

**ORIGINAL**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

DAVID L. INGRAM,

Petitioner.



Case No.: 19-0016  
Circuit Court No.: 18-F-28 & 163  
Fayette County, West Virginia

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PETITIONER'S REPLY BRIEF

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## REPLY ARGUMENT

Petitioner's life recidivist sentence violates the Proportionality Clause of the West Virginia Constitution because the circuit court applied an incorrect violence standard.<sup>1</sup> Selling a minuscule quantity of drugs<sup>2</sup> to an acquaintance does not warrant a life sentence.

But this Court must first decide the correct standard. Released within less than two months of one another, two opinions—*Lane* and *Norwood*—applied contradictory standards to assess the proportionality of life recidivist sentences.<sup>3</sup> The response agrees these cases conflict<sup>4</sup> and that an oral argument might help courts.<sup>5</sup>

If the Court adopts the *Lane* standard, which analyzes the triggering offense's facts and the predicate offenses' elements, then Petitioner prevails. Here, the circuit court found that Petitioner's triggering offense (delivery of a schedule II drug to a confidential informant) involved no actual or threatened violence.<sup>6</sup> And his predicates are strikingly similar to those in *Lane*: a proximate property crime and a remote crime that, albeit violent, does not show a pattern or escalation of violence.<sup>7</sup>

The response urges the Court to follow *Norwood* and wade into the political realm to categorically declare that all drug crimes are violent regardless of the facts.<sup>8</sup> However, as that request itself illustrates, the *Norwood* standard is no standard at all. It requires this Court to decide piecemeal which offenses are violent, based upon unpredictable and sometimes political factors.

The Court should therefore reject the unworkable standard from *Norwood* and explicitly adopt the one from *Lane* to reverse Petitioner's life recidivist conviction.

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<sup>1</sup> See W. Va. Const. Art. III, § 5.

<sup>2</sup> Pet'r. Br. 2, 3, 13.

<sup>3</sup> Compare *State v. Lane*, 241 W. Va. 532, \_\_\_, 826 S.E.2d 657, 664 (2019) with *Norwood*, \_\_\_ W. Va. \_\_\_, \_\_\_, 832 S.E. 2d 75, \_\_\_ (2019).

<sup>4</sup> Resp. Br. 10, 14.

<sup>5</sup> Resp. Br. 4-5; see also A.R. 360 (court below expressing concern for the lack of guidance).

<sup>6</sup> A.R. 368, 372.

<sup>7</sup> Compare A.R. 379-84 with *Lane*, 826 S.E.2d at 664.

<sup>8</sup> Resp. Br. 10, 17.

**1. *Lane* and *Norwood* conflict because prior case law has not articulated or applied a consistent standard for analyzing violence.**

The response asserts that *Lane* is an aberration and that this Court regards drug crimes as violent and worthy of life sentences.<sup>9</sup> Case law does not support this argument.

Both *Lane* and *Norwood* rely upon solid case law. They conflict only because none of that law establishes a consistent standard. To this point, the Court has variously relied upon the facts,<sup>10</sup> elements,<sup>11</sup> or its own policy preferences<sup>12</sup> to reach conflicting results. Sometimes breaking and entering is inherently violent,<sup>13</sup> and sometimes it is not.<sup>14</sup> The same is true for burglary.<sup>15</sup> Sometimes unlawful assault—even as a trigger—does not justify a life sentence.<sup>16</sup> Petitioner urges the Court to use his case as a vehicle to establish a standard. Until then, lower courts will lack meaningful guidance because *Norwood* and *Lane* are equally authoritative.

One consistent pattern that does emerge from case law, though, is this Court’s hesitance to impose life sentences for drug crimes. “[D]elivery of a controlled substance ... is [not] per se a crime of violence.”<sup>17</sup> *Lane* aside, this Court most recently affirmed a granted habeas petition in *Terry v. Lambert*.<sup>18</sup> In *Terry*, the Court signaled there was not even a “substantial question of law” that the circuit court had correctly thrown out a life recidivist sentence where one of the predicates was a drug crime.<sup>19</sup> The Court likewise invalidated life sentences predicated upon delivery of schedule I narcotics in both *State ex*

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<sup>9</sup> See Resp. Br. 10.

<sup>10</sup> E.g. *State v. Davis*, 189 W. Va. 59, 61–62, 427 S.E.2d 754, 756–57 (1993).

<sup>11</sup> E.g. *State v. Wyne*, 194 W. Va. 315, 319, 460 S.E.2d 450, 454 (1995).

<sup>12</sup> E.g. *Norwood*, 832 S.E.2d at 84.

<sup>13</sup> See *State v. Vance*, 164 W. Va. 216, 233, 262 S.E.2d 423, 432 (1980).

<sup>14</sup> *Davis*, 189 W. Va. at 61–62.

<sup>15</sup> Compare *State v. Housden*, 184 W. Va. 171, 175, 399 S.E.2d 882, 886 (1990) (burglary inherently violent) with *State ex rel. Boso v. Hedrick*, 182 W. Va. 701, 709, 391 S.E.2d 614, 622 (1990) (no actual violence during nighttime burglary of a dwelling house).

<sup>16</sup> See *State v. Miller*, 184 W. Va. 462, 465, 400 S.E.2d 897, 900 (1990).

<sup>17</sup> *Boso*, 182 W. Va. at 709.

<sup>18</sup> *Terry v. Lambert*, No. 17-0788, 2018 WL 4909890, at 3, (W. Va. Oct. 10, 2018) (memorandum decision).

<sup>19</sup> *Id.* at 1.

*rel. Boso*<sup>20</sup> and *State v. Deal*.<sup>21</sup> Finally, in *State v. Wilson*, the State agreed that the triggering offense—conspiracy to deliver drugs to a CI—was non-violent. It conceded error.<sup>22</sup>

Notwithstanding this history, the response incorrectly asserts that *State ex rel. Daye v. McBride*<sup>23</sup> created a presumption that drug crimes are violent.<sup>24</sup> However, the *Daye* Court did not analyze for proportionality or violence.<sup>25</sup> The opinion concerned whether a specific enhancement provision within the Uniform Controlled Substances Act superseded the general enhancement in the recidivist statute.<sup>26</sup> The Court held, consistent with past case law,<sup>27</sup> that some drug crimes involve violence and others do not. “[S]ince many of the offenses under the Uniform Controlled Substances Act are relatively minor and involve little or no danger to others, they may be inappropriate for the more severe treatment under [the recidivist statute].”<sup>28</sup> The Court simply chose not to per se exclude drug crimes from the recidivist statute’s operation. The assertion that drug crimes are therefore presumptively violent not only misses *Daye*’s plain language, it also affirms the consequent.

## **2. *Lane*’s standard is easy for circuit courts to apply, best comports with the code and constitution, and respects the legislature’s role.**

In *Lane*, this Court applied a straightforward standard that it should adopt for all recidivist cases going forward. For the triggering offense, the Court examined the facts in the light most favorable to the jury’s verdict.<sup>29</sup> For the proximate and remote predicates,

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<sup>20</sup> *State ex rel. Boso*, 182 W. Va. at 709.

<sup>21</sup> *State v. Deal*, 178 W. Va. 142, 147, 358 S.E.2d 226, 231 (1987).

<sup>22</sup> *State v. Wilson*, No. 11-0432, 2012 WL 3031065, 2 (W. Va. Mar. 12, 2012) (memorandum decision).

<sup>23</sup> *State ex rel. Daye v. McBride*, 222 W. Va. 17, 658 S.E.2d 547 (2007).

<sup>24</sup> Resp. Br. 10–11.

<sup>25</sup> See *Daye*, 222 W. Va. at 23; see also *State v. Norwood*, \_\_\_ W. Va. \_\_\_, \_\_\_, 832 S.E.2d 75, 90, n. 4 (2019) (Workman, J, dissenting).

<sup>26</sup> *Id.*

<sup>27</sup> E.g. *State ex rel. Boso*, 182 W. Va. at 709 (ruling that drug crimes are not per se violent, requiring an inquiry into the facts).

<sup>28</sup> *Daye*, 222 W. Va. at 23.

<sup>29</sup> See *Lane*, 826 S.E.2d at 664; see also Pet’r. Br. 6 (proposed syllabus points).

the Court analyzed the offenses' elements for actual or threatened violence.<sup>30</sup> This formula is simple and provides clear guidance for circuit courts, prosecutors, and defendants. It also comports with the Proportionality Clause's mandate that the punishment fit the crime and this Court's emphasis on the triggering conviction.<sup>31</sup> Moreover, it relies upon objective criteria that are better suited for adjudication by judges than dynamic policy concerns better left to legislators.<sup>32</sup>

The response argues that *Lane* burdens prosecutors with proving that the predicates were violent as an additional element.<sup>33</sup> However, this argument hinges upon a strawman reading of *Lane*. The judge, not the jury, makes the violence determination at sentencing.<sup>34</sup> And the *Lane* standard only analyzes the triggering offense's facts; for the predicates, the court should consider only the statutory elements.<sup>35</sup> Since the circuit court presides over the triggering offense shortly before the recidivist proceedings,<sup>36</sup> *Lane* creates no additional burden on the judge or prosecutor. There simply is no merit to the response's contention that prosecutors will have to prove that the predicates were violent.

The response also argues that *Lane* will set up defense lawyers for ineffective assistance claims because the standard makes it difficult to advise clients about the future consequences of their convictions.<sup>37</sup> This is backwards. To determine whether a conviction could later predicate a recidivist under *Lane*, one need only consult the West Virginia Code to see if the elements involve actual or threatened force.<sup>38</sup> But *Norwood's* approach,

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<sup>30</sup> *See id.*

<sup>31</sup> *See* W. Va. Const. Art. III, § 5; *Wanstreet*, 166 W. Va. at 534 (“[T]he third felony is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence.”).

<sup>32</sup> *Id.* at 531 (“[O]bjective standards also ensure that appellate courts will not inject their personal views as to appropriateness of a given sentence unless the sentence can be shown to have violated the objective criteria of constitutional proportionality.”); *but see Norwood*, 832 S.E.2d at 84.

<sup>33</sup> Resp. Br. 12, 14–15.

<sup>34</sup> *E.g. State v. Kilmer*, 240 W. Va. 185, 187, 808 S.E.2d 867, 869 (2017).

<sup>35</sup> *See Lane*, 826 S.E.2d at 664; *see also* Pet'r. Br. 6 (proposed syllabus points).

<sup>36</sup> *See* W. Va. Code § 61-11-19.

<sup>37</sup> Resp. Be. 15–16.

<sup>38</sup> *See Lane*, 826 S.E.2d at 664; *see also* Pet'r. Br. 6 (proposed syllabus points).

which relies upon extrinsic policy judgments, would require counsel to guess at the idiosyncrasies of future judges and the policy concerns of the day. Objectivity and predictability weigh in favor of adopting *Lane*, not *Norwood*.<sup>39</sup>

**3. *Norwood* produces inconsistent results based on unpredictable factors and usurps the legislature’s primary role in setting public policy.**

The response urges this Court to make categorical decisions about individual offenses based on extrinsic policy concerns and declare all drug crimes inherently violent.<sup>40</sup> However, this request itself shows that *Norwood* is unworkable.

The very fact that the response asks the Court to make categorical rules shows the problem with *Norwood*—its standard is no standard at all. Rather than create a generic test that circuit courts could objectively and predictably apply, *Norwood* requires this Court to declare, on a statute-by-statute basis, which offenses qualify for recidivism. That isn’t guidance; the response requires the Court to micromanage.

Worse still, those categories would remain in perpetual flux because *Norwood*’s approach merely creates an illusion of consistency. Even with a categorical rule, if the Court bases violence analysis upon extrinsic policy factors, then the “rule” is as fluid as the individual judges and changing norms.<sup>41</sup> At times, this Court has declared burglary, and even breaking and entering, to be inherently violent.<sup>42</sup> The Court has also said otherwise.<sup>43</sup> And the same is true of drug crimes.<sup>44</sup> *Norwood* found heroin to be inherently violent but not Oxycodone,<sup>45</sup> and the response would expand this to all drugs.<sup>46</sup> Yet previous iterations of the Court held the exact opposite; “delivery of a controlled substance ... is

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<sup>39</sup> See *Wanstreet*, 166 W. Va. at 531.

<sup>40</sup> Resp. Br. 17.

<sup>41</sup> But see *Wanstreet*, 166 W. Va. at 531.

<sup>42</sup> *Vance*, 164 W. Va. at 233.

<sup>43</sup> *Davis*, 189 W. Va. at 61–62.

<sup>44</sup> Compare *Boso*, 182 W. Va. at 709 with *Norwood*, 832 S.E.2d at 84.

<sup>45</sup> See *id.*

<sup>46</sup> See Resp. Br. 17.

[not] per se a crime of violence.”<sup>47</sup> Using policy to declare crimes violent will not settle anything; courts will have to revisit the policy debate every single time.

Finally, policy questions such as these are best left to the legislature. It is perfectly legitimate for this Court to hold the legislature accountable to the Constitution by limiting life recidivist sentences to crimes proportional to that punishment.<sup>48</sup> But to base that analysis upon extrinsic policy considerations, rather than statutory definitions created by the legislature, intrudes into the political domain. *Lane* commands courts to stick to traditional judicial functions—evaluating forensic facts (for the triggering offense) and interpreting the law (for the predicates). *Norwood* and the response would require courts to weigh societal policies and decide what the law *ought* to be.

**4. Petitioner’s case is strikingly like *Lane*, and as Proportionality is a legal question that ought to produce consistent results, this Court should reverse.**

The proportionality of a life sentence is not a sentencing question subject to discretion.<sup>49</sup> Rather, it is a question of law that turns upon the defendant’s propensity for violence as shown by the triggering offense and predicates.<sup>50</sup> The Court should therefore adopt the *Lane* standard because, unlike the *Norwood* approach urged by the response, *Lane* can produce consistent results. And, applying *Lane* to Petitioner’s case is simple. The facts are strikingly similar and should produce a consistent result—reversal.

Under the correct standard, courts look to the triggering offense’s facts because “it provides the ultimate nexus to the sentence.”<sup>51</sup> As in *Lane*,<sup>52</sup> the police used a confidential

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<sup>47</sup> *State ex rel. Boso*, 182 W. Va. at 709; *Accord. Daye*, 222 W. Va. at 23. (whether a drug crime warrants a life recidivist sentence depends upon the individual facts).

<sup>48</sup> See W. Va. Const. Art. III, § 5.

<sup>49</sup> See *State ex rel. Daye*, 222 W. Va. at 24.

<sup>50</sup> See *Kilmer*, 240 W. Va. 185 at Syl. Pt. 1.

<sup>51</sup> *Wanstreet*, 166 W. Va. at 534.

<sup>52</sup> *Lane*, 826 S.E.2d at 663.

informant to solicit drugs from Petitioner.<sup>53</sup> In both cases, the facts showed peaceful transactions without threatened or actual violence.<sup>54</sup>

The response argues that *Norwood* distinguishes between potentially therapeutic drugs and those that are purely recreational; since the jury convicted Petitioner of selling “street drugs” he deserves a life sentence.<sup>55</sup> However, this argument makes two mistakes. Legally, it ignores that *Norwood* and *Lane* did not reach differing conclusions because of a factual distinction; the cases applied separate, incompatible legal standards.<sup>56</sup> Along with the unworkable standard from *Norwood*, the Court should also reject this distinction as inapposite to a proper inquiry under *Lane*. And factually, the response is mistaken. Cocaine and methamphetamine are schedule II drugs, just like the oxycodone in *Lane*, because they have accepted medical uses.<sup>57</sup> As schedule II drugs, doctors use cocaine with patients and can prescribe methamphetamine.<sup>58</sup> So the response’s distinction between recreational schedule I drugs in *Norwood* and schedule II drugs in *Lane* weighs in Petitioner’s favor.

As defined by the elements set forth by the legislature, Petitioner’s predicates are also similar to those in *Lane*. For both *Lane* and Petitioner, their only violent crimes were the most remote.<sup>59</sup> *Lane* had, eighteen years prior, committed an unlawful wounding, when he was in his early twenties.<sup>60</sup> Based on the elements, that means he seriously injured a victim.<sup>61</sup> The State charged that twenty years before the recidivist, when Petitioner

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<sup>53</sup> A.R. 107–08, 111.

<sup>54</sup> Compare *Lane*, 826 S.E.2d at 664 with A.R. 368; see also A.R. 372 (court found no violence).

<sup>55</sup> Resp. Br. 13.

<sup>56</sup> Compare *Lane*, 826 S.E.2d at 664 (based on trigger’s facts and predicates’ elements) with *Norwood*, 832 S.E.2d at 84 (finding offenses “inherently violent” due to extrinsic policy assumptions).

<sup>57</sup> See W. Va. Code § 60A-2-206.

<sup>58</sup> See W. Va. Code § 60A-2-205.

<sup>59</sup> Compare *Lane*, 826 S.E.2d at 664–65 with A.R. 356, 371, 372.

<sup>60</sup> Compare *Lane*, 826 S.E. 2d at 661 with See West Virginia Division of Corrections and Rehabilitation Database Search for Joe Lane, <https://apps.wv.gov/ois/offendersearch/doc/>, (search Offender ID (OID) Number “3508270,” complete website validation entries, click “Search”).

<sup>61</sup> See W. Va. Code 61-2-9(a) (1997) (“If any person ... shoot, stab, cut, or wound any person, or by any other means cause his bodily injury with intent to maim, disfigure, disable, or kill, ... unlawfully but not maliciously, ... then the offender shall be guilty of a felony[.]”).

was eighteen, a court convicted him of un-aggravated robbery, which required a threat without actual harm.<sup>62</sup>

Under different circumstances, Lane’s crime involving violence could have justified a life sentence. However, the State charged Lane with a property crime as the proximate predicate.<sup>63</sup> This Court concluded that this progression—actual violence, property crime, drug crime—showed a de-escalation in violence that did not justify a life sentence.<sup>64</sup>

The same is true for Petitioner. To justify a life sentence, the State charged attempted third offense shoplifting.<sup>65</sup> Consistent with *Lane*, this Court should likewise reject a life sentence for Petitioner. His progression shows the same de-escalation. His remote predicate did not even involve actual violence—merely a threat.

The response urges the Court to look beyond the trigger and predicates to consider Petitioner’s un-convicted charges, misdemeanor record, and even his “minor traffic violations.”<sup>66</sup> This argument misunderstands the nature of proportionality analysis. To best respect legislative policy while adhering to the West Virginia Constitution, courts must weigh proportionality by applying objective criteria to the charged offenses only.

The legislature’s recidivist statute prescribes a life sentence for three-time felons.<sup>67</sup> As a matter of constitutional law, a life sentence is only proportionate if the trigger and predicates show a pattern or increasing tendency towards violence.<sup>68</sup> In the first instance or on appeal, the inquiry is a legal one—whether the recidivist conviction results in a disproportionate sentence.<sup>69</sup> This is a measured application of checks and balances, especially since the alternative to testing individual sentences for proportionality would be to

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<sup>62</sup> See W. Va. Code § 61-2-12 (1997).

<sup>63</sup> See *Lane*, 826 S.E.2d at 664.

<sup>64</sup> See *id.*

<sup>65</sup> A.R. 553.

<sup>66</sup> Resp. Br. 7, 9.

<sup>67</sup> W. Va. Code § 61-11-18(c).

<sup>68</sup> See *Lane*, 826 S.E.2d 657 at Syl. Pt. 6; see also W. Va. Const. Art. III, § 5.

<sup>69</sup> See *Lane*, 826 S.E.2d at 662.

rule the statute as a whole unconstitutional until fixed by the legislature to reflect the need for violence.<sup>70</sup>

But what the response urges is altogether different. If courts apply discretion to the totality of the circumstances to simply decide what sentence the defendant deserves, they are conducting traditional sentencing hearings entitled to enormous deference.<sup>71</sup> That rejects both the legislature's prescribed sentence and the rule-based approach to the Proportionality Clause. The Constitution requires the judiciary to check the excesses of criminal sentencing. It does not permit the judiciary to ignore the legislature and do as it pleases.

### CONCLUSION

Petitioner and the response agree that West Virginia's proportionality jurisprudence is in conflict. Both parties propose that the Court fix the law by establishing a standard.

However, only Petitioner's proposal fixes the problem by creating a legal standard that circuit courts can apply to reach consistent results. The response argument, at best, pushes these problems to another day and another case.

Petitioner therefore requests that this Court adopt the *Lane* standard for analyzing violence and vacate his life sentence.



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<sup>70</sup> Cf. *Hart v. Coiner*, 483 F.2d 136, 139 (4th Cir. 1973) (Finding individual life sentences may be disproportionate without invalidating entire West Virginia recidivist statute).

<sup>71</sup> See *Kilmer*, 240 W. Va. 185 at Syl. Pt. 1.