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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 19-0016**

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**STATE OF WEST VIRGINIA,**

*Plaintiff Below, Respondent*

**v.**

**DAVID I. INGRAM,**

*Defendant Below, Petitioner.*

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**RESPONDENT'S BRIEF**

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## ASSIGNMENTS OF ERROR

David I. Ingram (“Petitioner”), by counsel, advances a single assignment of error:

The circuit court applied an incorrect legal standard to judge Petitioner’s life recidivist sentence and erroneously concluded that his prior convictions showed sufficient violence to satisfy the Proportionality Clause of the West Virginia Constitution.

## STATEMENT OF THE CASE

### **A. Statement of Facts**

On April 12, 2017, a confidential informant (“CI”) cooperated with the Oak Hill Police Department and the Central West Virginia Drug Task Force to purchase cocaine from Petitioner. (App. at 107.) In exchange, the CI, a known drug addict, would not be charged with possession with intent and conspiracy based upon drugs found in her apartment. (App. at 107, 125.) The CI was given fifty dollars and purchased half a gram of cocaine from Petitioner inside his home at Shiloh Mobile Home Park in Fayette County, West Virginia. (App. at 104, 107.) A camera was placed on the CI and she went to Petitioner’s trailer and a short time later exited with the cocaine that was given to law enforcement. (App. at 108, 120.)

Five days later, on April 18, the CI agreed to buy methamphetamine (“meth”) from Petitioner in his vehicle in the parking lot of the Dollar Tree in Oak Hill, Fayette County, West Virginia. (App. at 110.) The CI was given a recording device and sixty dollars to buy a half gram of meth, entered Petitioner’s vehicle, and exited with the purchased meth. (App. at 111, 122.)

### **B. Procedural History<sup>1</sup>**

On January 10, 2018, the Grand Jury of Fayette County, West Virginia, returned Indictment 18-F-28 against Petitioner charging him with delivery of cocaine, a Schedule II narcotic controlled

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<sup>1</sup> Because Petitioner challenges only the lawfulness of his recidivist life sentence on direct appeal, the State limits its procedural discussion to information relevant to that issue.

substance (Count One) and delivery of methamphetamine, a Schedule II controlled substance (Count Two), both in violation of West Virginia Code § 60A-4-401. (App. at 378.) Petitioner's one-day trial was held on August 31, 2018, and consisted of five witnesses and six exhibits. (App. at 61–62.) The five State witnesses consisted of Christopher Young (App. at 43–58), CI Summer Fleming (App. at 59–74), Sergeant Richard Stephenson (App. at 76–80.), Sergeant C.L. Adkins (App. at 81–85), and Jared Vitatoe. (App. at 89–96.) At the conclusion of the trial, the jury found Petitioner guilty of both counts charged in the Indictment. (App. at 215–16.)

Four days later, on September 4, 2018, the State filed a Recidivist Information and an Amended Information alleging that on November 20, 1997, Petitioner was convicted of non-aggravated robbery, a felony offense, and was sentenced to an indeterminate term of incarceration of five to eighteen years by the Wood County Circuit Court. (App. at 382–84.) The Amended Information also alleged that on December 14, 2015, Petitioner was convicted of attempt to commit a felony, to wit: third offense shoplifting, a felony offense, and was sentenced to an indeterminate term of incarceration of one to three years by the Raleigh County Circuit Court. (App. at 382–84.)

On September 4, 2018, the Circuit Court of Fayette County held an arraignment on the State's Amended Recidivist Information. (App. at 224–31.) During the hearing, Petitioner, on the advice of counsel, stood silent on the charges contained in the Amended Information. (App. at 227–29.) On October 24, 2018, a recidivist jury found that on November 20, 1997, Petitioner was convicted of non-aggravated robbery and on December 14, 2015, Petitioner was convicted of attempt to commit a felony to wit: third offense shoplifting. (App. at 342–43.) On December 10, 2018, after hearing arguments of counsel and allocution by Petitioner, the Circuit Court noted Petitioner's lack of cooperation, lack of remorse for being a drug dealer, and extensive criminal

history. (App. at 368–71.) Regarding the 1997 non-aggravated robbery conviction, the Circuit Court noted Petitioner pleaded down from first degree robbery. (App. at 372.) The court further noted that although the facts of the instant drug offenses did not suggest any violence, drug activity itself is inherently violent. (App. at 372.) By Order entered December 14, 2018, the Circuit Court amended Petitioner’s sentence on Count One of Indictment 18-F-28 and imposed an enhanced recidivist penalty of life with the possibility of parole upon the felony conviction of delivery of cocaine. (App. at 573.) The Circuit Court further sentenced Petitioner on Count Two of Indictment 18-F-28 to one to five years upon the felony delivery of methamphetamine. (App. at 574.) Petitioner now appeals the recidivist sentence, alleging that the recidivist life enhancement to his felony delivery of cocaine conviction is unconstitutionally disproportionate.

#### **SUMMARY OF THE ARGUMENT**

The Circuit Court constitutionally applied a recidivist life enhancement to Petitioner’s third-offense felony, in adherence to the language of W. Va. Code § 61-11-18 and this Court’s holdings in *State v. Adams* and *State v. Norwood*. In *Adams*, this Court acknowledged that aggravated robbery is an inherently violent offense. Similarly, in its recent *Norwood* opinion, this Court found that the delivery of a dangerous and illegal street narcotic created enough of a risk of violence to satisfy the constitutional proportionality requirement. In Petitioner’s case, he was convicted of the triggering offenses of felony delivery of cocaine and delivery of meth, and the predicate offense of non-aggravated robbery. All three offenses carried the risk of real or threatened violence, and therefore they justify the imposition of a recidivist life penalty under W. Va. Code § 61-11-18, and are sufficient to support a finding that a recidivist life sentence is proportionate to those convictions.

While Petitioner’s case is rendered meritless by settled West Virginia law, the State urges this Court to adopt a categorical approach to delivery of narcotics-related offenses. Such offenses are inherently violent based upon the effect the delivery of illegal narcotics has on the user, the public, emergency services personnel, police, and even the dealers themselves. By requiring a trial court to undergo a per-case analysis as to whether a delivery-related offense carries the risk of real or threatened violence, this Court effectively requires the State to retry prior drug convictions, some of which may be decades old and outside of West Virginia jurisdiction. Moreover, by failing to adopt a bright-line categorical approach, this Court would leave the door open to challenges of ineffective assistance of counsel based upon defense counsel’s inability to clearly communicate the ramifications of a guilty plea involving a third-offense felony or a delivery of narcotics conviction. Finally, any distinction made between the delivery of prescription opioids and illegal street narcotics is demonstrably false, as such drugs are intermingled in the illegal marketplace. For these reasons, the State respectfully requests that this Court (1) affirm the recidivist life enhancement penalty entered by the circuit court below, and (2) adopt a categorical approach finding that the delivery of narcotics, regardless of type, carries with it a perceivable risk of both real and threatened violence.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Given this Court’s recent decision in *State v. Norwood*, No. 17-0978, 2019 WL 2332195 (W.Va. May 30, 2019), a conviction for the delivery of illegal narcotics may be used as a qualifying offense in support of a recidivist life enhancement penalty. Petitioner’s appeal challenges the Circuit Court’s recidivist life enhancement to his sentence for felony delivery of cocaine conviction and asserts that the enhancement is unconstitutionally disproportionate. To the extent that this Court wishes to entertain the State’s request for a categorical approach including delivery of narcotics offenses as “crimes of violence” under W.Va. Code § 61-11-18, oral argument is

requested. Otherwise, Petitioner's claims rely on well-settled case law, meaning that oral argument is unnecessary pursuant to W.Va. R. App. P. 18(a), and that the matter may be properly disposed by memorandum decision under W.Va. R. App. P. 21(c).

## ARGUMENT

### **A. Standard of Review.**

This Court reviews sentencing orders “under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 273, 496 S.E.2d 221, 223 (1997); *see also* Syl. pt. 1, in part, *State v. Adams*, 211 W.Va. 231, 565 S.E.2d 353 (2002). Sentences are not subject to appellate review “if within statutory limits and if not based on some [im]permissible factor[.]” Syl. pt. 1, in part, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504, 505 (1982). “It is not the proper prerogative of this Court to substitute its judgment for that of the trial court on sentencing matters, so long as the appellant’s sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles.” *State v. Georgius*, 225 W.Va. 716, 722, 696 S.E.2d 18, 24 (2010). When an issue is of a constitutional dimension, the question of law is reviewed de novo. *See* Syl. pt. 1, *State v. Finley*, 219 W.Va. 747, 639 S.E.2d 839 (2006) (citing Syl. pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)).

### **B. West Virginia’s Recidivist Statute and the Constitutionality of a Recidivist Life Enhancement.**

Under W.Va. Code § 61-11-18(c), a criminal defendant convicted in West Virginia of a third felony offense shall be sentenced to life with the possibility of parole. The defendant’s prior qualifying offenses must be felonious, in that they are punishable by confinement in a penitentiary, and may be from any jurisdiction within the United States. *See id.* Even though provided by statute, however, a recidivist life enhancement must meet constitutional proportionality principles when

considering the nature of both the triggering offense and the prior qualifying offenses. *See generally State v. Kilmer*, 240 W.Va. 185, 188, 808 S.E.2d 867, 870 (2017).

The appropriateness of a recidivist life enhancement and the proportionality of such a penalty to the triggering and underlying offenses is subject to additional scrutiny due to the severity of the punishment. *See* Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981) (“While our constitutional proportionality standards theoretically apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a recidivist life sentence.”). Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offense.’” Syl. Pt. 3, *Wanstreet*, 166 W.Va. at 523, 276 S.E.2d at 205 (citing Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980)).

In determining the constitutionality of a recidivist life enhancement, this Court has provided the following framework:

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 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.”

Syl. Pt. 3, *Kilmer* (citing Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981)). The nature of the final, triggering offense is entitled to closer scrutiny than the prior convictions, “since it provides the ultimate nexus to the sentence.” *State v. Deal*, 178 W. Va. 142, 147, 358 S.E.2d

226, 231 (1987) (citing *Wanstreet* at 534, 276 S.E.2d at 212). Overall, “the sentencing provisions of . . . W. Va. Code § 61-11-18 (2000) are ‘free from ambiguity [and] its plain meaning is to be accepted and applied without resort to interpretation.’” *Norwood*, No. 17-0978 at 12, 2019 WL 2332195 at \*7 (citing Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)).

**C. Petitioner’s predicate offense for non-aggravated robbery is a crime of anticipated violence, and is thus proportionate to the imposition of a recidivist life enhancement.**

Petitioner’s first underlying felony conviction of non-aggravated robbery is a suitable basis upon which to invoke West Virginia’s recidivist statute when analyzing the facts surrounding the conviction. In May 1997, Petitioner was indicted for Aggravated Robbery in violation of W.Va. Code § 61-2-12, “by unlawfully, intentionally and feloniously taking United States Currency of some value from the person or presence of [the victim], by the threat or presentation of a deadly weapon, to-wit: a hand gun, and that in so doing, the said [co-defendant] did use, present or brandish a firearm[.]” (App. at 563.) The initial Criminal Complaint alleged Petitioner was the getaway driver for his co-defendant. (App. at 565.) In October 1997, Petitioner pleaded guilty to the lesser included offense of non-aggravated robbery. (App. at 554.)

In *State v. Harless*, 168 W.Va. 707, 712, 285 S.E.2d 461, 465 (1981), this Court held that “the distinguishing feature of a nonaggravated robbery is that it is accomplished, not through violence to the victim or the threat or presentation of firearms or other deadly weapon or instrumentality, but through intimidation that induces fear of bodily injury in the victim.” Conversely, the distinguishing feature of aggravated robbery “is violence to the victim or the threat or presentation of firearms or other deadly weapons.” *State v. Phillips*, 199 W.Va. 507, 511, 485 S.E.2d 676, 680 (1997).

This Court has acknowledged that aggravated robbery is “recognized as a crime that involves a high potentiality for violence and injury to the victim involved.” *State v. Ross*, 184

W.Va. 579, 582, 402 S.E.2d 248, 251 (1990) (per curiam); *State v. Glover*, 177 W.Va. 650, 659, 355 S.E.2d 631, 640 (1987) (“[A]ggravated robbery has always been regarded as a crime of the gravest character.”). In *State v. Adams*, 211 W.Va. 231, 234, 565 S.E.2d 353, 356 (2002), this Court explicitly stated that because of “the inherent potential for harm in an aggravated robbery,” the trial courts have broad discretion in imposing sentences for aggravated robbery. Although Petitioner argues that the non-aggravated robbery offense involved only “a threat of physical force without a weapon or actual harm” (Pet’r Br. at 12), the plea non-aggravated robbery, a lesser included offense, does not diminish the actual potential for injury or death in the commission of the offense when Petitioner’s co-defendant brandished a firearm. Moreover, contrary to Petitioner’s argument, the threat of physical force itself qualifies the offense for the life recidivist enhancement. The Circuit Court therefore, properly examined the facts of the conviction and plea to the lesser included offense and concluded that this non-aggravated robbery conviction was inherently a crime of violence.

Petitioner further argues that the non-aggravated robbery conviction occurred twenty years prior to his triggering offense and therefore, should not have been considered for purposes of the life recidivist enhancement. (Pet’r Br. at 12.) In *State v. Jones*, 187 W.Va. 600, 604, 420 S.E.2d 736, 740 (1992), this Court stated that common sense dictates “that the age of a prior conviction should have little bearing in a recidivist proceeding, when the underlying purpose of the statute is considered.” This Court explained its decision as follows:

Obviously, when the life recidivist statute is invoked, the defendant will have at least two prior felony convictions. If they are serious felonies, the defendant will have served lengthy prison sentences. This means that at the time of the life recidivist trial, one or more of the earlier convictions may be rather old. Yet, the deterrent purpose of the recidivist statute would hardly be served if earlier felony convictions could be excluded because of their ages.

*Jones*, 187 W.Va. at 604, 420 S.E.2d at 740. In *State v. Deal*, 178 W.Va. 142, 358 S.E.2d 226 (1987) however, this Court, in finding that the life recidivist sentence imposed was disproportionate to the offense upon which it was based, noted that in the sixteen years since the defendant's previous conviction of a violent felony, the defendant did not demonstrate any propensity toward violent or severe crimes. In the instant case however, Petitioner has been charged with at least twenty-six various crimes including but not limited to, minor traffic violations, obstruction, malicious wounding, destruction of property, shoplifting, assault, and driving suspended since initial robbery conviction in 1997. (App. at 571–73.) Consequently, Petitioner's non-aggravated robbery conviction is not too remote for purposes of the life recidivist enhancement.

Accordingly, this Court should find that Petitioner's predicate offense of non-aggravated robbery, a violent or potentially violent offense, fully supports the Constitutional proportionality of the life recidivist enhancement.

**D. Petitioner's triggering convictions for Delivery of Schedule II Controlled Substances (Cocaine and Meth) are crimes of real and threatened violence, and thus, are proportionate to the imposition of a recidivist life enhancement.**

Before discussing the particular facts of Petitioner's case and whether his prior convictions for delivery of Schedule II narcotics (cocaine and meth) are constitutionally sufficient to impose the sentence he received below, it is important to examine first the fluctuating nature of whether drug offenses are sufficient for purposes of the proportionality principle's impact on a recidivist life sentence. In 2007, this Court's decision in *State ex rel. Daye v. McBride*, 222 W. Va. 17, 658 S.E.2d 547 (2007), created the presumption that drug offenses were crimes of violence and were permissible for use as either triggering or qualifying offenses under West Virginia's recidivist statute. This presumption was relied upon in *State v. Harris*, 226 W. Va. 471, 477 at n. 14, 702

S.E.2d 603, 609 at n. 14 (2010), and remained in effect until the January 2019 term of court, when this Court suggested a departure from including drug offenses as prior qualifying convictions under W. Va. Code § 61-11-18 altogether in *State v. Lane*, 241 W. Va. 532, 826 S.E.2d 657 (2019). Then, in *Norwood*, this Court implemented a case-by-case approach to determine whether the use of prior drug offenses constitute crimes of actual or threatened violence and are qualifying offenses for life recidivist sentences. These differing approaches affect the claim raised by Petitioner on appeal for two reasons: *First*, *Norwood*, as the controlling authority, requires that this Court should affirm Petitioner’s recidivist life sentence; and *second*, this Court should adopt a categorical approach for purposes of future recidivist proceedings involving the delivery of narcotics.

**1. Based upon this Court’s recent opinion in *State v. Norwood*, the inherently illegal and dangerous nature of cocaine and meth, Petitioner’s felony convictions are suitable for use in imposing a recidivist life enhancement.**

**a. This Court established an inference that convictions for delivery of narcotics are constitutionally proportionate for purposes of the imposition of a life recidivist penalty in *State ex rel. Daye v. McBride*.**

Beginning with this Court’s decision in *Daye*, this Court entertained the appeal of a life sentence imposed for a third offense of possession with the intent to deliver cocaine. Therein, the State contended that the lower court had to sentence Daye to a life recidivist enhancement in accordance with the provisions of W. Va. Code § 61-11-18(c) after it filed an information pursuant to W. Va. Code § 61-11-19, regardless of the second or subsequent offense provisions of W. Va. Code § 60A-4-408 and the Uniform Controlled Substances Act. *Id.*, 222 W.Va. at 20-21, 658 S.E.2d at 550-51. This Court agreed with the State, finding that “when any person is convicted of an offense under the Uniform Controlled Substances Acts . . . and it is further determined . . . that such person has been before convicted in the United States of a crime or crimes, including crimes under the Uniform Controlled Substances Act, . . . punishable by confinement in a penitentiary,

the court *shall* sentence the person” pursuant to the provisions of W. Va. Code § 61-11-18. *Id.*, 222 W.Va. at 24, 658 S.E.2d at 554 (emphasis added).

While the Court did not explicitly address the proportionality of such delivery of controlled substance offenses against the constitutionality of a recidivist life sentence, it created the presumption that such offenses were sufficient as either triggering or prior qualifying offenses. *See* W. Va. R. App. P. 10(c) (providing this Court with discretion to consider “plain error not among the assignments of error but *evident from the record* and otherwise within its jurisdiction to decide”) (emphasis added). Indeed, this Court’s own subsequent opinions concluded that its decision in *Daye* founded a categorical approach permitting delivery of controlled substance convictions for use in imposing a recidivist life enhancement penalty. *See State v. Harris*, 226 W. Va. 471, 477 at n. 14, 702 S.E.2d 603, 609 at n. 14 (2010) (finding that *Daye* “affirm[ed the] use of prior convictions for drug offenses to impose life imprisonment under recidivist statutes.”).

**b. This Court then distinguished its holding in *Daye* through the recent decision in *State v. Lane*, adopting a case-by-case approach when examining the constitutional proportionality of drug offenses used when imposing a recidivist life enhancement.**

The Court’s holding in *Daye* remained controlling for the next decade, but was recently revisited in *Lane*. There, *Lane* challenged the constitutional proportionality of his recidivist life sentence based upon the triggering offense being delivery of a controlled substance, which included four (4) Oxycodone pills. *See Lane*, 241 W.Va. at ---, 826 S.E.2d at 665. *Lane* also alleged that one of his prior qualifying offenses, conspiracy to commit the transfer of stolen property, was similarly a nonviolent felony unfitting of a life recidivist enhancement. *See id.*, 241 W.Va. at ---, 826 S.E.2d at 664. In response, the State argued that the opioid epidemic and potential for violence in drug transactions supported a finding that *Lane*’s triggering offense (and prior felony conviction

for unlawful assault) was a violent felony and is proportionate to the imposition of a recidivist life enhancement. *See id.*, 241 W.Va. at ---, 826 S.E.2d at 663.

Upon deciding the case, this Court concluded that Lane's triggering delivery of a controlled substance offense was a nonviolent crime. *See id.*, 241 W.Va. at ---, 826 S.E.2d at 665. In doing so, this Court rejected the State's reliance on *Daye*, reasoning that the opinion of *Daye* concluded on procedural grounds. *Id.* Based upon the facts of Lane's case, this Court found that there was no evidence that his sale of Oxycodone to a confidential informant was violent as to justify the imposition of a life sentence, and it concluded that his triggering offense (along with his conspiracy conviction) "were not serious penalties so as to justify this Court now imposing a life recidivist sentence." *Id.*, 241 W.Va. at ---, 826 S.E.2d at 664. Based upon this Court's holding in *Lane*, the determination of whether delivery of controlled substances convictions were crimes of violence appeared to shift to a case-by-case determination. Moreover, *Lane* had the effect of necessarily requiring prosecutors throughout the State to prove an additional element to a recidivist charge (beyond the general burden of proving identity): that a crime which did not appear violent *per se* was indeed violent based upon the facts giving rise to the offense. *See generally id.*, 241 W.Va. at ---, 826 S.E.2d 665 (wherein this Court ruminated upon the importance of the facts giving rise to a delivery of a controlled substance conviction).

- c. **This Court, however, distanced itself from the overarching implications of *Lane* through the recent decision in *Norwood*, which categorically implies that the delivery of illegal street narcotics (rather than prescription narcotics) is a suitable basis for imposing a recidivist life enhancement.**

This Court's opinion shifted again, however, in its most recent decision on the matter, *State v. Norwood*. In *Norwood*, this Court determined whether a conviction for delivery of a controlled substance, to wit; heroin, was a crime of real or threatened violence in support of a recidivist life enhancement. *See id.*, No. 17-0978 at 9-11, 2019 WL 2332195 at \*7-8. This Court rescinded the

case-by-case approach alluded to by *Lane*, however, in favor of a categorical determination that heroin, by its very nature as an illegal narcotic, is inherently dangerous. *See id.*, No. 17-0978 at 14, 2019 WL 2332195 at \*8 (“[D]ue to the nature of the drug transaction, and the drug that was the subject of the transaction, this Court concludes that there was an inherent threat of violence.”).

This Court also observed the reasoning of the underlying circuit court:

[The] [c]ourt would also note the inherent danger in the distribution of drugs, and while the [c]ourt was unable to identify any specific cases that have been decided by the Supreme Court of Appeals of this state, finding that distribution of narcotics has a potential for violence, it certainly has a potential for risk of injury and death to persons involved in consuming that product that [the petitioner] was peddling.

*Id.*, No. 17-0978 at 15, 2019 WL 2332195 at \*8. As such, the current jurisprudence involving the application of proportionality principles to recidivist life sentences establishes that illegal street drugs, such as cocaine, from the moment of their “clandestine creation,” are inherently dangerous both in terms of their illegal trade and their presupposed risk of harm to the public. *See id.*

**d. Because the nature of Petitioner’s triggering qualifying drug offenses involve the inherently violent offense of delivery of cocaine, an illegal street drug, this Court’s opinion in *Norwood* functions as the controlling authority.**

Based upon the holdings of *Norwood* and *Daye* (which was not overruled by *Lane*), Petitioner’s triggering convictions of delivery of controlled substance (cocaine and meth) are inherently dangerous and therefore, form suitable bases for the imposition of a recidivist life sentence enhancement. *See Norwood*, 2019 WL 2332195 at \* 8 (concluding that the dangerous nature of heroin, the nature of its illegality “[f]rom the moment of its clandestine creation,” and the dangers associated with its delivery create an observable potential for violence). Regardless, cocaine and meth are illegal street drugs. They are created illegally, and cannot be prescribed. They are harmful to a user of the drug. Their associations are violent. Even if this Court were to ameliorate the differences of *Lane* and *Norwood*, the facts of Petitioner’s triggering qualifying

offenses support the imposition of a recidivist life enhancement. Therefore, because the triggering offenses and the prior qualifying offense carries the real or inherent threat of violence, Petitioner’s recidivist life sentence, entered pursuant to W. Va. Code § 61-11-18, is constitutionally permissible.

**2. The State of West Virginia requests that this Court adopt a categorical approach for the purpose of determining when a prior drug-related felony conviction may be used as a prior qualifying offense for a recidivist life enhancement.**

As identified above, the decisions in *Lane* and *Norwood* are in tension. Certainly, “[t]he majority’s determination on the merits [in *Norwood*] that the recidivist life sentence imposed upon the petitioner does not violate the proportionality clause is in direct contravention with *State v. Lane* . . . .” *Norwood*, 2019 WL 2332195, at \*10 (Workman, J., dissenting). Nor can the *Lane* decision be justified by the inference developed by this Court in *Daye*—that delivery of controlled substance offenses are inherently dangerous—or its later explicit reliance on such inference in *Harris*.

The State therefore, requests that this Court adopt the categorical approach favored by the federal courts in reviewing the recidivist enhancement provisions of W.Va. Code § 61-11-18. *See Taylor v. United States*, 495 U.S. 575, 576–77 (1990) (holding that the “sentencing court must generally adopt a formal categorical approach in applying the enhancement provision, looking only to the fact of conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts.”). The reasons for such an approach are many.

First, by abandoning a categorical approach in recidivist proceedings, this Court effectively requires the State to carry the burden of proving material elements of all of a defendant’s prior qualifying offenses—essentially forcing our state prosecutors to retry prior criminal convictions. Normally, the only element the State must prove during recidivist proceedings is one of identity.

*See* W.Va. Code § 61-11-19. If a defendant disputes that he was previously twice convicted of a felony, the trial court will empanel a jury and allow the State to prove “whether the prisoner is the same person mentioned” in the records of the prior convictions. *Id.* By implementing the case-by-case approach of *Lane*, this Court asks prosecutors to instead prove additional facets of a criminal case during recidivist proceedings, such as whether violence occurred or was present during the commission of the prior crimes. Even more problematically, the State would be required to do this regardless of whether the conviction occurred a year ago in West Virginia, or twenty years ago in Alaska. To that end, the case-by-case approach of *Lane* imposes an undue burden on judicial resources in the West Virginia circuit courts, and an impossible burden on the resources of a county prosecutor’s office. Perhaps even more poignantly, the United States Supreme Court’s decision in *United States v. Davis* illustrated the constitutional risks created by permitting a trial court to examine what constituted “crimes of violence” on a case-by-case basis, reasoning that such estimation on a per-case basis rendered 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague. *See generally* No. 18-431 at 15-17.

*Second*, the case-by-case approach in *Lane* could potentially create disastrous instances of ineffective assistance of counsel by preventing criminal defense counsel from efficiently advising a client as to his or her exposure to recidivist proceedings. This Court has previously found that trial counsel’s failure to properly advise a client on the effects of his guilty plea was tantamount to ineffective assistance of counsel. *See State v. Hutton*, 239 W. Va. 853, 806 S.E.2d 777 (2017). And it has recognized trial counsel’s obligation of investigating a client’s case. *See State ex rel. Strogon v. Trent*, 196 W. Va. 148, 469 S.E.2d 7 (1996). While defense counsel’s representation of a client is based upon objective reasonability, *see* Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), there is currently no measure to the extent counsel must investigate prior offenses if they

are to be retried during recidivist proceedings in an effort to satisfy this Court's holding in *Lane*. As such, *Lane* raises significant questions on how defense counsel should best advise a client facing potential recidivist charges.

*Third*, drug-related crimes carry with them a litany of risks, be it obvious risks to the user, the buyer, or drug dealers, or inherent risks to police, emergency service providers, and the families of drug users. Drug crimes have resulted in substantial overdose deaths.<sup>2</sup> Police officers have been injured in the line of duty while investigating drug offenses and performing controlled buys of narcotics.<sup>3</sup> Officers have succumbed to accidental exposure.<sup>4</sup> Drug abuse in West Virginia has created “a child welfare crisis.”<sup>5</sup> Put simply, the inherent capacity for danger, injury and violence as a result of delivering drugs into West Virginia communities is observably high. West Virginia has been recognized as one of the states with the worst drug problems, and the harm to the community is visible from its panhandles to its capital.<sup>6</sup> Because the bar set by this Court in *Kilmer* is solely asks whether a crime carries with it “the potential or threat of violence,” the delivery of

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<sup>2</sup> See JoAnn Snoderly, *West Virginia Again Leads Nation in Drug Overdose Deaths*, Exponent Telegram (Nov. 29, 2018) [https://www.wvnews.com/theet/news/west-virginia-again-leads-nation-in-drug-overdose-deaths/article\\_42d95e63-cd30-5e38-8ecd-cba357d923d9.html](https://www.wvnews.com/theet/news/west-virginia-again-leads-nation-in-drug-overdose-deaths/article_42d95e63-cd30-5e38-8ecd-cba357d923d9.html).

<sup>3</sup> See Ashley B. Craig, *Officer Recovering After Controlled Drug Buy Gone Bad*, Charleston Gazette-Mail (Feb. 8, 2011) [https://www.wvgazettemail.com/news/officer-recovering-after-controlled-drug-buy-gone-bad/article\\_6869efed-aa75-5bef-a4e3-36e605a36a73.html](https://www.wvgazettemail.com/news/officer-recovering-after-controlled-drug-buy-gone-bad/article_6869efed-aa75-5bef-a4e3-36e605a36a73.html).

<sup>4</sup> See Tammie Toler, *Deadly Drug Exposure: Trooper Administered Narcan After Frightening Experience During Traffic Stop*, Princeton Times (Jul. 28, 2017) [https://www.ptonline.net/news/deadly-drug-exposure-trooper-administered-narcan-after-frightening-experience-during/article\\_d4b3f144-73c1-11e7-92dc-0b6b8ba9e9cc.html](https://www.ptonline.net/news/deadly-drug-exposure-trooper-administered-narcan-after-frightening-experience-during/article_d4b3f144-73c1-11e7-92dc-0b6b8ba9e9cc.html).

<sup>5</sup> JoAnn Snoderly, *Drug Epidemic Hits WV Children Hard, Stretches Resources*, WVNews (Jan. 13, 2019) [https://www.wvnews.com/news/wvnews/drug-epidemic-hits-wv-children-hard-stretches-resources/article\\_79e8f5ca-ae7f-57cf-b10a-46e7d310e61a.html](https://www.wvnews.com/news/wvnews/drug-epidemic-hits-wv-children-hard-stretches-resources/article_79e8f5ca-ae7f-57cf-b10a-46e7d310e61a.html).

<sup>6</sup> See R.J. Johnson, *Michigan, Missouri, & West Virginia Among States With Worst Drug Problems*, iHeartRadio (May 13, 2019) <https://www.iheart.com/content/2019-05-13-michigan-missouri-west-virginia-among-states-with-worst-drug-problems>.

harmful and illegal narcotics certainly meets the requirements to satisfy the constitutional proportionality principles attached to a recidivist life enhancement. 240 W. Va. 185, 808 S.E.2d at 871. The *Norwood* opinion correctly adheres to this general observation and categorically finds that heroin—by its very nature as an illegal narcotic or street drug—is inherently dangerous. Cocaine, or any other illegal narcotic, is the same.

*Lastly*, this Court’s differentiation between illegally sold and/or delivered prescription narcotics and illegally created and/or delivered street narcotics fails to consider their similarities based upon the impact of the drugs and the nature of drug trafficking. From the aspect of drug dealing, any narrative that presupposes that dealers limit themselves to only a particular drug is demonstrably false. *See State v. Broughton*, 196 W. Va. 281, 470 S.E.2d 413 (1996) (wherein the defendant was convicted of delivery of cocaine and marijuana); *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987) (wherein defendant pled guilty to delivery of marijuana in exchange for state’s dismissal of delivery of oxycodone charge); *Hutchinson v. Dietrich*, 183 W. Va. 25, 393 S.E.2d 663 (1990) (delivery of both marijuana and cocaine).<sup>7</sup>

For these reasons, this Court should adopt a categorical approach and find that the delivery of narcotics, regardless of type, are crimes of violence. Its adoption of such an approach could be narrow or sweeping. It could find that only delivery-related offenses are violent for purposes of W. Va. Code § 61-11-18. It could also categorically determine an aptitude for violence based upon the Scheduling of narcotics and the criteria created by the Legislature for such scheduling. *See* W. Va. Code § 60A-2-201, *et seq.* This Court could also look to the penalties associated with offenses

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<sup>7</sup> *See also* Jarrod Clay, *Two Men Arrested in “Largest Meth Bust in West Virginia History” Appear in Federal Court*, WCHS Eyewitness News (Apr. 3, 2019) <https://wchstv.com/news/local/two-men-arrested-in-largest-meth-bust-in-west-virginia-history-appear-in-federal-court> (involving a drug bust for both methamphetamine and fentanyl); *see also*, *Police: “High-Level” Drug Dealer Arrested in West Virginia*, AP News (Apr. 18, 2019) <https://www.apnews.com/9552b1b1576f44a6b9010ba5bd795ea7> (involving a drug bust for fentanyl, heroine, prescription pills, and marijuana).

committed under the Uniform Controlled Substances act for guidance as to the severity and inherent danger of a drug-related offense. *See* W. Va. Code § 60A-4-401, *et seq.*

Any holding to the contrary which implicates a per-case evaluation of prior drug offenses creates vagueness within W. Va. Code § 61-11-18, imposes a significant strain on state resources, runs contrary to the intended application of the recidivist statute, and creates confusion in practice. Moreover, as illustrated above, any notion that some drug offenses have less severe consequence merely by virtue of the drug type is unsupported by empirical data. Trial courts, county prosecutors, criminal defense attorneys, and criminal defendants must be provided certainty with regards to the application of West Virginia's recidivist statute, and a categorical approach is the vehicle with which to deliver it. Importantly, regardless of this Court's ultimate approach to delivery-related offenses, Petitioner's recidivist life sentence is constitutionally sound under the auspices of *Norwood*.

## VI.

### CONCLUSION

For the foregoing reasons, the State of West Virginia respectfully requests that this Court adopt a categorical approach by permitting all drug offenses to be used as prior qualifying offenses pursuant to West Virginia's recidivist statutes; find that the use of qualifying drug offense convictions for a recidivist life enhancement is not a violation of the proportionality clause contained in Article III, Section 5 of the West Virginia Constitution; and uphold Petitioner's recidivist sentencing below.

Respectfully Submitted,

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