IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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WILLIAM BALLENGER,
Petitioner Below, Petitioner

v. **Case No.: 23-107**

ROBIN MILLER, Superintendent,
Huttonsville Correctional Center
Respondent Below, Respondent

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

Based on a single incident with a single victim, a grand jury charged Petitioner with second degree robbery, malicious wounding, and first degree robbery.[1] Trial commenced in April of 2016, and a jury acquitted Petitioner of first degree robbery. However, the same jury also convicted him of second degree robbery, and battery as a lesser included offense of malicious wounding.[2] Following a recidivist trial, predicated on a prior conviction in the state of Kentucky for possession of cocaine, the circuit court enhanced Petitioner's second degree robbery sentence by five years.[3]

Petitioner's Kentucky felony is classified as a misdemeanor in West Virginia and is therefore, not a qualifying offense under the Habitual Offender Act. Despite this, trial counsel did not object to the State's use of the Kentucky felony for recidivist purposes and Petitioner's sentence was enhanced by five years. Trial counsel's failure to object precluded raising the issue on appeal.

Trial counsel provided further ineffective assistance by not objecting when the State charged Petitioner with two counts of robbery stemming from a single incident. The charges were not alternative counts, but rather an attempt by the State to subvert double jeopardy.

1. Out of state felony convictions that are classified as misdemeanors in West Virginia cannot be used for recidivist purposes.

When classifying an out of state felony conviction for recidivist purposes, the elements of the crime of conviction are compared to West Virginia law. Here, Petitioner's Kentucky felony conviction for the crime of possession of cocaine is classified as misdemeanor simple possession

[1] A.R. 1426-27. Petitioner was also charged and convicted of obstruction for giving a false name when he was arrested the next day. This charge is not relevant to Petitioner's appeal.
[2] A.R. 1489-94.
[3] A.R. 1496-1498.

in West Virginia as the elements are nearly identical.[4] *State v. Ward*, which is cited by Petitioner and Respondent, involved a similar situation.[5] In *Ward*, this Court stated that "there is no dispute that the petitioner was convicted of a felony in Indiana in 2005. Likewise, there is no dispute that the petitioner's Indiana offense–possession of methamphetamine—would have been considered a misdemeanor had it occurred in West Virginia."[6] The *Ward* Court did not engage in an analysis of the Indiana criminal complaint, opting instead to list the Indiana crime of conviction (possession of methamphetamine) and then footnote to the corresponding West Virginia simple possession statute.[7] Likewise, this Court need not look to the Kentucky criminal citation to classify Petitioner's Kentucky felony. While possession of cocaine is a felony in Kentucky, the same crime is a misdemeanor in West Virginia.

Despite citing to *Ward*, Respondent still contends that circuit courts have "a duty to analyze the facts underlying" the out of state conviction "because the Habitual Offender Act 'enhances punishment based on the earlier conduct.'"[8] Respondent further argues that reviewing the facts of an underlying criminal complaint or citation is permissible when classifying out of state felonies because West Virginia's habitual offender statute does not explicitly prohibit such inquiry. Both arguments are incorrect.

First, "[w]hether the *conviction of a crime* outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute . . . depends upon the *classification of that crime* in this State."[9] Furthermore, "[i]t is conceivable that there may be *crimes* which are punishable by confinement in a penitentiary in other jurisdictions and that the same *crimes* would

[4] Compare KRS § 218A.1415 with W. Va. Code § 60A-4-401(c) (2011).
[5] *State v. Ward*, 245 W. Va. 157, 858 S.E.2d 207 (2021).
[6] *State v. Ward*, 245 W. Va. 157, 160, 858 S.E.2d 207, 210 (2021).
[7] *State v. Ward*, 245 W. Va. 157, 160, 858 S.E.2d 207, 210 (2021).
[8] Resp. Br. 11, citing *State v. Ward*, 245 W. Va. 157, 162, 858 S.E.2d 207, 212 (2021).
[9] Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986) (emphasis added).

be classed as misdemeanors under our laws. In such event, it would seem proper that the laws of this State should be considered in determining the grade of the *crimes for which there have been former convictions*."[10]

Black's Law Dictionary, defines "crime" as "an act that the law makes punishable" and defines "conviction" as "the act or process of judicially finding someone guilty of a crime."[11] It is the Legislature that has the "substantive power to define crimes and prescribe punishments."[12] When defining crimes, the Legislature must do so "with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication."[13]

When the *Justice* and *Lawson* Courts spoke of crimes and convictions, they did not mean alleged conduct in a criminal citation. Instead, they were directly referring to an adjudication of guilt for engaging in legislatively prohibited conduct as defined in the elements of a criminal statute. In Petitioner's case, the prohibited conduct that a Kentucky court adjudicated him guilty of committing was possession of cocaine.[14] While Kentucky classifies possession of cocaine as a felony, West Virginia classifies the same conduct (possession of cocaine) as a misdemeanor. Regardless of the factual allegations in the Kentucky criminal citation, Petitioner was not adjudicated guilty of committing the crime of trafficking cocaine.[15]

Respondent advocates for a rule allowing prosecutors and courts to ignore the elements of out of state convictions, and instead, look to the facts alleged in an underlying criminal citation in

[10] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643, 645 (1942) (emphasis added).
[11] Black's Law Dictionary (11th ed. 2019).
[12] Syl. Pt. 3 in part, State v. Sears, 196 W. Va. 71, 73, 468 S.E.2d 324, 326 (1996).
[13] Syl. Pt. 7, State v. Horn, 232 W. Va. 32, 750 S.E.2d 248, 252 (2013).
[14] A.R. 1609-11.
[15] KRS § 218A.1412(1)(a) (Trafficking in controlled substances in the first degree is the Kentucky corollary to West Virginia's possession with intent to deliver a controlled substances—W.Va. Code § 60A-4-401.).

an effort to find additional or different charges that could have been brought had the defendant been arrested in West Virginia. This Court should reject Respondent's argument as contrary to longstanding precedent.[16] Respondent's argument also ignores the reality that facts, evidence, and statements listed in a criminal citation or complaint are often inadmissible. This inadmissibility leads to plea agreements to lesser included charges. Under Respondent's proposed rule, however, those inadmissible facts could later be used to enhance a felony conviction by five years or even up to a life sentence. This would ultimately result in a trial within a trial to determine the admissibility of facts and evidence alleged in an out of State criminal complaint/citation.

Finally, Respondent is incorrect that the habitual offender statute's silence on "reviewing the facts underlying the out-of-state criminal conviction" equates to approval of such review.[17] Instead, the opposite is true. "Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner."[18] Such construction negates Respondent's "silence equals approval" argument. In fact, silence equates to a strict prohibition against the judicial interpretation Respondent suggests.

2. Petitioner did not waive the recidivist issue.

Respondent's argument that Petitioner's enhancement claim was knowingly and intelligently waived by not asserting it on direct appeal is misplaced.[19] This Court has repeatedly held that claims of ineffective assistance of counsel should not be brought on direct appeal.[20] Instead, such claims are reserved for habeas corpus actions where trial counsel has an "opportunity

[16] *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643 (1942); *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986); *State v. Ward*, 245 W. Va. 157, 858 S.E.2d 207 (2021).
[17] Resp. Br. 10.
[18] Syl. Pt. 1, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986).
[19] Resp. Br. 8.
[20] *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995) ("The very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal.").

to explain the motive and reason behind his or her trial behavior."[21] An equally settled principal of appellate law is that errors not preserved in circuit court cannot be raised for the first time on direct appeal.[22]

Petitioner could not raise the recidivist issue on direct appeal because the error was not preserved below.[23] Trial counsel's failure to argue and preserve the issue gave rise to a claim of ineffective assistance. Under this Court's long standing precedent, such allegations are reserved for habeas corpus actions and not direct appeals.[24]

Moreover, in *Ford v. Coiner*,[25] cited by Respondent to support the argument that Petitioner waived the enhancement issue,[26] this Court repeatedly stressed that the error which should have been appealed was brought to the attention of trial counsel and the defendant.[27] Thus, there was a demonstrated knowing and intelligent waiver of the issue by failing to assert it on direct appeal.[28] Here, trial counsel was unaware of the legal principle underlying the ineffective assistance argument,[29] the circuit court did not inform Petitioner of the issue during the recidivist trial,[30] and Petitioner's appellate counsel (a different attorney than trial counsel) would not have known about the the issue as he did not request a transcript of the recidivist trial.[31]

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[21] *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995).
[22] Syl. Pts. 1-3, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998).
[23] A.R. 1274-1425 (recidivist trial with no objection to the Kentucky felony); A.R. 368 (habeas hearing; trial counsel does not have an explanation for failing to challenge Kentucky felony).
[24] *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995).
[25] *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91, (1972).
[26] Resp. Br. 8.
[27] *Ford v. Coiner*, 156 W. Va. 362, 366, 196 S.E.2d 91, 94 (1972); *Id.* at 367 and 367-368.
[28] Syl. Pt. 1, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972).
[29] A.R. 364.
[30] A.R. 1274-1425.
[31] A.R. 9 (Docket sheet lines 110-114 indicate only transcripts of the first/underlying trial were prepared; line 103 indicates Todd Meadows appointed as appellate counsel.); see also *State v. Ballenger*, No. 16-0986, 2017 WL 5632824, (W. Va. Nov. 22, 2017) (Todd Meadows listed as counsel of record for the appeal.).

Finally, *Justice v. Hedrick*, cited by both parties, came before this Court as a petition for writ of habeas corpus.[32] This Court granted the petition and reversed a sentence enhancement because the out of state felony was classified as a misdemeanor in West Virginia.[33] The same situation exists here.

Contrary to Respondent's argument, the enhancement issue is the exact type of claim that should be litigated in a habeas corpus action and this Court should review the argument on its merits.

3. The State violated double jeopardy when it charged Petitioner with two counts of robbery when there was only one incident and one victim.

Petitioner and Respondent agree that even though the State charged Petitioner with second and first degree robbery, only one robbery occurred.[34] However, Respondent incorrectly asserts that the State merely pursued "two alternate theories of Robbery."[35] Respondent's argument that no prejudice exists because Petitioner was acquitted of first degree robbery is also inaccurate.[36]

In reality, the State blatantly ignored double jeopardy principles[37] and attempted to secure two separate convictions for a single incident of robbery: one for second degree robbery of money, and another for first degree robbery of a cell phone.[38] That this was the State's intent is evidenced

[32] *Justice v. Hedrick*, 177 W. Va. 53, 54, 350 S.E.2d 565, 566 (1986).
[33] *Justice v. Hedrick*, 177 W. Va. 53, 57, 350 S.E.2d 565, 569 (1986).
[34] Resp. Br. 12-13.
[35] Resp. Br. 13.
[36] Resp. Br. 14-15.
[37] U. S. Con. Amd. V; W. Va, Cons. Art. III, Sec. V.
[38] A.R. 1426-27.

in the grand jury transcripts,[39] the State's opening statement[40] and closing argument,[41] and in the jury instructions.[42] Furthermore, the State argued in its "Respondent's Answer to Petitioner's Amended Petition For Writ of Habeas Corpus" that second degree robbery is not a lesser included of first degree robbery, but rather two distinct offenses.[43] Finally, the lower court echoed the State's argument and held that "the State Legislature intended to create two distinct statutory provisions under which an individual can be charged, and thus, intended to criminalize two distinct acts."[44]

Trial counsel's failure to argue for dismissal of one of the robbery counts, either pre-trial or at the close of evidence, constituted ineffective assistance of counsel. The resulting prejudice of facing two separate robbery charges was not cured by Petitioner's acquittal of the first degree robbery charge. Instead, the State denied Petitioner the opportunity to forego requesting instruction on second degree robbery as a lesser included offense—a strategy which would have found success in this case. Further prejudice existed as trial on greater and lesser included offenses have the potential to "induce" the jury to simply convict on one of the two charges as opposed to "continu[ing] to debate [a defendant's] innocence" on both charges.[45] Here, the inducement to

[39] Testimony before both grand juries included that Petitioner demanded money. A.R. 1659; 1669. However, only the second grand jury was presented with the second degree robbery charge. A.R. 1666.
[40] The State's opening statement listed the charges in a chronological order that indicated two separate incidents of robbery occurred: "So I would ask you to please listen to the testimony and if you do, I believe that you will find the Defendant, William "Ten" Ballenger guilty of second degree robbery, malicious wounding, first degree robbery and obstructing." A.R. 559.
[41] In closing argument, the State spoke of "robberies," and treated the two charges as distinct incidents temporally separated by the malicious wounding charge. A.R. 1163-64; 1163-1174.
[42] The elements of second degree robbery only included obtaining money by threats (A.R. 1150) while elements of first degree robbery only included taking a cell phone by force. A.R. 1157-58. Notably, the malicious wounding jury instruction contained lesser included offenses of unlawful wounding, and battery. A.R. 1151-56.
[43] A.R. 205 ("Furthermore it should be noted that based on the statutory language, second-degree robbery is not intended to be a lesser included of first-degree robbery . . . Simply put, the Legislature intended first and second-degree robbery to represent two distinct chargeable offenses.")
[44] A.R. 219.
[45] *Price v. Georgia*, 398 U.S. 323, 331–32 (1970).

convict is even greater as the issue involves multiple charges for the same offense as opposed to lesser included offenses. By further analogy to Rule 404(b), the two charges induced a conviction simply because Petitioner was a bad man who must have done something wrong to be charged with two separate crimes.[46]

Finally, this Court has recognized the inherent prejudice in facing multiplicitous charges in an indictment. In *State ex rel. Porter v. Recht*, this Court granted a writ of prohibition filed by a defendant seeking to dismiss counts in an indictment that violated double jeopardy.[47] In granting the writ, this Court held "Petitioner is entitled to the requested writ of prohibition to prevent him from being wrongly subjected to multiple punishments for the same two offenses."[48]

CONCLUSION

Petitioner moves the Court to vacate the recidivist conviction, vacate the second degree robbery conviction, and remand for a new trial on the remaining counts.

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[46] See *State v. Willett*, 223 W. Va. 394, 400, 674 S.E.2d 602, 608 (2009) (Ketchum concurring opinion).
[47] *State ex rel. Porter v. Recht*, 211 W. Va. 396, 566 S.E.2d 283 (2002).
[48] *State ex rel. Porter v. Recht*, 211 W. Va. 396, 397, 566 S.E.2d 283, 284 (2002).