IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 19-0326
Circuit Court No.: 18-F-15
Jefferson County, West Virginia

KEVIN TRAVIS COSTELLO,

Petitioner.

PETITIONER'S BRIEF

JUSTIN M. COLLIN
West Virginia State Bar #10,003
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
justin.m.collin@wv.gov

Counsel for Petitioner

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ASSIGNMENTS OF ERROR

1. The State violated the Rules of Discovery by introducing an undisclosed confession during trial.
2. The State presented insufficient evidence of Petitioner's Maryland conviction during the recidivist trial.
3. The trial court directed a verdict when it instructed the jury that Petitioner's prior convictions were felony offenses.
4. Petitioner's life sentence is disproportionate.

STATEMENT OF THE CASE

A jury convicted Petitioner of DUI causing serious bodily injury.[1] In the light most favorable to the verdict, Petitioner used heroin while driving home from work, passed out, ran into another vehicle, and seriously injured a child in the back seat. Prior to trial, the State did not disclose any oral statements to the defense. During trial, Petitioner's defense was that he consumed his heroin after the wreck to dispose of the drugs.[2] Petitioner's counsel was blindsided when Petitioner's probation officer testified that Petitioner confessed to using heroin while driving home.[3]

After the jury returned a guilty verdict, the State filed a recidivist information alleging two prior felony convictions: distribution of crack cocaine in the United States District Court for the Northern District of West Virginia at Martinsburg ("Federal conviction") and possession with intent to deliver heroin in the Circuit Court for Frederick County, Maryland ("Maryland conviction").[4] During the recidivist trial, the

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[1] A.R. 1768.
[2] A.R. 817.
[3] A.R. 867-68
[4] A.R. 1882-1932.

State did not introduce an order adjudicating Petitioner guilty of the Maryland conviction.[5] Furthermore, the trial court instructed the jury that Petitioner's prior offenses were felonies as a matter of law.[6] After the jury found that Petitioner was a habitual offender, the trial court imposed a life sentence.[7]

A. The State surprised Petitioner by introducing an undisclosed confession.

When the accident happened, Petitioner was on probation and supervised by Officer Lewis.[8] At his arraignment, Petitioner requested, and the trial court ordered the State to provide discovery.[9] The State did not disclose any oral statements; however, it did disclose Petitioner's written admissions to two probation violations (Admission 1 and 2).[10]

Petitioner moved to suppress his written admissions[11] and after hearing arguments of counsel, the trial court admitted Admission 1 (using heroin the day of the accident) but excluded Admission 2 because it was "ambiguously phrased in the disjunctive" and more prejudicial than probative:[12]

1. I Kevin Cotellese, have been advised of the alleged violations and hereby waive a Preliminary Hearing because I am guilty of violating charges 1,2 on the attached charge sheet.

[5] A.R. 2149.
[6] A.R. 1113-14.
[7] A.R. 2300.
[8] A.R. 616.
[9] A.R. 3-4, 1189-1202, 1204.
[10] A.R. 1346-47.
[11] A.R. 1340-1351.
[12] A.R. 1695-96 (trial court order), A.R. 1346-47 (probation excerpts).

VIOLATION CHARGES

1) You did violate rule J of the rules and regulations governing your release on Probation in that on or about 07-24-17, you did use drugs to wit: Heroin.

2) You did violate rule E of the rules and regulations governing your release on Probation in that on or about 07-24-17, you did manifest behavior that threatened the safety of yourself or others, or that could result in your imprisonment; which caused you to be charged with DUI (narcotics) with Felony serious bodily harm.

On the first day of trial, Petitioner again addressed the exclusion of Admission 2 and the State and trial court assured him Officer Lewis would not mention Petitioner's admission:[13]

> DEFENSE: Your Honor, I have a couple. One regarding Officer Lewis' testimony, Probation Officer Lewis. Regarding Probation Officer Lewis' testimony, I just want to ensure that he is instructed not to bring up the second admission in anyway. That was obviously redacted by the Court for a reason and I don't want it coming in the backdoor, so to speak, through Officer Lewis' testimony.
>
> THE COURT: We agreed that Officer Lewis will be careful in his testimony and not get to the second issue that was precluded by the Court.
>
> THE STATE: Yes, Your Honor. I've already instructed him, and he and two other witnesses are scheduled for tomorrow morning at nine o'clock so I will advise him again before nine o'clock.
>
> THE COURT: All right . . .

On the second day of trial Officer Lewis testified that Petitioner gave a complete oral confession: Petitioner snorted heroin while he was driving home from work, blacked out, crashed into the victim, and woke up sometime after the wreck.[14] At the conclusion of Officer Lewis's testimony, Petitioner moved for a mistrial.[15] He argued that Officer Lewis's testimony violated the trial court's order suppressing Admission 2.[16] The State countered that Petitioner's oral confession was factually distinct from Admission 2 and

[13] A.R. 329.
[14] A.R. 621.
[15] A.R. 642.
[16] A.R. 642.

that Petitioner "could have called the witness to see what he was saying."[17] The trial court denied Petitioner's motion:

> "So in terms of my ruling on the portion of the document that could not come in, I don't detect that what this witness said was in any way the same as what that portion of that document said . . . as I recall what was redacted is was not in any way what this witness just testified to regarding the snorting heroin, crossing of the bridge, blacking out, and waking after the car was flipped over . . ."[18]

After the State rested, Petitioner chose to testify. Petitioner admitted he confessed to Officer Lewis but claimed his confession was a lie he told to shorten his jail sanction for violating his probation.[19]

Petitioner renewed his motion for a mistrial after the State rested[20] and "reiterate[d] his previously made motions for acquittal" at the close of all evidence.[21] After the jury returned a verdict of guilty, Petitioner orally moved for a new trial to preserve the issue of "the statements of Mr. Lewis."[22] Petitioner filed a supplemental motion for a new trial which also renewed his motion for a mistrial,[23] and during oral argument he asserted a discovery violation based on the State's failure to disclose Petitioner's confession.[24] Petitioner argued that the nondisclosure "sandbagged"[25] the defense and he would have "altered [his] trial strategy in significant ways if that information had been presented . . . before trial."[26] In response, the State acknowledged

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[17] A.R. 643.
[18] A.R. 643.
[19] A.R. 712-13.
[20] A.R. 674-75.
[21] A.R. 780.
[22] A.R. 844.
[23] A.R. 1840-44.
[24] A.R. 860
[25] A.R. 860.
[26] A.R. 878.

its duty to disclose oral statements but asserted that despite speaking with Officer Lewis four times, he never mentioned that Petitioner gave a full confession.[27] The trial court recognized that all parties appeared surprised by Officer Lewis's testimony and Petitioner did not accuse the prosecutor of intentionally withholding evidence.[28] Ultimately, the trial court denied Petitioner's motion for a new trial. It held that any prejudice from the undisclosed confession was Petitioner's fault because he

> . . . should have informed his attorney about his oral confession *before* trial so counsel 1) could have attempted to suppress his oral confession pretrial; and/or, 2) been prepared at trial to address the confession through objections, motions, cross-examination, proposed jury instructions, and associated argument. Any error resulting from such recalcitrance is one of defendant's own making.[29]

B. The State filed a recidivist information alleging two prior drug convictions.

After the guilty verdict, the State filed a recidivist information alleging Petitioner's Federal and Maryland convictions.[30] During the recidivist trial, the State proved the fact of Petitioner's Federal conviction by introducing the customary court records: indictment, plea offer, judgment order, and an amended judgment order.[31]

To prove the Maryland conviction, however, the State did not introduce any such records. Instead, the State introduced docket sheets, documents generated the day of Petitioner's arrest (Charge Summary, Statement of Charges, Statement of Probable Cause, Commitment Pending Hearing, and Initial Appearance Questionnaire), unsigned, handwritten Courtroom Worksheets, a partially handwritten Probation/Supervision Order, a Commitment Record directed to the Commissioner of Corrections, a Maryland

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[27] A.R. 863.
[28] A.R. 879-80.
[29] A.R. 1968 (emphasis in the original).
[30] A.R. 1882.
[31] A.R. 2179-2232.

Sentencing Guidelines Worksheet, and Petitioner's probation transfer request and approval.[32] The State also called Petitioner's mother[33] and girlfriend[34] to testify about Petitioner's involvement in the criminal justice system.

After the parties rested, and over Petitioner's objection,[35] the trial court instructed the jury that the Federal and Maryland convictions were felony offenses as a matter of law.[36] The jury found Petitioner was a habitual criminal, and the trial court imposed a life sentence after rejecting Petitioner's proportionality argument.[37]

SUMMARY OF ARGUMENT

A. The introduction of an undisclosed confession warranted a new trial.

The trial court ordered the State to provide Petitioner with discovery. This included any oral statements made by Petitioner. The State disclosed two written admissions; however, it did not disclose any oral statements.

Petitioner's defense at trial was that he consumed his heroin after the accident to dispose of the evidence. During Officer Lewis's testimony, however, he informed the jury of an undisclosed confession. Specifically, that Petitioner admitted to using heroin before the accident. The State's failure to disclose Petitioner's confession to Officer Lewis violated the discovery rules and the trial court's discovery order.

Petitioner was blindsided by the undisclosed confession that related directly to the only disputed issue at trial. The State's failure to disclose the confession hampered the

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[32] A.R. 2149-2178.
[33] A.R. 1008.
[34] A.R. 1016.
[35] A.R. 924-28.
[36] A.R. 928, 1113-14.
[37] A.R. 2300.

preparation and presentation of Petitioner's case and he was prevented from mitigating the most damaging evidence admitted during trial.

The trial court abused its discretion in denying Petitioner's motions for mistrials and a new trial and failed to perform the correct analysis. The trial court should have determined whether Petitioner was "surprised on a material element," whether the nondisclosure "hamper[ed] the preparation and presentation of [Petitioner's] case,"[38] and whether a manifest necessity for a new trial existed.[39] Instead, the trial court blamed Petitioner for any prejudice from the undisclosed confession. It also held that Petitioner should have informed his counsel of the undisclosed confession so his counsel could prepare for its introduction or move to suppress it.

B. The State introduced insufficient evidence of the Maryland conviction and the trial court directed a verdict on the element of the character of the Maryland conviction.

This Court has held that in recidivist trials convictions are proven with judgment orders. Instead of proffering a judgment order for the Maryland conviction, the State introduced docket sheets, documents generated the day of Petitioner's arrest (Criminal Complaint, Commitment Pending Hearing, and Initial Appearance Questionnaire), unsigned, handwritten Courtroom Worksheets, a partially handwritten Probation/Supervision Order, a Commitment Record directed to the Commissioner of Corrections, a Maryland Sentencing Guidelines Worksheet, and Petitioner's probation transfer request and approval. The State also elicited testimony from Petitioner's mother

[38] Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980); *see also State ex rel. Rusen v. Hill*, 193 W. Va. 133, 139, 454 S.E.2d 427, 433 (1994).
[39] W Va. Code § 62-3-7.

and girlfriend regarding his criminal history. This evidence, without a valid judgment order, is insufficient to prove Petitioner's Maryland conviction.

The character of a prior conviction (felony or misdemeanor) is an element the State must prove beyond a reasonable doubt. The trial court abused its discretion and directed a verdict when it instructed the jury that the Maryland conviction was a felony as a matter of law. Moreover, the trial court's instruction precluded Petitioner from arguing that the State failed to prove the character of the Maryland conviction. This was a viable defense as only one document related to the Maryland conviction listed the offense as a felony.

C. Petitioner's life sentence is disproportionate.

Petitioner's life sentence is disproportionate. His triggering offense is admittedly violent. However, this Court has repeatedly held that predicate offenses must establish a pattern of violence to justify a life sentence. Here, Petitioner's predicates are for distribution of controlled substances. They do not involve actual or threatened violence and do not demonstrate the requisite pattern of violence.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner asks this Court to reverse his criminal conviction due to multiple errors. Oral argument and a signed opinion are appropriate, but because the law is well-settled, Petitioner requests a Rule 19 argument.

ARGUMENT

A. Petitioner moved for a mistrial and a new trial after the State violated the discovery rules by introducing an undisclosed confession. The trial court abused its discretion in denying Petitioner's motions.

The State violated the discovery rules and the trial court's discovery order by introducing an undisclosed confession that negated Petitioner's entire defense. The trial court abused its discretion when it denied Petitioner's motions for a mistrial and a new trial. The trial court's ruling that the undisclosed confession and Admission 2 were factually distinct was clearly erroneous and it was wrong as a matter of law to hold Petitioner at fault for any prejudice.

This Court reviews a trial court's rulings on discovery violations,[40] motions for new trials,[41] and motions for mistrials[42] for abuse of discretion. Factual findings are reviewed for clear error and "[q]uestions of law are subject to a de novo review."[43]

1. The undisclosed confession related directly to the only disputed element. Its introduction violated the trial court's discovery order, surprised Petitioner, and hampered the preparation and presentation of his case.

The State violated the rules of discovery[44] and the trial court's discovery order[45] by introducing Petitioner's undisclosed confession.[46] This violation surprised Petitioner and obliterated his defense. The trial court abused its discretion by denying Petitioner's motion for a new trial.[47]

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[40] *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 140, 454 S.E.2d 427, 434 (1994).
[41] Syl. Pt. 1, *State v. Anderson*, 233 W. Va. 75, 754 S.E.2d 761, 762 (2014) *citing* Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).
[42] Syl. Pt. 3, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).
[43] Syl. Pt. 1, *State v. Anderson*, 233 W. Va. 75, 754 S.E.2d 761 (2014) *citing* Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).
[44] W. Va. R. Crim. P. 16 (a)(1)(a).
[45] A.R. 1204.
[46] A.R. 621.
[47] A.R. 1951.

Pursuant to the discovery rule,[48] if the State intends to introduce any[49] oral statements made by a defendant, those statements must be disclosed.[50] Non-disclosure is fatal to the State's case when the statements are prejudicial and the trial court ordered their disclosure pursuant to a pre-trial discovery request.[51] Prejudice occurs when "the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case."[52] Whether the non-disclosure was "by fraud or accident . . . a new trial will be granted."[53]

Petitioner's discovery request[54] "extended throughout the trial," and he had "every right to rely fully upon" the absence of a confession in the State's disclosures.[55] The undisclosed confession surprised Petitioner[56] and uprooted his defense: that he was sober when the accident occurred and subsequently swallowed the heroin to dispose of the drugs. A confession is perhaps the strongest evidence of guilt. Here, there could be no greater hindrance to the preparation and presentation of Petitioner's case than his undisclosed confession that contradicted his theory of defense. Petitioner's counsel was blindsided by the confession and not prepared to defend against it. Based on his defense, the confession undermined his credibility and his testimony suffered as a result. As Petitioner's counsel argued during his motion for a new trial,

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[48] W. Va. R. Crim. P. 16 (a)(1)(a).
[49] Syl. Pt. 3, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987).
[50] W. Va. R. Crim. P. 16 (a)(1)(a).
[51] Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980).
[52] Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980); *see also State ex rel. Rusen v. Hill*, 193 W. Va. 133, 139, 454 S.E.2d 427, 433 (1994).
[53] State v. Grimm, 165 W. Va. 547, 555, 270 S.E.2d 173, 177–78 (1980) citing *State v. Price*, 100 W.Va. 699, 131 S.E. 710 (1926).
[54] A.R. 3, 1189.
[55] *State v. Cowan*, 156 W. Va. 827, 838, 197 S.E.2d 641, 647 (1973).
[56] A.R. 867-68.

> [t]his was something that I was blind sided by. You cannot prepare for a trial appropriately if you're going to be blind sided by a confession in the middle of the trial. It fundamentally altered everything [that] happen[ed] on day two . . .[57]

In an almost identical case, this Court found reversible error when, during trial, the State received a letter written by the defendant, and then introduced the letter without first disclosing it to the defense.[58] In support of its decision, this Court cited *Cunningham's* holding that failure to disclose evidence of identity required reversal (sunglasses that were described by witnesses).[59] The *Cunningham* Court's analysis illustrates why Petitioner's case should be reversed:

> It well may be that such nondisclosure was the result of inadvertence, oversight, or error on the part of the law enforcement officers or the prosecuting attorney. The fact remains, however, that the evidence so withheld was a critical item of proof in the case, and its reception into evidence during the trial could have had no effect other than to surprise defendant in the conduct of his defense and present a factual issue which he was unprepared to meet.[60]

On several other occasions, this Court ordered new trials after the State failed to disclose evidence that was much less prejudicial than the full confession at issue here. In *State v. Adkins*, this Court ordered a new trial because the State failed to provide the defendant with a complete criminal history of a confidential informant.[61] A new trial was also ordered in *State v. Keenan* when the State disclosed a corrected forensic report during trial that negated the theory of defense.[62] Finally, in *Grimm*, this Court held it was

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[57] A.R. 867-68.
[58] *State v. Cowan*, 156 W. Va. 827, 197 S.E.2d 641 (1973).
[59] *Cunningham v. State*, 254 So.2d 391 (Fla.App.).
[60] *State v. Cowan*, 156 W. Va. 827, 835–36, 197 S.E.2d 641, 646 (1973) citing *Cunningham v. State*, 254 So.2d 391, 392 (Fla.App. 1971).
[61] *State v. Adkins*, 223 W.Va. 838, 679 S.E.2d 670 (2009).
[62] *State v. Keenan*, 213 W. Va. 557, 562, 584 S.E.2d 191, 196 (2003).

an abuse of discretion to not grant a new trial after the State introduced an undisclosed report that contravened the theory of defense.[63]

The reason for the State's failure to disclose Petitioner's confession is immaterial.[64] The undisclosed confession was the strongest evidence of guilt admitted during trial, and its introduction blindsided Petitioner and eviscerated his defense. Petitioner could not have reasonably anticipated the undisclosed confession, he was not prepared to counter it, and it was impossible to recover from its introduction. The only remedy for the State's introduction of the undisclosed confession is a new trial. As such, it was an abuse of discretion for the trial court to deny Petitioner's motion for a new trial.

2. The trial court abused its discretion by denying Petitioner's mistrial motions.

The trial court further abused its discretion by denying Petitioner's repeated motions for a mistrial in the face of manifest necessity. There was no other viable way to correct the forceful and prejudicial error that resulted from Officer Lewis's testimony.

A defendant may move for a mistrial any time '[p]rior to the entry of the verdict . . .'[65] "[I]n any criminal case the court may discharge the jury, when it appears . . . there is manifest necessity for such discharge."[66] Manifest necessity is case specific and "may arise from various circumstances."[67] Whether to declare a mistrial is within the trial court's discretion; however, it is subject to careful review.[68] "[T]he power is a 'delicate

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[63] *State v. Grimm*, 165 W. Va. 547, 555, 270 S.E.2d 173, 178 (1980).
[64] *State v. Cowan*, 156 W. Va. 827, 835–36, 197 S.E.2d 641, 646 (1973) citing *Cunningham v. State*, 254 So.2d 391, 392 (Fla.App. 1971); *State v. Grimm*, 165 W. Va. 547, 555, 270 S.E.2d 173, 177–78 (1980) *citing State v. Price*, 100 W.Va. 699, 131 S.E. 710 (1926).
[65] *Vilar v. Fenton*, 181 W. Va. 299, 299, 382 S.E.2d 352, 352 (1989).
[66] W Va. Code § 62-3-7.
[67] Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).
[68] *See* Syl. Pt. 3, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).

and highly important trust' and must be exercised soundly . . ."[69] This Court will reverse a trial court's denial of a mistrial where "the circumstances [are] 'forceful' and 'prejudicial' to the accused."[70]

Officer Lewis's testimony that Petitioner admitted using heroin prior to the accident resulted in a manifest necessity to discharge the jury. The testimony was forceful and prejudicial. It surprised Petitioner and constituted the State's strongest evidence on the only issue in dispute: whether Petitioner used heroin before or after the accident. Moreover, disclosure of Officer Lewis's testimony would have fundamentally altered Petitioner's preparation and presentation of his defense.

Petitioner was not required, as the State suggested, to contact Officer Lewis before trial "to see what he [would say]."[71] Rather, it was the State's duty to disclose the confession to Petitioner.[72] By not disclosing the substance of Officer Lewis's testimony, the State created a manifest necessity for a new trial. Accordingly, it was an abuse of discretion for the trial court to deny Petitioner's repeated motions for mistrial.

3. The trial court's order denying Petitioner a new trial did not conduct the proper analysis and incorrectly blamed Petitioner for the State's discovery violation.

In denying Petitioner's motions for a mistrial and a new trial, the trial court did not conduct the proper analysis. At issue was whether a discovery violation surprised and prejudiced Petitioner and whether there was a manifest necessity for a new trial. Instead, the trial court adopted the State's argument and held that Officer Lewis's testimony

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[69] *See* Syl. Pt. 3, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).
[70] *State v. Smith*, 220 W. Va. 565, 568, 648 S.E.2d 71, 74 (2007).
[71] A.R. 643.
[72] W. Va. R. Crim. P. 16 (a)(1)(a).

"properly avoided any reference to that vague written admission."[73] This not only fails to address the issue of surprise and prejudice, but it is also a clearly erroneous finding of fact. Despite the ambiguity of the disjunctive clauses, any reading of Admission 2 is premised on Petitioner's admission to the conduct at issue in Petitioner's trial: DUI causing injury.[74]

The trial court's order also crafted a novel legal theory to shift the blame for any prejudice on Petitioner:

> [Petitioner] should have informed his attorney about his oral confession *before* trial so counsel 1) could have attempted to suppress his oral confession pretrial; and/or, 2) been prepared at trial to try to address the confession through objections, motions, cross-examination, proposed jury instructions, and associated argument. Any error resulting from such recalcitrance is one of defendant's own making.[75]

The trial court ignored that the discovery rules and its own order required the State, not Petitioner, to disclose oral statements/confessions. The trial court also imposed on Petitioner a duty to inform the State of evidence against him, and then move to suppress the evidence or accept its admission and any resulting prejudice. This is an affront to the right against self incrimination embodied in the 5th Amendment, applicable to West Virginia through the 14th Amendment, and embodied in our Constitution in Article III Section 5. It further ignores the presumption of innocence and incentivizes nondisclosure by prosecutors.

The defendants in *Grimm*, *Cowan*, and *Cunningham*, as the Petitioner here, knew of the undisclosed evidence and yet this Court and the Florida Court reversed their convictions. The trial court's order in this case ignores that this Court does not require

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[73] A.R. 1956.
[74] A.R. 1346-47.
[75] A.R. 1968 (emphasis in the original).

defendants to move to suppress undisclosed evidence. This Court should follow its precedent and reverse Petitioner's conviction.

B. Sentence enhancements for habitual offenders require proof beyond a reasonable doubt of (1) the fact of prior convictions and (2) the correct character of the prior convictions.

Despite the State's assertion during trial, ". . . identity is not the only issue presented in a recidivist proceeding . . ."[76] The recidivist statutes,[77] case law, and principles of due process[78] also require the State to prove beyond a reasonable doubt "the fact of prior conviction"[79] and the correct "character" of those convictions—that the prior convictions were felony/penitentiary offenses and not misdemeanor offenses.[80] The State presented insufficient evidence of the Maryland conviction because it did not introduce a judgment order. Additionally, the trial court's instruction that Petitioner's prior convictions were felonies as a matter of law relieved the State of its burden of proof and improperly directed a verdict on the character of his convictions.

1. The State's failure to introduce an order adjudicating Petitioner guilty of the Maryland conviction requires a finding of insufficient evidence.

The State attempted to prove the Maryland conviction without an order adjudicating Petitioner guilty of a felony. In the absence of a judgment order, the State

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[76] A.R. 912; *Oyler v. Boles*, 368 U.S. 448, 453–54 (1962).
[77] W. Va. Code § 61-11-18, W. Va. Code § 61-11-19.
[78] *In re Winship*, 397 U.S. 358, 364 (1970).
[79] *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 514, 583 S.E.2d 800, 811 (2002); Syl. Pt. 3, *State v. Wyne*, 194 W. Va. 315, 460 S.E.2d 450 (1995).
[80] *Oyler v. Boles*, 368 U.S. 448, 453–54 (1962); *State ex rel. Arbogast v. Mohn*, 164 W. Va. 6, 260 S.E.2d 820, 821 (1979) ("Character of the offense" describes felony or misdemeanor.); *State v. Brown*, 91 W. Va. 187, 112 S.E. 408, 409 (1922) (character refers to felony or misdemeanor) *overruled on other grounds by State v. Williams*, 196 W. Va. 639, 474 S.E.2d 569 (1996).

presented insufficient evidence to prove the Maryland conviction beyond a reasonable doubt.

United States District Courts and Maryland Circuit Courts are courts of record.[81] "[I]t is well-settled that a court of record speaks only through its record and anything not appearing on the record does not exist in law."[82] For recidivist purposes, this Court has held authenticated copies of state or federal judgment orders are sufficient proof of a prior conviction.[83]

It is well settled that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits state criminal convictions not supported by sufficient proof of each element.[84] Furthermore, "[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden."[85] In this case, Petitioner has met this heavy burden by virtue of the State's failure to introduce a judgment order establishing the Maryland conviction.

The State proved Petitioner's Federal conviction with the proper court records: indictment, plea offer, judgment order, and amended judgment order. This was sufficient evidence for the jury to find the fact of the Federal conviction proven beyond a reasonable doubt. To prove the Maryland conviction, however, the State relied on docket

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[81] Md. Const. art. IV, § 1.

[82] *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W.Va. 613, 617, 486 S.E.2d 782, 786 (W.Va.,1997) citing *State ex rel. Browning v. Oakley*, 157 W. Va. 136, 199 S.E.2d 752 (1973).

[83] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 644 (1942) (prior convictions proven by a formal record); *State v. Meadows*, 124 W. Va. 412, 20 S.E.2d 687, 688 (1942) (prior convictions proven by certified copies of judgments); *see also Comm. on Legal Ethics of W. Virginia State Bar v. Boettner*, 183 W. Va. 136, 137–38, 394 S.E.2d 735, 736–37 (1990) (order of judgment or conviction conclusive as to guilt in lawyer disciplinary proceedings); *but see* Syl. Pt. 4, *State v. Hulbert*, 209 W. Va. 217, 544 S.E.2d 919 (2001) (prior misdemeanor domestic violence convictions may be proven with evidence other than a judgment order).

[84] US Const. Amend. XIV; *see* W. Va. Const. Art. 3, § 10.

[85] Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

sheets, documents generated the day of Petitioner's arrest (Criminal Complaint, Commitment Pending Hearing, and Initial Appearance Questionnaire), unsigned, handwritten Courtroom Worksheets, a partially handwritten Probation/Supervision Order, a Commitment Record directed to the Commissioner of Corrections, a Maryland Sentencing Guidelines Worksheet, and Petitioner's probation transfer request and approval. The State also elicited testimony from Petitioner's mother and girlfriend regarding his criminal history.

Many of these documents reflect how the case began—not the ultimate disposition as required for recidivism. Moreover, the documents that do reference Petitioner's conviction, as well as the testimony by Petitioner's mother and girlfriend, are either not court records or cannot substitute for a judgment order.

Because the State did not introduce a judgment order, it presented insufficient evidence of Petitioner's Maryland conviction. This Court should therefore vacate Petitioner's life sentence and remand for a new sentencing hearing.

2. The trial court improperly directed a verdict on the element of the character of Petitioner's prior convictions.

It is axiomatic that the State must prove every element of a crime beyond a reasonable doubt. The correct character of a prior conviction, *i.e.*, whether the conviction is a felony or misdemeanor,[86] is an element the State must prove during a recidivist trial.[87]

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[86] *Oyler v. Boles*, 368 U.S. 448, 453–54 (1962); *State ex rel. Arbogast v. Mohn*, 164 W. Va. 6, 260 S.E.2d 820, 821 (1979) ("Character of the offense" describes felony or misdemeanor)

[87] *Oyler v. Boles*, 368 U.S. 448 (1962).

The trial court abused its discretion[88] by instructing the jury that the alleged prior convictions were "as a matter of law . . . felony crimes punishable by confinement in a penitentiary."[89] This instruction relieved the State of its burden to prove the character of the prior offenses beyond a reasonable doubt[90] and impermissibly directed a verdict in favor of the State[91] on an element of the offense.[92] The trial court was "[t]he wrong entity [to judge] the [Petitioner] guilty" of having been convicted of felony offenses[93] and its instruction "foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses . . ."[94]

The trial court's instruction also infringed on Petitioner's constitutional rights to "present a complete defense"[95] by precluding him from arguing that the State did not prove the character of the prior offenses beyond a reasonable doubt.[96] Typically, the character of a conviction will be established by the same documents that prove the fact of prior conviction. Accordingly, a successful challenge of the Federal conviction's character was unrealistic. Challenging the character of the Maryland conviction, however, was a viable defense. During the recidivist trial, the State did not introduce a Maryland indictment, plea offer, plea paperwork, adjudicative order, or a transcript of the plea and/or sentencing hearings. At best, the State's evidence regarding the character of

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[88] Syl. Pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
[89] A.R. 1113-14.
[90] In re Winship, 397 U.S. 358, 364, (1970).
[91] *Carella v. California*, 491 U.S. 263, 268-69 (1989) (concurrence) ("For a judge may not direct a verdict of guilty no matter how conclusive the evidence.") citing *Carpenters v. United States*, 330 U.S. 395, 408-09 (1947).
[92] *Oyler v. Boles*, 368 U.S. 448, 453–54 (1962).
[93] *Carella v. California*, 491 U.S. 263, 269 (concurrence) citing *Rose v. Clark*, 478 U.S. 570, 578 (1986).
[94] *Carella v. California*, 491 U.S. 263, 266 (1989).
[95] *State v. Zuccaro*, 239 W. Va. 128, 144, 799 S.E.2d 559, 575 (2017).
[96] *Oyler v. Boles*, 368 U.S. 448, 461 (1962) (dissent).

the Maryland conviction was circumstantial. Docket sheets and handwritten Courtroom Worksheets are insufficient bases for findings of law. With one exception, none of the documents relating to the Maryland conviction indicated that the conviction was for a felony. Only Petitioner's probation transfer request, drafted by a Maryland probation officer and not a court, designated Petitioner's conviction as a felony.

The insufficiency of the evidence for the Maryland conviction is magnified when it is used to prove the character of conviction. Petitioner could have argued to the jury that the State failed to prove the correct character of his Maryland conviction beyond a reasonable doubt. This was a viable argument especially when juxtaposing the evidence of the Maryland conviction with the evidence of the Federal conviction (indictment, plea offer, and two sentencing orders). However, the trial court's instruction denied Petitioner's right to present this argument.[97]

C. Petitioner's life sentence is disproportionate.

West Virginia has one of the most draconian recidivist statutes in the United States.[98] Nevertheless, the West Virginia Constitution requires that "[penalties] . . . be proportioned to the character and degree of the offense."[99] Therefore, this Court reads the recidivist statute ". . . in a restrictive fashion in order to mitigate its harshness."[100] The Proportionality Clause of the West Virginia Constitution only permits life recidivist sentences if the triggering *and* prior offenses "involve actual or threatened violence to the person."[101]

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[97] A.R. R. 1113-14.
[98] *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 536, 276 S.E.2d 205, 213 (1981).
[99] W. Va. Const. Art. III, Section 5.; Syl. Pt. 8, *State v. Vance,* 164 W.Va. 216, 262 S.E.2d 423 (1980); *Terry v. Lambert*, No. 17-0788, 2018 WL 4909890, at *2 (W. Va. Oct. 10, 2018)
[100] *Wanstreet* 166 W. Va. at 528.
[101] Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).

The standard of review is *de novo*. [102] Normally, trial courts exercise considerable discretion at sentencing.[103] However, courts have little discretion as to recidivist sentences.[104] If the triggering *and* predicate felonies show a propensity for violence, then the legislature only authorizes a life with mercy sentence.[105] The Proportionality Clause prohibits a life sentence if the charged priors do not show a pattern of violence.[106]

1. This Court has repeatedly held that a violent triggering offense is insufficient to impose a life sentence in the absence of predicate offenses demonstrating a pattern of violence.

Petitioner's triggering offense qualifies as violent and "is entitled to more scrutiny" than the predicate offenses.[107] However, his predicate felonies were for distribution of controlled substances and did not involve actual or threatened violence. As such, Petitioner's life sentence is disproportionate, and this Court should reverse it.[108]

This Court has held that "the sole emphasis [cannot] be placed on the character of the final felony . . ."[109] Instead, all offenses (triggering offense *and* predicate offenses) must be analyzed (1) "to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties

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[102] Syl. Pt. 1, *State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867 (2017) (standard of review for the constitutionality of a sentence is not reviewed under abuse of discretion standard).
[103] *Cf. State v. Head*, 198 W. Va. 298, 305, 480 S.E.2d 507, 514 (1996) (Rulings of W. Va. Crim. P. Rule 35(b) motions entitled to considerable discretion because they are derivative of the initial sentencing decision) (Clekcley, J., concurring).
[104] *See* Syl. Pt. 2, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).
[105] *Cf. State ex rel Daye v. McBride*, 222 W.Va. 17, 24, 658 S.E.2d 547, 554 (2007) (courts lack authority to impose second-time recidivist sentences for third-time recidivists).
[106] *State v. Kilmer*, 240 W. Va. 185, 189, 808 S.E.2d 867, 871 (2017).
[107] *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 533–34, 276 S.E.2d 205, 212 (1981).
[108] A.R. 2300.
[109] *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 533–34, 276 S.E.2d 205, 212 (1981).

and therefore justify application of the recidivist statute"[110] and (2) to determine if they establish a pattern or predisposition to violence.[111]

This Court's emphasis on a defendant's entire record, and not just the triggering offense, is reflected in multiple cases. In *Kilmer*, a violent triggering offense of unlawful assault and two predicate offenses of driving on a license revoked for DUI did not justify a life sentence. A similar situation occurred in *Miller* where a violent triggering offense was insufficient to justify a life sentence.[112] In *Miller*, the defendant shot the victim in the stomach and hand.[113] But because his prior felonies were for breaking and entering, false pretenses, and forgery and uttering, this Court reversed his life sentence. Again in *Terry*, this Court upheld a lower court ruling that a life sentence was disproportionate when based on a violent triggering offense of unlawful wounding but nonviolent predicate offenses of grand larceny and operating a clandestine drug laboratory.[114] Finally, in *Lane*, this Court held that the triggering offense of distribution of oxycodone was devoid of "testimony or evidence . . . to support any type of violence or even perceived violence. . ."[115] This Court further held that a life sentence was disproportionate even though the prior convictions were for unlawful wounding and conspiracy to transfer stolen property.[116]

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[110] Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 831, 286 S.E.2d 234 (1981).
[111] *State v. Kilmer*, 240 W. Va. 185, 189, 808 S.E.2d 867, 871 (2017).
[112] *State v. Miller*, 184 W. Va. 462, 400 S.E.2d 897 (1990).
[113] *State v. Miller*, 184 W. Va. 462, 463, 400 S.E.2d 897, 898 (1990).
[114] *Terry v. Lambert*, No. 17-0788, 2018 WL 4909890, at *1 (W. Va. Oct. 10, 2018).
[115] *State v. Lane*, 241 W. Va. 532, 826 S.E.2d 657, 664 (2019) *contra State v. Norwood,* 832 S.E.2d 75, 84 (W. Va. 2019).
[116] *State v. Lane*, 241 W. Va. 532, 826 S.E.2d 657, 661 (2019) *contra State v. Norwood,* 832 S.E.2d 75, 84 (W. Va. 2019).

Here, Petitioner's prior felonies did not involve actual or threatened violence; they did not demonstrate a propensity for violence; and they did not demonstrate a pattern of violence. Instead, Petitioner's prior convictions for distribution of controlled substances demonstrate that he is an addict. This is evidenced by the Federal Court order[117] and the Maryland Courtroom Worksheet[118] that required Petitioner to undergo substance abuse treatment. Regarding the Maryland conviction, Petitioner's admission to daily trips to purchase heroin and his arrest with only $240 of heroin is the behavior of an addict who is dealing to support his habit.[119] Petitioner's decision to use heroin on his way home from work, coupled with the testimony from Officer Lewis regarding how well he was doing, further indicates he was an addict struggling with his disease.[120]

The conduct on display in Petitioner's prior felonies is not the type of violent behavior that "[justifies] application of the recidivist statute."[121] Instead, as the Federal and Maryland courts recognized, the conduct called for intervention and treatment. This Court should resist the knee jerk reaction to focus solely on the facts of the triggering offense and reverse Petitioner's life sentence as "[c]ertainly, it cannot be said that [Petitioner] had a history of violent felony convictions prior to [the triggering felony]."[122]

CONCLUSION

This Court should reverse Petitioner's conviction for DUI causing serious bodily injury and remand for a new trial. This Court should further instruct the trial court that in

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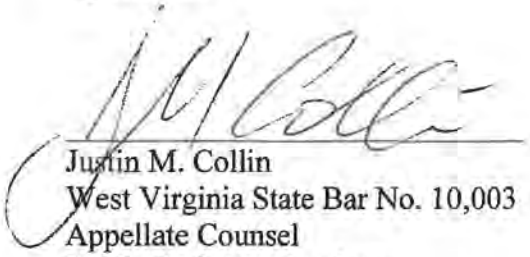
[117] A.R. 2228.
[118] A.R. 2170.
[119] A.R. 2165.
[120] A.R. 621.
[121] Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).
[122] *State v. Miller*, 184 W. Va. 462, 465, 400 S.E.2d 897, 900 (1990).

the event of a conviction on the underlying charge, Petitioner's prior felonies do not justify a life sentence as a recidivist.

Respectfully Submitted
Kevin Costello
By counsel:



Justin M. Collin
West Virginia State Bar No. 10,003
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, WV 25311
(304) 558-3905
justin.m.collin@wv.gov

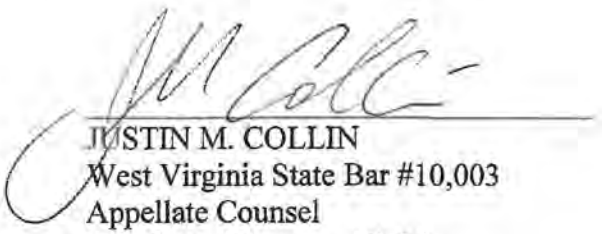
CERTIFICATE OF SERVICE

I, Justin M. Collin, counsel for Petitioner, Kevin Travis Costello, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *Petitioner's Brief* and *Appendix Record* to the following:

Lara Bissett
Assistant Attorney General
West Virginia Attorney General's Office
Appellate Division
812 Quarrier Street, Sixth Floor
Charleston, WV 25301

Counsel for Respondent

by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 4th day of November, 2019.



JUSTIN M. COLLIN
West Virginia State Bar #10,003
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
justin.m.collin@wv.gov

Counsel for Petitioner