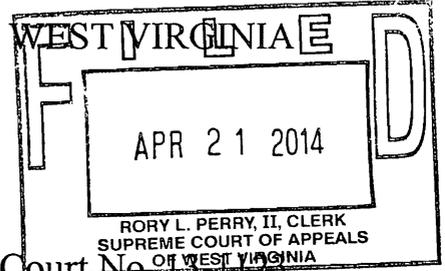


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Supreme Court No. 13-1123

v.

(Circuit Court No. 13-F-04, 13-F-06
Summers)

KEITH D.,

Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Trial Court Erred In Refusing To Let Keith D. Withdraw His Guilty Plea Prior To Sentencing. Keith D. Did Not Know He Could Receive A Life Sentence As A Habitual Offender Because The State, Trial Court, And His Own Lawyer Informed Him He Could Receive No More Than Ten Years In Prison In Consequence Of His Plea.

STATEMENT OF THE CASE

Keith D. is serving a life with mercy sentence because the State represented to him, his counsel, and the circuit court of Summers County that if he pleaded guilty to third degree sexual assault and possession of a firearm by a felon, he could receive no more than ten years in prison, only to surprise him with a habitual offender information after Keith D. took the bait. (Appendix Record (A.R.) 38). This tactic created a fair and just reason for the trial court to permit Keith D. to withdraw his plea and therefore the court abused its discretion when it refused to grant his request. He should now be permitted to either withdraw his plea or ask the trial court for specific performance of the agreed upon, unenhanced sentence range.

In March 2013, the State of West Virginia charged Keith D. with four counts of first degree sexual assault, one count of first degree sexual abuse, five counts of sexual abuse by a parent or guardian, and four counts of incest. (A.R. 1). The indictment indicates these charges stemmed from alleged abuse of Keith D.'s five year old stepdaughter. (A.R. 1-6). By a separate indictment, the State also charged him with possession of a firearm by a prohibited person. (A.R. 7-8).

On or before July 8, 2013, the State offered to let Keith D. plead down to one count of third degree sexual assault and the firearm charge. (A.R. 49). The State represented, as reflected by the written "Summary of Plea Agreement," that the maximum sentence he could possibly receive in consequence of his plea was six to ten years: one to five for the sexual assault, and not more than five for the firearm charge. (A.R. 15-16). The prosecution also

agreed to remain silent at sentencing, leaving completely to the judge's discretion what specific sentence would be appropriate within that range. (A.R. 16). At a July 19, 2013 plea hearing, the circuit court confirmed on the record that in terms of prison-time, Keith D. could receive no more than ten years in prison as a consequence of his plea. (A.R. 53-54). The State summarized its factual predicate for the plea, and when asked if that was "more or less what happened," Keith D. replied "Yes, sir, somewhat." (A.R. 57).

Per the terms presented to him at this hearing, Keith D. entered a guilty plea, which the circuit court accepted. (A.R. 56-57). Keith D. waived a presentence investigation because he wished to be sentenced immediately. (A.R. 58). The State objected, claiming Keith D.'s wife wanted to be present but could not be there that day because she had just given birth. (A.R. 58-59). Sentencing was set for August 2, 2013. (A.R. 59).

On July 25, the prosecution revealed its stated purpose in requesting a delay of sentencing was at least partially a pretext. It filed a habitual offender information, seeking a life sentence. (A.R. 9-12). The State could not have done so had Keith D. already been sentenced, but it chose not to communicate its intentions to Keith D., his lawyer, or the court when Keith D. entered his guilty plea. (A.R. 49-59, 62).

Keith D.'s trial lawyer served upon the State a "Motion to Withdraw From Representation" and a "Motion To Withdraw Plea" on July 31, 2013. (A.R. 40-40c). The Circuit Clerk's office filed these motions on August 2, the date originally set for sentencing prior to the State's habitual offender information. (A.R. 152). Keith D.'s trial lawyer explained he did not know his client could receive a life with mercy habitual offender sentence. (A.R. 62-63). The State had not brought it up at any point during the plea negotiations. *Id.* Furthermore, he admitted that the possibility of a habitual offender finding did not enter into his decisional process in advising his client to plead guilty, that he never mentioned to his client there was any chance of a life sentence, and that had he known the

State would seek a habitual offender information he never would have advised Keith D. to plead guilty. (A.R. 40a, 62-63).

The court ruled that per *Duncil v. Kaufman*, 183 W. Va. 175, 394 S.E.2d 870 (1990), it still had some discretion in allowing Keith D. to withdraw the plea even though the motion was filed pre-sentencing. (A.R. 63-64). The court denied the motion without explanation. *Id.* Keith D. now appeals, arguing the trial court's refusal of permission to withdraw his plea was an abuse of discretion because he should have been afforded actual notice of the State's ability and intent to seek a life sentence prior to the court's acceptance of his plea. He should now be allowed to withdraw his plea or request specific performance if warranted by the circumstances.

ARGUMENT SUMMARY

The trial court abused its discretion by refusing Keith D.'s request to withdraw his plea. His trial lawyer, the court, and the State all represented he could receive no more than ten years in prison for the two charges to which he pleaded guilty. He had no actual notice he could receive a life sentence as a habitual offender and now he should be allowed to withdraw his plea or request specific performance of the agreed upon, unenhanced sentencing range.

State ex. rel. Appleby v. Recht, cited *infra*, appears contrary to Keith D.'s interests, but this Court can distinguish that case based on its procedural posture and its facts. Furthermore, to whatever extent it does conflict with Keith D.'s request for relief, it ought to be overruled. West Virginia is already in the minority of states whose habitual offender procedures could conceivably result in this sort of surprise, and ruling Keith D. is not entitled to pre-plea notice would place West Virginia in the minority of that minority. Instead, West Virginia should follow the majority of states which require as a matter of due process, defendants must have

actual notice of their eligibility for habitual offender sentencing prior to pleading guilty, and extend to Keith D. the ability to withdraw his plea or seek specific performance of the bargained for sentencing range without enhancement.

Furthermore, in addition to Keith D.'s due process interest in being treated fairly, fully informing defendants of the consequences of their pleas promotes the deterrence policy underlying the habitual offender statute and bolsters the justification for the finality accorded guilty pleas. Finally, it is in the best interest of the State to encourage plea bargaining, and ruling in Keith D.'s favor would further that policy as well. This Court should therefore grant Keith D. relief by ordering the trial court to either allow him to withdraw his plea or, if circumstances so warrant, request specific performance of the plea bargain without the possibility of receiving an enhanced sentence.

STATEMENT REGARDING ORAL ARGUMENT

To the extent Keith D.'s situation is distinguishable from *State ex. rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) (Per Curiam), this is a case of first impression, and to whatever extent this case is in conflict with *Appleby*, Keith D. is asking this Court to overrule older case law. Under either situation a Rule 20 argument would be appropriate. Furthermore, Keith D. is requesting this court to adopt new syllabus points:

1. A defendant must have actual knowledge of his or her eligibility for habitual offender proceedings before entering a guilty plea to the underlying felony offense. The preferred practice would be for the State, if it is considering filing or investigating a habitual offender allegation, to notify the trial court so that the defendant can be so advised on the record during the plea colloquy.
2. If a defendant is charged as a habitual offender after pleading guilty without actual notice of that possibility, the trial court must afford him or her an opportunity to withdraw the guilty plea or request specific performance of the statutory sentencing range he or she was notified of during the plea colloquy.

Keith D. therefore requests a Rule 20 argument.

ARGUMENT

The Trial Court Erred In Refusing To Let Keith D. Withdraw His Guilty Plea Prior To Sentencing. Keith D. Did Not Know He Could Receive A Life Sentence As A Habitual Offender Because The State, Trial Court, And His Own Lawyer Informed Him He Could Receive No More Than Ten Years In Prison In Consequence Of His Plea.

Keith D. agreed to enter a guilty plea in this case because the State, his lawyer, and the trial court all told him the highest prison term he could possibly receive in consequence was six to ten years. (A.R. 13-18, 62-63, 53-54).¹ It therefore came as a shock when the State announced its intent to seek a life sentence pursuant to W. Va. Code § 61-11-18 (West 2014) (“habitual offender statute”) instead, conveniently waiting until after the trial court had accepted Keith D.’s plea to inform anyone of its plan. (See A.R. 62-63). This tactic was fundamentally unfair, and it was an abuse of discretion for the trial court to not permit Keith D. to withdraw his plea. He should now be allowed to do so, or request specific performance of the plea bargain and its agreed upon sentencing range without the possibility of enhancement.

a. Standard of Review – It is an Abuse of Discretion to Deny a Defendant’s Motion to Withdraw a Pre-sentencing Guilty Plea if he can Show any Fair and Just Reason for doing so.

The standard of review for a trial court’s decision whether to permit a defendant to withdraw his plea is abuse of discretion. *In re State ex rel. Eplin*, 132 W. Va. 610, 616, 53 S.E.2d 614, 618 (1949). However, “we indulge every reasonable presumption against the waiver of fundamental rights.” *Eplin*, 132 W. Va. at 618 (*quoting Glasser v. United States*,

¹ This case could have been argued as three separate assignments of error: 1) trial court error in failing to advise the defendant of the possibility of habitual offender sentencing, 2) prosecutorial misconduct for employing an unjust tactic and/or breaching its agreement, and 3) per se ineffective assistance of trial counsel for failing to advise Keith D. of the possible consequences of his plea. Any of these could individually be a basis for granting the relief Keith D. seeks, but ultimately, they are all derivative of the fundamental problem caused by Keith D.’s lack of actual notice he could receive a habitual offender sentence.

315 U.S. 60, 70, 62 S. Ct. 457, 465 (1942), *superseded* on unrelated grounds.). Therefore, “discretion [in the matter of the withdrawal of a plea of guilty] should be *exercised liberally*[.]” *Id.* at 617 (*quoting Bergen v. United States*, 145 F.2d 181, 187 (8th Cir. 1944)).

This discretion should be exercised especially liberally where, as here, the defendant has moved to withdraw the plea prior to sentencing. “In a case where the defendant seeks to withdraw his guilty plea before sentence is imposed, he is generally accorded the right if he can show *any fair and just reason*.” Syllabus Point 1, *State v. Olish*, 164 W. Va. 712, 266 S.E.2d 134 (1980) (*emphasis added*).

b. The State’s Late Notice of its Intent to File a Habitual Offender Information Deprived Keith D. of Actual Notice That His Plea Could Result in a Life Sentence and Therefore He Should Be Permitted to Withdraw it. To the Extent *State ex. rel. Appleby v. Recht* is in Conflict it ought to be Overruled.

Keith D. did not know the State could seek a life habitual offender sentence after he pleaded guilty with the understanding he could receive no more than ten years in prison. (*See* A.R. 62-63). This should be a fair and just reason for withdrawing his plea. Furthermore, Keith D. argues a defendant in his situation should have the option of requesting specific performance of the unenhanced sentencing range as agreed to by the parties and confirmed by the trial court during the plea colloquy. However, this Court ruled a guilty plea is valid notwithstanding the trial court’s failure to advise the defendant of the potential for a habitual offender sentence in *State ex. rel. Appleby v. Recht*, 213 W. Va. 503, 512, 583 S.E.2d 800, 809 (2002) (*Per Curiam*). Given the peculiar factual and procedural posture of that case it is questionable whether it applies to Keith D.’s situation, but to the extent it is in conflict with the relief he seeks here, it ought to be overruled. *Appleby* is a minority position, based on legal grounds which the United States Supreme Court subsequently undermined, and it is bad policy in any event. Instead, this Court should recognize that defendants should receive actual

notice of the State's ability and intent to file habitual offender informations prior to trial courts accepting their guilty pleas, preferably conferred on the record.

In *Appleby*, the defendant had been indicted for third offense DUI and third offense driving on a revoked license. *Appleby*, 213 W. Va. at 507. He attempted to plea bargain with the State, presumably seeking to reduce the charges to misdemeanors. *Id.* at Footnote 2. The State refused, stating it intended to file a habitual offender information if Mr. Appleby was convicted of the felonies. *Id.* Just prior to trial, the defendant pleaded guilty to both charges in the indictment and sought to be sentenced immediately. *Id.* at 508. The trial court accepted the plea but scheduled sentencing for a later date. *Id.* The State then filed a habitual offender information, and the defendant ultimately petitioned this Court for a writ of prohibition to stop the habitual offender proceeding or other appropriate relief, including the withdrawal of his plea. *Appleby v. Warden, Northern Regional Jail and Correctional Facility*, 595 F.3d 532, 534 (2010). As noted above, this Court denied Mr. Appleby's petition, ruling in part that the possibility of habitual offender sentencing was merely a collateral consequence of his plea. *Appleby*, 213 W. Va. at 507.

Appleby appears contrary to Keith D.'s interests at a superficial level, but in actuality the case is distinguishable. Procedurally, the *Appleby* case was a denied petition for writ of prohibition, so this Court's ruling can be regarded as less a reflection of the legal merits and more a simple declaration Mr. Appleby was not entitled to extraordinary relief. *See, e.g.*, Syllabus Point 4, *State ex. rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). This Court even noted that notwithstanding its decision in *Appleby* to not mandate the procedure, "...the better course of action for a trial court is to advise a defendant about the possibility of recidivist proceedings." *Appleby*, 213 W. Va. at Footnote 7. The defendant in *Appleby* was also asking for much more than Keith D. requests. Mr. Appleby demanded to be informed of habitual offender eligibility in a particular manner – by requiring trial courts to address it in

plea colloquies pursuant to West Virginia Criminal Procedure Rule 11. *Id.* at 510. Keith D. contends, as did this Court in *Appleby*, that this would be the preferred procedure, but it is not necessary. *See, id.*, at Footnote 7. Keith D. simply requests that defendants have actual notice before they plead guilty, however it is conveyed.

This Court could also limit *Appleby* to its facts and on that basis grant Keith D. relief. In *Appleby*, there was no surprise – the State had informed the defendant of its intent to file a habitual offender information as early as at a bond hearing, long before the trial court accepted the guilty plea. *Id.* at Footnote 6. Under those circumstances, the defendant’s decision to enter an un-negotiated plea to the indictment was likely an attempt avoid habitual offender sentencing by cutting short the State’s time to file the necessary paperwork. *See, id.*, at Footnote 7. In contrast, Keith D. had no idea he could receive a life sentence as a habitual offender. (*See* A.R. 62-63). Everyone had told him ten years was the longest prison term he could serve, and even his lawyer was caught off guard by the State’s questionable tactic. (A.R. 13-18, 62-63, 53-54). There is no reason this Court cannot both prevent criminal defendants from gaming the system, as in *Appleby*, and prevent the State from doing likewise, as happened in the instant case.

To whatever extent *Appleby* does conflict with Keith D.’s request for relief, though, it ought to be overruled. In West Virginia the State initiates habitual offender sentencing by filing an information and starting a separate proceeding after the defendant has been convicted of the underlying felony. *See Appleby*, 213 W. Va. at 510. The United States Supreme Court has ruled this two-proceeding system does not facially violate due process, *Oyler v. Boles*, 368 U.S. 448, 452, 82 S. Ct. 501, 504 (1962)², but it did not pass on whether this was a good idea. The vast majority of states rejects West Virginia’s approach and

² At the time *Oyler* was decided, due process did not require state courts to appoint counsel for indigent defendants, either. *Betts v. Brady*, 316 U.S. 455, 473, 62 S. Ct. 1252, 1262 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963).

addresses the defendant's habitual offender status in the same proceeding as the underlying felony, thus structurally preventing the surprise tactic employed by the State in Keith D.'s case.³

By Keith D.'s count, only Florida, Louisiana, Michigan, New Mexico, North Dakota, Pennsylvania, South Dakota, Virginia, and Washington are like West Virginia, making habitual offender sentencing a wholly separate proceeding.⁴ Of these, Florida, North Dakota,

³ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, Vermont, Wisconsin, and Wyoming incorporate habitual offender sentencing into the proceeding for the underlying felony instead of having separate proceedings brought pursuant to new charging instruments, though for fairness some states bifurcate jury trials. *See Handley v. State*, 686 So. 2d 540, 541 (Ala. Crim. App. 1996); Ariz. Rev. Stat. Ann. § 13-703 (West 2013); Ark. Code Ann. § 5-4-501 (West 2011); Cal. Penal Code § 667.7 (West 2012); Colo. Rev. Stat. Ann. § 18-1.3-801 (West 2013); Conn. Gen. Stat. Ann. § 53a-40 (West 2008); *Armstrong v. State*, 442 S.E.2d 759, 760 (Ga. 1994); Haw. Rev. Stat. § 706-606.5 (West 2013); *State v. Miller*, 264 P.3d 935, 940 (Idaho 2011); Ind. Code Ann. § 35-34-1-5 (West 2014); *State v. Brothorn*, 832 N.W.2d 187, 196 (Iowa 2013); *Price v. Com.*, 666 S.W.2d 749, 750 (Ky. 1984); Md. Rule 4-245 (West 2013); Mass. Gen. Laws Ann. ch. 279, § 25 (West 2012); MS R UNIF CIR AND CTY CT Rule 7.09 (West 2013); Mo. Ann. Stat. § 558.021 (West); *State v. Melone*, 2 P.3d 233, 237 (Mont. 2000); Neb. Rev. Stat. § 29-2221 (West 2013); Nev. Rev. Stat. Ann. § 207.010 (West 2009); N.H. Rev. Stat. Ann. § 651:6 (West 2014); *State v. Hudson*, 39 A.3d 150, 154 (N.J. 2012); N.Y. Crim. Proc. Law § 400.15 (McKinney 2014); *State v. Allen*, 233 S.E.2d 585, 589 (N.C. 1977); *Roberson v. State*, 362 P.2d 1115, 1119 (Okla. Crim.App. 1961); Or. Rev. Stat. Ann. § 137.635 (West 2013); R.I. Gen. Laws Ann. § 12-19-21 (West 2013) S.C. Code Ann. § 17-25-45 (West 2010); Utah Code Ann. § 76-3-203.5 (West 2013); *State v. Kasper*, 212, 404 A.2d 85, 100 (Vt. 1979); Wis. Stat. Ann. § 973.12 (West 2014); Wyo. Stat. Ann. § 6-10-203 (West 2013). Kansas and Texas also require habitual offender status to be alleged in the underlying case, though the prosecution can amend the underlying pleadings or make a motion for habitual sentencing after conviction *by jury trial*. *State v. Timley*, 875 P.2d 242, 256 (Kan. 1994), *overruled* on other grounds by *State v. Brooks*, 317 P.3d 54 (Kan. 2014); *Brooks v. State*, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997). Keith D. has not located any indication these states would prohibit defendants from withdrawing guilty pleas if the State delayed seeking habitual offender status until after their respective courts had accepted the pleas. Delaware once had a two-proceeding habitual criminal scheme like West Virginia, and now considers habitual offender status as a sentencing issue in the underlying felony proceeding. *Compare Mergenthaler v. State*, 239 A.2d 635, 638 (Del. 1968) *with* Del. Code Ann. tit. 11, § 4214 (West 2014).

⁴ Fla. Stat. Ann. § 775.084 (West 2012); *State v. Hayes*, 423 So.2d 1111, 1115 (La. 1982); *People v. Brown*, 822 N.W.2d 208, 218 (Mich. 2012); N.M. Stat. Ann. § 31-18-19 (West 2012); N.D. Cent. Code Ann. § 12.1-32-09 (West 2013); *Commonwealth v. Zorn*, 580 A.2d 8, 12 (Pa. Super. 1990); S.D. Codified Laws § 22-7-11 (West 2014); Va. Code Ann. § 19.2-

Pennsylvania, South Dakota, and Virginia require the State to serve notice on the defendant prior to trial or the trial court's acceptance of a guilty plea in the underlying felony. Fla. Stat. Ann. § 775.084 (West 2012); N.D. Cent. Code Ann. § 12.1-32-09 (West 2013); *Commonwealth v. Zorn*, 580 A.2d 8, 12 (Pa. Super. 1990); S.D. Codified Laws § 22-7-11 (West 2014); Va. Code Ann. § 19.2-297.1 (West 2013). Likewise, Michigan permits the State to file a notice seeking habitual offender sentencing after conviction, but requires the court to notify the defendant of possible habitual offender sentencing prior to accepting his or her plea. *People v. Brown*, 822 N.W.2d 208, 218 (Mich. 2012). Louisiana does not require pre-plea notice, but a defendant in Keith D.'s situation is permitted to withdraw his guilty plea or seek specific performance of the plea bargain without enhancement. *State v. Hayes*, 423 So.2d 1111, 1115 (La. 1982). In New Mexico, the State is duty-bound to inform the court of prior convictions and to seek a habitual offender sentence, and so the defendant presumably cannot be surprised as happened here. N.M. Stat. Ann. § 31-18-19 (West 2012). Only Washington imposes the harsh rule that defendants are not entitled to notice of their eligibility for habitual offender sentencing and cannot withdraw guilty pleas where they were unaware of the full consequences of that plea. *See State v. Barton*, 609 P.2d 1353, 1356-57 (Wash. 1980). West Virginia is already in the minority of states whose two-proceeding habitual offender scheme could conceivably result in the surprise tactic the State employed against Keith D. *See* Footnote 2, *supra*. If *Appleby* is read to permit the State to surprise defendants as happened here and then disallow defendants from withdrawing guilty pleas on that basis, then West Virginia will be in the minority of that minority, accompanied only by Washington.

Furthermore, the legal theory underlying the *Barton* and *Appleby* decisions has recently come under scrutiny and its continued validity is questionable. The Washington

297.1 (West 2013); *State v. Barton*, 609 P.2d 1353, 1356-57 (Wash. 1980).

court in *Barton* and this Court in *Appleby* chose not to require pre-plea notice of habitual offender eligibility by construing enhanced sentences as collateral, rather than direct consequences of guilty pleas. *Barton*, 609 P.2d at 1356; *Appleby*, 213 W. Va. at 507. However, the Supreme Court has ruled this distinction is inapplicable to situations like Keith D.'s, where the putatively collateral consequence is intimately related to the underlying criminal process. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). In *Padilla*, a criminal defendant received inaccurate advice from his lawyer concerning the immigration consequences of pleading guilty. *Padilla*, 559 U.S. at 359-60. The Kentucky courts found that deportation was merely a collateral, civil penalty stemming from Mr. Padilla's guilty plea and therefore the bad advice did not violate the constitution. *Id.*⁵ Without passing on the validity of the collateral consequences doctrine generally, the United States Supreme Court ruled the distinction was inapplicable to "an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty[.]" *Id.* at 364. The court found that consequences "intimately related to the criminal process" transcend the distinction and require a more nuanced analysis than simply being pigeonholed as collateral or direct. *Id.* at 365-66. Applying this test, the United States Supreme Court concluded that although deportation was a civil consequence, it was nonetheless intimately related to the criminal process because of its severe penalty and automatic operation. *Id.* As such, trial counsel provided constitutionally deficient representation by incorrectly advising his client concerning the consequences of his plea. *Id.* at 374-75.

Applied to West Virginia's habitual offender statute, it is clear that it too is intimately related to the criminal process and therefore cannot be discounted as "collateral." Unlike deportation, habitual offender proceedings are not civil actions in West Virginia. This Court

⁵ *Padilla* concerned ineffective assistance, but the collateral/direct dichotomy involved there is the same as that drawn by *Appleby* and *Barton* concerning the adequacy of the trial court's colloquy. Compare *Padilla*, 559 U.S. at 364 with *Appleby*, 213 W. Va. at 511.

has characterized the habitual offender statute as “highly penal.” *Holcomb v. Ballard*, 232 W. Va. 253, 752 S.E.2d 284, 291 (2013). Although they are not criminal in the sense of charging a criminal offense, they are criminal in that the defendant’s liberty is imperiled. *State ex rel. Ringer v. Boles*, 151 W. Va. 864, 870, 157 S.E.2d 554, 557 (1967). The State, through its prosecutorial function, initiates the procedure as part of the criminal process by filing a charging instrument, not a civil complaint. *See* Syllabus Point 1, *State ex rel. Bonnette v. Boles*, 148 W. Va. 649, 136 S.E.2d 873 (1964). The defendant is entitled to a jury trial, and the State has the burden of proving he or she is the same person previously convicted beyond a reasonable doubt. *State v. Barlow*, 181 W. Va. 565, 571, 383 S.E.2d 530, 536 (1989) (Per Curiam); *State v. Jones*, 187 W. Va. 600, 606, 420 S.E.2d 736, 742 (1992) (“The State, of course, bears the burden of proof in a recidivist trial.”). Finally, any sentence resulting from habitual offender status does not supplement punishment already handed down; it supersedes and *becomes* the penalty for the underlying felony. Syllabus Point 1, *Gibson v. Legursky*, 187 W. Va. 51, 415 S.E.2d 457 (1992). Under these circumstances, the severity and probability of the sanction do not even enter the equation; it is tautological that a criminal proceeding is “intimately related to the criminal process.” *Padilla*, 559 U.S. at 365-66. In light of this, the continued vitality of *Appleby* is questionable at best, and the better course would be for this Court to require criminal defendants to have actual knowledge of habitual offender eligibility before they plead guilty.

- c. **This Court Should Require Defendants to Receive Actual Notice of the Possibility of Enhanced Sentencing under West Virginia’s Habitual Offender Statute before Trial Courts can Accept Guilty Pleas. If Defendants are not so Notified, They should be permitted to Withdraw Their Pleas or Request Specific Performance of the Agreed-upon Sentencing Range without Enhancement.**

Instead of the direct/collateral dichotomy applied in *Barton* and *Appleby*, the better rule comes from the majority of states which require pre-plea notice in some fashion. Many

require this statutorily, even those with single-proceeding schemes which themselves should prevent this kind of surprise. *See, e.g.,* Wis. Stat. Ann. § 973.12 (West 2014). However, several have recognized this rule judicially as a matter of due process and fundamental fairness to the defendant. The Michigan Supreme Court did so in *People v. Brown*, 822 N.W.2d 208 (Mich. 2012). Just as happened to Keith D., the defendant in *Brown* pleaded guilty after only having been informed of the maximum sentence for the underlying felony, rather than the possible enhanced penalty he faced as a habitual offender. *Brown*, 822 N.W.2d at 210. The court concluded that because a habitual offender sentence took the place of the baseline sentence (just as it does in West Virginia), a defendant only informed of that baseline sentence has not actually been advised of the true maximum which could result from a guilty plea. *Id.* at 214. A defendant so misinformed cannot enter the plea with a full understanding of its consequences, rendering it involuntary. *Id.* at 214, 216-17. It would violate due process to hold defendants to involuntary pleas, and so the Michigan Supreme Court ruled defendants in *Brown*'s and Keith D.'s situation must be permitted to withdraw their guilty pleas. *See id.*

Under the facts of *Brown*, the Michigan Supreme Court thought the defendant could only seek to withdraw his plea. *Id.* at 217. However, the Louisiana Supreme Court has gone further. In *State v. Hayes*, 423 So.2d 1111 (La. 1982), the defendant pleaded guilty to several felonies believing he could receive no more than four years in prison based on representations made by the trial court, the state, and his lawyer. *Id.* at 1114. When the State came back after sentencing, charged Hayes as a habitual offender, and sought a twenty-four year sentence, he moved to withdraw the plea but was denied. *Id.* at 1112. The Louisiana Supreme Court treated this as an implied or expressed breach of the agreement. *See, id.*, at 1112-13. The State had promised four years, and then filed a subsequent charge to enhance the sentence to twenty-four. *Id.* The court ruled that this breach violated due process. *Id.* at 1113. "It is well

settled that whenever a guilty plea rests in any significant degree on an agreement or promise by the prosecutor, so that it can be viewed as part of the inducement or consideration, such promise must be fulfilled ... [t]he defendant was denied due process of law because the State failed to comply with the material representation or promise which induced the defendant's guilty plea.” *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971)); *See also State v. Myers*, 204 W. Va. 449, 464, 513 S.E.2d 676, 691 (1998). So characterized, that court ruled specific performance of the unenhanced plea bargain was an appropriate remedy in addition to the option to withdraw the plea. *Hayes*, 423 So.2d at 1115.

This is also a fair characterization of Keith D.’s case. The State may be a partisan, but its duty to seek justice circumscribes its advocacy. *See* Syllabus Point 2, *State v. Britton*, 157 W. Va. 711, 203 S.E.2d 462 (1974). When the State represented the maximum consequence of pleading guilty would be ten years in prison, it necessarily implied it would not seek a higher sentence. Filing a habitual offender information after the trial court accepted Keith D.’s guilty plea therefore violated this agreement. He should now be permitted to withdraw his plea or request specific performance of the agreed upon plea bargain without enhancement as a habitual offender. To avoid this situation in the future this Court should require defendants to have actual notice of their eligibility for a habitual offender sentence prior to trial courts accepting their pleas.

In addition to being the fair result for Keith D. and similarly-situated defendants, this is the better policy for the judicial system as a whole. In *Appleby*, this court asserted that policy weighed in favor of not requiring trial courts to provide pre-plea notice because prosecutors may not be aware of the defendants’ records prior to them pleading. *Appleby*, 213 W. Va. at 510; *See also id.* at Footnote 7. It is worth noting Keith D.’s case does not implicate this concern because the State was aware of Keith D.’s record well in advance of his plea. (A.R. 36). Even in principle, though, this concern is easily mollified. Keith D. is not asking

that the State make up its mind about seeking a habitual offender sentence prior to defendants entering guilty pleas, only that defendants know it is a *possibility* before they plead. If a prosecutor is ignorant of a defendant's record but would consider habitual offender proceedings if applicable, he or she may merely make that intent known to the defendant during plea bargaining, or notify the trial court so the defendant can be apprised of the possibility before pleading. Far from putting the State to an unfair burden, all this rule does is require the State to negotiate with defendants in an up front and honest manner.

By contrast, there are real policy concerns weighing in favor of mandating pre-plea actual notice. Although there is a necessary limit to the amount of information conveyed to defendants in plea colloquies, as a general matter, justice is better served the more informed defendants are of the process and consequences of their pleas. Especially with regards to second-offense habitual offenders who may face life sentences for future misconduct, requiring notice of the habitual offender statute serves the deterrence purposes of the law. After all, an enhanced penalty for habitual criminality cannot deter the conduct of individuals unaware of the full consequences of their actions. *See Appleby*, 213 W. Va. at 503. This is not only an issue of fairness to defendants, it helps to justify the level of finality the judicial system would like to accord guilty pleas since a well-informed defendant has less to legitimately complain about in post-conviction proceedings.

Allowing the State to surprise defendants with sentences harsher than those bargained for can also have a deleterious impact on the willingness of defendants and defense lawyers to engage in plea bargaining at all. Plea bargaining is an essential part of the criminal justice system. *See Welsh White, A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439 (1971). Upwards of 90% of all criminal proceedings result in plea bargains. *Id.* at Footnote 3. With such a high proportion of criminal cases resolved in this manner, it is questionable whether police, prosecutorial, judicial, and public defender resources could

accommodate the increased expense of more cases going to trial. *Id.* at 440. If defendants have reason to question the veracity of prosecutors offering pleas, the competency of their lawyers' advice, and the adequacy of the courts' prophylactic function to prevent plea bargaining abuses, that is precisely what will happen. Certainly, plea bargains will still take place – this is not an all or nothing proposition. But a ruling permitting the State to break plea-inducing promises, or to ambush defendants with new punishments after courts have accepted their guilty pleas would be a substantial upset to the incentives to plead guilty and negotiate with the State in good faith. “Even if the money were readily available, it would still not be clear that we could call upon sufficient numbers of competent personnel. A lowering of standards in order to man the store adequately may well result in poorer justice. It may also divert both funds and personnel from other segments of the criminal process, such as corrections work, where they are arguably more needed.” *Id.* at 440-41 (*quoting* Enker, *Perspectives on Plea Bargaining*, in Task Force Report 108, 112).

These policy grounds in favor of requiring actual notice are far more compelling than the policy underlying the *Appleby* decision. Furthermore if *Appleby* is upheld and read to prohibit the relief Keith D. seeks, West Virginia will not only hold to the minority position, but the minority of the minority as shown above. For these reasons, this Court should require defendants to have actual knowledge of their eligibility for habitual offender proceedings before trial courts can accept their pleas. Furthermore if a defendant does not have actual notice and the State attempts to surprise him or her with habitual offender proceedings after pleading guilty, the court should afford him or her the opportunity to withdraw the plea or order specific performance, as the circumstances dictate.

CONCLUSION

Keith D. respectfully requests that this Court reverse the trial court's denial of his motion to withdraw his plea, and remand the case back to the trial court with instructions to either order specific performance of the agreed upon sentencing range absent enhancement or allow Keith D. to withdraw his plea. Consistent with this holding, Keith D. respectfully requests that this Court adopt the syllabus points suggested in his "Statement Regarding Oral Argument," *supra*.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Matthew Brummond, do hereby certify on the 21st day of April, 2014, I delivered by mail, the attached *Petitioner's Brief* to *Derek A. Knopp, 812 Quarrier Street, Charleston, WV 25301, Attorney General Appellate Division Kanawha County of West Virginia.*

A handwritten signature in black ink, appearing to read 'Matt Brummond', written over a horizontal line.

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