

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

JUDGE R. KIRK GRIFFIN,
CIRCUIT COURT JUDGE

Date: 9-29-2026

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S.C. SUPREME COURT

CASE NO.

2020-CP-08-01349

APPELLATE NO.

2024-001521

Mr. Emory W. Roberts Jr., APPELLANT (PRO SE)

V.

STATE OF SOUTH CAROLINA, RESPONDENT

NAME OF DOCUMENT

Addendum/Supplement To Appeal (Brief)

NO RESPONSE PLEADING HAS BEEN
FILED AS OF THE ABOVE DATE

Honorable Clerk of Court:

Please Clock, Date, Stamp,
File and Return Stamped Copy,
Thank You Greatly In Advance.

Respectfully Submitted,
Mr. Emory W. Roberts Jr. 373393
Appellant, Pro se.

1.) Whether State has met its burden of production on the element of whether defendant "Purchased, OR Brought Into This State" trafficking amounts of heroin?

2.) Whether State has met its burden of production on the essential element of trafficking heroin in regards to "Actual Amount of heroin"?

3.) Whether the State failed to produce "sufficient evidence" for any element thereby not bringing the fact into issue, and whether defendant was entitled to a directed verdict in defendant's favor?

(See Tr. July 24-28, 2017, Page 789, lines 18-22)(Directed Verdict).

4.) Whether habeas relief should be granted for insufficient evidence because petitioner showed that no rational trier of fact, viewing evidence in light most favorable to prosecution, could have found the essential elements of the crime beyond a reasonable doubt?

5.) Whether trial counsel was ineffective Assistance of counsel causing prejudice to Mr. Roberts Sixth Amendment right to effective assistance of counsel when he failed to specifically move for a directed verdict on essential elements of Trafficking (Purchased or brought into this State; Actual Amount of heroin)?

At trial, defense counsel was "ineffective assistance of counsel" when he did not [object] to [lab reports] read by Special Agent Justin Wingo "offered against the defendant to prove the truth of the matter asserted", which is categorically barred by the confrontation clause, (Crawford v. Washington) therefore petitioner contends that "ineffective assistance of counsel" is sufficient [cause] for "procedurally defaulted claim". Petitioner also alleges "structural error" in that the Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged", and "absent this proof", it "necessarily renders a trial fundamentally unfair and deprives a defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence... and no criminal punishment may be regarded as fundamentally fair". (Neder, 527 U.S. at 8-9).

Accordingly, at trial the State offered the testimony of Special Agent Justin Wingo. On cross-examination, defense counsel questioned Agent Wingo concerning [All] lab reports he testified to, asking Agent Wingo the percentage of heroin in the samples? (Tr. Page 736, lines 17-18). In response, Agent Wingo stated: "I'm a narcotics agent. I am not" a chemist. I am not in the lab. And I [could not] tell you how "they" test that stuff. You would have to reference a chemist" (Tr. Page 736, lines 19-22). Defense counsel then asks Agent Wingo: "Okay, So if I mix a gram of heroin with 27 grams of baby powder, it's going to come up, yep, that sure does weigh 28 grams. But that doesn't mean it's 28 grams of heroin, does it? The Case Agent answers, stating: "That means there's heroin in there, sir. But, again, I am [not] a chemist." (Tr. Page 737, lines 1-9) (Emphasis). Just a week prior to trial at defendant's pre-trial hearing on July 19, 2017, on cross-examination, Agent Wingo testified that [he] did not have any "knowledge or evidence," nor any "witness"

that had informed him that Mr. Roberts was involved with any [out-of-state] purchases of heroin. (Tr. July 19, 2017, page 93, lines 9-10)

Therefore, Agent Wingo not only failed to give testimony regarding "Actual Amounts of heroin", but he also testified that he had [not] been "informed" that Mr. Roberts was [involved] with any [out-of-state] purchases of heroin. (Emphasis).

Further, on cross-examination, defense counsel questioned Agent Wingo, asking: "Did you [ever] see with your own eyes Mr. Roberts hand [any] drugs to anybody?" (Tr. July 24-28, 2017, page 736, lines 5-6). Agent Wingo answered: "With my own eyes, no sir" (Tr. July 24-28, 2017, page 736, lines 7-8).

Further on in the trial, the State offered the testimony of Forensic Scientist Lawrence ZivKovich, who testified for the State as to what a controlled substance may [contain], but not the "Actual Amounts of heroin". (Tr. Page 334, lines 1-8; Page 340, lines 7-9). Mr. ZivKovich "never" gave testimony regarding "Actual Amounts of heroin", only the [weight] of the entire sample - but not how much actual heroin. For example, Mr. ZivKovich testified that states exhibit 47 [contained] heroin and "methamphetamine with a weight of 1.28 grams - a combined weight" of 1.28 grams - but [not] the "actual amount of heroin". (Tr. Page 342, lines 11-12) (Emphasis).

The State was confident in how much a sample weighed but [never] offered testimony regarding "Actual Amounts of heroin".

Ineffective assistance of counsel at trial is "cause" for procedurally defaulted claim. Counsel failed to "specifically" ask for a "directed verdict" on "trafficking offenses"; (Tr. Page 789, lines 19-25) and failed to [object] to admission of lab reports.

Discussion: The reasonable doubt standard applies in both state and federal proceedings. See Sullivan V. La., 508 U.S. 275, 278 (1993). The Winship reasonable doubt standard protects three interest. First, it protects the defendant's liberty interest. See 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. See id. Third, it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. Id. at 363-64. A state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts upon which the distinction turns because the interest in due process is implicated. See Apprendi V. N.J., 530 U.S. 466, 488-92 (2000) (state must prove every element that distinguishes lesser from greater crime).

The burden of proof consist of two parts: the burden of production and the burden of persuasion. The party bearing the burden of production must produce enough evidence to put a fact in issue. (Purchase, or bring into this State) and (Actual amount of heroin). If a party fails to sustain its burden of production, that party is subject to an "adverse ruling by the court".

For instance, the prosecution has the burden of production on every element of the offense charged. If the State fails to produce sufficient evidence for any element thereby not bringing the fact into issue, the judge may direct a verdict in the defendant's favor. The Due Process Clause places on the prosecution the "burden of persuasion" on "every element" of the crime charged; only rarely does the burden shift to the defendant.

Any shifting of the burden of persuasion must withstand constitutional scrutiny.

The Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. In re Winship, 397 U.S. 358, 364 (1970). Due Process Clause protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute crime with which he is charged. U.S.C.A. Const. Amend. 14.

Due Process Clause [commands] that no man lose [his] liberty unless government has borne burden of convincing fact finder of his guilt. U.S.C.A. Const. Amend. 14.

See Jackson v. VA., 443 U.S. 307, 319 (1979) (habeas relief granted for insufficient evidence because prisoner showed that no rational trier of fact, viewing evidence in light most favorable to prosecution, could have found the essential elements of the crime beyond a reasonable doubt).

"It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution [must] convince the trier of all the essential elements of guilt." C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence, § 2497 (3d ed. 1940).

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, for example, Miles v. United States, 103 U.S. 304, 312, 26 L. Ed. 481 (1881); Davis v. United States, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L. Ed. 499 (1895); Holt v. United States, 218 U.S. 245, 253, 31 S.Ct. 2, 6, 54 L. Ed. 1021 (1910); Wilson v. United States, 232 U.S. 563, 569-570, 34 S.Ct. 347, 349, 350, 58 L. Ed. 728 (1914); Brinegar v. United States, 338 U.S. 160, 174, 69 S.Ct. 1302, 1310, 93 L. Ed. 1879 (1949); Leland v. Oregon, 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 1006, 96 L. Ed. 1302 (1952); Holland v. United States,

348 U.S. 121, 138, 75 S.Ct. 127, 136, 137, 99 L.Ed. 150 (1954); Speiser V. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 21 L.Ed. 2d 1460 (1958). Cf. Coffin V. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895). Mr. Justice Frankfurter stated that "it's the duty of the government to establish guilt beyond a reasonable doubt."

This notion - basic in our law and rightly one of the boast of a free society - [is] a requirement and a safeguard of due process of law in the historic, procedural content of "due process." Leland V. Oregon, *supra*, 343 U.S., at 802-803, 72 S.Ct., at 1009. In a similar vein, see Brinegar V. United States, *supra*, 338 U.S., at 174, 69 S.Ct., at 1310.

Essential Element: Purchase, OR Brought Into This State.

Special Agent, Justin Wingo - being the "Case Agent" regarding the investigation into "alleged" heroin trafficking offenses concerning Mr. Roberts, stated on cross-examination: "No sir, [they] didn't inform me that Mr. Roberts was [involved] with [out-of-state] purchases of heroin." (Tr. July 19, 2017, page 93, lines 9-10) (Emphasis). Due Process Clause protects accused against conviction except upon proof beyond [reasonable doubt] of [every fact] necessary to constitute crime with which he is charged. U.S. C. A. Const. Amend. 14.

It is an indisputable fact that if the "lead investigator/case agent" testified that he did not "have any knowledge or evidence", or "witness" to [inform] him of the necessary facts to constitute the crime - then the prosecuting Attorney could not have them, and therefore, the State could not "bring the fact into issue" in order to substantiate the crime with which he was accused.

Again, when under cross-examination, Agent Justin Wingo was questioned: "And they informed you that Mr. Roberts was [involved] with [out-of-

- state purchase? (Tr. July 19, 2017, page 93, lines 7-8), Case Agent, Justin Wingo stated: "No sir, they didn't inform me that Mr. Roberts was [involved] with [out-of-state] purchases of heroin." (Tr. July 19, 2017, page 93, lines 9-10). "No rational [trier of fact], viewing evidence in light most favorable to prosecution, could have found the essential elements of the crime beyond a reasonable doubt." Jackson V. VA., 443 U.S. 307, 319 (1979).

At trial, on cross-examination, the defense questioned Agent Justin Wingo, asking: "Did you [ever] see with your own eyes Mr. Roberts hand [any] drugs to anybody?" (Tr. July 24-28, 2017, page 736, lines ~~5-6~~ ⁵⁻⁶ E.R.). Agent Wingo answered: "With my own eyes, no, sir." (Tr. July 24-28, 2017, page 736, lines 7-8). Proof of a criminal charge beyond a reasonable doubt is constitutionally required. See Miles V. United States, 103 U.S. 304, 312, 26 L. Ed. 491 (1881).

Defendant was "charged" with trafficking in heroin. "The State [must] prove beyond a reasonable doubt that the defendant... purchased, brought into this state... purchase, or bring into this state," charged amount of actual heroin. The State failed to meet its "burden of production on every element of the offense "charged". The State failed to "bring the fact into issue" regarding "out-of-state" purchases of heroin by Mr. Roberts, or that he "purchased, or brought into this State" any heroin at all. (Emphasis).

There was [no] reliable detective [testimony] that they saw Mr. Roberts handle [any] drugs at all. There was not [a] detective that [ever] saw Mr. Roberts with drugs in his hand. (Tr. Page 736, lines 5-8; page 160, lines 22-24; page 436, lines 4-6) (Emphasis). "The Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt" of [every fact] necessary to constitute the crime with which the defendant is charged." In re Winship, 397 U.S. 358, 364 (1970).

Essential Element Regarding: "Actual Amount Of Heroin"

On cross-examination, defense counsel questioned Agent Wingo concerning [all] lab reports he testified to, asking the [percentage of heroin] in the samples? (Tr. Page 736, lines 17-18), The [Case Agent] answered: "I'm a narcotics agent. I am [not] a chemist." I am not in the lab. And I [couldn't] tell you how "they" test that stuff. You would have to reference a chemist." (Tr. Page 736, lines 19-22) (Emphasis). Defense counsel then states: "Okay. So if I mix a gram of heroin with 27 grams of baby powder it's going to come up, yep, that sure does weigh 28 grams. But that doesn't mean it's 28 grams of heroin, does it? The Case Agent answers: "That means there's heroin in there, sir. But, again, I am [not] a chemist." (Tr. Page 737, lines 1-9) (Emphasis). Accordingly, State did not present sufficient evidence regarding essential element of "how much actual amount of heroin" to substantiate proof beyond a reasonable doubt.

Lawrence ZivKovich, who is employed as a forensic scientist by SLED, testified for the state as to what a controlled substance may [contain]. (Tr. Page 334, lines 1-8; Page 340, lines 7-9). Mr. ZivKovich testimony was based on the state's exhibits and whether it [contained] heroin and how much the "entire substance/sample" weighed. (Tr. Page 340, lines 17-18; Page 342, lines 4-5; Page 342, lines 20-21; Page 343, lines 4-5; Page 343, lines 16-17; Page 344, lines 2-4; Page 344, lines 16-17). Mr. ZivKovich testified to what the controlled substance [contained] and the weight of that "entire" substance - but not [how much actual heroin]. For example, Mr. ZivKovich testified that states exhibit 47 [contained] heroin "and" methamphetamine with a weight of 1.28 grams (Emphasis) (Tr. Page 342, lines 11-12). "A substance [containing] heroin "and" methamphetamine - with a "combined" weight of 1.28 grams - but how much actual heroin? What is the amount of heroin?

Mr. ZivKovich said in his testimony that there was heroin found in the samples, but it doesn't say how much heroin? He says the weight of this or that whole sample was so much. Could have been sand with four sprinkles of heroin in it. We don't know. The State are confident in the weight of the sample, but they did not say the sample contained "half heroin, one-quarter heroin, one-eighth heroin, or even 10 percent heroin." The State [never] established how much [actual] heroin it was. There has to be sufficient proof beyond a reasonable doubt.

The State [failed] to prove beyond a reasonable doubt that the amount of heroin or any mixture containing heroin was 4 grams or more but less than 14 grams; 14 grams or more but less than 28 grams; and 28 grams or more. The State failed to produce sufficient evidence regarding the essential element of "how much actual heroin" thereby "not bringing the fact into issue". See In re Winship, 397 U.S. 358, 364 (1970).

On cross-examination, Mr. ZivKovich was questioned in regards to his testimony regarding state's exhibits when defense counsel asked Mr. ZivKovich: "Mr. ZivKovich, you would be [unaware] as to which "particular" buys these were connected to and which -- whether these were collected -- who they were collected from, et cetera? You would not know that, correct?"

Mr. ZivKovich answered: "That's correct". (Tr. Page 347, lines 12-16) (Emphasis).

See Jackson V. VA., 443 U.S. 307, 319 (1979) (habeas relief granted for insufficient evidence because prisoner showed that no rational trier of fact, viewing evidence in light most favorable to prosecution, "could have found the essential elements of the crime beyond a reasonable doubt").

State Understands Clearly That It Hasn't Proven Actual
Amounts Of Heroin - Which Is Essential Element
Of Trafficking

Assistant Attorney General inquires to the trial judge: "Your Honor, one matter concerning the charge, I wanted to inquire for the Court. Does your charge include language that any mixture of a substance that contains a substance, that the [entire mixture] counts towards the weight pursuant to State v. Johnson?" (Tr. Page 861, lines 14-18) (Emphasis).

The trial judge responds: "I don't make any charge that would constitute a charge on the facts... (Tr. Page 861, lines 19-20), My charge reflects exactly what the [statute] says, which is the State [must] also prove beyond a reasonable doubt that the [amount of heroin] or any mixture containing heroin [was] -- and it states the amounts." (Tr. Page 861, lines 24-25; Page 862, lines 1-2) (Emphasis).

Prejudice

Defendant was prejudiced a fundamentally fair trial when trial counsel stipulated to the chain of custody and infringed defendant's right to confront lab technicians regarding their lab reports concerning the chemical composition of the substance. Defendant suffers prejudice in regards to "reasonable doubt standard" and the loss of his liberty when State had not established guilt beyond a reasonable doubt of "every fact" necessary to constitute crime with which he "was" charged. Defendant suffers prejudice from invalid conviction regarding the State failing to "bring the facts into issue" (Actual Amount of heroin) and (Purchase, or bring into this State), in order to substantiate the crime with which he was accused.

In Conclusion...

The reasonable doubt standard applies in both state and Federal proceedings. A State may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts upon which the distinction turns, because the interest in due process is implicated.

State lacked subject matter jurisdiction in regards to elements of offense when State had not met its burden of production and did not produce enough evidence to put the facts into issue.

State offered the testimony of the "lead investigator" or "case agent" who gave testimony that [he] had no knowledge, nor had he been informed that defendant was involved with any "out-of-state" purchases of heroin - which is an essential element of trafficking heroin. The Case Agent also gave testimony in regards to [all] the [lab reports] he testified to. When asked on cross-examination about the percentage of heroin in the samples, Agent Wingo stated that he "is not a chemist" and [he] couldn't tell how they "test that stuff".

In regards to the testimony of Forensic Scientist Lawrence Zirkovich, his testimony was only to the extent that samples "contained" heroin, but never testified as to "actual amounts of heroin".

Defendant asks this Court to reverse his convictions on the grounds of insufficient evidence?

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