IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0326

KEVIN TRAVIS COSTELLO,

Petitioner,

v.

On Appeal from the Circuit Court of Jefferson County (Case No. 18-F-15)

STATE OF WEST VIRGINIA,

Respondent.

STATE OF WEST VIRGINIA'S RESPONSE BRIEF

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ASSIGNMENTS OF ERROR

Kevin Travis Costello ("Petitioner"), by counsel, advances four assignments of error, contending that (1) the introduction of his undisclosed confession warranted a new trial; (2) his Maryland felony conviction was not properly established at his recidivist trial; (3) the trial court erred when it instructed the jury that his previous convictions were felonies; and (4) his sentence is constitutionally disproportionate to his criminal conduct. Pet'r's Br. at 1. As discussed below, these claims are without merit.

STATEMENT OF THE CASE

A. Indictment and case overview.

On January 16, 2018, Petitioner was indicted by a Jefferson County Grand Jury for driving under the influence causing serious bodily harm when he drove into another vehicle and severely injured a 29 month-old boy, J.T. Appendix Record ("A.R.") at 2064-65. Petitioner was convicted of this Count following a jury trial. A.R. at 841. After a recidivist trial, he was convicted and sentenced to life in prison pursuant to W. Va. Code § 61-11-18(c). A.R. at 2311.

B. Pretrial ruling on certain statements made by Petitioner.

At the time of the crash, Petitioner had only recently been released from imprisonment and placed on probation. *See* A.R. at 615; 1850-51. Following his arrest, Petitioner met with his probation officer, William Lewis, because his suspected criminal conduct violated a number of terms relating to his release. A.R. at 617-18. During this meeting, Petitioner admitted to violating two of those terms: (1) using heroin; and (2) "manifest[ing] behavior that threatened the safety of yourself or others, or that could result in your imprisonment which caused you to be charged with DUI (narcotics) with Felony serious bodily injury." A.R. at 1690.

Before trial, Petitioner moved to exclude these statements on the basis they were made during the course of a legal examination and were inadmissible. A.R. at 1340. Following a hearing, the trial court determined that Petitioner's admissions were voluntarily given and were not the subject of a legal examination. A.R. at 1695 ("Costello, after acknowledging to his probation officer that he was not threatened, induced or compelled to give any statement at all thereby obviating the concerns of compulsion and undue influence by law enforcement during custodial interrogation as explained in *Miranda*, chose instead to voluntarily make certain admissions as to his probation violations."). The court ruled that Petitioner's first admission—that he used heroin—was admissible, but excluded Petitioner's admission to the second violation under Rule 403 because it "lacks clarity and is ambiguously phrased in the disjunctive." A.R. at 1695.

C. Overview of Petitioner's trial for DUI causing serious bodily harm.

1. The crash.

On July 24, 2017, Timothy Turner was driving his car on U.S. 340 in Jefferson County, West Virginia. A.R. at 364-65, 382. His 29-month old son, J.T., was in the back seat of the car. A.R. at 366, 382. Suddenly, a vehicle traveling the other direction drove up a bank along the road before making a "beeline" for their car. A.R. at 381. It hit them. *Id.* As a result of the crash, J.T. was severely and permanently injured. *See* A.R. at 368, 379-80. Among other things, he fractured his skull and underwent a number of corrective surgeries. A.R. at 383-84. At trial, the parties stipulated that J.T. "received a serious bodily injury" as a result of the crash. A.R. at 382.

Eyewitnesses to the crash (or its immediate aftermath) testified that Petitioner "wasn't right;" his words were jumbled and he was speaking "incoherently." A.R. at 408. He seemed tired, but at the same time was unable to sit still. A.R. at 427. His eyes were glossy; he was very disoriented and kept pacing around. A.R. at 451. The responding officers were informed by these

eye witnesses that Petitioner seemed to be under the influence of "some type or drug or alcohol" and observed Petitioner "having a tough time keeping upright when he was walking and he appeared to be . . . falling asleep almost as he was standing[.]" A.R. at 503. Petitioner was also "stumbling," "mumbling," and having difficulty walking. A.R. at 505.

Petitioner failed a field sobriety test. A.R. at 549-51. He even fell asleep while one of the officers was explaining how to perform the field sobriety test. A.R. at 551-52. While he took a breath test, which showed he had zero alcohol in his system, Petitioner refused to submit to a blood draw. A.R. at 552-53. Once in police custody, Petitioner failed later sobriety tests. A.R. at 600 ("During this point I could hear him snoring and he was asleep"). He fell asleep a total of 42 times during these tests. A.R. at 604.

2. Testimony of William E. Lewis and related arguments.

William Lewis, who, at times relevant to this case, was a state probation and parole officer, testified at trial. A.R. at 614. At the time of the crash, Petitioner was on probation from a Maryland conviction and Lewis was his probation or parole officer. *See* A.R. at 614-16. Lewis met with Petitioner on July 27, 2017, at the Eastern Regional Jail to discuss the nature of the charges and because it would have an impact on Petitioner's probationary status. A.R. at 617-20. During their conversation, Petitioner admitted to Lewis that he had possession of heroin on July 24, 2017. A.R. at 620. He signed a probation and parole violation form reflecting the same. A.R. at 621-22.

Lewis also testified at trial that Petitioner told him during this meeting that he was driving home from work that day and snorted heroin before the crash occurred. A.R. at 621 ("I guess the heroin was called elephant or something to that effect. He was driving from work. He said he snorted the heroin. He remembers crossing the bridge. After he crossed the bridge he said he blacked out. When he came to, the vehicle had turned over and that's when the accident

happened."). Petitioner's counsel did not object to this testimony, but, following it, requested a sidebar and asked the trial court to declare a mistrial on the basis that the State improperly elicited this testimony in violation of the trial court's pretrial ruling on the admission of certain documentary evidence. A.R. at 642-44. Namely, Petitioner claimed that Lewis' testimony amounted to the admission of a portion of a document the court excluded *in limine*.[1] The court declined to grant a mistrial, explaining:

> THE COURT: I don't detect that what this witness said was in any way the same as what that portion of the document said. So I'm going to deny your motion
>
> * * * *
>
> THE COURT: [W]hat was redacted [ ] was not in any way what this witness just testified to regarding the snorting heroin, crossing of the bridge, blacking out, and waking after the car was flipped over so the motion is denied . . . . and actually the Court's ruling is further buttressed by this witness' testimony because this witness was abundantly clear that he makes no decision[.] [H]e was not the hearing examiner on this process, rather his role is to forward the document to Maryland to make the decision.

A.R. at 643-44.

Following the close of the State's case, Petitioner renewed his motion for a mistrial on the basis that Lewis' testimony violated the court's pretrial ruling on the admission of Petitioner's statement that he violated Part E of the rules governing his early release from prison. The court rejected the argument, explaining:

> THE COURT: [Lewis] testified that the defendant told him that he had ingested a substance, heroin, and that he recalls crossing the bridge and then the next thing he lost consciousness and awoke when his car was upside down. The statement that was redacted says, and I quote, 'You did violate Rule E of the rules and regulations governing your release on probation and that on or about 7-24-17 you did manifest behavior that threatened the safety of yourself or others, or that could result in imprisonment; which caused you to be charged with DUI, narcotics with felony serious bodily harm.' I don't see those as even close to identical statements.

[1] As outlined above, the portion of that document (Petitioner's admission to violating a term of his release) was excluded under Rule 403 on the basis that the statement Petitioner signed was confusing and ambiguous because it was written in the disjunctive. A.R. at 1695.

A.R. at 675-76.

3. Petitioner's relevant testimony.

After the State rested, Petitioner testified on his own behalf and explained his history battling addition. A.R. at 679. He conceded that he relapsed about 10 days before the accident, (A.R. at 680), but denied using heroin immediately before the accident. A.R. at 682-89. He also admitted he had heroin on him at the time of the accident. A.R. at 694-95. Finally, Petitioner admitted that he told Lewis he was high at the time of the accident, but told the jury he lied because he wanted Lewis to be lenient on him. A.R. at 712-14.

4. Petitioner's motion for a new trial.

Following his conviction, Petitioner filed a motion for a new trial on the basis that the introduction of Lewis' testimony at trial warranted a mistrial. *See* A.R. at 1951, 1955. Specifically, Petitioner sought a new trial on the basis that Lewis' oral testimony violated the court's *in limine* ruling which excluded a portion of Petitioner's written admission that he violated the rules of his early release when he caused a wreck and used heroin. *See* A.R. at 1956. Petitioner also advanced the position that the trial court was required to conduct a hearing to determine whether Petitioner's oral confession to Lewis was voluntary. A.R. at 1956-57.

The court's detailed order denying those claims is set forth on pages 1951 through 1969 of the Appendix Record. Succinctly, it determined that its *in limine* ruling excluding a written statement made by the Petitioner did not include the oral statement he gave to Lewis. A.R. at 1959. The court also found that Petitioner's pretrial motion to suppress sought only the suppression of Petitioner's written statements and therefore, it could not be construed to encompass the subject matter of Lewis' testimony (that Petitioner spoke to him and told him he consumed heroin before the accident occurred). A.R. at 1959.

The court similarly rejected Petitioner's argument that it was required to conduct a voluntariness hearing because, among other things, Petitioner "makes no argument that the confession was actually involuntary." A.R. at 1961. The court further observed that:

> [it] has been provided with no argument regarding what 'good cause' may exist for [Petitioner]'s failure to contest the voluntariness of his confession during pretrial proceeding. Defense counsel advised the Court in oral argument on the post-trial motion that he was personally unaware that [Petitioner] confessed until Lewis testified to the fact at trial. But there is no evidence that [Petitioner] himself was unaware of his oral confession prior to trial. Thus, while defense counsel has at least one good explanation for why he did not contest the voluntariness of the confession (i.e., his client did not inform him of his confession), the Court cannot find any good cause for [Petitioner] not raising the matter with his attorney so that his counsel could be prepared to address the confession.

A.R. at 1962. Nonetheless, it also concluded that it had previously ruled that the statements Petitioner made to Lewis were voluntary, (A.R. at 1963-64), that, even setting aside Lewis' testimony, the evidence in the case "justified a guilty verdict beyond a reasonable doubt," (A.R. at 1967), and "even if [Petitioner]'s confession was involuntary and improperly admitted, the error was harmless beyond a reasonable doubt." *Id.* The court reached this conclusion in part because, during trial, the prosecution played a number of recorded jail calls in which Petitioner admitted that he was responsible for the accident and that the accident resulted from his decision to consume drugs. *Id.*

D. Recidivist Proceedings.

Following Petitioner's conviction of DUI causing serious bodily injury, the State filed a Recidivist Information. A.R. at 1882. In the Information, the State alleged that Petitioner had been previously convicted of two felony offenses: (1) on May 14, 2012, for the felony offense of Possession of Heroin with Intent to Distribute in Case No. 10-K-12-051137 in Frederick County, Maryland, in violation of Maryland Code CL 5-602, (*id.* at 1882); and (2) on September 15, 2000, in Case No. 3:00-cv-2702 in the United States District Court for the Northern District of West

Virginia for the felony offense of Distribution of Crack Cocaine in violation of 21 U.S.C. § 841(a)(1). A.R. at 1883. The jury convicted Petitioner as charged in the Information. A.R. at 2059-60.

1. Maryland Conviction.

At trial, the State introduced a certified Commitment Order completed by the Circuit Court of Frederick County, Maryland in Case No. 10-K-12-051137. A.R. at 2260. The defendant in that case was a man named Kevin Travis Costello and that order, completed by Judge Adams, who was the circuit court judge who presided over the case, commanded the Maryland Department of Corrections "to receive the above named Defendant who has been sentenced and is hereby committed to your custody by Judge Therasa M. Adams." *Id.* This certified Commitment Order further reflects that Petitioner was "found guilty as to Count I, CDS Poss. Intent Distribute Heroin [in violation of] Art. CR.5 Sec. 602," and was sentenced to "25 years" with 10 of those years suspended—meaning he was ordered to serve 15 years imprisonment—beginning on May 14, 2012. *Id.* In addition, the State introduced a certified sentencing worksheet from this same case, signed by Judge Adams of the Circuit Court of Frederick County, Maryland, which reflects that Petitioner was convicted of possession with intent to distribute heroin, faced a term of imprisonment between 10 and 40 years' imprisonment, and that he received the following: "sentenced to 25 yrs DOC, suspend all but 15 yrs., 3 yrs supervised probations, fines and costs waived, probation transfer to West Virginia." A.R. at 2178.

The State introduced other similar materials and called Sandra Amos, Petitioner's mother, to testify. A.R. at 1009. She testified that Petitioner served several years of imprisonment in Maryland due to his conviction there. A.R. at 1013. Petitioner's girlfriend provided corroborating

testimony. *See* A.R. at 1019 (testifying that Petitioner went to prison for a drug charge in Maryland and served multiple years of imprisonment).

2. The court's instructions to the jury.

The circuit court ruled that whether or not a crime is a crime punishable by time in a penitentiary (i.e., a felony) presents a "question of law." *See* A.R. at 928. It determined that Petitioner's convictions from Maryland and from federal court were qualifying offenses under West Virginia's recidivist statute. *Id.* Accordingly, the circuit court instructed the jury, in relevant part, that: "You are instructed as a matter of law that the offenses of possession with intent to distribute heroin in the State of Maryland and distribution of crack cocaine in the federal court are both felony crimes punishable by confinement in a penitentiary." A.R. at 1113-14.

E. Sentence.

Before sentencing, Petitioner challenged the imposition of a life sentence upon him, arguing that it would be disproportionate to his criminal conduct and that his predicate crimes did not involve violence. *See* A.R. at 1997. The circuit court examined Petitioner's criminal history, including his predicate and triggering offenses, and issued a detailed opinion and order in which it concluded that the imposition of a life sentence upon Petitioner was constitutional and that his crimes involved actual or threatened violence. A.R. at 2300-12. The following is an overview of those findings:

Petitioner's first criminal convictions occurred when he was only 18 years old and were for larceny, vandalism, and trespassing. A.R. at 2303. When he was 19, Petitioner was convicted of possession of a controlled substance, marijuana. *Id.* Just a couple of years later—at age 22—Petitioner was convicted in federal court of "possession with intent to distribute cocaine," which was one of his predicate felonies. *Id.* This included over 400 grams of cocaine base in addition to

3,000 grams of marijuana. *Id.* The lower court aptly summarized Petitioner's increasingly dangerous criminal conduct as:

> Defendant's first felony conviction demonstrates that within the first five years of his adult life, his criminal behavior had escalated from property crimes and simple possession of a non-narcotic, controlled substance to participation in distribution of a substantial amount of Schedule II narcotic (i.e., cocaine).

Id. Continuing, it explained that "[t]his Court cannot ignore the substantial amount of cocaine involved in the crime nor the significant risk of serious bodily injury or death that the distribution of cocaine creates." A.R. at 2304. "[C]ocaine use can result in seriously bodily injury or death." *Id.* (citing *U.S. v. McNutt*, 960 F.2d 144 (1st Cir. 1922).; *Blair v. State*, 481 So.2d 1279 (Fla. App. 1986); *Nykiel v. Bor. of Sharpsburg Police Dep't*, 778 F. Supp. 2d 573 (W.D. Pa. 2011)). The court further observed that:

> Defendant's participation in the distribution of a large amount of a dangerous narcotic elevates the risk that recipients of the poison will suffer serious bodily injury or death from an overdose and enables end users to create additional danger to others, for example, by driving under the influence of a controlled substance.

A.R. at 2304. The court concluded that, given Petitioner's felony conviction for possession of cocaine with intent to distribute—which "involved distribution of a large amount of a known toxic substance, which at a minimum, constitutes reckless conduct that places citizens at risk of serious physical harm or death"—it constituted "a crime of violence for recidivist purposes." A.R. at 2306.

As to Petitioner's second predicate felony, the court noted that:

> after satisfying his ninety-seven month sentence for his first felony conviction, Defendant's reckless conduct escalated, continuing to show indifference to the value of human life . . . . On December 20, 2011, Defendant was arrested when the car in which he was traveling from Maryland to West Virginia was pulled over and he was found to be in possession of three bags of heroin.

A.R. at 2306. Following his arrest (and admission that he had been selling heroin for many months), Petitioner "plead guilty to possession with intent to distribute heroin." A.R. at 2307. Given these facts, the lower court observed that:

> Defendant's second felony conviction demonstrates that within just a few years after his release from a lengthy term in federal custody, his criminal behavior escalated from distribution of a Schedule II narcotic (cocaine) to distribution of a Schedule I narcotic (heroin). It is beyond cavil that the opioid epidemic has wreaked havoc on our society, ruining or extinguishing countless lives in the process. Instead of correcting his behavior, [Petitioner] began distributing an even more dangerous drug.

A.R. at 2307. Thus, the court concluded that Petitioner's conviction for possession with intent to distribute heroin was a crime of violence and supported imposition of an enhanced sentence. A.R. The court found that Petitioner's triggering offense—causing the near-death of a young child because he drive while high on heroin—involved actual injury. A.R. at 2306-07. The court summarized Petitioner's conduct as:

> In sum, Defendant's criminality has established a pattern of dangerous misconduct that has either created the threat of physical harm or death (e.g., his first two felonies) or actually caused serious bodily injury (e.g., his third felony). He has been unpersuaded to change by lesser periods of incarceration followed by supervised release.

A.R. at 2309. Finally, the court noted that "Defendant lacks remorse" and "has failed to accept responsibility for his action," and concluded that "[h]aving sentenced the Defendant to fifteen years to life imprisonment, it is this Court's hope that the West Virginia Department of Corrections avoids repeating Maryland's mistake in releasing the Defendant without being first well and truly confident that the Defendant will not recidivate. Public safety demands no less." A.R. at 2311.

This appeal followed.

SUMMARY OF THE ARGUMENT

Petitioner's claim that the State violated the rules of discovery and the Court's discovery order was not raised below and has been waived. Even assuming it could be raised in this appeal, it is without merit, and the trial court did not err when it denied Petitioner's motion for a mistrial.

Petitioner's challenges to his recidivist trial and enhanced sentence are equally unavailing. The State introduced sufficient evidence to establish Petitioner was twice convicted of "crimes punishable in the penitentiary" and the circuit court correctly ruled that whether Petitioner's convictions were felonies was a question of law rather than a question of fact.

Finally, Petitioner's enhanced sentence is constitutional pursuant to W. Va. Code § 61-11-18, and because, as the circuit court recognized below, Petitioner's triggering and predicate offenses all involved actual violence or created the potential for violence.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this matter is unnecessary as the case involves issues of settled law. A memorandum decision affirming Petitioner's conviction is appropriate. W. Va. R. App. P. 21.

STANDARD OF REVIEW

Petitioner's first assignment of error—a claim that the trial court erred in declining to grant his motion for a mistrial—is reviewed (if it is reviewed at all) for an abuse of discretion. *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008) ("The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.").

Petitioner's second assignment of error presents a challenge to the sufficiency of the evidence adduced at his recidivist trial. On appeal, a petitioner claiming that there was insufficient evidence to support a conviction faces a "heavy burden." Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). "[A]ll [ ] evidence, whether direct or circumstantial, [must be viewed] in the light most favorable to the prosecution [and the appellate court] must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution." *Id.*

The circuit court's ruling that whether or not an offense qualifies as a "crime punishable in the penitentiary" pursuant to W. Va. Code § 61-11-18 is a question of law and is reviewed *de novo*.

Syl. Pt. 1, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

Finally, Petitioner's fourth assignment of error presents a challenge to the constitutionality of his sentence and is reviewed *de novo*. *State v. James*, 227 W. Va. 407, 413, 710 S.E.2d 98, 104 (2011) (quoting Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008)).

ARGUMENT

A. The State did not violate the rules of discovery and the trial court did not err when it declined to grant a mistrial.

As an initial matter, the arguments Petitioner advances in this appeal—that the State violated the Rules of Discovery and the circuit court's discovery order—were not raised below in Petitioner's motion for a mistrial. Instead, these claims have been raised for the first time in this appeal and should not be reviewed. That is, below, Petitioner sought a mistrial on two grounds: First, that Lewis' trial testimony violated the circuit court's *in limine* ruling that excluded one of Petitioner's written admissions; and second, that the court needed to conduct a voluntariness hearing to determine whether Petitioner's oral confession to Lewis was voluntary. A.R. at 1951-57; 1840-41. The circuit court evaluated these claims and determined that there was no basis to conduct a voluntariness hearing and concluded, given its *in limine* ruling, that Petitioner's confession was voluntary. A.R. at 1968. The court also determined that Lewis' testimony that Petitioner orally confessed to consuming heroin before the accident did not violate its pretrial ruling which excluded Petitioner's written admission. A.R. at 1959. The court reached this conclusion because Petitioner's written confession was ambiguous and lacked clarity whereas Lewis' testimony was not confusing. A.R. at 1959.

In this appeal, Petitioner points to the circuit court's ruling to argue that the trial court erred when it found that no discovery violation occurred. Pet'r's Br. at 14 (citing A.R. at 1968). But the circuit court was not asked to rule on whether or not a discovery violation occurred. A.R. at 1840-43. Put simply, Petitioner did not seek relief below on the basis that the State violated Rule 16 or the court's discovery order; therefore, it makes sense that the court below did not engage in an evaluation of whether Rule 16 had been violated. A.R. at 1951-68. It is a basic tenant of appellate review that claims falling outside of the issues presented below will, as a general matter, not be reviewed on direct appeal. Syl. Pt. 1, *State v. Allen*, 208 W. Va. 144, 539 S.E.2d 87 (1999) ("As a general rule, . . . errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there."); *see State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996) (explaining that "absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal."); *see generally Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 540 (8th Cir. 2009) (noting that an appellate court is a court of review not of "first view"). Accordingly, Petitioner's first assignment of error (and his three supporting arguments) is not cognizable in this appeal and should not be addressed.

By the same token, any challenge to Lewis' testimony in this appeal has been waived because Petitioner's trial counsel consciously chose to forego raising a contemporaneous objection during trial. A.R. at 874-75 (reflecting trial counsel's decision to withhold a contemporaneous objection as a strategic decision and his concession that he could have objected sooner); *see also id.* at 1960 (reflecting the trial court's finding that the objection was not timely). It is incumbent upon a litigant to raise a timely and proper objection during trial or he will generally waive his

right to contest it on appeal. *See State v. McGilton*, 229 W. Va. 554, 558-59, 729 S.E.2d 876, 880-81 (2012) (quoting and citing in part *Peretz v. United States*, 501 U.S. 923, 936-37 (1991)); *see also State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (explaining that the "raise or waive rule" prevents a party from "making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error"); *State v. Lively*, 226 W. Va. 81, 92, 697 S.E.2d 117, 128 (2010) (discussing a party's obligation to raise a contemporaneous objection such that the party does not gain an "unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error"). Because trial counsel engaged in a strategic decision to *not* raise a contemporaneous objection to Lewis' testimony, the challenge to Lewis' testimony in this appeal has been waived.

Assuming, purely for the sake of argument, that Petitioner's complaints are cognizable in this appeal, for the reasons discussed below, Petitioner's claims fail in substance.

1. The prosecution did not violate the Rules of Discovery or the trial court's discovery order.

Rule 16 of the West Virginia Rules of Criminal Procedure requires the State, upon request of the Defendant, to disclose:

> any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state; that portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest in response to interrogation by any person then known to the defendant to be an agent of the state; and recorded testimony of the defendant before a grand jury which relates to the offense charged. ***The state must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be an agent of the state if the state intends to use that statement at trial.***

W. Va. R. Crim. P. 16 (emphasis added). It is evident from the plain language of this rule that the State has an obligation to disclose oral statements made by the defendant to an agent of the State "if the state intends to use that statement at trial." *Id.*

Petitioner alleges that the State "violated the rules of discovery and the trial court's discovery order" when a State witness testified at trial that Petitioner admitted to consuming heroin before the accident occurred. Pet'r's Br. at 9. Petitioner's claim fails because the State was unaware that Lewis would testify that Petitioner admitted to consuming heroin before the accident occurred. *See* A.R. at 1877. The prosecutor interviewed Lewis four times before trial and Lewis never indicated that Petitioner admitted to using heroin before the accident occurred. *See id.* Thus, the State could not have *intended* to use that statement at trial. For these reasons, Rule 16 was not violated. For the same reasons, the State did not violate the circuit court's discovery order (which required the State to produce evidence falling within Rule 16's scope to the Petitioner, A.R. at 1204).

Petitioner's reliance upon *Grimm* and its progeny for the proposition that the State was somehow obligated to produce evidence relating to this unknown statement before trial is unsound. In *Grimm*, the prosecution had in its possession a copy of the defendant's "booking report," but withheld that report from production. *State v. Grimm*, 165 W. Va. 547, 553, 270 S.E.2d 173, 177 (1980). This Court held that "[w]hen a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial." Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173. *Grimm* is inapplicable to the matter at hand because the prosecution was unaware—

and therefore did not have "possession"—of this evidence. Simply put, the State cannot disclose that which is does not know.[2]

Petitioner's reliance on *Adkins* and *Keenan* similarly fails. *Adkins* is distinguishable as that case involved the State's suppression of a confidential informant's criminal history of which the State undoubtedly possessed. *State v. Adkins*, 223 W. Va. 838, 842, 679 S.E.2d 670, 674 (2009) (per curiam). *Keenan* involved a case where the State produced an initial forensic report indicating that the victim had gun powder residue on the victim's hands but failed to produce an amended report which indicated there was no such residue. *State v. Keenan*, 213 W. Va. 557, 562, 584 S.E.2d 191, 196 (2003).

Relatedly, and contrary to Petitioner's claim, *Cunningham* is not "almost identical" to this case. Pet'r's Br. at 11. In *Cunningham*, the defendant was accused of raping a young girl. *Cunningham v. State*, 254 So. 2d 391, 392 (Fla. Dist. Ct. App. 1971). He filed a discovery motion asking the State to make available "all tangible things of whatever kind or nature possessed by it which had a relationship to the prosecution against him." *Id.* at 391. The State indicated it had possession of the victim's clothing, but made no mention that it had actual possession of a pair of sunglasses the defendant had allegedly been wearing that day. *Id.* At trial, multiple witnesses identified the defendant because he was wearing sunglasses on the day of the sexual assault. *Id.* at 392. To corroborate this testimony and establish that the defendant was the individual who raped the young girl, the State attempted to introduce a pair of sunglasses found at the crime scene and kept as evidence by the police. *Id.* at 392. The Defense objected because this evidence had

[2] Unlike an exculpatory statement, Lewis' testimony regarding this inculpatory statement (a confession which Petitioner does not dispute he gave) is not imputed onto the prosecution. *See generally State v. Peterson*, 239 W. Va. 21, 29, 799 S.E.2d 98, 106 (2017), *cert. denied sub nom. Peterson v. W. Virginia*, 138 S. Ct. 643 (2018) (discussing the parameters of the State's obligation to identify and produce exculpatory evidence before trial).

not been previously disclosed. *Id.* On appeal, the District Court of Appeal of Florida reversed because the State "withheld" this evidence. *Id.* These facts are not analogous to the case at hand in any sense. Here, the State did not withhold anything.

These cases involve instances where the State actually withheld evidence it possessed from the defense. That did not occur here. For these reasons, Petitioner's contention that the State violated the Rules of Discovery is without merit.

2. The trial court did not abuse its discretion in denying Petitioner's motion for a mistrial.

Petitioner next contends that the trial court erred when it declined to grant a mistrial due to the State's alleged discovery violation. Pet'r's Br. at 13 ("By not disclosing the substance of Officer Lewis's testimony, the State created a manifest necessity for a new trial."). As outlined in the preceding sections, the State did not violate the rules of discovery. Therefore, the circuit court did not err for declining to grant a mistrial.

3. The trial court's analysis on the claims raised before it was proper.

Petitioner next argues that the trial court did not conduct the proper analysis when ruling on whether or not to declare a mistrial because "[a]t issue was whether a discovery violation surprised and prejudiced Petitioner," thereby creating a "manifest necessity" to order a new trial. Pet'r's Br. at 13. This argument is predicated upon the notion that a discovery violation actually occurred (it is also predicated upon the incorrect assumption that such a claim was raised below). As outlined above, there was no such violation (nor was such a claim raised in the first instance). Accordingly, this argument fails.

Inasmuch as Petitioner contends that the Lewis' testimony operated as an end-run-around which allowed the State to introduce evidence of Petitioner's admitted probation violation despite its exclusion, that argument fails. The court's pretrial ruling excluded a portion of a written

statement signed by Petitioner on the basis that it was confusing and ambiguous and, therefore, that it violated Rule 403. A.R. at 1695. Lewis' trial testimony, on the other hand, pertained to an oral conversation he had with Petitioner in which Petitioner admitted to consuming heroin before the accident occurred. A.R. at 621. The circuit court correctly ruled that these two pieces of evidence were entirely different and that its ruling on the former did not impact the introduction of the latter. A.R. at 1959. Given this, the circuit court's ruling denying Petitioner's motion for a mistrial was correct and should be affirmed by this Court.

B. The State established Petitioner's previous convictions by sufficient evidence and the circuit court correctly ruled that whether Petitioner's convictions qualified as a "crime punishable by confinement in a penitentiary" was a question of law.

West Virginia's Recidivist Statute—W. Va. Code § 61-11-18(c)—provides for the imposition of an enhanced sentence "[w]hen it is determined . . . that such person [was] twice before convicted in the United States of a crime punishable by confinement in a penitentiary[.]" *Id.* The process for instituting recidivist proceedings is well-established: Once a defendant is convicted of the "triggering" offense, the prosecutor must inform the court that he or she intends to seek a recidivist enhancement, and the trial court shall, within that term:

> 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.

W. Va. Code § 61-11-19. As the statute makes clear, in a contested recidivist proceeding, the State is required to prove, beyond a reasonable doubt, "the identity of the defendant." *Id.*; *see also State v. Barlow*, 181 W. Va. 565, 571, 383 S.E.2d 530, 536 (1989) ("The defendant's identity in a habitual criminal proceeding is the key factual issue, and the burden is, of course, on the State to

establish that the defendant is the same individual who was convicted previously."). This Court has also held that the State must establish that "each penitentiary offense including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence." *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 511, 583 S.E.2d 800, 808 (2002) (per curiam).

In the same vein, the Court has cautioned the parties in a recidivist proceeding from attempting to try the facts of the underlying convictions. *See State v. Criss*, 125 W. Va. 225, 23 S.E.2d 613, 613 (1942). It is not proper for the jury in a recidivist proceeding to consider the facts and circumstances of the defendant's previous convictions; the jury is instead tasked simply with determining whether the person on trial is the same individual who was previously convicted of those crimes. Thus, the State need establish only the identity of the defendant and the timing of the convictions. *Barlow*, 181 W. Va. at 571, 383 S.E.2d at 536; *Appleby*, 213 W. Va. at 511, 583 S.E.2d at 808.

Petitioner's challenge in this appeal attacks the introduction of testimony and other evidence regarding his Maryland felony conviction. He contends that (1) the State introduced insufficient evidence to establish that conviction, and (2) the court erred by ruling, as matter of law, that the crimes reflected in the convictions outlined in Case No. 10-K-12-051137 (Circuit Court of Frederick County, Maryland) and Case No. 3:00-cv27-02 (United States District Court for the Northern District of West Virginia) qualified as felonies under W. Va. Code § 61-11-18. (Pet'r's Br. at 17-19). For the reasons discussed below, these claims miss their mark.

1. The State introduced sufficient evidence to establish Petitioner's Maryland conviction beyond a reasonable doubt.

A criminal defendant who challenges the sufficiency of the evidence supporting his conviction faces a heavy burden. *State v. Guthrie*, 194 W. Va. 657, 667, 461 S.E.2d 163, 173 (1995) (describing the standard to be applied in such cases as "strict" and "highly deferential"). A

conviction is proper where the jury is able to find, beyond a reasonable doubt, that the crime charged was committed. *See* Syl. Pts. 1 and 2, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. It can be obtained through direct or circumstantial evidence. *Id.* at 668, 461 S.E.2d at 174. Moreover, the inquiry on appeal is whether *any* reasonable fact-finder could have found the elements of the crime charged satisfied beyond a reasonable doubt. *Id* at 668, 461 S.E.2d at 174. ("[W]hen reviewing a conviction [on appeal], we may accept any adequate evidence, including circumstantial evidence, as support for the conviction. It is possible that we, as an appellate court, may have reached a different result if we had sat as jurors. However, [ ] it does not matter how we might have interpreted or weighed the evidence. Our function 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.").

Here, the State introduced a number of documents—most notably a certified commitment order—and elicited testimony from multiple witnesses establishing, beyond a reasonable doubt, that Petitioner was convicted of possession of heroin with intent to distribute and was sentenced to 25 years of incarceration. *See, e.g.*, A.R. at 2260, 2178. Specifically, the State introduced a certified commitment order completed by the Circuit Court of Frederick County, Maryland in Case No. 10-K-12-051137. A.R. at 2260. That certified Order, completed by the judge who pronounced Petitioner guilty and sentenced him in that case, commanded the Maryland Department of Corrections "to receive the above named Defendant who has been sentenced and is hereby committed to your custody by Judge Therasa M. Adams. The Defendant has been found guilty as to Count I, CDS Poss. Intent Distribute Heroin [in violation of] Art. CR.5 Sec. 602" and that he was sentenced to 25 years imprisonment with 10 of those years suspended. A.R. at 2260. The

same record indicates that Petitioner was ordered to serve 15 years, beginning on May 14, 2012. *Id.* This certified document is dated May 15, 2012 and signed by Judge Adams. A.R. at 2260; *see generally id.* at 991. This document standing by itself constituted sufficient evidence for the jury to find that Petitioner had previously been convicted of possession of heroin with intent to distribute in violation of Art. CR. 5 Sec. 602 of the Maryland Code.

In addition, the State introduced a certified sentencing worksheet from Petitioner's case, which was signed by the judge of the Circuit Court of Frederick County, Maryland, which indicated that Petitioner was convicted of possession with intent to distribute heroin, faced a term of between 10 and 40 years' imprisonment, and that the sentenced imposed by the trial court was 25 years, with ten of those years suspended. A.R. at 2178.

The State used other materials—including an initial appearance questionnaire relating to this case—to establish to the jury that the man named Kevin Travis Costello in that case was the same Kevin Travis Costello appearing before them. A.R. at 991 (recounting biographical identifiers contained in the initial appearance questionnaire which was signed by Kevin Travis Costello). And the State introduced a transfer request which was completed pursuant to the Interstate Commission for Adult Supervision which indicated that Petitioner had been convicted of a "felony (heroin)" in Frederick County, Maryland. A.R. at 2250. In addition, Petitioner's mother and girlfriend both testified that Petitioner was convicted of a drug offense in Maryland and was required to serve a number of years in prison there. A.R. at 1013, 1019.

The sum total of this evidence established conclusively and unequivocally that Petitioner was convicted of a crime (possession of heroin with intent to distribute) in the Circuit Court of Frederick County, Maryland and sentenced to 25 years of imprisonment with 10 of those years

suspended. Viewing the evidence in the light most favorable to the State, it is manifestly apparent that Petitioner's challenge to the sufficiency of the State's evidence fails.

Finally, any suggestion that Petitioner was not convicted of felony offenses in his Maryland or federal court proceedings is disingenuous. Petitioner, vis-à-vis his trial counsel, admitted both in open court and in written pleadings filed with the circuit court that Petitioner's predicate convictions were felonies. *See, e.g.*, A.R. at 896, 901, 1975. This occurred even before Petitioner's recidivist conviction. *Id.* at 901. For these reasons, Petitioner's claim fails.

2. Whether or not a conviction qualifies under W. Va. Code § 61-11-18 is a question of law.

The trial court correctly ruled that whether or not Petitioner's previous convictions fall within the ambit of W. Va. Code § 61-11-18 was a question of law. Its corresponding jury instruction, which provided that the alleged prior convictions constituted "crimes punishable by confinement in a penitentiary," was proper. A.R. at 1113-14.

The key issue in a recidivist proceeding is identity. *Barlow*, 181 W. Va. at 571, 383 S.E.2d at 536. Second, the State must establish the timing of each offense. *Appleby*, 213 W. Va. at 511, 583 S.E.2d at 808. Whether or not a conviction for a certain crime qualifies as "an offense punishable by confinement in a penitentiary," however, is a question of law for the court—not a question of fact for the jury. *See, e.g., State v. Bird*, 352 P.3d 215, 216 (Wash Ct. App. 2015) ("Whether a prior conviction qualifies as a predicate offense is a threshold question of law for the court, and not an essential element of the crime of felony DUI."); *People v. Nguyen*, 899 P.2d 352, 355 (Colo. App. 1995) ("[T]he question of whether a prior conviction is a felony is a question of law."); *State v. Brown*, 452 So. 2d 326, 329 (La. Ct. App. 1984) ("[A]ll the jury was required to know was that the defendant had been convicted of a crime which would have been a felony under Louisiana law. That determination is a question of law, not fact, and thus was not required to be

presented to the jury."); *State v. Spoonmore*, 323 N.W.2d 202, 203 (Iowa 1982) ("Defendant also objects because the trial court permitted the jury to decide if the prior offenses were felonies. We agree this was error. The court must make that determination."); *see also Ramirez v. Mukasey*, 520 F.3d 47, 48 (1st Cir. 2008) ("The question of whether a state crime is an aggravated felony is a question of law that we review de novo."); *Ramsey v. I.N.S.*, 55 F.3d 580, 582 (11th Cir. 1995) ("Whether Ramsey's conviction for attempted lewd assault is an aggravated felony is a question of law.").

Indeed, "[w]hen the jury is called upon to decide, as an 'element' of an offense or enhancement, whether '[a] person previously has been convicted of a felony,' it does not 'try' the question whether the prior offense was a felony. Rather, the issue for the jury to decide is whether *the defendant is the person who suffered* the felony conviction." *People v. Haywood*, 54 Cal. Rptr. 2d 120, 126 (Ct. App. 1996), *as modified* (July 11, 1996) (emphasis in original). The underpinning rationale is straightforward: "The question whether a given conviction is or is not a felony, however, is **always** the same." *People v. Haywood*, 54 Cal. Rptr. 2d 120, 126 (Ct. App. 1996), *as modified* (July 11, 1996) (emphasis added). In addition, as the Supreme Court of Indiana observed, permitting the jury to categorize whether an offense is a felony or a misdemeanor "would produce undesirable results:"

> Permitting the jury to determine whether [a defendant]'s prior convictions, [are felonies] would invite their independent judgment as to the fairness of the categorization of those offenses as felonies by the legislature. Whether the jury approves of the categorization of the offenses as felonies has no bearing on whether the accused has been convicted of those offenses. Thus, allowing the jury to make such a judgment would give that body the opportunity to move far outside its realm and consider totally irrelevant factors in deciding the defendant's status as a habitual offender. In addition, permitting the jury to determine whether a given offense is a felony would allow them to decide a pure question of law which has previously been settled by the legislature; given such an opportunity, the jury might possibly reach a different conclusion from that properly drawn by the legislature.

Griffin v. State, 415 N.E.2d 60, 67 (In. 1981).[3] For these reasons, the circuit court correctly ruled that this issue presented a question of law for the court and was *not* a question of fact for the jury. Petitioner's challenge otherwise fails.

C. Petitioner's life sentence under West Virginia Code § 61-11-18 is constitutional.

West Virginia's recidivist statute, W. Va. Code § 61-11-18, provides for enhanced punishment for individuals convicted of multiple offenses.[4] The text of this statute 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)). A defendant convicted of his second offense "shall" receive a five year sentence enhancement. W. Va. Code § 61-11-18(a). A third or subsequent offense results in the imposition of a life sentence. W. Va. Code § 61-11-18(c). Thus, "[i]f a defendant is twice convicted of a penitentiary offense, he falls within the ambit of West Virginia Code § 61–11–18," *Recht*, 213 W. Va. at 519, 583 S.E.2d at 816, and so long as the State meets the procedural obligations imposed upon it under W. Va. 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

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[3] Petitioner's citation to *Oyler v. Boles* to claim that a recidivist proceeding requires the State to prove, and the jury to find, that the conviction is a felony or misdemeanor is misplaced. (Pet'r's Br. at 17 n.86-87). The Supreme Court did <u>not</u> decide that issue. *Oyler v. Boles*, 368 U.S. 448, 454, n.9 (1962) ("The fact that the statute expressly provides for a jury trial on the issue of identity and is silent as to how other issues are to be determined does not foreclose the raising of issues other than identity. This is especially clear in the case of legal issues, such as the petitioners now raise, where a jury trial would be inappropriate.").

[4] Defined as a crime punishable by confinement in a penitentiary, but more commonly understood to mean a felony or enhanced misdemeanor. *See generally State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 646-47, 474 S.E.2d 572, 576-77 (1996).

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."). The purpose of recidivist statutes is well-established: They are "to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." *Recht*, 213 W. Va. at Syl. Pt. 3, 583 S.E.2d at 804 (quoting Syl. Pt. 3, in part, *State v. Jones*, 187 W.Va. 600, 420 S.E.2d 736 (1992) and citing W. Va. Code, 61-11-18 (1943), *and* W. Va. Code 61-11-19 (1943)).

Of course, these enhanced sentences are creatures of legislative design, and this Court has held that its plain text must bend to a proportionality principle embedded in our state constitution. Syl. Pt. 8, *State v. Norwood*, 242 W. Va. 149, 832 S.E.2d 75 (2019). Our constitution requires that any sentence imposed must be proportionate to the criminal conduct giving rise to the conviction. W. Va. Const. Art. III Section 5 ("Penalties shall be proportioned to the character and degree of the offence."). And even though the statute is facially constitutional, existing precedent suggests that it will be unconstitutional as applied where a particular sentence is disproportionate to the underlying conduct. *See, e.g.*, *State v. Miller*, 184 W. Va. 462, 465, 400 S.E.2d 897, 900 (1990) (reversing imposition of life sentence). This Court has articulated a test with which to measure whether application of the life recidivist statute, W. Va. Code § 61-11-18(c), can withstand scrutiny in a given case:

> [T]he appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to 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.

Miller, 184 W. Va. at Syl., 400 S.E.2d at 897; Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981); *State v. Davis*, 189 W. Va. 59, 61, 427 S.E.2d 754, 756 (1993); *see also State v. Oxier*, 179 W. Va. 431, 433, 369 S.E.2d 866, 868 (1988) (per curiam) ("Crimes involving the potentiality of violence fall in the category of those supporting the imposition of a life sentence under the recidivist statute."); *Norwood*, 242 W. Va. at --, 832 S.E.2d at 84.[5]

In applying this test, this Court has determined that a sentence cannot be enhanced under the Recidivist Statute unless the triggering (most recent) offense and at least one of the underlying predicate offenses involved "actual or threatened" violence. *See Beck*, 167 W. Va. at Syl. Pt. 7, 286 S.E.2d at 236; *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 537, 276 S.E.2d 205, 214 (1981) (overturning recidivist-enhanced life sentence imposed upon forgery conviction "in light of the nonviolent nature of th[e] crime and similar nature of the two previous [underlying] crimes"); *see also State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867, 870 (2017) (determining that defendant's recidivist-enhanced life sentence was disproportionate because even though triggering offense of unlawful assault was violent, the underlying offenses were nonviolent).

In fact, this Court recently announced this rule in Syllabus Point 12 of *State v. Hoyle*, which provides, in relevant part, that:

> For purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1)

[5] As several current and former justices have recognized, opinions from this Court applying this judicially-created test are not harmonious. *Compare State v. Lane*, 241 W. Va. 532, 541, 826 S.E.2d 657, 666 (2019) (Armstead, J., dissenting) (observing that the Court's existing precedent regarding which crimes support imposition of a life sentence under the Recidivist Statute constitute an "inconsistent hodgepodge of legal authority"), *with Norwood*, 242 W. Va. at --, 832 S.E.2d at 89 (J. Workman, dissenting) (observing that the Court's precedent is conflicting and have treated similarly-situated criminal defendants differently). *Cf. Hundley v. Mirandy*, No. 16-1111, 2018 WL 1641118, at *8 (W. Va. Apr. 5, 2018) (Ketchum, J., dissenting) (questioning which crimes are "per se" violent in nature); *Id.* at *2 (Loughry, J., dissenting) (noting that the Court has not consistently applied its own precedent when evaluating which crimes support imposition of a life sentence under the Recidivist Statute). Nonetheless, for the reasons outlined in this brief, existing precedent establishes that Petitioner's life sentence is constitutional.

> actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results.

State v. Hoyle, No. 18-0141, 2019 WL 6258349, at *2 (W. Va. Nov. 22, 2019).

Consequently, whether Petitioner's life sentence is constitutional in this matter turns on whether Petitioner's felony convictions are "qualifying convictions," which is to say whether the triggering offense and at least one predicate offense involved either actual violence, the potential for violence, or had a substantial impact upon the victim. *Id.*; *see also Norwood*, 242 W. Va. at Syl. Pt. 8, 832 S.E.2d at --; *Miller*, 184 W. Va. at Syl., 400 S.E.2d at 897.

It is unquestionably true that Petitioner's triggering offense—DUI causing serious bodily injury—involved actual violence, and is therefore a qualifying offense. Petitioner concedes as much in this appeal, just as he did below. Pet'r's Br. at 20. The severity of Petitioner's triggering offense strongly supports application of the life recidivist statute. *Cf. State v. Deal*, 178 W. Va. 142, 147, 358 S.E.2d 226, 231 (1987) (observing that 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.") (internal citations omitted); *Miller*, 184 W. Va. at Syl., 400 S.E.2d at 897 (explaining that the "violence" inquiry is focused heavily on the triggering offense).

And when considering Petitioner's predicate offenses, it is apparent that both of these offenses created the serious potential for violence. As the circuit court found below, the severity of Petitioner's criminal conduct has increased over the course of his life and his previous periods of incarceration (which are substantial) did nothing to rehabilitate him. As a teenager, Petitioner committed a number of property and drug possession offenses. A.R. at 2302. At age 22, he was convicted of his first predicate felony. That felony—imposed by a federal court—involved Petitioner's possession with intent to distribute a *substantial* amount of cocaine (over 400 grams). *See id.* The lower court correctly found that the circumstances surrounding this conviction created

"the significant risk of serious bodily injury or death that the distribution of cocaine creates." *Id.* at 2304 (gathering authority including *U.S. v. McNutt*, 960 F.2d 144 (1st Cir. 1922); *Blair v. State*, 481 So.2d 1279 (Fla. App. 1986); *Nykiel v. Bor. of Sharpsburg Police Dep't*, 778 F. Supp. 2d 573 (W.D. Pa. 2011)). The court also noted the uptick in the severity of Petitioner's criminal conduct. A.R. at 2304 ("Defendant's participation in the distribution of a large amount of a dangerous narcotic elevates the risk that recipients of the poison will suffer serious bodily injury or death from an overdose and enables end users to create additional danger to others, for example, by driving under the influence of a controlled substance."). The court found that the distribution of such a "large amount of a known toxic substance" constituted, at a minimum, "reckless conduct that places citizens at risk of serious physical harm or death." A.R. at 2306. These findings establish that this predicate felony supports imposition of Petitioner's enhanced sentence. *See, e.g.*, *Norwood*, 242 W. Va. at --, 832 S.E.2d at 84 (observing that crimes involving illicit drugs may be qualifying predicate offenses and explaining that an evaluation of whether a predicate offense satisfies this test depends upon the facts of each case).

Next, the court observed that, despite Petitioner spending 97 months in federal prison, shortly after his release, he continued to engage in increasingly dangerous criminal activity. A.R. at 2306. Petitioner pled guilty to possession of heroin with intent to distribute after he was pulled over and found with three bags of heroin. *Id.* As recounted below:

> Defendant's second felony conviction demonstrates that within just a few years after his release from a lengthy term in federal custody, his criminal behavior escalated from distribution of a Schedule II narcotic (cocaine) to distribution of a Schedule I narcotic (heroin). It is beyond cavil that the opioid epidemic has wreaked havoc on our society, ruining or extinguishing countless lives in the process. Instead of correcting his behavior, [Petitioner] began distributing an even more dangerous drug.

Id. at 2307. Thus, the court concluded that Petitioner's conviction was a crime of violence and supported imposition of an enhanced sentence. *Id.* This finding was proper. *Cf. Norwood*, 242 W. Va. at --, 832 S.E.2d at 84 (observing that crimes involving illicit drugs may be qualifying predicate offenses and explaining that an evaluation of whether a predicate offense satisfies this test depends upon the facts of each case).

The reality is that Petitioner is an accomplished felon whose criminal conduct has only increased in severity and violence. His conduct "has established a pattern of dangerous misconduct that has either created the threat of physical harm or death (e.g., his first two felonies) or actually caused serious bodily injury (e.g., his third felony). He has been unpersuaded to change by lesser periods of incarceration followed by supervised release." A.R. at 2309. As the court below observed, public safety demands that Petitioner serve the sentence that was imposed. *Id.* at 2311. And this demand is consistent with both the recidivist statute and the Constitution. Protecting the public from dangerous individuals like Petitioner—a career felon whose propensity to engage in serious and violence criminal conduct has only increased as he has aged—is ***exactly*** why our State has a life recidivist statute. Syl. Pt. 3, in part, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992) ("The statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice, as the case may be, on a penitentiary offense."). There can be little doubt that application of the life recidivist statute in this matter was appropriate and fully comports with our law.

CONCLUSION

The State of West Virginia requests this Court affirm the Circuit Court of Jefferson County's sentencing order and deny Petitioner Kevin Travis Costello's requested relief in full.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0326

KEVIN TRAVIS COSTELLO,

Petitioner,

v.

On Appeal from the Circuit Court of Jefferson County (Case No. 18-F-15)

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing "State of West Virginia's Response Brief" upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this day, December 5, 2019, addressed as follows:

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