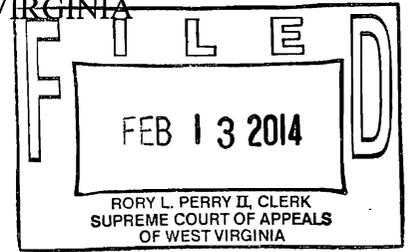


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

DANIEL L. HERBERT,

Defendant Below, Petitioner.

DOCKET NO.: 13-0962  
(Berkeley County Case No.: 12-F-204)

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**RESPONDENT STATE OF WEST VIRGINIA'S BRIEF**

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## PETITIONER'S ASSIGNMENT OF ERROR

- I. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION TO BIFURCATE THE SUBSTANTIVE ELEMENTS OF THE CHARGE OF BEING A CONVICTED FELON IN POSSESSION OF A FIREARM?

### STATEMENT OF THE CASE

The Petitioner was indicted by a Berkeley County Grand Jury in October of 2012, for two (2) felony counts of attempted murder, three (3) felony counts of malicious assault, five (5) felony counts of wanton endangerment, one (1) felony count of being a convicted felon in possession of a firearm, and one (1) misdemeanor count of fleeing from a law enforcement officer by means other than the use of a vehicle. [Appendix Record, hereinafter referred to as AR, pg. 16-20.] The charges arose from the Petitioner firing five (5) shots from a .38 caliber revolver at the City of Martinsburg's Fourth of July celebration at War Memorial Park on July 4, 2012, shooting a twenty-five year old man twice and an eight-year-old girl once. The Petitioner then fled on foot and was chased by Martinsburg City Police Officers until he was apprehended. The Petitioner had previously been convicted of the felony offense of Aggravated Robbery. [AR, pg. 12-13.]<sup>1</sup>

On or about March 20, 2013, the Petitioner filed a "Motion for Severance of Offense and Bifurcated Trial." [AR, pg. 4-6.] Therein, the Petitioner moved the trial court to sever Count Eleven (11) of the indictment, the charge of being a convicted felon in possession of a firearm, **W.Va. Code §61-7-7(b)(1)**, and also moved the trial court to bifurcate the trial of that count pursuant to this Honorable Court's holding in State v. McCraine, *infra*. [Id.] The State did not object to the severance of Count Eleven (11) and elected to proceed on that charge first. [AR,

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<sup>1</sup> The Petitioner was subsequently convicted following a jury trial of two (2) felony counts of attempted murder, three (3) felony counts of malicious assault, two (2) felony counts of wanton endangerment, and one (1) misdemeanor count of fleeing from a law enforcement officer by means other than the use of a vehicle. The trial court sentenced the Petitioner to an aggregate sentence of not less than twenty-three (23) nor more than fifty (50) years in the penitentiary. The Petitioner's appeal of that conviction and sentence is currently pending before this Court. Docket No. 13-1264.

pg. 7-8.]

The State did object, however, to the bifurcation of that trial under the facts and circumstances of this case as well as the nature of this charge, which the State argued were clearly distinguishable from McCraine. [Id.] Following argument at the pretrial hearing, the trial court took the matter under advisement and shortly thereafter issued an order granting the Petitioner's motion to bifurcate the "status element" of Count Eleven of having been previously convicted of a felony crime of violence. [AR, pg. 7-10.] However, later that same day, the trial court entered an order vacating the order of bifurcation and an order denying the Petitioner's motion to bifurcate, finding that the Petitioner's prior conviction is an essential element of the charge (in fact it is what makes the behavior cited in that count- the possession of a firearm-criminal) and citing Federal precedent to support its logic. [AR, pg. 11-15.] The Petitioner ultimately stipulated that he had previously been convicted of a qualifying felony,<sup>2</sup> and the trial court read a limiting instruction to the jury regarding that stipulation. [AR, pg. 21-22; 25-26.]

Following a two-day trial, the jury returned a verdict of guilty as to the felony offense of being a convicted felon in possession of a firearm upon which the Petitioner was convicted. [AR, pg. 1-3.] On July 25, 2013, the Petitioner was sentenced to a determinate term of five (5) years in the penitentiary for that conviction.

### **SUMMARY OF ARGUMENT**

The trial court properly denied the Petitioner's motion to bifurcate the substantive elements of the charge of being a convicted felon in possession of a firearm. State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003), holds that a trial court must grant bifurcation in cases before a jury in which a criminal defendant seeks to contest the validity of an alleged prior

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<sup>2</sup> Petitioner's counsel was careful to clarify on the record that the Petitioner still wished to preserve and maintain his objection to the court's denial of bifurcation so that he may appeal that issue but was only stipulating to the conviction based upon the trial court's decision to deny bifurcation. [AR, pg. 29-30.]

conviction as a status element. However, those “status element” cases are limited to prior convictions used to enhance the penalty for the same criminal behavior that could otherwise stand alone for jury consideration, such as Driving Under the Influence, Domestic Battery, Domestic Assault, or Shoplifting. With the instant charge of being a felon in possession of a firearm, there is no stand alone crime, as possessing a firearm is not a crime in and of itself. It is only a crime under W.Va. Code §61-7-7(b)(1) when the possessor, like the Petitioner, was previously convicted of a qualifying criminal offense.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The State believes that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Honorable Court in its discretion were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate since this appeal involves a narrow issue of law.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY DENIED THE PETITIONER’S MOTION TO BIFURCATE THE ESSENTIAL ELEMENTS OF THE CRIME OF BEING A CONVICTED FELON IN POSSESSION OF A FIREARM.**

##### **A. Standard of Review**

“Generally, findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*.” Syl. Pt. 1, in part, State ex rel. Cooper v. Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996).

Syl. Pt. 1, State v. McCraine, 214 W. Va. 188, 588 S.E.2d 177 (2003).

## B. Discussion

The Petitioner was charged with the felony offense of being a person prohibited from possessing firearms in possession of a firearm. More specifically, the Petitioner was charged under **W.Va. Code §61-7-7(b)(1)**, with a qualifying prior felony conviction of Aggravated Robbery, a crime of violence to the person of another.<sup>3</sup>

The Petitioner argues that the trial court committed reversible and prejudicial error by denying the Petitioner's motion to bifurcate the elements of the offense of being a convicted felon in possession of a firearm for the purpose of trial. The Petitioner states that the trial court was required to bifurcate based upon this Honorable Court's decisions in State v. McCraine, *supra.*, and State v. Reed, 218 W.Va. 586, 625 S.E.2d 348 (2005).

In State v. McCraine, the Defendant McCraine was charged with Driving Under the Influence, Third Offense in violation of W.Va. Code §17C-5-2(d) and (l).<sup>4</sup> Prior to trial, McCraine moved to bifurcate based upon this Court's ruling in State v. Nichols, 208 W.Va. 432, 541 S.E.2d 10 (1999), which the trial court denied finding that McCraine had not mounted a meritorious challenge against the legitimacy of his prior convictions. This Honorable Court reversed the trial court and amended its ruling in Nichols, holding that

a trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. To the extent that our decision in State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), conflicts with this holding it is hereby modified.

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<sup>3</sup> **W.Va. Code §61-7-7(b)(1)** provides, relevant to this case, that any person who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another and who possesses a firearm shall be guilty of a felony..

<sup>4</sup> Driving Under the Influence carries enhanced penalties as convictions therefor accumulate. The offense of Driving Under the Influence is contained in **W.Va. Code §17C-5-2(d)**. An enhanced penalty for a second conviction of DUI, as defined in **W.Va. Code §17C-5-2(d)**, is contained in **W.Va. Code §17C-5-2(k)**, and an enhanced penalty for a third conviction of DUI, again as defined in **W.Va. Code §17C-5-2(d)** is contained in **W.Va. Code §17C-5-2(l)**.

Syl. Pt. 11, State v. McCraine, 214 W. Va. 188, 588 S.E.2d 177 (2003).

While this holding seems to apply to “**any** alleged prior conviction as a status element” of an offense, it is significant that this Court’s underlying rationale for bifurcation under such circumstances is so “the jury may consider the issue of prior conviction **separately from the issue of the underlying charge.**” (Emphasis added.)

Also in McCraine, this Court specifically stated that it is revisiting its “legal determination in State v. Nichols as it relates to the circumstances under which bifurcation is warranted in cases involving challenges to **prior convictions as status elements of a recidivist crime** such as second and subsequent offenses of DUI. State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001).” State v. McCraine, 214 W.Va. at 203, 588 S.E.2d at 192 (emphasis added). This Court also noted that Nichols established the procedure by which criminal defendants who seek to challenge collateral conviction status elements **separately from the underlying charge** may obtain a bifurcated proceeding. State v. McCraine, 214 W.Va. at 204, 588 S.E.2d at 193 (emphasis added).

Similar to McCraine, in State v. Reed, *supra.*, the Defendant Reed was convicted of Domestic Battery, Third Offense in violation of **W.Va. Code §61-2-28(a) and (d)**.<sup>5</sup> Reed moved the trial court to bifurcate his trial so that the jury could hear and consider the underlying criminal charge separate and apart from his prior convictions. State v. Reed, 218 W.Va. at 588, 625 S.E.2d at 350. Based upon this Court’s precedent as established in Nichols, the trial court denied Reed’s motion. Id. Reed then stipulated to the prior convictions. Id. This Court ultimately found that Reed had failed to properly preserve his objection and affirmed his

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<sup>5</sup> Like Driving Under the Influence, Domestic Battery also carries enhanced penalties as convictions accumulate. The underlying offense of Domestic Battery is defined in **W.Va. Code §61-2-28(a)**. An enhanced penalty for a second conviction is contained in **W.Va. Code §61-2-28(c)**, and an enhanced penalty for a third or subsequent conviction is contained in **W.Va. Code §61-2-28(d)**.

conviction. Id. at 591, 353.

In the case at hand, the Petitioner was charged with being a felon in possession of a firearm. When examining the instant offense, it becomes clear that McCraine and Reed do not apply as the Petitioner claims they do. This Court's decisions in those cases, and in its previous decisions in Nichols and Dews, have express limitations.<sup>6</sup> They are limited to certain criminal offenses that contain status elements of prior convictions meant to enhance the penalties for criminal behavior that would otherwise stand alone for jury consideration, such as Second and Third Offense DUI, Second and Third Offense Domestic Battery and Domestic Assault, and Second and Third Offense Shoplifting. The procedure first discussed in Nichols and modified by McCraine allows the jury first to determine the defendant's guilt on the underlying crime (such as DUI, Domestic Battery, Domestic Assault or Shoplifting). Then, after returning a verdict of guilty on the underlying criminal offense, the second part of the trial would begin wherein the jury would determine if the defendant is the same individual who was previously convicted of one or more of the same offense.

In distinction to those enhanced penalty offenses, if the instant crime of being a felon in possession of a firearm were to be bifurcated, there would be no underlying criminal offense for the jury to first consider. It is not a criminal offense for a citizen to simply possess a firearm. Not only is there no such crime, but the Second Amendment of the United States Constitution provides a right to bear arms: no West Virginia jury would "convict" someone of simply possessing a firearm without any explanation as to why or how such an act is criminal. The State cannot reasonably impanel a jury to determine whether an individual possessed a firearm without any context that would make that possession criminal. To do so would cause significant

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<sup>6</sup> Both of the Defendants in Nichols, *supra*. and in Dews, *supra*, were charged with Driving Under the Influence, Third Offense.

confusion for the jury.

The trial court agreed with the State, citing the decisions of a number of Federal Courts which have handed down precedent dealing specifically with motions to bifurcate the charge of being a felon in possession of a firearm. The trial court was particularly swayed by the reasoning in United States v. Barker, 1 F.3d 957 (9<sup>th</sup> Cir. 1993). In that case, the Ninth Circuit held that a single offense of being a felon in possession of a firearm may not be bifurcated into multiple proceedings. Id. at 959. In reaching this conclusion, the Ninth Circuit joined several other Federal Courts in finding that to order bifurcation of this offense would remove an element of the crime from the jury's consideration, prevent the government from having its case decided by the jury, and change the very nature of the charged offense. Id. In addition to noting that bifurcation would make it impossible for the court to read the indictment to the jury or instruct the jury as to the elements of the crime charged, Federal Courts have recognized the impact such a bifurcation would cause on the jury's separate and blind consideration of the possession element. Such a bifurcation order "might unfairly confuse the jury, prompting it to exercise its power of nullification on the unwarranted belief that the defendant was charged for noncriminal conduct."

Id.

When a jury is neither read the statute setting forth the crime nor told of all the elements of the crime, it may, justifiably, question whether what the accused did was a crime.... Possession of a firearm by most people is *not* a crime. A juror who owns or who has friends and relatives who own firearms may wonder why [the defendant's] possession was illegal. Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element.

Id., citing United States v. Collamore, 868 F.2d 24, 28 (1<sup>st</sup> Cir. 1989), *abrogated on other grounds* by United States v. Tavares, 21 F.3d 1 (1<sup>st</sup> Cir. 1994). *See also* United States v. Gillam, 994 F.2d 97, 101-102 (2<sup>nd</sup> Cir. 1993), *cert. denied* 114 S.Ct. 335 (1993); United States v.

Jacobs, 44 F.3d 1219, 1222-1223 (3<sup>rd</sup> Cir. 1994), *cert. denied* 115 S.Ct. 1835 (1995); United States v. Milton, 52 F.3d 78, 80-81 (4<sup>th</sup> Cir. 1995), *overruled on other grounds by United State v. Baker*, 719 F.3d 313 (4<sup>th</sup> Cir. 2013); United States v. Underwood, 97 F.3d 1453, 1459 (6<sup>th</sup> Cir. 1996); United States v. Aleman, 609 F.2d 298, 310 (7<sup>th</sup> Cir. 1979), *cert. denied* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980), *superseded by statute on other grounds*; United States v. Koskela, 86 F.3d 122, 125-126 (8<sup>th</sup> Cir. 1996); United States v. Brinklow, 560 F.2d 1003, 1006 (10<sup>th</sup> Cir. 1997), *cert. denied* 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978); United States v. Birdsong, 982 F.2d 481, 482 (11<sup>th</sup> Cir. 1993), *cert. denied* 508 U.S. 980 113 S.Ct. 2984, 125 L.Ed.2d 680 (1993).

The Barker court further addressed a common misunderstanding concerning the fundamental nature of “prejudicial evidence,” which the Petitioner advances in support of his argument herein:

Evidence is prejudicial only when it has an additional adverse effect on a defendant beyond tending to prove the fact or issue that justified its admission. A prior conviction is not prejudicial when it is an element of the charged crime. Proof of the felony conviction is essential to the proof of the offense—be it proof through stipulation or contested evidence. The underlying facts of the prior conviction are completely irrelevant...the existence of the conviction itself is not.

United States v. Barker, 1 F.3d 957, 959, fn. 3.

In consideration of the above, the trial court in this matter found that the bifurcation procedure outlined in Nichols and McCraime is not applicable to the charge of being a felon in possession of a firearm, as they are limited to certain criminal offenses that contain status elements of prior convictions to enhance the penalties for the same criminal behavior that could otherwise stand alone for jury consideration. [AR, pg. 12-15.]

However, the trial court then went on to find that the Petitioner could stipulate that he

“previously was convicted of a felony crime of violence to the person of another,” pursuant to Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).<sup>7</sup> [Id.] The Petitioner, without waiving his objection, chose to stipulate to his prior conviction and tendered to the court a limiting instruction, which he requested be read to the jury regarding said stipulation. [AR, pg. 29-30.] The lower court gave the limiting instruction proposed by the Petitioner. [AR, pg. 21-22.] The jury convicted the Petitioner. [AR, pg. 1-3.]

The State maintains, based on the law as examined above, that the trial court was correct in its reasoning and decision in denying the Petitioner’s motion to bifurcate the offense of being a felon in possession of a firearm but allowing the Petitioner the option to stipulate to the fact that he was previously convicted of a qualifying offense and receiving a limiting instruction thereon.

The Petitioner ends his argument by asserting that, although the various Federal decisions cited by the trial court were in effect at the time of this Honorable Court’s rulings in McCraine and Reed, this Court did not reference or cite them. The State’s response to that point is simple. This Court never referenced any of the Federal precedent on the crime of being a felon in possession of a firearm in McCraine or Reed because they are clearly distinguishable, as discussed above. The holdings of McCraine and Reed were never intended to apply to this crime for the reasons explored above.

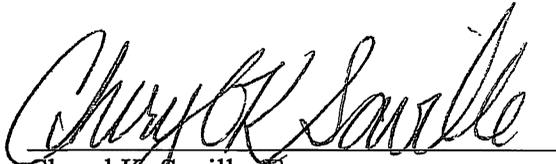
### **CONCLUSION**

For the foregoing reasons, this Court is respectfully requested to refuse the Petition for Appeal.

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<sup>7</sup> Old Chief specifically involved allowing a defendant to stipulate to his prior conviction(s) of a qualifying offense with regard to the crime of being a felon in possession of a firearm. The stipulation allowed the Petitioner to avoid the potential of the jury having placed before it the particularized violent details of his actions which established the basis for his prior Aggravated Robbery conviction.

Respectfully submitted,  
State of West Virginia,

A handwritten signature in cursive script, reading "Cheryl K. Saville". The signature is written in black ink and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 10<sup>th</sup> day of February, 2014:

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