Goes only to the Punishment") is not the line of demarcation for Purposes of the right to Jury trial and to Proof beyond a reasonable doubt. See, Blakely v. Washington, 542 U.S. 296 (2004) Apprendi v. New Jersey, 530 U.S. 466 (2000)

So also does McMillan, which even while narrowing Mullaney made it very clear that the mere fact that a certain finding "Goes only to the Penalty" does not end the inquiry. This court Precedents, that the distinctive treatment of recidivism determinations for double Jeopardy Purposes takes some explaining, but it takes some explaining for respondent, court no less than for me. And the explanation assuredly is not what this court Precedents suggest, that all things being equal, recidivism is never an element of the crime. It does much violence to this court's Jurisprudence, and to the traditional Practice of requiring a Jury finding recidivism beyond a reasonable doubt, to explain Graham as a recidivism exception to the normal double Jeopardy rule that conviction of a lesser included offense bars later trial for the Greater crime, and that Practice has allowed recidivism to be charged and tried separately. Spencer, id. Graham, id..

In assessing Petitioner's claim, we must examine McMillan to determine the various features of the case upon which the Court's conclusion arguably turned. The McMillan court Pointed out:

1) that the statute Plainly does not transgress the limits expressly set out in Patterson;

2) that the defendant (unlike Mulloney's defendant) did not face a differential in sentencing range from a nominal fine to a mandatory life sentence;

3) that the statute did not alter the maximum Penalty for the crime, but operates solely to limit the sentencing court's discretion in selecting a Penalty within the range available to it;

4) that the statute did not create a separate offense calling for a separate Penalty; and,

5) that the statute Gave no impression of having been tailored to Permit the visible Possession finding to be a tail which wags the dog of the substantive offense, but to the contrary, simply took one factor that has always been considered by sentencing courts to bear on Punishment and dictated the Precise weight to be Given that factor. McMillan, id, at 88-90,.

This case resembles McMillan in respect to most of these factors. But it is different in respect to the third factor. for it does not "alter the maximum Penalty for the crime" McMillan, id, at 87; and it also creates a wider range of appropriate Punishment like statute in McMillan. We nonetheless conclude that these differences do not change the constitutional outcome for several basic reasons:

First, the sentencing factor at issue here recidivism is a traditional, if not the most traditional, basis for a sentencing courts increasing an offender's sentence. See, e.g., Parke v. Raley, 506 U.S. 20 (1992) (Recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States); South Carolina Code Ann. Sec. 17-25-45(A) (Cum. Supp. 18)

Consistent with this tradition, the court said long ago that a State need not allege a defendant's Prior conviction in the indictment or information that alleges the elements of the underlying crime, even though the conviction was "necessary to bring the case within statute" Graham, id, at 624,. That conclusion followed, the Court said

> "from the distinct nature of the issue and the fact that recidivism does not relate to the commission of the offense but Goes to the Punishment only and therefore ... may be subsequently decided"
>
> Graham, id, at 629,.

The court has not deviated from this view. See, Oyler v. Boles, 368 U.S. 448 (1962) As stated Previously, General Assembly reflecting this tradition, has never, to my research, made a defendant's recidivism an element of an offense where the conduct Proscribed is otherwise unlawful. Washington, id, at 710-11,.

Although this Precedent does not foreclose Petitioner's claim, because the statute at issue in Graham and Oyler Provided for a Jury determination of disputed fact i.e., (Prior convictions) to hold that the constitution requires recidivism be deemed an "element" of Petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as "Going to the Punishment only" Graham, id,.

Second, the major difference between this case and McMillan consists of the circumstance that the sentencing factor at issue here (Prior conviction) triggers an increase in the maximum Permissive sentence, while the sentencing factor at issue in McMillan triggered a mandatory minimum sentence. Yet that difference between a Permissive maximum and mandatory minimum does not systematically, or normally, work to the disadvantage of a criminal defendant.

Although McMillan Pointed to a difference between mandatory minimums and higher authorized maximums, it neither "rested its Judgment" on that difference, nor, "rejected" the above analysis. Rather, McMillan said that the Petitioner's argument in that case would have had "more superficial appeal" if the sentencing fact "exposed them to Greater or additional Punishment" McMillan, id,.

For the reasons Just Given, and in light of the Particular sentencing factor at issue in this case recidivism, we should take McMillan's statement to mean more than it said, and therefore make a determinative difference here.

A determination of the best recidivist trial procedure necessarily involves a consideration of a wide variety of criteria, such as which method provides most adequate notice to the defendant and an opportunity to challenge the accuracy and validity of the alleged prior convictions, which method best meets the particular jurisdiction's allocation of responsibility between court and jury, which method is best accommodated to the state's established trial procedures, and of course which method is apt to be the least prejudicial in terms of the effect of prior-crime evidence on the ultimate issue of guilt or innocence.

To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions, 33 N.Y.U.L. Rev. 210 (1958) Lane, id, and which we present this matter in a legislative rule-making context, is a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment.

Two part jury trials are not rare in this court's jurisprudence. Blakely, id, Apprendi, has been compelled by this court as a matter of constitutional law.

It seems to me that the use of prior-convictions evidence in these circumstances is fundamentally at odds with traditional notions of due process, not because this procedure is not the nicest resolution of conflicting but legitimate interest of the state and the accused, but because it needlessly prejudices the accused without advancing any legitimate interest of the state. If I am wrong in thinking that the introduction of prior-crime evidence serves no valid purpose I am not alone, for the Court never states what interest of the State is advanced by this procedure. And this failure, in my view, undermines the logic of the court's opinion.

There is much said about the valid purpose of enhanced punishment for repeating offenders, with which I agree, and about the variety of occassions in criminal trials in which prior-crime evidence is admitted as having some relevance to the question of Guilt or innocence. But I can not find support for this Procedure in either the Purposes of recidivist statute or by analogy to the traditional occasions where Prior - crime evidence is admitted. And the court never faces up to the Problem of trying to Justify this recidivist Procedure on the Ground that the State would not violate due Process if it used Prior convictions simply as evidence of Guilt because it showed criminal Propensity.

Whether or not respondent has recidivist statutes on its books, it is well established that evidence of Prior convictions may not be used by the state to show the accused has a criminal disposition and that the Probability that he committed the crime currently charged is increased.

While this Court has never held that the use of Prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, this court's decisions exercising supervisory Power over criminal trials in federal courts, Michelson v. United States, 335 U.S. 469 (1948) as well as decisions by courts of appeals and of state courts, Lovely v. United States, 169 F.2d 386 (4th Cir. 1948); People v. Molineux, 168 N.Y. 264 (1901) suggest that evidence of Prior crimes introduced for no Purpose other than to show criminal disposition would violate the Due Process Clause. See, E.G., Other Crimes Evidence at Trial: of Balancing and other Matters, 70 Yale. L. J. 763 (1961).

Evidence of Prior convictions has been forbidden because it Jeopardizes the Presumption of innocence of the crime currently charged. A Jury might Punish an accused for being Guilty of a Previous offense, or feel that incarceration is Justified because the accused is a bad man without regard to his Guilt of the crime currently charged. Of course it flouts human nature to suppose that a Jury would not consider a defendant's Previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson Put it in a famous Phrase

"the naive assumption that PreJudicial effects can be overcome

by instructions to the Jury --- all Practicing lawyers know
to be unmitigated fiction."
Krulewitch v. United States. 336 U.S. 440 (1949)

The availability of this Procedural alternative, through which the interests of the state as reflected in its recidivists statutes can be fully effectuated while Prejudice to defendant is avoided, means that the only interest the state may offset against the Possibility of Prejudice to Justify introducing evidence of Prior crimes in this case is the inconvience which would result from Postponing a determination that the defendant falls within a recidivist category until the Jury has found him Guilty of the crime currently charged.

However, for the Purpose of deciding this case, it is necessary to consider whether the State's convience in not conducting a two-stage trial Justifies the Prejudice which ensues when Prior convictions are Presented to a Jury before it has decided whether defendant Guilty of the crime currently charged. For the fact is under Watson v. State. 338 S.E.2d 636 (1985); Chubb v. State, 401 S.E.2d 159 (1991) this method could as argued by Petitioner be used to find facts regarding Prior convictions to balance against the Prejudice which ensues from the admission of this Prior-conviction evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lowell Wallace

Date: February 28th, 2019