IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-318
Case No. 22-F-361
Circuit Court of Raleigh County

ANDREW MILLER,

Defendant below, Petitioner.

PETITIONER'S BRIEF

Matthew Brummond
Appellate Counsel
W.Va. Bar No. 10878
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, WV 25311
(304) 558-3905
Matt.D.Brummond@wv.gov

Counsel for the Petitioner

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Petitioner and two others were in an apartment, and one was non-fatally shot. The State blamed Petitioner. Petitioner testified he saw the third man shoot the victim. The jury convicted Petitioner and found him to be a third offense recidivist.

I. Did the State comment on post-arrest silence by asking Petitioner why he did not blame the third man at his preliminary hearing?

II. Did the State fail to meet its burden of proving each predicate offense occurred after the prior, where both offenses occurred within a month of each other and before the State had charged either?

STATEMENT OF THE CASE

A Raleigh County jury convicted Petitioner of malicious assault, wanton endangerment, and felon in possession, then recidivized him.[1] However, it did so in a proceeding marred by prosecutorial overreach.

First, the prosecutor commented upon Petitioner's post-arrest silence.[2] He asked Petitioner why he did not tell his lawyer about the other shooter, on the grotesque theory that if true, his lawyer would have disclosed the privileged communication to the prosecutor.[3] He then asked about his silence at the preliminary hearing. "[T]here were police officers around you, weren't there? … you could have told them?"[4]

And second, the State sought a third offense recidivist without any regard for its burden to prove two distinct predicates.[5] Its exhibits made clear that for recidivist purposes, Petitioner had only one prior conviction.[6]

The bar for a fair trial cannot be this low.[7] Petitioner appeals.

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[1] A.R. 1075–79.
[2] *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).
[3] *See* A.R. 898–99.
[4] A.R. 898.
[5] *See* A.R. 1108–09.
[6] *See* A.R. 1094–1106.
[7] *State v. Walker*, 207 W. Va. 415, 421, 533 S.E.2d 48, 54 (2000) ("To permit the State to do what occurred in this case, would effectively make *Miranda* warnings meaningless.").

A. Three people—Petitioner, a drug dealer, and an addict—were in an apartment. Someone shot the addict. The drug dealer successfully fled from police, and the State charged Petitioner for the shooting.

In 2022, Petitioner resided with his girlfriend in an apartment complex in Beckley, West Virginia.[8] On June 2, she permitted J.T., a drug dealer, to conduct business out of her home.[9] She also had another houseguest, the victim.[10] He was a drug user, but was visiting as a friend, not to purchase.[11] The victim knew Petitioner but the drug dealer was a stranger.[12]

While the girlfriend was out of the room, someone shot the victim.[13] Surveillance video first shows the victim fleeing to another apartment.[14] Petitioner exits next, then the drug dealer, who has a bag slung over his shoulders.[15]

The drug dealer alluded capture, and during trial was still at large.[16] Petitioner had a brief interaction with the police who responded to the shooting and gave a fake name.[17] They patted him down, found no weapons, and released him.[18] Police later identified Petitioner and the State charged him for the shooting.[19]

B. At trial, Petitioner and the State presented competing theories of the case. The State impeached Petitioner with his silence at his preliminary hearing.

Jurors had to decide whether to believe the victim, who said Petitioner shot him, or the defense theory, that the victim was afraid to incriminate the drug dealer who remained at large.[20] Each side presented eyewitness testimony—the victim and Petitioner—and each had corroborating circumstantial evidence.

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[8] A.R. 551.
[9] A.R. 553.
[10] A.R. 553–54.
[11] *Id.*; A.R. 755.
[12] A.R. 756.
[13] A.R. 761; A.R. 589.
[14] A.R. 1073.
[15] *Id.*
[16] A.R. 676–77.
[17] A.R. 407–08.
[18] *Id.*
[19] A.R. 471–72.
[20] *Compare* A.R. 381–89 (State's opening) *with* A.R. 389–96 (Petitioner's opening).

The State argued that Petitioner was also a drug dealer and believed the victim had stolen his drugs.[21] Petitioner's girlfriend testified that from her bedroom she heard a voice she believed to be Petitioner demand that the victim return his "bag."[22] She then heard a gunshot.[23] The victim said Petitioner shot him, and the police later found a gun near the scene that tested positive for Petitioner's DNA.[24]

Petitioner testified that the drug dealer shot the victim.[25] The victim told a nurse and investigating officer he did not know his assailant,[26] and he had a motive to falsely implicate Petitioner: the drug dealer remained a threat to him.[27] The drug dealer's flight itself suggested guilt,[28] and he was the only one with a literal bag.[29] Petitioner ditched his gun and gave a fake name because he was on parole for a felony.[30] Finally, the victim was adamant that the gun found at the scene was the wrong one.[31] A different gun shot him.[32]

Jurors thus had to decide who to believe, and the prosecutor and defense lawyer vigorously challenged each other's witnesses.[33] The prosecutor sought to preclude Petitioner from testifying as an eyewitness at all.[34] When this failed, he asked if he could at least question Petitioner as to "why he did not alert authorities that this purported other individual committed the crime?"[35] It is not unconstitutional to impeach a person with pre-arrest silence,[36] and the defense did not object.[37]

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[21] *See* A.R. 945.
[22] A.R. 545–47.
[23] A.R. 547.
[24] A.R. 902.
[25] A.R. 884.
[26] A.R. 488; A.R. 757.
[27] A.R. 975.
[28] See Syl. Pt. 6, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981).
[29] A.R. 1073; A.R. 592.
[30] *See* A.R. 889.
[31] A.R. 730.
[32] A.R. 730–33; A.R. 735.
[33] *Compare* A.R. 381–89 (State's opening) *with* A.R. 389–96 (Petitioner's opening).
[34] A.R. 868; *but see Rock v. Arkansas*, 483 U.S. 44, 51–52 (1987).
[35] A.R. 871.
[36] *See Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).
[37] A.R. 871.

Accordingly, the defense also did not object in open court when the prosecutor asked Petitioner about his failure to report a crime that evening or in the days after.[38] But then the prosecutor began asking about post-arrest silence: "[Y]ou had a lawyer for some time … you could have told your lawyer who would have told - -"[39] The defense objected that this ventured into privileged communications.[40] The court sustained the objection.[41]

The prosecutor continued asking about post-arrest silence: "During the preliminary hearing there were police officers around … you could have told them?"[42] Again the defense objected.[43] In addition to his privilege to communicate with his attorney, he had a privilege against self-incrimination.[44] Asking about his silence at the preliminary hearing violated his constitutional rights.[45]

This time, the court overruled the objection.[46] So, the prosecutor pressed on: "You could have spoken to law enforcement … between June 2nd and this afternoon, you [had] all kinds of opportunities to tell this story … you didn't do it?"[47] The defense objected. "Your Honor, again, I'm going to object. I believe that this is a clear violation of his Fifth Amendment Right and his right to have counsel. He has violated two constitutional rights, Your Honor."[48]

The court overruled the objection, and the prosecutor continued.[49] "You had ample opportunity? … and you didn't do it?"[50] The defense objected a fourth time. "Now, I think we are going to have to testify as to what he did and didn't tell his attorney, which I

[38] A.R. 898.
[39] *Id.*
[40] *Id.*
[41] A.R. 899.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] A.R. 900.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

think is a violation."[51] The prosecutor continued before the court could respond, but the defense pushed for a ruling.[52] "I would ask for a ruling on that, Your Honor. I believe he violated the confidentiality of the attorney/client privilege as to what he did and didn't say, and then he asked him specifically 'What did you tell your attorney?'"[53]

The court put an end to the matter. "Well, I sustained that objection and I'm overruling the present objection."[54]

C. The State recidivized Petitioner with two overlapping predicates.

The jury returned a guilty verdict, and the State asked the court not to dismiss the jurors yet.[55] It intended to serve a recidivist information on Petitioner for an immediate trial the following day.[56]

The next morning the parties and court met.[57] The State presented its information charging Petitioner with two prior convictions: one in Raleigh County with an April 12, 2010 sentencing date, and one a week later, on April 19, 2010, in Kanawha County.[58] The information did not specify when the underlying offenses occurred.

At Petitioner's request, the defense lawyer moved to withdraw.[59] Petitioner had encountered communication issues with his lawyer pretrial as well, but at that time the court mediated the situation to Petitioner's satisfaction.[60] This time Petitioner alleged improper conduct by counsel that made Petitioner uncomfortable going forward with him.[61] He requested new counsel, or to represent himself.[62]

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[51] A.R. 901. *See also* WV RPC Rule 3.7 ("Lawyer as Witness").
[52] A.R. 901.
[53] *Id.*
[54] *Id.*
[55] A.R. 995–96; A.R. 1000.
[56] *See id.*; A.R. 1015–16.
[57] *Id.*
[58] A.R. 1108–09.
[59] A.R. 1016–17.
[60] A.R. 73–77.
[61] A.R. 1017; A.R. 1019; A.R. 1024–25.
[62] A.R. 1017.

The court permitted Petitioner to represent himself, with former counsel on standby.[63] But it denied his motion for a continuance to research recidivism and review the discovery.[64] Instead, the court allowed Petitioner a few minutes to review the information and recidivist statute and consult with his former lawyer.[65] But it would not dismiss the jury or delay the recidivist trial to a new date.[66]

Petitioner denied the information and the State proceeded to present its case.[67] In testimony, the State focused on the dates of conviction.[68] But its sealed exhibits revealed the full sequence for both case histories.[69]

Kanawha County Indictment 09-F-794 charged that on an unknown day in April 2009, Petitioner robbed and attempted to murder an individual.[70] He pleaded guilty on April 19, 2010.[71] He waived a PSI, and the court immediately sentenced him.[72]

Raleigh County indictment 09-F-233H charged that with a co-defendant, Petitioner on May 7, 2009, committed multiple counts of burglary, wanton endangerment, kidnapping, robbery, malicious assault, and conspiracy to murder.[73] The court accepted a plea deal on February 26, 2010.[74] The exhibits do not include a sentencing order, but an order accepting the plea scheduled the hearing for April 12, 2010.[75]

The jury found that Petitioner was the same individual convicted in both predicate cases. The verdict form did not ask whether Petitioner committed the second offense after his conviction and sentence for the first offense.[76]

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[63] A.R. 1019.
[64] A.R. 1021–24.
[65] A.R. 1028.
[66] A.R. 1024.
[67] A.R. 1025; A.R. 1027–30.
[68] *See* A.R. 1034; A.R. 1040.
[69] A.R. 1094–1106.
[70] A.R. 1098–1100.
[71] A.R. 1101–02.
[72] *Id.*
[73] A.R. 1103–04.
[74] A.R. 1105–06.
[75] *Id.*
[76] A.R. 1107.

SUMMARY OF ARGUMENT

In most cases where the prosecutor comments on the defendant's silence, the record is murky as to whether the comment truly concerned post, as opposed to pre, arrest silence, and whether a sustained objection and corrective instruction mitigated the harm. Not here.

In a case that came down to credibility, the State went on at length concerning Petitioner's post-arrest silence. The prosecutor asked about Petitioner's choice to remain silent during the preliminary hearing, which necessarily entailed State custody. He then went on at length about Petitioner's silence right up until the day of trial. And rather than mitigate the harm, the court's erroneous ruling amplified it, giving a judicial stamp of approval to the prosecutorial misconduct.

The State also overreached with its recidivist information. The policy, common law, and now the text of the recidivist statute makes clear that each subsequent offense must occur after the prior conviction. Whatever the State may think of Petitioner's history, it is without authority to imprison him for life with only one predicate offense.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

It is beyond reasonable question that prosecutors may not comment upon post-arrest silence.[77] And where a case comes down to whether jurors believe the impeached defendant, such an error cannot be harmless.

Likewise, it is beyond reasonable question that defendants cannot serve life sentences for only a single, non-homicide predicate. Prosecutors who cannot prove two predicates should not seek life, and circuit courts are without jurisdiction to order the sentence.[78] Petitioner therefore requests a Rule 19 argument and signed opinion.

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[77] *See Doyle*, 426 U.S. at 618 ("it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."); Syl. Pt. 1, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977) (modification recognized by *State v. Hoard*, 248 W. Va. 428, ____, 889 S.E.2d 1, 11 (2023)).

[78] *See* Syl. Pt. 1, *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978).

ARGUMENT

I. The prosecutor violated the state and federal constitutions by commenting on Petitioner's post-arrest silence at his preliminary hearing.

So far as Petitioner can determine, it is virtually unprecedented for a prosecutor to impeach a defendant with what he supposedly failed to tell his lawyer. But there is robust case law as to commenting upon post-arrest silence regarding the police.[79] Prosecutors can't do it.[80] Not without violating constitutional rights they are sworn to uphold.[81] It is therefore remarkable that the prosecutor below did so in a premeditated fashion,[82] and even more remarkable that the court permitted it despite repeated, specific, objections.[83]

"No person ... shall be compelled in any criminal case to be a witness against himself[.]"[84] The Fifth Amendment applies to all custodial interrogations, not just those in front of a jury, and police must warn those in their custody that they have a right not to answer questions.[85] A warning of the right to remain silent would be "meaningless" if prosecutors could later impeach a defendant for invoking it.[86] It is implicit to the warning itself that the individual may not be punished for silence.[87] Prosecutor's engage in misconduct[88] and violate due process when they comment upon post-arrest silence.[89]

There is no factual question as to whether the prosecutor referred to post-arrest silence.[90] The prosecutor expressly anchored his question to the preliminary hearing, which axiomatically occurred after Petitioner was in custody.[91] By that time, both the arresting officer and a magistrate would have warned Petitioner he had the right to remain silent.[92]

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[79] *See Doyle*, 426 U.S. at 618 (1976).
[80] *See Boyd*, 160 W. Va. 234 at Syl. Pt. 1; *Hoard*, 889 S.E. 2d at 11.
[81] W. Va. Const. art. IV, § 5.
[82] *See* A.R. 871.
[83] *See* A.R. 899–01.
[84] U.S. Const. Amend. V; *accord.* W. Va. Const. Art. III, § 5.
[85] *See Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).
[86] *Walker*, 207 W. Va. at 421; *see also Doyle v. Ohio*, 426 U.S. 610, 617 (1976).
[87] *See Doyle*, 426 U.S. at 618.
[88] *See* Bennett L. Gershman, *Prosecutorial Misconduct*, § 11:15 (Thomson Reuters 2019–2020).
[89] *See Doyle*, 426 U.S. at 619.
[90] *See State v. Hoard*, 248 W. Va. 428, 889 S.E.2d 1, 11 (2023).
[91] *State v. Davis*, 236 W. Va. 550, 555, 782 S.E.2d 423, 428 (2015).
[92] *See* W. Va. Code § 62-1-6.

This Court reviews the legal issue of whether the lower court erred in allowing the State to inquire into post-arrest silence *de novo*.[93] Here, too, there is little question. The state and federal constitutions have prohibited the practice for decades.

1. The prosecutor's misconduct violated Petitioner's right to due process.

In *Doyle v. Ohio*, the Supreme Court addressed this exact question.[94] There, co-defendants offered the same exculpatory explanation for the first time during separate trials.[95] Their explanation was not facially implausible, and little in the record contradicted it besides an informant's testimony—who their account impeached.[96] In a single colloquy each, the State impeached the co-defendants with their post-arrest silence.[97]

The Ohio courts approved of this cross-examination on the theory that the co-defendants' silence went to credibility, not guilt.[98] But the Supreme Court reversed.[99] It ruled that implicit to *Miranda* warnings is the assurance the State will not weaponize silence, and that post-arrest silence may be reliance on *Miranda* rather than evidence of recent fabrication.[100] Thus the court held that impeaching a defendant with post-arrest silence violates the Due Process Clause of the Fourteenth Amendment.[101]

In *State v. Boyd*, this Court agreed, and ruled that under the state constitution "it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury."[102] The Court reversed even though the trial court had advised jurors that the defendant had the right to remain silent.[103]

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[93] *See Hoard*, 889 S.E.2d at 11 (exercising plenary review).
[94] *See Doyle*, 426 U.S. at 611.
[95] *See id.* at 612–13.
[96] *See id.* at 613.
[97] *See id.* at 614.
[98] *See id.* at 615–16.
[99] *See id.*
[100] *See id.* at 617–18.
[101] *See id.* at 619–18.
[102] *Boyd*, 160 W. Va. 234 at Syl. Pt. 1. The Court later clarified the pre/post arrest distinction in *State v. Oxier*, 175 W. Va. 760, 761, 338 S.E.2d 360, 361 (1985).
[103] *See id.* at 236.

These cases are directly on point. The prosecutor impeached Petitioner with his silence after the arresting officer and a magistrate had warned him of his rights.[104] This was a premediated strategy, not a stray comment from a rogue witness.[105] The court overruled Petitioner's objections, allowing the prosecutor to pound home the impeachment.[106] Whether he appreciated the wrongfulness of his actions or not, the prosecutor's misconduct violated due process.[107]

2. The illegal impeachment was not harmless beyond a reasonable doubt.

Furthermore, the error prejudiced Petitioner, warranting a new trial. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt[.]"[108] The State, to meet this heavy burden, must prove there is no "… reasonable possibility that the evidence complained of might have contributed to the conviction."[109]

Here, the State cannot prevail because the illegal impeachment bore on the credibility contest the jury had to decide. This is like *Boyd*, where the defendant testified to a complete defense.[110] His explanation conformed to the basic case facts, and this Court found reversible error.[111] Likewise here, Petitioner's testimony undermined the State's entire case. Certainly, if jurors believed the victim, they could convict. But Petitioner's trial theory—if believed—gave a "not entirely implausible"[112] explanation why the victim would lie.[113] Thus, if jurors believed Petitioner, they were duty-bound to acquit. This error strikes at the heart of the issue jurors needed to resolve.

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[104] A.R. 898–01.
[105] *Compare* A.R. 871 *with State v. Hamilton*, 177 W. Va. 611, 614, 355 S.E.2d 400, 403 (1987).
[106] *See* A.R. 899–01.
[107] *See* Gershman, § 11:15, *supra* at n. 88.
[108] *Chapman v. California*, 386 U.S. 18, 24 (1967); *accord. Hoard*, 248 W. Va. 428 at Syl. Pt. 6.
[109] *Chapman*, 386 U.S. at 23–24.
[110] *See Boyd*, 160 W. Va. at 236.
[111] *See id.*; *id.* at 240–41.
[112] *Doyle*, 426 U.S. at 613.
[113] *See* A.R. 975.

Nor was the credibility contest so lopsided that the prosecutor's thumb on the scale had no impact. Usually, constitutional harmless error analysis is qualitative: whether the error concern a contested issue, an element of the offense, or otherwise concerned a factor pertinent to the jury's decision-making.[114] But in extreme cases, the analysis can become quantitative. No matter its character, a minor error need not result in reversal if overwhelming, untainted evidence points to guilt.[115] But that is not this case.

As noted, the defense theory provided a complete explanation for the victim to lie if jurors credited his testimony.[116] The surrounding facts also lend credence to Petitioner's account. Originally, the victim said he did not know his shooter.[117] The drug dealer was the only stranger in the apartment.[118] Moreover, the dispute Petitioner's girlfriend overheard from another room concerned someone's "bag."[119] The State supposed this was street slang for drugs,[120] but there was also a literal bag that could have been the subject of controversy: the one security cameras caught the drug dealer removing from the apartment.[121]

DNA evidence proved that the gun recovered from the scene belonged to Petitioner, but that was it.[122] When police approached Petitioner, he had good reason to ditch the gun and give a fake name regardless of who shot the victim.[123] He was on parole for a felony.[124] Crucially, the gun is even less probative because the victim denied it was the one that shot him.[125] Evidently, conviction required jurors to believe the victim—but only so far.

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[114] *See Chapman*, 386 U.S. at 23–24.
[115] *See*, *e.g.*, *Buxton v. Ballard*, No. 14-0648, 2015 WL 2364510, at *5 (memorandum decision) (W. Va. May 15, 2015) (defendant's impeached testimony, even if believed, could not explain away the detailed accounts of uninterested eyewitnesses).
[116] *See* A.R. 975.
[117] A.R. 488; A.R. 757.
[118] A.R. 756.
[119] A.R. 545–47.
[120] A.R. 754.
[121] A.R. 1073.
[122] A.R. 902.
[123] *See* A.R. 889.
[124] *Id.*
[125] A.R. 730.

All of this is to say this was no easy case. If one begins with the presupposition that the State's theory was correct, then even barely prima facie evidence is strong. But that would be to substitute one's own judgment for that of the jury.[126] For this error to be harmless, the State must prove, beyond a reasonable doubt, that the State's illegal impeachment could not have impacted the verdict.[127] Giving due regard for what the jury *could* have believed based on the presentation of the evidence, rather than making assumptions about what it *should* have believed, it is clear the State cannot meet this burden. Petitioner requests a new trial in which the State does not weaponize his decision to exercise constitutional rights.

II. The State failed to prove beyond a reasonable doubt that each predicate offense occurred after the conviction for each prior.

It has long been the rule that each predicate offense must be a separate transaction or series of transactions.[128] "In other words, to sustain a conviction in a recidivist action, the prosecution must prove that each offense is committed subsequent to each preceding conviction and subsequent to each preceding sentence."[129]

The testimony solicited by the prosecutor, while Petitioner represented himself on short notice, may have obscured the sequence. But the State's exhibits remove any doubt. Petitioner committed two sets of offenses within one month: one in Kanawha and the other in Raleigh County.[130] The two counties indicted him, he pleaded guilty, and the counties sentenced him within a week of each other.[131] This does not meet the State's burden.[132] Therefore the State is without authority to imprison Petitioner for life.[133]

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[126] *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996) ("[O]ur decisions have made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence.").
[127] *See Chapman*, 386 U.S. at 23–24.
[128] *See* Syl. Pt. 1, *State ex rel. Stover v. Riffe*, 128 W. Va. 70, 35 S.E.2d 689 (1945).
[129] *State v. Norwood*, 242 W. Va. 149, 156, 832 S.E.2d 75, 82 (2019).
[130] *See* A.R. 1094–06.
[131] *Id.*
[132] Syl. Pt. 1, *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978).
[133] *Id.*

"Habitual criminal proceedings … are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner."[134] "The primary purpose of our recidivist statutes ... is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." "[P]rior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section[.]"[135] "Where a prisoner being proceeded against under the habitual criminal statute remains silent or says he is not the same person who was previously convicted and sentenced to the penitentiary offense or offenses alleged in the information, a circuit court has no jurisdiction to impose an enhanced sentence under the statute where the State fails to prove beyond a reasonable doubt that each penitentiary offense, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence."[136]

The State's strict compliance with the recidivist statute is jurisdictional, and the legality of a recidivist sentence is a question of law the Court reviews *de novo*.[137] Here, as a matter of law and indisputable fact, the State cannot meet its burden of proving beyond a reasonable doubt that the second predicate is a separate series of transactions from the first predicate. It thus lacks authority to imprison Petitioner for life, and he requests that the Court vacate his recidivist sentence.

Petitioner denied the information, triggering the State's duty to prove the second predicate offense occurred after conviction and sentencing for the first.[138] Here, it failed.

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[134] Syl. Pt. 2, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981) (quoting *State ex Rep. Ringer v. Boles*, 151 W. Va. 864, 871, 157 S.E.2d 554, 558 (1967)).
[135] W. Va. Code § 61-11-18(c).
[136] *McMannis*, 161 W. Va. 437 at Syl. Pt. 1.
[137] *See Norwood*, 242 W. Va. at 156; *cf.* W. Va. Crim. P. R. 35(a).
[138] *See McMannis*, 161 W. Va. at 442.

The information is silent as to when each offense occurred, and the verdict form did not ask jurors to find they were separate offenses.[139] Instead, it charged that for the first predicate, from Raleigh County, Petitioner was convicted via guilty plea on February 26, 2010, and sentenced on April 12, 2010.[140] For the second predicate to be a separate transaction within the meaning of the recidivist statute, Petitioner must have committed the offense "subsequent to [the] preceding conviction and sentence."[141] In other words, he must have committed the Kanawha County offense after April 12, 2010.

The information, trial testimony, and verdict form are silent as to when the second offense occurred. Instead, the above sources only establish that Kanawha County convicted and sentenced Petitioner on April 19, 2010.[142] It is possible for someone to commit a second crime in the one week interim between April 12th and 19th, but the State introduced no evidence that Petitioner did.[143] On the contrary, the sealed exhibits from the trial refute this.

The sealed exhibits show that Petitioner committed the Kanawha County offense *first*, on an unknown date in April, 2009.[144] He did not commit the Raleigh County offense until May 7, 2009.[145] Neither county charged him until September 2009.[146] Therefore, for purposes of the recidivist statute, its policy, and the long-standing case law of this Court, the two predicates represent a single series of transactions.[147]

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[139] *See* A.R. 1107–09; *see also McMannis*, 161 W. Va. at 439 & 442 (State should allege the order in which the predicates occurred and, jury should render a verdict on the issue).
[140] A.R. 1108–09.
[141] *McMannis*, 161 W. Va. 437 at Syl. Pt. 1.
[142] A.R. 1108–09; A.R. 1034; A.R. 1040.
[143] *See McMannis*, 161 W. Va. at 439.
[144] *Compare* A.R. 1098–1100 *with* A.R. 1103–04.
[145] A.R. 1103–04.
[146] A.R. 1098–1100; A.E. 1103–04.
[147] *See McMannis*, 161 W. Va. 437 at Syl. Pt. 1; *see also* W. Va. Code § 61-11-18(d).

Whether to charge a defendant as a third offense recidivist is within the prosecutor's discretion.[148] The prosecutor is in the best position to know the defendant's record and ought to be familiar with the law governing recidivism.

It is unclear why the State prosecuted Petitioner as a third offense recidivist. With only one predicate, it is without authority to seek a life sentence and the court is without jurisdiction to order it.[149]

CONCLUSION

"[I]t is 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."[150]

Petitioner has no reason to doubt subjective good faith. But objectively, the prosecutor's actions deprived him of a fair trial and subjected him to a life sentence which the trial court had no jurisdiction to confer. Petitioner asks the Court to reverse his conviction and vacate his recidivist sentence.

Respectfully submitted,
Andrew Miller,
By Counsel

/s/ Matthew Brummond…
Matthew Brummond
W. Va. State Bar No. 10878
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, W. Va. 25311
Phone: 304-558-3905
Fax: 304-558-1098
Matt.D.Brummond@wv.gov

Counsel for Petitioner

[148] *Cf.* Syl. Pt. 3, *Martin v. Leverette*, 161 W. Va. 547, 244 S.E.2d 39 (1978).
[149] *See McMannis*, 161 W. Va. 437 at Syl. Pt. 1.
[150] *Boyd*, 160 W. Va. 234 at Syl. Pt. 3.