

DO NOT REMOVE  
FROM FILE



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Plaintiff Below, Respondent,

vs.) No. 21-0382

MICHAEL PAUL CONN,  
Defendant Below, Petitioner.

(A Certified Question arising  
from the Circuit Court of Cabell  
County, Case No.: 14-F-512)

FILE COPY

**PETITIONER'S BRIEF**

Counsel for the Petitioner, Michael Conn

Jeremy B. Cooper  
WV State Bar ID 12319  
Blackwater Law PLLC  
6 Loop St. #1  
Aspinwall, PA 15215  
Tel: (304) 376-0037  
Fax: (681) 245-6308  
jeremy@blackwaterlawpllc.com

**TABLE OF CONTENTS**

Certified Question..... 1

Proposed Answer..... 1

Statement of the Case..... 1

Summary of Argument..... 3

Statement Regarding Oral Argument and Decision..... 4

Argument..... 5

    A. Standard of Reveiw..... 5

    B. A sex offender registration predicated on a written finding of sexual motivation, rather than the commission of a “qualifying offense” cannot, by definition, be a lifetime registration..... 5

Conclusion..... 9

**TABLE OF AUTHORITY**

**CASES**

*Alden v. Harpers Ferry Police Civil Service Commission*, 209 W.Va. 83, 543 S.E.2d 364 (2001)..... 5

*Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)..... 5

*Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996)..... 5

*Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984)..... 9

*State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016)..... 8

*State ex rel. St. Clair v. Howard*, 856 S.E.2d 638 (W. Va. 2021).....8

*State v. Brandon B.*, 624 S.E.2d 761, 218 W. Va. 324 (2005).....5

*State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).....8

**STATUTES**

W. Va. Code §15-12-1, *et. Seq.* (2013)..... *passim*

W. Va. Code § 61-2-10.....*passim*

**ADMINISTRATIVE RULES**

81 CSR 14 § 18-14-7.2.b..... 9

### CERTIFIED QUESTION

**Is the [Petitioner's] 1998 conviction for "Attempt to Commit an Assault during the Commission of a Felony," under W.Va. Code 61-2-10, which was found by the Circuit Court to be a sexually motivated crime against a minor, a qualifying offense under the West Virginia Sex Offender Registration Act, W.Va. Code 15-12-1 *et seq.*, which would require the [Petitioner] to become a registered sex offender for life?**

**Proposed Answer:** No. A "qualifying offense" is clearly and unambiguously defined by statute to the exclusion of the crime of which the Petitioner was convicted. A lifetime registration for an offense against a minor requires a conviction of a "qualifying offense." Therefore, the proper duration for the Petitioner's registration is ten years.

### STATEMENT OF THE CASE

In January of 1998, the Petitioner was charged in indictment 98-F-39 with multiple counts of 3<sup>rd</sup> Degree Sexual Assault. (Joint Appendix ["J.A."], at 1-2). On July 28, 1998, the Petitioner entered a guilty plea to one count of 3<sup>rd</sup> Degree Sexual Assault before Hon. Alfred E. Ferguson. On August 26, 1998, the Petitioner filed a motion to withdraw that plea, apparently because he did not want to enter a plea that would require him to register as a sex offender under the law in effect at that time. (J.A., at 19-21). An order was entered dismissing the indictment at 98-F-39. (J.A., at 69). A new plea agreement was reached, and the Petitioner entered a guilty plea to information 98-F-161, Attempt to Commit an Assault during the Commission of a Felony. (J.A., at 3-4). That plea was entered on August 28, 1998, and the defendant was sentenced to 1-3

years of incarceration. (J.A., at 5-9). During the August 28, 1998 plea hearing, the prosecutor proffered that the evidence the State would prove at trial “would be that on or about August the 20<sup>th</sup>, 1997, that the defendant, Michael Conn, did actually have intercourse with a juvenile, [T.E.], who was under the age of sixteen and less – and more than four years difference between their ages.” (J.A., at 31).

In 2000, the West Virginia Legislature amended the sexual offender registry requirements, which were stated explicitly to apply both prospectively and retroactively. After this change, the Petitioner was instructed to register as a sex offender following his release on parole in 2001. He has been required to register for life since that time. (J.A., at 22, 75). The Petitioner was subsequently reincarcerated for a parole violation, and filed a petition for post-conviction habeas corpus relief in 2003, 03-C-1067, contesting this registration. (J.A., at 10-15).

Following the Circuit Court's initial denial of the habeas petition, this Court considered this matter in a motions conference on September 14, 2005, and remanded for the Circuit Court to make written findings of fact concerning whether the Petitioner's 1998 conviction was sexually motivated. The matter was then returned to this Court on a mandamus petition seeking enforcement of the prior remand order on the motions docket of March 16, 2006, with that mandamus petition being granted unless sooner mooted. Thereafter, a hearing was held on May 19, 2006 before Judge Ferguson, at which time he made written findings that the 1998 offense was sexually motivated, based upon the State's proffer at the August 28, 1998 plea hearing. (J.A., at 40-42). The Petitioner appealed this ruling to this Court, which refused to hear the appeal by order entered October 11, 2006.

In 2014, the Petitioner was charged in the currently contested indictment 14-F-512, with

six counts of Failure to Register as a Sex Offender or Provide Notice of Registration Changes. (J.A., at 43-44). Following an apparent failure to appear at arraignment, a warrant was issued in December of 2014, and executed on May 25, 2017. (J.A., at 77). The Petitioner then entered a no contest plea to two counts of Failure to Register on January 9, 2018, and was sentenced to two 1-5 year sentences to run consecutively. (J.A., at 45-50, 52-53). He served approximately two years, mostly in St. Mary's Correctional Center, on these failure to register convictions. (J.A., at 58).

The Petitioner then filed a “PETITION FOR WRIT OF ERROR CORAM NOBIS and MOTION IN ARREST OF JUDGMENT AND FOR DISMISSAL OF THE INDICTMENT” in March of 2021, seeking to vacate his convictions and to dismiss his indictment, on the theory that he should have only been required to register for ten years, and was therefore no longer required to register as a sex offender at the time the indictment alleged that he violated his registration requirements. (J.A., at 55-68). The Respondent filed a written response, which, while acknowledging that “assault during commission of a felony” is not a qualifying offense under the statute that could lead to a lifetime registration, the “underlying felony” of that charge – third degree sexual assault – is itself a qualifying offense. (J.A., at 76-82). The Circuit Court held a hearing on this matter on April 20, 2021, following which the Circuit Court entered an order certifying a question to this Court as described above.

### **SUMMARY OF ARGUMENT**

This matter turns on the plain language of W. Va. Code §15-12-1, *et. Seq.* (2013), the “Sex Offender Registration Act” (“the Act”). Specifically, Section 4 of the Act requires that



before a person can be required to register for life (as opposed to ten years) for an offense against a minor, the person must be convicted of a “qualifying offense” against a minor. The question of what is a qualifying offense is a simple one, as that term is defined in the Act as any crime listed in §15-12-2(b). Notably, the crime for which the Petitioner was convicted is not among those crimes listed in §15-12-2(b). Instead, the Petitioner was required to register based on a circuit court’s written finding of sexual motivation, which can be the basis of a registration for a non-qualifying offense pursuant to §15-12-2(c). An entire hearing was held in Circuit Court, at this Court’s direction, to determine whether the Circuit Court could make findings to support a requirement to register. Moreover, while the Legislature specifically provided in the Act that an attempt to commit a qualifying offense is to be considered the same as a qualifying offense, it made no parallel provision for the “underlying crime” in an assault during commission of a felony. This case presents a straightforward issue, and can be easily resolved by applying the plain language of the Act.

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

This Court has already indicated by prior order that it has granted oral argument in this case. While the legal issues arising in this certified question are arguably resolved by the application of settled law, there is reason to believe that the State Police may, based on that agency’s administrative rules, be imposing an illegal lifetime registration on other similarly situated registrants in West Virginia. For that reason, this Court should resolve this matter by signed opinion clearly holding that cases involving minor victims in which there is a written finding of sexual motivation, rather than conviction of a qualifying offense, cannot be the basis

for a lifetime registration under the Act.

## ARGUMENT

### A. Standard of Review

The appropriate standard of review for this case is *de novo*, for two reasons. First, because it is the generally applicable standard for certified questions. See, Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996). Second, because this matter entirely concerns the interpretation of a statute:

1. "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." Syllabus point 3, *Alden v. Harpers Ferry Police Civil Service Commission*, 209 W.Va. 83, 543 S.E.2d 364 (2001).

Syl. Pt. 1, *State v. Brandon B.*, 624 S.E.2d 761, 218 W. Va. 324 (2005). Accordingly, this Court may employ plenary review of the underlying proceedings.

### B. A sex offender registration predicated on a written finding of sexual motivation, rather than the commission of a "qualifying offense" cannot, by definition, be a lifetime registration.

This case presents a simple issue. That issue is whether a conviction for "Assault During the Commission of a Felony," pursuant to W. Va. Code § 61-2-10, in conjunction with a written finding of sexual motivation by a Circuit Court, may be the basis for a lifetime registration under W. Va. Code §15-12-4(a). This issue can be resolved by applying the plain language of the Act, which is entirely unambiguous, and requires no application of the rules of statutory construction.

The duration of a registration under the Act is determined based upon the following language:



(a) A person required to register under the terms of this article shall continue to comply with this section, except during ensuing periods of incarceration or confinement, until:

(1) Ten years have elapsed since the person was released from prison, jail, or a mental health facility or 10 years have elapsed since the person was placed on probation, parole, or supervised or conditional release. The 10-year registration period may not be reduced by the sex offender's release from probation, parole, or supervised or conditional release; or

(2) For the life of that person, if that person: (A) Has one or more prior convictions or has previously been found not guilty by reason of mental illness, mental retardation, or addiction for any qualifying offense referred to in this article; (B) has been convicted or has been found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense as referred to in this article, and upon motion of the prosecuting attorney, the court finds by clear and convincing evidence that the qualifying offense involved multiple victims or multiple violations of the qualifying offense; (C) has been convicted or has been found not guilty by reason of mental illness, mental retardation, or addiction of a sexually violent offense; (D) has been determined pursuant to §15-12-2a of this code to be a sexually violent predator; or (E) **has been convicted** or has been found not guilty by reason of mental illness, mental retardation, or addiction of a **qualifying offense as referred to in this article, involving a minor or a person believed or perceived by the registrant to be a minor.**

W. Va. Code §15-12-4(a) (emphasis added).

As alluded to in the above code section, the Act explicitly defines a “qualified offense” as follows:

(e) (1) On the date that any person convicted or found not guilty by reason of mental illness, mental retardation, or addiction of **any of the crimes listed in §15-12-2(b) of this code, hereinafter referred to as a “qualifying offense”** ...

W. Va. Code §15-12-2(e)(1) (emphasis added).

W. Va. Code §15-12-2(b) lists the following crimes:

(b) Any person who has been convicted of an offense or an attempted offense or has been found not guilty by reason of mental illness, mental retardation, or addiction of an offense under any of the following provisions of this code or under a statutory provision of another state, the United States Code or the Uniform Code of Military Justice which requires proof of the same essential elements shall register as set forth in

§15-12-2(d) of this code and according to the internal management rules promulgated by the superintendent under authority of §15-2-25 of this code:

- (1) §61-8A-1 et seq. of this code;
- (2) §61-8B-1 et seq. of this code, including the provisions of former §61-8B-6 of this code, relating to the offense of sexual assault of a spouse, which was repealed by an act of the Legislature during the 2000 legislative session;
- (3) §61-8C-1 et seq. of this code;
- (4) §61-8D-5 and §61-8D-6 of this code;
- (5) §61-2-14(a) of this code;
- (6) §61-8-6, §61-8-7, §61-8-12, and §61-8-13 of this code;
- (7) §61-3C-14b of this code, as it relates to violations of those provisions of chapter 61 listed in this subsection; or
- (8) §61-14-2, §61-14-5, and §61-14-6 of this code: Provided, That as to §61-14-2 of this code only those violations involving human trafficking for purposes of sexual servitude require registration pursuant to this subdivision.

W. Va. Code §15-12-2(b).

Notably, there is no reference to the crime for which the Petitioner pleaded guilty, which was (attempted) assault during the commission of a felony, encoded at W. Va. Code § 61-2-10. The Respondent does not contest that the Petitioner's requirement to register was predicated upon the written findings of the Circuit Court, which were entered belatedly in this matter following the Petitioner's initiation of a habeas proceeding on the subject of his registration requirement. By definition, a registration requirement that is predicated on a written finding arises under W. Va. Code §15-12-2(c), and not under §15-12-2(b), the latter of which defines the bounds of a "qualifying offense."

The three subsections of code quoted above are sufficient to resolve the certified

question. This is the same argument (among others not within the scope of this certified question) advanced by the Petitioner in the lower court. (J.A., at 54-58). There is no ambiguity whatsoever in any of the relevant statutory language.

8. “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).” Syl. Pt. 6, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016).

Syl. Pt. 8, *State ex rel. St. Clair v. Howard*, 856 S.E.2d 638 (W. Va. 2021).

The argument advanced by the Respondent below appears to be based upon one of two theories; either that the written factual finding of sexual motivation itself encompasses conduct that would constitute a qualifying offense, or that the “underlying” felony of the assault during a commission of a felony is a qualifying offense (third degree sexual assault in both instances). (J.A., 76-82). Neither one of these ideas finds any support in the plain language of the statute. W. Va. Code §15-12-4(a)(2)(E) requires a *conviction* (or acquittal by reason of insanity) of a qualifying offense, not simply a finding determining that the acts constituting a qualifying offense were committed.

Similarly, the notion that third degree sexual assault being the “underlying” offense for the assault during the commission of a felony somehow transmutes the latter charge into a qualifying offense finds no support in the statute. In fact, it is clear that the Legislature, if it had intended to make the “underlying” crime involved in a conviction for a violation W. Va. Code § 61-2-10 part of the analysis of what is a qualifying offense, could have done so. The Legislature specifically included language in W. Va. Code §15-12-2(b) which deems all convictions of an “attempt” to commit a qualifying offense as qualifying offenses themselves. It clearly could have taken a similar tack with “underlying” offenses for other crimes, or other inchoate offenses,

but it did not do so. If this Court were to find sufficient ambiguity in the statute to resort to rules of statutory construction, the argument advanced by the Respondent would be defeated by the presence of language authorizing the use of the underlying crime in an attempt, without mentioning a similar provision for any other crimes that may involve an underlying offense. "In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). The arguments advanced by the Respondent do not survive scrutiny in light of the statutory language of the Act.

Finally, it is worth noting what may be the genesis of the improper determination by the State Police (which has not yet been rectified) that the Petitioner is a lifetime registrant. It is notable that both the version in effect in 2013, and the current version of the WV State Police Regulations 81 CSR 14, state in section 18-14-7.2.b that lifetime registration is to be imposed upon a "conviction or finding of not guilty by reason of mental illness, mental retardation or addiction of a sexually violent offense or any offense determined to be sexually motivated[.]" This regulation is obviously unlawful in light of the plain text of the statute, but it nevertheless demonstrates the probable genesis of the State Police's mistake in this case. For the reasons described in this brief, there is no statutory authority for the lifetime registrations of individuals who have a finding of sexual motivation, because, by definition, such individuals have not been convicted of a qualifying offense.

### **CONCLUSION**

For the foregoing reasons, the Petitioner respectfully requests that this Court answer the

certified question in the negative, hold that offenses against minors that are not “qualifying offenses” may not be the source of a lifetime registration requirement, and grant any other relief the Court deems just and proper.

MICHAEL PAUL CONN,  
Petitioner, by counsel,



---

Jeremy B. Cooper  
WV State Bar ID 12319  
Blackwater Law PLLC  
6 Loop St. #1  
Aspinwall, PA 15215  
Tel: (304) 376-0037  
Fax: (681) 245-6308  
jeremy@blackwaterlawpllc.com

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA,  
Plaintiff Below, Respondent,**

**vs.) No. 21-0382**

**MICHAEL PAUL CONN,  
Defendant Below, Petitioner.**

**(A Certified Question arising  
from the Circuit Court of Cabell  
County, Case No.: 14-F-512)**

**CERTIFICATE OF SERVICE**

On this 8<sup>h</sup> day of November, 2021, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Brief to Lara Bissett, Esq., by U.S. Mail to Building 6, Ste 406, 1900 Kanawha Blvd. E, Charleston, WV 25305.

  
\_\_\_\_\_  
Jeremy B. Cooper  
WV State Bar ID 12319  
Blackwater Law PLLC  
6 Loop St. #1  
Aspinwall, PA 15215  
Tel: (304) 376-0037  
Fax: (681) 245-6308  
jeremy@blackwaterlawpllc.com