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Lockhart v. Nelson: Trial Error, Evidentiary Insufficiency, and Double Jeopardy

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I. INTRODUCTION

The double jeopardy clause of the fifth amendment guarantees that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." The clause was applied equally to the states through the fourteenth amendment. Although double jeopardy has existed for over two centuries, it has taken the United States Supreme Court quite some time to unravel exactly what constitutes being "twice put in jeopardy of life or limb." In

1. U.S. Const. amend. V.
2. It was made applicable through the fourteenth amendment. See Benton v. Maryland, 395 U.S. 784, 794 (1969).
the course of that time an interesting dichotomy arose. On a defendant’s appeal from a guilty verdict, the appellate court had to determine whether the guilty verdict was obtained unfairly, in the eyes of that court, by means of trial error or insufficient evidence. However, the relief granted (a new trial or acquittal) depended on the appellant’s requested relief. ³

*Lockhart v. Nelson,* ⁴ decided November 14, 1988, dealt with an aspect of double jeopardy that had not been previously considered despite the Supreme Court’s most recent address to the issue in two cases, *Burks v. United States* ⁵ and *Greene v. Massey,* ⁶ both decided June 14, 1978. The specific issue addressed by the Supreme Court in *Lockhart* was what effect the double jeopardy clause had on a reviewing court when it was faced with erroneously admitted evidence—evidence that, when discounted, left the state’s burden of proof unfulfilled.

This comment will discuss the *Lockhart* opinion, its foundation in previous Supreme Court decisions, and its implications, both generally and in West Virginia.

II. Statement of the Case

Respondent Johnny Lee Nelson pleaded guilty in Arkansas state court “to burglary, a class B felony, and misdemeanor theft after taking forty-five dollars from a vending machine in 1979.” ⁷ He was later sentenced under the Arkansas Habitual Offender Statute to twenty years imprisonment. ⁸ That statute provides that a defendant who is convicted of a class B felony and “who has previously been convicted of . . . [or] found guilty of four (4) or more felonies,”

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⁵. 437 U.S. 1 (1978).


may be sentenced to an enhanced term of imprisonment of between twenty and forty years.9

Under the Arkansas statute, in order to enhance the defendant's sentence, the state must prove at a separate sentencing hearing, beyond a reasonable doubt, "that the defendant has the requisite number of prior felony convictions."10 The state may use three types of documents in order to meet its burden.11 One of these three types of documents which the state can use to establish the prior felony convictions is "a duly certified copy of the record of a previous conviction or a finding of guilt by a court of record."12 The defendant is entitled to challenge the state's evidence of his prior convictions and to rebut it with his own evidence.13

At Nelson's sentencing hearing, "the State introduced, without objection from the defense, certified copies of four prior felony convictions."14 However, one of those convictions had been pardoned by the Governor of Arkansas several years after its entry.15 Neither the prosecutor nor defense counsel knew of the pardon; consequently no objection was made to its entry into evidence.16 Although the respondent testified under cross-examination that it

12. Id. The pertinent text of § 41-1003 provided that:
[A] previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. The following are sufficient to support a finding or a prior conviction or finding of guilt:
(1) a duly certified copy of the record of a previous conviction or finding of guilt by a court of record; or
(2) a certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendant, as they appear in the records of his office; or
(3) a certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office.
15. Id.
16. Id.
was “his belief that the conviction in question had been pardoned,” the prosecutor suggested that Mr. Nelson had confused a “pardon” with “commutation to time served.” \(^{17}\) Under further court questioning, Nelson finally agreed that a commutation indeed had taken place rather than a pardon. \(^{18}\) The case was submitted to a jury, \(^{19}\) which found that the state met its burden of proving four prior convictions and thence the court imposed an enhanced sentence. The Arkansas Court of Appeals rejected Nelson’s appeal because of his failure to make a contemporaneous objection to the use of the conviction in question. \(^{20}\) Nelson then “petitioned the Arkansas Supreme Court for post-conviction relief, which was denied” on the basis that Nelson’s assertion of a pardon was unsupported by any factual evidence. \(^{21}\)

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\(^{17}\) Id.

\(^{18}\) Id. The line of questioning went in this fashion:

**DEFENSE COUNSEL:** Mr. Nelson, you mentioned in reference to the very first conviction that you had something about a pardon. Was that not really the judge commuted that, your sentence to time served?

**NELSON:** No, sir. Just like I said, the time when I got that charge on that rape, assault—they had me with rape, assault and a robbery. They had the sentences you know in two sentences. I had the fourteen years and I had a seven years. But during the time I doing time, on doing time you do the smallest time first and the large time last. Well in the process... some more people had my case investigated by the F.B.I. And during that time Governor Faubus gave me a pardon on the whole thing.

**DEFENSE COUNSEL:** You’re saying on the robbery charge?

**NELSON:** On the robbery and the rape charge. Of course I was sentenced to 21 years and I was doing time on the robbery charge... But in the process of the investigation they cut the whole thing to time served.

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**PROSECUTOR:** Your Honor, I feel compelled... to make a motion to strike this testimony because I think the defendant is in error. I think he’s confused as to the meaning of the pardon and a commutation.... I think the records are clear that are in the court and perhaps some comment by the Court to the jury could clear the matter up.

**THE COURT:** I think he cleared it up himself when he said it was commuted to time served. It that what you said?

**NELSON:** Yes, sir.


\(^{19}\) As of February 27, 1981, the Habitual Offenders Act was amended such that the trial court, rather than the jury, now hears the evidence and makes the finding as to whether the sentence should be enhanced or not. While the trial court erroneously applied the old version of the act, none of the reviewing courts felt that this error was of any consequence except to permit the defendant a new sentencing. However, “all of this is mooted by the failure of either party to ever assert any objection.” _Nelson_, 641 F. Supp. at 179 n.2.

\(^{20}\) _Lockhart_, 109 S. Ct. at 288 n.4.

\(^{21}\) Id. at 288-89 n.4.
Several years later, the respondent sought a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas, claiming "that the enhanced sentence was invalid because one of the prior convictions used to support it had been pardoned." When it was discovered that the prior conviction in question had indeed been pardoned, "the District Court declared the enhanced sentence to be invalid." The state expressed its intention to resentence the petitioner, using another prior conviction not offered at the initial sentencing hearing, and the "respondent interposed a claim of double jeopardy."

The district court concluded that the double jeopardy clause did in fact apply to the Arkansas Habitual Offender Act because the enhancement procedure possessed all "the hallmarks of the trial on guilt or innocence." It noted, however, that despite the applicability of double jeopardy, the state could still resentence if the use of the invalid prior conviction was trial error as opposed to a deficiency in the proof of the prosecution's case for enhancement.

Because the Eighth Circuit, where the District Court for the Eastern District of Arkansas is located, had never faced the precise issue in question, the district court followed persuasive authority from Fifth Circuit holdings. The court concluded that the state's failure to introduce four valid prior convictions was effectively an acquittal on the issue of enhancement, and that exposing Nelson to a second hearing would violate the constitutional prohibition against double jeopardy.

22. Id. at 289.
25. Nelson, 641 F. Supp. at 178. The district court relied heavily on Bullington v. Missouri, 451 U.S. 430 (1981), in deciding that double jeopardy applied. Bullington involved a second hearing, following conviction, on the issue of imposition of a capital sentence. The jury decided that the state did not carry its burden and thereby refused to order Bullington's execution. When Bullington's life conviction was set aside by the trial court, the state was prevented from attempting again to secure capital punishment if a conviction was entered on the basis that the sentencing procedure "was itself a trial on the issue of punishment," and double jeopardy thereby attached. Nelson, 641 F. Supp. at 178-80 (quoting Bullington, 451 U.S. at 438).
jeopardy. The court believed this was a question of evidentiary insufficiency. Thus, although the underlying felony sentence was unaffected, the district court denied the state a second opportunity to obtain an enhanced sentence.

On appeal, the United States Court of Appeals, Eighth Circuit, affirmed the district court's ruling on the basis that the state had failed to prove the existence of four prior felony convictions and thereby failed to prove Nelson was a habitual offender. The appeals court agreed with the district court that the state's evidence was insufficient and that double jeopardy barred retrial. The stage was set for the state's appeal to the United States Supreme Court.

III. PRIOR LAW

The United States Supreme Court had dealt in large degree with the question of double jeopardy and its application when it decided two cases on the same day in 1978. With Burks v. United States and Greene v. Massey the Court addressed a number of double jeopardy issues, but left others open.

A. Burks v. United States

The defendant in Burks was tried in the United States District Court for the Middle District of Tennessee for robbery. The jury disbelieved Burks' principal defense of insanity, and found him guilty as charged. On appeal, the United States Court of Appeals agreed with the petitioner that "the evidence was insufficient to support the verdict and reversed his conviction." At that time, rather than

29. Id.
30. Id. at 186.
31. Id.
38. Id. at 3.
terminating the case against Burks, the court of appeals remanded to the district court "for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered."\(^{40}\) The court of appeals directed the district court to choose the appropriate course (i.e., new trial or acquittal) based on a "balancing of the equities,"\(^{41}\) a procedure adopted from the Fifth Circuit in *United States v. Bass*.\(^{42}\) That balancing test required the court to direct a verdict of acquittal unless the court was satisfied that the government had "sufficient additional evidence" that would enable it to meet its burden on the issue of defendant's sanity.\(^{43}\) The Supreme Court addressed the question of whether a defendant could be tried a second time after a reviewing court had "determined that in a prior trial the evidence was insufficient to sustain the" jury's verdict.\(^{44}\) In a unanimous decision\(^ {45}\) the Supreme Court felt it should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient.\(^ {46}\)

The Supreme Court then concluded:

>[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.\(^{47}\)

\(^{40}\) *Id.*

\(^{41}\) *U.S. v. Bass*, 490 F.2d 846 (5th Cir. 1974).

\(^{42}\) 490 F.2d at 852-53, *overruled on other grounds*, *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984).

\(^{43}\) *Burks*, 547 F.2d at 970. The directions from the appeals court did leave open the option to the district court of refusing to order a new trial if the prosecution "had the opportunity fully to develop its case or in fact did so at the first trial." *Id.* The court of appeals felt it had the authority to order the "balancing" remedy because Burks had explicitly requested a new trial. *Id.*

\(^{44}\) *Burks*, 437 U.S. at 5 (1978).

\(^{45}\) Justice Blackmun took no part in the consideration or decision of the case.

\(^{46}\) *Burks*, 437 U.S. at 11.

\(^{47}\) *Id.* at 15. The Court was impressed with the rationale set forth in *United States v. Tateo*, 377 U.S. 463 (1964), which justified retrial to correct trial error on the basis that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 466.
The Supreme Court expressed that the same was not true when a conviction was overturned based on a failure of proof at trial because such a failure of proof "means that the government's case was so lacking that it should not have even been submitted to the jury."\(^{48}\) The Supreme Court held that double jeopardy precluded a second trial once the reviewing court found the evidence insufficient to sustain the guilty verdict. Consequently, Burks' case was remanded for acquittal.\(^{49}\)

**B. Greene v. Massey**

*Greene* involved a Florida jury conviction of two co-defendants for first-degree murder, without a recommendation of mercy. Pursuant to Florida law at the time, the trial court sentenced both defendants to death.\(^{50}\) On appeal to the Florida Supreme Court, the convictions were reversed due to evidentiary insufficiency and new trials ordered in a 4-3 decision.\(^{51}\) Despite the petitioners' claim of double jeopardy, the Second District Court of Appeal of Florida allowed a retrial,\(^{52}\) at which the co-defendants were again convicted of first-degree murder with each receiving a life sentence, this time with a recommendation of mercy.\(^{53}\)

Both the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Fifth Circuit dismissed a petition for writ of habeas corpus.\(^{54}\) The United States Supreme Court granted certiorari\(^{55}\) and held, as it did in *Burks*, "that the Double Jeopardy Clause precludes a second trial once a

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49. *Id.* at 18. The Court overruled any prior decisions suggesting that moving for a new trial, as Burks did, was a waiver of right "to a judgment of acquittal on the basis of evidentiary insufficiency." *Id.*
reviewing court\textsuperscript{56} has determined that the evidence introduced at trial was insufficient to sustain the verdict.\textsuperscript{57} However, the Court was troubled by the Florida Supreme Court's "special concurrence" which, according to the United States Supreme Court, could be interpreted to mean that "the concurring justices thought that the \textit{legally competent} evidence \ldots at the first trial was insufficient to prove guilt. That is, they were of the opinion that once the inadmissible hearsay evidence was discounted, there was insufficient evidence to permit the jury to convict."\textsuperscript{58} Conversely, this meant then that only \textit{with} the hearsay evidence \textit{was} there enough evidence to convict. In a footnote, the United States Supreme Court expressly reserved its opinion as to the double jeopardy implications of a retrial following such a holding.\textsuperscript{59}

IV. Case Analysis

A. Decision

The dichotomy of trial error and evidentiary insufficiency set out in \textit{Burks v. United States}\textsuperscript{60} ultimately provided the focus of the debate in \textit{Lockhart}.\textsuperscript{61} The \textit{Lockhart} decision would determine whether admission of the pardoned conviction into evidence constituted trial error (thereby permitting retrial) or evidentiary insufficiency (thereby barring retrial on double jeopardy grounds). Chief Justice Rehnquist, writing for the majority,\textsuperscript{62} determined that \textit{Lockhart} presented the court with the question expressly reserved in \textit{Greene v. Massey},\textsuperscript{63} namely whether double jeopardy allows retrial when a reviewing court determines that a conviction must be reversed because of erroneously admitted evidence and that without the inadmissible evidence there was insufficient evidence to support a conviction.\textsuperscript{64}

\textsuperscript{56} I.e., the Florida Supreme Court in the case at hand.
\textsuperscript{57} \textit{Greene}, 437 U.S. at 24.
\textsuperscript{58} \textit{Id.} at 26.
\textsuperscript{59} \textit{Id.} at 26 n.9.
\textsuperscript{60} 437 U.S. 1 (1978).
\textsuperscript{62} Chief Justice Rehnquist was joined by Justices White, Stevens, O'Connor, Scalia, and Kennedy.
\textsuperscript{63} \textit{Greene}, 437 U.S. at 26 n.9.
\textsuperscript{64} \textit{Lockhart}, 109 S. Ct. at 290.
1. Trial Error for the Majority

The majority in *Lockhart* held that it was "'beyond dispute that this is a situation described in *Burks* as reversal for 'trial error.'"\(^{65}\) The majority analogized the situation in *Lockhart* to "'newly discovered evidence;'"\(^{66}\) the evidence of the disputed conviction was introduced, and only years later was it discovered that it had been pardoned.\(^{67}\) Once the majority decided that trial error existed rather than insufficiency of evidence, retrial was permissible under the precedent of *Burks*.

2. Going Beyond Trial Error v. Evidentiary Insufficiency

The majority did not stop with its decision that *Lockhart* should be reversed due to trial error. The Court may have seen this case as an opportunity to eliminate the need for future adjudications to determine whether a situation of trial error or evidentiary insufficiency exists. To accomplish this, the majority examined the question of whether an appellate court should consider inadmissible evidence on appeal. Chief Justice Rehnquist wrote the following:

The basis for the *Burks* exception to the general rule is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.\(^{68}\)

Consequently, the majority held that the double jeopardy clause did not preclude retrial where all of the state's evidence admitted by the trial court—"'whether erroneously or not —would have been sufficient to sustain a guilty verdict.'"\(^{69}\) The majority did not believe that *Burks* had resolved this question.\(^{70}\) Clearly *Burks* did

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65. *Id.*

66. *Id.* at 291 n.7.

67. *Id.*

68. *Id.* at 291.

69. *Id.* at 287.

70. *Id.* at 294 (Marshall, J., dissenting).
not settle the issue of how much evidence was to be considered on review. Otherwise, *Lockhart* would not have had to have been decided by the Supreme Court. This does not detract from the *Lockhart* majority opinion; it merely explains the lack of unanimity among the justices in *Lockhart* despite the fact that the *Lockhart* majority based much of its reasoning on the unanimous *Burks* decision. The dissent in *Lockhart* resulted from different interpretations of the breadth of *Burks*.

3. The Minority View: The Evidence Never Existed

The minority opinion 71 also focused on Arkansas case law which held that a "pardon ed conviction cannot be counted toward the four prior convictions required under the State's sentence enhancement statute." 72 "A pardon simply 'blots out of existence' the conviction as if it had never happened." 73 The dissent's view in this case was that the improper evidence (pardoned conviction) could not be considered by the reviewing court along with the admissible evidence, because the conviction in question ceased ever to have existed once it was pardoned.

The majority effectively countered the minority's "it was never really there" argument by stating the following:

Had the defendant offered evidence at the sentencing hearing to prove that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon. 74

The majority thus felt it had put the parties back where they were prior to the mistake.

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71. Justice Marshall authored the minority opinion, which was joined by Justices Brennan and Blackmun. *Id.* at 292.
72. *Id.* at 293 (Marshall, J., dissenting); Duncan v. State, 254 Ark. 449, 494 S.W.2d 127 (1973).
74. *Id.* at 291.
4. Evaluation of the Decision

Lockhart requires that a reviewing court consider all evidence proffered at trial in deciding whether the evidence was insufficient or not. It is a common sense, practical decision; one much more easily applied than the minority's predictable call for some sort of balancing test. Instead of determining evidentiary insufficiency on review with its accompanying hazy hindsight, sufficiency is determined by what was presented and accepted at trial. It is a chain reaction: had the pardoned conviction in Lockhart been properly excluded at trial, how could a reviewing court say that more evidence would not have been proffered? The majority's attempt at putting the parties back where they started is the best way to take into account the fact that the parties took one path when the evidence was admitted and may have taken a completely different one had the evidence been properly excluded.

B. Implications—Generally

The major implication is clear: the range to which the double jeopardy clause applies has been narrowed. However, the minority probably inflates the degree to which this narrowing has occurred. A conviction based on insufficient evidence will still result in acquittal, and retrial will still be barred based on double jeopardy. However, the reviewing court will consider all the evidence admitted at trial. The rule in Lockhart should apply only where evidence is later found to be inadmissible, and where there is enough evidence (including the evidence in question) on which to base a conviction.

The distinction between trial error and insufficient evidence is now moot. All evidence is to be considered on appeal regardless of its prior categorization (trial error or insufficiency). Insufficiency of evidence (and bar to retrial based on double jeopardy) is determined once everything has been considered.

75. Id. at 295-96 (Marshall, J., dissenting). The dissent's test is one of balancing "the defendant's interest in repose with society's interest in punishing the guilty." Id. This muddy, inconclusive test clearly falls far short of the coherent and cogent majority ruling.

76. Id. at 292 (Marshall, J., dissenting).
Lockhart's holding is easily applied by lower appellate courts to a question with the potential of being a "hair-splitting" one. To formulate rules and guidelines, as the minority would have liked,\(^7\) would have ultimately led to more litigation, more questions, and the inevitable appearance of exception upon exception.

The crucial question to be answered is whether this result embodies the classic double jeopardy evil of a state ""honoring its trial strategies and perfecting its evidence through successive attempts at conviction.""\(^8\) The minority answers affirmatively. However, it overstates its case. Lockhart will only arise where the court has allowed in evidence, that is later determined to be inadmissible, and the prosecutor and defense counsel offer no objection, as in Lockhart where the conviction had in reality been pardoned. It is unlikely that this scenario will occur with a great degree of regularity. To believe otherwise would be to have scant faith in the bench and bar. And when it does happen, it is so similar to admission of, for example, improper hearsay evidence, that to treat it as anything but the trial error, which it so closely resembles, is illogical.

The onus is on counsel to do his or her homework, so that it is known with surety whether or not the evidence is proper, or, as in Lockhart, whether the convictions are valid. Counsel's expectation that opposing counsel will do his or her work is unprofessional, at worst, and misplaced faith, at best.\(^9\) As well, the specter of malpractice and professional discipline would in theory be a deterrent to the occurrence of the scenario in question. A defendant, forced to bear the expense of another trial, might recover costs from his or her attorney on the basis that the attorney should have realized that the evidence was defective. Likewise if

\(^7\) Id. at 294-96 (Marshall, J., dissenting).
\(^8\) Id. at 292 (quoting Tibbs v. Florida, 457 U.S. 31, 41 (1982)).
\(^9\) The district court in Nelson issued an order indicating that although Nelson's "attorney made no contemporaneous objection to the use of the pardoned conviction, counsel's failure to object constituted ineffective assistance of counsel," thereby not preventing "the Court from considering the petition." Nelson, 641 F.2d at 175. Ineffective assistance too was considered by the Court as constituting "cause," thereby satisfying the exception to Wainwright v. Sykes, 433 U.S. 72 (1977). Nelson, 641 F. Supp. at 175.
A prosecutor knowingly entered into evidence convictions or other evidence that he or she knew to be invalid, professional discipline would very likely ensue. It is probably not uncommon, and maybe not entirely unjustified, for court appointed criminal defense counsel to almost automatically disbelieve his or her client’s insistence of having been set-up, having been pardoned, or having had no prior criminal record. However, *Lockhart* should provide a lesson to wary counsel: the client is not always lying or ignorant.

C. Implications—West Virginia

Aside from generalized implications, *Lockhart v. Nelson* bears interest in West Virginia because West Virginia has a sentence enhancement procedure not unlike that in the Arkansas statute that predicated *Lockhart*. Under West Virginia’s “‘habitual criminal statute,’’ with one prior conviction, five years are added to a subsequent conviction sentence if the sentence imposed is for a definite terms of years; five years are added to the maximum term of imprisonment when an indeterminate sentence is imposed. If two prior convictions exist, the sentence is extended to confinement for life. Procedurally, the prosecuting attorney has the burden

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82. *Id.* § 61-11-18.

83. *Id.* The complete text of § 61-11-18 is as follows:

When any person is convicted of an offense and is subject to confinement in the penitentiary therefor, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person had been before convicted in the United States of a crime punishable by imprisonment in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, five years shall be added to the maximum term of imprisonment otherwise provided for under such sentence.

When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.

The statute was deemed constitutional and not in violation of the proportionality principle contained in state and federal guarantees against cruel and unusual punishment in State v. Oxier, 369 S.E.2d
of producing evidence of any prior convictions. If the prisoner concedes he or she is the person named in the prior convictions, the court extends the sentence accordingly.

Faced with a defective enhancement proceeding in State ex rel. McMannis v. Mohn, the West Virginia Supreme Court of Appeals held that because the underlying conviction was still valid, double jeopardy did not prevent a resentencing, because resentencing was "unrelated to the underlying truth-finding process which led to the conviction and only corrects the improper sentence." In addition, the court permitted the state to reinvoke the recidivist proceeding to enhance the underlying sentence on the basis that:

the initial conviction under our recidivist statute does not violate double jeopardy principles, since the recidivist proceeding does not involve a new offense, but rather an enhancement of the penalty for the underlying felony conviction. It is not a multiple punishment for the same offense.

Rather, the punishment for the underlying felony is statutorily lengthened as a result of the recidivist charge.

The court concluded that double jeopardy was not applicable and that "this determination is made upon the entire record submitted to the jury and not upon the residual evidence remaining after the appellate court reviews the record for evidentiary error." It thus appears that West Virginia is entirely in accord with

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866 (W. Va. 1988).

It should be noted that the state must prove that the prior convictions, except for the first offense and conviction, were for offenses committed after each preceding conviction and sentence. State v. McMannis, 161 W. Va. 437, 441-42, 242 S.E.2d 571, 575 (1978). This implies that a person who commits a crime while out on bond awaiting trial on a separate matter, and is later convicted, could not have his or her sentence enhanced if convicted of the second offense.


85. W. Va. Code, supra note 84. Only if the prisoner claims he is not the person named in the prior conviction or remains silent is a jury impanelled, and then only to establish the prisoner's identity. Id. The recidivist hearing must be held within the same term of court as the conviction or the enhancement must be removed. Id.; State v. Billups, 368 S.E.2d 723, 724 n.1 (W. Va. 1988).


87. Id. at 142, 254 S.E.2d at 812. See also State ex rel. Young v. Morgan, 317 S.E.2d 812, 814-15 (1984).

88. Mohn, 163 W. Va. at 142, 254 S.E.2d at 812.

89. Id. at 142-43, 254 S.E.2d at 812-13.

90. Mohn, 163 W. Va. at 144, 254 S.E.2d at 813.
the recent United States Supreme Court ruling in *Lockhart*.

V. CONCLUSION

When an appeals court finds a conviction was wrongly obtained, two results are possible: the court can remand the case if the conviction resulted out of trial error, or the court can order an acquittal if the conviction resulted despite insufficient evidence. *Lockhart v. Nelson* will insure that the latter result is less common because double jeopardy now does not forbid retrial so long as the sum of the state's evidence admitted—erroneously or not—would have been sufficient to sustain a guilty verdict. 91

*Lockhart* may signify a trend toward narrowing double jeopardy, but the case in and of itself is less notorious than the minority fears. The minority is mistaken in saying that retrial under the circumstances in *Lockhart* simply allows the state to "hon[e] its trial strategies and perfect[ ] its evidence through successive attempts at conviction." 92 As the majority explains, it "merely recreates the situation" that would have existed had the evidence been excluded as it properly would have been. 93 Who knows how the prosecution's trial strategy is changed when a certain bit of evidence is improperly permitted. Maybe other, allowable evidence, for whatever reason, is held back. It would therefore be wrong to flatly say that there must exist a situation of evidentiary insufficiency.

*Lockhart* signifies a break from the less than satisfactory dichotomy of trial error versus insufficient evidence. The Court sidestepped the issue and said simply that all the evidence at trial would be considered—improper or otherwise—and retrial would be permissible if there existed enough evidence in total to convict. The nature of the improper evidence is not important. Rather, the amount is the critical consideration. 94

92. *Id.* at 292 (Marshall, J., dissenting).
93. *Id.* at 291.
94. *Id.* at 287.
Lockhart is consistent with West Virginia’s approach to the situation in question and is on the whole a decision easily applied by reviewing courts. Lockhart is a signal that the High Court will not be satisfied by muddy, murky “balancing tests” and instead is committed to more practical holdings and rules of law.

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