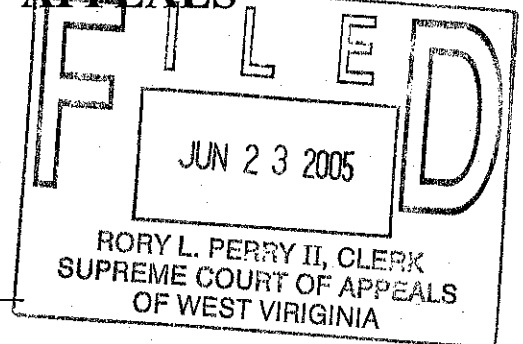


**IN THE SUPREME COURT OF APPEALS**

**OF**

**WEST VIRGINIA**



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CHARLESTON

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**STATE OF WEST VIRGINIA,**

**Plaintiff Below, Appellee,**

**v.**

**No. 32610**

**DAVID M. REED,**

**Defendant Below, Appellant.**

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**APPELLANT'S BRIEF**

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Attorney for Appellant  
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**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

This is a criminal appeal taken from the Circuit Court of Cabell County, Honorable Alfred E. Ferguson presiding. The State of West Virginia was represented by Cabell County Assistant Prosecuting Attorney Kellie M. Neal. Mr. Reed was represented by Nancy Fraley of the Cabell County Office of the Public Defender.

A Cabell County Grand Jury returned a six-count indictment against the Defendant, Mr. Reed, on January 9, 2003, for three counts of 3<sup>rd</sup> Offense Domestic Battery, WV Code §61-2-28(d), and three counts of 2<sup>nd</sup> Offense Violation of a Domestic Violence Protective Order, WV Code §48-27-903(b). Prior to trial, Defense counsel filed a motion for severance of the counts on February 10, 2003. See *Defendant's Motion for Severance*. Additionally, she filed a motion for bifurcation of the prior domestic battery convictions (for purposes of this appeal, only Count III, 3<sup>rd</sup> Offense Domestic Battery, will be addressed because after Defendant's conviction and enhancement pursuant to the recidivist statute, all remaining charges were dismissed and not brought to trial) on February 19, 2003. See *Defendant's Motion to Bifurcate Trial*.

A hearing on Defendant's motions was held on March 6, 2003. See *Proceedings, March 6, 2003*. The Court withheld ruling on Defendant's motion to sever (which motion was later granted and is irrelevant to the issues to be raised in this appeal). The Court next addressed Defendant's motion to bifurcate. *Id.*, page 11, line 5. The Assistant Prosecutor advised the Court that it was the defendant's burden to put forth some evidence "that that is not him or he doesn't have those convictions, and until he does - - or else he has to stipulate." *Id.*, page 11, line 11. The Court then denied Defendant's motion without a meritorious claim hearing. *Id.*, page 11, line 15. Defense counsel stipulated to the convictions "based upon that denial of the motion."

Id., page 11, line 17. The record does not reflect a colloquy between the trial court, the defendant, defense counsel and the State indicating the precise stipulation nor does it reflect whether the defendant's stipulation was a voluntary and knowing one. Id. An Order was entered on March 13, 2003, denying Defendant's motion to bifurcate the prior convictions for failure to present satisfactory evidence that the alleged prior convictions were invalid as against him. See ORDER, March 13, 2003.

On March 11, 2003, following a jury trial, Mr. Reed was convicted of Domestic Battery. See Proceedings, March 11, 2003, page 265, line 5. The State then filed a Recidivist information on April 7, 2003, alleging that Mr. Reed had previously been convicted of a felony, in accordance with WV Code §61-11-19. Defense counsel then filed motions to set aside the verdict, judgment of acquittal notwithstanding the verdict and motion for a new trial on April 10, 2003.

Mr. Reed admitted to being the person named in the recidivist information at the hearing on April 17, 2003. By Order entered on April 23, 2003, the Circuit Court denied Defendant's April 10, 2003 motions, found Mr. Reed was the same person as name in the recidivist information, sentenced Defendant to two-to-five years in the penitentiary and dismissed the remaining counts alleged in the indictment. On May 23, 2003, Defendant filed a notice of intent to appeal prior to the review of any transcripts.

On August 4, 2003, the appeal period was extended for 30 days, and again for 30 more days on September 23, 2003. By Order entered on May 3, 2004, pursuant to an order entered by the West Virginia Supreme Court of Appeals, Mr. Reed was resentenced. Subsequently, a corrected resentencing order clarifying that a copy be directed to counsel for the defendant was

entered on May 4, 2004.

On June 7, 2004, an Order was entered allowing trial counsel to withdraw and appointing current appellate counsel. A petition to appeal was filed and heard by this Court. Appeal was granted on April 7, 2005.

## II. STATEMENT OF FACTS

Mr. Reed was charged with 3<sup>rd</sup> Offense Domestic Battery. Prior to trial, he moved for bifurcation of the prior offenses. Based upon the status of the law at that time under Nichols, defendant was denied bifurcation without a meritorious claim hearing. The Prosecutor advised the Court that the only alternative was stipulation, failing to include the option of the State proving the prior offenses at trial.

Based upon the denial of bifurcation, Mr. Reed stipulated to the prior offenses. No colloquy is reflected on the record. On March 11, Mr. Reed was found guilty of Domestic Battery. On April 17, Mr. Reed was subjected to a recidivist proceeding and admitted to being the person named in the information. At that point, Mr. Reed's underlying felony Domestic Battery conviction was enhanced and the minimum period of one year was doubled pursuant to WV Code §61-11-18(a). Mr. Reed was ultimately sentenced to two-to-five years in the penitentiary.

### **III. ASSIGNMENTS OF ERROR**

**1) Mr. Reed was denied the absolute right to bifurcation of the prior offenses, under the current status of the law as held in McCraine, despite his timely request.**

**2) Based upon the holding in McCraine, Mr. Reed's felony conviction after being denied bifurcation should be reversed, and absent a valid conviction on the principal offense for which he was indicted, the Court lacked jurisdiction and authority to impose an enhanced sentence under the habitual criminal statute and the sentence is void.**

### **IV. STANDARD OF REVIEW**

Where the issue on appeal from the circuit court is a question of law, a de novo standard of review is used. See Chrystal R.M. v. Charlie A.L., 459 S.E.2d 415 (W.Va. 1995), at Syl. Pt. 1.

**V. POINTS AND AUTHORITIES**

**STATUTORY PROVISIONS**

WV Code §48-27-903(b) ..... I  
WV Code §61-2-28(d) ..... I  
WV Code §61-11-18(a) ..... iii, 3  
WV Code §61-11-19 ..... ii

**CASELAW**

Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995) ..... iv  
Gibson v. Legursky, 187 W.Va. 51, 415 S.E.2d 457 (1992) ..... 3  
In Re Winship, 397 U.S. 358 (1970) ..... 4  
Mullaney v. Willbur, 421 U.S. 684 (1975) ..... 5  
Patterson v. New York, 432 U.S. 197 (1977) ..... 4  
State v. Anderson, 212 W.Va. 761 (2002) ..... 4  
State v. Daniel, 182 W.Va. 643 (1990) ..... 4  
State v. Gangwer, 168 W.Va. 190, 283 S.E.2d 839 (1981) ..... 2  
State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001) ..... 1  
State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003) ..... iii, iv, 1, 2, 3  
State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999) ..... iii, 1, 2, 3, 4, 5  
State v. Wyne, 194 W.Va. 315, 460 S.E.2d 450 (1995) ..... 3

## VI. DISCUSSION

1) Mr. Reed was denied the absolute right to bifurcation of the prior offenses, under the current status of the law as held in McCraine, despite his timely request.

A trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of an alleged prior conviction as a status element and timely requests that the jury consider the issue separately from the issue of the underlying charge. State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177, at 193-194 (2003). This modifies the prior legal standard of requiring either the State to prove the status elements at trial, allowing the defendant to stipulate to prior convictions or attempt to bifurcate, provided the Defendant carried the burden of producing satisfactory evidence to constitute a meritorious claim which defeats the validity of a prior conviction. See State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), Syl. Pts. 3 & 4.

In McCraine, the appellant filed a motion to bifurcate jury consideration of the 3<sup>rd</sup> Offense Felony DUI charge from prior DUI convictions. See McCraine, at 183. This motion was denied. Id. After being resentenced in order to extend the appeal period, Defendant filed an appeal assigning as error, among other things, the Court's failure to bifurcate the pending charge from consideration of proof of prior convictions. Id., at 184. The matter was reviewed *de novo*. Id., at 192.

The Court looked to State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001), where it was recognized that Nichols had established prior convictions as status elements of certain enhanced offenses. Id., at 193. As elements of a criminal offense, the burden could not be shifted to the defendant; the State would be required to prove each element beyond a reasonable

doubt. Id. A majority of the McCraine Court found it best to alter Nichols to ensure the Defendant's continued right to a fair trial and held that bifurcation is an absolute provided there is a timely request for a jury to consider the matters separately. Id., at 193-194. The Supreme Court reversed the judgment involving McCraine's 3<sup>rd</sup> Offense DUI conviction and remanded for a new, bifurcated trial. Id. Because the decision regarding bifurcation was a procedural requirement to guarantee similarly situated criminal defendants a fair trial, application of this ruling was limited to cases in litigation or on appeal during the pendency of McCraine in which the issue was properly preserved. Id., at 194.

This case falls within the boundaries for retroactive application of McCraine. "In the absence of any countervailing factors, where a new rule of criminal law is made of a nonconstitutional nature, it will be applied retroactively only to those cases in litigation or on appeal where the same legal point has been preserved." See Syl. Pt. 3, State v. Gangwer, 168 W.Va. 190, 283 S.E.2d 839 (1981).

Prior to trial, Mr. Reed's defense counsel moved for similar bifurcation on February 19, 2003. A hearing on the motion was held on March 6, 2003, which motion was denied pursuant to the Court's reliance on the standard from Nichols. Based upon that denial, defendant stipulated to the two prior domestic battery convictions. After being resentenced in order to extend the appeal period, Defendant appeals and now alleges that he is entitled to the same relief provided by McCraine and requests reversal and remand for a new, bifurcated trial due to the alleged error being properly preserved and due to this matter being in litigation or on appeal during the pendency of the McCraine decision.

**2) Based upon the holding in McCraine, Mr. Reed's felony conviction after being denied bifurcation should be reversed, and absent a valid conviction on the principal offense for which he was indicted, the Court lacked jurisdiction and authority to impose an enhanced sentence under the habitual criminal statute and the sentence is void.**

If Mr. Reed's conviction is to be reversed due to the failure of the lower Court to grant bifurcation, and McCraine's retroactive effect applying to Mr. Reed's appeal, the sentence enhancement from one-to-five years in the penitentiary to two-to-five years in the penitentiary, based upon WV Code §61-11-18(a), cannot stand.

Another felony must be proven other than those for which the defendant has already been convicted. Gibson v. Legursky, 187 W.Va. 51, 415 S.E.2d 457 (1992), at Syl. Pt. 1. The trial court does not impose a separate sentence for the last felony conviction, but imposes an enhanced sentence on the last felony conviction. State v. Wyne, 194 W.Va. 315, 460 S.E.2d 450 (1995).

It is not a conviction for a separate crime. Therefore, when the underlying conviction is reversed, the enhancement is void.

## VII. CONCLUSION

Because Mr. Reed timely requested bifurcation of the prior domestic battery status elements, and this request was denied during the pendency of McCraine which makes absolute the above bifurcation, Mr. Reed is entitled to reversal of his conviction and remand for a new, bifurcated trial. Because Mr. Reed is entitled to reversal of his conviction, the habitual criminal penalty must be reversed as well, as it merely piggybacks and enhances the penalty from the reversed conviction.

It may be argued that this court should stray from precedent and return to Nichols. There is no justification to veer from the principle of stare decisis in circumstances where the law is clear. State v. Anderson, 212 W.Va. 761, at 767 (Justice Albright concurring) (2002). "Casting aside well-settled law for no reason other than to substitute judge-made law is particularly reprehensible in the area of criminal law where clarity and fairness are overriding concerns." Id. McCraine overturned Nichols after careful consideration as to the possibility that Nichols may shift the burden to the Defendant. See McCraine, at 207.

While it has been argued that Nichols is the right path based upon its comparison to an alibi defense, the alibi defense is an affirmative defense. An affirmative defense does not serve to negative any facts of the crime which the State is to prove in order to convict. See Patterson v. New York, 432 U.S. 197, at 207 (1977). It constitutes a separate issue on which the defendant may be required to serve the burden of persuasion. Id. The State may not shift to the Defendant the burden of disproving any element of the State's case. See Syl. Pt. 5, State v. Daniel, 182 W.Va. 643 (1990). In a criminal proceeding, Due Process requires the State to prove every element of a crime beyond a reasonable doubt. See In Re Winship, 397 U.S. 358 (1970); see also

Mullaney v. Willbur, 421 U.S. 684 (1975).

Here, the Defendant was required to “disprove” a prior conviction, a “status element” of the offense. This issue should be resolved as such; prior convictions should be deemed “sentence enhancements”, not “status elements”. If a defendant is to be required to offer evidence disputing a prior conviction “status element”, as Nichols required, that defendant is essentially being forced to disprove an “element” of a crime, which is burden shifting. It changes a procedural violation into a Constitutional Due Process violation.

Respectfully Submitted,

David M. Reed,  
By Counsel



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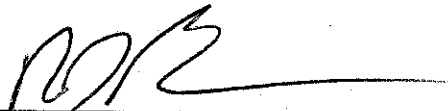
**DAVID REED,**  
**Defendant.**

**CERTIFICATE OF SERVICE**

The undersigned attorney does hereby certify that the foregoing **APPELLANT'S BRIEF** has been served to the following by depositing a true and exact copy in the United States mail, postage prepaid, addressed as follows:

**TO:** Dawn Warfield, Assistant Attorney General  
West Virginia Attorney General's Office, Appellant Division  
State Capitol, Building 1, Room E26  
Charleston, WV 25305

Dated this 21<sup>st</sup> day of June, 2005.



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