No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Michael Paul Conn, *Petitioner*,

v.

State of West Virginia, Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2022 Term

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March 21, 2022
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EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 21-0382

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

V.

MICHAEL PAUL CONN,
Defendant Below, Petitioner.

Certified Question from the Circuit Court of Cabell County
The Honorable Paul T. Farrell, Judge
Indictment No. 14-F-512

CERTIFIED QUESTION ANSWERED

Submitted: February 15, 2022
Filed: March 21, 2022

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JUSTICE MOATS delivered the Opinion of the Court.

JUSTICE ALAN D. MOATS, sitting by temporary assignment.

JUSTICE WOOTON dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

2. "When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq*. and *W. Va. Code*, 58-5-2 [(1998)], the statute relating to certified questions from a circuit court of this State to this Court." Syllabus point 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

Moats, Justice:

The Circuit Court of Cabell County certifies one question to this Court pertaining to whether an "attempt to commit an assault during the commission of a felony"—when the underlying felony is sexual assault in the third degree—is a qualifying offense under the Sex Offender Registration Act, West Virginia Code §§ 15-12-1 to -10 (hereinafter sometimes referred to as "the Act"), which would require Petitioner Michael Paul Conn ("Mr. Conn") to register as a sex offender for life. After considering the parties' briefs and oral arguments, the appendix record submitted, and the applicable legal authority, we conclude that Mr. Conn's conviction for "attempt to commit an assault during the commission of a felony" which was based on a proffer that Mr. Conn committed sexual assault in the third degree, is a qualifying offense under the Act that requires Mr. Conn to register as a sex offender for life.

I.

FACTUAL AND PROCEDURAL HISTORY

This case originated more than twenty years ago, when Mr. Conn was indicted in January of 1998 on four counts of sexual assault in the third degree. It was alleged that Mr. Conn, then aged twenty-two, engaged in sexual intercourse with a thirteen-year-old girl. As part of a later plea agreement, the indictment was dismissed, and Mr. Conn pleaded guilty to an information, charging him with one count of attempt to commit a felony, "stating that he unlawfully, feloniously, knowingly and intentionally attempted

to commit an assault during the commission of a felony." As a proffer to support the plea, the State noted:

> The evidence of the State would be that on or about August the 20th, 1997, that [Mr. Conn] did actually have intercourse with a juvenile, [T.E.], who was under the age of sixteen [ ] and more than four years difference between their ages, and [Mr. Conn] being twenty-two[.]

As part of this plea agreement, Mr. Conn was sentenced to not less than one nor more than three years in prison, to be served consecutively to another sentence he was serving in another matter. At the time of his conviction and sentence, Mr. Conn was not required to register as a sex offender.

Afterward, in 1999, the West Virginia Legislature enacted the Sex Offender Registration Act, West Virginia Code §§ 15-12-1 to -10. Shortly thereafter, in 2000, the registration requirements for sex offenders were amended. The amendment extended the registration requirements to perpetrators convicted of attempted offenses. *See generally* W. Va. Code § 15-12-2 (eff. 2018). Because the amendment was effective both retroactively and prospectively, Mr. Conn was required to register as a sex offender. *See* W. Va. Code § 15-12-2(a) (eff. 2018) ("The provisions of this article apply both retroactively and prospectively.").

Subsequently, in 2003, Mr. Conn filed a petition for writ of habeas corpus in the Circuit Court of Cabell County alleging (1) unlawfully induced guilty plea; (2) ineffective assistance of counsel; (3) false declamation of character; and (4) violation

of his constitutional rights. According to the appendix record, the petition for writ of habeas corpus was summarily dismissed. Then, on appeal to this Court, we remanded the matter for further findings of fact regarding whether Mr. Conn's crime was sexually motivated for the purpose of the requirement that he register as a sex offender. Upon remand, a hearing was held in May of 2006. At the hearing, the State represented that, in entering his guilty plea to "attempt to commit an assault during the commission of a felony," Mr. Conn understood that there would be evidence at trial that the underlying felony was of a sexual nature. Mr. Conn did not refute that characterization—he merely pointed out that he entered an *Alford/Kennedy* plea[1] maintaining his innocence. The circuit court ultimately found that based on the 2000 change in the statute, Mr. Conn was required to register as a sex offender because the felony underlying his plea was sexual in nature.

Years later, in 2014, Mr. Conn was indicted on six counts of failure to register as a sex offender or provide notice of registration changes. He entered an *Alford/Kennedy* plea to two counts of the indictment on January 9, 2018. Mr. Conn then filed a "Petition for Writ of Error *Coram Nobis* and Motion in Arrest of Judgment and for Dismissal of the

[1] *See Kennedy v. Frazier,* 178 W. Va. 10, 357 S.E.2d 43 (1987). A *Kennedy* plea—sometimes referred to as an *Alford/Kennedy* plea—is a guilty plea in criminal law that a defendant can enter without admitting his or her actual participation in the crime. In Syllabus point one of *Kennedy*, this Court held: "An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him."

Indictment" in March of 2021.[2] In this petition, Mr. Conn claimed that the State Police mistakenly believed him to be a lifetime registrant[3] when his conviction only required him

[2] In Syllabus point 5 of *State v. Hutton*, 235 W. Va. 724, 776 S.E.2d 621 (2015), this Court held:

> A claim of legal error may be brought in a petition for a writ of error coram nobis only in extraordinary circumstances and if the petitioner shows that (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) there exists a substantial adverse consequence from the conviction; and (4) the error presents a denial of a fundamental constitutional right.

[3] West Virginia Code § 15-12-4(a) (eff. 2018) states that "[a] person required to register under the terms of this article shall continue to comply with this section, except during ensuing periods of incarceration or confinement[.]" The statute continues, and specifies two timeframes for registration:

> (1) Ten years have elapsed since the person was released from prison, jail, or a mental health facility or 10 years have elapsed since the person was placed on probation, parole, or supervised or conditional release. The 10-year registration period may not be reduced by the sex offender's release from probation, parole, or supervised or conditional release; or
>
> (2) For the life of that person, if that person: (A) Has one or more prior convictions or has previously been found not guilty by reason of mental illness, mental retardation, or addiction for any qualifying offense referred to in this article; (B) has been convicted or has been found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense as referred to in this article, and upon motion of the prosecuting attorney, the court finds by clear and convincing evidence that the qualifying offense involved multiple victims or multiple violations of the qualifying offense; (C) has been convicted or has been found not guilty by reason of mental illness, mental retardation, or addiction of a sexually violent offense; (D) has been determined pursuant to §15-12-2a of this code to be a sexually violent predator; or (E) has been convicted or has been found not guilty by reason of mental illness, mental retardation,

to register for ten years because he did not commit a "qualifying offense" or "sexually violent offense" and he was not determined to be a "sexually violent predator."

The State responded that the underlying felony—sexual assault in the third degree—of Mr. Conn's conviction of attempt to commit assault during the commission of a felony *is* a qualifying offense for lifetime registration. After a hearing, the circuit court certified the following question[4] to this Court:

> Is [Mr. Conn's] 1998 conviction for "Attempt to Commit an Assault during the Commission of a Felony," under W. Va. Code [§] 61-2-10, which was found by the Circuit Court to be a sexually motivated crime against a minor, a

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> or addiction of a qualifying offense as referred to in this article, involving a minor or a person believed or perceived by the registrant to be a minor.

[4] Pursuant to Rule 17(a)(1) of the West Virginia Rules of Appellate Procedure, when questions are certified by a circuit court or administrative tribunal,

> the order of certification complying with statutory requirements must further contain a concise statement of each question of law, the answer to each question of law by the circuit court or administrative tribunal, a notation of the extent to which the action is stayed pending resolution of the certified questions, and a directive to the parties to prepare a joint appendix of the record sufficient to permit review of the certified questions.

Here, the Circuit Court of Cabell County failed to answer the certified question. However, in accordance with the authority given to this Court by Rule 2 of the West Virginia Rules of Appellate Procedure, we suspend the procedure in this matter for judicial efficiency. *See* W. Va. R. App. P. 2 ("In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Supreme Court to do substantial justice.").

> qualifying offense under the West Virginia Sexual Offender Registration Act, W. Va. Code [§] 15-12-1 *et seq.,* which would require [Mr. Conn] to become a registered sex offender for life?

II.

STANDARD OF REVIEW

This Court's review of questions certified by a circuit court is plenary. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996). Additionally, to the extent that the resolution of the certified question requires us to engage in statutory interpretation, we apply the same level of review. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). With these standards in mind, we now address the arguments presented.

III.

DISCUSSION

In the case sub judice, we first acknowledge this Court's authority to reformulate certified questions:

> When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate

> questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq*. and *W. Va. Code*, 58-5-2 [(1998)], the statute relating to certified questions from a circuit court of this State to this Court.

Syl. pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993). In accordance with this authority, we reformulate the question as follows:

> Is Mr. Conn's 1998 conviction—"Attempt to Commit an Assault during the Commission of a Felony," under West Virginia Code § 61-2-10, the underlying felony being a violation of West Virginia Code § 61-8B-5(2), third degree sexual assault, when he had intercourse with a juvenile under the age of sixteen when he was twenty-two years of age—a qualifying offense under the West Virginia Sex Offender Registration Act, West Virginia Code § 15-12-1 et seq., which would require Mr. Conn to become a registered sex offender for life?

To begin our analysis, we look to the issue presented to this Court in the reformulated certified question, i.e., is a conviction for "attempt to commit an assault during the commission of a felony"—when the underlying felony committed was sexual assault in the third degree—a qualifying offense that requires lifetime sexual offender registration? Mr. Conn argues that "qualifying offense" is clearly and unambiguously defined by the Act as any crime listed in West Virginia Code § 15-12-2(b)(2) (eff. 2018),[5]

[5] West Virginia Code § 15-2-2 has been amended many times since its enactment in 1999. However, the changes have mostly been for readability and stylistic purposes. Furthermore, due to the Legislature's express intent for the Act to apply retroactively, we cite to the most current version, which became effective in 2018.

and because "attempt to commit an assault during the commission of a felony" is not explicitly listed, he is not required to register as a sex offender for life.

Because the resolution of this matter requires us to examine various statutory provisions, we set forth the proper framework for our analysis.

> When this Court endeavors to construe a statutory provision, our primary aim is to give effect to the intent of the Legislature. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Accordingly, "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case[,] it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959). On the other hand, "[a] statute that is ambiguous must be construed before it can be applied." Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992).

Bradford v. W. Va. Solid Waste Mgmt. Bd., ___ W. Va. ___, ___, 866 S.E.2d 82, 87 (2021).

At the outset of our analysis, we examine the Sex Offender Registration Act. In West Virginia Code § 15-12-1a(b), the Legislature made clear its intent by "declar[ing] that there is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses in order to allow members of the public to adequately protect themselves and their children from these persons." To that end, the Act provides that "[a]ny person who has been convicted of an offense or an attempted

offense" enumerated in the Act shall be made to register as a sex offender. W. Va. Code § 15-12-2(b). The Act enumerates the following offenses:

> (1) §61-8A-1 et seq. of this code;
>
> (2) §61-8B-1 et seq. of this code, including the provisions of former §61-8B-6 of this code, relating to the offense of sexual assault of a spouse, which was repealed by an act of the Legislature during the 2000 legislative session;
>
> (3) §61-8C-1 et seq. of this code;
>
> (4) §61-8D-5 and §61-8D-6 of this code;
>
> (5) §61-2-14(a) of this code;
>
> (6) §61-8-6, §61-8-7, §61-8-12, and §61-8-13 of this code;
>
> (7) §61-3C-14b of this code, as it relates to violations of those provisions of chapter 61 listed in this subsection; or
>
> (8) §61-14-2, §61-14-5, and §61-14-6 of this code: Provided, That as to §61-14-2 of this code only those violations involving human trafficking for purposes of sexual servitude require registration pursuant to this subdivision.[6]

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[6] Each of these statutes refer to various sexual offenses. *See, e.g.*, W. Va. Code § 61-8A-1 to -7 (preparation, distribution or exhibition of obscene matter to minors); W. Va. Code § 61-8B-1 to -18 (sexual offenses); W. Va. Code § 61-8C-1 to -11 (filming of sexually explicit conduct of minors); W. Va. Code § 61-8D-5 (sexual abuse by a parent, guardian, custodian or person in a position of trust to a child; parent, guardian, custodian or person in a position of trust allowing sexual abuse to be inflicted upon a child; displaying of sex organs by a parent, guardian, or custodian); W. Va. Code § 61-8D-6 (sending, distributing, exhibiting, possessing, displaying or transporting material by a parent, guardian or custodian, depicting a child engaged in sexually explicit conduct); W. Va. Code § 61-2-14(a) (abduction of person; kidnapping or concealing child); W. Va. Code § 61-8-6 (detention of person in place or prostitution); W. Va. Code § 61-8-7 (procuring for house of prostitution); W. Va. Code § 61-8-12 (incest); W. Va. Code § 61-8-13 (incest; limits on interviews of children eleven years old or less); W. Va. Code § 61-3C-14b (soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity); W. Va. Code § 61-14-2 (human trafficking of an

Additionally, West Virginia Code §15-12-2(c) (eff. 2018) provides that "[a]ny person who has been convicted of a criminal offense where the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article."

Mr. Conn contends that the certified question can be answered by simply applying the plain language of the Act. According to Mr. Conn, the Act explicitly defines "qualifying offense" as any of the crimes listed in West Virginia Code § 15-12-2(b). *See supra* W. Va. Code §15-12-2(b). He argues that, because there is no reference to his crime—attempt to commit assault during the commission of a felony, located at West Virginia Code § 61-2-10—then he has not committed a "qualifying offense" under the Act. Mr. Conn maintains that he was required to register as a sex offender not because he committed a "qualifying offense," but because of the circuit court's written findings that his offense was sexually motivated. He contends that, by definition, a registration requirement predicated on a written finding arises under West Virginia Code § 15-12-2(c), and not under West Virginia Code § 15-12-2(b), the latter of which enumerates the "qualifying offenses."

The State acknowledges that "attempt to commit an assault during the commission of a felony," as proscribed in West Virginia Code § 61-2-10 (eff. 1882), is not

individual; aiding and abetting human trafficking); W. Va. Code § 61-14-5 (sexual servitude); and W. Va. Code § 61-14-6 (patronizing a victim of sexual servitude).

a "qualifying offense" specified in the Act. However, the State contends that the underlying felony—third degree sexual assault—needs to be examined because Mr. Conn's statutory offense of attempt does not exist in a vacuum. In that regard, the State argues that because Mr. Conn's conviction of attempt to commit an assault during the commission of a felony is inextricably linked to one of the qualifying offenses under the Act, he must be required to register as a sex offender for life. The State maintains that requiring Mr. Conn to register as a sex offender for life under these circumstances comports with the Legislature's intent when it enacted the registration requirements. We agree.

This Court has recognized that "[t]he crime of attempt does not exist in the abstract but rather exists only in relation to other offenses." *State v. Starkey*, 161 W. Va. 517, 522 n.2, 244 S.E.2d 219, 223, n.2 (1978), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) (citing W. LaFave & A. Scott, *Handbook on Criminal Law* 49 (1972)). *See also United States v. Dozier*, 848 F.3d 180, 185 (4th Cir. 2017) ("However, we note a unique complexity of general attempt statutes: they do not set forth a standalone crime. . . . It would therefore be imprudent to analyze the statutory language . . . in complete isolation."); *State v. James F.*, No. 15-0194, 2016 WL 2905508, at *3 (W. Va. May 18, 2016) (memorandum decision) ("[T]he [attempt] statute establishes the punishment for attempting, unsuccessfully, to commit some crime specified elsewhere in the code[.] . . . An 'attempt crime' is inextricably linked to the offense that was attempted.").

Based upon our examination of the Act and this Court's body of caselaw, we conclude that Mr. Conn did commit a "qualifying offense" that requires him to register as a sex offender for life. As the State correctly stated, there is an inextricable link between the crime of "attempt to commit an assault during the commission of a felony" and the underlying felony committed. While we acknowledge that "attempt to commit an assault during the commission of a felony" under West Virginia Code § 61-2-10 is not specifically enumerated as a "qualifying offense" under the Act, the analysis cannot stop there. Rather, the inquiry is twofold, and we must take the next step in the analysis: What felony was Mr. Conn in the process of committing when he was *attempting to commit an assault*?

Basic criminal law says that no conviction is possible unless every element is proved beyond a reasonable doubt. *See* Syl. pt. 1, in part, *Jones v. Warden, W. Va. Penitentiary*, 161 W. Va. 168, 241 S.E.2d 914 (1978) ("In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged[.]"). Under West Virginia Code § 61-2-10, the actus reus of "assault during the commission of a felony" is to "shoot, stab, cut or wound another person," and the attendant circumstance is that the assault occur during "the commission of, or attempt to commit[,] a felony." *See* W. Va. Code § 61-2-10. Both the actus reus and the attendant circumstances are elements of the crime.

Accordingly, Mr. Conn entered an *Alford/Kennedy* plea to attempted assault during the commission of a felony. *See* W. Va. Code § 61-2-10. The underlying felony

offense to which Mr. Conn's conviction of attempted assault is inextricably intertwined is third degree sexual assault pursuant to West Virginia Code § 61-8B-5 (eff. 2000). The State's proffer at Mr. Conn's plea hearing made clear that, had the matter gone to trial, the State would have produced evidence to show "that on or about August the 20th, 1997, . . . the defendant, Michael Conn, did actually have intercourse with a juvenile, [T.E.], who was under the age of sixteen . . . [, that there was] more than four years difference between their ages, and Mr. Conn being twenty-two[.]"[7] A review of the Act clearly shows that convictions pursuant to West Virginia Code § 61-8B-5 are explicitly enumerated as "qualifying offenses." *See supra* W. Va. Code § 15-12-2(b)(2). *See, e.g.*, *State v. Penwell*, 199 W. Va. 111, 116, 483 S.E.2d 240, 245 (1996) ("[I]t is readily apparent that it would not be possible under W. Va. Code § 61-2-10 to prove an assault in the commission of, or attempt to commit, the felony of aggravated robbery without proving each and every element of the commission of, or attempt to commit, the crime of aggravated robbery.").

From this, it must be concluded that Mr. Conn could not have been convicted of "attempt to commit assault during the commission of a felony" unless he was also guilty of committing, or attempting to commit, a felony. In this case, the felony referenced by "during the commission of a felony" was determined to be sexual assault in the third degree, which is explicitly enumerated as a "qualifying offense" in West Virginia Code

[7] This proffer, made by the State at the 2006 hearing, "was not objected to or contested in any way by [Mr. Conn.]"

§ 15-12-2(b)(2). Therefore, based on the foregoing, we conclude that Mr. Conn is required to be a lifetime registrant because he *was* convicted of a qualifying offense.

IV.

CONCLUSION

For the reasons set forth above and based upon all of the foregoing, we answer the reformulated certified question from the Circuit Court of Cabell County as follows:

> Is Mr. Conn's 1998 conviction—"Attempt to Commit an Assault during the Commission of a Felony," under West Virginia Code § 61-2-10, the underlying felony being a violation of West Virginia Code § 61-8B-5(2), third degree sexual assault, when he had intercourse with a juvenile under the age of sixteen when he was twenty-two years of age—a qualifying offense under the West Virginia Sex Offender Registration Act, West Virginia Code § 15-12-1 et seq., which would require Mr. Conn to become a registered sex offender for life?
>
> Answer: *Yes.*

The certified question having been reformulated and answered, this case is dismissed from the docket of this Court and remanded to the circuit court for proceedings consistent with this opinion.

Certified question answered.

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 21-0382 – *State of West Virginia v. Michael Paul Conn*

WOOTON, Justice, dissenting:

The issue in this case is whether a conviction for the crime of attempt to commit an assault during the commission of a felony,[1] West Virginia Code § 61-2-10 [(2020)],[2] is a qualifying offense under the Sex Offender Registration Act ("the Act").[3] If the conviction is a qualifying offense set forth by the Legislature in West Virginia Code § 15-12-2(b), then the petitioner Michael Conn is required to register as a sex offender for life; but if, as the petitioner argues, his conviction is only supported by a finding that it was sexually motivated, *see* West Virginia Code § 15-12-2(c), he is only required to register for a ten-year period. The majority freely acknowledges that the offense for which the petitioner was convicted "is not specifically enumerated as a 'qualifying offense'" under the Act. Despite this unambiguous recognition that should have easily resolved this case,

[1] This language is taken from the charging information as discussed *infra* in greater detail and is the title given to West Virginia Code § 61-2-10. *See infra* note 2.

[2] West Virginia Code § 61-2-10, "Assault during commission of or attempt to commit a felony[]" provides:

> If any person in the commission of, or attempt to commit a felony, unlawfully shoot, stab, cut or wound another person, he shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be confined in the penitentiary not less than two nor more than ten years, or be confined in jail not exceeding one year and be fined not exceeding one thousand dollars.

[3] *See id*. §§ 15-12-1 to -10 (2019).

the Court determines that the petitioner nonetheless must register as a sex offender for life "because he *was* convicted of a qualifying offense[]" – even though the Legislature has never identified the offense as such. *See id*. § 15-12-2(b) (enumerating qualifying offenses; discussed *infra* in greater detail). The majority has rewritten a clear and unambiguous statute to include a new qualifying offense, which action not only directly contradicts the language of the Act, but also violates any semblance of fundamental fairness. Therefore, I respectfully dissent to the majority's decision.

In January 1998, in Case No. 98-F-39 the petitioner was indicted on four counts of third-degree sexual assault on a minor. On July 28, 1998, he entered a guilty plea to one count of third-degree sexual assault. However, shortly thereafter, he moved to withdraw that plea as he did not want to be convicted of a crime that would require him to register as a sex offender under the law in effect at that time[4] "because he wouldn't get to be around his children." The State joined in the motion, and the circuit court allowed the petitioner to withdraw the plea.

A new plea agreement was negotiated in which the petitioner agreed to plead guilty to an information filed in a new case, Case No. 98-F-161, for "attempting to commit

[4] There is no identification either in the appendix record or the briefing of what law was in effect at the time which would have required the petitioner to register as a sex offender.

an assault during the commission of a felony." This new plea agreement was specifically intended to avoid a conviction which would require the petitioner to register as a sex offender. To that end, the charging information drafted by the State made no reference to any sexually related crime, providing only as follows:

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

On August 28, 1998, during a plea hearing, the petitioner pleaded guilty to the crime charged in the information, was found guilty and convicted of "Attempt to Commit a Felony, a provable offense as contained in Information No. 98-F-161[,]" and was sentenced to serve a term of one to three years in prison. The State then moved to dismiss the first felony indictment, Case No. 98-F-39, charging four counts of third-degree sexual assault, which motion was granted by the circuit court. Thus, the only relevant conviction that exists is an attempt to commit a felony. *See* W. Va. Code § 61-2-10.

In 2000, the West Virginia Legislature amended the sexual offender registry requirements set forth in the Act.[5] *See* W. Va. Code §§ 15-12-1 to -10. Because West

[5] The Act was originally enacted in 1999.

Virginia Code § 15-12-2(a) expressly provided that "[t]he provisions of this article apply both prospectively and retroactively," the petitioner was instructed to register as a sex offender in 2001. He filed a petition for post-conviction habeas corpus relief in 2003, challenging the requirement that he had to register as a sex offender under the Act. The circuit court denied the habeas petition; however, upon appeal to this Court, we remanded the case to the circuit court to make written findings of fact concerning whether the petitioner's 1998 conviction was sexually motivated under the provisions of West Virginia Code § 15-12-2(c).[6] A finding of sexual motivation in regard to the petitioner's conviction was necessary because the crime for which the petitioner was convicted was *not a qualifying offense* under the Act.[7] Hence, if the petitioner's conviction was not found to

[6] West Virginia Code § 15-12-2 (c) provides, in relevant part: "(c) Any person who has been convicted of a criminal offense where the sentencing judge made a written finding that the offense was *sexually motivated* shall also register as set forth in this article." (Emphasis added).

[7] The qualifying offenses, which the majority acknowledges in footnote six of the opinion "refer to various sexual offenses[,]" do not require a circuit court to find that the crime was "sexually motivated." The specific qualifying offenses set forth in West Virginia Code § 15-12-2(b) are as follows:

> (b) Any person who has been convicted of an offense or an attempted offense or has been found not guilty by reason of mental illness, mental retardation, or addiction of an offense under any of the following provisions of this code or under a statutory provision of another state, the United States Code or the Uniform Code of Military Justice which requires proof of the same essential elements shall register as set forth in § 15-12-2(d) of this code and according to the internal management rules promulgated by the superintendent under authority of § 15-2-25 of this code:
>
> (1) § 61-8A-*1 et seq*. of this code;

be sexually motivated, then he would not have to register at all as a sex offender. However, if the circuit court found it was sexually motivated, then statutorily he was required to register for a period of ten years – but not for life. *See id*. § 15-12-4 (setting the duration for registration; discussed *infra* in greater detail).

On May 19, 2006, the circuit court conducted a hearing on the issue of whether the petitioner's 1998 conviction was sexually motivated. The court determined that the 1998 offense was sexually motivated, based on the State's proffer at the August 28, 1998, plea hearing that the evidence that it *would prove* at trial "would be that on or

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> (2) § 61-8B-1 *et seq*. of this code, including the provisions of former § 61-8B-6 of this code, relating to the offense of sexual assault of a spouse, which was repealed by an act of the Legislature during the 2000 legislative session;
>
> (3) § 61-8C-1 *et seq*. of this code;
>
> (4) § 61-8D-5 and § 61-8D-6 of this code;
>
> (5) § 61-2-14(a) of this code;
>
> (6) § 61-8-6, § 61-8-7, § 61-8-12, and § 61-8-13 of this code;
>
> (7) § 61-3C-14b of this code, as it relates to violations of those provisions of chapter 61 listed in this subsection; or
>
> (8) § 61-14-2, § 61-14-5, and § 61-14-6 of this code: *Provided*, That as to § 61-14-2 of this code only those violations involving human trafficking for purposes of sexual servitude require registration pursuant to this subdivision.

about August the 20th, 1997, that the defendant, Michael Conn, did actually have intercourse with a juvenile[.]"[8] Based on this finding by the circuit court in 2006, the petitioner was only required to register as a sex offender for a ten-year period. *See id*. The petitioner appealed the ruling to this Court, which refused to hear the appeal by order entered October 11, 2006. Thus, the circuit court's finding effectively resolved any issue in regard to the duration of the petitioner's registration. *See id*.

In 2014, the petitioner was charged in the currently contested indictment, Case No. 14-F-512, with six counts of failing to register as a sex offender or provide notice of registration changes. On January 9, 2018, the petitioner entered a no contest plea to two counts of failure to register, and he was sentenced to consecutive indeterminate terms of one to five years.[9] In March of 2021, the petitioner filed a petition for writ of error coram nobis and motion in arrest of judgment and for dismissal of the indictment,[10] arguing that

[8] There is no mention in the circuit court's order making a finding of sexual motivation in regard to how long the petitioner was required to register based on that finding.

[9] The petitioner failed to appear at an arraignment, after which a warrant was issued in December of 2014 and executed on May 25, 2017.

[10] *See* Syl. Pt. 5, *State v. Hutton*, 235 W. Va. 724, 776 S.E.2d 621 (2015) ("A claim of legal error may be brought in a petition for a writ of error coram nobis only in extraordinary circumstances and if the petitioner shows that (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) there exists a substantial adverse consequence from the conviction; and (4) the error presents a denial of a fundamental constitutional right.").

he only should be required to register as a sex offender for ten years. He further contended that because more than ten years had passed, he was no longer required to register as an offender at the time of the indictment.

In order to resolve the petition, the circuit court should have simply applied the law to the facts of the case and afforded the petitioner the relief to which he was legally entitled. However, the circuit court opted to pose a certified question to this Court, asking whether the petitioner's conviction for an attempt to commit an assault during the commission of a felony was a "qualifying offense" under the language of the Act which would require the petitioner register as a sex offender for life.[11]

The majority begins by reformulating the certified question as follows:

> Is Mr. Conn's 1998 conviction—"Attempt to Commit an Assault during the Commission of a Felony," under West Virginia Code § 61-2-10, *the underlying felony being a violation of West Virginia Code § 61-8B-5(2), third[-]degree*

[11] The circuit court posed the following question:

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

> *sexual assault, when he had intercourse with a juvenile under the age of sixteen when he was twenty-two years of age*—a qualifying offense under the West Virginia Sex Offender Registration Act, West Virginia Code § 15-12-1 et seq., which would require Mr. Conn to become a registered sex offender for life?

(Emphasis added). The question certified by the circuit court was whether a finding that the conviction for which the petitioner was convicted was "sexually motivated" elevates a nonqualifying offense to a qualifying offense under the Sexual Offender Registration Act. The majority reformulated the certified question to focus on the language in the State's proffer made during the plea hearing in regard to the underlying felony – that the evidence that State "*would have produced*" at trial was "that on or about August the 20th, 1997, . . . the defendant, Michael Conn, did actually have intercourse with a juvenile . . . who was under the age of sixteen and more than four years difference between their ages, Mr. Conn being twenty-two" – *a crime for which the petitioner was neither charged nor convicted*.

The majority answers the reformulated question by determining that the crime of attempt to commit an assault during the commission of a felony was a "qualifying offense" under the provisions of West Virginia Code § 15-12-2(b) and therefore the petitioner was required to register for life. In reaching this conclusion, the majority employs an analysis that contravenes basic principles of statutory construction.

The first problem the majority faces is that the law of the case was established in the petitioner's original appeal; this Court determined that the petitioner's conviction was not a qualifying offense, which is why we remanded the case for a determination as to whether the conviction was "sexually motivated." The majority finesses this finding by "reformulating" the certified question. The majority then replaces the finding made by the circuit court in 2006 upon remand by this Court – that the petitioner's conviction was sexually motivated – with a new finding – that "the underlying felony being a violation of West Virginia Code § 61-8B-5(2), third[-]degree sexual assault, when he had intercourse with a juvenile under the age of sixteen when he was twenty-two years of age[.]" Thus, the majority deftly elevates the offense to which the petitioner pled guilty – attempt to commit a felony – into the offense of third-degree sexual assault, a charge to which the petitioner never pled guilty; indeed, a charge which was dismissed in 1998 on motion of the State!

The majority also ignores the language in section 15-12-2(b) of the Act that provides that "[a]ny person who has been convicted of an offense or an attempted offense" of the specified qualifying offenses shall register as a sex offender for life. *Id*. The petitioner was not convicted of a specified qualifying offense or an attempt to commit a specified qualifying offense. Moreover, the statutory language plainly states that sex offender registration is inextricably tied to a conviction – not a proffer, and not an underlying crime which was dismissed.

Second, the majority correctly sets forth the law in regard to statutory construction which requires a statute to be applied as written where no ambiguity exists. *See Bradford v. W. Va. Solid Waste Mgmt. Bd.*, ___ W. Va. ___, ___, 866 S.E.2d 82, 87 (2021) ("Accordingly, '[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case[,] it is the duty of the courts not to construe but to apply the statute.' Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959)."). Both parties contend that the statute is clear and unambiguous. Nonetheless, the majority declines to apply the language of the Act as written, choosing instead to read into the Act a new qualifying offense of attempt to commit an assault during the commission of a felony. Not only does this violate a fundamental principle of statutory construction, it also fails to consider another basic rule of statutory construction: "[i]n examining statutory language generally, words are given their common usage and '*[c]ourts are not free to read into the language what is not there*, but rather should apply the statute as written.'" *Keatley v. Mercer Cnty. Bd. of Educ.*, 200 W.Va. 487, 491, 490 S.E.2d 306, 310 (1997) (quoting *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994) (emphasis added).). Succinctly stated, the language of the Act fails to include as a qualifying offense the crime for which the petitioner stands convicted. The majority acknowledges this fact, yet inexplicitly declares it to be qualifying offense. Undoubtedly if the Legislature had intended a conviction for attempt to commit an assault during the commission of a felony, West Virginia Code § 61-2-10, to be a qualifying offense, it would have identified it as such. *See* W. Va. Code § 15-12-2(b). This Court has previously held

that "[i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.". Syl. Pt. 11, *Brooke B. v. Ray*, 230 W. Va. 355, 738 S.E.2d 21 (2013).

In short, the majority has rewritten the Act in order to add an additional qualifying offense to those offenses enumerated by the Legislature. In this regard, the majority states that

> [b]ased upon our examination of the Act and this Court's body of caselaw, we conclude that Mr. Conn did commit a "qualifying offense" that requires him to register as a sex offender for life. As the State correctly stated, there is an inextricable link between the crime of "attempt to commit an assault during the commission of a felony" and the underlying felony committed. While we acknowledge that "attempt to commit an assault during the commission of a felony" under West Virginia Code § 61-2-10 is not specifically enumerated as a "qualifying offense" under the Act, *the analysis cannot stop there. Rather, the inquiry is twofold, and we must take the next step in the analysis: What felony was Mr. Conn in the process of committing when he was attempting to commit an assault?*[12]

(Emphasis and footnote added). Contrary to the majority's statement that further inquiry is legally supported when a conviction is not found to be a qualifying offense, there is no

[12] It is unclear exactly what the majority's newly created inquiry is directed to analyzing. The crime with which the petitioner was charged was "attempt to commit an assault during the commission of a felony."

legal authority either in the Act or in our caselaw that supports such action on the part of the Court.

The majority then analyzes the petitioner's conviction based upon its answer to a question the circuit court never asked. The majority begins by reasoning that "[b]asic criminal law says that no conviction is possible unless every element is proved beyond a reasonable doubt." It then relies upon this Court's opinion in *State v. Starkey*, 161 W. Va. 517, 522 n.2, 244 S.E.2d 219, 223, n.2 (1978), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) (quoting W. LaFave & A. Scott, *Handbook on Criminal Law* 49 (1972)), in which the Court stated in dicta in a footnote that a commentator had noted that "'[t]he crime of attempt does not exist in the abstract but rather exists only in relation to other offenses.'" Based upon this "authority," the majority reasons that because the petitioner's conviction is so "inextricably intertwined" with the third-degree sexual assault and because third-degree sexual is a qualifying offense, therefore "it must be concluded that Mr. Conn could not have been convicted of 'attempt to commit assault during the commission of a felony' unless he was also guilty of committing, or attempting to commit, a felony." The recitation of these principles of criminal law suggests the possibility that the majority was not mindful that the Sexual Offender Registration Act is a "civil regulatory statue and not a criminal penalty statute." *See State v. Whalen*, 214 W. Va. 299, 301 n.2, 588 S.E.2d 677, 679 n.2 (2003); *see also* W. Va. Code § 15-12-1a ("It is not the intent of the Legislature that the information be used to

inflict retribution or additional punishment on any person convicted of any offense requiring registration under this article.").

Third, the majority's opinion authorizes a court to look behind any conviction to determine whether it can be deemed to be a qualifying offense, notwithstanding the legislature's omission of that conviction from the statutory list of qualifying offenses. Clearly, this holding emasculates the language of West Virginia Code § 15-12-2(c), which provides that "[a]ny person who has been convicted of a criminal offense where the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article." *See* Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009) ("This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions*."). In clear, unequivocal language, the Legislature set forth in section 15-12-2(c) the exact procedure for dealing with criminal offenses that are not qualifying offenses, which procedure requires the circuit court to make a finding that the crime was sexually motivated. *Id.* The legislation specifies that a determination that a crime was sexually motivated will result in an individual having to register as a sex offender for a period of

ten years. *See* W. Va. Code § 15-12-4.[13] The petitioner concedes to having to register for a ten-year period; he only challenges having to register for life.

[13] West Virginia Code § 15-12-4 provides:

> a) A person required to register under the terms of this article shall continue to comply with this section, except during ensuing periods of incarceration or confinement, until:
>
> (1) *Ten years have elapsed since the person was released from prison*, jail, or a mental health facility or 10 years have elapsed since the person was placed on probation, parole, or supervised or conditional release. The 10-year registration period may not be reduced by the sex offender's release from probation, parole, or supervised or conditional release; or
>
> (2) *For the life of that person, if that person*: (A) Has one or more prior convictions or has previously been found not guilty by reason of mental illness, mental retardation, or addiction for any qualifying offense referred to in this article; (B) *has been convicted* or has been found not guilty by reason of mental illness, mental retardation, or addiction *of a qualifying offense as referred to in this article*, and upon motion of the prosecuting attorney, the court finds by clear and convincing evidence that the qualifying offense involved multiple victims or multiple violations of the qualifying offense; (C) *has been convicted* or has been found not guilty by reason of mental illness, mental retardation, or addiction *of a sexually violent offense*; (D) *has been determined pursuant to § 15-12-2a of this code to be a sexually violent predator*; or (E) *has been convicted* or has been found not guilty by reason of mental illness, mental retardation, or addiction *of a qualifying offense as referred to in this article, involving a minor or a person believed or perceived by the registrant to be a minor*.

(Emphasis added).

Finally, the majority seemingly overlooks the fact that the petitioner's conviction in this case was based on a plea agreement. In 1998, the petitioner, the State, and the circuit court all agreed to allow the petitioner to plead to a crime that would not subject him to registration as a sex offender because it would prevent him from seeing his children. Everyone involved at the time the plea was entered believed that pleading guilty to the crime of attempt to commit an assault during the commission of a felony achieved the desired goal – a conviction not subject to sex offender registration. The Legislature thwarted this when it enacted an amended version of the Act in 2000 and made the provisions applicable both "retrospectively and prospectively," *see* West Virginia Code § 15-12-2.

All the petitioner seeks by way of relief in coram nobis is that the duration of his period of registration be limited to ten years and not life. For the reasons set forth above, I believe that the petitioner is entitled to the requested relief under the Act, and I further believe that to deny the petitioner the requested relief is to deny the petitioner fundamental fairness. *See State v. Myers*, 204 W. Va. 449, 458, 513 S.E.2d 676, 686 (1998) ("A plea agreement presupposes fundamental fairness in the process of securing such an agreement between a defendant and the State. *See State v. Schaff*, 958 P.2d 682 (Mont.1998). Plea agreements are a form of contracts, their unique nature requires ordinary contract principles to be supplemented with a concern that the bargaining and execution process does not violate the defendant's right to fundamental fairness under the

due process clause. *See United States v. Schilling*, 142 F.3d 388 (7th Cir.1998). Plea bargaining is to be conducted fairly on both sides, with the results not frustrating the reasonable expectations of either the defendant or the State. *See McClellan v. State*, 967 S.W.2d 706 (Mo.App.1998).)."

The majority opinion acknowledges that the petitioner was not convicted of a qualifying offense. Moreover, this Court found (albeit implicitly) that the petitioner was not convicted of a qualifying offense when it remanded the petitioner's case to the circuit court to make findings in regard to whether his 1998 conviction was sexually motivated. In 2006, pursuant to remand, the circuit court made a finding of sexual motivation as set forth in the Act. *See* W. Va. Code § 15-12-2(c). This Court then refused the petitioner's appeal of that order finding his offense was sexually motivated. We have held that "[t]he general rule is that when a question has been definitively determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal and it is regarded as the law of the case." Syl. Pt. 1, *Mullins v. Green*, 145 W. Va. 469, 115 S.E.2d 320 (1960). Simple application of the established law to the facts in this case leads inescapably to the conclusion that the petitioner must register as a sex offender for a period of ten years. With all due respect, the result mandated by the majority is contrary to the law.

For the foregoing reasons, I respectfully dissent.

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on August 17, 2022, the following order was made and entered **in vacation:**

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 21-0382

Michael Paul Conn,
Defendant Below, Petitioner

ORDER

The Court, having maturely considered the petition for rehearing filed by the petitioner Michael Paul Conn, by Jeremy B. Cooper, his attorney, is of opinion to and does refuse the petition for rehearing. Justice Wooton would grant.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.) No. 21-0382

MICHAEL PAUL CONN,
Defendant Below, Petitioner.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner, Michael Paul Conn, by counsel, Jeremy B. Cooper, sets forth the following pursuant to Rule 25 of the West Virginia Rules of Appellate Procedure, as his Petition for Rehearing of the Signed Opinion of this Court, issued on March 21, 2022. The Petitioner asserts that a misapprehension of law evident in the decision in this matter justifies rehearing, concerning a serious constitutional question that arises by implication from the manner in which the Court answered the certified question, and which inures to the prejudice of the Petitioner's federal constitutional rights, as well as the rights of those persons similarly situated to him.

Without setting forth a new Syllabus Point, this Court has created a new rule that, in the most narrow conceivable construction, any person who is convicted of "assault during the commission of a felony" pursuant to W. Va. Code § 61-2-10, will be considered to have been convicted of a "qualifying offense" for purposes of the Sex Offender Registration Act (Article 12, Chapter 15, W. Va. Code) if the "underlying felony" of that conviction is itself one of the qualifying offenses set forth in W. Va. Code §15-12-2(b).

The Legislature has long explicitly stated in the text of the statute that a conviction for an attempt to commit a qualifying offense is equivalent to conviction of the underlying qualifying offense for registration purposes: "Any person who has been convicted of an offense or an attempted offense…" W. Va. Code §15-12-2(b).[1] Now, for the first time, this Court has determined that not only the statutorily delineated attempt convictions, but also convictions of W. Va. Code § 61-2-10, will be deemed equivalent to a conviction of an "underlying felony." At no point prior to March 21, 2022, has that rule existed. It is a new law, and pursuant to the Due Process Clause of the Fourteenth Amendment, a new law, even of judicial origin, cannot be

1 This provision was also present in the version of the sex offender registration status in effect in 1998 when the Petitioner was originally convicted. W. Va. Code § 61-8F-2 (1998).

applied retroactively.

The Supreme Court of the United States has long held that the manner in which a state court interprets its state's statutes implicates due process no less than the manner in which a state's legislature drafts them. In *Bouie v. City of Columbia,* 378 U.S. 347 (1964), the Supreme Court considered a case in which a decision of South Carolina's high court expanded the scope of a facially narrow trespassing statute to encompass conduct beyond what was described in the language of the statute.

> Petitioners contend, however, that by applying such a construction of the statute to affirm their convictions in this case, the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. We agree with this contention.
>
> The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court. As was said in *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989, 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Bouie, 378 U.S. at 350-351.

As in *Bouie*, the Court in the instant matter has taken explicit statutory language, and added a new category of qualifying conduct that will lead to criminal liability under a statute. "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 353. Just as the South Carolinian defendants in *Bouie* could not have foreseen that a trespass statute prohibiting "entry" would impose criminal liability for "remaining on the premises," the Petitioner could not possibly

deduce that the rule announced in this case would be applied to his registration conduct in 2014. See also, *Rogers v Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001), holding that while the due process principle described in *Bouie* is not as expansive as the Ex Post Facto Clause that applies to legislatures, it protects against violation by the courts of "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." *Rogers*, 532 U.S. at 459.

In the instant case, as the Opinion is currently written, the Court has now taken the "inextricably linked" framework that prior to this case had only ever been applied in the context of attempt crimes relating to the extended supervision statute,[2] and expanded it to encompass assault during the commission of a felony in the context of the Sex Offender Registration Act. There are other inchoate crimes, such as solicitation, or conspiracy, which up until the present could only result in a ten-year registration in the event of a judicial finding of sexual motivation pursuant to W. Va. Code §15-12-2(c). Does this "inextricably linked" analysis also apply to those convictions? There is certainly a compelling argument that a conspiracy or solicitation is equally inextricably linked to the underlying crime as an attempt. There is likewise a compelling argument that every person who had a sexually motivated conspiracy or solicitation conviction in, for example, 2005, and who has since completed their 10 year registration period must now register again. If these individuals are now prosecuted for having not registered for any period of time prior to March 21, 2022, should they be protected by *ex post facto* principles emanating from the Due Process Clause of the Fourteenth Amendment? The Petitioner submits that such individuals cannot be lawfully prosecuted for violating a legal rule that had not been

2 *State v. James F.*, No. 15-0194 (W.Va. May 18, 2016) (memorandum decision); *State v. Scott*, No. 27-0536 (W. Va. Oct. 12, 2018) (memorandum decision).

announced, as such a conviction would violate due process considerations protected by *Bouie*. Neither should the Petitioner himself have been prosecuted for violating the statute in 2014 based upon the rule announced in this case in 2022.

If this Court is of the opinion that the Petitioner's ten year registration under W. Va. Code §15-12-2(c) is not stringent enough to satisfy the Legislature's intent – even though it was the Legislature that wrote the apparently not-stringent-enough duration provision at issue here – then the new rule announced in this case may only be applied going forward. While this Court has the power to modify the law in the manner that it has done in this case, it does not have the power to permit the law to be applied retroactively. Under *Bouie*, the same analysis that the Court applied in *State ex rel. Phalen v. Roberts*, 858 S.E.2d 936 (W. Va. 2021) last year, and *Adkins v. Bordenkircher*, 164 W. Va. 292, 262 S.E.2d 885 (1980) four decades ago, should apply to the decision in this case. The new rule should be prospective only, and not apply to conduct that predated it. The Petitioner requests that this Court grant rehearing and modify its opinion to so state.

WHEREFORE, the Petitioner respectfully requests that this Court grant rehearing, modify its disposition on the certified question to comport with the constitutional principles asserted herein, or grant any other relief the Court deems just and proper.

Respectfully submitted,

Michael Paul Conn, Petitioner,
By counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.) No. 21-0382

MICHAEL PAUL CONN,
Defendant Below, Petitioner.

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

CERTIFICATE OF SERVICE

On this 19th day of April, 2021, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of this Petition for Rehearing to Lara Bissett, at 1900 Kanawha Blvd E, Bldg. 6, Ste 406, Charleston, WV 25305, by U.S. Mail.

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