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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.) No. 21-0382

MICHAEL PAUL CONN,
Defendant Below, Petitioner.

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

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITY

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

TREATISES

CERTIFIED QUESTION

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

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

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

ARGUMENT

1. The circuit court's failure to indicate an answer on the certification order should not function as an impediment to the consideration of the Certified Question.

The Respondent has asserted that this matter is not properly before the Court because the

circuit court did not write either "yes" or "no" on a blank that was left in the certified question order, which is not in strict compliance with Rule 17(a)(1) of the West Virginia Rules of Appellate Procedure. The Respondent's argument does not credit Rule 2 of those rules, which directs that "In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Supreme Court to do substantial justice." W.Va.R.A.P. 2.

Furthermore, the Respondent argues that this Court may not exercise jurisdiction over a certified question that has not been answered by the circuit court. Respondent's Brief, at 6. However, that argument ignores Rule 1(b) of the Rules which states that "These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court of Appeals as established by law." W.Va.R.A.P. 1(b). The Petitioner asserts that this Court should either continue with the certified question proceedings on the existing order, or enter an order directing the circuit court to submit a supplemental order indicating an answer to the certified question.

2. It is a misstatement of the law and a misrepresentation of the record for the Respondent to assert that the Petitioner was convicted of attempted third degree sexual assault.

The Respondent's argument rests on the premise that, contrary to the positions of the parties below, and contrary to the view of every court that has previously examined the facts of this case, that the Petitioner was actually convicted of "Attempt to Commit Sexual Assault in the Third Degree" as opposed to the crime of "Attempt to Commit Assault During the Commission of a Felony."

To review, the text of the information which is the charging document for the Petitioner's conviction reads as follows:

> THE PROSECUTING ATTORNEY CHARGES:
> That on or about the 20th day of August, 1997, in the County of Cabell, State of West Virginia, MICHAEL CONN did commit the offense of "ATTEMPT TO COMMIT A FELONY" by unlawfully, feloniously, knowingly and intentionally attempting to commit an **assault during the commission of a felony**, against the peace and dignity of the State.

(J.A., at 4) (emphasis added).

During his habeas review of this matter, Judge Ferguson examined the information and stated that:

> THE COURT: All right. I have got file No. 98-F-161, which is the Information. And the Information filed was attempt to commit a felony. I guess the other charges will be dismissed and the attempt to commit a felony alleges on or about August the 20th, 1997, in Cabell County, that the defendant unlawfully, feloniously, knowingly and intentionally attempted to commit an assault during the commission of a felony, against the peace and dignity of the State.
> So, it doesn't set forth in there -- well, it doesn't set forth anything of a sexual nature.

(J.A., at 30).

The language of the indictment specifically names the underlying felony to which the inchoate attempt relates. The indictment is unambiguous on its face. Both the circuit court below, and the State by its Assistant Prosecuting Attorney, acknowledged that the conviction at issue is "attempt to commit an assault during the commission of a felony" as reflected in the agreed certification order that is part of the record of the proceeding in this Court. "Assault during the Commission of a Felony" is a distinct crime set forth at W. Va. Code §61-2-10.

On the surface, it is understandable why counsel for the Respondent would seek to

mislead this Court into believing what is not true. The Respondent cannot prevail on the certified question under the actual facts of this case, unless this Court modifies the law by jettisoning fundamental legal precepts. The position staked out by the State in the proceeding below[1] is wholly untenable, and the Respondent is no doubt aware of that fact at this juncture. Under the plain language of W. Va. Code §15-12-4 and §15-12-2(b), a conviction for an offense (or attempt thereof) that is not one of the qualifying offenses specifically delineated in the statute can only lead to a ten year registration. The Respondent does not even credibly argue otherwise. Instead the Respondent has created a fantasy scenario under which it might prevail: that, despite the unmistakable language of the information to which he pleaded, the Petitioner is actually convicted of attempt to commit third degree sexual assault after all. Respondent's Brief, at 10-13.

The attempt at sleight of hand is especially egregious in light of the fundamental due process principles that would have to be ignored were the Respondent's argument to be accepted. This Court has established two tests for the sufficiency of an indictment, as set forth in Syllabus Points 5 and 7 of *State v. Chic-Colbert*, 231 W.Va. 749, 749 S.E.2d 642 (2013).

> 5. " ' "An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W.Va. R.Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." Syl. Pt. 6, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999).' Syl. Pt. 5, *State v. Haines*, 221 W.Va. 235, 654 S.E.2d 359 (2007)." Syl. Pt. 4, *Ballard v. Dilworth*, 230 W.Va. 449, 739 S.E.2d 643 (2013).
>
> [...]

1 As is evident from the formulation of the certified question, the State argued below that the definition of a qualifying offense includes those offenses for which the court makes a finding of sexual motivation, which is not a meritorious argument for the reasons set forth in the Petitioner's Brief.

> 7. " 'An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.' Syl. Pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983)." Syl. Pt. 1, *State v. Mullins*, 181 W.Va. 415, 383 S.E.2d 47 (1989).

Chic-Colbert, 749 S.E.2d 644-45.

In no universe does the information pass muster as a charging document for an attempt to commit sexual assault in the third degree. To reiterate, the conduct of which the Petitioner is accused in the information is "unlawfully, feloniously, knowingly and intentionally attempting to commit an **assault during the commission of a felony**[.]" (J.A., at 4) (emphasis added). Not "attempting to commit a sexual assault in the third degree." The Respondent fundamentally mischaracterizes the law by suggesting that the underlying crime of the Petitioner's conviction for attempt is a free-floating question that can be determined after the fact by exegesis. The underlying crime of an attempt is wholly inseparable and fundamental to the conviction:

> We would be remiss if we neglected to mention that the petitioner necessarily mischaracterizes his convictions as being "of violating W. Va. Code § 61-11-8." The so-called "attempt statute" prescribes various degrees of punishment for "[e]very person who attempts to commit an offense, but fails to commit or is prevented from committing it," unless the attempt is elsewhere criminalized by a more specific provision relating to the particular substantive offense. **The attempt statute does not itself describe a criminal offense.** *State v. Starkey*, 161 W. Va. 517, 522 n.2, 244 S.E.2d 219, 223 n.2 (1978) ("**The crime of attempt does not exist in the abstract but rather exists only in relation to other offenses.**" (quoting W. LaFave & A. Scott, Handbook on Criminal Law 49 (1972))), overruled on other grounds by *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

State v. Michael S., No. 14-0133 *6 n.4 (W. Va. Nov. 19, 2015) (memorandum decision)

(emphasis added). The Respondent quotes this same authority but fails to understand the implication of the inextricability of the underlying crime and the attempt thereof. The proposition that the State can simply go back in time and retroactively change the nature of a conviction misstates the law and is an intolerable affront to the Petitioner's due process rights.

First, it offends his right to notice. "An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him [...] is defective, although it may follow the language of the statute.' *United States v. Simmons*, 96 U.S. 360, 362, 24 L.Ed. 819." *Russell v. United States*, 369 U.S. 749, 765 (1962). There is nothing in the text of the information that would lead the Petitioner, or any other reasonable person, to believe that he would be convicted for an attempt to commit third degree sexual assault. Neither the name of the crime of sexual assault in the third degree, nor a single one of its elements, is listed in the information.

Second, it offends his right to have the terms of his consummated plea agreement enforced.

> 2. "When a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable 'right' inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." Syl. Pt. 4, *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998).

Syl. Pt. 2, *State v. Blacka*, 815 S.E.2d 28 (W. Va. 2018). The Petitioner agreed to plead to and be convicted of the "provable offense contained in Information No. 98-F-161." (J.A., at 5). He did not agree to be convicted of an attempted third degree sexual assault. As already repeated several times in this brief, the information, through which he consented to be charged, accused him of "attempting to commit an assault during the commission of a felony." (J.A., at 4). By

suggesting otherwise, in violation of the plea agreement, counsel for the Respondent has marred the fundamental fairness of the earlier proceeding, and has violated the standards of conduct attributable to prosecutors.

> This Court has referenced a "prosecutor as an officer of the Court" in several contexts. *State v. Schlatman*, 233 W.Va.84, 90, 755 S.E.2d 1, 7 (2014). We have delineated "the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case,in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." *State v. Boyd*, 160 W.Va. 234, 242-43, 233 S.E.2d 710, 717 (1977); see also *State v. Wilson*, 6 P.3d 637, 639 (Wash. Ct. App. 2000) ("Plea agreements concern fundamental rights of the accused, and invoke due process considerations that require a prosecutor to adhere to the terms of the agreement." (footnote omitted)); *State v. Tourtellotte*, 564 P.2d799, 802 (Wash. 1977) ("If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question.").

Blacka, at 33. It should not be forgotten that this case is before the Court because the Petitioner alleges that he was wrongfully convicted and incarcerated for two years for failing to register as a sex offender when he, by all appearances, was not actually required by law to register. If that is true, then it represents a grave breakdown of the justice system, whether attributable to the State, to the State Police, to the Petitioner's indigent defender, or to all three. The position adopted by the Respondent in this case adds further insult and disrepute to the integrity of the legal proceedings endured by the Petitioner.

Third, the Respondent's position offends his right not to be convicted of a felony that has not gone before a grand jury absent a knowing waiver. Regarding the waiver of grand jury indictment, this Court has held that:

> 6. "`A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on

> felony offenses for which a grand jury has returned an indictment.' Syl. Pt. 1, *State v. Adams*, 193 W. Va. 277, 456 S.E.2d 4 (1995)." Syl. Pt. 1, *State v. Haines*, 221 W. Va. 235, 654 S.E.2d 359 (2007).
>
> 7. A defendant may waive his constitutional right to a grand jury indictment as provided in article III, section 4 of the West Virginia Constitution and elect to be prosecuted by information in accordance with the provisions of Rule 7 of the West Virginia Rules of Criminal Procedure if such waiver is made intelligently and voluntarily.

Syl. Pts. 6 and 7, *Montgomery v. Ames*, 241 W.Va. 615, 827 S.E.2d 403 (2019).

The record is devoid of any evidence to support that the Petitioner ever consented to being charged by information for attempt to commit third degree sexual assault. On the other hand, the record supports the notion that the Petitioner consented to be charged with attempt to commit an assault during commission of a felony, as the information via which he agreed to be charged actually lists that crime by name. (J.A., at 4).

The Respondent relies on the fact that the information and the conviction order only state "attempt to commit a felony" instead of naming the underlying crime of the attempt. Respondent's Brief, at 8, n.2. However, the 1998 conviction at issue has already been collaterally reviewed. In its final order denying habeas relief in 03-C-1067, and finding the Petitioner's crime to be sexually motivated, the Circuit Court unequivocally found as follows:

> 4. On August 29, 1998, pursuant to an agreement reached between the State and the Petitioner, Petitioner was permitted to withdraw his earlier guilty plea and he then pleaded guilty to Information No. 98-F-161, charging him with one count of Attempt to Commit a Felony, stating that he unlawfully, feloniously, knowingly and intentionally **attempted to commit an assault during the commission of a felony.**

(J.A., at 41).

The factual proffer during the plea hearing encompassed conduct that could support a

charge of Third Degree Sexual Assault. That fact is relevant for a finding of sexual motivation, but it does not render a conviction for one crime into a conviction for another. A lifetime registration requires a conviction for a qualifying offense. A finding of sexual motivation supports a ten year registration. W. Va. Code §§15-12-2(b), 15-12-4. The Petitioner has not, and could not have been, convicted of Third Degree Sexual Assault under the relevant procedural facts of this case.

The Respondent's assertion that the Petitioner was convicted of attempt to commit third degree sexual assault is also logically incoherent. The entire purpose of the plea agreement was so that the Petitioner could avoid the 1998 version of the sex offender registration statute.[2] W. Va. Code § 61-8F-2 (1998), like the current Sex Offender Registration Act, required registration for a violation of any section, *or an attempt thereof*, of article 8B, Chapter 61 of the West Virginia Code. Obviously, Third Degree Sexual Assault is included in that article. Assault during the Commission of a Felony was not, either in 1998, or now, a "qualifying offense" under the statute. In his final habeas order, Judge Ferguson specifically found that "At the time of the guilty plea, Petitioner would not have been required to register as a sex offender as a result of this plea." (J.A., at 41). This is the same judge who sentenced the Petitioner. (J.A., at 7). It makes absolutely no sense that the Petitioner would agree to a plea agreement, with the explicit purpose of avoiding registration, that would require him to plead guilty to a crime that would subject him to registration. But more importantly, Judge Ferguson found that he was convicted of a crime that would not require registration at the time of the plea. By definition, that crime

2 During the May 19, 2006 hearing in the habeas case, 03-C-1067, the Petitioner's then-counsel quoted from the transcript of the sentencing hearing: "On August 28th of '98 the Court said: 'Well, there were four felony charges in the indictment and they were sexual in nature, which would have required him to enlist as a sex offender. He has gotten a big break, I think, as far as dismissing these charges;...' because he won't have to register as a sex offender. And that was on Page 11 of the transcript from that date." (J.A., at 18).

could not have been Attempted Third Degree Sexual Assault. W. Va. Code § 61-8F-2 (1998).

The Respondent's reliance on *State v. Scott*, No. 27-0536 (W. Va. Oct. 12, 2018) (memorandum decision) is misplaced, as that case is inapposite to the instant fact pattern. In *Scott*, as in *State v. James F.*, No. 15-0194 (W.Va. May 18, 2016) (memorandum decision), the respective appellants were convicted of attempts of underlying crimes that would subject them to extended supervision. These cases have no bearing on whether a conviction for a non-qualifying offense under the Sex Offender Registration Statute can lead to a lifetime registration, contrary to the plain language of that statute. In those cases, this Court held that an attempt is "inextricably linked" to the underlying crime that was attempted. *Scott*, at *3. That is true. What is not true is that an attempt is "inextricably linked" to any crime other than the crime attempted. What this Court has not approved, and what the Respondent seeks in spite of the fundamental constitutional principles it would debase, is the transmutation of one offense – the one to which a defendant pleads guilty[3] – into a second offense that also happens to be within the scope of the factual proffer for the guilty plea. The State dismissed the sexual assault charges. (J.A., at 3). The information was not for an attempt of sexual assault. It was for an attempt of the discrete crime of Assault during the Commission of a Felony. (J.A., at 4).

If the Petitioner was convicted of an attempt of Third Degree Sexual Assault of a minor, he would be subject to lifetime registration. That is not in question. If that was the case, the Petition for Writ of Coram Nobis never would have been brought. But he was simply not convicted of that crime, despite the indecipherable arguments the Respondent has advanced to this Court to the contrary.

3 The Respondent explicitly acknowledges that "[t]o be sure, attempt to commit a felony as proscribed by West Virginia Code § 61-2-10, to which Petitioner pled guilty, is not one of the qualifying offenses specified in the Act." Respondent's Brief, at 8.

The incoherence of the Respondent's argument takes many forms. The Respondent asserts that "the language of the statute is clear and unambiguous." Respondent's Brief, at 11. Yet the Respondent then suggests that "[t]he only way to effectuate [the legislative intent of the statute] is to read § 15-12-4 *in pari materia* with § 15-12-2(b) in its entirety and not just in the context of the list of qualifying offenses therein." Respondent's Brief at 12. Unambiguous statutes are never read *in pari materia.* "The rule that statutes which relate to the same subject should be read and construed together is a rule of statutory construction and does not apply to a statutory provision which is clear and unambiguous." Syl. Pt. 1, *State v. Epperly*, 65 S.E.2d 488, 135 W.Va. 877 (1951). The Respondent's invitation to construe an unambiguous statute to accomplish a vague policy objective is meritless.

> Moreover, as in the case of all other rules of statutory construction, the necessity of applying the rule as to the construction of statutes *in pari materia* exists only where the terms of the statute to be construed are ambiguous, or its significance doubtful. [...]' 50 Am.Jur., Statutes, Section 348.

Epperly, 65 S.E.2d at 491, 135 W.Va. at 882.

The Respondent states repeatedly that the Petitioner is convicted of attempt to commit Third Degree Sexual Assault. Each of these assertions is a misrepresentation to this Court. It is an affront to the Petitioner's constitutional rights, and principles of prosecutorial propriety, to argue that he has been convicted of a different crime than the one to which he pleaded guilty. The Petitioner was convicted of a non-qualifying offense: attempt to commit an Assault during the Commission of a Felony. His conviction was found to be sexually motivated. He was required to register as a sex offender for that reason. Based on the language of the statute, that period of registration should have lasted ten years from his release. This Court should answer

the certified question in the negative.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court answer the certified question in the negative, hold that offenses against minors that are not "qualifying offenses" may not be the source of a lifetime registration requirement, and grant any other relief the Court deems just and proper.

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MICHAEL PAUL CONN,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

On this 31st day of December, 2021, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Reply Brief to Lara Bissett, Esq., by U.S. Mail to Bldg 6, Room 406, 1900 Kanawha Blvd. E, Charleston, WV 25305.

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