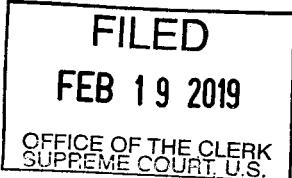


ORIGINAL
No. 18-8424



IN THE
SUPREME COURT OF THE UNITED STATES

KEITH JENKINS - PETITIONER

vs.

DARREL VANNOY, Warden -- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR CERTIORARI

Keith Jenkins #407412, *Petitioner-Appellant*
Camp C Bear 3, Louisiana State Prison
Angola, Louisiana 70712

Prepared By:

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QUESTION(S) PRESENTED

Is The Trial Court In Error By Denying The Motion To Quash Based On Errors In The Multiple Offender Charging, Pleading And Proof? Did The Multiple Bill Proceeding Deny Keith Jenkins Due Process Of Law?

Does It Violate The Eight Amendment Prohibition Against Cruel And Unusual Punishment Or The Louisiana's Constitution's Prohibition Against Excessive Punishment To Sentence An Addicted Defendant To The Maximum Sentence Of Life Imprisonment Without Benefit Of Probation Or Parole, For Crime Association With The Addiction? Would A Sentence Of Twenty To Thirty Was More Appropriate To The Offense And Offender?

Did Jenkins' Trial Counsel Rendered Ineffective Assistance In Violation Of The Fifth, Sixth And Fourteenth Amendments To The United States Constitution And Article I, §§ 2, 13 And 16 Of The Louisiana Constitution Of 1974?

LIST OF PARTIES

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:

Keith Jenkins, Petitioner-Appellant

Darrel Vanney, Respondent-Appellee

Leon A. Cannizzaro, Jr., D.A., Attorney for Respondent-Appellee

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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 B to the petition and is

reported at Doc No. 17-30842; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

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

reported at USDC 2:16-CV-6645; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix C attached to the writ of habeas corpus and is

reported at State ex rel. Keith Jenkins, 204 So.3d 182 (La. 2016); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix ____ To the petition and is

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **November 21, 2018**.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals 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. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was **May 2, 2016**.
A copy of that decision appears at **Appendix C attached to the writ of habeas corpus**.

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

Constitution

La. Const. Art. I, § 15 (1974)	9
Article I, § 15 of the Louisiana Constitution of 1974	10
Fifth, Sixth And Fourteenth Amendments To The United States Constitution	31
Article I, §§ 2, 13 And 16 Of The Louisiana Constitution Of 1974	31

Statutory

La. R.S. 15:529.1	9
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La. R.S. 14:95.1	26
La. C.E. Art. 404(B)(1)	26
La. C.Cr.P. Art. 920	26

STATEMENT OF THE CASE

1. *Course of Proceedings*

On February 12, 2008, Jenkins was charged with one count of possession with intent to distribute cocaine, and one count of felon in possession of a firearm. Jenkins' Motion to Suppress Evidence was denied and the trial court found probable cause.¹

Just as trial was set to begin, trial counsel, Donald Donnelly (hereinafter "Donnelly"), stated for the record that the State had offered Jenkins a plea offer of ten years without any enhancements. On Donnelly's advice, Jenkins rejected the offer.² On count one, Jenkins' prior criminal history was not admissible at trial, however, Jenkins' criminal history was admissible as to count two. Even so, Donnelly failed to file a motion to sever the two charges, and Jenkins proceeded to jury trial on both counts. One count one, the jury returned the responsive verdict of guilty of attempted possession with intent to distribute cocaine against Jenkins. As to count two, Jenkins was found guilty as charged.³ Jenkins' motions for New Trial and Post Judgment Verdict of Acquittal were denied.⁴

Initially, the trial court sentenced Jenkins to fifteen years on both counts to be served concurrently.⁵ On May 21, 2009, the court denied Jenkins' motion to reconsider sentence, but granted his motion for appeal.⁶ On May 6, 2009, the State filed a Multiple Bill of Information against Jenkins, alleging that he was a quadruple offender.⁷ Jenkins sought to quash the multiple bill of information, however, his motion was denied.⁸

1 See La. R.S. 40:967; La. R.S. 14:95.1; Habeas Corpus Appendix "2", Habeas Corpus Appendix "4" p. 22

2 See Habeas Corpus Appendix "19", pp. 2-3.

3 See Habeas Corpus Appendix "19" p. 62.

4 See Habeas Corpus Appendix "18" pp 3-4.

5 See Habeas Corpus Appendix "4" pp. 28-29; Appendix "18" p. 5.

6 See Habeas Corpus Appendix "4" pp. 28-29; Appendix "18" pp. 6-7.

7 See Habeas Corpus Appendix "4" p. 3.

8 See Habeas Corpus Appendix "4" pp. 28-29, 43; Appendix "18" pp. 27-31.

On May 21, 2009, Jenkins was adjudicated as a fourth felony offender as to count one. The court vacated the previously imposed sentence of fifteen years at hard labor and sentenced Jenkins to Life imprisonment at hard labor without the benefits of probation, parole or suspension of sentence. The trial court again Jenkins' motion to reconsider sentence.⁹

On May 21, the trial court granted Jenkins motion for appeal and designation of record, returnable on or before July 21, 2009.¹⁰ The Louisiana Appellate Project attorney, Sherry Waters, (hereinafter "Water"), was appointed to represent Jenkins on direct appeal.

On January 4, 2010, Waters filed a brief on Jenkins' behalf in the Fourth Circuit Court of Appeal, and on January 22, 2010, the State filed its opposition brief. On July 21, 2010, the appellate court affirmed Jenkins' convictions and sentences, but remanded for the imposition of a mandatory fine as to count two. Jenkins then timely sought the discretionary review of the Louisiana Supreme Court which was denied on February 18, 2011.¹¹

On May 3, 2012, Jenkins timely filed an Application for Post Conviction Relief. On September 11, 2014, Jenkins received a copy of the minute entry reflecting the trial court's denial of his Application for Post Conviction Relief. On September 18, 2014, Jenkins filed a Notice of Intent with the trial court requesting a return date in which to seek writs from the denial of his Application for Post Conviction Relief.

On September 25, 2014, Jenkins filed a timely application for supervisory writ of review to the Fourth Circuit Court of Appeal, which was denied on May 6, 2015. Jenkins again filed an application for writ of certiorari to the Louisiana Supreme Court. On May 2, 2016, the Louisiana Supreme Court declined to invoke its supervisory power and denied Jenkins' writ application.

9 See Habeas Corpus Appendix "4" pp. 28-29; Appendix "18" pp. 27-31.

10 See Habeas Corpus Appendix "4" pp. 28-29.

11 See *State v. Jenkins*, 2009-1665 (La. App. 4th Cir. 7/21/10), 39 So.3d 859; *writ denied*, 2010-1926, (La. 2/18/11, 57 So.3d 330).

Petitioner filed an Application for Writ of Habeas Corpus. On September 12, 2017, the U.S. District Court, Eastern District of Louisiana, denied Petitioner's Application for Writ of Habeas Corpus. This was received on September 15, 2017. On October 5, 2017, Petitioner filed a *Notice Of Appeal & Request To Proceed In Forma Pauperis*. This was granted and Petitioner is timely filing his Certificate of Appealability within the required time.

2. *Facts of the Offense*

Detective Andrew Roccaforte testified that on February 12, 2008, around 2:00 p.m., he and several officers were conducting surveillance in the 1300 block of Alabo Street, in New Orleans. Detective Roccaforte stated that he observed a black male, later identified as Keith Jenkins, standing on the downtown sidewalk. With the aid of binoculars, Detective Roccaforte testified that he observed a red vehicle park at the location where Jenkins was standing.¹² Detective Roccaforte further testified that the driver of the car approached Jenkins and he observed what appeared to be a drug transaction between Jenkins and the unknown male. The driver of the red vehicle was never identified by officers because they did not stop him, although allegedly he gave Jenkins an undetermined amount of currency in exchange for narcotics.¹³

Detective Roccaforte stated that as he continued his observation, he saw Jenkins enter an alleyway. As he continued to watch, Detective Roccaforte stated that Jenkins returned to the street holding his waistband and acting nervously. The Detective stated that a silver PT Cruiser pulled up to the curb, and he watched as Jenkins entered the vehicle on the passenger side. Detective Roccaforte testified, that based on his suspicion, he initiated a stop of the silver vehicle.¹⁴

12 See Habeas Corpus Appendix "19" pp. 9-11.

13 See Habeas Corpus Appendix "19" pp. 10-11.

14 See Habeas Corpus Appendix "19" pp. 10-12.

According to Detective Roccaforte's testimony, when the traffic stop was initiated, Jenkins exited the vehicle and began to run away from the police. Detective Roccaforte stated that he was following the actual chase in his vehicle to keep an eye on Jenkins as he attempted to flee, and that Jenkins did not know that he (Detective Roccaforte) was pursuing him.¹⁵

During his testimony at, Detective Roccaforte stated that he observed Jenkins discard a gun and a white object in the vacant lot overgrown with knee length grass.¹⁶ However, the other officers that were allegedly in pursuit of Jenkins, never reported seeing Jenkins discard or toss any items. After Jenkins was restrained by other officer's, Detective Roccaforte testified that he returned to empty lot and recovered a weapon and drugs that he allegedly observed Jenkins toss. According to Detective Roccaforte's testimony, it took him thirty seconds to one minute to locate the contraband, although it was allegedly thrown into knew-high grass.¹⁷ The police officer's field-tested the suspected cocaine and it tested positive. The weapon was not examined for latent prints or DNA.¹⁸

Officer Joseph Pollard testified that he took Jenkins' fingerprints in court and matched them to fingerprints from an arrest register, because, two prints on the conviction documents were not suitable for identification.¹⁹ Without objection from Jenkins' trial counsel, the officer testified that Jenkins was the same person who previously pled guilty to possession of cocaine. During his testimony, Jenkins admitted to his past convictions for possession of cocaine, and his history of substance abuse. Jenkins told the jury that he has been sober since 2004.²⁰ Jenkins testified that he did not run from the officer's and that the allegations against him were not true.²¹ Jenkins testified that at the time of his arrest, he resided in Baton Rouge, and worked for Isidore and Sons Cement Company in Gonzales.²² Jenkins

15 See Habeas Corpus Appendix "19" p. 13.

16 See Habeas Corpus Appendix "19" p. 14.

17 See Habeas Corpus Appendix "19" p. 23.

18 See Habeas Corpus Appendix "19" pp. 23-24.

19 See Habeas Corpus Appendix "19" pp. 4-6.

20 See Habeas Corpus Appendix "19" p. 48

21 See Habeas Corpus Appendix "19" p. 49.

22 See Habeas Corpus Appendix "19" p. 50.

testified that he was in the area that day, because, he went to check on his mother's house located at 1503 Benton Street.²³ Jenkins said that he was in the silver PT Cruiser with three other people, two of whom were in court during trial.²⁴ Jenkins' trial counsel did not call any witnesses to corroborate his testimony.

23 See Habeas Corpus Appendix "19" p. 46.
24 See Habeas Corpus Appendix "19" pp. 53-54.

REASONS FOR GRANTING THE PETITION

I. REASONABLE

The Trial Court Erred In Denying The Motion To Quash Based On Errors In The Multiple Offender Charging, Pleading And Proof. The Multiple Bill Proceeding Denied Keith Jenkins Due Process Of Law.

The procedural due process requirements for an enhancement proceeding subjecting a criminal defendant to life imprisonment have three sources: the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, § 15 of the Louisiana Constitution; and La. R.S. 15:529.1. Jenkins raised concerns with the due process problems of the multiple bill procedure in a motion to quash that the trial court denied. In the multiple bill proceedings, Jenkins was exposed to a mandatory life sentence, but was not protected by the constitutional guarantees of due process. Jenkins' adjudication as a fourth felony offender by the court must be vacated.

The Sixth Amendment to the United States Constitution is what guaranteed Jenkins' right to a trial by jury, while he was exposed to spending fifteen years in prison if convicted. However, the proceeding which resulted in the determination that Jenkins would spend the remainder of his natural life in prison lasted only fifteen minutes. Contrary to justice, Jenkins' fate was decided by the assistant district attorney and the trial court.

The State is bound by law to ensure that Jenkins' right of due process is not contravened by anything it does in a criminal prosecution. Even so, the habitual offender hearing held in this case violated Jenkins' right of due process in at least two ways: 1) Jenkins' was subjected to a life sentence although the multiple bill and the underlying offense of possession with the intent to distribute cocaine was not initiated or instituted by a grand jury indictment as required by the Louisiana Constitution;²⁵ and 2) La. R.S. 15:529.1 contains elements, in addition to the existence of prior convictions, which must be proven beyond a reasonable doubt, and in a jury trial before his sentence can be increased from

²⁵ See La. Const. Art. I, § 15 (1974).

a maximum of fifteen years to a twenty to life sentence.

The State's violation of Louisiana's constitutionally mandate charging requirement is a blatant contravention of Jenkins' right of due process. The State misused the lesser procedural requirements of La. R.S. 15:529.1 to have Jenkins adjudicated as a fourth felony offender and sentenced to life imprisonment. However, neither the State, or the court gave any consideration to the fact that the jury did not return a verdict of guilty as charged against Jenkins. What this means is, the court allowed the State to use the ambiguous language of the statute to infringe on Jenkins' right of due process. Therefore, the trial court's denial of Jenkins' motion to quash the multiple, and the imposition of the sentence of life should be vacated.

The district attorney's office knew about Jenkins' prior convictions when he was arraigned for this current offense. The previous convictions were for simple possession of cocaine and originated in Orleans Parish. In pre-trial hearings, his multiple bill status was discussed in term of sentencing exposure, as his trial attorney announced prior to trial.²⁶ It was clear from the start that the State would institute proceedings to subject Jenkins to the possibility of life imprisonment.

The Louisiana Constitution requires a Grand Jury Indictment. The district attorney certainly knew about Jenkins' three prior convictions when he was charged with possession with intent to distribute cocaine in this case. All three of his previous alleged offenses for simple possession of cocaine occurred in Orleans Parish as well. In pre-trial hearings, his multiple bill status was discussed in terms of sentencing exposure, as his trial attorney announced prior to trial.²⁷ Again, it is apparent that from the beginning, the State had every intention to institute habitual offender proceedings against Jenkins and thereby subject him to a mandatory life sentence.

Article I, § 15 of the Louisiana Constitution of 1974 states in pertinent part that "no person shall be held to answer for ... a crime punishable by life imprisonment except on indictment by a grand

26 See Habeas Corpus Appendix "19" pp. 2-3.

27 See Habeas Corpus Appendix "19" pp. 2-3.

jury.” Further, La. C.Cr.P. Art. 382(A) in pertinent part states that prosecution “for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury.” Under the State’s theory, Jenkins’ life sentence was mandatory on a conviction for possession with intent to distribute cocaine. The State was constitutionally required to either proceed by grand jury indictment, or waive the possibility of a life sentence.

However, neither the underlying case for possession with intent to distribute cocaine or the later allegation of fourth offender status were charged by grand jury indictment. Both were charged by bills of information.²⁸ The ability for any prosecutor to seek life imprisonment at hard labor by the mere filing of a bill of information, is a granting of power that neither the Louisiana or the United States Constitutions authorizes to any prosecuting agency. What has taken place in this case, and upheld by Louisiana courts is a direct contravention of Jenkins’ right of due process. And again, Jenkins reminds the Court that he was found guilty of attempted possession with the intent to distribute cocaine. As a result, the district court was without jurisdiction to impose a life sentence.²⁹ Jenkins’ sentence is in violation of the Louisiana and the United States Constitutions and must be vacated.

Under Louisiana’s habitual offender law, Jenkins’ conviction for attempted possession with intent to distribute cocaine made him eligible for punishment by life imprisonment at hard labor without benefits of probation, parole or suspension of sentence. Considering the clear language of La. Const. Art. I, § 15, it is the punishment of certain offenses that determines the method of criminal institution. Even a person who is later acquitted or gets a lesser verdict for a crime that was punishable by life imprisonment had to have been charged by grand jury indictment. The actual “crime” is irrelevant. The Louisiana Supreme Court’s decision in *State v. Alexander*,³⁰ conflicts with the intent of La. Const. Art. I, § 15, and La. C.Cr.P. Art. 382. The Court afforded more weight to the legislative

28 See Habeas Corpus Appendix “4” pp. 1-3.

29 See La. Const. Art. I, § 15 (1974); La. C.Cr.P. Art. 382.

30 *State v. Alexander*, 325 So.2d 777 (La. 1976).

intent that is contrary to the intent of Louisiana Constitution of 1974. In a clear violation of due process, the Louisiana court have granted power to the State prosecutors that the Louisiana Constitution expressly forbids.

Under the Louisiana Constitution, and the Louisiana Code of Criminal Procedures, no one can be tried for a crime that may be punishment by life imprisonment without an indictment from the grand jury.³¹ However, Jenkins was prosecuted and sentenced to life imprisonment at hard labor without benefits of probation, parole or suspension of sentence by a habitual offender bill of information, filed by the State, after being convicted for attempting to possess cocaine and allegedly attempting to distribute the same. This illegal practice of the State is unconstitutional, and violated Jenkins' right of due process.

In *State v. Donahue*,³² the Louisiana Supreme Court annulled and set aside the defendant's conviction for second degree murder because the prosecution was not instituted by a grand jury indictment. According to the court's ruling in *Donahue*, there is a difference between "a capital crime [and] a crime punishable by life imprisonment."³³ In *Donahue*'s case, the institution of prosecution was a jurisdictional matter because second degree murder "carries a punishment of life imprisonment," and the "institution of prosecution ... by bill of information rather than grand jury indictment constituted error."³⁴ Jenkins filed a motion to quash the multiple offender bill of information attacking the general deficiencies of La. R.S. 15:529.1. Jenkins' adjudication as a fourth felony offender and the resultant life sentence is unconstitutional and violates his right of due process.

The opinion of the Louisiana Supreme Court concerning this issue is conflicted. This may be gleaned from reading *State v. Alexander*, and *State v. Donahue*. In *Alexander*, the court did not point to any authority before concluding that:

31 See La. Const. Art. I § 15 (1974); La. C.Cr.P Art. 382.

32 *State v. Donahue*, 355 So.2d 247 (1978)

33 *State v. Donahue*, 355 So.2d at 249

34 *State v. Donahue*, 355 So.2d at 249

[T]he constitutional provision was not intended to and does not apply to the institution of enhanced-penalty proceedings, La. R.S. 15:529.1, after a defendant has been convicted of a crime charged. It applies only to the substantive crime with which an accused is initially charged.³⁵

The opinions of the court in *Alexander* and *Donahue* opposed each other. The idea that a multiple offender bill of information is “merely a method of informing the sentencing court of the circumstances and requesting an enhancement-of-penalty” is erroneous and only serves to contravene the requirements of La. Const. Art. I, § 15, and La. C.Cr.P. Art. 382.³⁶

Jurisprudence from the Louisiana Supreme Court concerning this issue is conflicted. In *Alexander*, the court found that a multiple offender sentence is because of prior convictions and not the current conviction; eliminating the need for an indictment.³⁷ But in other cases, to avoid double jeopardy and ex post facto challenges, the court has said that a multiple offender sentence is because of the present conviction and not the priors.³⁸

Jenkins is respectfully suggesting that the *Alexander* court's decision be clearly defined or overruled. The *Alexander* court did not address the issue if: the underlying offense should be charged by an indictment when the prior record and possibility of a life sentence is known at the time of the institution of prosecution; the State's failure to charge the underlying offense by indictment is a waiver of its option to proceed with a multiple offender allegation that would subject a defendant to a life sentence; and if the multiple offender status alone should be charged by indictment when a life sentence is sought of is mandatory.

35 *State v. Donahue*, 325 So.2d at 777, 778-79 (La. 1976)

36 *State v. Donahue*, 325 So.2d at 779

37 *State v. Donahue*, *supra*.

38 *State v. Dorothy*, 623 So.2d 1276 (La. 1993); *State v. Hill*, 340 So.2d 309; *State v. Wooster*, 67 So.2d 366 (1915); *State v. Jackson*, 332 So.2d 755 (La. 1976).

The Louisiana Supreme Court's decision in *Alexander* should also be considered in the light of the United States Supreme Court's opinion in *United States v. Booker*.³⁹ Although *Booker* addresses petit jury trial and not grand jury indictments, the Court still opined that the "Framers would not have thought it too much to demand that, before depriving a man of ... his liberty" the State should suffer the modest inconvenience of submitting his accusation to "the unanimous suffrage of twelve of his equals and neighbors, rather than a lone employee of the State."⁴⁰ In *Booker*, the Court expresses that if more than ten years is to be served, the matter should be decided by a jury of twelve. If this is true in that situation, then surely, when the prosecution is seeking to have a defendant imprisoned for the remainder of his natural life, the proceeding should be instituted by a grand jury instead of one or two State employees.⁴¹ In this context, it seems obvious that this is what the Framers of the Louisiana Constitution intended.⁴²

The Louisiana Constitution of 1974 empowers a grand jury to decide if criminal defendant's should be subjected to the possibility of serving the rest of their lives in prison, and not the office of the district attorney.

The office of the district attorney is statutorily empowered to subject an offender to life imprisonment by La. R.S. 15:529.1. However, the statute should be declared unconstitutional because it violated the Sixth and Fourteenth Amendments to the United States Constitution, La. Const. Art. I, § 15, and La. C.Cr.P. Art. 382. The State used La. R.S. 15:529.1 to violate Jenkins' right of due process and subject him to a life sentence with a multiple offender bill of information.

Jury trial is required for non-conviction elements of La. R.S. 15:529.1. The jury's verdict of attempted possession with intent to distribute cocaine subjected Jenkins to a sentence of zero to fifteen

39 See *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, 73 USLW 4056 (U.S., 2005).

40 *U.S. v. Booker*, 540 U.S., at 238, 125 S.Ct., at 752; (quoting *Blatchley v. Washington*, 542 U.S. 296, 313-314, 124 S.Ct. 2531, 2543, 159 L.Ed.2d 403, 72 USLW 4546 (citation omitted)).

41 *U.S. v. Booker*, *supra*.

42 See La. Const. Art. I, § 15.

years; not the life sentence he received. Where “the jury's verdict alone does not authorize the sentence” and “the judge acquires that authority only upon finding some additional fact,” a jury must render a verdict.⁴³ The existence of the prior simple possession of cocaine convictions alone did nothing to enhance Jenkins' sentence. The State, under La. R.S. 15:529.1, was required to prove all of the additional elements: identity, ten year lapse, and that the other conviction(s) occurred and were final before the present one. While the statute requires the State to prove these elements beyond a reasonable doubt, the statute is still unconstitutional because it does not require the elements to be proved to a jury. Because the resulting mandatory life sentence was based on the court's finding of facts and not the determination of the jury, Jenkins' sentence must be vacated and remanded for sentencing consistent with the jury's verdict.⁴⁴

If only the existence of the prior convictions were needed to enhance the present sentence as in other jurisdictions,⁴⁵ then Jenkins would not be entitled to a jury trial. But under Louisiana's recidivism statute, there are other elements that require a jury determination.⁴⁶ *Shepard v. U.S.*, is close to Jenkins' case.⁴⁷ The Government involved the Armed Career Criminal Act (ACCA § 924(e)(1)) on *Shepard's* guilty plea to being a felon in possession of a firearm which increased a maximum 37 month sentence to a mandatory minimum 15 year sentence if *Shepard* had three previous convictions for “a violent felony or a serious drug offense.” *Shepard* never conceded that his predicate pleas of guilty qualified as violent felonies or serious drug offenses. The Court overruled *Taylor v. United States*, and upheld the

43 *Blakely* and *Booker*, *supra*.

44 Like the federal ACCA in *Shepard* and the Washington state enhancement statute at issue in *Blakely*, Louisiana's R.S. 15:529.1(D)(3) makes the imposition of an enhanced sentence by the district court mandatory and imposes binding requirements on all sentencing judges. While the exception to La. R.S. 15:529.1, carved by *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 679, the Louisiana Supreme Court found that it did not avoid the constitutional issue. Federal departures, like the *Johnson* exceptions, are unavailable in most cases and the judge is legally bound to impose a sentence within the statutory range. Because the sentence is mandatory, jury trial is required.

45 *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 104 L.Ed.2d 350 (1998) is an exception to the *Apprendi* line of cases for judicial fact finding that concerns a defendant's prior convictions. See *Apprendi v. New Jersey*, 530 U.S. 466, 487-490, 120 S.Ct. 2348, 147 L.Ed.2d ---, 68 USLW 4576 (2000); *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), footnote eight.

46 See La. R.S. 15:529.1.

47 *Shepard v. U.S.*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205, 73 USLW 4186 (U.S. 2005).

district court's refusal to look past the Massachusetts court documents to the police reports and external evidence to determine the type of prior felonies.⁴⁸

Under *Shepard*, any external materials or issues required by the statute. That does not appear on the face of certified court documents, must be decided by a jury and proven beyond a reasonable doubt. This would include the time lapses, the dates of discharge, the adequacy of the plea, etc. *Shepard* furthered the Court's prior decisions in *Apprendi* and *Blakely*⁴⁹ and under these decisions, La. R.S. 15:529.1, which has elements in addition to the existence prior convictions, unconstitutionally allows enhancement without a jury's determination. Jenkins had a right to a jury trial on the elements of La. R.S. 15:529.1 that must be proven beyond a reasonable doubt.

The *Shepard*'s decision was the first case that the Court applied the decision in *Apprendi* to show proof of prior convictions, and seemingly starting to erode its decision in *Almendarez-Torres*. The Court said:

While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.

Justice opined that *Almendarez-Torres* should be reconsidered to be aligned with *Apprendi*, *Jones*,⁵⁰ and *Booker*:

48 See *Taylor v. United States*, 495 U.S. 575, 599, 110 S.Ct. 2143, 109 L.Ed.2d 607 (U.S. Mo. 1990); (the Court held that a court imposing sentence under ACCA could look to statutory element, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary).

49 In *Apprendi*, New Jersey moved to enhance a 3-10 year sentence for weapon and bomb possession under a hate crime statute that required a court finding of "a biased purpose" before extending the sentence 10 to 20 years. The Court found that the Due Process Clause of the Fourteenth Amendment required that a factual determination which increased the maximum prison sentence had to be made by a jury on the basis of proof beyond a reasonable doubt.

50 In *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the carjacking statute had varying sentences depending on the degree of injury to the victim, as determined by the sentencing judge. Jones was sentenced to twenty-five years after the judge determined that the victim suffered "serious bodily injury." The Court, in *Jones*, held that the carjacking statute established three separate offenses by this specification of distinct elements, each of which must be charged by indictment and proved to a jury beyond a reasonable doubt. *Jones*, 119 S.Ct. at 1228. The Court said, "for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." *Jones* at 2423, n. 6. The Court vacated Jones' sentence and remanded. The *Jones* Court's decision was reaffirmed in *Apprendi* and *Shepard*.

Almendarez-Torres, like *Taylor*, has been eroded by this court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided ... this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintained absolutely fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.⁵¹

Applying the plurality decision of *Shepard*, even without taking it to the next step as Justice Thomas did, the issues and elements of La. R.S. 15:529.1 beyond what appears on the face of the prior plea documents, must be proven to a jury and beyond a reasonable doubt. A judge presiding in a multiple bill hearing can only determine the existence and admissibility of the prior conviction if it is disputed, and nothing more.

Without another jury verdict, the district court's imposition of the life sentence, beyond the fifteen years allowed by the jury verdict, violated Jenkins' Due Process and Sixth Amendment rights. Sentencing discretion cannot properly be exercised by the court until constitutional requirements are met. As noted in *Apprendi* "the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. It fits squarely within the usual definition of an 'element' of the offense."⁵² The Court's previous decision that found that La. R.S. 15:529.1's elements and procedures were merely 'sentencing enhancement[s]'⁵³ not entitled to other due process safeguards, and does not apply to Jenkins' right to jury trial.

The characterization of La. R.S. 15:529.1 as a sentence enhancement is irrelevant and no longer ends the inquiry. The Court in *Booker* found that a State's label of a "sentence enhancement" was irrelevant for constitutionally purposes. The Court said that merely using the label "sentence

51 *Shepard v. U.S.*, 544 U.S. 13, 27-28, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (Internal citation omitted).

52 *Apprendi*, 530 U.S. at 494, n. 19, 120 S.Ct. 2348.

53 See *State v. Dorfkey*, 723 So.2d 825 (La. 1993); *State v. Hill*, 340 So.2d 309 (La. 1976); *State v. Johnson*, 432 So.2d 815 (La. 1983); *State v. Wootten*, 67 So.2d 366 (1915); *State v. Jackson*, 332 So.2d 755 (La. 1976).

enhancement" did not provide a principle basis for denying the right to jury trials.⁵⁴ In this case, Jenkins' maximum sentence under the jury verdict was fifteen years, but his mandatory sentence under facts found by the district court judge was life imprisonment. Jenkins' freedom was in more serious jeopardy in the "enhancement" proceeding. He needed the constitutional safeguards.

The Court in *Booker* recognized, as it had in *Jones*, *Apprendi*, and *Blakely*, that jury fact-finding may lessen the expedient or efficient sentencing of defendants. But, a criminal defendant's Sixth Amendment right to a jury trial has always outweighed the interest of concluding trials swiftly.⁵⁵ La. R.S. 15:529.1 is incompatible with the Constitution's Sixth Amendment requirement of a jury trial for determination of the elements beyond the existence of the prior conviction.

The Sixth Amendment violation is 'plain error' of constitutionally magnitude and does not require specific objection in the lower court. It is not 'harmless error.' Keith Jenkins complained of the problems with R.S. 15:529.1 and the constitutionally validity of the prior pleas, but did not specifically address the violation of his Sixth Amendments right to jury trial. The unconstitutionality of R.S. 15:529.1 did not require objection and can be raised at any stage. The multiple offender sentence must be vacated until the State affords Keith Jenkins the right to a jury trial on his alleged multiple offender status.

54 In *Booker*, the Court said, "It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to raise before trial or proved by more than a preponderance. As the enhancements became greater, the jury's verdict on the underlying crime became less significant. And the enhancements became very serious indeed. As far as the defendants are concerned, they face significantly higher sentences – in *Booker*'s case almost 10 years higher – because a judge found true by a preponderance of the evidence a fact that was never submitted to a jury."

55 *Blakely v. Washington*, 542 U.S., at 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. As Blackstone said, "However convenient these [new methods of trial] may appear at first (as doubtless arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in question of the most momentous concerns." 4 *Commentaries on the Laws of England* 343-344 (1769).

II. REASONABLE

It Violates The Eighth Amendment Prohibition Against Cruel And Unusual Punishment Or The Louisiana's Constitution's Prohibition Against Excessive Punishment To Sentence An Addicted Defendant To The Maximum Sentence Of Life Imprisonment Without Benefit Of Probation Or Parole, For Crime Association With The Addition; A Sentence Of Twenty To Thirty Was More Appropriate To The Offense And Offender.

As acknowledged in his trial testimony, Jenkins was a substance abuser who is sometimes sober, but still succumbs to the desire to use drugs.⁵⁶ The trial court acknowledged this fact when it sentenced Jenkins. The court expressed that had any of Jenkins' prior convictions would have been its section that the court would have "straightened [Jenkins] out."⁵⁷ Jenkins addition is the cause of his recidivism. Jenkins does not have any convictions for violent crimes. In fact, other than the conviction for felon in possession of a firearm, all of Jenkins' convictions are drug related. In this case, Jenkins is convicted of attempting to possess eight (8) grams of cocaine with the intent to distribute the same. If the drugs belong to him, it would have been for his personal use. However, the State did not present any evidence that proves beyond a reasonable doubt that the drugs really belonged to him. Jenkins was allegedly observed by police officers who claimed to be conducting surveillance of a known drug area.⁵⁸ Still, the prosecution did not present any evidence to corroborate this. Even more, there was no monies recovered. This is strange when considering the fact that the officers swore that they observed Jenkins conduct a drug transaction.

The trial court pointed out that Jenkins had not taken advantage of the opportunities to seek help with his addiction while on probation. However, aside from this conviction, Jenkins has not spent much time in a custodial environment conducive to rehabilitation. Considering these factors, along with the

⁵⁶ See Habeas Corpus Appendix "19" p. 48; La. R.S. 40:967(b)(4)(B) which prohibits that a person convicted of distribution of cocaine, "shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence, and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars."

⁵⁷ See Habeas Corpus Appendix "18" p. 26.

⁵⁸ See Habeas Corpus Appendix "19" pp. 9-11. It was established at trial that the officer's used binoculars in this operation.

trial court's observation that Jenkins needs straightening out, the court's failure to consider rehabilitative treatment, or the statutory minimum allowed in this case is error. Jenkins' mandatory sentence of life imprisonment without the benefit of probation, parole or suspension of sentence is therefore constitutionally excessive, and constitutes cruel and unusual punishment. Jenkins' motion to reconsider his sentence was denied in error.⁵⁹

A sentence may be constitutionally excessive even when it is within the statutory limits.⁶⁰ A sentencing court should consider the punishment and the crime in light of the harm done to society, and whether the penalty is so disproportionate that it is a shock to the sense of justice.⁶¹ In *State v. Donaldson*, the Fourth Circuit Court of Appeal addressed the probable excessiveness of maximum sentences imposed under the multiple offender statute where the court stated that:

Relator's multiple offender sentence of 198 years at hard labor without benefit of parole is hereby vacated, and this case is remanded for resentencing. The record of sentencing does not show adequate compliance with LSA-C.C.R.P. Art. 894.1, nor provide a factual basis for concluding that relator was beyond any hope of rehabilitation and that he therefore warranted punishment with the maximum sentence provided by law. See *State v. Oubichon*, 422 So.2d 1140 (La. 1982); *State v. Kenner*, 384 So.2d 413 (La. 1980). Upon resentencing, the district court should comply with LSA-C.C.R.P. Art. 894.1, as amended by Act 22 of 1991, which requires consideration of the sentencing guidelines promulgated by the Louisiana Sentencing Commission in determining the appropriate sentence to be imposed.⁶²

The court should have considered if Jenkins' sentence was disproportionate as to shock the sense of justice in light of the harm done to society.⁶³ Jenkins' prior convictions happened in a short period of time, and were for simple possession of cocaine. During this time, Jenkins was deep in the throes of his addiction. As for the present conviction, the police did not find any money on Jenkins' person. Jenkins is not a predator who preys on society and therefore cannot be considered as the worst

59 See Habeas Corpus Appendix "4" p. 42; Appendix "18" p. 7.

60 See *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979).

61 See *State v. Bouanou*, 384 So.2d 355, 358 (La. 1980).

62 See *State v. Donaldson*, 98-1015 (La. App. 4th Cir. 1/6/99), 726 So.2d 1003, 1005, note 2 ¶ 2

63 See *State v. Bouanou*, *supra*, at 358.

kind of offender who must spend the rest of his natural life in prison. However, Jenkins' conviction for attempted possession with the intent to distribute is somewhat odd.

The police officer's in this case accused Jenkins of conducting a drug transaction. Again, it must be pointed out that the prosecution's burden was not met. Jenkins was allegedly observed, during an organized surveillance operation, selling drugs. However, the prosecution failed to present any audio or visual evidence in support of this allegation. And again, there was not any currency recovered. The jury verdict is indicative of the truth, because Jenkins was found guilty of *attempted* possession with intent to distribute. Jenkins was not selling drugs.

Another strange thing is the fact that the district court acknowledged Jenkins' addiction, but failed to consider if it contributed to his recidivism.⁶⁴ Jenkins has no record of physical violence of any sort, and his life sentence for attempted possession of cocaine with intent to distribute is nothing but a needless infliction of cruel and unusual punishment and must be vacated. In an attempt to justify giving Jenkins such a grossly disproportionate sentence, the trial court expressed concern about the weapon Jenkins allegedly tossed while running from the police.⁶⁵ However, not only did the prosecution not produce any physical or scientific evidence that the weapon came from Jenkins; Jenkins was already sentenced to fifteen years at hard labor for the firearm conviction.⁶⁶

As this Court is aware, there are three factors to consider when reviewing sentences for excessiveness: the nature of the crime; the nature and background of the offender; and the sentence imposed for similar crimes by the same court and other courts.⁶⁷ A punishment is unconstitutionally

64 See Habeas Corpus Appendix "18" p. 26.

65 See Habeas Corpus Appendix "18" p. 27.

66 See Habeas Corpus Appendix "18" p. 6.

67 For cases with similar facts situations, the sentences are uniformly less: the lack of indication that the defendant was heavily involved in dealing drugs make the twenty year sentence excessive in *State v. Gordon*, 444 So.2d 1188 (La. 1984). Gordon was convicted of distributing four ounces of cocaine on two occasions only six weeks apart to same undercover agents, yet the court found there was no evidence that defendant was a large scale distributor or that he made sales for reasons other than to support his own habit. Fifteen year sentences at hard labor on each of the two counts of distribution of cocaine were found excessive by the Court in *State v. Cook*, 598 So.2d 423 (La. App. 5th Cir. 1992), where the trial court failed to consider mitigating factors, including the relatively small amount of cocaine which was sold to an undercover agent. A sentence of twelve-years was nonetheless excessive for three counts of distribution

excessive if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.⁶⁸

Jenkins' record shows that he was a street level runner who worked to finance his addiction. In *State v. Burns*, the Fourth Circuit Court of Appeal remanded the defendant's case for resentencing after concluding that a life sentence as a habitual offender was unconstitutional and excessive.⁶⁹ In *Burns*, the defendant was in possession of two rocks of crack cocaine, fifty-seven dollars, and had sole one rock of crack cocaine second before his arrest. Likewise, in *State v. Winters*, the imposition of the maximum sentence was vacated by the Court of Appeal. The Court reasoned that maximum sentences are "reserved for the worst offenders."⁷⁰ In the same manner, Jenkins' life sentence is unconstitutionally excessive. Additionally, like the defendant in *Burns*, Jenkins admitted that he was addicted to cocaine. The defendant in *Burns* was 25, while Jenkins was 28. The appellate court in *Burns* noted that:

[I]t is safe to assume he deals to support his habit, all the while lining the pockets of the major, despicable, and all too often, untouchable drug dealers. Two of his prior convictions were for possession of cocaine, which lends strength to the argument that this is a case of a drug-addicted young man and not a hardened and violent criminal.

Defendant is only twenty-five years old. Our jurisprudence believes that age is a factor to be considered when the statutes impose such harsh penalties. *State v. Taylor*, 96-1843 (La. App. 4th Cir. 10/29/97), 701 So.2d

of cocaine to the extent it exceeded two years at hard labor, though the defendant sold "crack" to an undercover officer and had prior convictions for driving while intoxicated in *State v. Wyatt*, 591 So.2d 761 (La. App. 2nd Cir. 1991). In *State v. Davis*, 563 So.2d 473 (La. App. 1st Cir. 1990), a fifteen year sentence given to a thirty year old was excessive where Davis continued to maintain his innocence and felt the narcotics officer mistakenly identified him as the person who actually committed the crime, and a pre-sentence investigation report specifically recommended that any sentence imposed be suspended and that defendant be placed on probation for five years. Before the amendment to the sentencing provisions of LSA-R.S. 40:967, the court in *State v. Daniels*, 607 So.2d 620 (La. App. 2nd Cir. 1992), upheld a fifteen year sentence.

68 *Rummel v. Estelle*, 45 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980); *State v. Tedree*, 425 So.2d 1251, 1253-1254 (La. 1983); *State v. Hotopk*, La. App. 99-243, (La. App. 5th Cir. 11/10/99), 750 So.2d 1036. *State v. Wilson*, 96-1392 p. 3 (La. 12/13/96), 685 So.2d 1063, 1065; citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Davis*, 449 So.2d 452, 454 (La. 2003); *State v. Johnson*, 709 So.2d 672, 674-75 (La. 1998); *State v. Lobato*, 603 So.2d 739, 751 (La. 1992); *State v. Johnson*, 406 So.2d 569 (La. 1981).

69 See *State v. Burns*, 97-1553 (La. App. 4th Cir. 11/10/98), 723 So.2d 1013.

70 See *State v. Winters*, 612 So.2d 259, 261 (La. App. 1992).

766, 773; *State v. Hayes*, 712 So.2d at 1022. While the State argues that defendant's accumulation of four felonies by the tender age of twenty-five exemplifies his criminal propensities and complete lack of respect for law and order, we believe he is young enough to be rehabilitated. He indeed deserves serious punishment, including imprisonment, but a sentence less than life would afford him the opportunity to partake in self-improvement classes while incarcerated and the possibility of a productive future. He is also young enough to overcome his addiction to cocaine, the root of his criminal problems.⁷¹

In *State v. Stevenson*, the Fourth Circuit reversed a mandatory sentence of life imprisonment that was imposed after the defendant was adjudicated as a third-felony habitual offender.⁷² Defendant Stevenson was a thirty-eight year old mother who had been convicted for distributing one rock of crack cocaine, with prior convictions for theft and simple burglary of an inhabited dwelling.⁷³

District courts have a constitutional duty to refrain from excessive sentences. There was clear and convincing evidence that the life sentence imposed against Jenkins is excessive under the circumstances, which also rebuts the presumption of constitutionality of the sentence under La. R.S. 15:529.1. Jenkins was convicted by a jury for *attempted* possession with the intent to distribute street level sale amount of cocaine. It is for this offense that Jenkins was multiple billed. For his conviction as a felon in possession of a firearm, Jenkins punishment was a sentence of fifteen years at hard labor. Jenkins admitted that he suffered an addiction to crack cocaine, which is a serious illness that requires treatment to cure. Surely, a sentence of life imprisonment could not be the answer for Jenkins who was twenty-eight years old and not beyond rehabilitation.⁷⁴ Similar to the defendants in the jurisprudence cited herein, Jenkins was at best a petty street dealer whose criminal history is limited to his addiction.

There is nothing Jenkins or his criminal history that supports the imposition of a life sentence. The district court's conclusions that there were not other options in sentencing Jenkins to life in prison

71 See *State v. Burns*, 723 So.2d at 1019.

72 See *State v. Stevenson*, 1999-2824 (La. App. 4th Cir. 3/15/00), 757 So.2d 872; *writ denied*, 00-61 (La. 11/17/00, 773 So.2d 734).

73 See *State v. Stevenson*, 757 So.2d at 874 (citing *State v. Burns*, *supra*).

74 See Habeas Corpus Appendix "18" pp. 27-29.

for the remainder of his natural is erroneous.⁷⁵

In this case, the State used three convictions for simple possession of small amounts of cocaine, Jenkins' drug addiction, and one conviction for attempted possession with intent to distribute to impose a life sentence. By resorting to La. R.S. 15:529.1, the State seeks to punish a repeat drug offender for his compulsion to possess and use drugs beyond the statutes which serve to address the underlying offense itself.

The purpose of the habitual offender statute is to deter recidivism. However, the goal of the statute is not achieved by the imposition of a life sentence in regard to Jenkins who was recognized by the trial court as a drug addict. Unlike other recidivists, a drug addict's actions are not an intentional or flagrant disregard for the law. Jenkins was compelled by his addiction.

While it is true that the trial court mentioned Jenkins' previous convictions and his addiction. It is also equally true that the trial court did not take Jenkins' addiction into consideration when it came time to sentence him. The trial court did not even consider the fact that Jenkins was not found guilty as charged by the jury, and that a lesser verdict of guilty of attempted possession with the intent to distribute was returned. Nor did he consider the low level of distribution involved. Instead, the court focused on the gun charge that Jenkins had already received his punishment and is altogether separate from the multiple offender enhancement proceeding. The district court should have found the life sentence to be unconstitutionally excessive, requiring the imposition of a lesser sentence. The sentence imposed on Jenkins must be vacated and the case remanded with an order to reconsider the sentence under all of the statutory factors of La. C.Cr.P. Art. 894.1, including mitigating factors and justification of addiction.

⁷⁵ See Habeas Corpus Appendix "18" p. 6.

III. REASONABLE

Jenkins' Trial Counsel Rendered Ineffective Assistance In Violation Of The Fifth, Sixth And Fourteenth Amendments To The United States Constitution And Article I, §§ 2, 13 And 16 Of The Louisiana Constitution Of 1974.

The United States Supreme Court established a two-prong test for evaluating claims of ineffective assistance of counsel. A Petitioner seeking relief must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense.⁷⁶ "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary." The "decision not to investigate must be directly assessed for reasonableness in all circumstances."⁷⁷ "[A]dequate investigation is a requisite of effective assistance,⁷⁸ and counsel's performance at trial is to be reasonably effective."⁷⁹

A. Failure to file pretrial motions. Jenkins' trial was fundamentally unfair because of the prejudicial joined of the offenses charged in the bill of information.⁸⁰ The State's introduction of Jenkins' prior convictions to the jury, at the beginning of trial, severely prejudiced him concerning his presumption of innocence in connection with the charge of possession with intent to distribute cocaine. The State's first witness, officer Joseph Pollard, testified that he took fingerprints in court. He used the prints taken that morning to match them to arrest registers, because the prints to be used for comparison from the "Certified Pack" were not suitable for comparison. Without any objection from Jenkins' trial counsel, officer Pollard testified that Jenkins was the same person who had pled guilty to possession of cocaine on three prior occasions.

To prove that Jenkins was a convicted felon in possession of a firearm, the State used officer

76 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

77 *Wiggles v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); citing *Strickland v. Washington*, *supra*.

78 See *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979)(per curiam); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978) (per curiam).

79 See *Evitts v. Lacey*, 469 U.S. 387, 195 S.Ct. 830, 83 L.Ed.2d 821 (1985).

80 Cf. La. C.Cr.P Art. 493; La. C.Cr.P Art. 495.1.

Pollard's testimony. However, the two prejudicially joined offenses only robbed Jenkins of his presumption of innocence.⁸¹

When the State tried Jenkins for the charges alleged in the bill of information jointly, it demonstrated to the jury that he had prior convictions for possession of cocaine. Trial counsel, and the State failed to inform the jury that Jenkins did not have a conviction for possession with the intent to distribute cocaine.

The accusations against Jenkins ensued from the same alleged acts. For the State to prove a violation of La. R.S. 14:95.1, an offender's prior convictions may be disclosed because it is relevant to the charged offense. However, the problem arises when an offender's presumption of innocence is taken away because of a prejudicial joining of offenses.⁸²

The State was allowed to introduce prior evidence of Jenkins' criminal conviction to the jury, effectively introducing character evidence to the jury.⁸³ This proved prejudicial to Jenkins, because it created bias against him in the minds of the individual jurors. Jenkins' trial counsel was ineffective for not filing a motion to sever prejudicially joined offenses that affected Jenkins' substantial rights.⁸⁴

B. Failure to investigate. Jenkins' trial counsel failed to investigate the facts and claims of the prosecution's case against him. Trial counsel failed to investigate information concerning an eyewitness to the police going into the abandoned house and coming out again with the contraband allegedly tossed into an empty lot by Jenkins.

Jenkins' trial counsel also failed to investigate if any audio/visual evidence was available. A lawyer must engage in a reasonable amount of pretrial investigation, and "at a minimum, counsel has the duty to interview potential witnesses and make an independent investigation of the facts and

81 See *State v. Roe*, 2013-1434, 151 So.3d 838, 856 (La. App. 4th Cir. 2014); *State v. Esquivel*, 11-0976, p. 11, (La. App. 4th Cir. 7/15/12), 97 So.3d 575, 582; La. C.Cr.P. Art. 493; La. C.Cr.P. Art. 495.1.

82 See La. C.Cr.P. Art. 493; La. C.Cr.P. Art. 495.1.

83 See La. C.E. Art. 404(B)(1); *State v. Nguyen*, 04-321 (La. App. 5th Cir. 9/28/04), 888 So.2d 900.

84 See *State v. Crochet*, 2005-0123 (6/23/06), 931 So.2d 1083; citing La. C.Cr.P. Art. 920; *State v. Strickland*, 34-0025, p. 13, 683 So.2d 218, 226 (La. 1996).

circumstances of the case.⁸⁵

Trial counsel's ineffectiveness clearly caused harm to Jenkins, and his ineffectiveness cannot be "considered strategic choices since counsel by his failure has not obtained the facts upon which such a tactical decision could be reasonably made."⁸⁶

Jenkins' entire defense basically rested on his own shoulders. Jenkins testified that he was living in Baton Rouge. He worked for Isidore and Sona Cement Company in Gonzales at the time of the charged offense. Jenkins testified that he was in the area that day because he went to check on his mother's house located on Benton Street.

Jenkins also testified that he was in a silver PT Cruiser with three other people, although the police said there were three people total in the vehicle. Jenkins said he did not run from the police. Jenkins also admitted to a past addiction to cocaine and his subsequent arrest and convictions for simple possession of cocaine. Jenkins had been free from his cocaine addiction since 2004.

Jenkins further testified that he believed the police arrested him because of his previous arrest history. He believes the officers found the weapon and cocaine in the abandoned house and wrongly accused him of possessing them. In fact, Jenkins testified that the police took him to the abandoned house where they found the drugs.

Jenkins' trial counsel was also ineffective for not having the State's evidence tested for fingerprints and other scientific evidence. If Jenkins was really carrying the weapon on his waistline as alleged by the State, then it would be reasonable to test that evidence for DNA.

C. Failure to subject the State's case to meaningful adversarial testing. Jenkins' trial counsel failed to subject the State's case to any meaningful adversarial testing. The State's case consisted of uncontested and uncorroborated testimony from officers of the New Orleans Police Department.

85 *Neely v. Calhoun*, 764 F.2d 1173, 1178 (5th Cir. 1985); *Jones v. Jones*, 988 F. Supp. 1000, 1002 (E.D. La. 1997).

86 *Neely v. Calhoun*, 764 F.2d 1173, 1178 (5th Cir. 1985); *Bryant v. Scott*, 28 F.3d 1411, 1417 (5th Cir. 1994); *Proffitt v. Whidmon*, 831 F.2d 1245 (5th Cir. 1987); *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989).

Jenkins' trial counsel failed to challenge their version of events that caused Jenkins' arrest. He did not ask one question about audio/visual surveillance that is commonly used by police in surveillance of a "known drug outlet where they distribute various drugs," and where the police have made "numerous arrests in that area in the past."⁸⁷ However, the State produced nothing to corroborate the detective's statement. According to detective Roccaforte's testimony, there were marked and unmarked police units involved in the surveillance of this particular area.⁸⁸ Jenkins' trial counsel did not even attempt to obtain video footage from the mounted cameras that are standard in police vehicles to test the accuracy of the officer's testimony.

D. Failure to interview and subpoena witnesses. Jenkins' trial counsel was ineffective for not interviewing and subpoenaing Ms. Matthew to testify to what she witnessed on the day this alleged offense occurred. Ms. Matthew would have told trial counsel, and the jury, that she witnessed police officers carrying items from the abandoned house on Alabo Street.

Jenkins' trial counsel also failed to interview and call the two witnesses that were in court on the day of trial. It is confounding that trial counsel would not call witnesses to the stand who Jenkins boldly stated at trial present in the vehicle with him when this incident occurred, and that they were also in the courtroom on the day of trial.⁸⁹

E. Failure to permit Jenkins to accept the State's offer to 10 years without sentencing enhancements. Jenkins' trial counsel informed Jenkins of the State's offer of ten years without any habitual offender sentencing enhancements. However, Mr. Donnelly failed to inform the court for the record, why Jenkins refused the offer.

Jenkins did not accept the State's plea offer because he was advised not to do so by his trial counsel. The reason for Mr. Donnelly's advice is at least two-fold. Jenkins is actually innocent of the

⁸⁷ See Habeas Corpus Appendix "20" p. 3.

⁸⁸ See Habeas Corpus Appendix "19" p. 12.

⁸⁹ See Habeas Corpus Appendix "19" pp. 49, 54.

charges against him, and Mr. Donnelly told him that the jury would not believe the allegations without any photographs, audio/video evidence, or any fingerprint and DNA evidence. His “advice” was to go to trial.

When a plea bargain has been offered, a defendant has the right to the effective assistance of counsel in considering whether to accept it or reject it. When that right is denied, prejudice is shown if the loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.⁹⁰

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

(Signature) Keith Jenkins
KEITH JENKINS

Date: February 11, 2019

⁹⁰ See *Missouri v. Frye*, 132 S.Ct. 1399, 80 USLW 4253 (U.S. Mo. 2012); *Lagler v. Cooper*, 132 S.Ct. 1376, 80 USLW 4244 (U.S. 2012).