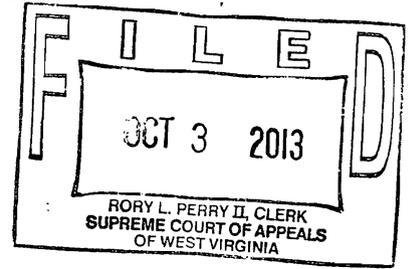

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0574^S



STATE OF WEST VIRGINIA,

Respondent,

v.

CARLOS ANGLE,

*Defendant Below,
Petitioner.*

BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

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BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

I.

STATEMENT OF THE CASE

On September 23, 2011, the Prosecuting Attorney filed a Recidivist Information in the Circuit Court of Marion County, West Virginia, alleging that the Petitioner was subject to confinement in a state correctional facility pursuant to W. Va. Code § 61-11-18(c). (App. at 4.) The Information alleged that on or about July 28, 2011 the Petitioner was convicted of First Degree Sexual Abuse in Case No. 09-F-83 and that this conviction was a third or subsequent offense felony as the Petitioner had been previously convicted in Marion County of Extortion on July 20, 1990 in Case No. 90-F-102, two counts of unlawful wounding on December 10, 1991 in Case No. 91-F-162, and unlawful wounding on December 16, 1991 in Case No. 91-F-161. (*Id.*) The Petitioner was arraigned on the above Information on September 23, 2011. (*Id.* at 5-6.)

After being duly cautioned, the Petitioner elected to remain silent as to the Information. (*Id.*) The Court thereafter ordered “the matter to be scheduled at a later date so that a jury may be empaneled to inquire whether the Defendant is the same person as alleged in the Information.” (*Id.*) On August 27, 2012, an Agreed Order Continuing until the Next Term of Court was entered. (*Id.* at 22-23.) The Order contains a typewritten Case No. 09-F-197 along with a handwritten Case No. 11-F-171 (the recidivist case). (*Id.*) This Order was signed by the Petitioner’s counsel and also contained an attached document signed by the Petitioner stating that the Petitioner waived both his right to have the case tried in the present term as well as the right to be present at the hearing on the motion to continue. (*Id.*) This document was also signed by Petitioner’s counsel. (*Id.*)

On January 30, 2013, a jury was empaneled to decide whether the Petitioner had been twice before convicted of a crime punishable by confinement in a penitentiary. (Trial Tr. at 21-22.) Sergeant William Matthew Pigott of the Fairmont Police Department testified as to the Petitioner’s triggering offense in Case No. 09-F-83 as well as to the Petitioner’s prior convictions. (*Id.* at 37.) Sgt. Pigott had arrested the Petitioner on October 30, 2008. (*Id.* at 39-44, App. at 28.) This arrest led to the Petitioner’s indictment and conviction on the triggering offense in Case No. 09-F-83. (Trial Tr. at 42.) The arrest report contained a photograph to which Sgt. Pigott identified as matching the Petitioner. (*Id.* at 40.) This report also identified the Petitioner’s birth date as being 3/26/1972; it identified his Social Security number as ###-##-3253; it also contained the Petitioner’s fingerprint cards which also identified the same birth date and Social Security number. (*Id.*) The State thereafter admitted into evidence the Sentencing Order regarding Case No. 09-F-83 reflecting that the

Petitioner was convicted of First Degree Sexual Abuse to which Sgt. Pigott testified was an offense punishable by imprisonment in the penitentiary. (*Id.* at 43-44, App. at 30-32.)

Sgt. Pigott then testified as to public records from the Marion County Circuit Clerk's Office regarding the Petitioner's prior convictions. (Trial Tr. at 46.) First the State presented documents pertaining to the Petitioner's extortion conviction in Case No. 90-F-102. (*Id.* at 46-47, App. at 34-42.) These documents reflect that the Petitioner pleaded guilty to Extortion on July 20, 1990, and received a sentence of one to five years in the State Penitentiary in which the execution of that sentence was suspended and the Petitioner was placed on probation for two years. (*Id.*)

Sgt. Pigott then testified as to public records from the Marion County Circuit Clerk's Office regarding the Petitioner's conviction in Case No. 91-F-161. (Trial Tr. 48-49, App. at 43-48.) These records reflect that the Petitioner committed the offense of Unlawful Wounding on or about July 25, 1991, pleaded guilty to Unlawful Wounding on December 16, 1991, and received a sentence of one to five years in the State Penitentiary. (*Id.*)

The State then presented public records from the Marion County Circuit Clerk's Office regarding the Petitioner's conviction in Case No. 91-F-162. (Trial Tr. 50-53, App. 49-53.) These documents indicate that on or about June 1, 1991, the Petitioner committed two counts of Unlawful Wounding, was convicted of two counts of unlawful wounding on December 10, 1991, and received a sentence of one to five years on each count. (*Id.*) The State also introduced a pre-sentence investigation report within these records that reflected the Petitioner's date of birth as being 3/26/1972 and his Social Security number as being 236-21-3258. (App. at 52-53.) It should be noted here that throughout the proceedings Sgt. Pigott stated that a second Social Security number was associated with the Petitioner at some point in the Petitioner's criminal history. (*Id.* at 42, 52,

57-58.) This same report contains the Petitioner's prior record indicating that he pleaded guilty to Extortion on July 20, 1990, and that he pleaded guilty to Unlawful Wounding in Case No. 91-F-161. (*Id.*) The report also reflected that the Petitioner received a sentence of one to five years in Case No. 91-F-161 which was to run concurrent with his sentence in Case No. 91-F-162. (*Id.*)

The State also presented a criminal history report from the Criminal Identification Bureau (CIB) showing the Petitioner's birthdate of 3/26/1972 as well as his arrest record concerning Case No.'s 90-F-102, 91-F-161, and 91-F-162. (*Id.* at 54.)

The State also presented to the jury testimony from a probation officer, Heather Campbell, who performed a pre-sentence investigation of the Petitioner. (Trial Tr. at 65.) The significant portion of Campbell's testimony dealt with what the Petitioner told her during her pre-sentence investigation. Specifically, Campbell testified that the Petitioner acknowledged in her presence that he had been convicted and sentenced on the prior three cases, referring to Case Nos. 90-F-102, 91-F-161, and 91-F-162. (*Id.* at 69-70.)

Based upon the foregoing the jury returned a verdict of "guilty of the offense of THIRD OFFENSE FELONY," to which the Petitioner currently takes appeal. (App. at 27.)

II.

SUMMARY OF ARGUMENT

The trial court in this case had jurisdiction to impose a life sentence on the Petitioner because the evidence the State adduced at trial was sufficient beyond a reasonable doubt to conclude that the Petitioner had committed three prior felonies, with at least two being committed after the preceding offense and sentencing. While the Petitioner attempts to rely on this Court's decision in *State v. McMannis*, *infra*, for the proposition that it was impossible for the jury to find that each of the

Petitioner's prior offenses to have occurred before the preceding offense and sentencing, the State in that case had "no evidence of record" to support a finding. The State in this case put on ample evidence that the Petitioner had committed at least two prior offenses along with the triggering offense each of which were committed after the preceding offenses and sentences. The Petitioner also cannot satisfy the plain error standard as to this assignment of error.

The Petitioner also challenges the sufficiency of the Recidivist Information, but again, the sufficiency of the Information was never challenged below, and the Petitioner cannot demonstrate how the Information filed affected his substantial rights. The lower court's use of the Petitioner's 1990 extortion conviction for recidivist purposes was also proper since that offense was committed and the Petitioner was subsequently convicted and sentenced in 1990. The Petitioner's rights to a speedy trial and presence were not violated when he expressly waived those rights in a signed document also signed by his counsel. Additionally, even if this Court is inclined to apply the three term rule to what constitutes a reasonable time in which to hold recidivism proceedings, the Petitioner consented during the third term to a continuance during to the following term in which the proceeding was so held.

The lower court also properly admitted statements from the Petitioner to a probation officer admitting that he had been in fact convicted of the alleged three prior felonies. The Petitioner's Sixth Amendment right to counsel as to the recidivism charge had not yet attached since no formal proceedings had yet been initiated. Even if the lower court erred here, it is harmless since the State introduced ample other evidence linking the Petitioner to the three prior felonies. As to the other evidence which Petitioner objects, the Petitioner expressly waived his claims regarding State Exhibits 1 and 6 as his trial counsel affirmatively stated that he had no objection as to admitting

either piece of evidence. As to State Exhibit 7, all of the records therein are proper public records which were not objected to, and furthermore, the Petitioner cannot carry his burden that he was prejudiced as the Petitioner has not shown that any of the information therein was inaccurate or erroneous.

The Petitioner also does not point to any prejudice regarding the off the record bench trials. The only apparent ground the Petitioner raises is that a juror was removed from the panel. However, this juror was replaced by an alternate and counsel never objected. Indeed, the alternate juror must have had the same qualifications as the original juror. As such, he has failed to show how the unrecorded bench conferences prejudiced his appeal.

As to the multitude of grounds raised regarding ineffective assistance, this is a direct appeal. This Honorable Court has often expressed its reluctance to address the issue of ineffective assistance upon direct appeal, and the petitioner has proffered no reason why this is the rare case where that issue should be addressed on direct appeal.

Finally, the imposition of a life sentence in this case is not disproportionate because the Petitioner's prior convictions have involved acts of violence. The Petitioner's argument that the remoteness of the prior convictions should be considered has already been previously entertained and rejected by this Court.

For the foregoing reasons, the lower court's judgment should be affirmed.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this matter. In accordance with Rev. R.A.P. 18(a), the State notes that the dispositive issues have been authoritatively decided and the facts and

legal arguments have been adequately presented in the briefs and record. The decisional process would not be significantly aided by oral argument.

IV.

ARGUMENT

A. THE LOWER COURT HAD JURISDICTION TO IMPOSE A LIFE SENTENCE BECAUSE THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE PETITIONER HAD BEEN CONVICTED AND SENTENCED ON EACH PRIOR CRIME BEFORE THE NEXT CRIMES WAS COMMITTED.

The Petitioner cites to the case of *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978), where this Court held that the State in a recidivist proceeding under W. Va. Code §§ 61-11-18 and 19, must prove beyond a reasonable doubt that the prior offenses were committed after the preceding offense and sentencing. *Id.*, Syllabus Point 1. This Court made the following holding in *McMannis*:

Because *no such showing* was made in the instant habitual criminal proceeding, and because the jury rendered no verdict as to this issue, the trial court was without jurisdiction to impose any additional sentence in excess of the sentence of imprisonment provided by statute for the principal offense.

Id., 161 W. Va. at 442, 242 S.E.2d at 575 (emphasis added). The Petitioner specifically argues that the lower court necessarily erred because the jury did not render a verdict on the issue of the chronological order of the Petitioner's prior convictions, nor did the jury receive any instructions regarding this issue. As a result, the Petitioner argues the lower court lacked jurisdiction to impose the enhanced life sentence.

However, in *McMannis*, this Court noted that there was “no evidence of record” which contradicted the defendant’s claim that both of his prior felony convictions were committed during the same month. *Id.*, 161 W. Va. at 439, 242 S.E.2d at 573. Furthermore, this Court held that not only because the jury rendered no verdict as to this issue, but also because “no such showing was made” in the criminal proceeding, did the trial court have no jurisdiction to impose any additional sentence. *Id.*, 161 W. Va. at 442, 242 S.E.2d at 575.

In this case however, the State did in fact prove beyond a reasonable doubt that the Petitioner had committed and been convicted and sentenced on a prior crime before the Petitioner’s next two felony offenses were committed. The State introduced public records from the Marion County Circuit Clerk’s office showing that the Petitioner had committed Extortion in June of 1990, was convicted in July of 1990, and received a sentence of one to five years in the West Virginia State Penitentiary in July of 1990 in which the execution of this sentence was suspended and the Petitioner was placed on probation for two years. Following this conviction and sentence, the State introduced evidence that the Petitioner had committed two more felony offenses in June and July of 1991 in which the Petitioner was subsequently convicted and sentenced for that same year. Following these convictions the State introduced evidence of the Petitioner’s arrest, conviction, and sentencing occurring in 2008 through 2011 in Marion County for First Degree Sexual Abuse. Therefore, even if we were to count the two felony offenses committed in 1991 as one offence for purposes of applying the recidivism statute, the Petitioner committed and was convicted of one felony in 1990, then committed and was convicted for another qualifying felony in 1991, and thereafter committed another felony in 2008 in which he was subsequently convicted.

Unlike *McMannis*, in which the State made no showing on the record that the defendant had committed and been convicted and sentenced on a prior crime before the next crimes were committed, we are left in this case with the State making such a showing and a jury verdict finding the Petitioner “guilty of the offense of third offense felony.”

Several courts have addressed the issue of the requirements *vel non* of a verdict form in a recidivist or habitual offender proceeding. *See State v. Domanski*, 115 P.2d 729 (Wash. 1941) (verdict form in habitual offender need not include all elements of prior conviction if the record as a whole “together with the verdict, its meaning and all the necessary parts thereof are sufficiently clear to support the judgment and sentence.”) *See also Fogle v. State*, 700 P.2d 208, 212 (Okla. 1985) (failure of defendant to object to verdict forms in habitual offender proceeding constitutes waiver; in absence of rebutting evidence, nature of prior offense and convictions was adequately proven). *See also People v. Hampton*, 857 P.2d 441, 445 (Colo. 1992) (defendant did not challenge verdict form in habitual offender proceedings; uncontroverted evidence showed prior offenses and convictions supported recidivist sentence; sentence affirmed.)

The record as a whole is sufficiently clear to support the lower court’s judgment and sentence when the verdict form is read together with the evidence adduced at trial that the Petitioner committed and was convicted and sentenced for one predicate offense in 1990, and thereafter committed two more felony offenses in which he was convicted and sentenced in 1991, and thereafter committed another felony in 2008 in which he was convicted in 2011.

Additionally, no objections were made at trial as to the jury verdict form used nor the jury instructions. Because there was no objection to the jury instructions given, the only means by which this Court can find error would be to invoke the plain error doctrine. To find plain error in this case,

“there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Although the Petitioner does argue that the lower court erred as to the instructions the lower court gave, he does not argue as to any of the other elements needed to invoke plain error. When the instructions are read together with the jury verdict and the other evidence adduced at trial, the alleged error does not seriously affect the fairness, integrity, or public reputation of the proceedings, nor did the alleged error affect the Petitioner’s substantial rights.

B. THE RECIDIVIST INFORMATION FILED WAS SUFFICIENT ON ITS FACE.

The Recidivist Information filed in this case was sufficient on its face as it averred the Petitioner’s previous convictions, the dates of those convictions, the court wherein those convictions were had, criminal docket numbers regarding those convictions, the identity of the Petitioner as the person so convicted, and that each conviction was subject to confinement in a state correctional facility. (App. at 4.)

The Petitioner argues that since the Recidivist Information filed in this case did not allege any records of sentences on the predicate offenses, the Information does not comply with W. Va. Code § 61-11-19 and the enhanced sentence must necessarily fail citing *State ex rel. Yokum v. Adams*, 145 W. Va. 450, 114 S.E.2d 892 (1960). *Yokum*, however, is factually dissimilar from the case at hand.

The Petitioner correctly cites Syl. Pt. 2 of *Yokum* stating;

In the absence of a written information filed with the court, setting forth the previous conviction and sentence, or convictions and sentences, an additional sentence imposed, under the provisions of Code, 61-11-18, . . . is void.

Syl. Pt. 2, *Id.*, 145 W. Va. 450, 114 S.E.2d 892. However, in *Yokum*, no written information was filed with the court prior to sentencing the defendant. *Id.*, 145 W. Va. at 452, 114 S.E.2d at 895 (1960). Furthermore, the life sentence imposed under W. Va. Code § 61-11-18 was void because one of the prior felony convictions the State relied upon did not precede the commission of the triggering offense. *Id.* In this case, a timely Recidivist Information was filed alleging proper convictions that could serve to impose a life sentence under W. Va. Code § 61-11-18.

This Court has had the opportunity to address a filed Recidivist Information that contained inaccurate information. In *State v. Masters*, 179 W. Va. 752, 373 S.E.2d 173 (1988), a Recidivist Information was filed that contained an inaccurate criminal docket number of one of the prior felony convictions relied upon. This Court stated the “purpose of the statutory requirement of a written allegation concerning the previous conviction or convictions is to give the defendant reasonable notice so he can intelligently determine how to respond and prepare a defense to the recidivist charge. The two key elements in a recidivist proceeding are proof of the prior felony conviction, and proof that the defendant is the person who was convicted of that felony.” *Id.*, 179 W. Va. at 755, 373 S.E.2d at 176. The Court subsequently found:

Here the defendant was clearly and plainly advised of the offense charged. There is no claim that he was hampered in preparing a defense because of the lack of adequate notice. The erroneous criminal docket number did not adversely affect any substantial right of the defendant and must be disregarded as harmless error under Rule 52(a) of the West Virginia Rules of Criminal Procedure.

Id., 179 W. Va. at 756, 373 S.E.2d at 177. Moreover, this Court has held:

An indictment alleging a prior conviction for the purpose of augmenting the sentence to be imposed, is sufficient, as to such prior conviction, if it avers the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identifies the person so convicted as the person subsequently indicted.

Syl. Pt. 3., *State v. Loy*, 146 W. Va. 308, 309, 119 S.E.2d 826, 827 (1961).

In this case the Petitioner was also clearly and plainly advised of the offense charged and does not assert that he was hampered in preparing a defense because of the absence of the records of sentences within the Recidivist Information. The Recidivist Information filed in this case, although it does not contain the records of sentences on the Petitioner's prior convictions, did not affect any substantial right of the Petitioner and is without merit.

Additionally, the Petitioner never objected to the Information. "The scrutiny given to an indictment depends, in part, on the timing of a defendant's objection to that indictment." *United States v. Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001). Consistent with this rule, this Court has held that

while a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. Pt. 1, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

A timely objection is one "made at the earliest possible moment." *State v. Palmer*, 210 W. Va. 372, 376-77, 557 S.E.2d 779, 783-84 (2001) (per curiam) (footnote omitted). *See also United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976) (objection to indictment made only after all the evidence had been presented in a lengthy jury trial- "the very limited resources of our judicial system require that such challenges be made at the earliest possible moment in order to avoid needless

waste”). Courts applying tests similar to Miller have characterized the test as being a “stringent standard[.]” *Pheaster*, 544 F.2d at 361, the stringency of which increases with the delay in making an objection.” [T]he tardier the challenge, the more liberally and aggressively have indictments been construed so as to save them[.]” *United States v. Prince*, 868 F.2d 1379, 1384 (5th Cir. 1989) (quoting *United States v. Richardson*, 687 F.2d 952,962 (7th Cir. 1982)). Such a liberal reading is further justified by the fact that a delay in objecting “tends to negate the possibility of prejudice in the preparation of the defense,’ because one can expect that the challenge would have come earlier were there any real confusion about the elements of the crime charged.” *United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000) (citation omitted). Here the Petitioner's trial counsel did not object at any point to the Information. The Petitioner faces an uphill struggle.

The Information in this case should be upheld because there was never any real confusion about what was being charged. The Information properly laid out the statute it was proceeding under, each prior conviction, the date of that conviction, the court in which the convictions were had, along with the Case Nos. for each conviction. Therefore, giving the Information a liberal construction as no objection was made to its validity, the Information should be upheld.

C. THE LOWER COURT PROPERLY DENIED THE PETITIONER’S MOTION TO DISALLOW THE USE OF HIS 1990 EXTORTION CONVICTION AS A SEPARATE PREDICATE OFFENSE.

The Petitioner was convicted for the offense of Extortion on July 20, 1990. The trial court sentenced the Petitioner to one to five years to be served in the West Virginia State Penitentiary. The court thereafter suspended the execution of that sentence and placed the Petitioner on probation for two years. The Petitioner, citing *Murphy v. State*, 689 S.W.2d 341 (Tex App. 1985), argues that

since the trial court granted the Petitioner probation, his conviction was not final until the Petitioner's probation was revoked on January 6, 1992.

For purposes of applying W. Va. Code § 61-11-18, accepting the Petitioner's argument would effectively mean that convictions on which probation was granted to defendants would never qualify as a prior conviction under the recidivism statute if the defendant's probation period expires without it being revoked. Trial courts would often think twice before granting probation if defendants could avoid application of the recidivism statute in this way.

Further supporting the above contention is Syl. Pt. 5 in *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90 (1968), which states "A probationer who at all times during the period of his valid probation has been available for the service of process of the court which granted such probation and set aside the sentence of imprisonment for the offense of which he was convicted may not again be sentenced for such offense after the expiration of his probationary period."

The primary purpose of the habitual criminal statute "is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." *McMannis*, 161 W. Va. at 441, 242 S.E.2d at 574-75. Defendants who have been convicted of a crime punishable by confinement in a penitentiary and subsequently granted probation do not fall outside those the recidivism statute was meant to deter. This Court has stated "[i]n effect, there is a probation sentence which operates independently of the criminal sentence." *Jett v. Leverette*, 162 W. Va. 140, 146, 247 S.E.2d 469, 472-73 (1978).

The Petitioner in this case was convicted of Extortion on July 20, 1990 in the Circuit Court of Marion County, West Virginia in Case No. 90-F-102. The sentencing order in that case sentenced the Petitioner to one to five years in the West Virginia State Penitentiary. The order then

suspended the execution of that sentence, and placed the defendant on two years probation. The lower court properly denied the Petitioner's motion to disallow the use of his 1990 extortion conviction as a separate and first predicate offense preceding the Petitioner's convictions in 1991 and 2011.

The Petitioner also within this assignment of error asserts that using the 1990 Extortion conviction violated the Petitioner's equal protection rights under the West Virginia and United States Constitutions. Specifically the Petitioner argues that W. Va. Code § 62-12-3 permits arbitrary decisions since criminal defendants under the statute may be placed on probation with either the imposition of the sentence suspended or with the imposition imposed but the execution thereof suspended. The Petitioner further argues that the discretion given to trial judges under the statute results in arbitrary decisions which when taken with the application of W. Va. Code §§ 61-11-18 and 19 would endorse arbitrary treatment to a class of individuals who may receive enhanced sentences.

This Court has consistently held that the matter of probation is within the sound discretion of the trial court. *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997) (the decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court's discretion); *State v. Miller*, 172 W. Va. 718, 720, 310 S.E.2d 479, 481 (1983) (the matter of probation is within the sound discretion of the trial court); *State v. Drake*, 170 W. Va. 169, 173, 291 S.E.2d 484, 488 (1982) (Except for clear statutory exceptions, this legislative grant of power charge places the matter of probation within the sound discretion of the trial court); *State v. Wotring*, 167 W. Va. 104, 118, 279 S.E.2d 182, 192 (1981).

Furthermore, the United States Supreme Court has had the opportunity to specifically address application of the Equal Protection Clause to W. Va. Code § 61-11-18 in *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501 (1962) wherein the Court stated:

Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.

(368 U.S. at 456, 82 S.Ct. at 506). Given this Court's longstanding recognition of the discretion given to trial courts in deciding whether to grant probation along with the U.S. Supreme Court's decision in *Oyler*, the Petitioner has failed to allege a denial of equal protection in this case.

D. THE PETITIONER'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED WITH RESPECT TO THE RECIDIVIST PROCEEDING.

It is well settled in West Virginia that recidivist proceedings may be held at a subsequent term of court from the time a Recidivist Information is filed. This Court has stated that "W. Va. Code § 61-11-19 does not prohibit trial upon the information at a subsequent term of court within a reasonable time." *State v. Deal*, 178 W. Va. 142, 146, 358 S.E.2d 226, 230 (1987); *State ex rel. Housden v. Adams*, 143 W. Va. 601, 607, 103 S.E.2d 873, 876 (1958) (There is no provision in such section requiring the other steps such as sentencing at that term, as these, we think, could be had at some subsequent term within a reasonable time).

In attempting to expound on what a reasonable time is under the above case law the Petitioner argues that the standards associated with the right to a speedy trial encompassed under Article III Section 14 of the West Virginia Constitution and W. Va. Code § 62-3-21 should apply. In support, the Petitioner cites previous cases where this Court has applied other constitutional

standards, such as those dealing with cruel and unusual punishment, due process, and double jeopardy, to recidivist proceedings. *Wanstreet v. Bordenkircher*, 276 S.E.2d 205 (W. Va. 1981); *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980); *Martin v. Leverette*, 161 W. Va. 547, 244 S.E.2d 39 (1978).

However, this Court has not extended the right to a speedy trial in all proceedings in which it has extended other constitutional rights. For example, in *State ex rel. Strickland v. Melton*, supra, this Court determined that when the record is silent as to whether a defendant was afforded the assistance of counsel in a hearing revoking probation and imposing sentence, that revocation and imposition of sentence are void absent the defendant waiving his right to assistance of counsel. 152 W. Va. at 510, 165 S.E.2d at 96. Later, in *State v. Inscore*, 219 W. Va. 443, 449 634 S.E.2d 389, 395 (2006), this Court found that the speedy trial standards contained within W. Va. Code § 62-3-21 have no application to probation revocation proceedings. In reaching this conclusion, the *Inscore* Court adopted the reasoning of the United States Supreme Court in *Carchman v. Nash*, 473 U.S. 716, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985), citing the following:

A probation-violation charge, which does not accuse an individual with having committed a criminal offense in the sense of initiating a prosecution, thus does not come within the terms of Art. III. Although the probation-violation charge might be based on the commission of a criminal offense, it does not result in the probationer's being "prosecuted" or "brought to trial" for that offense. Indeed, in the context of the Agreement, the probation-violation charge generally will be based on the criminal offense for which the probationer already was tried and convicted

Inscore, 219 W. Va. at 448, 634 S.E.2d at 394. Likewise, a recidivist proceeding is based on criminal offenses for which a defendant has already been tried and convicted, and it does not accuse an individual in the sense of initiating a prosecution for a crime or misdemeanor in which Article III, Section 14 of the W. Va. Constitution denotes. Accordingly, even though other constitutional

dimensions have been attached to recidivist proceedings, it does not follow that the right to a speedy trial should as well.

Even if this Court were to accept application of the three-term rule in determining what constitutes as holding a trial “within a reasonable time” for purposes of a recidivist hearing, the State did not violate that rule in this case. The State in this case filed a timely Information on September 23, 2011. “When counting terms for purposes of the three-term rule, the term in which the defendant is indicted is not counted as one of the three terms.” *State v. Carrico*, 189 W. Va. 40, 44, 427 S.E.2d 474, 478 (1993). Not counting the term in which the Information was filed and the Petitioner arraigned, the Petitioner consented to a continuance to the next term of court during the third term for purposes of the three-term rule on August 27, 2012. The trial was then held, pursuant to the continuance, during the next term of court on January 30, 2013.

The Petitioner argues that he did not in fact consent to a continuance as to the recidivism hearing in Case No. 11-F-171, but only as to Case No. 09-F-197. Whether to grant or deny a continuance is left to the discretion of the judge at trial, and the review of a granting or denying a continuance is under an abuse of discretion standard. *See*, for example, Syl. Pt. 13 of *State v. Elswick*, 225 W. Va. 285, 693 S.E.2d 36, (2010), citing Syl. Pt. 2 of *State v. Bush*, 163 W. Va. 168, 255 S.E.2d 539, “A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.”

The Agreed Upon Order Continuing until the Next Term of Court on August 27, 2012 was signed by the Petitioner’s counsel and the State. Attached to the Order was another document signed by the Petitioner in which he specifically waived his right to have the case tried in the present term

and his right to be present at the hearing on the motion to continue. This document was also signed by Petitioner's counsel and makes no reference to either Case No. 11-F-171 or 09-F-197. Furthermore, Petitioner's counsel had just been substituted as Petitioner's counsel on August 16, 2012 after Petitioner's former counsel was granted a motion to withdraw the same day. The Order stated that the matter should be continued so as to give both the defendant and the State ample time to explore the issues and continue with negotiations. Finally, the Petitioner makes no showing that he was persuaded in his defense of the recidivist proceedings by the continuance. Under these circumstances, the trial judge did not abuse his discretion in granting the order.

E. THE LOWER COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED A CONTINUANCE AFTER THE PETITIONER EXPRESSLY WAIVED HIS RIGHTS TO BE PRESENT AS WELL AS TO HAVE HIS TRIAL DURING THE PRESENT TERM.

Insofar as the Petitioner challenges the granting of the continuance itself, the Respondent incorporates the above argument regarding the lower court's decision to grant the continuance. The Petitioner correctly cites *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975) stating that if the Petitioner demonstrates that he was absent during a critical stage of the trial proceeding, his conviction will be reversed where a possibility of prejudice appears. *Grob* also states that an accused, by declaration and conduct, can waive a fundamental right if it is demonstrated that such waiver was made knowingly and intelligently. *Id.* 158 W. Va. at 658, 214 S.E.2d at 336.

The Petitioner argues that he was denied the right to be present at the proceeding regarding the August 27, 2012 Order. There is no evidence in the record that a hearing took place. Moreover, the Petitioner argues that since no hearing took place, there is no transcript of such proceedings to determine whether the Petitioner's waiver of his speedy trial rights was knowing and intelligent. In effect, the Petitioner argues that the lower court erred because it did not hold a hearing, with the

Petitioner present, before entering the Agreed Order continuing the trial until the next term of court. The Respondent is aware of no such requirement regarding motions to continue. *See United States v. Bowe*, 221 F.3d 1183, 1189 (11th Cir. 2000) (due process does not require a hearing, with the defendant present, before ruling on any motion to continue.)

The record in this case shows the Petitioner in this case knowingly and intelligently waived his rights to a speedy trial as well as his right to be present during the motion to continue. The lower court in this case had before it a signed document from the Petitioner specifically stating that counsel had advised the Petitioner of his right to have his case tried in the present term as well his right to be present at any hearing regarding a motion to continue and the Petitioner expressly waived both rights. The signature of Petitioner's counsel also appears on the Agreed Order to continue. Under these circumstances, the lower court did not abuse its discretion in granting the continuance without a hearing when it had before it Petitioner's counsel and a signed document from the Petitioner waiving both his right to be present and to be tried at the present term of court.

F. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED WHEN THE PETITIONER ADMITTED TO THE PROBATION OFFICER HE HAD BEEN CONVICTED OF THREE PRIOR FELONIES.

The Petitioner utilizes *Maine v. Moulton*, 474 U.S. 159 to argue that the State, by introducing the testimony of a probation officer regarding the Petitioner's statements as to his prior convictions during a pre-sentence investigation for the principal offense, have circumvented his Sixth Amendment right to the assistance of counsel.

The Sixth Amendment right to counsel arises as to the specific offense which is charged. *State v. Williams*, 226 W. Va. 626, 629, 704 S.E.2d 418, 421 (2010). In *Williams*, the defendant had received a sentence of one to three years in the penitentiary, but was later placed on five years probation after successful completion of a youthful offender program. *Id.* 226 W. Va. at 627, 704 S.E.2d at 419. Thereafter a petition to revoke the defendant's probation was filed and after the defendant's arraignment he was released on bond with home confinement. *Id.* While the defendant was reporting to the W. Va. State Police to comply with terms of the West Virginia Sex Offender Act, a trooper questioned him based on suspicions he had received from a probation officer. *Id.* Pursuant to this questioning, the defendant confessed that he had sex with an underage girl. *Id.* The defendant argued that since he was appointed counsel for purposes of probation revocation, the statement should have been suppressed. *Id.* 226 W. Va. at 628, 704 S.E.2d at 420.

In denying the defendant's contention, this Court held that proceedings had not yet been initiated for the specific offense for which the defendant was charged as a result of his confession, and that therefore the right to counsel under the 6th Amendment had not yet attached. *Id.* 226 W. Va. at 630, 704 S.E.2d at 422. The *Williams* Court specifically addressed *Moulton*, *supra*, in its decision correctly citing it as stating Pursuant to the Sixth Amendment right to counsel, "incriminating statements [obtained by police] pertaining to *pending* charges are inadmissible at the trial of those charges" *Id.*, 226 W. Va. at 630, 704 S.E.2d at 422.

The record does not establish that the pre-sentence investigation took place subsequent to the Recidivist Information being filed by the State, and as such the statements pertaining to the Petitioner's prior criminal history cannot be said to have been pertaining to *pending* charges of which the Sixth Amendment right to counsel would have attached. Therefore, the lower court did not err

as the Petitioner's statements made to the probation officer were properly admitted as the charge of recidivism would have still been in the investigative stages.

Alternatively, this error would constitute harmless error as the testimony and documentary evidence admitted through Sgt. Pigott was sufficient to convict the Petitioner under the recidivism statute.

G. THE PETITIONER HAS FAILED TO CARRY HIS HEAVY BURDEN TO SHOW PLAIN ERROR AS TO THE ADMISSION OF STATE EXHIBITS ONE, SIX, AND SEVEN.

The Petitioner argues that State's Exhibits 1 (or at least a portion thereof), State's Exhibit 6, State's Exhibit 7, and information obtained by the Petitioner's probation officer, are all inadmissible and require reversal of the sentence. This is in error.

As to State's Exhibits 1 and 6, when the State offered Exhibit 1 into evidence, the Petitioner's trial counsel affirmatively said he had "No. Objection." (Trial Tr.. at 44.) When the State offered Exhibit 6 into evidence, the court asked the Petitioner's trial counsel was "there any objection," to which the Petitioner's counsel answered, "No, sir." (*Id.* at 56.) These affirmative statements constitute waiver, not just forfeiture and doom the Petitioner's claims.

In applying plain error, the courts draw a distinction between waiver and forfeiture. Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.

Syl. Pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Where a party affirmatively replies he has no objection, he cannot invoke plain error since the affirmative statement "No, objection" or the like constitutes a waiver, pure and simple. *See, e.g., State v. White*, 744 S.E.2d 668,

678 (W. Va. 2013) (per curiam); *State v. Davis*, 204 W. Va. 223, 227, 511 S.E.2d 848, 852 (1998) (per curiam). See also *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. 2009) (citation omitted) (“Plain error review does not apply when ‘a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce’ or for a trial strategy reason.”). The Petitioner has waived objection to State’s Exhibits 1 and 6.

State’s Exhibit 7 was a photographic and conduct record, (App. at 56), two sets of fingerprints, (*id.* at 57-58), a commitment order in case 91-F-162 (Marion County), (*id.* at 59), a sentencing order in case # 91-F-161-M (Marion County), (*id.* at 60-62), a sentencing order in case # 91-F-161-M (Marion County), (*id.* at 63-65), and commitment orders in case # 91-F-162 (Marion County), (*id.* at 66-67), and a commitment order in case # 90-F-102. (*Id.* at 68.) These materials fall well within the public records exception to West Virginia Rule of Evidence 803(8)(B), which provides that evidence is not rendered inadmissible by the hearsay rule where the evidence is a public record or report, that is “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel[.]”

As to the commitment and sentencing orders, the Division of Corrections must have these documents in order to accept the inmate. W. Va. Code § 62-7-10. As to the fingerprinting and photography, these are steps that are routinely undertaken when a person is booked into a facility. “[F]ingerprinting and photographing a suspect, and cataloguing a judgment and sentence are the types of routine and unambiguous matters to which the public records hearsay exception in Rule 803(8)(B) is designed to apply.” *United States v. Weiland*, 420 F.3d 1062, 1075 (9th Cir. 2005).

Hence, “the relevant contents of the ‘penitentiary packet,’ including [the commitment and sentencing documents] the fingerprints, and the photograph, were properly admitted pursuant to the public records hearsay exception in Rule 803(8).” *Id.* See also *People v. Gregg*, 298 P.3d 983, 990 (Colo. Ct. App. 2011) (citing *United States v. Vidaure*, 861 F.2d 1337, 1341 (5th Cir.1988) (“‘penitentiary packet’ indicating prior conviction admissible under public records exception[.]”). As to the probation officer, she testified she collected information contained in an Interstate Identification Index in order to complete her presentence investigation. (Trial Tr. at 67.) The so called “Triple I,” would also fall within the public records rule. There is no requirement of a live witness to establish admissibility under Rule 803(8)(B). Had this Court wanted to impose such a requirement it could have, as it did under Rule 803(6). Finally, the Petitioner has not shown that any of the information that was not objected to is inaccurate or erroneous and therefore cannot carry his burden to show prejudice. See *United States v. Rodriguez-Adorno*, 695 F.3d 32, 39 (1st Cir. 2012) (“Since he did not raise objections to any of this testimony at trial, we review only for plain error and appellant bears the burden of establishing prejudice.”).

The sentence should be affirmed.

H. THE PETITIONER CANNOT COMPLAIN ABOUT OFF THE RECORD BENCH CONFERENCES BECAUSE HE HAS FAILED TO SHOW THAT THEY PREJUDICED HIS APPEAL.

At pages 21, 73, 74, and 80 the court went “off the record” for discussions. The transcript reflects that the Petitioner was present during the off the record conferences at pages 21, 74, and 80. “Under the provisions of W. Va. Code, 51-7-1 and -2, all proceedings in the criminal trial are required to be reported; however, the failure to report all of the proceedings may not in all instances constitute reversible error.” *State v. Brown*, 210 W. Va. 14, 25, 552 S.E.2d 390, 401 (2001)

(quoting Syl. Pt. 5, *State v. Bolling*, 162 W. Va. 103, 246 S.E.2d 631 (1978)). “Whether failure to report constitutes reversible error or not cannot be determined by a mechanistic rule, but must depend on the facts of each case.” *Id.*, 552 S.E.2d at 401 (quoting *State v. Messinger*, 163 W. Va. 447, 453, 256 S.E.2d 587, 590 (1979)). “Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant’s appeal.” Syl. Pt. 8, *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000).

Here, the Petitioner does not show how any of the bench conferences prejudiced his appeal. The only apparent ground the Petitioner raises is that a juror was removed from the panel. (Pet’r’s Br. at 36.) This juror was replaced by an alternate. (Trial Tr. at 74.) Since, as the Petitioner concedes, the record does not show that trial counsel objected, (Pet’r’s Br. at 36), the Petitioner has waived any argument here related to the replacement of the original juror with an alternate. Indeed, the alternate juror must have had the same qualifications as the original juror. W. Va. R. Crim. P. 24(c). As such, he has failed to show how the unrecorded bench conferences prejudiced his appeal since he was tried by an unbiased jury.

To the extent the Petitioner contends that he was not present during the conference at page 73, a criminal defendant has the “right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence.” *Faretta v. California*, 422 U.S. 806, 816 (1975). Where fundamental fairness is not thwarted by absence, there is ground for reversal. And in *Snyder v. Massachusetts*, 291 U.S. 97, the Supreme Court cautioned that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. *Id.* at 115. Here, the Petitioner was aware he had a right to be present at any bench conference (he had already been present at one in this trial before) and counsel never objected to the Petitioner’s absence from the bench conference at page 73.

The sentence should be affirmed.

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE PREMATURE AT THE DIRECT APPEAL STAGE.

The Petitioner raises a number of alleged grounds of ineffective assistance of counsel. These claims are, at best, premature.

“[I]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal.” *State v. Triplett*, 187 W. Va. 760, 771, 421 S.E.2d 511, 522 (1992). “In cases involving ineffective assistance on direct appeals, intelligent review is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior.” *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995). “To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.” *Id.* at 14-15, 459 S.E.2d at 125-26. “It is apparent that we intelligently cannot determine the merits of this ineffective assistance claim without an adequate record giving trial counsel the courtesy of being able to explain his trial actions.” *Id.* at 17, 459 S.E.2d at 128. “When the critical component of a fully developed record is missing, an ineffective assistance claim is all but guaranteed to be denied[.]” *State v. Frye*, 221 W. Va. 154, 158, 650 S.E.2d 574, 578 (2006) (per curiam).¹

¹Such a “decision does not foreclose further development of the ineffectiveness of counsel issue on a post-conviction collateral attack, if that procedure is available to the defendant” nor would such a course reflect any judgment as to the merits of such a claim. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

J. THE LIFE SENTENCE IMPOSED ON THE PETITIONER IS NOT SO DISPROPORTIONATE AS TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

“The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5 [of the West Virginia Constitution], will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute’ Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).” Syllabus Point 2, *State v. Housden*, 184 W. Va. 171, 399 S.E.2d 882 (1990).

State v. Wyne, 194 W. Va. 315, 318, 460 S.E.2d 450, 453 (1995). The Petitioner in this case had been convicted of extortion in 1990, two counts of unlawful wounding in 1991, and sexual abuse in the first degree in 2008. The Petitioner correctly cites that this Court has previously held that remoteness of prior convictions is not to be considered in this determination, but invites the Court to do so anyway. In *State v. Jones*, 187 W. Va. 600, 604, 420 S.E.2d 736, 740 (1992), this Court stated that “[c]ommon sense would dictate that the age of a prior conviction should have little bearing in a recidivist proceeding, when the underlying purpose of the statute is considered.” Indeed the gravamen of the proportionality test as cited above is to give emphasis to the nature of the final offense triggering the recidivist sentence and to also consider whether the other underlying convictions involved actual or threatened violence.

Although the record does not reflect the factual predicates upon which the Petitioner was convicted, the crimes of unlawful wounding and sexual abuse in the first degree necessarily involve actual or threatened violence in order to have been committed. In order to commit unlawful wounding one had to unlawfully, but not maliciously, shoot, stab, cut, or wound any person. W. Va. Code § 61-2-

9. Moreover, giving emphasis to the nature of the final triggering offense, sexual abuse in the first degree must involve either subjecting another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or subjecting a physically helpless person to sexual contact; or subjecting a child who is younger than twelve years old to sexual contact.

Given the Petitioner's criminal history, a life recidivist sentence imposed on the Petitioner is not so disproportionate as to constitute cruel and unusual punishment.

V.

CONCLUSION

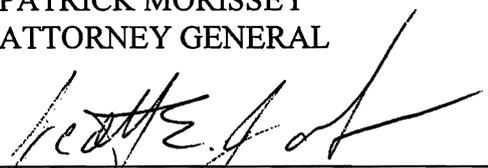
The circuit court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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By Counsel,

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²This Brief was prepared with the assistance of Derek Knopp, an employee of the Attorney General, who will be licensed to practice law as a member of the bar of this court this month.

CERTIFICATE OF SERVICE

I, SCOTT E. JOHNSON, Senior Assistant Attorney General, counsel for the respondent do hereby verify that I have served a true copy of the ***BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF*** upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 3rd day of October, 2013, addressed as follows:

Eric Powell, Esquire
500 Green Street
Parkersburg, WV 26101



SCOTT E. JOHNSON