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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0109

STATE OF WEST VIRGINIA,

*Plaintiff below,
Respondent,*

v.

JOSHUA DWAYNE PLANTE,

*Defendant below,
Petitioner,*

RESPONDENT'S BRIEF

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ASSIGNMENT OF ERROR

1. 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.
2. 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 AND AMBIGUOUS.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner was indicted for Murder (Count I) and Possession with Intent to Deliver a Controlled Substance (Count II). A.R. 4. The circuit court severed the two counts and tried the Petitioner on the Possession with Intent to Distribute count first. *See* A.R. 35 & n.1. The jury convicted the Petitioner of Possession with Intent to Distribute. Aug. 7, 2018 Tr. at 319.

The State filed a Recidivist Information. A.R. 5. The Petitioner admitted he had previously been convicted of three felony offenses (the triggering offense and the two predicate offenses as charged in the Recidivist Information). Jan. 8, 2019 Tr. at 7-8. The Petitioner, however, contended imposition of a life sentence as a Recidivist was unconstitutional. A.R. 43. The circuit court entered an order on January 11, 2019, finding imposition of a life sentence was permissible and imposing a life sentence.¹

¹The Petitioner did not include a copy of the circuit court’s January 11, 2019 Order in the Appendix Record. However, a copy of the January 11, 2019 Order is included as an attachment to the Notice of Appeal.

B. The Trial

Prior to the first State witness testifying, the circuit court read stipulations to the jury that had been agreed to by both the State and the Petitioner: (1) the exhibits of physical evidence to be introduced including but not limited to the drugs, guns, ammunition and digital scales, were admissible without the State establishing a chain of custody; (2) the Petitioner was lawfully arrested by the Huntington Police Department on an unrelated matter and was lawfully searched incident to this arrest; (3) the Petitioner resided at 322² Olive Street, Huntington, Cabell County, West Virginia, at the time of his arrest;³ (4) the Petitioner's residence at 325 Olive Street, Huntington, West Virginia, was lawfully searched and the items therein were lawfully seized by the Huntington Police Department. Aug. 6, 2018 Tr. at 81.

The State called Huntington Police Department Detective Stephen Maniskas. Aug. 6, 2018 Tr. at 87. Detective Maniskas was assigned to the Department's drug unit as well as the Huntington FBI violent crimes and drug task force. Aug. 6, 2018 Tr. at 87. On June 19, 2016, Detective Maniskas was contacted by Detective Dishman who gave him an address and asked him to go to that address to be on the lookout for the Petitioner. Aug. 6, 2018 Tr. at 88. Detective Maniskas and other Detectives set up surveillance in the 400 block of West 7th Avenue in Huntington. Aug. 6, 2018 Tr. at 88. Detective Maniskas was driving a van accompanied by two or three other officers. Aug. 6, 2018 Tr. at 89. The officers observed the Petitioner leaving 417 West 7th Avenue. Aug. 6, 2018 Tr. at 89, 98. Detective Maniskas pulled out of where he was parked and boxed the Petitioner in as the Petitioner was trying to enter an automobile. Aug. 6, 2018 Tr. at 89. Once the Petitioner

²While the circuit court originally stated 322 Olive Street, it was actually 325 Olive Street. *See, e.g.*, Aug. 6, 2018 Tr. at 94.

³Although the State would not usually employ an address, it does so here pursuant to West Virginia Rule of Appellate Procedure 40(e)(2) ("Personal identifiers such as . . . address may be used only when absolutely necessary to the disposition of the case.").

was arrested, the officers searched him and discovered United States currency, 3 grams of heroin, and a cigar box, as well as several other items. Aug. 6, 2018 Tr. at 90, 91.

Detective Maniskas testified that 3 grams of heroin is not consistent with personal use. Aug. 6, 2018 Tr. at 91. According to Detective Maniskas, a typical dosage unit for heroin is a tenth or two-tenths of a gram. Aug. 6, 2018 Tr. at 91. Thus, the 3 grams of heroin found on the Petitioner represented about thirty doses. Aug. 6, 2018 Tr. at 91-92. Moreover, the Petitioner had no other items on his person indicating personal use such as needles, spoons, or tie off material. Aug. 6, 2018 Tr. at 92. Nor was there anything found on the Petitioner's person indicating he was snorting heroin. Aug. 6, 2018 Tr. at 92. Detective Maniskas testified that the Petitioner did not have the appearance of a heroin addict. Aug. 6, 2018 Tr. at 118.

The police subsequently executed a search warrant on 325 Olive Street, Huntington, West Virginia. Aug. 6, Tr. at 137.⁴ Detective Maniskas reviewed the property receipt for 325 Olive Street, where the Petitioner resided at the time of his arrest, Aug. 6, 2018 Tr. at 97, which showed there were digital scales, multiple cell phones, a baggy containing heroin, a baggy containing cocaine base, other sandwich baggies, and multiple firearms, including pistols and rifles with live ammunition, and \$320 in United States currency at that location. Aug. 6, 2018 Tr. at 94-97. Detective Maniskas testified that the digital scales were found in the living room, along with two cell phones. Aug. 6, 2018 Tr. at 102. A third cell phone was found on the porch. Aug. 6, 2018 Tr. at 103-104. Miscellaneous paperwork was located in the living room. Aug. 6, 2018 at 104. Heroin was located in the kitchen. Aug. 6, 2018 Tr. at 104-105. Found in bedroom 3 of the residence at 325 Olive Street were a Glock pistol, an AK-47 assault rifle, and cocaine. Aug. 6, 2018 Tr. at 106-

⁴The police also executed a search warrant on 417 7th Avenue, but apparently found no contraband at that location. Aug. 6, 2018 Tr. at 101.

106. Detective Maniskas explained that the presence of digital scales, plastic baggies, U.S. currency, firearms, and multiple cell phones are indicative of an intent to deliver. Aug. 6, 2018 Tr. at 92.

The State specifically asked Detective Maniskas, “[i]n your experience as investigating drug cases, with those amount of items in your house, no indicia of personal use on you and the amount of drugs he had on him, does that lend itself more to personal use or intent to deliver?” Aug. 6, 2018 Tr. at 97-98. Detective Maniskas answered, “[i]ntent to deliver, sir.” Aug. 6, 2018 Tr. at 98. The State also asked Detective Maniskas, “[w]hen you search the home of a suspected drug dealer, do they respect bedroom boundaries? Is the drug dealer’s bedroom the only place where indicia of drug use is?” Aug. 6, 2018 Tr. at 112. Detective Maniskas answered “[n]ot typically, no, sir.” Aug. 6, 2018 Tr. at 112.

The State next called Huntington Police Detective Dakota Dishman. Aug. 6, 2018 Tr. at 121. On June 19, 2016, Detective Dishman was investigating the Petitioner for a crime unrelated to the drug charge. Aug. 6, 2018 Tr. at 121. Detective Dishman had requested the assistance of fellow officers to stake out locations where the Petitioner might be located while Detective Dishman was obtaining arrest and search warrants for the Petitioner. Aug. 6, 2018 Tr. at 122. While preparing the warrant applications, Detective Dishman received word the Petitioner had been arrested. Aug. 6, 2018 Tr. at 122. Detective Dishman was made aware the Petitioner had heroin on his person when he was arrested. Aug. 6, 2018 Tr. at 122. Detective Dishman received the heroin on the Petitioner’s person and turned it into the evidence room. Aug. 6, 2018 Tr. at 122. Detective Dishman’s search warrant for the Petitioner’s residence at 325 Olive Street included looking for items related to possession with intent to deliver. Aug. 6, 2018 Tr. at 123. Detective Dishman explained that the search warrant would cover items such as drugs, scales, ledgers, guns, cell

phone, plastic baggies, and currency. Aug. 6, 2018 Tr. at 124. Detective Dishman testified that there was no evidence that the heroin seized from the Petitioner at the time of his arrest was the same as found at 325 Olive Street. Aug. 6, 2018 Tr. at 129.⁵

Next testifying for the State was Huntington Police Lieutenant David Castle, Aug. 6, 2018 Tr. at 136, the Department's forensic investigations unit supervisor. Aug. 6, 2018 Tr. at 137. In this role, Lieutenant Castle and his unit collect and document evidence from major crime scenes in Huntington as well as executing search warrants in that City. Aug. 6, 2018 Tr. at 137.

Lieutenant Castle assisted in the execution of the search warrant on 325 Olive Street. Aug. 6, 2018 Tr. at 137. Lieutenant Castle testified that while executing the warrant, the police seized from 325 Olive Street a digital scale, Aug. 6, 2018 Tr. at 138-139, three cell phones, Aug. 6, 2018 Tr. at 139, miscellaneous papers from the living room floor, Aug. 6, 2018 Tr. at 139, a baggy with heroin located in a kitchen drawer next to some scales and some baggies, Aug. 6, 2018 Tr. at 139-140, 144, a number of firearms, firearm magazines, and ammunition, Aug. 6, 2018 Tr. at 140-141, and a baggy with cocaine base. Aug. 6, 2018 Tr. at 141. The digital scales were located in the living room, and the cell phones were located in the living room or on the porch. Aug. 6, 2018 Tr. at 143. The miscellaneous paperwork was located in the living room. Aug. 6, 2018 Tr. at 143. A number of the firearms were located in bedroom 3. Aug. 6, 2018 Tr. at 105. Lieutenant Castle testified that Bedroom 3 contained primarily female paraphernalia and accouterments. Aug. 6, 2018 Tr. at 179-180.

The Petitioner asked the court for a judgment of acquittal

⁵Blake Kinder, a West Virginia State Police Crime Laboratory technician testified at trial that the West Virginia State Police Crime Laboratory lacked the capacity to determine if two samples of heroin came from the same batch. Aug. 6, 2018 Tr. at 213-214. Mr. Kinder was not sure if this type of testing could be done by any laboratory. Aug. 6, 2018 Tr. at 214-215.

because one of the things the state has to prove is that he had the intent to distribute to somebody else. Not only did they not have any evidence of phone transactions or tracking set up like that, they have no undercover witness to say that my client was selling, they had no drugs seized from any potential buyer from my client.

He had \$100 on him or less than \$100 on him. And the indicia that was found at the house was pretty much what was left in the corners of baggies, which is just as likely a user leaving behind what they have had as it is packaged for sale, because if somebody is selling with those wrapped up packages like that they're not going very far. I really think the point of this is to prove the intent, and we admitted the possession all along. I don't think that they have shown that there was an intent to deliver it to anybody else.

Aug. 7, 2018 Tr. at 232. The State responded, "Your Honor, in accordance with the agreed upon instructions, not only the weight of the drugs as testified by Detective Maniskas but also the other evidence of the scales, the baggies, the guns and the currency all lead to a reasonable inference of intent to deliver." Aug. 7, 2018 Tr. at 232. The circuit court denied the motion, "[f]or the reasons I agree with the state, it's met its burden, at least at this point, to get the matter past the judgment for acquittal, so I will deny your motion." Aug. 7, 2018 Tr. at 232.

In his case in chief, the Petitioner called his mother, Carmon Plante. Aug. 7, 2018 Tr. at 252. The Petitioner listed his sister Shaina's residence at 325 Olive Street as his official residence. Aug. 7, 2018 Tr. at 253-254. He did so because he was on probation. Aug. 7, 2018 at 254. Ms. Plante testified that the Petitioner spent time at her residence. Aug. 7, 2018 Tr. at 252. She also testified that the Petitioner stayed with his sister as well as Chandra Harmon, an ex-girlfriend, Aug. 7, 2018 Tr. at 254, as well as Elizabeth Bolton. Aug. 7, 2018 Tr. at 255; 259. The Petitioner spent the majority of time between Chandra's and Shaina's. Aug. 7, 2018 Tr. at 255.

The Petitioner also called Chandra Harmon. Aug. 7, 2018 Tr. at 264. Ms. Harmon testified that the Petitioner spent most nights at her house. Aug. 7, 2018 Tr. at 264.

The jury convicted the Petitioner of Possession with Intent to Deliver a Controlled Substance. Aug. 7, 2018 Tr. at 319.

C. The Recidivist Information.

Immediately after the jury returned its verdict, the State requested the Recidivist Information be filed. Aug. 7, 2018 Tr. at 321. The Recidivist Information charged the Petitioner with having previously been convicted of (1) the federal felony offense of Possession with Intent to Distribute Cocaine Base and (2) the federal felony offense of Possession of a Firearm not Registered to Defendant in the National Firearms Registration and Transfer Record. A.R. 5.⁶

On December 4, 2018, the Petitioner's counsel admitted to the circuit court the Petitioner had "no good faith reason to suggest that [the Petitioner] is not the person that was previously convicted twice before he was convicted this time." Dec. 4, 2018 Tr. at 2. The Petitioner, however, contended that none of his three convictions (the triggering State felony or the two federal felonies) were crimes of violence so that imposition of a life recidivist sentence would be constitutionally impermissible. Dec. 4, 2018 Tr. at 2-3. The circuit court ordered the parties to brief the issue of the constitutional permissibility of imposing a life recidivist sentence on the Petitioner. Dec. 4, 2018 Tr. at 5.

The State filed its circuit court brief on December 10, 2018. A.R. 35. The Petitioner filed his Memorandum of Law on January 2, 2019. A.R. 43. On January 8, 2019, the circuit court convened a hearing at which the Petitioner admitted, after the Recidivist Information was read to him, that he was the same individual named in the information. Jan. 8, 2019 Tr. at 7-8. The circuit court then heard oral argument relating to the filings of the State and the Petitioner concerning imposition of a Recidivist sentence. Jan. 8, 2019 Tr. at 8-20. On January 11, 2019, the circuit court

⁶The National Firearms Registration and Transfer Record is the central registry of all restricted weapons as defined in federal law under 26 U.S.C. § 5845. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco and Firearms, *Fact Sheet-National Firearms Act (NFA) Division*, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-firearms-act-nfa-division>.

entered its Order Imposing Life Sentence in which it found the Petitioner's Recidivist life sentence constitutional.⁷ Order Imposing Life Sentence, ¶¶ 6-10 (Jan. 11, 2019).

SUMMARY OF ARGUMENT

The Petitioner argues that his conviction was not supported by sufficient evidence and that his life recidivist sentence was unconstitutional under Article III, § 5 of the West Virginia Constitution. Neither of these contentions entitle him to relief.

First, the Petitioner undertakes an uphill climb in challenging the sufficiency of the evidence to support his conviction. The evidence adduced at trial, taken in a light most favorable to the State, was that the Petitioner was arrested with a non-personal use amount of heroin in his possession. The residence where he lived was searched and the police discovered evidence of the drug trade, including drug residue, baggies, digital scales, and firearms with live ammunition. This was sufficient evidence for a reasonable jury to have convicted the Petitioner.

Second, the Petitioner contends that his life recidivist sentence is constitutionally disproportionate to his drug offense. He argues that the test employed by this Court for determining if a sentence is proportionate under West Virginia Constitutional Article III, § 5 is unconstitutionally vague under federal due process principles. The State asks this Court to adopt as the exclusive test for disproportionality the United States Supreme Court's gross disproportionality test under the Eighth Amendment—and under this test the Petitioner's sentence is constitutional.

⁷As noted above, this Order was not included by the Petitioner in the Appendix Record in this appeal. However, it is before the Court by virtue of it being attached to the Notice of Appeal the Petitioner filed in this appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State is requesting that this Court adopt the United States Supreme Court's Eighth Amendment gross disproportionality test to determine if criminal sentence is constitutionally disproportionate under Article III, § of the West Virginia Constitution.. As such, it requests the case be set for a Rule 20 oral argument. This case is not suitable for a memorandum decision.

ARGUMENT

A. The State adduced constitutionally sufficient evidence at trial for the petit jury to have found the Petitioner guilty of Possession of Heroin with Intent to Deliver.

The Petitioner claims there was insufficient evidence to sustain his conviction for Possession of Heroin with Intent to Distribute. Pet'r Br. at 8. Because there was sufficient evidence to sustain the Petitioner's conviction, the Petitioner's claim is meritless and the judgment of the circuit court should be affirmed.

A petitioner "faces an 'uphill climb' when he challenges the sufficiency of the evidence[.]" *State v. Scott*, 206 W. Va. 158, 167, 522 S.E.2d 626, 635 (1999) (quoting *State v. LaRock*, 196 W.Va. 294, 303, 470 S.E.2d 613, 622 (1996)). The West Virginia Supreme Court of Appeals has "adopted, both generally and in cases with circumstantial evidence, the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979)." *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996). "[T]he standard enunciated in *Jackson* remains a difficult one for petitioners to meet." *Edwards v. Jones*, 720 F.2d 751, 755 (2d Cir. 1983) (quoting *Gruttola v. Hammock*, 639 F.2d 922, 927 (2d Cir. 1981)). "When considering sufficiency-of-evidence claims, this Court's review is highly deferential to the jury's verdict." *State v. Thompson*, 240 W. Va. 406, 414, 813 S.E.2d 59, 67 (2018). "This standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *State v. Guthrie*, 194 W. Va. 657, 667–68, 461 S.E.2d 163, 173–74 (1995). *See also State v. Miller*, 195

W. Va. 656, 661, 466 S.E.2d 507, 512 (1995) (“the defendant has a heavy burden when challenging the sufficiency of the evidence”).

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.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). “It is now well recognized and firmly settled that proof of guilt may be established by circumstantial evidence as well as direct evidence.” *State v. Bailey*, 151 W. Va. 796, 804, 155 S.E.2d 850, 855 (1967). “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.” Syl. Pt. 2, in part, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). “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.” *LaRock*, 196 W. Va. at 304, 470 S.E.2d at 623. In this regard, any evidence that contradicts the jury verdict is discounted. *Cf. Graham v. Wallace*, 208 W. Va. 139, 141, 538 S.E.2d 730, 732 (2000) (citing Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)) (“On appeal of a plaintiff’s verdict, we are required to assume that a (properly instructed) jury credited the evidence that was favorable to the plaintiff’s case and discredited the evidence that was unfavorable to that case.”). *See also Policano v. Herbert*, 453 F.3d 79, 96 (2d Cir. 2006) (Raggi, J., dissenting from denial or rehearing en banc) (“Thus, in considering a constitutional sufficiency challenge, a . . . court disregards (as it must assume the jury did) any

evidence that does not support the jury verdict”); *Yarbrough v. Warden*, No. 3:08-CV-123, 2009 WL 8389035, at *13 (S.D. Ohio Dec. 28, 2009), *report and recommendation adopted*, No. 3:08-CV-123, 2011 WL 3841672 (S.D. Ohio Aug. 30, 2011) (“The test under *Jackson v. Virginia* does not weigh the contradictory evidence . . . “); *State v. Treadway*, 130 P.3d 746, 748 (N.M. 2006) (“This Court evaluates the sufficiency of the evidence in a criminal case by . . . disregarding all evidence and inferences to the contrary.”); *State v. Niederstadt*, 66 S.W.3d 12, 14 (Mo. 2002) (en banc) (“The Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences.”); *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss.1995) (“All evidence and inferences derived therefrom, tending to support the verdict, must be accepted as true, while all evidence favoring the defendant must be disregarded”); *State v. Lyons*, 459 S.E.2d 770, 776 (N.C. 1995) (the only time the defendant’s evidence is considered is “in those instances in which it is favorable to the State[.]”). Furthermore a reviewing court must “consider the evidence as a whole, and not as individual pieces,” *United States v. Rahman*, 189 F.3d 88, 122–23 (2d Cir. 1999), “and remember that the jury is entitled to base its decision on reasonable inferences from circumstantial evidence.” *Id.* at 123. *See also United States v. Wilson*, 107 F.3d 774, 778 (10th Cir. 1997) (rather than examining evidence in “bits and pieces,” court evaluates sufficiency of evidence by considering collective inferences to be drawn from evidence as whole).

“Reversal for insufficient evidence is reserved for the rare case ‘where the prosecution’s failure is clear.’” *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997) (quoting *Burks v. United States*, 437 U.S. 1, 17 (1978)). Thus, under *Jackson*, a petitioner “must prove there is *no* evidence from which the jury could find guilt beyond a reasonable doubt.” *State v. Zuccaro*, 239 W. Va. 128, 145, 799 S.E.2d 559, 576 (2017) (emphasis in original). Because there was evidence

produced by the State sufficient for a reasonable jury to have found the Petitioner guilty beyond a reasonable doubt in this case, the circuit court should be affirmed.

The Petitioner was indicted for Possession with Intent to Deliver a Controlled Substance, A.R. 4, and was convicted by a jury of that offense. Aug. 7, 2018 Tr. at 319. The circuit court instructed the jury:

The offense charged in the sole count of the indictment of this case is possession with intent to deliver a controlled, one narcotic, controlled substance . . .

Possession with intent to deliver a Schedule I narcotic controlled substance is committed when any person unlawfully and feloniously possesses a Schedule I narcotic controlled substance with intent to deliver and said [sic] controlled substance to another person.

The Court instructs the jury that heroin is a schedule I narcotic controlled substance.

Before the defendant, Joshua Dwayne Plante, can be convicted of possession with intent to deliver a schedule I narcotic controlled substance, the State of West Virginia must prove beyond a reasonable doubt that the defendant, Joshua Dwayne Plante, in Cabell County, West Virginia, on or about the 20th day of June, 2016, did knowingly possess a Schedule I narcotic controlled substance, to wit, heroin, with the intent to deliver that controlled substance.

Aug. 7, 2018 Tr. at 278-279.

The Court further instructed the jury that:

. . . a person who is the absolute perpetrator of a crime is a principal in the first degree. A person who is not actually or constructively present at the time or the place of the commission of the criminal act by the absolute perpetrator but who counseled, procured, planned, instigated or commanded the criminal act is an accessory before the fact to the criminal act and as such may be criminally liable for the criminal act as if the absolute perpetrator of the crime.

You are further instructed that a person who is actually or constructively present at the scene of the crime at the time of the criminal acts which shared criminal intent somehow contributing to the criminal act of the actual perpetrator is an aider and abettor and a principal in the second degree and as such may be criminally liable for the criminal act as if he were the absolute perpetrator of the crime. Actual physical presence at the scene of the criminal act is not necessary

where the aider and abettor was constructively present at a convenient distance at the time and place of the criminal act acting in concert with the actual perpetrator.

Aug. 7, 2018 Tr. at 280-281.

The circuit court also instructed the jury that:

. . . the offense of possession with intent to deliver a controlled substance is the knowing possession of the controlled substance with the intent to deliver that substance. The element of possession includes the physical possession of the controlled substance on the person of the accused or the constructive possession of the controlled substance by the accused. When the State of West Virginia relies on the concept of constructive possession, it must prove to you beyond a reasonable doubt that the accused was linked to the controlled substance in question, to the extent that the accused had knowledge of the presence of the controlled substance, where it was found, and that the accused exercised control and dominion over the controlled substance. More than one person can have constructive possession of a controlled substance at a given time.

Aug. 7, 2018 Tr. at 282.

The circuit court additionally instructed the jury that:

. . . the State of West Virginia has the burden to prove to you beyond a reasonable doubt all the elements of the offense charged in this case including the element of intent to deliver a controlled substance. This element of intent to deliver a controlled substance maybe inferred from surrounding circumstances including but not limited to the manner in which the controlled substance was packaged, the presence of weighing scales, measuring devices, firearms, large sums of money, business records or other paraphernalia customarily used in the packaging and delivery of controlled substances, and the amount of controlled substance present, and in this regard the Court instructs the jury that if they find from the evidence in this case that the defendant had possession of an amount of controlled substance that is more than a person normally kept for his personal use, they may infer from that fact and the other facts and circumstances the intent to deliver.

Aug. 7, 2018 Tr. at 282-283.

As stated in syllabus point 4 of *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975), “[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 [the] defendant's dominion and control." The State easily meets this test.

In the present case, the Petitioner stipulated to the jury that he resided at 325 Olive Street at the time of his arrest. Aug. 6, 2018 Tr. at 85.⁸ See *In re Starcher*, 202 W. Va. 55, 61, 501 S.E.2d 772, 778 (1998) ("Numerous jurisdictions have upheld convictions in criminal cases where one or more of the elements of the crime was proven by stipulation.").

The Petitioner also stipulated that 325 Olive Street was lawfully searched and items therein were lawfully seized by the police. Aug. 6, 2018 Tr. at 81. Located and seized from 325 Olive Street were digital scales, multiple cell phones, a baggy containing heroin, other sandwich baggies, multiple firearms (both rifle and pistol) and ammunition. Aug. 6, 2018 Tr. at 94-97. These types of items are normally associated with drug dealing. Aug. 6, 2018 Tr. at 92. See, e.g., *State v. Case*, 870 N.W.2d 274 (Iowa Ct. App. 2015) (table) (text available at 2015 WL 2394105) ("Digital scales are associated with drug dealing."); *United States v. Fudge*, 175 F. App'x 694, 698 (6th Cir. 2006) (observing that "classic trappings of drug dealing" include a digital scale and plastic baggies); *United States v. Triana*, 477 F.3d 1189, 1195 (10th Cir. 2007) ("scales . . . and ziplock baggies—so called 'tools of the drug trade'—were further evidence from which the jury could infer an intent to distribute"); *United States v. Carrasco*, 257 F.3d 1045, 1048 (9th Cir.2001) (stating that plastic baggies and scales are known tools of drug trade); *United States v. Fisher*, 912 F.2d 728, 731 (4th Cir. 1990) ("Baggies and baggie corners are well-known tools of the narcotics distribution trade."); *United States v. Lazcano-Villalobos*, 175 F.3d 838, 844 (10th Cir. 1999) ("cellular telephones are recognized tools of the drug-dealing trade"); *United States v. Ward*, 171 F.3d 188, 195 (4th

⁸As noted above, the circuit court misspoke at trial and indicated that the Petitioner resided at 322 Olive Street.

Cir.1999) (“Guns are tools of the drug trade.”); *United States v. Regans*, 125 F.3d 685, 686 (8th Cir. 1997) (“We have frequently observed that a firearm is a ‘tool of the trade’ for drug dealers”); *United States v. Russell*, 134 F.3d 171, 183 (3d Cir.1998) (“[I]t has long been recognized that firearms are relevant evidence in the prosecution of drug-related offenses, because guns are tools of the drug trade.”); *United States v. Goodnight*, 67 Fed. Appx. 677, 681 (3d Cir. 2003) (“Moreover, gun possession may serve as circumstantial evidence from which a jury can infer drug activity.”). These items were found throughout 325 Olive Street, and, as Detective Maniskas testified, drug dealers operating out of a drug house do not normally respect bedroom boundaries. Aug. 6, 2018 Tr. at 112.

Further, when arrested, the Petitioner had upon him United States currency and 3 grams of heroin.⁹ Aug. 6, 2018 Tr. at 90, 91. Detective Maniskas’s testimony at trial established that 3 grams

⁹The Petitioner asserts in his brief that this 3 grams of heroin constituted Rule 404(b) evidence. Pet’r Br. at 7, 10, 11. Any argument related to Rule 404(b) is not properly before this Court for at least two reasons, because it was not preserved at trial and is not properly briefed before this Court.

First, because the Petitioner never raised this argument in the circuit court, it is waived. This Court has observed that “[i]t must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.” *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996). “To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.” *Id.*, 470 S.E.2d at 170. The Petitioner, by failing to raise the 404(b) objection below, (and, of course, by failing to show in his brief where the issue was preserved at trial, W. Va. R. App. P. 10(c)(7)) have waived the 404(b) issue on appeal. *See, e.g., Coleman v. Sopher*, 201 W. Va. 588, 614, 499 S.E.2d 592, 618 (1997) (McHugh, J., concurring).

Second, the Petitioner’s cursory treatment of the 404(b) claim in his appellate brief is not sufficient to have preserved the alleged error to justify this Court’s review. This Court has stated that “appellate courts frequently refuse to address issues that appellants . . . fail to develop in their brief.” *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995). To preserve an issue in an appellate brief requires more than simply raising it in a “perfunctory manner unaccompanied by some effort at developed argumentation.” *Id.*, 461 S.E.2d at 111 n.16. “Indeed,

of heroin is not consistent with personal use. Aug. 6, 2018 Tr. at 91. According to Detective Maniskas, a typical dosage for heroin is a tenth to two-tenths of a gram. Aug. 6, 2018 Tr. at 91. The 3 grams found on the Petitioner represented, therefore, about thirty doses. Aug. 6, 2018 Tr. at 91-92. Detective Maniskas also testified that when the Petitioner was arrested he did not have any items indicating personal use such as needles, spoons, or tie-off material. Aug. 6, 2018 Tr. at 92. The Petitioner did not have anything on his person indicating that the Petitioner was snorting heroin. Aug. 6, 2018 Tr. at 92. When the Petitioner was arrested he was in “pretty good physical shape,” Aug. 6, 2018 Tr. at 120, and his appearance was not that of a heroin addict. Aug. 6, 2018 Tr. at 118. Moreover, “[i]ntent to distribute may be inferred from possession of . . . a quantity of drugs larger than needed for personal use.” *United States v. Fisher*, 912 F.2d 728, 730 (4th Cir. 1990). *See also People v. Jones*, 575 N.E.2d 561, 563 (Ill. Ct. App. 1991) (“A reasonable inference of intent to deliver arises from possession of a quantity of drugs greater than that which might be used for personal consumption.”).

The evidence in this case, taken as a whole and in a light most favorable to the State, demonstrates that a reasonable jury could have concluded beyond a reasonable doubt that: (1) when arrested outside 417 7th Avenue, the Petitioner had personal possession of an amount of heroin in excess of a personal use amount; (2) possession of an amount of drugs in excess of personal use amounts was evidence of drug dealing; (3) the Petitioner resided in a residence (325 Olive Street) containing numerous items spread throughout the residence used in drug dealing, including heroin residue—the very type of drug he possessed in a non-personal use amount at the

‘[i]t is . . . well settled, . . . that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.’” *Id.*, 461 S.E.2d at 111 n.16 (quoting *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3rd Cir.1993)). “The [Ppetitioner’s] mere assertion, without supporting case law, is inadequate to preserve the assignment of error.” *State v. Ladd*, 210 W. Va. 413, 424 n.1, 557 S.E.2d 820, 831 n.1 (2001).

time of his arrest; and, (4) given the above evidence, that the Petitioner was involved in drug dealing from 325 Olive Street in Huntington. As such, the circuit court should be affirmed.

B. West Virginia should adopt as the controlling test for purposes of West Virginia Constitution Article III, § 5 the gross disproportionality test employed by the United States Supreme Court under the Eighth Amendment to the United States Constitution.

The Petitioner contends that this Court's test for what constitutes a disproportionate sentence under Article III, § 5 of the West Virginia Constitution does not comport with federal due process standards since the State disproportionality test is void for vagueness. Pet'r Br. at 16. Because the time has now come to bring West Virginia law in sync with federal law as articulated by the United States Supreme Court, this Court should take this opportunity to hold that the federal gross-disproportionality test under the Eighth Amendment is the only test to be applied by West Virginia State Courts in addressing claimed disproportionate sentencing. And under this test, the Petitioner's sentence was constitutional.

C. West Virginia Code §§ 61-11-18 & 61-11-19

West Virginia Code § 61-11-18(c) provides, "[w]hen it is determined, as provided in section nineteen of this article,¹⁰ that [a] person shall have been twice before convicted in the

¹⁰Pursuant to West Virginia Code § 61-11-19:

It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not. If he says he is not, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impanelled to inquire whether the prisoner is the same person mentioned in the several records. If the jury finds

United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life.” (footnote added).¹¹

“We have previously recognized that West Virginia Code § 61–11–18 is ‘plain and unambiguous. . . .’” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 519, 583 S.E.2d 800, 816 (2002) (per curiam) (quoting *State ex rel. Chadwell v. Duncil*, 196 W.Va. 643, 647, 474 S.E.2d 573, 577 (1996) (per curiam)). “If a defendant is twice convicted of a penitentiary offense he falls within the ambit of West Virginia Code § 61–11–18.” *Id.*, 583 S.E.2d at 816. If the State meets the procedural obligations imposed on it under West Virginia Code § 61-11-19, imposition of a life sentence is mandatory. Syl. Pt. 3, *State ex rel. Cobb v. Boles*, 149 W.Va. 365, 141 S.E.2d 59 (1965) (“Where an accused is convicted of an offense punishable by confinement in the penitentiary and, after conviction but before sentencing, an information is filed against him setting forth one or more previous felony convictions, if the jury find or, after being duly cautioned, the accused acknowledges in open court that he is the same person named in the conviction or convictions set forth in the information, the court is without authority to impose any sentence other than as prescribed in Code, 61–11–18, as amended.”). Notwithstanding the plain language of West Virginia Code § 61-11-18(c), this Court has held there are constitutional limitations to imposing a life recidivist sentence.

that he is not the same person, he shall be sentenced upon the charge of which he was convicted as provided by law; but if they find that he is the same, or after being duly cautioned if he acknowledged in open court that he is the same person, the court shall sentence him to such further confinement as is prescribed by section eighteen of this article on a second or third conviction as the case may be.

¹¹A life sentence under the recidivist statute renders a defendant eligible for parole after fifteen years. W. Va. Code § 62-12-13(c) (“an inmate sentenced for life who has been previously twice convicted of a felony may not be paroled until he or she has served fifteen years”). *See State ex rel. Appleby v. Recht*, 213 W. Va. 503, 515, 583 S.E.2d 800, 812 (2002) (per curiam) (“If convicted as a recidivist, Mr. Appleby would be eligible for parole after serving fifteen years.”).

D. West Virginia Constitution Article III, § 5

West Virginia Constitution Article III, § 5 provides, in pertinent part, “[p]enalties shall be proportioned to the character and degree of the offence.” West Virginia employs two tests to measure whether a sentence is disproportionate, a subjective test and an objective test. *State v. Gibbs*, 238 W.Va. 646, 659, 797 S.E.2d 623, 636 (2017).

Under the subjective test, “Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.” Syl. Pt. 5, *State v. Cooper*, 172 W. Va. 266, 267–68, 304 S.E.2d 851, 852 (1983). Under the objective test, “[i]n determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). This Court went on to explain that violence had now become a crucial aspect of applying the recidivist statute:

We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the 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. A further analysis is then made of our recidivist statute in relation to other states’ recidivist statutes to determine their treatment of similar offenses.

Id. at 537, 276 S.E.2d at 214. This aspect of *Wanstreet* was subsequently elevated to a Syllabus Point (Syllabus Point 7) in *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981):

The 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 the 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.

The “actual or threatened violence” limitation on West Virginia Code § 61-11-18(c) is purely a matter of judge made law as the term “violence” or “violent” does not appear in West Virginia Code § 61-11-18. *See Gardner v. Ballard*, No. 16-0688, 2017 WL 2492800, at *3 (W. Va. June 9, 2017) (memorandum decision) (“Under West Virginia Code § 61–11–18 there is no requirement for any court to determine if the triggering offense is a violent offense, which could arguably be subjective in nature. The plain language of West Virginia Code § 61–11–18 simply states that an individual convicted of two prior crimes punishable by confinement in a penitentiary is subject to a life sentence.”).

E. The *Johnson* triumvirate of cases

In a trilogy of cases beginning with *Johnson v. United States*, 135 S. Ct. 2551 (2015), the United States Supreme Court addressed several federal statutes attempting to define a violent offense for purposes of criminal sentencing. In each of these cases, the Supreme Court recognized that the definition of violence was unconstitutionally vague.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the United States Supreme Court addressed the constitutionality of the Armed Career Criminal Act of 1984. The ACCA prohibits certain classes of persons from shipping, possessing, or receiving firearms. *Johnson*, 135 S. Ct. at 2555. While the ACCA generally punishes a violation of this ban by up to 10 years’ imprisonment, if the violator has three or more earlier convictions for a “serious drug offense” or a “violent

felony,” the ACCA increases his prison term to a minimum of 15 years and a maximum of life.

Johnson, 135 S. Ct. at 2555. The ACCA defined “violent felony” as:

any crime punishable by imprisonment for a term exceeding one year . . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. at 2555-2556. Specifically at issue in *Johnson* was whether the ACCA’s so-called residual clause, (“otherwise involves conduct that presents a serious potential risk of physical injury to another[,]”) comported with due process. *Johnson*, 135 S. Ct. at 2556.¹² The Supreme Court concluded it did not.

The Supreme Court explained the ACCA “requires courts to use a framework known as the categorical approach when deciding whether an offense ‘is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.’” *Johnson*, 135 S. Ct. at 2557. “Under the categorical approach, a court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense

¹²*Johnson* dealt with the United States Constitution’s Fifth Amendment due process clause, which applies only to the federal government. The United States Constitution’s 14th Amendment due process clause, applies only to the States. The two due process clauses are, however, generally read co-extensively. *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 778 n.12, 575 S.E.2d 377, 388 n.12 (2002) (quoting *Rutherford v. City of Newport News*, 919 F. Supp. 885, 893 n. 10 (E.D.Va.1996) (citation omitted) (“The Fifth Amendment’s due process clause applies to the Federal Government. The clause in the Fourteenth Amendment applies to states and municipalities. The rights protected by the two clauses are co-extensive.”)). The United States Supreme Court has recognized that the void for vagueness doctrine is an aspect of both the Fifth Amendment’s due process clause and the Fourteenth Amendment’s due process clause. *Welch v. United States*, 136 S. Ct. 1257, 1261–62 (2016) (“The *Johnson* Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) and the Fourteenth Amendment (with respect to the States)”).

and not in terms of how an individual offender might have committed it on a particular occasion.” *Id.* (citation omitted). To do so, a court must “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.* (citation omitted). This process goes beyond determining whether creation of risk is an element of the crime; instead, asking whether the crime involves conduct presenting too much risk of physical injury. *Id.* Complicating such a decision, the inclusion of the enumerated crimes of burglary and extortion take the analysis “beyond evaluating the chances that the physical acts that make up the crime will injure someone,” given that burglary and extortion do not normally cause physical injury. *Id.* In that light, the Supreme Court found that, first, the residual clause left grave uncertainty about how to estimate the risk posed by a crime by tying that assessment to a judicially imagined “ordinary case” of a crime instead of real-world facts or statutory elements. It questioned how to imagine a criminal’s behavior and, further, how the idealized ordinary case of the crime subsequently plays out in assessing potential risk. *Id.* at 2557-2558. Second, the residual clause left uncertainty about how much risk it takes for a crime to qualify as a violent felony. *Id.* at 2558. The United States Supreme Court found that “[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.* Thus, the United States Supreme Court found the residual clause of the ACCA to be unconstitutionally vague.

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the United States Supreme Court again addressed whether a federal statute’s definition of a violent offense was unconstitutional as being vague. The Immigration and Nationality Act (INA) renders deportable any alien convicted of an “aggravated felony” after entering the United States. *Dimaya*, 138 S. Ct. at 1210. Such an alien is

also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the United States. *Id.*

The INA defined “aggravated felony” by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. *Id.* According to one item on that lengthy enumeration, an aggravated felony includes “a crime of violence (as defined in section 16 of title 18 . . .) for which the term of imprisonment [is] at least one year.” § 1101(a)(43)(F). The specified statute, 18 U.S.C. § 16, provides the federal criminal code’s definition of “crime of violence.” Its two parts, often known, respectively, as the elements clause and the residual clause, cover:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Relying on *Johnson*, the Supreme Court held the residual clause of 18 U.S.C. § 16 unconstitutional as being void for vagueness. *Dimaya*, 138 S. Ct. at 1223.

Finally, in *United States v. Davis*, 139 S. Ct. 2319 (2019), the United States Supreme Court addressed the constitutionality of 18 U.S.C. § 924(c) under the void for vagueness doctrine. Section 924 authorizes increased criminal penalties for using or carrying a firearm “during and in relation to,” or possessing a firearm “in furtherance of,” any federal “crime of violence or drug trafficking crime.” § 924(c)(1)(A). Section 924 defined the term “crime of violence” in two subparts—the first an elements clause, and the second a residual clause. According to § 924(c)(3), a crime of violence is “an offense that is a felony” and

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Supreme Court explained that section 924(c) bore more than a passing resemblance to the residual clause of the ACCA struck down in *Johnson* and the residual clause of the INA struck down in *Dimaya*. *Davis*, 139 S. Ct. at 2325. The *Davis* Court then encapsulated the teachings of *Johnson* and *Dimaya*: “Those decisions teach that the imposition of criminal punishment can’t be made to depend on a judge’s estimation of the degree of risk posed by a crime’s imagined ‘ordinary case.’” *Davis*, 139 S. Ct. at 2326.

In light of these federal cases, it appears that *Wanstreet*, *Beck*, and their progeny’s reliance on whether a crime is one of actual or threatened for State constitutional disproportionality review is questionable.

F. The time has now come to bring West Virginia into line with the United States Supreme Court’s Eighth Amendment proportionality law.

The State of West Virginia now asks this Court to refine West Virginia law to bring it into line with the United States Supreme Court’s Eighth Amendment’s disproportionality law as the proper test under both the Eighth Amendment and Article III, § 5 of the West Virginia Constitution.

The State recognizes this path will require the Court to overrule *Wanstreet*, *Beck*, and their progeny as they relate to actual or threatened violence. But the principle of stare decisis, “the policy of the court to stand by precedent[,]” *Banker v. Banker*, 196 W. Va. 535, 546 n.13, 474 S.E.2d 465, 476 n.13 (1996), “is not a rule of law but is a matter of judicial policy.” *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 718, 143 S.E.2d 154, 162 (1965). And this policy is not “inflexible[.]” *Id.*, 143 S.E.2d at 162. While stare decisis is an important doctrine, *Janasiewicz v. Bd. of Ed.*, 171 W. Va. 423, 424, 299 S.E.2d 34, 35 (1982), it is not sacrosanct. *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 201, 728 S.E.2d 74, 85 (2012) (Benjamin, J., concurring). While “the doctrine of stare decisis instructs us to be cautious in deciding whether to overrule precedent[,]” *State ex rel.*

Discover Fin. Servs., Inc. v. Nibert, 231 W. Va. 227, 248, 744 S.E.2d 625, 646 (2013), it does not create an insurmountable bar to overruling prior cases. Stare decisis should not control when the Court is confronted, such as in the case at bar, with special justification for departing from it. See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“any departure from the doctrine of stare decisis demands special justification.”).

The rule of stare decisis must yield when prior case law has proved unworkable. “The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable.” *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). The actual or threatened violence test is an unworkable one as has been recognized in the dissenting opinion in *State v. Lane*, 241 W. Va. 532, 826 S.E.2d 657, 668 (2019) (Armstead, J., dissenting), “[p]ost-*Wanstreet*, this Court has, on numerous occasions, handed down what are seemingly divergent and inconsistent opinions on the application of the recidivist statute.” Indeed, the difficulty in applying *Wanstreet*, *Beck* and their progeny as it relates to actual or threatened violence is illustrated by two of this Court recent cases, *State v. Lane* and *State v. Norwood*.

In *State v. Lane*, 241 W. Va. 532, 826 S.E.2d 657 (2019), Lane was convicted of two counts of delivery of oxycodone. *Id.* at 535–36, 826 S.E.2d at 660–61. Based on prior felony convictions for unlawful wounding and conspiracy to commit a felony of transferring stolen property, Lane was convicted as a recidivist under West Virginia Code § 61-11-18(c) and sentenced to life with mercy. *Id.* at 536, 826 S.E.2d at 661. This Court reversed Lane’s life sentence. This Court looked to Syllabus Point 7 of *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981), to conclude that a life sentence for Lane’s drug offense was constitutionally disproportionate as the offense was not violent:

Despite the State’s argument to the contrary, the facts surrounding the final triggering offense committed by the petitioner—the delivery of four Oxycodone

pills—did not involve any actual or threatened violence. There was no testimony or evidence, whatsoever, to support any type of violence or even perceived violence surrounding the controlled buys of Oxycodone. While there was testimony that a child was present when the confidential informant first knocked on the door of the residence in which the petitioner was located, there was no evidence that when the petitioner came out onto the porch to conduct the sale of the Oxycodone pills to the confidential informant that the child was present.

Moreover, when examining the petitioner’s prior felonies, although he had a conviction for the violent felony of unlawful wounding, that conviction occurred twenty years prior to the drug offense. Further, the petitioner’s second felony of conspiracy to commit transferring stolen property did not involve any violence or threat of violence. The prior sentences imposed on the petitioner for these prior felonies were not serious penalties so as to justify this Court now imposing a life recidivist sentence.

Lane, 241 W. Va. at 539, 826 S.E.2d at 664.

Lane produced a dissenting opinion that asserted that drug dealing was, indeed, violent:

Illegal drug trade is proximately linked to violence against a person in that it evolves from a culture of physical peril, harm to children (such as those born with withdrawals or, as in this case, direct witnesses to drug transactions and drug-intoxicated adults), and crippling addictions . . . Selling opiates is not, as Petitioner contends, a nonviolent offense, but rather “one phase of a large scale, well entrenched criminal activity that springs from human greed and preys on man’s weakness – one that turns buyers into sellers, makes addicts out of newborn infants and sets addicts to mugging, thievery, prostitution, robbery and murder to support an insatiable appetite.” *People v. Gardner*, 78 Misc. 2d 744, 750, 359 N.Y.S.2d 196, 202 (N. Y. Sup. Ct. 1974). This sentiment from Gardner is neither archaic nor limited to other jurisdictions. In Beckley, West Virginia, on August 29, 2006, right before the eyes of both his girlfriend and a fellow officer, “Corporal Charles E. ‘Chuck’ Smith, III, of the Beckley Police Department was shot and killed during a[n] undercover drug deal.” *State v. Martin*, 224 W. Va. 577, 579, 687 S.E.2d 360, 362 (2009) (per curiam). In Huntington, West Virginia, a drug dealer paid a drug addict \$ 1,500 to murder a prostitute suspected of stealing from the dealer’s drug stash. *State v. Holmes*, No 11-0436, 2011 WL 8197528, at *1 (W. Va. Nov. 10, 2011).

Lane, 241 W. Va. at 545, 826 S.E.2d at 670 (Armstead, J., dissenting) (quoting Respondent’s Brief).

In *State v. Norwood*, 832 S.E.2d 75 (W. Va. 2019), Norwood was convicted by a jury of his peers on one count of delivery of a controlled substance—heroin—and was sentenced as a recidivist under West Virginia Code § 61-11-18. *Norwood*, 832 S.E.2d at 78-79. Norwood challenged his recidivist sentence claiming that his recidivist sentence was disproportionate under West Virginia Constitution Article III, § 5. The Court affirmed Norwood’s recidivist sentence notwithstanding *Lane*, acknowledging:

that a majority in this Court’s recent opinion in *Lane*, 241 W. Va. 532, 826 S.E.2d 657 (2019), declined to impose a life sentence on proportionality grounds under the recidivist statute where the predicate felony convictions flowed from two counts of delivery of a controlled substance—a total of four Oxycodone pills. In this matter, however, due to the nature of heroin itself, heroin trafficking clearly warrants application of the recidivist statute.

Id. at 84. *Norwood* drew a dissenting opinion (from the author of the *Lane* majority opinion) arguing that the result in *Norwood* was “inconsistent on its face with our recent *Lane* decision.” *Norwood*, 832 S.E.2d at 88.

Furthermore, it cannot be ignored that in the past this Court has itself chosen to disregard the actual or threatened violence test. This Court has at times recognized that a non-violent offense—if serious enough—can constitute a sufficient predicate felony for imposition of a life recidivist sentence under West Virginia Code § 61-11-18(c). *See State v. Wyne*, 194 W. Va. 315, 319, 460 S.E.2d 450, 454 (1995) (“Moreover, even though the record of the two prior felonies does not indicate that they occurred with any actual or threatened violence, nevertheless, the crime of second degree arson to which the defendant entered a guilty plea is a serious offense as illustrated by its statutory definition in W. Va. Code, 61-3-2 (1935).”). *Cf. State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 648, 474 S.E.2d 573, 578 (1996) (West Virginia Code § 61-11-18(a) recidivist enhancement applied to non-violent third offense shoplifting conviction).

If “[p]redictability is at the heart of the doctrine of Stare decisis[.]” *Hock v. City of Morgantown*, 162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979), the actual or threatened violence test hardly advances this end and the actual or threatened violence test cannot be justified. *See, e.g., Febus v. State*, 542 S.W.3d 568, 576 (Tex. Ct. Crim. App. 2018) (“If a prior decision was poorly reasoned or unworkable, we do not achieve the goals sought through reliance upon stare decisis by continuing to follow that precedent.”).

Finally, *Wanstreet* and *Beck* were based upon constitutional interpretation of Article III, § 5 of the West Virginia Constitution. The pull of stare decisis is at its nadir in constitutional cases as the legislature lacks the power to alter a judicial decision. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 235 (1997) (stare decisis “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”).

G. The Eighth Amendment

The abandonment of *Wanstreet*, *Beck*, and their progeny as it relates to actual or threatened violence does mean there would be no constitutional check on application of West Virginia Code § 61-11-18(c) nor does it represent a wholesale abandonment of the subjective and objective test for constitutional disproportionality. Adopting the United States Supreme Court’s Eighth Amendment disproportionality test is simply a refinement of the factors already reviewed by this Court in its disproportionality jurisprudence under Article III, § 5 of the West Virginia Constitution.

The Eighth Amendment bars the infliction of “cruel and unusual punishment[.]” The Due Process Clause of the Fourteenth Amendment “makes the Eighth Amendment’s prohibition against . . . cruel and unusual punishments applicable to the States.” *Cooper Indus., Inc. v. Leatherman*

Tool Grp., Inc., 532 U.S. 424, 433–34 (2001). See also *Hutto v. Finney*, 437 U.S. 678 (1978) (recognizing that “[t]he Eighth Amendment’s ban on inflicting cruel and unusual punishments [is] made applicable to the States by the Fourteenth Amendment[.]”); *Facility Review Panel v. Holden*, 177 W. Va. 703, 704, 356 S.E.2d 457, 458 (1987) (per curiam) (“The Fourteenth Amendment to the United States Constitution extends to the states the Eighth Amendment prohibition against cruel and unusual punishment for inmates who are serving a sentence[.]”). As the Petitioner’s sentence is not one of those rare cases where the Eight Amendment is affronted, *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003), the Petitioner’s recidivist sentence passes muster under the Eighth Amendment.

In *Ewing v. California*, 538 U.S. 11 (2003), following Justice Kennedy’s concurring opinion in *Harmelin v. Michigan*, 501 U.S. 957, 996-997 (1991),¹³ the United States Court held that the Eighth Amendment’s cruel and unusual punishments clause contains a “‘narrow proportionality principle’” applicable to noncapital cases. *Ewing*, 538 U.S. at 20 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-997 (1991) (Kennedy J., concurring in part and concurring in judgment)). “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). If a reviewing court finds an inference that a sentence is grossly disproportionate to the crime (an inference of gross disproportionality is a function of measuring the gravity of the crime, that is, the harm the crime does to the individual victims and/or society

¹³Justice Kennedy’s separate opinion in *Harmelin* has become the leading authority in this area. See *Graham v. Florida*, 560 U.S. 48, 59 (2010) (stating that Justice Kennedy’s opinion in *Harmelin* was the “controlling opinion” with regard to the proportionality issue).

as a whole, against the degree of the defendant’s culpability and involvement in the crime¹⁴), then the reviewing court conducts an interjurisdictional and intrajurisdictional review of the sentence (that is, it compares sentences between jurisdictions as well as sentences within the sentencing jurisdiction) “to validate an initial judgment that a sentence is grossly disproportionate to a crime.” *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). *See also United States v. Cobler*, 748 F.3d 570, 575 (4th Cir. 2014):

In the context of an as-applied challenge, the Court has explained that the “narrow proportionality principle” of the Eighth Amendment “does not require strict proportionality between crime and sentence,” but “forbids only extreme sentences that are grossly disproportionate to the crime.” *Graham* [v. *Florida*], 560 U.S. [48,] 59–60, 130 S. Ct. 2011 [(2010)] (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–01, 111 S. Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring)) (internal quotation marks omitted). Before an appellate court concludes that a sentence is grossly disproportionate based on an as-applied challenge, the court first must determine that a “threshold comparison” of the gravity of the offense and the severity of the sentence “leads to an inference of gross disproportionality.” *Id.* (quoting *Harmelin*, 501 U.S. at 1005, 111 S. Ct. 2680 (Kennedy, J., concurring)) (brackets omitted). In the “rare case” that a reviewing court concludes that such an inference may be drawn, the court is required to compare the defendant’s sentence: (1) to sentences for other offenses in the same jurisdiction; and (2) to sentences for similar offenses in other jurisdictions. *Id.* If this extended analysis validates the threshold determination that the sentence is grossly disproportionate, the sentence is deemed “cruel and unusual” punishment under the Eighth Amendment. *Id.*

To adopt the *Ewing* test requires only a refinement of the subjective and objective tests that otherwise guide West Virginia’s proportionality jurisprudence. The shocks the conscience test is analogous to the initial *Ewing* step, a threshold comparison of the gravity and the severity of the offense against the sentence imposed. *See State v. Adams*, 211 W. Va. 231, 233, 565 S.E.2d 353, 355 (2002) (“In making the determination of whether a sentence shocks the conscience, we

¹⁴*See, e.g., United States v. Wiest*, 596 F.3d 906, 911–12 (8th Cir. 2010) (“Within the threshold comparison, this court looks first to the gravity of the crime, considering the harm caused or threatened to the victim or to society, and the culpability and degree of the defendant’s involvement.”).

consider all of the circumstances surrounding the offense.”). If the sentence shocks the conscience is met, or, in other words, if the sentence imposed weighed against the facts of the crime leads to a belief the sentence might be disproportionate, the court then applies inter-jurisdictional and intra-jurisdictional review, like it currently does in analyzing the objective test. *See* Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981) (“In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.”). Thus, adopting the *Ewing* test has the virtue of both putting West Virginia’s constitutional disproportionality jurisprudence on firm federal constitutional footing without making any wholesale revisions to existing West Virginia law (save abandonment if the actual or threatened violence test—which is not necessarily a fair measure of the severity of a crime anyway. *See Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (“[T]he presence or absence of violence does not always affect the strength of society’s interest in deterring a particular crime or in punishing a particular criminal.”)).

Thus, in *Ewing*, the United States Supreme Court upheld a 25 year to life sentence under California’s three-strikes law, without conducting an interjurisdictional or intrajurisdictional review, when the triggering offense was a grand larceny of three golf clubs whose value totaled roughly \$1200.00, coupled with several serious and/or violent prior felonies. *Ewing*, 538 U.S. at 28. *See Redman v. Ballard*, No. 14-0894, 2015 WL 5125826, at *12 (W. Va. Aug. 31, 2015) (memorandum decision) (internal citations omitted):

Under the United States Constitution, the Petitioner’s prior convictions do not even have to amount to a crime of violence in order for the habitual offender statute to apply. In *Ewing v. California*, 538 U.S. 11, 124 S. Ct. 1179 (2003), the United States Supreme Court found that the Eighth Amendment does not require strict

proportionality between crime and sentence but merely forbids only extreme sentences that are grossly disproportionate to the crime. In *Ewing*, the Court specifically found that sentencing the defendant to a term of twenty-five years to life for the theft of three golf clubs, pursuant to California's three strikes law, was not grossly disproportionate and thus did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. The Court found that the sentence was justified by the state's public safety interest in incapacitating and deterring recidivist felons.

In other words, this Court's disproportionality jurisprudence already takes into account the severity of the crime as well as intra-jurisdictional and inter-jurisdictional sentence review. The adoption of the Supreme Court's Eighth Amendment gross disproportionality test simply refines how those factors are viewed and applied.

In the pending case, the Petitioner was convicted of Possession with Intent to Distribute. His two prior felonies were Possession of Cocaine Base with Intent to Deliver and Possession of a Firearm not Registered to Defendant in the National Firearms Registration and Transfer Record. The Petitioner's life with parole eligibility recidivist sentence is not one of those extreme, exceedingly rare cases where the sentence is grossly disproportionate to the crime.

The Petitioner's drug crime conviction is for an extremely serious offense that harmed individual members of society as well as society as a whole. "Drug crimes are very serious and represent one of the greatest threats to society." *State v. Mullens*, 221 W. Va. 70, 110, 650 S.E.2d 169, 209 (2007) (quoting *United States v. Chen*, 979 F.2d 714, 718 (9th Cir.1992)) (Benjamin, J., dissenting). "The distribution of heroin in the community is extremely harmful to many persons including addicts that use the drug on a daily basis as well as to the victims of property crimes committed by addicts to fund their daily purchases of the drug." *United States v. Breedlove*, No. 10 CR 50078-5, 2013 WL 12110538, at *4 (N.D. Ill. Oct. 21, 2013), *aff'd*, 756 F.3d 1036 (7th Cir. 2014). As explained by Justice Kennedy's separate opinion in *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991), "[p]ossession, use, and distribution of illegal drugs represent 'one of the greatest

problems affecting the health and welfare of our population.’ *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989).” Indeed, “[f]ew problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances.” *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring).

The Petitioner claims that his heroin distribution offense was non-violent. Pet’r Br. at 7-8. This is inaccurate. “We are not, as defendant urges dealing with ‘nonviolent’ offenses here. Realistically, we deal with but one phase of a large scale, well entrenched criminal activity that springs from human greed and preys on man’s weakness—one that turns buyers into sellers, makes addicts out of newborn infants and sets addicts to mugging, thievery, prostitution, robbery and murder to support an insatiable appetite.” *People v. Gardner*, 359 N.Y.S.2d 196, 202 (Sup. Ct. 1974). Indeed, “[t]he impact of drugs on the health and welfare of society is reflected in studies which demonstrate that there is a direct nexus between illegal drugs and crimes of violence, including the majority of homicides, assaults, robberies and weapons offenses.” *Valona v. United States*, 919 F. Supp. 1260, 1271 n.6 (E.D. Wis. 1996) (citing *Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring)).¹⁵

¹⁵This Court—as have the federal courts sitting in West Virginia—has confronted the pernicious results of drug crimes on participants, law enforcement, and innocent victims. *See, e.g., In re M.D.*, No. 11-1182, 2012 WL 2988768, at *1 (W. Va. Mar. 23, 2012) (memorandum decision) (“The instant petition was based on the children’s mother using drugs while pregnant with A.D., who was born addicted to drugs and had withdrawal symptoms”); *In re B.B.*, 224 W. Va. 647, 653, 687 S.E.2d 746, 752 (2009) (per curiam) (parental rights terminated in part because “the children were exposed to illegal drug abuse by adults in the home”), *State v. Holmes*, No. 11-0436, 2011 WL 8197528, at *1 (W. Va. Nov. 10, 2011) (memorandum decision) (“Petitioner, who is from Detroit, sold illegal drugs from her house in Huntington. The murder victim, Wendy Morgan, used a room in petitioner’s house for purposes of drug use and prostitution. Witnesses testified that Morgan stole drugs and money from Petitioner’s house and, in retaliation, Petitioner ordered that Morgan be killed.”); *State v. Martin*, 224 W. Va. 577, 579, 687 S.E.2d 360, 362 (2009) (per curiam) (“... Corporal Charles E. ‘Chuck’ Smith, III, of the Beckley Police Department was shot and killed during an undercover drug deal.”); *State v. Wade*, 200 W. Va. 637, 651, 490 S.E.2d 724, 738 (1997) (“... the violent conflict arose from a disputed drug transaction, and where Wade fired at

Further, the Eighth Amendment does not require a crime be violent for proportionality analysis. “[T]he presence or absence of violence does not always affect the strength of society’s interest in deterring a particular crime or in punishing a particular criminal.” *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). See *Redman v. Ballard*, No. 14-0894, 2015 WL 5125826, at *12 (W. Va. Aug. 31, 2015) (memorandum decision) (“Under the United States Constitution, the Petitioner’s prior convictions do not even have to amount to a crime of violence in order for the habitual offender statute to apply.”). And whether termed violent or non-violent, it is evident that illegal drug dealing of any kind poses a danger to individual members of society and society as a whole that society has a right, if not duty, to deter.

“The heroin and opioid crisis in our state implicates the general welfare in a preeminent way.” *United States v. Walker*, No. 2:17-CR-00010, 2017 WL 2766452, at *7 (S.D. W. Va. June 26,

the command of Stradwick, the drug dealer”); *Sergent v. Charleston*, 209 W. Va. 437, 445, 549 S.E.2d 311, 319 (2001) (per curiam) (“the suspects were suspected drug dealers who were known to be armed because they had just shot at undercover police officers”); *State v. Johnson*, 179 W. Va. 619, 627, 371 S.E.2d 340, 348 (1988) (defendant’s motive to commit robbery was to obtain means to purchase illegal drugs); *State v. Evans*, 172 W. Va. 810, 813 & n.3, 310 S.E.2d 877, 880 & n.3 (1983) (“we find that there was sufficient evidence to convince impartial minds beyond a reasonable doubt that the appellant acted with malice. The jury in this case may have believed that the shooting was intentional. They may also have believed the testimony of the Rocchi brothers that the appellant declared on two separate occasions prior to the death of Ernie Hall that Ernie had ‘messed over’ the appellant. Andy Rocchi interpreted the appellant’s statement to be indicative of some difficulty in a drug deal.”); *State v. Hilling*, No. 06-F-146 (Cir. Ct. Monongalia County, W. Va., July 17, 2007) (final order affirming jury verdict of first degree murder without mercy of defendant who killed victim, in part, because the defendant believed the victim would inform police of defendant’s drug dealing), *pet’n appeal refused*, No. 080281(W. Va. May, 22, 2008), *denial of habeas corpus aff’d*, No. 12-0131 (W. Va. June 24, 2013) (memorandum decision); *Hicks v. Ballard*, No. 2:08-CV-01365, 2011 WL 1043459, at *1 (S.D. W. Va. Mar. 18, 2011) (“The jury found that Hicks had shot and killed Terrence Spencer. . . following an altercation arising from a proposed drug transaction.”), *appeal dismissed*, 461 Fed. Appx. 316 (4th Cir. Jan. 9, 2012); *Spry v. United States*, 2:03-2317, 2006 WL 2061134, at *5 (S.D. W. Va. July 21, 2006) (“Vanover and Cletus Robbins visited Defendant at his home to collect a drug debt. Defendant refused to pay the debt and shot Robbins in the shoulder.”); *Marker v. United States*, No.2:04-01161, 2006 WL 1767976, at *10 (S.D. W. Va. June 26, 2006) (“The firearm had been used in a drug-related murder”).

2017). Drug “offenses are at the root of some of the gravest problems facing our country. The ‘fruit’ of the drug plague is everywhere; it fills our jails, our courts, our streets, and our nurseries.” *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990). In other words, “[o]ur entire society is negatively affected by criminal drug activities.” *Robinson v. State*, 906 S.W.2d 534, 537 (Tex. Ct. App. 1995). Consequently, “[s]ociety as a whole is the victim when illegal drugs are being distributed in its communities.” *United States v. Green*, 532 F.3d 538, 549 (6th Cir. 2008). Indisputably, the Petitioner’s drug crime of distributing heroin was an extremely serious offense. *Young v. Miller*, 883 F.2d 1276, 1285 (6th Cir. 1989) (“indisputably, heroin dealing in any quantity is a very serious offense.”). Thus, a life with mercy sentence is not grossly disproportionate to his crime.

Moreover, the Petitioner’s predicate offenses also constituted serious offenses as well. The Petitioner was previously convicted of possession with intent to distribute cocaine base. A.R. 5. “[D]istribution of cocaine base is a serious offense.” *United States v. Ellis*, 483 F. App’x 940, 941 (6th Cir. 2012). Additionally, the Petitioner had a previous conviction for Possession of a Firearm not Registered to Defendant in the National Firearms Registration and Transfer Record. A.R. 5. This is an offense under 26 U.S.C. § 5861(d). This too is a serious offense endangering the public. “What must be registered are those devices which are of such a nature that they are inherently inimical to the public safety if they are freely possessed by private persons in an open society.” *United States v. Homa*, 441 F. Supp. 330, 332 (D. Colo. 1977), *aff’d*, 608 F.2d 407 (10th Cir. 1979). “There can be no doubt that one of the basic purposes of this statute is to reduce traffic in such instruments that have as their prime purpose human disfigurement and death.” *United States v. White*, 368 F. Supp. 470, 474 (N.D. Ind. 1973), *aff’d*, 498 F.2d 1404 (7th Cir. 1974). *Accord United States v. McKelvey*, 7 F.3d 236 (6th Cir. 1993) (Table) (text available at 1993 WL 339704

at *6) (“Furthermore, one of the basic purposes of . . . Section 5861(d), which makes it unlawful for any person to possess a firearm which is not registered to him/her in the National Firearms Registration and Transfer Record, is to reduce traffic in such instruments that have as their prime purpose human disfigurement and death.”).

In light of the Petitioner’s crime and criminal history, the Petitioner’s 15 year to life recidivist sentence is by no means grossly disproportionate to his crime, especially given that the Petitioner is parole eligible. *Cf. Daye v. Ballard*, No. 5:08-CV-00215, 2017 WL 4158638, at *7 (S.D. W. Va. Sept. 18, 2017), *appeal dismissed*, 740 F. App’x 311 (4th Cir. 2018) (“In *Ewing* and other cases addressing proportionality, the Supreme Court has considered eligibility for parole an important factor limiting the harshness of a life sentence imposed when a relatively minor crime triggers a recidivist sentence.”). As such, his sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Cabell County, West Virginia should be affirmed.

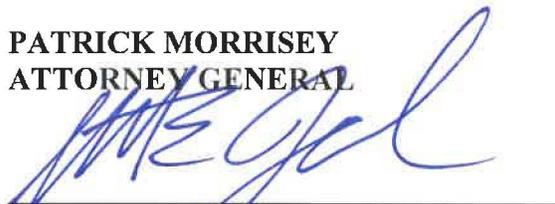
Respectfully submitted,

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