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



STATE OF WEST VIRGINIA,

Respondent,



v.

Supreme Court No.: 21-0738
Case No. 20-F-430
Circuit Court of Raleigh County

TREMAINE JACKSON,



Petitioner.

---

**PETITIONER'S BRIEF**

---

Graham B. Platz
West Virginia Bar #14093
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
1 Players Club Drive, Suite 301
Charleston, WV 25311
(304) 558-3905
graham.platz@wv.gov

*Counsel for Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Constitutional Provisions**



**Statutes and Rules**



**Other Authorities**

## ASSIGNMENTS OF ERROR

I. Did the circuit court commit reversible error when it refused to accept Petitioner's felon status stipulation and instead permitted the State to admit the name and nature of the prior conviction?

II. Did the circuit court commit reversible error when it prohibited Petitioner from testifying in his own defense?

## STATEMENT OF THE CASE

Petitioner was convicted on a four-count indictment in the Raleigh County Circuit Court in March of 2021. A.R.1200. On appeal, Petitioner seeks reversal of all his convictions. Count one charged him with first degree murder. Count two charged him with using a firearm in count one. Count three charged him with being a felon in possession of a firearm. Count four charged him with using a firearm in count three. *Id.* All the convictions stem from the same incident in Beckley, West Virginia.

Petitioner traveled to Beckley with three women to engage in a fraudulent drug transaction. A.R. 1191. Those women were Araena Kersey, Tohosha Ugbomah, and Latoya Carter. The sale was arranged between Petitioner and Troy Williams, and the pair met in the parking lot of Pet Supplies Plus to carry out the deal. A.R. 1192. Petitioner got out of the backseat of his vehicle, leaving the three women inside. Mr. Williams got partially into the backseat to inspect the narcotics. At that time, Ms. Kersey, the woman in the backseat of the car with Mr. Williams, pulls out a gun and holds it to Mr. Williams head. She threatens, "give me the fucking money." A.R. 788–89, 727. Mr. Williams tries to get out of the vehicle and is shot. Ms. Kersey assumes Petitioner shot Mr. Williams. A.R. 791. Ms. Ugbomah testified that Petitioner shot Mr. Williams but she did not see him do it. A.R. 728. Other witnesses do not testify to the shooter's identity definitively. A.R. 510–11, 728. Petitioner claims Ms. Kersey shot Mr. Williams. A.R. 948.

The jury heard the testimony of Ms. Kersey and the other witnesses, but the trial court prohibited the jury from hearing Petitioner's recollection of events. A.R. 948–54. The trial court also prohibited Petitioner from stipulating to his felon status and instead admitted evidence of a prior voluntary manslaughter conviction. A.R. 574.

**A. Petitioner's felon status stipulation.**

On February 10, 2021, during a pretrial hearing, the court took up a 404(b) motion it had previously tabled. A.R. 158–59. The State wanted to introduce a conviction order from Kanawha County it believed resembled the current charges. The State argued that Petitioner's voluntary manslaughter conviction should be admitted because it could show absence of mistake, or *modus operandi*. A.R. 164. The State explained that

> if you just change the dates and names of the actions, the moving elements are identical, both in terms of the drug trafficking specter, as I said; you know, the guy's using essentially the same type of lethal weapon, a firearm, a handgun; he's hitting the guy in the same place over the same issue, same type of dispute, so to say that they are congruent I think is very accurate.

A.R. 164–65. Petitioner's position was that the admission of the evidence would be highly prejudicial. A.R. 168–69. After a long and detailed discussion, the court deferred ruling but told both parties that if these were the arguments presented at trial, the evidence would not be admitted. A.R. 174.

When the issue resurfaced at trial, Petitioner did not want the jury to know about the name and nature of his prior conviction. A.R. 566. With a police officer on the stand, the State asked "[w]as there a time, sir, when you were involved in a matter for which [Petitioner] received a conviction?" A.R. 564. Petitioner objected out of concern that the prior conviction will consequentially admit prejudicial evidence. A.R. 566. Petitioner offered to stipulate to the prior felony conviction. A.R. 569. The State's reason for admitting this evidence at trial is different than

the reason given during the pretrial hearing. The State argued at trial that it wanted to admit Petitioner's Kanawha County conviction order for voluntary manslaughter because it "preferred to prove [felon status] through the admission of this evidence." A.R. 570. The trial court refused to accept Petitioner's stipulation because "the Court cannot require a stipulation." A.R. 574.

**B. Petitioner's testimony.**

Petitioner took the stand to testify in his own defense. A.R. 941. Petitioner testified:

> I get out of the car, he gets in the car. Around five to four minutes go by, I hear 'give me - - give me the money. I'm not playing.' I look. I see a gun to his head. He goes like this and moves back trying to get out. 'Bop,' he falls down, and I sit there and I look at him. I'm looking. I'm in shock. I didn't pull no gun on nobody. You see clear as day that that man says that it was two guns in the car pointed at people. I never had a gun outside that car. I never had a gun in my possession, not on me.

*Id.* Petitioner's counsel then asked, "do you know who pulled that trigger?" A.R. 948. Petitioner answered "Yes, sir." *Id.*

At that time, the State objected "as to the *Malick* ruling we had prior to trial."[1] *Id.* The State argued that if the defense wanted to show someone else committed the crime, the State was entitled to notice under *State v. Malick*. Petitioner maintained that this violated his right to put on a defense, and that the testimony should be allowed. Still, the court prohibited Petitioner from testifying further and struck his statement about his knowledge of the shooter from the record. A.R. 948–54.

## SUMMARY OF ARGUMENT

It is *per se* prejudicial for a court to choose to admit a piece of evidence that carries a substantial degree of prejudice when alternative proof exists free of that risk. A court unnecessarily

[1] During a pretrial hearing, the State moved the court to exclude inadmissible evidence of guilt of another, relying on *State v. Malick*, 193 W. Va. 545, 547 S.E.2d 482 (1995). A.R. 124. In making the motion the State spoke only on the admissibility standard and did not mention notice. A.R. 125. The court granted the State's motion pending the appropriate evidentiary foundation at trial. A.R. 126–27.

prejudices a jury when it refuses a defendant's felon status stipulation. A stipulation has the same probative value as a conviction order, and it does not disclose details about the prior offense. The Raleigh County Circuit Court committed reversible error when it admitted evidence of the name and nature of Petitioner's prior conviction over accepting his stipulation. Petitioner's jury should have never known about his voluntary manslaughter conviction, but it should have been allowed to consider Petitioner's version of events. The trial court applied a non-existent notice rule to preclude Petitioner's testimony, violating Petitioner's rights to a fair trial and to testify in his own defense. The jury's mercy verdict came after submitting questions concerning the very fact issue Petitioner wished to testify to. A conviction rendered by a prejudiced jury that was precluded from hearing Petitioner's side of the story must be reversed.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner assigns as error the Raleigh County Circuit Court's departure from clearly established precedent of this Court and the United States Supreme Court when it refused Petitioner's stipulation to his felon status. This Court has held:

> When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant.

Syl. Pt. 3, *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999) (adopting *Old Chief v. United States*, 519 U.S. 172 (1997)). In *State v. Herbert*, this Court again set forth the rule:

> "when a defendant is charged with a crime in which a prior conviction is an essential element of the current crime charged (*e.g.* being a felon in possession of a firearm . . . ), and *stipulates* to having been previously convicted of a crime . . . [t]he jury shall be informed of a prior [conviction], but shall otherwise not be informed of the name or nature of the defendant's prior convictions"

Syl. Pt. 5, 234 W. Va. 576, 767 S.E.2d 471 (2014) (emphasis in original). Petitioner's second assignment of error implicates state and federal constitutional rights concerning the circuit court's refusal to let Petitioner testify in his own defense. Petitioner requests a Rule 19 argument.

## ARGUMENT

This Court should reverse Petitioner's convictions because the Raleigh County Circuit Court erred in two ways that deprived Petitioner of his constitutionally protected right to a fair trial. *See* U.S. Const. amend. XIV; W. Va. Const. art. III, § 14. First, the court rejected Petitioner's offer to stipulate to his felon status and instead admitted the name and nature of his prior conviction. Second, the court prohibited Petitioner from testifying when it erroneously relied upon a non-existent common law rule. Each error deprived Petitioner of a fair trial. This Court should reverse his convictions.

### I. The trial court erred when it refused Petitioner's felon status stipulation because the prior conviction prejudiced the jury's consideration of the current charges.

The trial court abused its discretion when it did not allow Petitioner to stipulate to his felon status because the court admitted evidence with no probative value but a substantial risk of prejudice. This Court reviews a circuit court's decisions on the rules of evidence for an abuse of discretion. *State v. Crabtree*, 198 W. Va. 620, 626, 482 S.E.2d 605, 611 (1996). Defendants have the right to stipulate to status elements of crimes charged. Syl. Pt. 5, *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014) (holding "when a defendant is charged with a crime in which a prior conviction is an essential element of the current crime charged (*e.g.* being a felon in possession of a firearm . . . ), and *stipulates* to having been previously convicted of a crime . . . [t]he jury shall be informed of a prior [conviction], but shall otherwise not be informed of the name or nature of the defendant's prior convictions") (emphasis in original).

Accordingly, a trial court must accept a defendant's stipulation to status elements of crimes charged. *See Old Chief v. United States*, 519 U.S. 172, 174 (1997) (holding "a [trial] court abuses its discretion. . . [when] it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction"). There is no additional evidentiary value gained from offering the name and nature of the offense to the jury, but it puts "a powerful weapon in the prosecution's hands to introduce evidence of the sort generally explicitly forbidden by the propensity rule." Hannah J. Goldman, *Prejudicial Character Evidence: How the Circuits Apply Old Chief to Federal Rule of Evidence 403*, 84 FORDHAM L. REV. 281, 283 (2015) (internal citations omitted). Because the prior voluntary manslaughter charge was prejudicial not only to the felon in possession charge, but also the homicide charge, this Court should reverse all of Petitioner's convictions.

The jury improperly considered Petitioner's voluntary manslaughter conviction because Petitioner offered to stipulate that he had a prior conviction. The details of a conviction have no probative value when the stipulation serves as an alternative method of proof. *Old Chief*, 519 U.S. at 191. "If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting evidence to the jury regarding the stipulated prior conviction." Syl. Pt. 3, *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999) *overruled on other grounds by State v. Johnson*, 238 W. Va. 580, 797 S.E.2d 557 (2017). The Supreme Court's decision in *Old Chief* caused courts across the

country to reevaluate the interplay between stipulations and admissibility.[2] *Old Chief's* reasoning was persuasive even among courts that did not fully adopt the Court's holding.[3] This Court adheres to the majority view, and admissibility of prior bad acts is subject to the unfair prejudice limitation of W.V.R.E. 403. *See Nichols*, 208 W. Va. at 444, 541 S.E.2d at 322.

A jury is made aware of the stipulation to status elements but is not told the details because "proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current charge." *Old Chief*, 519 U.S. at 191; Syl. Pt. 5, *Herbert*, 767 S.E.2d 471. A status element stipulation is essential to a jury's deliberation because it is the defendant's felon status that makes otherwise legal conduct illegal. *Herbert*, 234 W. Va. at 593, 767 S.E.2d at 488. The jury's knowledge of the conviction, but not the name and nature of that conviction, is a necessary compromise that sits comfortably between Federal Rules of Evidence 404(b) and 403. *Old Chief*, 519 U.S. at 19–91.

Here, the trial court rejected Petitioner's stipulation and allowed the State to corrupt the jury with inadmissible considerations. With a police officer on the stand, the State asked "[w]as there a time, sir, when you were involved in a matter for which [Petitioner] received a conviction?" A.R. 564. Petitioner objected out of concern that evidence of the prior conviction will consequentially admit prejudicial evidence. A.R. 566. Petitioner offered to stipulate to the prior felony conviction. A.R. 569. The state dismisses the offer because the conviction order is the best

---

[2] *See e.g.*, *State v. Alexander*, 571 N.W.2d 662 (Wis. 1997) (adopting *Old Chief*); *Brown v. State*, 719 So.2d 882 (Fla. 1998) (same); *State v. Lee*, 977 P.2d 263 (Kan. 1999) (same); *Carter v. State*, 824 A.2d 123 (Md. 2003) (same); *State v. James*, 583 S.E.2d 745 (S.C. 2003) (same).

[3] *See State v. James*, 81 S.W.3d 751, 759 (Tenn. 2002) (holding Tennessee's evidentiary analysis was different than the federal test but nonetheless employing *Old Chief* to reverse a conviction for improperly admitted conviction evidence); *People v. Walker*, 812 N.E.2d 339, 350 (Ill. 2004) (analogizing to *Old Chief* even though there was no Illinois rule analogous to FRE 403); *But see State v. Ball*, 756 So. 2d 275, 278 (La. 1999) (rejecting *Old Chief* because state law required proof of a specific felony conviction).

evidence of the prior conviction, arguing "the State is not willing to accept the stipulation now; the State prefers to prove [the conviction] through the admission of this evidence." A.R. 570.

The State's purpose for admitting evidence of this conviction now is different than it was pretrial. At a pretrial hearing on the admissibility of 404(b) evidence, the State asked for a ruling on the admissibility of Petitioner's prior conviction to show absence of mistake, or *modus operandi*. A.R. 165. Naturally, Petitioner argued the evidence would be highly prejudicial. A.R. 168–69. The court deferred ruling but told both parties that if these were the arguments presented at trial, the evidence would not be admitted. A.R. 174. Now, the State asserts it only wants to use the conviction to prove Petitioner's felon status. A.R. 570. The trial court admitted the evidence on that basis—despite having a stipulation to the entire element this evidence was purported to prove and the court's previous recognition of the substantial risk of prejudice. A.R. 578–79.

When the trial court refused to accept Petitioner's stipulation and admitted the name and nature of the conviction—applying a plainly incorrect interpretation of the law where "the Court cannot require a stipulation"—it abused its discretion. A.R. 574. The danger of a tainted conviction requiring reversal intensifies when the prior conviction admitted into evidence resembles charges in the present case. *James*, 81 S.W.3d at 762 (reasoning the admission of similar prior bad acts exponentially increases the risk "that a jury would convict on the perception of a past pattern of conduct, instead of on the facts of the charged offense"). Enough doubt in a verdict to warrant reversal even exists when the prior conviction makes the State's theory more plausible, particularly when the other evidence against the defendant is not overwhelming. *Walker*, 812 N.E.2d at 342.

The admission of Petitioner's prior convictions is analogous to *James* and *Walker* where both courts found the admission of the prior conviction prejudicial and reversed. In *James*, prior convictions for aggravated robbery, second degree murder, and aggravated kidnapping were

introduced over a stipulation objection, to prove felon status in the current trial for the charges of aggravated robbery, aggravated kidnapping, and felony escape. *James*, 81 S.W.3d at 764. The court reversed because although there was sufficient evidence to support the conviction, the evidence was not overwhelming, and the prior convictions were highly prejudicial because of their similarity. *Id.* In *Walker*, a prior possession with intent to deliver conviction was admitted in a felon in possession case where the State's theory was that after a drug deal gone bad the defendant sought out a firearm to exact revenge. *Walker*, 812 N.E.2d at 342. The court reversed because the "fact that defendant had a prior drug conviction made the State's story more plausible." *Id.* The *Walker* court also found the jury's questions during deliberations that indicated the jury did not fully accept the State's theory undermined confidence in the conviction. *Id.*

Petitioner's prior conviction for voluntary manslaughter is highly prejudicial for both his felon in possession count and his murder count. Even considering the voluntary manslaughter conviction, the jury struggled with the State's theory. It sent back two questions aimed at clarifying the exact moment in time Petitioner wanted to testify about. A.R. 1082–83. Further still, the verdict came back with a mercy recommendation. There is a very real and very reasonable probability that the admission of the prior conviction impacted the jury's verdict. This Court should reverse Petitioner's convictions.

## II. The trial court denied Petitioner his constitutional rights to a fair trial and to testify in his own defense.

Petitioner's due process rights were violated when the court cut off Petitioner mid-testimony and prohibited him from offering his perception of events because the State objected for lack of notice. Both state and federal due process provides defendants the right to present a meaningful defense. Syl. Pt. 3, *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995) (holding "a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain

rights, such as . . . to offer testimony in support of his or her defense"); *State ex rel. Harvey v. Yoder*, 239, W. Va. 781, 786, 806 S.E.2d 437, 442 (2017) (emphasizing an essential component of the West Virginia Constitution's due process guarantee is a defendant's turn to offer testimony of his or her own). Moreover, the Fourteenth Amendment of the United States Constitution provides a defendant "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "That opportunity would be an empty one if . . . competent, reliable evidence . . . [was excluded] when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Petitioner's empty opportunity below entitles him to a new trial.

A fair trial requires—at minimum: "a right to examine witnesses . . ., to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273 (1948). West Virginia recognizes those same minimum requirements. W. Va. Const. art. III, § 14; *Jenkins*, 195 W. Va. at 628, 466 S.E.2d at 479 (reasoning the exclusion of critical evidence is fundamentally unfair, violating the state and federal constitutions). Similarly, a defendant's right to personally take the stand has numerous constitutional origins and cannot be arbitrarily restricted. *See Rock v. Arkansas*, 483 U.S. 44 (1987). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that is was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967) (holding the federal standard applied to the states).

Here, Petitioner was denied his right to a fair trial because the trial court prohibited him from testifying about his personal knowledge concerning Mr. William's death. The trial court's error was not harmless beyond a reasonable doubt because this close case was decided without the jury hearing Petitioner's side of the story. Petitioner's testimony culminated with him describing

the altercation that occurred in the back seat of the car. A.R. 947–48. On direct examination, he said:

> I get out of the car, he gets in the car. Around five to four minutes go by, I hear 'give me - - give me the money. I'm not playing.' I look. I see a gun to his head. He goes like this and moves back trying to get out. 'Bop,' he falls down, and I sit there and I look at him. I'm looking. I'm in shock. I didn't pull no gun on nobody. You see clear as day that that man says that it was two guns in the car pointed at people. I never had a gun outside that car. I never had a gun in my possession, not on me.

*Id.* Petitioner's counsel then asked, "do you know who pulled that trigger?" A.R. 948. Petitioner answered "Yes, sir." *Id.*

At that time, the State objected "as to the *Malick* ruling we had prior to trial." *Id.* The State argued that if the defense wanted to show someone else committed the crime, the State was entitled to notice under *State v. Malick*, 193 W. Va. 545, 547 S.E.2d 482 (1995). The State's objection is baseless, and the court sustaining the objection is clearly erroneous as a matter of law. *State v. Malick* does not require the defendant to provide notice to the State if he or she intends to suggest there is an alternative perpetrator. *See* 193 W. Va. 545, 547 S.E.2d 482. The word "notice" does not appear one time in the *Malick* opinion. *Malick's* lone holding is that alternative perpetrator evidence is admissible only when there is a direct link to someone other than the defendant, and the guilt of that other person is inconsistent with the guilt of the defendant. *Id.* Still, the court prohibited Petitioner from testifying further and struck the statement about his knowledge of the shooter from the record. A.R. 948–54.

The circuit court's error is not harmless beyond a reasonable doubt in the way that *Chapman* requires because it is hard to maintain confidence in a verdict rendered without Petitioner having had a full and fair opportunity to be heard—especially when the two questions sent back by the jury concern the evidence Petitioner hoped to speak on. The first jury question

sought clarification on if a witness saw the flash from the gun firing come from inside the car or outside the car. A.R. 1082. The second question asked what forensic testing was done on the inside of the vehicle. A.R. 1082–83. The court did not answer the jury's questions, responding only that the evidence is the evidence. A.R. 1084. The jury's verdict—which included a recommendation of mercy—is not sufficiently sound to withstand constitutional scrutiny.

The trial court had no authority to exclude Petitioner's testimony in this case. Due process under the state and federal constitutions entitled Petitioner to a fair trial. Unless this Court believes beyond a reasonable doubt that the exclusion of the testimony had no impact on the verdict, a new trial is required. Given the facts here, only when a jury hears Petitioner's version of events can this Court be sufficiently confident in the resulting verdict. The jury's questions demonstrate it was a close call, and the subject of Petitioner's testimony is exactly what the jury was focused on. The trial court's deprivation of Petitioner's constitutional right to testify in his own defense is not harmless beyond a reasonable doubt. Petitioner's convictions should be reversed.

## CONCLUSION

Petitioner was denied a fair trial below. He was prohibited from stipulating to a prior felony conviction, and he was prohibited from testifying in his own defense. The trial court's erroneous rulings were made in direct contradiction to well established precedent of this Court and the United States Supreme Court. This Court should reverse Petitioner's convictions and remand for a new trial.

Respectfully submitted

JERMAINE JACKSON

By Counsel

Graham B. Platz
Appellate Attorney
West Virginia State Bar #14093
Public Defender Services

One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: 304-558-3905
graham.platz@wv.gov

*Counsel for the Petitioner*

**CERTIFICATE OF SERVICE**

I, Graham Platz, counsel for Petitioner, Tremaine Jackson, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *"Appendix Record"* to the following:

Katherine M. Smith
Assistant Attorney General
West Virginia Attorney General's Office
Appellate Division
812 Quarrier Street, Sixth Floor
Charleston, WV 25301

*Counsel for Respondent*

via hand-delivery on the 17th day of December; 2021.

Graham B. Platz
Appellate Attorney
West Virginia State Bar #14093
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: 304-558-3905
graham.platz@wv.gov

*Counsel for the Petitioner*