



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0962

**STATE OF WEST VIRGINIA,
PLAINTIFF BELOW/RESPONDENT,**

v.

**DANIEL L. HERBERT,
DEFENDANT BELOW/PETITIONER**

PETITIONER'S REPLY BRIEF

DANIEL L. HERBERT,
Defendant Below/Petitioner

A handwritten signature in cursive script, appearing to read "Matthew L. Harvey" followed by a flourish.

Matthew L. Harvey, Esquire
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TABLE OF AUTHORITIES

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REPLY BRIEF

Petitioner does not intend to present to the Court in this Reply Brief a redundant enunciation of the arguments set forth in his brief, except as the arguments directly respond to what Petitioner believes is an incorrect statement of law or fact as set forth in the State's response.

Petitioner would begin with a reiteration of what he believes is the principle of law set forth in State v. McCraine, 588 S.E.2d 177, 214 W.Va. 188 (2003), and State v. Reed, 625 S.E.2d 348, 218 W.Va. 586 (2005), that is germane/relevant to this appeal. Petitioner submits that the issue is how a circuit court should deal with the admissibility of evidence of a prior conviction whether deemed a "status" element or an "essential" element of an offense if a defendant is challenging the validity of the conviction as it is to be applied to the underlying charge, not the mere existence of the conviction. Petitioner makes this statement in reply to the arguments set forth in pages 1 through 5 of the Response Brief of the State.

Petitioner notes the State never acknowledges or addresses the fact that the issue before the Court only arises if a defendant is challenging the validity of a prior conviction. (McCain, *supra*

specifically involves the defendant's challenge of one or more the prior underlying DUI convictions as your Petitioner also desired to do). Petitioner says it should make no difference whether the prior conviction challenged as invalid is deemed an essential element of the underlying offense for which the defendant stands trial or merely affects the sentence to be imposed upon the underlying conviction whether the underlying conviction is a misdemeanor or a felony.

Petitioner submits that both the circuit court and the state's reliance upon the federal cases as cited by the court below in its order denying bifurcation, and in the State's brief are not directly relevant to the issue that your Petitioner reiterates is the essential issue in the case, because none of the cases cited by either the Court or the State deal with a defendant who is challenging the validity of the prior conviction, merely its introduction into evidence.

Petitioner points out that Judge Yoder ignored the fact that this Court has broadened the rights of a criminal defendant allowing him to challenge the validity of a prior conviction in the Court where the prior conviction is being introduced by the State to either elevate the offense from a misdemeanor to a felony offense, or to enhance the sentence that your Petitioner may receive upon conviction of the underlying offense. Petitioner submits this is not the rule of law in the majority of the federal courts, wherein under the federal system, a defendant who seeks to challenge the validity of a prior conviction being used to enhance the sentence upon a conviction may only do so by a collateral proceeding to-wit: either a habeas corpus or coram nobis proceeding and thus a defendant in federal court is not permitted to challenge the conviction in a court where the conviction is being introduced to enhance the penalty upon conviction. See U.S. v. Martinez Cruz, No. 12-3050 (DC 2013), U.S. v. Roman, 989 F.2d 1117 (11 Cir. 1993) U.S. v. Isaacs, 14 F.3d. 106 (1st Cir.

1993), U.S. v. Cooper, 203 F.3d (1279 11.Cir 2000), Cuppett v. Duckworth, 8 F.3d. 1132 (7th Cir. 1993), U.S. v. Spell, 44 F.3d 936 (11. Cir 1995).

Petitioner submits regardless of whether by stipulation or by the calling of witnesses and the presentation of evidence in a unitary trial wherein the jury is being asked to determine the validity of the prior conviction, as well as the guilt or innocence of your Petitioner, the prejudice to a defendant is the same.

Petitioner submits that as stated in his original brief this procedural protocol for West Virginia criminal defendant is based on the West Virginia due process clause, as set forth in Article III, Section 10 of the WV Constitution.

Respectfully submitted,

DANIEL L. HERBERT
Defendant/Petitioner, below


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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2014, true and accurate copies of the foregoing PETITIONER'S REPLY BRIEF were deposited in the United States mail contained in a postage pre-paid envelope addressed to counsel for all other parties to this petition as follows:

Christopher Quaesbarth, Esq.
Assistant Prosecuting Attorney
Berkeley County Judicial Center
380 W. South Street
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Signed: Matthew L. Harvey for
Matthew L. Harvey, Esquire (WV State Bar No. 9813)
Counsel for Petitioner, Daniel L. Harbert