

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



STATE OF WEST VIRGINIA

Respondent,

v.

NO: 19-0109

JOSHUA DWAYNE PLANTE

Petitioner

LEGAL MEMORANDUM IN SUPPORT
OF PETITION FOR APPEAL

A Courtenay Craig (#8530)
CRAIG LAW OFFICE
337 Fifth Avenue
Huntington, WV 25701
(304) 697-4422--Telephone
(304) 699-0016

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JURISDICTION

West Virginia Code §58-5-1. When appeal lies.

A party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties. The defendant in a criminal action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court in which there has been a conviction or which affirms a conviction obtained in an inferior court.

STANDARD OF REVIEW

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syllabus Point 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

STATEMENT OF THE CASE AND FACTS

Joshua Plant was arrested on June 20, 2016 when police observed him leaving the residence of a former girlfriend. He had been the subject of an unrelated murder investigation and police had applied for a warrant at that time. Mr. Plant was arrested without incident in that he did not flee, resist, or otherwise obstruct justice (Tr. Vol. I, Pg. 90). There was no drug contraband found at the residence where he was arrested at 4th Street West and Seventh Avenue. (Tr. Vol. I, Pg. 101) At the time he was arrested, he was found in possession of approximately \$100 and 2.89 grams of heroin. (Tr. Vol. I, Pg. 99) Based on that possession, law enforcement applied for and received a search warrant for 325 Olive Street, Huntington, WV (Tr. Vol. I, Pg. 123), Mr. Plante’s address registered with federal probation (Tr. Vol. I, Pg. 133). At the residence, authorities found a small amount of heroin in two small bags (.244 grams) and (.274 grams) (Tr. Vol. I Pg. 212), digital scales (Tr. Vol. I, Pg. 144) and approximately \$320 in cash (Tr. Vol. I, Pg. 96-97) various places in the residence. Most contraband items were located in a

female's room (Tr. Vol. I, Pg. 115). Mr. Plante's sister, Shaina, was the lessee, but Mr. Plante stipulated this was his legal address as well. (Tr. Vol. I, Pg. 84-85).

Evidence shows two of three bedrooms in the residence were undecorated and contained unpacked boxes (Tr. Vol. I Pg. 188 and Vol. II, Pg. 248-249). In some of the boxes, fire arms were located. Mr. Plante was not charged with those firearms and no forensic evidence suggested a link between Mr. Plante and the firearms (Tr. Vol. I, Pg. 201-202). Mr. Plante was not forensically linked to any evidence collected (Id.). His parole paperwork was retrieved, but no other evidence linked him to the contraband recovered.

Mr. Plante was not charged with possession of any kind on June 20, 2016. He was later charged with "joint possession" of heroin with his sister in Count II of Cabell County Indictment 17-F-14 (See Indictment, App. Pg. 4). Count I constituted the murder charge (Id.). Mr. Plante moved for, and received, a severance regarding the two charges as there was no evidence suggesting a connection between the two and admission of unrelated evidence would clearly prejudice the defendant at trial. His sister was severed from his case as well.

After a brief trial, Mr. Plante was convicted of "possession with intent to distribute" heroin on or about August 7, 2018. (See Docket. App. Pg. 1-2) The State moved for the life recidivist that same day (See Recidivist Docket. App. Pg. 3 and 5). The parties briefed the matter and orally argued on or about January 2, 2019. (Id.) The lower court imposed the life sentence by order on January 10, 2019. (Id.) The actual sentencing order was entered on January 23, 2019 and amended the next day (See Orders App. Pg. 52-55). Counsel read *State v. Lane* and moved for a Rule 35 hearing on April 4, 2019. (See Motion. App. Pg. 56-57) That motion was denied that same day. It is from the amended sentencing order of May 14, 2019, and the

January 10, 2019 imposition of the recidivist life sentence Mr. Plante is appealing.

SUMMARY of ARGUMENTS

1. The State provided absolutely no evidence Mr. Plante ever physically possessed, or constructively possessed any of the items located at his legal address, but, most importantly, they cannot even put him at the residence at any time when the drugs might have been there. Given that fact, they cannot demonstrate he “exercised dominion and control” required to prove constructive possession beyond a reasonable doubt, therefore, the case was not proven. He was not charged with possession of the 2.89 grams on his person in the indictment, rather he was indicted for joint possession with his sister of the .498 grams found at their residence at 325 Olive Street. Other than baseless implication, the State never linked the two batches of heroin collected. The heroin found at his arrest on Seventh Avenue was 404(b) evidence.

2. West Virginia has never legislated or enunciated a bright-line rule regarding what offenses require imposition of a life-recidivist sentence. In fact, a majority of the jurisprudence overlooks what is the closest to a bright-line standard regarding the matter: the presence of, threat of, or use of violence. In the most recent decision in *State of West Virginia v. Norwood*, the Court seemed to contradict the previous decision in *State of West Virginia v. Lane* within two months of that ruling. Non-violent heroin offenses were suddenly violent offenses for recidivist purposes when a non-violent opioid offense recidivist sentence was just reversed. in *Lane*, despite two separate deliveries.

A defendant has no reasonable notice as to what constitutes conduct to meet the life-recidivist sentence, other than a third felony triggers the process, as this Court, in its various iterations, has consistently offered different rationales to include non-violent conduct within that

test as evidence of violence, or potential violence. When this Court includes blatantly non-violent conduct as evidence of violence regarding imposition of the life-recidivist sentence, it sets up a defacto “residual clause test” designed to catch all the crimes opinion, or political expediency, may deign worthy of violent status at any given time. What is factually non-violent one moment suddenly constitutes evidence of violence for recidivist purposes the next. The United States Supreme Court has roundly rejected this kind of logic and practice not once, but twice, in the last five years. See *United States v. Johnson* 576 U.S. ___ 2015, authored by Antonin Scalia, and *Sessions v. Demaya* 584 U.S. _____ 2018 directly addressing the issue of what constitutes vague, ambiguous, and arbitrary application of law regarding a determination of a crime of violence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rule 19 applies because errors in settled law and claims of unsustainable exercise of discretion exist when law governing that discretion is settled.

ARGUMENT **POINT ONE**

THERE WAS INSUFFICIENT EVIDENCE TO DEMONSTRATE MR. PLANTE “CONSTRUCTIVELY POSSESSED” THE HEROIN FOUND AT HIS LEGAL RESIDENCE AND, AS SUCH, THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD HIS CONVICTION

STANDARD OF REVIEW

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt

beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.”

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Points 1 and 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor’s coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution’s favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution’s theory of guilt. Syllabus Point 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

ARGUMENT

Neither Mr. Plante nor his sister, Shaina, were found in physical possession of the drugs

charged in Count II of the indictment. Mr. Plante was not home at the time of the search. (See Criminal Complaints. App. Pgs. 6, 9-10) He made no statements against interest. The drugs referenced in a criminal complaint were those found in Ms. Plante's rented home at 325 Olive Street in Huntington, what Mr. Plante listed as his official address with federal probation. Ms. Plante was at the residence when the search warrant was executed but, Mr. Plante was already under arrest on the murder charge. Mr. Plante was never charged with possession in a criminal complaint in this matter. (See Appendix and Transcript et al) He was indicted for possession with his sister in Count II of 17-F-14. What was found at the residence is separate from that found on his person on June 20, 2016 when he was arrested. What was found on his person at the scene of his arrest on Fourth Street West and Seventh Avenue was never charged, whereas the heroin found at 325 Olive Street was charged to Shaina Plante in criminal complaint 16-M06F-00586 (See Complaint, App. Pg. 6), and then both of them in Count II of his indictment. The heroin on Mr. Plante's person at his 4th Street West and Seventh Avenue arrest was 404(b) evidence at trial, not conduct charged in the indictment.

That means the State had to demonstrate Mr. Plante constructively possessed the drugs found at his legal address of 325 Olive Street while he was elsewhere. The standards for establishing "constructive possession" are found in *State v. Dudick* 213 S.E.2d 458 (W.Va 1975) In Syllabus Pt. 3., *Dudick* states: "[i]n West Virginia mere physical presence on premises in which a controlled substance is found does not give rise to a presumption of possession of a controlled substance, but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance." And in Syllabus Pt. 4. It states, "[t]he offense of possession of a controlled substance also includes constructive possession, but the

State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant's dominion and control.” Given those two requirements, the State failed to prove its case beyond a reasonable doubt, even in a light most favorable to it. There is no evidence which establishes knowledge or presence by Mr. Plante, both of which are required to prove constructive possession beyond a reasonable doubt.

There is no evidence Mr. Plante was ever in the residence at the same time the charged heroin was. The only evidence he was in the residence near the time it was discovered was his mother’s testimony he was there the night before for his sister’s birthday. His mother also testified she did not see any contraband while there but, she left early as she had church duties the next day. (Tr. Vol II, Pg. 256-257) There were no other witnesses who testified factually about how or when the heroin arrived at the residence or to whom it might belong. Actually, the only witnesses who testified for the State were police officers who had no advanced knowledge of anything regarding drugs prior to Mr. Plante’s arrest and execution of the search warrants.

The heroin in the residence was found in two tiny baggy corners in the kitchen drawer (.224 of a gram and .274). The drawer in the house was closed (Tr. Vol. I, Pg. 178). Weapons found in the bedrooms were concealed from plain view as well. (Tr. Vol I, Pg. 152) Nothing in or around the house showed Mr. Plante used or was connected to the crime, neither fingerprint evidence nor evidence collected, like cell phones. The two sets of drugs, the two tiny bag corners at the residence and the 2.89 grams on his person, were never tested to show whether or not they came from the same batch of heroin, therefore, it is impossible to suggest possession of one is implied knowledge of another. (Tr. Vol. I, Pg. 212-215) 404(b) specifically prohibits the use of conduct to show Mr. Plante acted in conformity with the charged conduct. There was

nothing to suggest a pattern, motive, or lack of mistake, and no legally required uses by the State were identified. By the State's own admission, there was never any evidence Mr. Plante sold drugs in this matter, was the subject of an on-going investigation, or was the subject of some tip to law enforcement regarding drug sales. (Transcript et al)

Testimony at trial also established there were as many as three other possible suspects responsible for the heroin in the home besides Mr. Plante and his sister. Video surveillance taken from outside the Olive Street residence shows at least two other black males who are not Mr. Plante directly outside the home in the early morning of June 20, 2016, as well as someone driving a pick-up truck. (Tr. Vol. I, Pg. 127) Furthermore, Mr. Plante's mother testified Shaina Plante had a boyfriend who lived with her at the time. (Tr. Vol. II, Pg. 256) If he was not one of the other two males seen, that makes three other possible persons who could have used or possessed those drugs besides Mr. Plante and his sister. Ms. Plante was not found in possession of any drugs so the State also failed to prove knowledge on her part as well. There was no testimony or evidence regarding Ms. Plante's culpability or knowledge. It should also be remembered it was Shaina Plante's birthday the night before and there was a celebration attended by their mother and others after she left.

Given all the previous facts, the State failed to prove Mr. Plante or his sister constructively possessed the heroin at the home beyond a reasonable doubt. He was not there when it was found. He was not implicated in possession by another witness. The State did not even demonstrate he was aware the heroin in the home was there. The State did not demonstrate the two seizures of heroin were connected. Officers did not surveil him from one address to the other. Authorities were just on the general look out for him with a list of various locations he

might be found. It did not demonstrate his presence or his knowledge of the heroin at 325 Olive Street, which are the two key elements. When the State failed to demonstrate those two facts, they could not prove his dominion and control beyond a reasonable doubt because “the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant's dominion and control.” *Id* at Syllabus Pt. 4.

Mr. Plante listed 325 Olive Street as his legal address, but he stayed three other places. (TR. Vol. II, Pg. 251-258) The State failed to establish Mr. Plante ever stayed overnight there much less be present when heroin was there.

The State did nothing to provide evidence of how Mr. Plante and his sister “jointly committed” possession, if neither physically possessed what was found, and the State never provided evidence of knowledge by either party. Merely suggesting drugs were found in a residence both parties listed as a residence, after a birthday party, does not establish constructive possession or the joint commission of any criminal act.

The actual facts of *State v. Dudick* clearly put Metro Dudick in the same apartment with drugs, however, the standard required the State prove he was aware the drugs were there, and that he exercised dominion and control over them. The facts at bar are no different, except Mr. Plante was not physically present contemporaneously with the discovery of the drugs charged whereas Dudick was. Mr. Plante’s sister was physically present but, the State offered no evidence regarding her knowledge of its presence. The jury may not presume facts not in evidence and the State did not demonstrate “knowledge or dominion and control” by either party, beyond a reasonable doubt as required under *Dudick*. Therefore, this Court must overturn the verdict below.

ARGUMENT
POINT TWO.

THE COURT ERRED WHEN IT IMPOSED THE LIFE-RECIDIVIST SENTENCE BECAUSE IT IS CONSTITUTIONALLY DISPROPORTIONATE TO MR. PLANTE'S CONDUCT WHEN MR. PLANTE HAS NEVER COMMITTED A CRIME OF VIOLENCE, AND THE PRESENT TEST EMPLOYED BY THIS COURT IS ARBITRARY AS WELL AS VAGUE AN AMBIGUOUS

STANDARD OF REVIEW

Sentencing orders are reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. Syllabus Point 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)." Syllabus Point 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011); Syllabus Point 1, *State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867 (2017).

ARGUMENT

West Virginia Code § 61-11-18(c) authorizes the imposition of a life sentence "[w]hen it is determined . . . that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary" However, the West Virginia Supreme Court of Appeals has long recognized that a life sentence imposed under this statute is appropriate only when it does not run afoul of the constitutional proportionality principle. Mr. Plante has three convictions but none of the behavior he engaged in in any of those three warrants a life-recidivist sentence and the sentence is, therefore, unconstitutional on proportionality grounds, despite this Court's most recent ruling in *Norwood*.

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has

an express statement of the proportionality principle. 'Penalties shall be proportioned to the character and degree of the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).Syl. Pt. 1, *State v. Housden*, 184 W. Va. 171, 399 S.E.2d 882 (1990).

This Court has also explained that there are "specific guidelines for analyzing a life recidivist sentence under the proportionality doctrine. . . . [S]uch a punishment 'must be viewed from two distinct vantage points: first, the nature of the third offense and, second, the nature of the other convictions that support the recidivist sentence.'" Id. at 174, 399 S.E.2d at 885 (quoting *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 533-34, 276 S.E.2d 205, 212 (1981)). As we held in syllabus point two of *Housden*, 184 W. Va. at 172, 399 S.E.2d at 883,

"[t]he appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, 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).(Emphasis added).

Every bit of this initial argument was reaffirmed by this Court as recently as last year in *Terry v. Lambert* (W. Va., 2018) and this year in *State v. Lane* (W.Va. 2019).

It is constitutionally disproportionate to impose a life-recidivist in Mr. Plante's case given his specific offense characteristics especially when West Virginia does not define "crimes of violence" and the federal government just legislated reduced sanctions on non-violent drug offenders in the criminal justice reform act predicated, in part, on the notion non-violent offenders are less of a threat to society.

It is even more unfair given the ruling in *Norwood* which completely ignores the fact that

a majority of the deaths and violence in the State of West Virginia started with pharmaceutical companies over-supplying our communities with pills, 97 oxycontin pills per person, over a five-year period, in Cabell County alone. That conduct is likely overlooked because it is corporate and does not come with the “street” stigma that accompanies heroin. However, one could use the logic in *Norwood* to demonstrate those same pharmaceutical sales were the direct source of the deaths and crimes of violence in our State associated with the opioid epidemic. Even further, one could suggest the criminality and overdoses were readily foreseeable when those companies intentionally over-supplied those communities. Once prescriptions, necessary and unnecessary, ran out, pills were too expensive, unavailable, or phased out, and the free black market provided heroin as an alternative. But for the greed of those pharmaceutical companies, and their lobbyist enablers, some of whom allege to protect this State right now, 90% of the crimes and deaths would not have occurred here. Yet, here we are ignoring that fact because it doesn’t suit a narrative that heroin does. That kind of logic, fortunately, is arbitrary and vague and shown as such in both *United States v. Johnson* 576 U.S. ____ (2015) and *Sessions v. Dimaya* 584 U.S. ____ (2018).

In both *Johnson* and *Dimaya*, the Court reviewed a statute defining “crime of violence.” In *Johnson*, the Court reviewed the Armed Career Criminal Act’s definition of “crime of violence, and upheld it, but struck down the residual clause which spoke about potential risk of injury. 18 U.S.C. § 924(e)(2)(B) defined a “violent felony” as an act that threatens “use of physical force against the person of another,” “is burglary, arson, or extortion,” “involves use of explosives,” or “otherwise involves conduct that presents a serious potential risk of physical injury to another.” The last part of this definition became known as the “residual clause” and the

Court found it unconstitutionally vague and arbitrary.

The Supreme Court reversed and remanded Johnson for further proceedings. *Johnson*, 135 S. Ct. at 2563. Writing for the Court, Justice Scalia declared that ACCA's residual clause violated the Due Process Clause of the Fifth Amendment because it was void for vagueness. *See id.* at 2556–67. *Justice Scalia was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Though the case was decided on the basis of vagueness, this had not been the question originally presented to the Court. The original briefs of both parties, as well as several amici, did not address the question of the clause's unconstitutional vagueness, but focused their discussion entirely on the issue of whether the defendant's predicate crime — possession of a sawed-off shotgun — was a violent felony that merited an ACCA sentencing enhancement. See Brief for Petitioner at i, Johnson, 135 S. Ct. 2551 (No. 13-7120)* The Court's vagueness doctrine, he began, had long stood to protect defendants from any “criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson*, 135 S. Ct. at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

The doctrine's protections extend to criminal sentencing statutes. *United States v. Batchelder*, 442 U. S. 114, 123 (1979). That means the W.Va. recidivist statute and the *Norwood* decision fall squarely within this analysis.

According to Scalia, features of ACCA's residual clause combined to make it the kind of standardless sentencing statute that the vagueness doctrine prohibits. *at* 2557. Both derived from the “categorical approach” to ACCA-enhanced sentencing required under *Taylor v. United States*. 495 U.S. 575 (1990). Courts using the categorical approach may only “assess” whether a

crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. *Johnson*, 135 S. Ct. at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). It forces courts to “picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.” *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). The majority noted that it declined the dissent’s invitation to overturn *Taylor* and reject its categorical approach for several reasons: (1) the Government did not ask the Court to do so, (2) Congress intentionally wrote ACCA to require consideration of prior convictions, not prior conduct, and (3) “requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction” would be “utter[ly] impracticab[le].” *Id.* at 2562. Thus, the first problem, Justice Scalia explained, was that the residual clause “tie[d] the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* at 2557. Without guidance regarding proper “ordinary case” determination, individual judges were left to speculate on what conduct most typically gives rise to a particular conviction. *Id.* at 2557–58.

That is exactly what the *Norwood* decision does. It presumes conduct not supported by the record, and imposes a sentence arbitrarily, because this Court now believes any involvement with heroin automatically implies a risk of violence. A majority of the deaths involved in the heroin epidemic are self-inflicted overdoses not the result of violent conduct. Death and violence are not always synonymous, even when drugs are involved. Counsel is unaware of any analysis demonstrating heroin dealers are disproportionately more violent than other drug dealers or drug users. One can overdose and die from oxycodone, an opioid like heroin, and

certain individuals dealing oxycodone pills can be violent.

In Sessions v. Dimaya, another residual clause issue regarding crime of violence, the United States Supreme Court found the phrase “substantial risk of physical force” unconstitutionally vague and the indeterminacy about how to measure the risk posed by the crime and the indeterminacy of how much risk for the crime to qualify as a violent felony resulted in “more unpredictability and arbitrariness than the Due Process Clause tolerates.” Again, the language of the statutes and the logic employed by the federal courts with regards to what constituted a “crime of violence” under the residual clause of both the ACCA and immigration statutes are exactly what the *Norwood* opinion does, only without an actual residual clause, and it is unconstitutional. This Court modified the standard enunciated in *Lane* and presumed the possession with intent to deliver heroin a violent crime despite the lack of violence factually in this case, and a lack of evidentiary basis heroin dealing is any more violent than any other type of drug dealing. Defendants cannot rely on the changing decisions from this Court for notice. *Lane* possessed drugs as well, yet his life-recidivist sentence was overturned because it was only four oxycodone pills. There were, however, two deliveries in *Lane*. There is no proof of delivery in this case.

Dimaya cited the exact same rationale as found in United States v. Johnson 576 U.S. ___ 135 S. Ct. 2551; 192 L. Ed. 2d 569. The Immigration and Nationality Act’s “crime of violence” provision was unconstitutionally vague, in violation of the Due Process Clause of the Fifth Amendment. Justice Elena Kagan delivered the 5-4 opinion as to parts. To determine whether a person’s conduct falls within a “crime of violence” under Section 16(b), courts

consider the overall nature of the offense, particularly “whether ‘the ordinary case’ of an offense poses the requisite risk.” The Court found that the term “ordinary case” under the “crime of violence” was too vague in that it risked unpredictable and arbitrary interpretation.

In *Johnson*, 18 U.S.C. § 924(e)(2)(B) defined a "violent felony" as an act that threatens "use of physical force against the person of another," "is burglary, arson, or extortion," "involves use of explosives," or "otherwise involves conduct that presents a serious potential risk of physical injury to another." Again, that standard found in the residual clause, all language after the “or,” was insufficiently precise according to Scalia. That language embodies the “implied violence test” used in *Norwood* and other cases justifying a determination of violence for non-violent offense behavior.

If Mr. Plante’s conduct fails to demonstrate actual violence under West Virginia law, the Court’s test in *Norwood* is too vague and arbitrary. Furthermore, West Virginia often provides its citizens more protection than federal standards. "The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syllabus Point 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979)." Syl. pt. 1, *State v. Bonham*, 173 W. Va. 416, 317 S.E.2d 501 (1984). A fifteen-year sentencing enhancement should be one of those instances as it is the largest sentencing enhancement, as large as the minimum parole eligibility for first-degree murder.

This is clearly a case where this State is giving less protection than required by the United States Constitution, which is reversible error. *Johnson* and *Dimaya* clearly establish, without a precise definition of a crime of violence, any subsequent attempt to make “violent” crimes which are not inherently so, or factually contain actual violence, merely because they

show a perceived potential for violence is vague, ambiguous, and arbitrarily enforced. Mr. Plante's conduct does not warrant a life-recidivist sentence.

MR. PLANTE'S SPECIFIC CONVICTIONS

The crux of the State of West Virginia's argument for the imposition of the life recidivist to Mr. Plante lies entirely within determinations made according this Court in previous decisions. There is no West Virginia Code definition of crime of violence and this Court wants to employ an unconstitutionally vague and arbitrary standard to impose one when it deems fit.

The State wants this Court to infer, in direct contravention to the evidence in his cases, Mr. Plante's previous crimes constituted substantial risk of physical force to person or property. Subsection (b) of 18 U.S.C. §16 was struck down for being too vague and arbitrary, as was the residual clause for the ACCA, therefore, those arguments cannot apply here. That means the only spot of logical retreat is the test found in State v Beck *supra*. There are no crimes in Mr. Plante's criminal history which have as "an element the use, attempted use, or threatened use of physical force against the person or property of another," or which include threats of violence, or actual violence. Therefore, Mr. Plante does not qualify for the life-recidivist sentence under West Virginia proportionality standards.

CONVICTION #3

Mr. Plante's most recent conviction in 17-F-14 in Cabell County Circuit Court was for "possession with intent to deliver heroin. This is the triggering offense. It is not a crime of violence under any definition, except that announced most recently in *State v. Norwood*. Less than two grams of heroin were found at his "official residence" he shared with his sister. He was not at the residence when the drugs were found. Only one of the contraband items were found in

the living room, all other items were found in his sister's room, another unoccupied bedroom, and a kitchen drawer. Mr. Plante's mother testified Mr. Plante was living three different places at the time. There was no violence or potential violence involved in the arrest or crime for which he was convicted. Mr. Plante did not threaten anyone, did not physically assault anyone, and was not found in possession of a weapon, nor was he charged with possession of a weapon.

CONVICTION #2

Mr. Plante's second conviction in 3:11-cr-00059, in the United States District Court for Southern District of West Virginia, was for a violation of 26 U.S.C. §§ 5841, 5861(d) and 5871, Possession of a Firearm not Registered to Defendant in the National Firearm Registration and Transfer Record. Mr. Plante was accused of selling unloaded firearms in the "Smokin Aces" federal investigation. Mr. Plante admitted selling a .22 pistol, a .22 rifle, a 9 mm pistol, and a modified shotgun. No violence threats of violence, or potential violence were ever alluded to in the narrative of that case and would have been mentioned because the case involved undercover federal agents. The only time Mr. Plante was accused of possessing the firearms was transporting them to the sales. The State relies on dicta in non-binding federal cases to suggest Mr. Plante was involved in inherently dangerous conduct by merely selling the firearms. Not only is this position not supported by the facts in Mr. Plante's case, except perhaps his conviction being a prohibition against possession, it isn't supported by the United States Constitution. If these weapons are legal to sell to the general public under the Constitution and laws of the land, nothing makes them anymore destructive or dangerous when Mr. Plante sells them unloaded to federal agents, particularly with no link to previous or subsequent violence. None of these firearms were military weapons and the State's assertion anyone who possesses

firearms is an inherent threat to public safety is going to come as news to law enforcement, legal owners, and licensed firearm distributors. It is also in direct contravention to the decision in *Johnson* where the Court found mere possession of a sawed-off shotgun insufficient to merit a “crime of violence.”

CONVICTION #1

Mr. Plante’s first conviction in 3:11-cr-00077 was for possession with intent to deliver 7.97 grams of cocaine base. The exact narrative of his behavior in that case from the Federal PSR states as follows: “[o]n October 15, 2008, officers from the Huntington, West Virginia, Police Department were conducting surveillance at Sunoco station in the 1900 block of Ninth Avenue, an area known as a high drug trafficking area. During the surveillance, of the officers observed the defendant, Joshua Dwayne Plante, approach another individual and conduct what was believed to be a drug transaction. Another officer began approaching the defendant, and he dropped two baggies of marijuana. The defendant was placed under arrest for possession of marijuana. In a search incident to arrest, the defendant was found in possession of suspected cocaine base, which field tested positive.” No violence, threats of violence, or potential violence were ever suggested. Mr. Plante didn’t even run.

SPECIFIC OFFENSE CHARACTERISTICS

On the date of his first arrest, Mr. Plante was barely 18 years old. He was sentenced to 18 months in prison, before the disparity between powder and crack cocaine had been properly addressed. He neither fled nor possessed a weapon.

Mr. Plante’s second arrest conduct came when he was 20 years old in 2010. Mr. Plante was arrested and tried in 2011, but he wasn’t even old enough drink alcohol legally when he

sold the weapons. He also received an enhanced sentence on this charge because one of the weapons had an obliterated serial number.

Mr. Plante's final arrest came at 27 years old. Mr. Plante possessed the heroin he had because he had become addicted to narcotics while incarcerated. He possessed it for personal use. While the jury found him guilty of possession with intent to deliver, Mr. Plante had no weapons, no scales and very little money on his person when arrested. There was no testimony of any wired buys, related transactions, or conspiracy. While weapons were found in searches related to this case, one weapon found was inoperable and never tested, one weapon was not Mr. Plante's according to witness Chandra Harmon, and one weapon was found in a room belonging to Mr. Plante's sister. Simply put, there are no connections between Mr. Plante's convictions and violence or threatened violence, physical or otherwise.

The total amount of drugs Mr. Plante was convicted of possessing in the two drug cases was less than 10 grams. With the case facts, particularly his young age, and those drug amounts, a life recidivist sentence is disproportionate to his offense conduct.

IMPROPER ASSERTIONS BY THE STATE

In original arguments before the Court, the State attempted to suggest Mr. Plante protected his drugs with weapons. This is unsupported by the facts of the individual cases and the State's own actions. Mr. Plante was never found in possession of weapons and drugs simultaneously or charged as such. He was neither charged with use of a weapon during the commission of a felony by the federal authorities nor "possession of a firearm by a prohibited person" by State authorities. The State is barred by Rule 8(a)(2) of the West Virginia Rules of Criminal Procedure from ever trying Mr. Plante with any of the guns found in 17-F-14 because

the State did not try him on those possible charges when it knew or should have known they were part of the same criminal transaction as they attempted to allege here ex post facto. Rule 8(a)(2) states in pertinent part: *Mandatory joinder*. —

“If two or more offenses are known or should have been known by the exercise of due diligence to the attorney for the state at the time of the commencement of the prosecution and were committed within the same county having jurisdiction and venue of the offenses, all such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution if they are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, whether felonies or misdemeanors or both. Any offense required by this rule to be prosecuted by a separate count in a single prosecution cannot be subsequently prosecuted unless waived by the defendant.”

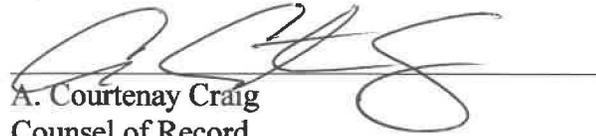
It cannot be relevant conduct as the State does not have any relevant conduct provisions and the State barred the consideration of that evidence by failing to charge Mr. Plante with the guns, much less try him.

The State has also twice alluded to the fact Mr. Plante has been charged with murder.” At this time, that is only a charge and not a proper consideration on whether to impose a life-recidivist sentence in regards to previous convictions at this time. The State chose to try the drug charge first. Had it wanted the benefit of the murder conviction for consideration, it should have tried that case first and obtained a conviction.

CONCLUSION

WHEREFORE, the appellant, Joshua Dwayne Plante respectfully requests the Court grant his Petition for Appeal, reverse the lower Court’s ruling for remand and dismiss for failure to prove all the essential elements at trial.

Respectfully Submitted and Approved,
JOSHUA DWAYNE PLANTE
By Counsel

A handwritten signature in black ink, appearing to read 'A. Courtenay Craig', is written over a horizontal line.

A. Courtenay Craig
Counsel of Record
337 Fifth Avenue
Huntington, WV 25701
(304) 697-4422--Telephone
(304) 699-0016—Facsimile