IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-318

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Andrew Miller,

Petitioner,

v.

State of West Virginia,

Respondent.

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

I. Whether the State's comments on Petitioner Andrew Miller's post-arrest silence requires reversal where the overwhelming evidence showed that Miller shot the victim.

II. Whether the Court should apply *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978) to overturn Miller's recidivist sentence—or overturn *McMannis*, because it rewrites the plain language of West Virginia's three-strike recidivist statute.

INTRODUCTION

When Anthony Goard was shot, all the evidence pointed to Petitioner Andrew Miller as the man behind the trigger. Goard testified that Miller had shot him, and Miller's girlfriend testified that Miller and Goard were fighting over drugs. Miller also ditched a gun right before police stopped him and patted him down—Miller also gave them a fake name. So the jury's decision to convict Miller of felony malicious wounding, wanton endangerment, and felon in possession of a firearm was an easy one. And because this was Miller's third felony conviction—he had already been convicted of multiple felonies arising from two separate instances—the jury applied West Virginia's three-strike recidivist statute.

Hoping to avoid his life sentence, Miller challenges both his conviction and sentence. But Miller was not harmed by the prosecutor's brief questioning about his pre-trial silence given the overwhelming evidence that showed Miller shot Goard. And the jury properly applied the plain text of West Virginia's recidivist statute to find that Miller was eligible for life imprisonment. A decades-old case that did not analyze the statutory text then and cannot stand now under even its own purpose-driven view should not stand in the way. In short, nothing about Miller's conviction or sentence was improper.

The Court should affirm.

STATEMENT OF THE CASE

1. One night in June 2022, Miller and his girlfriend Niesha Dotson had two people over to their apartment. App. 551. Anthony Goard, Dotson's friend, had frequently hung out in the apartment, and Josh Thompson was a drug dealer who sold drugs out of the apartment. App. 552-53, 584. Soon after everyone got there, Miller and Dotson got into an argument over Dotson possibly giving Goard drugs. App. 556-57. Miller then asked Goard whether he had the drugs, and Goard said he didn't. App. 729. Miller then shot Goard. App. 729.

Goard, Thompson, and Miller left the apartment following the shooting. Goard made it down the hall to another apartment to get medical help—and that's where first responders eventually found him and performed life-saving medical techniques. App. 420. Thompson fled the scene and still remains at large. App. 641. Miller tried to flee too, but police spotted him as fitting the description dispatch gave them before he could get away. App. 407, 434. Police stopped him and patted him down; they did not find a gun on him. App. 407. Miller then gave the police a fake name, App. 407-08, and the police let him go as they went into the building to help Goard. App. 435. Police eventually found a gun close to the apartment where they had stopped Miller, which forensic tests showed had Miller's DNA on it. App. 424, 508.

Shortly after the shooting, Beckley City Police executed an arrest warrant on Miller. App. 462. A Raleigh County grand jury eventually charged Miller with two counts of wanton endangerment with a firearm, one count of malicious wounding, and one count of felony prohibited person in possession of a firearm. App. 1074.

2. The State produced substantial evidence at trial proving that Miller shot Goard. Chiefly, the evidence was Goard's testimony to that effect. App. 761-62. Goard testified that Miller asked him if Goard had his "bag," which Goard explained could mean anything, but likely meant drugs. App. 728-29, 754, 759. And he said that Miller and Dotson argued about Dotson allegedly giving

Goard drugs. App. 729. Goard then testified that Miller asked him again about the drugs—and then Miller shot him. App. 737.

Likewise, Miller's girlfriend Dotson testified that she got into an argument with Miller over her possibly giving Goard a bag of drugs. App. 556-57. And while Dotson was in the bathroom, she heard Miller ask Goard about the "bag." App. 564. Dotson then heard a commotion and a gunshot. App. 564. After the shooting, she said Miller had "a look" she had never seen before. App. 565. Dotson also asked Miller if he did something; he did not say anything. App. 568. Dotson further testified that Miller "always carried a gun." App. 571. After Miller left the apartment, Dotson cleaned up the crime scene and placed the shell casing in her bedroom drawer to "protect" Miller. App. 574-75.

Police also testified that Miller fit the description that dispatch gave them of the shooter, App. 406—with both Dotson and Goard confirming that Miller wore the clothes in question the day of the shooting. App. 572-74, App. 746-47. Police also testified that they patted Miller down to check for a firearm. App. 407. They then asked Miller for his name, and he gave them a fake one. App. 407-08. Police also testified that they eventually found a gun nearby where they had stopped Miller. App. 423-24. Forensic tests later showed that Miller's DNA was on the gun. App. 508. In sum, strong evidence showed that Miller shot Goard.

Against this evidence, Miller testified that Thompson shot Goard. App. 884. Miller said that he was yelling at Dotson about Thompson's drugs, and the drugs were not his. App. 883. He also testified that he did not have a gun with him the day of the shooting. App. 886.

On cross-examination, Miller said that he lied to police because he was on parole and feared being associated with the crime. App. 896-97. The State then asked Miller if he told the investigating officer that he saw Thompson shoot Goard. App. 898. Miller said no. App. 898.

Miller also confirmed that he did not tell law enforcement at any time that Thompson shot Goard. App. 898. Continuing this line of questioning, the State attempted to ask Miller whether he told his attorney about what he witnessed, who might then have told law enforcement—but Miller's attorney objected to the questioning before Miller could answer. App. 898. The court sustained the objection. App. 898-99.

The State then asked Miller if he could have told law enforcement officers at his preliminary hearing. App. 899. Miller said he could have. App. 899. Miller's attorney objected after Miller's answer, and the court overruled the objection. App. 899-900. The State next asked if Miller had ample opportunity to tell someone he did not do it; he agreed that he did. App. 900. Miller's attorney then objected to the question, which the court overruled. App. 900. The State then asked Miller if he told anyone that someone else did it. App. 900. Miller said "No," followed by "Oh, yeah, yeah, I did." App. 901. His lawyer objected again to the question, which the trial court again overruled. App. 901. The State then changed direction and asked Miller about the firearm with his DNA on it that the police had found. App. 901.

The jury ultimately found Miller guilty of wanton endangerment with a firearm, malicious wounding, and felony prohibited person in possession of a firearm. App. 1076. The jury acquitted Miller on the second count of wanton endangerment with a firearm. App. 1076.

3. Following Miller's felony convictions, prosecutors filed a Recidivist Information seeking the lifetime-imprisonment enhancement under West Virginia Code § 61-11-18. Miller had previously been convicted of many other felonies from two different convictions. First, from an April 2009 incident he pleaded guilty to attempted first-degree murder with the use of a firearm in April 2010. App. 1099-1102. And second, he pleaded guilty to burglary, wanton endangerment

with a firearm, kidnapping, and conspiracy to commit first-degree murder from a separate May 2009 incident in February 2010. App. 1102-06.

At the recidivist trial, Miller represented himself while his former counsel appeared as supervisory or advisory counsel. App. 1017-20. He chose to proceed without his counsel's advice. App. 1024-25. After hearing from a couple witnesses concerning Miller's previous convictions, the jury agreed with the information. App. 1062, 1077. The circuit court imposed a sentence of life imprisonment with the possibility of parole. App. 1078.

Miller then filed a notice of appeal challenging his conviction and his life sentence.

SUMMARY OF ARGUMENT

Following a jury trial in Raleigh County, Miller was convicted for shooting Goard. The trial court sentenced him to life in prison after the jury found that Miller had been convicted and sentenced to two prior felony offenses. Miller's conviction and sentence are correct.

I. When questioning Miller about his theory that someone else shot Goard, the State referenced both Miller's pre- and post-*Miranda* silence. The State's improper references to Miller's post-*Miranda* silence were therefore cumulative in effect—and not a reason for a new trial. And even if this Court doesn't consider the comments cumulative, any error is harmless as the evidence of Miller's guilt is overwhelming. This Court recently upheld a conviction in a case like here, finding an improper reference harmless where the evidence of guilt was great. *State v. Hoard*, 248 W. Va. 428, 889 S.E.2d 1, 13 (2023). The Court should affirm Miller's conviction.

II. West Virginia's recidivist statute prescribes a mandatory life sentence for defendants who have "been twice before convicted … of a crime punishable by confinement in a penitentiary"—in other words, a felony. W. VA. CODE §§ 61-11-1, 18. And Miller satisfies the recidivist statute's plain text: he had twice been convicted and sentenced for other felonies before he shot Goard and was convicted and sentenced for doing so. Even so, Miller invokes *McMannis* to say that because

he committed his second set of felonies before the conviction for his first, he only had one qualifying felony under the recidivist statute. But *McMannis* read an additional, atextual requirement into the recidivist statute: requiring *each* offense to be committed "subsequent to *each* preceding conviction and sentence." 161 W. Va. at 437, 242 S.E.2d at 573 (emphasis added). *McMannis* was wrong in 1978 and remains wrong now: it ignores the statutory text and context of the recidivist statute, and the legislative purpose it invoked to rewrite the statute does not support that outcome, either. Reliance interests are also particularly low in this area where the precedent governs simply how severe punishment may be, instead of giving West Virginians notice what conduct is—or is not—criminal. So the stare decisis factors weigh in favor of overturning *McMannis* to avoid giving defendants like Miller a technical out that the recidivist statute does not support. This Court should do so and affirm Miller's sentence.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument under Rule 20 because it asks this Court to reconsider its precedent.

STANDARD OF REVIEW

Miller argues that he is entitled to a new trial because the circuit court erred in admitting evidence of his pre-trial silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) and *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977). This Court reviews evidentiary rulings "under an abuse of discretion standard." *State v. Marple*, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996). Even evidentiary rulings that "affect[] constitutional rights." *State v. Frazier*, 229 W. Va. 724, 727, 735 S.E.2d 727, 730 (2012).

Miller also argues that the circuit court wrongly sentenced him to life imprisonment under West Virginia's recidivist statute. This Court reviews a sentencing order "under a deferential

abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

ARGUMENT

I. The State's Remarks Concerning Miller's Silence Do Not Warrant Reversal.

Miller's post-arrest-silence claim turns on the false idea that (admittedly) improper questions made a difference in who the jury chose to believe. Pet'r's Br. 10. But by that point in the trial, the jury had already heard properly admitted testimony concerning Miller's pre-*Miranda* silence that undercut Miller's testimony that somebody else was the shooter. This made the comments on post-*Miranda* silence cumulative in effect. In any event, the overwhelming evidence at trial pointed to Miller as the shooter—witness testimony, forensics, and Miller's actions all supported the verdict. So asking Miller about his post-arrest silence was harmless beyond a reasonable doubt. This Court should affirm his conviction.

A. The improper questions are not enough for a new trial because they were cumulative to appropriate questions making the same point.

The State's permissible references to Miller's pre-arrest silence rendered very similar questions about his post-arrest silence cumulative in effect.

1. Miller's central theory at trial is that Thompson—not him—was the shooter. Pet'r's Br. 3. To poke holes in that defense, the prosecutor cross-examined Miller as to whether he told anybody else that Thompson was the shooter. The prosecutor began by asking Miller if he reported the crime the evening it happened or in the days after. App. 898. Miller hadn't. Miller concedes that nothing about this exchange was unconstitutional. Pet'r's Br. 4. He's right, *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980), and that rule makes sense because a suspect is not facing compulsion within the meaning of the Fifth Amendment pre-*Miranda*. *Salinas v. Texas*, 570 U.S. 178, 192, (2013) (Thomas, J., concurring in judgment). But Miller argues that it was a

constitutional error for the court to allow the prosecutor to also ask whether Miller could have told officers about another shooter at his preliminary hearing or at any other time leading up to trial—in other words, why he stayed silent post-arrest. Pet'r's Br. 4; App. 898-900.

While Miller's correct that this Court and the United States Supreme Court make the State's references to his post-*Miranda* silence improper, *Boyd*, 160 W. Va. 234, 233 S.E.2d 710, *Doyle*, 426 U.S. 610, the United States Supreme Court has also held that a State's permissible references to a defendant's pre-*Miranda* silence make subsequent references to a defendant's post-*Miranda* silence "cumulative." *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993). The reason is that referring to a defendant's silence at a time when it is fair game for impeachment makes any error in *also* making the same point another way not so harmful as to require reversal. *Id.* That reasoning is even stronger when the improper references are infrequent and the evidence of guilt is "weighty." *Id.*

While *Brecht* applied this cumulative analysis in the habeas context, at least one federal court had already found that references to "post-*Miranda* silence was cumulative of other permissible evidence" on direct appeal. *United States v. Rivera*, 944 F.2d 1563, 1569 (11th Cir. 1991). Like the Supreme Court in *Brecht*, the Eleventh Circuit in *Rivera* found that permissible evidence of the same character and getting to the same point meant that improper references were "not so harmful." *Id.* And just as the Supreme Court would later do in *Brecht*, the *Rivera* Court remarked that its "conclusion is further fortified when the degree of prejudice from this constitutional error is juxtaposed against the strength of the evidence." *Id.*

Like in *Brecht* and *Rivera*, here the prosecutor legitimately inquired into Miller's pre-arrest silence—if Thompson was really the shooter as Miller now claimed, Miller could have told the police when they stopped him, but he didn't. The prosecutor then made the same point, albeit

improperly, by asking Miller if he could have told somebody his theory at his preliminary hearing or later. App. 899. So both lines of inquiry went to Miller's decision not to tell anybody who the real shooter was—making the improper remarks cumulative in effect. In short, because the State was "clearly entitled" to question Miller on his pre-arrest statements (and lack thereof), additional comments on "post-*Miranda* silence was cumulative of other permissible evidence." *Rivera*, 944 F.2d at 1569. And as explained below, the overwhelming evidence of Miller's guilt further supports this finding.

2. Nevertheless, Miller argues that "[a] warning of the right to remain silent would be 'meaningless' if prosecutors could later impeach a defendant for invoking it." Pet'r's Br. 8. Miller relies on *State v. Walker* for this point, where this Court found reversible error where the State cross-examined the defendant about his post-*Miranda* silence and then "made repeated remarks" about it in the State's closing argument. 207 W. Va. 415, 419-21, 533 S.E.2d 48, 52-54 (2000). To do otherwise, this Court said, "would effectively make *Miranda* warnings meaningless." *Id.* at 421, 533 S.E.2d at 54.

Agreed, but only as far as *Walker* goes. It stands for the general rule—which the State does not challenge here—that commenting on post-*Miranda* silence is error. Notably, *Walker* did not involve any pre-*Miranda* references, so the cumulative issue was never in play. So *Walker* provides little guidance under facts like these. And *Walker* itself is no per se rule. There and since, this Court has looked at references to post-*Miranda* silences based on the facts of the cases. *Walker* considered four context-specific factors "in determining whether improper prosecutorial comment is so damaging as to require reversal"—including how extensive the comments are. 207 W. Va. at 421, 533 S.E.2d at 54 (citation omitted). Based on that factor, harping "repeated[ly]" on post-*Miranda* silence during the State's closing argument—not a few questions during a longer and far-

ranging cross-examination earlier in the trial, as here—gave the Court "little difficulty in finding reversible error." *Id.* Further, just last year in *State v. Hoard*, this Court found "*Walker* unpersuasive under the facts present here." 248 W. Va. 428, 439, 889 S.E.2d 1, 12 (2023). Far from treating *Walker* as an iron-clad rule, the Court detailed other cases where it refused to reverse based on post-*Miranda* silence comments—and ultimately did the same thing there, too. *Id.* at 440, 889 S.E.2d at 13.

So the cumulative-error analysis is consistent with this Court's practice of looking at all the facts of the case to see if improper comments require reversal. And the facts here show that the minimal references to the post-*Miranda* silence are cumulative in effect combined with the pre-*Miranda* references. The comments were also not prejudicial against the weight of the evidence (see below), but given their cumulative nature, the Court need not even reach the harmless-error stage of the analysis.

In any event, adopting a cumulative finding here would not render *Miranda* meaningless any more than using the ordinary harmless-error lens does. To start, it would merely continue what this Court has repeatedly recognized—remedies for constitutional errors depend on the context. *State v. A.B.*, 247 W. Va. 495, 507, 881 S.E.2d 406, 418 (2022), *cert. denied sub nom. A. B. v. W. Virginia*, 143 S. Ct. 2499 (2023) (applying harmless error where defendant went to trial with counsel who had an actual conflict of interest); *State v. Miller*, 184 W. Va. 367, 369, 400 S.E.2d 611, 613 (1990) (failure to instruct the jury on the essential elements of the offenses charged is reversible error). A cumulative finding also does not render *Miranda* meaningless because it only applies when the State has already properly elicited the same testimony about pre-*Miranda* silence. In that sense, it's a different species of the more general harmless error argument: if the jury can and did hear about the defendant's silence already, then mentioning the same thing again

is less likely to be prejudicial. Nor is the cumulative analysis a per se rule in favor of the State. As already explained, *Brecht* and *Rivera* mirror this Court's approach of looking at the evidence overall in determining whether the error was cumulative. So *Walker*'s approach to post-*Miranda* silence still matters. It's just that everything else it said—and that this Court said in similar contexts since—matters too.

B. Any improper remarks regarding Miller's pre-trial silence were harmless.

In any event, the questions concerning Miller's pre-trial silence were harmless. True, this Court has embraced the rule set out in *Doyle v. Ohio* that a defendant's silence cannot be used against him or her. *See Boyd*, 160 W. Va. at 240, 233 S.E.2d at 716. But (again), this Court has also recognized that constitutional errors are not per se reversible. *State v. Blair*, 158 W. Va. 647, 659, 214 S.E.2d 330, 337 (1975) ("[A]ppellate courts are not bound to reverse for a technical violation of a fundamental right."). Instead, this Court applies harmless error—including in instances where the State references a defendant's post-*Miranda* silence during trial. *Hoard*, 248 W. Va. at 440, 889 S.E.2d at 13; *Marple*, 197 W. Va. at 53, 475 S.E.2d at 53.

In applying harmless error, the Court sees if "the guilty verdict actually rendered ... was surely unattributable to the error." *Marple*, 197 W. Va. at 53, 475 S.E.2d at 53. It does this by looking at the improper references to post-*Miranda* silences and considering whether the overwhelming evidence otherwise supported conviction. *Id.*; *Hoard*, 248 W. Va. 428, 889 S.E.2d at 13. For example, just last year in *Hoard*, this Court found harmless error where the State referred to the defendant's post-arrest silence twice at trial. "[T]he brevity of [the] references, coupled with the overwhelming evidence," meant that the "error was harmless." *Hoard*, 248 W. Va. at 438, 889 S.E.2d at 11. This result held even despite the circuit court ruling that "Hoard needed to state that he didn't give any statement to police upon the advice of counsel"—though he ultimately never

answered that he never told police, that direction from the circuit court put even greater weight on the post-*Miranda* silence than a prosecutor's comment alone. *Id.* at 436, 889 S.E.2d at 9. Likewise, in *Marple*, this Court affirmed a defendant's conviction where the investigating officer commented on the defendant's post-*Miranda* silence. 197 W. Va. 47, 54, 475 S.E.2d 47, 54 (1996). This Court considered that the officer only made a "few remarks" and that the post-*Miranda* silence was never used during closing argument—and weighed those few remarks against the 28 witnesses in the case, the defendant's own statements to some of the witnesses, and the forensic evidence. *Id.* at 53-54, 475 S.E.2d at 53-54. Given that record as a whole, *Marple* concluded that the "jury would have reached the same verdict absent the post-*Miranda* silence testimony." *Id.*; *see also State v. Hillberry*, 233 W. Va. 27, 34, 754 S.E.2d 603, 610 (2014) (finding no reversible error where brief reference to a defendant's pre-trial silence was an isolated comment and the prejudicial effect was minimal); *State v. Hamilton*, 177 W. Va. 611, 614-15, 355 S.E.2d 400, 403-04 (1987) (same); *State v. Bruffey*, 231 W. Va. 502, 509-10, 745 S.E.2d 540, 547-48 (2013) (finding no error with brief references to *Miranda* warnings because State never "suggest[ed] that his silence is indicative of guilt");

Only where the evidence is considerably less weighty or the remarks considerably more prejudicial has the Court found reversible error. Take Miller's reliance on *Boyd*. That case involved a murder with no witnesses and where the defendant admitted he killed the victim but claimed self-defense. 160 W. Va. at 236, 233 S.E.2d at 714. The prosecutor asked the defendant more than once about his pre-trial silence *and* asked him why he did not say anything. *Id.*, 233 S.E.2d at 714. The questions were pointed: Why, if the defendant testified to the jury "'I had to kill the man because he had a gun in his hand,'" did he "not tell that to the police when [they] gave [him] the opportunity immediately after it happened to make a statement about what happened?"

Id., 233 S.E.2d at 713 n.1. So the prosecutor impeaching Boyd's silence directly undercut his defense in a way more general remarks on post-arrest silence may not. *Boyd*, too, was decided well before this Court started applying the harmless error test expressly in this context in cases like *Marple* and *Hoard*. Because *Boyd* does not talk about balancing the remarks against the weight of the evidence overall, it provides little guidance in a case where even Miller agrees harmless error would apply if the facts warranted it. Pet'r's Br. 10-12.

Walker also involved a self-defense theory, so the question of whether the defendant shot the victim was never in dispute as it is here. 207 W. Va. at 417, 533 S.E.2d at 50. As explained above, the prosecutor in *Walker* also made extensive references to Walker's silence—both in cross examination and in closing argument. *Id.* at 419-421, 533 S.E.2d at 52-54. In closing, for instance, the State kept saying that the defendant "never said anything to the police officers," then asked the jury directly "why wouldn't he?" *Id.* at 421, 533 S.E.2d at 54. The prosecutor insisted to the jury that not saying anything "doesn't make sense"—because "[i]f it happened, he would have told them. He would have said that to the police officers." *Id.* Thus, the errors in *Walker* had a far greater potential for prejudice than in other cases with a few remarks on cross-examination alone.

These cases all show that this Court considers the references to the defendant's post-*Miranda* silence while also considering their context and the other evidence of guilt in determining harmless error. *See also Brecht*, 507 U.S. at 639 ("The State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case … Moreover, the State's evidence of guilt was, if not overwhelming, certainly weighty."). And they show this Court's oft-repeated conclusion that a few stray comments are usually harmless when measured against the trial as a whole. *See State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 63 (1979) ("If the case contains a number of substantial key factual conflicts

or is basically a circumstantial evidence case, or is one that is largely dependent on the testimony of a co-participant for conviction, there is an increased probability that the error will be deemed prejudicial.").

This case is the same. Here, the State introduced extensive evidence that Miller shot Goard. Chiefly, Goard testified that Miller shot him. App. 761. The State also showed that Miller had a motive for shooting Goard: Miller thought Goard had his drugs. App. 564. Miller's girlfriend Dotson testified that she got into an argument with Miller over her possibly giving Goard a bag of drugs. App. 556-557. And while Dotson was in the bathroom, she heard Miller ask Goard about the drugs and then heard a gunshot. App. 564. Goard also testified to this sequence of events. App. 729, 737. Immediately following the shooting, Miller fled the scene. App. 407, 434. But before he could fully get away, officers spotted him matching the description dispatch gave them of the suspected shooter. App. 407. And when confronted by officers, Miller gave them a fake name. App. 407-408. Police later found a gun with Miller's DNA on it very near where the officers stopped him. App. 508.

Against this substantial evidence, Miller countered only with his own testimony. And he's inconsistent about that testimony now. *See* Pet'r's Br. 11 (arguing Miller "had good reason to ditch the gun and give a fake name"); *but see* App. 885 (Miller testifying that he did not have a firearm on him the day of the shooting). So this case did not come down only on credibility issues like Miller makes it out, Pet'r's Br. 10, or like *Boyd* where the improper references to the defendant's silence significantly impeached his testimony, 160 W. Va. at 236, 233 S.E.2d at 714—the overwhelming testimonial and physical evidence showed that Miller shot Goard.

Add to all that the fact that the prosecutor's references to Miller's post-arrest silence made up only a small portion of the State's cross-examination. Miller does not argue that the State came

back to this point later at trial, so his case is not like *Walker*, which involved repeated references to the defendant's silence and a closing argument that drew heavily on that silence to undermine the defendant's self-defense theory. *See Walker*, 207 W. Va. at 419-421, 533 S.E.2d at 52-54. Instead, this case presents the same scenario as *Hoard* and *Marple*, where this Court found harmless error where the references to post-arrest were brief, and the evidence of guilt was overwhelming. This Court should do the same here and affirm Miller's conviction.

II. This Court Should Overturn *McMannis* And Affirm Miller's Sentence.

Miller's sentencing argument fails, too. Under its unambiguous language, the West Virginia state recidivist statute applies to defendants who have been convicted of two felony offenses. That's Miller. But Miller objects based on an atextual, judicially created expansion of the statute that requires each offense to be committed after each previous conviction and sentence are entered. And because Miller committed his second set of felonies before he was convicted and sentenced for his first felony, he claims that the circuit court cannot now impose a life sentence under the recidivist statute. Pet'r's Br. 13-14. But this Court should reject this argument by overturning its decision in *McMannis*. Though stare decisis generally counsels against revisiting precedent, the doctrine is not absolute. It does not require keeping to a poorly reasoned decision that ignored the statutory text and falls on its own reasoning, and that has not engendered any significant reliance interests. This Court should affirm Miller's sentence.

A. The recidivist statute's plain language applies to Miller.

1. West Virginia's recidivist statute provides that a person who has "been twice before convicted … of [certain crimes] punishable by confinement in a penitentiary"—in other words, most felonies, see W. VA. CODE § 61-11-1—"shall be sentenced to … life" in prison upon a third conviction. W. VA. CODE § 61-11-18. "[P]rior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section." *Id.*

Offenses committed close in time arising from a single course of conduct often count as a transaction or series of transactions, not unconnected crimes at different times. *Gilkerson v. Lilly*, 169 W. Va. 412, 416, 288 S.E.2d 164, 167 (1982); *Wooden v. United States*, 595 U.S. 360, 369 (2022). The statute is meant to "deter[] and segregat[e] habitual criminals" from further threatening society. *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 517, 583 S.E.2d 800, 814 (2002). And the punishment "is [] automatic … regardless of the nature of the penalty for the underlying third felony." *State v. Lane*, 241 W. Va. 532, 539, 826 S.E.2d 657, 664 (2019).

Like in all statutory construction cases, applying West Virginia's recidivist statute begins "with the text of the statute." *W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970). The Court has applied aspects of the recidivist statute many times—enough to conclude that the law, with its "plain and unambiguous" language, falls in that "no interpretation required" category. *Recht*, 213 W. Va. at 519, 583.

So the recidivist statute is unambiguous. It applies to criminals who have been convicted of two prior felonies. And those felonies need to be separated by gaps in time or intervening events to count as more than a single transaction.

Here, Miller was convicted of felonies from two prior transactions. First, he was convicted in Raleigh County of burglary, wanton endangerment with a firearm, kidnapping, and conspiracy to commit first-degree murder from a May 2009 incident. Second, he was convicted in Kanawha County of attempted first-degree murder with the use of a firearm from an April 2009 incident. Miller committed these crimes several weeks apart and in different counties, so they are not part of a series of transactions, either. In arguing otherwise, Miller confuses *McMannis*'s holding about

committing the offenses "subsequent to each preceding conviction and sentence," syl. pt. 1, 161 W. Va. 437, 242 S.E.2d 571, with the statutory requirement that the two convictions cannot come from the "same transaction or series of events," W. VA. CODE § 61-11-18. *See* Pet'r's Br. 13 ("For the second predicate to be a separate transaction within the meaning of the recidivist statute, Petitioner must have committed the offense 'subsequent to the preceding conviction and sentence'" (cleaned up)). And the only fact Miller points to is that he committed one felony in April 2009 and another set of felonies in May 2009. Pet'r's Br. 14. But there's nothing unusual about the idea that different crimes in different weeks in different counties would represent different transactions. So Miller has to do more than point to the bare dates to meet his burden to show an abuse of discretion in the conclusion below that his crimes were distinct.

Thus, the recidivist statute's plain text applies to Miller.

2. To the extent statutory purpose is helpful, it also supports the court's decision to apply the recidivist statute to Miller. This Court has repeatedly said that the recidivist statute's "primary purpose" "is to deter felony offenders … from committing subsequent felony offenses." *McMannis*, 161 W. Va. at 441, 242 S.E.2d at 574-75. And as this Court further explained, "[t]he statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice." Syl. pt. 3, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992). It does this by "segregating habitual criminals" from further threatening society. *Recht*, 213 W. Va. at 517, 583 S.E.2d at 814.

Miller is the type of habitual criminal the recidivist statute is aimed toward. His prior convictions were for serious crimes—attempted first degree murder on one occasion and burglary, wanton endangerment with a firearm, kidnapping, and conspiracy to commit first-degree murder on another. His latest (triggering) convictions were for wanton endangerment with a firearm,

malicious wounding, and felon in possession of a firearm. So Miller has persisted in criminality despite already been convicted and sentenced twice before. Again, no abuse of discretion in applying the statute's plain terms to an offender with Miller's repeated, violent criminal history.

3. But despite the statute's "plain and unambiguous" language, *Recht*, 213 W. Va. at 519, 583 S.E.2d at 816, Miller is right that under *McMannis*'s view of the statute he is not a third-offense recidivist after all. Pet'r's Br. 12-15.

See, forty-five years ago *McMannis* read into the statute a requirement that "the alleged conviction or convictions … were for offenses committed after each preceding conviction and sentence" to further "the deterrent purpose of the statute." *McMannis*, 161 W. Va. at 441, 242 S.E.2d at 575. As a result, *McMannis* held that before the trial court imposes the life recidivist enhancement, the State must prove beyond a reasonable doubt "that the second conviction for a penitentiary offense was for an offense committed after the first conviction and sentence on a penitentiary offense, and that the principal penitentiary offense was committed after the second conviction and sentence on a penitentiary offense." *Id.* 161 W. Va. at 444, 242 S.E.2d at 575. So because Miller committed his second offense before his first offense's conviction and sentence, the recidivist statute would not apply to him. In other words, even though the statutory text and context squarely require applying the recidivist statute here, *McMannis*'s atextual gloss allows certain convicted defendants to circumvent that result. This Court should fix this issue here.

B. This Court should overturn *McMannis*.

Stare decisis is a "matter of judicial policy." *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 1029, 207 S.E.2d 169, 173 (1974). Under it, courts generally stand by their prior decisions, because doing so "promotes certainty, stability and uniformity in the law." *Id.* Stare decisis "reflects respect for the accumulated wisdom of judges who have previously tried to solve the

same problem." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

But stare decisis does not mean that courts should never overrule erroneous precedents. Stare decisis is no "inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 927-28 (1991). To the contrary, this Court has said that overruling a previous decision is appropriate where there is "evidence of changing conditions or serious judicial error in interpretation." *Jenkins v. City of Elkins*, 230 W. Va. 335, 340-41, 738 S.E.2d 1, 6-7 (2012).

Whether the original court got its prior decision right is usually the most important factor when considering whether to overrule it. As this Court recognized over a century ago: "[I]t is better to be right than to be consistent with the errors of a hundred years." *Lovings v. Norfolk & W. Ry. Co.*, 47 W. Va. 582, 35 S.E. 962, 965 (1900). Beyond whether the decision was correctly decided, courts also weigh heavily the "reliance interests at stake." *Ramos*, 140 S. Ct at 1414 (Kavanaugh, J., concurring in part). That makes sense—"[p]redictability is at the heart of the doctrine of *stare decisis*." *Harshbarger v. Gainer*, 184 W. Va. 656, 662, 403 S.E.2d 399, 405 (1991) (Stephens, J., concurring) (quoting *Hock v. City of Morgantown*, 162 W.Va. 853, 856, 253 S.E.2d 386, 388 (1979)); *Meadows v. Meadows*, 196 W. Va. 56, 64, 468 S.E.2d 309, 317 (1996) (stating stare decisis is important to "furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise").

Here, the stare decisis principles do not weigh in favor of adhering to *McMannis*. Most importantly, *McMannis* is wrong. *McMannis* did not address the statutory text at all, contradicting this Court's frequent command that the plain text of the statute controls. And while *McMannis* considered the statute's purpose in its analysis, that's not enough to justify keeping it. Trying to advance the Legislature's purported purpose is not the courts' role, for one thing, and giving the

statute its plain meaning would, in fact, advance the statute's purposes of deterring criminals and protecting the public. Low reliance interests also favor this Court reconsidering *McMannis*. Defendants like Miller have not relied on *McMannis* to help them figure out whether their conduct is criminal or not—that is, how to conform their conduct to the law—but just to get a reduced sentence. That's not the type of reliance interest that justifies keeping plainly wrong precedent on the books. The reliance interests are also weaker here because this Court has already started to rein in *McMannis*, recognizing that the text and purpose of the statute do not square with its prior decision. This Court should take the final step now and revert the law back to what the recidivist statute says.

1. Whether the Court's previous decision is correct is often the most important factor in the stare decisis analysis. *Lovings*, 47 W. Va. at ___, 35 S.E. at 965; *State v. Coles*, 234 W. Va. 132, 139, 763 S.E.2d 843, 850 (2014). *How* wrong the decision is can make the case for keeping it even weaker—though other factors may outweigh overturning a wrong but fair decision, the balance may well be different for an egregiously wrong decision. *Hock*, 162 W. Va. at 856, 253 S.E.2d at 388 ("[R]egardless of what we think of the merits of this case, we must be true to a reasonable interpretation of prior law in the area of property where certainty above all else is the preeminent compelling public policy to be served."). And *McMannis* is egregiously wrong. It deviated from the plain statutory text without explanation and cannot stand on its own premises, either. That's a strong basis to overturn.

First, the plain text controls and *McMannis* got the text plain wrong. Again: The recidivist statute applies to defendants who "have been twice before convicted in the United States of a crime punishable by imprisonment in a state or federal correctional facility which has the same or substantially similar elements as a qualifying offense." W. VA. CODE § 61-11-18(d). So the

statute's "plain and unambiguous" language looks only at whether a defendant has two prior convictions at the time of sentencing for the third. *Recht*, 213 W. Va. at 519, 583 S.E.2d at 816.

What doesn't the recidivist statute look at? Whether a defendant had been convicted *and* sentenced for conviction one before conviction two, and the same for convictions two and three. Nor does the recidivist statute speak to when the convictions occurred in relation to each offense. So everything *McMannis* said about the order of operations that must occur before applying the recidivist statute is missing from the text.

Context, as in the rest of the recidivist statute's text, confirms this textual command. The recidivist statute is harsh, and the Legislature knew that and chose to mediate it partially by putting two express caveats into it. First, it allowed "[t]hat prior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section." W. VA. CODE § 61-11-18(d). This is why no one argues Miller's three convictions for his May 2009 conduct should count as three crimes for recidivist-enhancement terms. And second, the Legislature said "[t]hat the most recent previous qualifying offense which would otherwise constitute a qualifying offense for purposes of this subsection may not be considered if more than 20 years have elapsed." *Id.* These caveats reflect policy judgments balancing critically important issues of public safety, justice, and fair punishment. And they are quintessential legislative judgments, not judicial ones, so courts are constrained from writing additional policy considerations into a statute. *See* syl. pt. 2, *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009) ("This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation."). More to the point, that the Legislature understood these competing factors, added caveats in some circumstances, but declined to put in *additional* caveats like the ones *McMannis* did is even more

textual reason for courts to respect that legislative choice. Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) ("In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.").

McMannis gave this text and context short shrift—and that's being generous. Despite these strong textual cues, *McMannis* did not address the text *at all*. Instead, *McMannis* started with prior case law, then persisted in what it thought was a position that advanced the statute's purpose. 161 W. Va. at 441, 242 S.E.2d at 574. Worse, the cases *McMannis* relied on do not engage the statute's text, either. *See State ex rel. Stover v. Riffe*, 128 W. Va. 70, 73, 35 S.E.2d 689, 690 (1945) (relying on the "purpose" of the statute and a hypothetical to find recidivist statute should not apply where the third conviction was for an offense committed before the second conviction); *State ex rel. Medley v. Skeen*, 138 W. Va. 409, 416, 76 S.E.2d 146, 150 (1953) ("The reason most frequently given for such construction of the [recidivist] statute is that additional punishment is imposed to prevent such persons from engaging in crime in the future."). *McMannis* admitted as much—it said, for instance, that *Riffe* was "[b]ased on the public policy of deterrence." 161 W. Va. at 439, 242 S.E.2d at 574.

Given that *McMannis* did not even consider the recidivist statute's text, it is difficult to imagine the Court reaching that sort of conclusion today, much less using that sort of text-free reasoning to get there. Time and again, the Court has insisted—rightly—that "[i]f the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *State v. Dubuque*, 239 W. Va. 660, 665, 805 S.E.2d 421, 426 (2017); *see also, e.g.*, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995) (same); syl. pt. 2, *Crockett*, 153 W.Va. 714, 172 S.E.2d 384 ("Where the language of

a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."). Indeed, the principle is hardly new. *See, e.g.*, syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").

McMannis's missing textual analysis is even less reason for this Court to defer to it now. This is not a case where *McMannis* reasonably interpreted the recidivist statute but ultimately got it wrong, for instance. *See Hock*, 162 W.Va. at 856, 253 S.E.2d at 388 ("[R]egardless of what we think of the merits of this case, we must be true to a reasonable interpretation of prior law."). Instead, *McMannis* read requirements into the recidivist statute. That approach is especially unjustifiable given that this Court has repeatedly said that the recidivist statute is "plain and unambiguous." *Recht*, 213 W. Va. at 519, 583 S.E.2d at 816; *see also, e.g.*, *State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 647, 474 S.E.2d 573, 577 (1996) (per curiam). *McMannis*'s atextual result cannot be squared with either this Court's approach to statutory interpretation generally or its line of cases interpreting the recidivist statute specifically as unambiguous.

Finally, all of the above means that Miller also cannot take refuge in the idea that stare decisis carries more weight in the statutory context. Putting aside that even that additional weight should not be enough to look the other way when the textual analysis is plainly wrong, as it is here, that "special force" for statutory stare decisis only applies "in the area of statutory interpretation." *See Haney v. Cnty. Comm'n, Preston Cnty.*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002). And this Court has repeatedly said that statutory interpretation is needed only when a statute is ambiguous. *See* syl. pt. 5, *State of West Virginia v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959) (finding that when a statute is plain and unambiguous, "the

statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute"). And—again—the recidivist statute is not ambiguous. Text and context favor this Court revisiting *McMannis*.

Second, *McMannis*'s purpose rationale is not persuasive either—or at least not under circumstances like Miller's. As stated above, this Court is clear that purpose is never enough to set aside clear text. *See* syl. pt. 2, *Crockett*, 153 W.Va. 714, 172 S.E.2d 384 ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."). In any event, *McMannis*'s purpose-driven rationale is wrong on its own terms, so there is even less reason to keep following it.

McMannis did get it right that the recidivist statute is meant to deter felons from committing future violations. *McMannis*, 161 W. Va. at 440, 242 S.E.2d at 574. But that rationale is only part of what animates the statute. It's about public safety, too. *See Recht*, 213 W. Va. at 510, 583 S.E.2d at 807 (noting recidivist statute's two primary purposes are deterring felony offenders and "protect[ing] society from habitual criminals"). And reading the recidivist statute to not apply to a two-time violent offender because of the timing quirk for when convictions one and two were entered does the opposite of advancing that legislative purpose. The Legislature made a deliberate choice that serious, repeated offenses warrant enhanced sentences. Miller's conviction here falls in that category.

Rewriting the statute as *McMannis* did is not necessary to advance the Legislature's deterrence goal, either. As a general matter, the recidivist statute reaches felonies, as in crimes that people know are crimes. Indeed, given this Court's proportionality analysis, defendants also have notice that the statute only applies to offenses serious enough that they involve "actual or threatened violence." Syl. pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). So even

if a defendant has not been convicted yet, the statute still provides notice to a defendant who committed a violent offense that a life sentence may be looming if they commit more felonies down the line. The statute, thus, still serves as a deterrent in the circumstances *McMannis* considered. What *McMannis* does, then, is reward defendants who have not been caught or convicted before they commit another felony.

At most, perhaps *McMannis*'s argument that no deterrence value is served applying the recidivist statute to someone who was not sentenced and convicted before committing another felony would make sense for someone who committed the third offense before they were sentenced for crime two. It's possible in that case that the second sentence would be doing the work of deterrence: the defendant might think that the recidivist statute is not a concern if they have only one conviction on their record when they commit a third felony, even though they know they engaged in criminal conduct a second time already. But that's not true here. Miller's first and second convictions and sentences were back in 2010—making any sort of argument implausible that he did not know he was facing a third conviction and the potential life enhancement that comes with it when he shot someone in 2022. He knew for twelve years that he had two felony convictions. So even if the Court took an about-face from its ordinary approach to statutory construction and deemed *McMannis*'s solely purposivist approach appropriate, it would not be a basis to stretch the statute *at a minimum* in circumstances like these. In short, the statute—as written—is strong deterrence in all cases. And especially for defendants like Miller that continue to commit violent crimes long after convictions one and two are final.

All of this means that the Court should overrule *McMannis*. It was wrong when it was issued and has not gotten better with age. The unsoundness of *McMannis* cuts heavily in favor of overruling the decision and returning to the statute's plain text.

2. The reliance interests at stake also cut in favor of overruling *McMannis*. Reliance in stare decisis terms looks at whether the case "furnish[es] a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Meadows*, 196 W. Va. at 64, 468 S.E.2d at 317. And because "[p]redictability is at the heart of the doctrine of stare decisis," a less-than-perfect case may be upheld to avoid upsetting settled expectations—though even then, only provided it is "a reasonable interpretation of prior law." *Harshbarger*, 184 W. Va. at 662, 403 S.E.2d at 405. No part of that rule describes *McMannis*.

First, as discussed above, this is not a case of an unclear statute. *McMannis* departs from the recidivist statute's plain text, making it an *unreasonable* interpretation of law. That alone lessens the reliance interests. *Harshbarger*, 184 W. Va. at 662, 403 S.E.2d at 405. But the recidivist statute's plain text also matters in reliance terms because people do not have to rely on this Court's interpretation to understand what it means. The statute is quite clear—if you have been "twice before convicted," a third felony conviction puts you at risk of life imprisonment. W. VA. CODE § 61-11-18(d). This scenario is not like *Adkins v. City of Huntington*, for example, where this Court interpreted an ambiguous statute to find that a city is considered a political subdivision and is entitled to a statutory exemption. Syl. pt. 2, 191 W. Va. 317, 445 S.E.2d 500 (1994); *see also Haney*, 212 W. Va. at 828, 575 S.E.2d at 438 (applying stare decisis to *Adkins*). In that situation, it made sense to worry about upsetting reliance interests because the statute did not speak clearly; this Court's precedent gave the needed explanation. This, though, is an unambiguous statute that speaks plainly for itself.

Second, any reliance interest here is less significant than it would be in a typical criminal-law case because defendants have not been relying on *McMannis* to conform their conduct to the law. Recall again that reliance interests provide "a clear guide for the conduct of individuals to

enable them to plan their affairs with assurance against untoward surprise." *Meadows*, 196 W. Va. at 64, 468 S.E.2d at 317. This same principle undergirds notice in the due process context: "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. pt. 1, *State v. Flinn*, 158 W. Va. 111 208 S.E.2d 538 (1974). So when dealing with what constitutes a "delinquent child" in a criminal statute, for instance, *see id.*, or what it means to "maintain adequate and suitable facilities," *see State v. Blair*, 190 W. Va. 425, 438 S.E.2d 605 (1993), a judicial interpretation can play a critical role for individuals seeking to conform their behavior to the law—and accordingly avoid criminal liability.

But this case does not involve that sort of notice. Miller is not arguing that *McMannis* is what gave him notice that the aggravated assault he committed in 2022 was a crime. He's not even arguing that he would not have committed the crime had he known that *McMannis* was wrong, and that the recidivist statute reaches him. Instead, he invokes *McMannis* to get a more lenient sentence than he would have under the recidivist statute's terms alone. That is not the sort of reliance interest that counteracts the consequences of adhering to precedent that is plainly wrong. Indeed, while reliance interests are low for a criminal statute like this one, those consequences are also high: removing the Legislature's decision that defendants like Miller should be subject to longer sentences hurts public safety.

Third, and finally, this Court has already started to pare back *McMannis*, so whatever reliance claim might have been true before is at least weaker now. In *State v. Norwood*, this Court applied the recidivist statute to a criminal defendant who had not been discharged of his prior penitentiary sentences before his third conviction—something the defendant said contradicted *McMannis*'s commands. 242 W. Va. 149, 156-57, 832 S.E.2d 75, 82-83 (2019). The Court started

with a textual argument: adopting the defendant's argument "would further dilute the clear and unambiguous meaning of our recidivist statute." *Id.* at 156, 832 S.E.2d at 82. To illustrate this point, this Court posed a hypothetical where a defendant currently incarcerated on a first felony offense commits another felony in prison. After he is convicted and sentenced for that felony, he commits another felony while still serving time for the now two prior felonies. *Id.* Under the defendant's theory, a recidivist life sentence would have been "improper." *Id.* But the Court rejected this theory by looking at the recidivist's "primary purpose": "[T]o deter felony offenders … from committing subsequent felony offenses." *Id.* at 157, 832 S.E.2d at 83. Imposing a recidivist sentence on someone who has already "been twice convicted and sentenced for crimes punishable by confinement in a penitentiary" but not finished serving those sentences would still be a deterrent—and thus purpose-driven reasoning illustrated the Court's textual concern with the defendant's argument. *Id.*

This Court's reasoning in *Norwood* is significant because it balked at applying *McMannis* to the defendant's circumstances based on statutory text and confirming it with purpose analysis. By noting that the defendant's *McMannis* argument "would *further* dilute the clear and unambiguous meaning of our recidivist statute," *Norwood*, 242 W. Va. at 156, 832 S.E.2d at 82 (emphasis added), the Court suggested that *McMannis*'s approach to the text has cracks. In other words, *Norwood* at least signaled five years ago—three years before Miller's third set of felonies here—that *McMannis* itself may not adhere to the recidivist statute's plain text, and thus that it might well need reining in. The State is now asking the Court to finish the job.

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In sum, the stare decisis arguments for keeping *McMannis* are near zero. *McMannis* was wrongly decided, its errors have become more glaring with time, and both the type and degree of

potential reliance interests at stake are minimal. All of that is enough to overturn it. At minimum, though, the Court should at least continue what it started in *Norwood* and hold that *McMannis* does not apply under *these* circumstances—that is, where both convictions were final before the defendant committed the crime that led to the triggering conviction. This Court should hold that *McMannis*'s atextual analysis should not trump the recidivist statute's plain text and purpose, and affirm Miller's sentence.

CONCLUSION

This Court should affirm Miller's conviction and the circuit court's sentence.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-318

Andrew Miller,

Petitioner,

v.

State of West Virginia,

Respondent.

CERTIFICATE OF SERVICE

I, Spencer J. Davenport, do hereby certify that on January 10, 2024, the foregoing Response Brief is being served on counsel of record by File & Serve Xpress.

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