IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**STATE OF WEST VIRGINIA ex rel.
OFFICE OF THE BERKELEY COUNTY
PROSECUTING ATTORNEY,**

Petitioner,

v.

THE HONORABLE BRIDGET COHEE,

Respondent.

PETITION FOR WRIT OF PROHIBITION

ON APPEAL UNDER ORIGINAL JURISDICTION
FROM THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
CASE NO. CC-02-2022-F-8

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VERIFICATION

I, Shannon Frederick Kiser, Assistant Prosecuting Attorney, do hereby swear upon information and belief that the allegations and factual representations within this "***Petition for Writ of Prohibition***" are true and accurate representations of the proceedings as contained within Berkeley County Circuit Court Case No. CC-02-2022-F-8, that the errors as pled by the State of West Virginia are not based upon any frivolous or impermissible action, and that the cases and statutes represented throughout are accurate representations of West Virginia law.

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Taken, subscribed and sworn to before me this 21st day of December 2022.

Notary Public: Summer D. Nails

My Commission Expires: Oct. 15, 2025

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QUESTION PRESENTED

Should a writ of prohibition lie against a circuit court that dismisses a recidivist action based upon a scrivener's error listing an incorrect subsection of the Recidivist Statute, to-wit: W. Va. Code § 61-11-18(c) (regarding recidivism of individuals previously convicted of first or second degree murder), instead of W. Va. Code § 61-11-18(d) (regarding recidivism of third-time offenders with qualifying felony convictions), when:

1. The State filed an Amended Recidivist Information in the underlying criminal case prior to the Defendant's arraignment on the recidivist charge; and
2. The circuit court properly arraigned the Defendant under the correct applicable code section, thereby providing the Defendant with fair notice of the charges against him?

I.

INTRODUCTION

This matter involves the State of West Virginia's recidivation of a felony criminal Defendant to a lifetime penalty based upon the existence of sufficient enumerated predicate and qualifying offenses at the time of the Defendant's conviction. Following a jury trial which commenced on February 9, 2022, the Defendant, Lateef Jabrall McGann, was convicted by a Berkeley County Petit Jury of one felony count of Fleeing with Reckless Indifference and one misdemeanor count of Fleeing on Foot. The State immediately thereafter filed a Recidivist Information alleging that the Defendant, now guilty of a qualifying enumerated offense, was twice before convicted of qualifying offenses for purposes of a recidivist lifetime enhancement. In the initial filing, however, the State committed the clerical error of listing the statutory authority for the recidivist enhancement as W. Va. Code § 61-11-18(c), addressing the recidivist penalty for one convicted of a qualifying murder offense, instead of W. Va. Code § 61-11-18(d), which properly addressed the Defendant's status as a lifetime offender. The State, however, caught this mistake and immediately remedied it by filing an Amended Recidivist Information prior to the Defendant's arraignment on the recidivist charge. This Amended Recidivist Information, which was filed prior to the Defendant's arraignment in the related criminal case where the original information was filed, was not formally filed within the recidivist case number.

Despite the Defendant receiving fair notice of the recidivist charge he faced and the trial court's arraignment of the Defendant upon the proper basis for the charge, counsel for the Defendant ultimately moved the court to dismiss the action based upon the State's original clerical mistake. Therein, counsel argued that fair notice and notions of due process did not apply to the State's alleged error of filing the Amended Recidivist Information in the Defendant's related

felony matter. Counsel therefore urged the trial court that dismissal was the only appropriate remedy. Ultimately, the trial court granted the Defendant's motion, finding that the State committed error, that any application of a harmless error determination to a recidivist information was inappropriate, and that fair notice of the same was irrelevant in light of *State ex rel. Ringer v. Boles*, 151 W. Va. 864, 157 S.E.2d 554 (1967), and *Holcomb v. Ballard*, 232 W. Va. 253, 752 S.E.2d 284 (2013). The court, however, urged the State to seek review before this Court, given that the ruling was contrary to *State v. Crabtree*, 198 W. Va. 620, 483 S.E.2d 605 (1996).[1]

The State now seeks review of the trial court's disposition below, and thereby petitions this Court for a Writ of Prohibition directing the trial court to vacate its dismissal order in the recidivist action below. In support of its position, the State identifies that the following legal authority exists which permits it to remedy clerical errors in recidivist information filings so long as they create no unconstitutional prejudice or surprise to the defendant as a result. The Defendant's proposed application of law would result in nothing else but holding the State accountable to a level of perfection that, however noble and desired, is simply unachievable in practice. The State therefore respectfully asks this Court to grant its requested writ and direct the trial court below to vacate the dismissal order and allow the matter to proceed to a trial on the merits.

II.

STATEMENT OF FACTS

On September 30, 2021, Patrolman Cook of the Martinsburg Police Department was on routine patrol when he observed a white Toyota Rav4 sitting in an alleyway occupied by the Defendant and another individual. (Appendix Record ["AR"] at 34.) Upon approaching the vehicle

[1] During the hearing, the Court even offered to submit the matter as a Certified Question to this Court. (*See* AR at 80.)

in his cruiser, the Defendant sped off through the alleyway. (*Id.*) Patrolman Cook activated his emergency lights and sirens and began pursuit. (*Id.*) The Defendant then made a sharp turn onto Union Street and ran through six stop signs before coming to a stop, where the Defendant then fled on foot. (*Id.*) The Defendant and his co-defendant were thereafter apprehended, whereupon law enforcement seized marijuana, packaging materials, and over $4,500.00 in cash between the two. (*Id.*) The matter then proceeded to trial.

On February 10, 2022, a Berkeley County petit jury found the Defendant, Lateef Jabrall McGann, guilty of one felony count of Fleeing with Reckless Indifference, in violation of West Virginia Code § 61-5-17(f), and one misdemeanor count of Fleeing on Foot, in violation of West Virginia Code § 61-5-17(d). (AR at 11-13.) On that same day, the State—having reviewed the Defendant's extensive criminal history—filed an "Information of the Prosecuting Attorney" citing two prior qualifying offenses as a basis for seeking a third-offense recidivist sentence of the Defendant. (AR at 14-15.)

First, the State alleged that the Defendant was previously convicted within the United States District Court for the Northern District of West Virginia of the felony offenses of Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1), and Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (a)(2), on December 10, 2009.[2] (AR at 14; 25-30.) Second, the State alleged that the Defendant was previously convicted within the Circuit Court of Berkeley County, West Virginia, of the felony offense of Wanton Endangerment, in violation of W. Va. Code § 61-7-12, on May 2, 2008.[3] (AR

[2] The District Court sentenced the Defendant to a period of fifty-seven months following his federal conviction. (AR at 14.)

[3] The Circuit Court of Berkeley County sentenced the Defendant to a period of two years following his conviction for wanton endangerment. (AR at 15.)

at 14-15; 17-24.) Finally, the State alleged that it could prove that the Defendant was the same individual who committed the aforementioned crimes, as it was familiar with the Defendant's criminality—both in and out of jail—due to an extensive local criminal history beginning in 2006.[4] (AR at 14-15; 35-37.) Within the Information, however, the State committed a scrivener's error (largely based upon the use of a prior version of the West Virginia Recidivism Statute), and listed the applicable code section as W. Va. Code § 61-11-18(c)—the code section which relates to recidivism of an individual previously convicted of murder. (AR at 15.)

Upon discovering this error, the State, out of an abundance of caution and within 20 days of filing the original Information, filed an "Amended Information of Prosecuting Attorney" changing the applicable code section to W. Va. Code § 61-11-18(d), which relates to third-time felony offenders. (AR at 43-44.) The State filed the Amended Information in Berkeley County Case No. 21-F-248, the criminal matter where it filed the original Information.[5] (*See* AR at 14-15; 43-44.)

The trial court thereafter arraigned the Defendant on the recidivist information on March 9, 2022. (AR at 46.) During this hearing, the court advised the Defendant of the charge under the appropriate statutory subsection of W. Va. Code § 61-11-18(d). (*See* AR at 46; *see generally* AR at 82-94.) Indeed, the Defendant argued the statute's inapplicability insofar that Fleeing with Reckless Indifference was not a crime of violence as contemplated by the lifetime offender

[4] The Defendant has been the subject of a substantial number of investigations involving the Martinsburg Police Department, the Martinsburg Detachment of the U.S. Mashal Service, the Berkeley County Sheriff's Department, and the Eastern Panhandle Drug and Violent Crimes Task Force. (AR at 35-37.) These investigations have resulted in convictions for (a) wanton endangerment; (b) destruction of property; (c) possession with intent to deliver cocaine base; (d) felon in possession of a firearm; (e) fleeing from an officer; (f) obstructing; (g) conspiracy to deliver crack cocaine; (h) felony escape; (i) making a correctional facility less secure; (j) rioting; (k) conspiracy to destruction by rioting; (l) willful disruption of governmental process; and (m) causing injuries to an inmate, in addition to the underlying charges. (*See* AR at 35-38.)

[5] Although filed in Case No. 21-F-248, the State captioned the Amended Information under Case No. 22-F-8.

provision, whereupon the State articulated the enumerated offenses applicable to W. Va. Code § 61-11-18(d). (*See id.*)

Following the Defendant's arraignment, he moved to continue the matter before counsel ultimately withdrew from representation. (AR at 48-50.) The trial court then appointed new counsel to the matter. (AR at 51-52.) Following the appointment of new counsel, the State again served discovery upon the Defendant, which included the Amended Information. (AR at 54.)

The Defendant then moved to dismiss the recidivist action by challenging the application of W. Va. Code § 61-11-18(d) to the underlying offense, relying solely upon the amended information filed by the State. (*See* AR 55-60.) The Defendant first attacked the plea agreement from the 2008 conviction and attempted to argue that language in the plea agreement precluded the State from seeking a later recidivist enhancement. (AR at 55-57.) The Defendant next attacked the proportionality of a lifetime recidivist enhancement as it related to the totality of the Defendant's qualifying and predicate offenses. (AR at 58-60.) Importantly, both of the Defendant's arguments related specifically to defenses arising out of lifetime recidivism under W. Va. Code § 61-11-18(d), as alleged in the State's amended information. (*See generally* AR 55-60.) *See also* W. Va. Code § 61-11-18(d). The trial court denied both of these motions. (AR at 61-64; 68.)

On October 17, 2022, the Defendant filed another motion to dismiss, this time attacking the original information filed by the State.[6] (AR at 65-66.) Therein, the Defendant alleged that the recidivist proceedings were based upon the incorrect statutory authority of W. Va. Code § 61-11-18(c) and that the Court retained no jurisdictional authority to proceed. (*Id.*) Further, the Defendant argued that, by virtue of *State ex rel. Ringer v. Boles*, the Court was prohibited from any harmless error analysis and thus bound to dismiss the matter as improperly filed. (*Id.*) At a hearing on the

[6] The Defendant filed this motion on the morning of a pretrial hearing, leaving the State with mere hours in which to respond. (*See* AR at 9-10.)

same day, the trial court dismissed the recidivist action over the objection of the State based upon the Defendant's arguments. (AR at 68-69.) In doing so, the Court found that State's failure to file the amended information in the instant proceeding relieved it of jurisdiction to hear the matter, and that the State would furthermore be barred to refile due to expiration of the term of court following the Defendant's conviction. (*Id.*) The State then filed a motion to reconsider on October 19, 2022. (AR at 71-78.)

In its motion to reconsider, the State acknowledged that the defect in the original recidivist information was merely a scrivener's error, which the State addressed through citation to the proper recidivist statute less than twenty days later in an amended filing. (*Id.*) The State further acknowledged that it never alleged that the Defendant was previously convicted of murder, but rather sought recidivist enhancement due to the Defendant's status as a habitual offender. (AR at 72.) The State then asserted that both it and the trial court informed the Defendant of the information against him during the March 9, 2022, arraignment; that the Defendant possessed a copy of the amended information at said arraignment; and that the Defendant was provided an additional copy of the amended information upon being appointed new counsel. (AR at 71-72.) The State therefore argued that the Defendant was properly on notice of the charges against him. (AR at 73.)

The State also identified that West Virginia does not treat immaterial defects in a recidivist information as fatal. (AR at 74-75.) Citing *State v. Crabtree*, the State acknowledged that immaterial defects in a recidivist information are subject to harmless error analyses under West Virginia jurisprudence. 198 W. Va. 620, 634, 483 S.E.2d 605, 619 (1996) (concluding that defects in a recidivist information filed by the State were tantamount to harmless error). (AR at 74-75.) The State therefore argued that, because the Defendant was privy to the nature of the recidivist

action against him, and because the scrivener's error did not create any surprise to the Defendant as contemplated by *Crabtree*, the trial court should reconsider and deny the Defendant's motion to dismiss. (*Id.*)

The trial court thereafter set the matter for a hearing on November 17, 2022, after which it denied the State's motion and stood upon its prior ruling dismissing the State's recidivist information. (AR at 79-80.) In doing so, it dismissed this Court's holding in *Crabtree* as dicta, rather than controlling authority, but acknowledged that the State could file a petition for writ of prohibition on the issue. (*Id.*) The State now seeks prohibition of the trial court's dismissal and a finding by this Court that its recidivist information is indeed subject to harmless error analysis.

III.

SUMMARY OF THE ARGUMENT

The trial court committed clear error by exceeding its legitimate powers when it dismissed a recidivist action by the State after the State timely amended its original recidivist information to address an error in the original filing that was both clerical and immaterial in nature. In doing so, the court erroneously found that the immaterial change within the State's amended filing was jurisdictional in nature and required dismissal pursuant to *Holcomb*, even though said error was not a procedure error as contemplated by W. Va. Code 61-11-19. As such, the court implicitly rejected this Court's holding in *Crabtree*, which found that an immaterial defect in a recidivist information may be properly cured by the State. Thus, the trial court's dismissal of the State's recidivist action is contrary to established West Virginia law and the prior holdings of this Court. The State therefore requests that this Court grant prohibition against the trial court below and vacate the order of dismissal. The State further requests that this Court modify Syl. Pt. 3 of

Hillberry to include that a challenge to immaterial and nonprocedural defects to a recidivist information is subject to review under harmless error.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Given that controlling case law regarding any cure of defect in a recidivist information is largely contained in the body of this Court's opinions regarding the issue, the State respectfully seeks oral argument in this matter. Although the State asserts the legal authority supporting its position is clear—thus minimizing the aid that this Court might receive by virtue of oral argument—it nevertheless requests that this Court author a syllabus point and signed opinion creating indisputable guidance to prevent same or similar issues from arising within all West Virginia jurisdictions. Thus, the State requests oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure, as this matter ultimately "involve[es] constitutional questions regarding . . . [this Court's prior] ruling."

V.

ARGUMENT

A. Standard of Review

The State seeks prohibition of the trial court exceeding its legitimate powers by granting the Defendant's motion to dismiss, which requires this Court to employ a five-factor conjunctive analysis of the lower court's ruling. *See* Syl. Pt. 2, *State ex rel. State v. Sims*, 240 W. Va. 18, 807 S.E.2d 266 (2017). The Court must determine "whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief." *Id.* It must then determine "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal." *Id.* Next, the Court must evaluate "whether the lower tribunal's order is clearly erroneous as a

matter of law," and "whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law." *Id.* Finally, the Court must conclude "whether the lower tribunal's order raises new and important problems or issues of law of first impression." *Id.* "Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.*

Here, the trial court exceeded its legitimate powers by disregarding the clear precedent of *Crabtree* when granting the Defendant's motion to dismiss. As a result, the State is left with no recourse to address the matter, meaning that the first two factors of this Court's analysis are satisfied. The trial court committed clear error by treating as dicta the holding of the signed opinion of Justice Cleckley in *Crabtree*. *See generally State v. McKinley*, 234 W. Va. 143, 153, 764 S.E.2d 303, 313 (2014) (finding that signed opinions, regardless of whether they contain a syllabus point, "carry significant, instructive, precedential weight because such opinions apply settled principles of law in different factual and procedural scenarios. . . ."). Although arguably not oft-repeated, the trial court's dismissal of the State's recidivist information manifests disregard for procedural and substantive law, and therefore raises important problems of law of first impression.

As the State's request for prohibition satisfies all five factors of analysis to warrant this Court's consideration, the State therefore requests that this Court adjudicate the matter on its merits.

B. The Trial Court Erred by Finding that the State's Amended Recidivist Information Was Neither Timely Amended Nor Subject to Harmless Error Analysis.

The trial court created clear error warranting prohibition when it concluded that the State's amended recidivist information was not timely amended or subject to review under harmless error analysis. When imposing such a heightened standard of perfection upon the State, the trial court ignored jurisprudence from this Court that indeed found any immaterial defects contained within

a recidivist information to be subject to harmless error analysis and the question of unconstitutional prejudice or surprise to a criminal defendant.

Generally, "the procedural recidivist requirements of [W. Va. Code § 61-11-19] are mandatory, jurisdictional, and not subject to harmless error analysis." Syl. Pt. 1, *Holcomb v. Ballard*, 232 W. Va. 253, 752 S.E.2d 284 (2013). This Court has previously distilled those statutory jurisdictional requirements to three main components as they relate to the information contained within a recidivist information. *See* Syl. Pt. 3, *State v. Hillberry*, 233 W. Va. 27, 754 S.E.2d 603 (2014); *see also* W. Va. Code § 61-11-19.[7] Specifically, "a recidivist information is sufficient if it alleges a previous conviction with such particularity as to give reasonable notice to the defendant: (1) of the nature and character of the previous conviction; (2) of the court wherein the previous conviction occurred; and (3) that the identity of the person previously convicted is the same as the defendant. *Id. See also* Syl. Pt. 3, *State v. Masters*, 179 W. Va. 752, 373 S.E.2d 173 (1988); Syl. Pt. 3, *State v. Loy*, 146 W. Va. 308, 119 S.E.2d 826 (1961) (holding that an information is sufficient if it "avers the former conviction with such particularity as to reasonably

[7] W. Va. Code § 61-11-19 reads, in full:

> A prosecuting attorney, when he or she has knowledge of a former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary, may give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the next term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he or she is the same person or not. If he or she says he or she is not, or remains silent, his or her plea, or the fact of his or her silence, shall be entered of record, and a jury shall be impaneled to inquire whether the prisoner is the same person mentioned in the several records. If the jury finds that he or she is not the same person, he or she shall be sentenced upon the charge of which he or she was convicted as provided by law; but if they find that he or she is the same, or after being duly cautioned if he or she acknowledged in open court that he or she is the same person, the court shall sentence him or her to such further confinement as is prescribed by § 61-11-18 of this code on a second or third conviction as the case may be: *Provided,* That where the person is convicted pursuant to a plea agreement, the agreement shall address whether or not the provisions of this section and § 61-11-18 of this code are to be invoked.

indicate the nature and character of the former offense, the court wherein the conviction was had and identifies the person so convicted as the person subsequently [convicted]").

Thus, a jurisdictional determination necessarily turns on the key question of notice, as it does here. "The purposes of the statutory requirement of a written allegation concerning the previous conviction or convictions is to give the defendant reasonable notice so he can intelligently determine how to respond and prepare a defense to the recidivist charge." *Hillberry* at 35, 754 S.E.2d at 611 (*citing Masters* at 755, 373 S.E.2d at 176). Put simply, if a recidivist information lists the aforementioned requirements to provide a defendant with reasonable notice, it meets the jurisdictional elements of W. Va. Code § 61-11-19. *See id.*

So long as the defect is not jurisdictional in nature, this Court has long held that immaterial defects in a recidivist action are subject to harmless error analysis. *See State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996) (finding that the State's amendment to the wording of the charge on the day of the recidivist trial was immaterial and harmless); *Gardner v. Ballard*, No. 13-1301, 2014 WL 5546202 (W. Va. Nov. 3, 2014) (holding that a clerical error in the recidivist information was harmless); *Hillberry*, 233 W. Va. 27, 754 S.E.2d 603 (2014) (applying harmless error analysis to recidivist proceedings). "A person convicted of a felony may not be sentenced pursuant to [W. Va. Code §§ 61-11-18 and 61-11-19] unless a recidivist information and any or all *material* amendments thereto as to the person's prior conviction or convictions are filed . . . before expiration of the term at which such person was convicted, so that such person is confronted with the facts charged in the entire information, including any and all *material* amendments thereto." Syl. Pt. 1, *State v. Cain*, 178 W. Va. 353, 359 S.E.2d 581 (1987) (emphasis added). Thus, it follows that any amendments to a recidivist information that do not disrupt the Defendant's ability to

reasonably ascertain the charges against him are ultimately harmless, as they do not unconstitutionally prejudice a defendant. *See generally Crabtree* at 619, 482 S.E.2d at 634.

In *Crabtree*, this Court was confronted with a recidivist information that listed an offense of "Breaking and Entering" instead of "Entering without Breaking" as a prior conviction. *Crabtree* at 633, 482 S.E.2d at 618. During the recidivist proceedings, the State moved to amend the information to accurately reflect the charge, which the trial court granted. *Id.* On appeal, this Court found that the change did not result in the "element of surprise" and was additionally harmless, given that the State included four separate convictions within the recidivist information. *Id.* at 634, 482 S.E.2d at 619.

Later, in *Hillberry*, the Court considered a challenge to a recidivist information that (a) included the incorrect docket numbers for the prior offenses, (b) failed to include the defendant's sentences for the prior convictions; and (c) did not attach any records evidencing the defendant's prior convictions. 233 W. Va. at 34, 754 S.E.2d at 610. The Court concluded that, despite these alleged shortcomings, "it [was] clear that the defendant had adequate notice of his three prior convictions and could 'intelligently determine how to respond and prepare a defense to the recidivist charge.'" *Id.* at 35, 754 S.E.2d at 611 (citing *Masters* at 755, 373 S.E.2d at 176).

i. The State's clerical error of listing Subsection (c) of W. Va. Code § 61-11-18, rather than the applicable Subsection (d), was not material in nature, and is thus not subject to the jurisdictional prohibitions of *Holcomb*.

Here, the State's error of listing W. Va. Code § 61-11-18(c) as the applicable charging statute, based upon using a prior version of the statute, was immaterial given that the State properly and accurately listed the two prior convictions it used as a basis for the recidivist action, including the (a) nature and character of those convictions; (b) the courts where those prior convictions occurred; and (c) the Defendant's identity as the alleged defendant in those convictions. As

discussed above, this not only comports with the language of *Hillberry*, but also with the very text of W. Va. Code § 61-11-19. As such, this Court should take explicit notice that, pursuant to W. Va. Code § 61-11-19, the State *is not required* to identify the applicable subsection of W. Va. Code 61-11-18, but merely the charges upon which the recidivist allegations are based.

Evidencing the State's intention, the original recidivist information even goes as far to notify the Defendant that he was being subject to a recidivist enhancement due to his status as a habitual offender. (AR at 15 (stating that the State is seeking a recidivist penalty because the Defendant is a "habitual offender" because of his prior convictions.")) The State then filed an amended recidivist information containing the exact same provisions, albeit citing the correct subsection of W. Va. Code § 61-11-18. The Court arraigned the Defendant as a habitual offender, under W. Va. Code § 61-11-18(d), and the State served as part of the discovery the amended information. These facts are indisputable. Ergo, the Defendant cannot say with any measure of veracity that the State did not properly notice him of the jurisdictional elements of W. Va. Code §61-11-19, and the Defendant's reliance on *Holcomb* is misplaced. *Hillberry* therefore controls, meaning this Court should conclude that the State's recidivist information, even in its prior form, is jurisdictionally sound and the trial court's ruling was clearly erroneous.

ii. Even if this Court were to deem the clerical error as a jurisdictional defect, such a defect was cured by the State's filing of an amended information and the Defendant's arraignment upon the same within the applicable time constraints of W. Va. Code § 61-11-19.

Even in the event that this Court would venture into the jurisdictional can of worms by holding the prior recidivist information to an as-of-yet unseen jurisdictional standard under W. Va. Code § 61-11-19, the State contends that it did present the Defendant with a timely amended recidivist information. After discovering the clerical error in the original filing, the State filed an amended recidivist information within 20 days of the conclusion of the Defendant's criminal trial

for the triggering offense. While the State concedes that the amended information was not e-filed under the new recidivist docket number, it was nevertheless filed in the pending criminal matter which triggered the recidivist action by virtue of the Defendant's conviction (important, given that the Defendant's sentencing in that matter would be subsumed by the recidivist sentence). The Court then utilized this amended information at the Defendant's recidivist arraignment. Indeed, the Defendant's counsel even argued preliminary challenges to the State's contention that the Defendant is a habitual offender who should be subject to a lifetime enhancement by virtue of his prior and current convictions.

While the State acknowledges an e-filing error in this matter, it is nonetheless clear that the Defendant is attempting to relieve himself of any recidivist enhancement by virtue of a inconsequential technicality rather than an outright jurisdictional defect. It goes without saying that, had the document been handed directly to the circuit clerk, the amended information would have been filed correctly. Yet, because the amended information was filed in an interrelated criminal matter involving the identical judge, identical defense counsel, identical Defendant, identical plaintiff, and identical prosecuting attorney, the Defendant requested that the trial court deem it irreparably and fatally flawed. Such a stance is untenable. More importantly, it is unsupported by the direct language of W. Va. Code § 61-11-19.

Pursuant to W. Va. Code § 61-11-19, "[a] prosecuting attorney, when he or she has knowledge of a former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary, may *give information thereof to the court immediately upon conviction and before sentence.*" (Emphasis added). W. Va. Code § 61-11-19 then continues to specify the contents of that information and the procedure by which a recidivist trial shall take place. It does not specify the manner in which the court may receive said

information, but merely that the court shall receive it and that the Defendant shall be arraigned upon it. The State therefore contends that, while imperfect, the filing of the amended recidivist information with the court and counsel of record, resulting in the Defendant's arraignment upon the same, was proper.

Lastly, the State asserts that there *is not a commonly accepted procedure* in West Virginia for the filing and opening of recidivist actions. Counties employee various methodology in processing recidivist matters. In some counties, such as Berkeley, a new case number is generated in which to file the recidivist matter and all associated pleadings and orders. In others, such as Monongalia County, recidivist proceedings are filed exclusively within the triggering felony's case number. These local rules, however, *do not* set the jurisdictional or constitutional floor. The trial court's ruling therefore births a jurisdictional quandary wherein the State's filing of an amended information in the associated felony matter is jurisdictionally and constitutionally flawed, when in other counties such practice is the jurisdictionally and constitutionally sound. Thus, in many other counties, the issue here would have never occurred. For this reason alone, the Court should find the Amended Recidivist Information timely and appropriately filed. Additionally, the Court should provide some form of overarching guidance to the circuit courts as to the proper and unified filing of recidivist proceedings within the State.

iii. Based upon any of the foregoing conclusions, the trial court exceeded its legitimate powers by granting the Defendant's motion to dismiss, as the State served him with a timely amended recidivist information and thus properly noticed him of the material criteria specified by *Hillberry*.

Under either analysis, the trial court exceeded its legitimate powers by granting the Defendant's motion to dismiss the recidivist action brought by the State. Under jurisdictional inspection, the State furnished the Court with a copy of a proper recidivist information within 20 days of the Defendant's conviction of the triggering offense. Similarly, upon a non-jurisdictional

analysis, the State's clerical error was immaterial in nature and did nothing to frustrate notions of reasonable and adequate notice. To the extent that the trial court relied only upon this Court's unrelated syllabus points of *Holcomb* while simultaneously disregarding the language of *Crabtree*, it is error requiring prohibition. To the extent that the trial court found that the State's clerical error of listing the inaccurate subsection of W. Va. Code § 61-11-18 was fatal and material, amounting to an unconstitutional jurisdictional defect, it is error requiring prohibition. And to the extent that the trial court disregards all other filings and procedures in this case, and instead focuses solely on a recidivist information filed immediately upon conclusion of the Defendant's trial when determining that the State did not adhere to the requirements of W. Va. Code 61-11-19, it is error requiring prohibition.

VI.

CONCLUSION

WHEREFORE, the State of West Virginia respectfully requests that this Court grant its Petition for Writ of Prohibition and allow prohibition to lie against the Circuit Court of Berkeley County, West Virginia, thereby vacating the trial court's dismissal order entered November 22, 2022.

Respectfully Submitted,

STATE OF WEST VIRGINIA ex rel.
OFFICE OF THE BERKELEY COUNTY
PROSECUTING ATTORNEY,

Petitioner, By Counsel,

CATIE WILKES DELLIGATTI
PROSECUTING ATTORNEY

Shannon Frederick Kiser (WVSB #12286)
Assistant Prosecuting Attorney
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CERTIFICATE OF SERVICE

I, SHANNON F. KISER, Assistant Prosecuting Attorney and counsel for the State of West Virginia, hereby verify that I have served a true copy of the foregoing "***Petition for Writ of Prohibition***" upon both the Respondent and counsel for the Defendant in this matter, via hand delivery and/or United States first-class mail, on DEC. 21, 2022, to the following addresses:

The Honorable Bridget Cohee
380 West South Street, Ste. 4400
Martinsburg, WV 25401

S. Andrew Arnold
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P.O. Box 69
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Counsel for Defendant

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