IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY

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REPLY ARGUMENT

Petitioner's case came down to credibility. Jurors had to decide whether Petitioner or an at-large drug dealer shot the complainant.[1] The defense presented an explanation why the complainant would lie out of fear and offered corroborating evidence to support his innocence.[2] If jurors believed Petitioner over the complainant, they could acquit.

Jurors convicted and recidivized Petitioner, but only after the State below overreached. It impeached Petitioner with his post-*Miranda* silence in violation of the Fifth and Fourteenth Amendments.[3] Also it sought a third offense recidivist though the prosecutor should have known that under existing West Virginia law, Petitioner only had one prior conviction.[4]

The Response concedes the State's impeachment violated the constitution, but argues the misconduct was harmless.[5] Yet it directs the Court's attention to incorrect standards that, under the circumstances of this case, are unconstitutionally lax.[6] Because jurors had to decide whether to believe Petitioner, the State cannot show beyond a reasonable doubt that the prosecutor's illegal impeachment did not impact their verdict.[7]

As to the recidivist sentence, the Response also cannot defend the prosecutor's actions under the law in effect. Instead, it asks the Court to overrule decades of precedent and not require the State to prove the defendant's prior offenses were separate transactions.[8] But doing so goes against the text and history of the statute. And in any event, due process prohibits the State from applying its novel interpretation to Petitioner.[9]

The Response asks the Court to overlook admitted error and apply novel law retroactively because what happened below is indefensible. Petitioner requests a new trial.

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[1] *Compare* A.R. 381–89 (State's opening) *with* A.R. 389–96 (Petitioner's opening).
[2] *See id.*; *see also* Petr.'s Br. 3.
[3] A.R. 898–901; *see also Doyle v. Ohio*, 426 U.S. 610, 619 (1976).
[4] *See* A.R. 1108–09; A.R. 1094–1106.
[5] Resp.'s Br. 1.
[6] *See* Resp.'s Br. 8, 9–10, 11–12.
[7] *See Chapman v. California*, 386 U.S. 18, 21 (1967).
[8] *See* Resp.'s Br. 1.
[9] *See Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964).

I. Under the proper standard, the State cannot prove the prosecutor's impeachment was harmless.

The issue in this case is whether the constitutional error conceded by the State is harmless under *Chapman v. California*.[10] Though the Response paraphrases the correct standard at one point, its actual analysis depends upon laxer standards that do not apply here.[11] Affirming under the Response's theory would itself violate the constitution.[12]

A. *Chapman v. California* is the proper standard—not plain error, nonconstitutional harmlessness, nor *State v. Sugg* as the Response suggests.

Since no court has ruled upon harm, this Court's analysis is necessarily plenary. Whether a constitutional error may be deemed harmless is a federal question.[13] In *Chapman v. California*, the Supreme Court rejected an "overwhelming evidence" test that asked whether the jury could have still convicted on the remaining evidence.[14] Instead, "before 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."[15] For a *Doyle*[16] error on direct review to be harmless, the State must prove beyond a reasonable doubt that illegal impeachment with post-*Miranda* silence did not contribute to the verdict.[17]

Here, the State cannot meet this burden. The trial was a credibility contest, and the State concedes the prosecutor's impeachment should not have occurred.[18] Thus, it cannot prove that the prosecutor's comment on credibility played no part in the verdict. The Response does not even analyze under this standard.[19] Instead of addressing whether jurors could have acquitted without the error, it argues they still could have convicted.[20]

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[10] *See Chapman*, 386 U.S. at 21.
[11] *See* Resp.'s Br. 7; *but see id.* at 8, 9–10, 11–12 (analyzing cases applying the wrong standard).
[12] *Cf. State ex rel. Juan M. v. Ames*, No. 22-0011, 2023 WL 2785789, at *4 (W. Va. Apr. 5, 2023) (memorandum decision), reh'g granted, opinion withdrawn (June 7, 2023), opinion superseded on reh'g, No. 22-0011, 2023 WL 3969760 (W. Va. June 13, 2023).
[13] *See Chapman*, 386 U.S. at 21.
[14] *Id.* at 23.
[15] *Id.* at 24.
[16] *See supra.* n. 3.
[17] *See Brecht v. Abrahamson*, 507 U.S. 619, 635–36 (1993).
[18] *Compare* A.R. 381–89 *with* A.R. 389–96; Resp.'s Br. 1.
[19] *See* Resp.'s Br. 8, 9–10, 11–12.
[20] *Id.*; *but see Chapman*, 386 U.S. at 23.

Rather than *Chapman*, the Response directs this Court to *Brecht v. Abrahamson* and its application of the nonconstitutional harm standard from *Kotteakos v. U.S* to federal habeas review.[21] It is mistaken to do so. The *Brecht* court explained that federalism and the costs of retrial after federal habeas justify a standard more deferential to state court decisions.[22] It therefore applied *Kotteakos* to Section 2254 habeas cases, but explained that direct and collateral review are different.[23] *Brecht* itself states that *Chapman* still applies to direct review and governs this Court's disposition.[24] Yet the Response does not alert the Court to the *Chapman* case.[25]

The State also emphasizes that in *State v. Marple*,[26] this Court found harmlessness where, unresponsive to the prosecutor's question, a witness blurted out that the defendant had remained silent.[27] But *Marple* was a plain error case.[28] The court was analyzing whether the rogue outburst affected substantial rights and whether to exercise discretionary review.[29] That inquiry is essentially the same as nonconstitutional harm analysis,[30] and does not apply here.[31] Petitioner objected—quite a bit—to a repeated line of questioning that the Response concedes violated the constitution.[32] Per *Brecht* itself, on direct review the error can only be harmless if the State proves beyond a reasonable doubt that the illegal evidence did not contribute to the verdict.[33]

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[21] *See* Resp.'s Br. 8; *Brecht*, 507 U.S. at 631–32; *Kotteakos v. U.S.*, 328 U.S. 750 (1946).
[22] *See Brecht*, 507 U.S. at 636.
[23] *See id.*; *see also* 28 U.S.C. 2254 (federal habeas review of state court convictions).
[24] *See id.*
[25] *See* Resp.'s Br. i–iv.
[26] *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47 (1996).
[27] *See* Resp.'s Br. 11; *see also Marple*, 197 W. Va. at 53.
[28] *See Marple*, 197 W. Va. 47 at Syl. Pts. 1–3; *see also* Resp.'s Br. 12 (relying upon *State v. Bruffey*, 231 W. Va. 502, 745 S.E.2d 540 (2013) and *State v. Hillberry*, 233 W. Va. 27, 754 S.E.2d 603 (2014), both of which were also plain error cases).
[29] *See Marple*, 197 W. Va. at 53.
[30] *See id.*; *see also State v. Miller*, 194 W. Va. 3, 18, n. 25, 459 S.E.2d 114, 129, n. 25 (1995) ("Indeed, Rule 52(b) prejudice is indistinguishable from ordinary, harmless error review, except for the fact that the burden is upon the defendant.").
[31] *See also* Resp. Br. 13 (citing *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979), the foremost West Virginia case for *nonconstitutional* harmless error).
[32] A.R. 898–901.
[33] *See Brecht*, 507 U.S. at 635–36.

The Response directs the court to the wrong standard a third time by confusing *impeachment* with post-*Miranda* silence with prosecutorial *comment* on silence in closing.[34] In addition to the constitutional challenge to cross-examination under *Doyle v. Ohio*, the Court has analyzed similar, but distinct, errors under the *State v. Sugg*[35] test for prosecutorial misconduct in closing argument.[36] For ordinary misconduct, the Court's prejudice review is much more deferential because a comment's prejudice is inextricable from its impropriety.[37] In those cases, issues like frequency or repetition may matter. But here, Petitioner challenges the prosecutor's impeachment under the constitution, not his closing under *Sugg*.[38] Because this is direct review of the prosecutor's concededly unconstitutional cross-examination, harmlessness is a federal question reviewable under *Chapman*.[39]

B. Under *Chapman*, the State cannot prove the prosecutor's attack on Petitioner's credibility did not affect the jury's evaluation of his credibility.

The difference between *Chapman* and *Kotteakos* analysis is crucial. *Chapman* rejected tests focused on the strength of the State's evidence, which is what the Response argues.[40] Only in extreme cases, like a defendant caught in the act with no explanation save guilt, will that alone suffice under *Chapman*.[41] Rather the test is qualitative, and turns on the illegal evidence's relation to the material jury issues.[42] Here, the State cannot satisfy its burden of proving there is no "reasonable possibility that the evidence complained of might have contributed to the verdict."[43] The case turned on whether jurors believed Petitioner and the prosecutor's constitutional violation impugned his credibility.

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[34] *E.g.,* Resp.'s Br. 9–10 (discussing *State v. Walker*, 207 W. Va. 415, 533 S.E.2d 48 (2000)).
[35] *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).
[36] *E.g., Walker*, 207 W. Va. at 420–21 (separately discussing examination, under *Doyle/Boyd*, and closing argument under *Sugg*).
[37] *See Sugg*, 193 W. Va. 388 at Syl. Pt. 6.
[38] Resp.'s Br. 1.
[39] *See Brecht*, 507 U.S. at 635–36.
[40] *See Chapman*, 386 U.S. at 21; *but see* Resp.'s Br. 14–15 (recounting evidence pointing to guilt rather than analyzing what jurors could have believed if not for unconstitutional impeachment).
[41] *E.g., U.S. v. Rivera*, 944 F.2d 1563, 1565–66 (11th Cir. 1991) (discussed *infra* at 5).
[42] *See Chapman*, 386 U.S. at 23–24.
[43] *Id.*

The Response analyzes the facts through the distorting lens of plain and nonconstitutional harmless error rather than engage Petitioner's *Chapman* argument, so there is little point to reprinting his original analysis in full.[44] Suffice it to say, it is nearly axiomatic that unconstitutional impeachment, of a party whose credibility jurors must evaluate to reach a verdict, could have impacted their verdict. If the situation were flipped, and Petitioner's testimony was necessary to convict the drug dealer he incriminated, there is no doubt it would be sufficient to convince rational jurors to convict. Conversely here, rational jurors would be duty-bound to acquit if they believed Petitioner.

Though the Response never cites *Chapman*, it does identify one case in which the court conducted the correct analysis.[45] However, *U.S. v. Rivera* is distinguishable. There, a customs inspector approached a woman returning from overseas and discovered drugs in her luggage.[46] During a lengthy investigatory stop, pre-arrest search, and post-arrest search, the defendant presented a "deadpan" demeanor, and registered no shock when the inspector removed drugs concealed in her bags.[47] The defendant argued on appeal that testimony about her demeanor amounted to a comment on silence.[48]

Rather than address the "thorny issue" of when a comment on demeanor becomes a comment on silence, the Eleventh Circuit ruled that any error, if one occurred, was harmless.[49] The prosecutor argued the defendant's demeanor *as a whole* was incriminating, without any distinction between pre or post-*Miranda* silence; the record did not reveal when—or if—she was Mirandized during the interaction.[50] That, coupled with the overpowering guilt of a smuggler caught red-handed at customs, was enough for the court to affirm without tackling the more difficult question.[51]

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[44] *See* Petr.'s Br. 10–12.
[45] *See* Resp.'s Br. 8–9 (discussing *Rivera*, 944 F.2d 1563).
[46] *See Rivera*, 944 F.2d at 1565.
[47] *See id.* at 1565–66.
[48] *See id.* at 1567.
[49] *Id.* at 1569.
[50] *See id.* at 1568.
[51] *See id.* at 1569–70.

Petitioner's case is different. The prosecutor expressly commented on post-*Miranda* silence, demanding to know why Petitioner did not speak with police at the preliminary hearing.[52] And far from overwhelming evidence, the record shows a credibility contest.[53] The State may not believe Petitioner's account, but rational jurors could have credited it, if the prosecutor had not illegally discredited him.[54] Finally the Eleventh Circuit found it significant that *Rivera* did not concern impeachment. "[W]e note that the prosecution's comments on [the defendant's] demeanor were introduced in its case-in-chief and therefore may pose problems of a different dimension than the more ordinary use of silence to impeach a defendant's testimony."[55] The Response overlooks that the *Rivera* court itself said this case is different.

The Response also argues—again with an eye to *Brecht* rather than *Chapman*[56]—that prosecutors may get away with commenting on post-*Miranda* silence so long as they also make a point to comment on pre-*Miranda* silence.[57] The perversity of excusing willful constitutional violations aside, the Response ignores the specific facts of this case. Petitioner had an excellent reason not to speak with police pre-arrest: he was on parole and should not have been associating with the drug dealer or the complainant.[58] This explained his silence and lessened its impeachment value—but only as to his pre-arrest silence. After police arrested Petitioner, he had much less to gain from not reporting what he witnessed. Thus, the two separate impeachments—pre- and post-*Miranda*—are not equivalent. The prosecutor asking why Petitioner did not tell his side of the story at the preliminary hearing was far more damaging. Whether an error is harmless is fact-intensive and controlled by the United States Constitution. Yet the Response glosses over these facts and relies upon the wrong standard.

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[52] A.R. 899.
[53] *Compare* A.R. 381–89 *with* A.R. 389–96.
[54] *See* A.R. 898–901.
[55] *Rivera*, 944 F.2d at 1569, n. 20.
[56] *See* Resp.'s Br. 8.
[57] Resp.'s Br. 7–8.
[58] A.R. 889.

To find harmless error, The State must prove there is no "reasonable possibility that the evidence complained of might have contributed to the verdict"[59] such that "the court [can] declare a belief that it was harmless beyond a reasonable doubt."[60] If the State could satisfy this high burden, the Response would have analyzed the proper standard. It didn't because it can't.

When the Supreme Court decided to apply *Kotteakos* to 2254 habeas cases, one concern was that, just like the Response urges, state courts could relax their analyses.[61] That knowing if they mouthed the words of *Chapman* but in actuality applied a laxer standard, their lawlessness would be insulated from review by federal courts applying *Kotteakos*.[62] But the Supreme Court remained resolute that state court judges would fulfill their duties even in tough cases.[63] Petitioner shares this faith.

II. The text and history of West Virginia's recidivist law require the State to prove each subsequent offense be a separate transaction occurring after conviction for the prior.

Since 1945, this Court has read the recidivist law as requiring that each predicate offense occur after conviction and sentencing for the preceding predicate.[64] *I.e.*, that the offender is a recidivist.[65] For the next *seventy-five years*, the legislature agreed that is the meaning of the recidivist statute.[66] And in 2020, it removed any doubt by codifying the Court's reading: "[P]rior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section[.]"[67] The Response's argument that this Court should read the element out of the statute—so soon after the legislature wrote it in—is unpersuasive.

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[59] *Chapman*, 386 U.S. at 23.
[60] *Id.* at 24.
[61] *See Brecht*, 507 U.S. at 636; *see also id.* at 649 (White, J, dissenting).
[62] *See id.* at 636.
[63] *See id.*
[64] *See* Syl. Pt. 1, *State ex rel. Stover v. Riffe*, 128 W. Va. 70, 35 S.E.2d 689 (1945).
[65] RECIDIVIST, Black's Law Dictionary (11th ed. 2019).
[66] *See* W. Va. Code § 61-11-18 (1994) and W. Va. Code § 61-11-18 (2000) (revising statute but not abrogating *Stover*).
[67] W. Va. Code § 61-11-18 (2020).

A. The text and history of West Virginia's recidivist law require that each predicate occur after conviction for the predicate before it.

The Response concedes that Petitioner wins under existing law.[68] Specifically, that per *State ex rel. Stover v. Riffe* and *State v. McMannis*,[69] predicates must be separate transactions in that each offense is committed after conviction and sentencing for the preceding offense.[70] Instead, it argues that the Court ought to uproot eight decades of precedent to endorse, after the fact, the prosecutor's failure to follow the law.[71]

The Court correctly decided *Stover* and *McMannis*. The Response simply critiques the Court's reasoning because, historically, its interpretive framework was more purposivist.[72] But that does not mean the decisions were wrong. No matter one's interpretative philosophy, "the primary purpose in construing a statute is to ascertain and give effect to the intent of the legislature."[73] If the Court did that, then it does not matter how it got there. And the near eighty-year history since *Stover* proves that the Court succeeded.

The United States Supreme Court confronted a similar challenge in *Kimble v. Marvel Entertainment*.[74] The court had previously interpreted a statute under a purposivist framework, and the petitioner asked the court to overrule its precedent based on its current, more textualist approach.[75] The court declined.[76] The prior holding was not wrong simply because the court's analytical emphasis had shifted. Even if the Supreme Court would reach a different conclusion today, "stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up."[77] So an argument that a change in interpretive frameworks could reach a different result is unavailing.[78]

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[68] *See* Resp.'s Br. 18.
[69] *Stover*, 128 W. Va. at 70; *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978).
[70] *See McMannis*, 161 W. Va. 437 at Syl. Pt. 1.
[71] *See* Resp.'s Br. 15.
[72] *See* Resp.'s Br. 18.
[73] *State v. Smith*, 243 W. Va. 470, 475, 844 S.E.2d 711, 716 (2020).
[74] *Kimble v. Marvel Ent., LLC*, 576 U.S. 446 (2015).
[75] *See Kimble*, 576 U.S. at 456.
[76] *See id.* at 449.
[77] *Id.* at 455.
[78] *See id.*

Rather, the issue was the legislature's intent, and the Supreme Court found it highly significant that Congress had accepted—and moreover relied upon—the court's prior interpretation.[79] Congress was free to amend the statute if it disagreed with the court, yet it never abrogated it.[80] Rather, during the ensuing years, Congress relied on the court's interpretation in crafting other amendments to the statutory scheme.[81] This showed that regardless of the interpretive framework, the court had accomplished what it had set out to do: it had correctly "ascertain[ed] and give[n] effect to the intent of the legislature."[82]

Petitioner's case is materially the same as *Kimble*, and he asks the Court to reach the same conclusion. Other than its disagreement with the outcome, the Response's only argument to dispense with stare decisis is that criminal defendants don't read caselaw.[83] But this completely ignores *the legislature's* reliance interest.

In *Kimble*, Congress had relied upon the Supreme Court's interpretation for fifty years, and the court cited an earlier case stating that a fourteen-year period without legislative intervention "enhance[d] even the usual precedential force we accord to our interpretations of statutes[.]"[84] This Court ruled that each predicate offense must occur after conviction for the prior one *nearly eighty years ago*.[85] Back then, purposivism was just as much the norm as textualism is now, and the legislature would have expected the Court to consider its policy and purpose when it enacted laws.[86] If the Court was mistaken,[87] the legislature was always free to amend the statute.[88] Yet, it didn't. Relying on *Stover* and *McMannis* as a backdrop, the legislature amended the recidivist law twice in seventy-five years and opted not to abrogate this Court's understanding of its intent.

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[79] *See Kimble*, 576 U.S. at 456 ("[C]ritics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").
[80] *See id.*
[81] *See id.* at 456–57.
[82] *See Smith*, 243 W. Va. 470 at Syl. Pt. 1.
[83] *See* Resp.'s Br. 20.
[84] *See Kimble*, 576 U.S. at 456 (quoting *Watson v. U.S.*, 552 U.S. 74, 82–83 (2007)).
[85] *See* Syl. Pt. 1, *State ex rel. Stover v. Riffe*, 128 W. Va. 70, 35 S.E.2d 689 (1945).
[86] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 626 (1990).
[87] *See Smith*, 243 W. Va. 470 at Syl. Pt. 1.
[88] *See Kimble*, 576 U.S. at 456–57.

Here, the case for stare decisis is stronger than in *Kimble*, because the legislature evinced its reliance through more than mere "acquiescence[.]"[89] Beginning in 2020, the legislature introduced a series of amendments to overhaul the recidivist law to account for this Court's caselaw interpreting it.[90] This included a new provision codifying *Stover/McMannis*: "prior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section[.]"[91] If the legislature wanted to abrogate this Court's interpretation of the recidivist statute, it could have simply said that conviction sequence was irrelevant. But instead, it codified *Stover/McMannis*. This Court had faithfully applied its principles of interpretation and correctly effectuated the legislature's intent.[92]

To avoid the clear import of the 2020 amendment, the Response assigns the law an alternative purpose.[93] It interprets the new element as a limitation on crimes related to one another, without regard for conviction order.[94] This ignores the legislature's reliance on the Court's interpretations. But it also is an unworkable element in practice that the legislature would not have intended.

At present, recidivist trials are simple: the jury only must determine the defendant's identity and whether the convictions occurred in the proper order.[95] The State could base its entire case on authenticated court documents and prevail before lunchtime. But the Response interpretation adds a subjective and easily contested factual element that could overwhelm the otherwise mechanistic nature of these proceedings.

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[89] *See id.* at 456.
[90] *See* WV LEGIS 88 (2020), 2020 West Virginia Laws Ch. 88 (S.B. 765); WV LEGIS 84 (2021), 2021 West Virginia Laws Ch. 84 (S.B. 496); WV LEGIS 79 (2022), 2022 West Virginia Laws Ch. 79 (S.B. 232); *see also* W. Va. H.B. 5132, Increasing Criminal Penalties for Repeat Offenders for Certain Crimes, 2024 W. Va. Reg. Sess. (2024).
[91] W. Va. Code § 61-11-18.
[92] *See Smith*, 243 W. Va. 470 at Syl. Pt. 1.
[93] *See* Resp.'s Br. 16–17.
[94] *See id.*
[95] *See State v. Costello*, 245 W. Va. 19, 31, 857 S.E.2d 51, 63 (2021) (favorably citing *McMannis*, 161 W. Va. 437).

Petitioner's case shows why. The State presumes Petitioner's prior convictions were unrelated from the silent record, but this would be a jury question.[96] His prior convictions occurred within as little as a week of each other (one indictment is imprecise).[97] Under the Response's interpretation of the new element, he could have challenged that they charged the same "transaction" or were parts of a "*series* of transactions."[98] He could have contested guilt simply by arguing that the offenses were related conduct, that there was a common motive or they formed part of the same conspiracy, etc. Given the timeframe here, that's plausible. but if the Court accepts the Response's reading, the State must disprove even facially absurd arguments that the offenses are related.[99] The Response's interpretation is much easier said than done.

The Response's proposed interpretation would be a force multiplier for cost, time, and jury burden in recidivist trials, and is not likely what the legislature intended. But if nothing else, predictability counsels against this Court altering its interpretation at this time.[100] The legislature is overhauling recidivism, including bills in the 2024 session.[101] It does not need a moving target.

B. Applying the Response's atextual interpretation retroactively to Petitioner would violate the Due Process Clause of the Fourteenth Amendment.

Reliance, predictability, and separation of powers all counsel against pulling the rug out from the legislature during its overhaul of the recidivist statute, to say nothing of the policy consequences of the Response's novel interpretation. But even if the Court saw fit to change the law and overrule an eighty-year-old precedent for those going forward, the law in effect at the time of Petitioner's conviction would still entitle him to relief.

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[96] *See* Resp.'s Br. 16–17; *see also Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (any fact, other than the mere existence of a prior conviction, must be pled in the indictment and proven to the jury); *U.S. v. Gaudin*, 515 U.S. 506, 512 (1995) (Juries resolve mixed questions of law and fact).
[97] A.R. 1094–1106.
[98] W. Va. Code § 61-11-18 (*emphasis added*).
[99] *See Morissette v. U.S.*, 342 U.S. 246, 274–76 (1952).
[100] *See Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 1029, 207 S.E.2d 169, 173 (1974).
[101] *E.g.,* W. Va. H.B. 5132, Increasing Criminal Penalties for Repeat Offenders for Certain Crimes, 2024 W. Va. Reg. Sess. (2024).

The Due Process Clause of the Fourteenth Amendment requires that citizens have notice of what conduct will be punished.[102] Criminal statutes must be sufficiently definite,[103] and the constitution separately prohibits ex post facto laws.[104] This rule extends to novel judicial interpretations.[105] If a new construction unforeseeably broadens the conduct which would constitute an offense, it may not be applied retroactively.[106] Simply put: if applying a new law to the defendant would violate the Ex Post Facto Clause if enacted by the legislature, then it violates the Due Process Clause if done by the judiciary.[107]

The Response's proposed overruling on *McMannis* and re-envisioning of the recidivist statute qualifies. Removing an element is substantive, its inclusion had been long-standing and in effect when the State charged Petitioner, and until the Response's invitation to re-write the statute whole cloth, had shown no sign of weakening.

First, the Response proposes a substantive change to the offense. *McMannis* clarified that for the *Stover* rule, the State bears the burden of proving the sequence beyond a reasonable doubt, the same as any other element.[108] If the Court reads this requirement out, then it has expanded the range of conduct which would trigger the statute. The Response admitted as much when it conceded Petitioner would win under existing law.

Second, the Court's construction of the offense is long-standing—nearly eighty years[109] without legislative challenge. Rather than abrogate the Court's interpretation, the legislature has now codified it.[110]

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[102] U.S. Const. Amend. XIV; *see also* W. Va. Const. Art. III, § 10.
[103] Syl. Pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).
[104] U.S. Const. Art. I, § 10; *see also* W. Va. Const. Art. III, § 4.
[105] *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964); *see also State ex rel. Lorenzetti v. Sanders*, 235 W. Va. 353, 366, 774 S.E.2d 19, 32 (2015).
[106] *See Bouie*, 378 U.S. at 352.
[107] *See id.*
[108] *Compare McMannis*, 161 W. Va. 437 at Syl. Pt. 1 (State must prove the fact beyond a reasonable doubt) *with Gardner v. Ballard*, No. 16-0688, 2017 WL 2492800, at *3 (W. Va. June 9, 2017) (memorandum decision) (violence requirement arises out of the constitution, not the textual elements, and therefore is not subject to a vagueness challenge).
[109] *See Stover*, 128 W. Va. 70 at Syl. Pt. 1.
[110] *See* W. Va. Code § 61-11-18.

And third, there has been no indication this Court would retreat from its interpretation. The Court has cited it favorably as recently as 2021.[111] And the Court has consistently applied the rule. In *State v. Norwood*,[112] the defendant argued that he should not be recidivized until after *serving* his entire sentence, including any period of probation, parole, or supervision.[113] The Court reaffirmed *McMannis* in rejecting this. To count as a separate offense, the defendant must have already been convicted and *sentenced*.[114] The Court has never suggested a defendant must fully discharge the sentence for a subsequent offense to be a separate transaction. That was the rule in 1945, and the Court has not wavered from it.[115] The *Norwood* Court stated, "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."[116] Petitioner can find no case where the Court has even hinted at openness to changing the law on this point.

Therefore, the Response's re-envisioned statute cannot apply to Petitioner, and the Court has no reason to interfere with the legislature's project. Whether *Stover/McMannis* correctly interpreted the legislature's intent is now up to the legislature to decide.

CONCLUSION

After police and a magistrate told Petitioner he had the right to remain silent, and after his lawyer advised him of the same, the prosecutor turned that right into a weapon.

The same prosecutor overcharged Petitioner by missing a bedrock principle of recidivist law. The evidence of this conduct was then placed under seal.

On appeal, the State cannot defend any of this. Instead, the Response asks the Court to retroactively legitimize misconduct. Petitioner requests that the Court instead grant him a new—and for the first time, fair—trial.

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[111] *State v. Settle*, No. 19-0840, 2021 WL 3833869, at *2 (W. Va. Aug. 27, 2021) (memorandum).
[112] *State v. Norwood*, 242 W. Va. 149, 832 S.E.2d 75 (2019).
[113] *See Norwood*, 242 W. Va. at 156.
[114] *See id.* at Syl. Pt. 4 (quoting *McMannis*, 161 W. Va. 437 at Syl. Pt. 1).
[115] *See Stover*, 128 W. Va. 70 at Syl. Pt. 1.
[116] *Norwood*, 242 W. Va. at 156.

Respectfully submitted,
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