

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-432

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**STATE OF WEST VIRGINIA
EX REL. STATE OF WEST VIRGINIA
Petitioner,**

v.

**THE HONORABLE BRIDGET COHEE,
Judge of the Circuit Court of Berkeley County,
and LATEEF JABRALL MCGANN
Respondents.**

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	1
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	2
ARGUMENT.....	3
I. Judge Cohee did not err as a matter of law by imposing a lesser sentence enhancement because she reasoned that to impose a life sentence in this case would have violated the proportionality principle found in Article III, Section 5 of the West Virginia Constitution.....	5
II. Judge Cohee employed a recognized proportionality analysis because she followed this Court's case law and even specifically relied upon this Court's recent holdings in <i>State v. Hoyle</i> and <i>State v. Horton</i> in support of her ruling.....	8
III. West Virginia Code § 61-11-18(b) authorizes the sentence in this case because it provides for a sentence enhancement of twice the minimum term of years otherwise provided for under the regular sentence.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Daye v. McBride</i> , 222 W. Va. 17, 658 S.E.2d 547 (2007).....	7
<i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996).....	6,10
<i>State v. Beck</i> , 167 W. Va. 830, 831, 286 S.E.2d 234 (1981).....	5,8
<i>State v. Booth</i> , 224 W. Va. 307, 685 S.E.2d 701 (2009).....	3
<i>State v. Goodnight</i> , 169 W.Va. 366, 287 S.E.2d 504 (1982).....	3,4
<i>State v. Horton</i> , 248 W.Va. 41, 886 S.E.2d 509 (2023).....	8
<i>State v. Hoyle</i> , 242 W. Va. 599, 836 S.E.2d 817 (2019).....	6,8
<i>State v. Kilmer</i> , 240 W. Va. 185, 808 S.E.2d 867 (2017).....	3,5
<i>State v. Lane</i> , 241 W.Va. at 538, 826 S.E.2d at 663 (2019).....	4,5,6,7

<i>State v. Lucas</i> , 201 W. Va. 271, 496 S.E.2d 221 (1997).....	3
<i>State v. Riffle</i> , 247 W.Va. 14, 875 S.E.2d 152 (2002).....	3
<i>Wanstreet v. Bordenkircher</i> , 166 W. Va. 523, 276 S.E.2d 205 (1981).....	4,5,8

Statutes

West Virginia Code § 61-11- 18.....	<i>passim</i>
West Virginia Code § 61-5- 17.....	9

Other Authorities

United States Constitution Eight Amendment.....	4,6,8
West Virginia Constitution Article 3, Section 5.....	<i>passim</i>
West Virginia Constitution Article 5.....	1
West Virginia Constitution Article 8, Section 1.....	1
West Virginia Constitution Article 8, Section 5.....	1
West Virginia Rules of Appellate Procedure 10.....	1

West Virginia Rules of Appellate Procedure

19.....3

West Virginia Rules of Criminal Procedure 35.....10

QUESTIONS PRESENTED

Can the State force a judge to sentence a defendant to life in prison when the judge finds that a life recidivist sentence would be disproportionate to the character and degree of the offense?

Does the proportionality clause found in Article III, Section 5 of the West Virginia Constitution apply equally to the Supreme Court and Circuit Courts?

STATEMENT OF THE CASE

No statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief. W. Va. R. App. P. 10(d). Petitioner stated in their brief that Judge Cohee “did not appear to believe that any additional enhancement [for the Defendant] needed to conform with any particular provision of the West Virginia Code.” Petitioner’s Brief, Page 4. This is inaccurate. Judge Cohee specifically stated during the sentencing hearing that “I believe that the appropriate proportional sentence is twice the minimum term.” App. 62. Twice the minimum term is the relevant language of West Virginia Code § 61-11-18(b) verbatim.

SUMMARY OF ARGUMENT

Contrary to the State’s assertion that a “sentencing judge has only the power that the Legislature has chosen to give her,” the Judiciary and Legislature are – in fact – separate branches of government. Petitioner’s Brief, Page 6; *See* W. Va. Const. art. V. A circuit court judge is a member of the judiciary. *See* W. Va. Const. art. VIII, section 5. “The judicial power of the state shall be vested solely in a supreme court of appeals and in the circuit courts . . . and in the justices, judges and magistrates of such courts.” W. Va. Const. art. VIII, section 1. Circuit court judges

have a duty to interpret and apply the statutes passed by the legislature according to the West Virginia and United States Constitutions.

Accordingly, Judge Cohee was required to apply the proportionality clause of the West Virginia Constitution and the Eighth Amendment of the United States Constitution to the statutory penalty set forth in West Virginia Code § 61-11-18(d); anything less would have been unconstitutional. Judge Cohee upheld her constitutional duty, applied the proportionality principle, and found that sentencing the defendant to life in prison would have been disproportionate based upon the character and degree of the offense. Instead of a life sentence, Judge Cohee imposed the lesser sentence enhancement found in subsection (b), where the minimum term shall be twice the term of years otherwise provided for under the sentence.

Now the State, despite the West Virginia Constitution, United States Constitution, and this Court's extensive case law on the proportionality principle, seeks to effectively eliminate the sentencing judge's role entirely. By logical extension of the arguments in Petitioner's Brief, the State seeks to virtually eliminate the judge's role in sentencing. Judge Cohee did not abuse her discretion. The sentencing judge acted within her discretion and followed the constitutional commands found in Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution by refusing to sentence the Respondent to life in prison. Therefore, the State's petition for a writ of prohibition should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent requests oral argument. Oral argument would aid the decisional process because the legal arguments presented in the briefs and record on appeal are in substantial conflict. This case involves the assignment of error in the application of settled law; and the State further

claims an unsustainable exercise of discretion where the law governing that discretion is settled. Respondent, therefore, request this case be set for Rule 19 argument. W. Va. R. App. P. 19. Furthermore, this case is not appropriate for a memorandum decision because the State's legal argument and constitutional theories challenge the basis for this Court's entire jurisprudence on the proportionality of life recidivist sentences. Syllabus points would be instructive to make clear whether the State may challenge a judge's sentence when she finds a life recidivist sentence to be disproportionate to the character and degree of the offense and whether the constitutional proportionality clause applies to the Supreme Court and Circuit Courts alike. Additionally, a robust restatement of this Court's entire proportionality clause analysis for life recidivist sentences by syllabus point would give circuit court judges clear guidance on the precise analysis they should follow to foster uniformity between the circuit courts on this issue.

ARGUMENT

"The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, *State v. Booth*, 224 W. Va. 307, 685 S.E.2d 701 (2009). Syl. Pt. 1, *State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867 (2017). In addition, "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review. Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 3, *State v. Riffle*, 247 W.Va. 14, 875 S.E.2d 152 (2002).

Under the proportionality clause of the West Virginia Constitution as set forth in Article III, Section 5, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. *Penalties shall be proportioned to the character and degree of the*

offence." (Emphasis added). In this case, instead of a life sentence, Respondent was sentenced to an enhanced indeterminate sentence according to the provisions of West Virginia Code § 61-11-18(b). The State seeks to prohibit the Circuit Court from imposing any sentence other than life in prison for Respondent. This sentence is not subject to appellate review because the trial court imposed its sentence based upon the proportionality clause, which is a permissible factor in sentencing. *See* Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

Moreover, "[d]espite the statute providing that a life sentence 'shall' be imposed where a defendant has been convicted of three felonies, any life sentence imposed by the circuit court under the recidivist statute, nonetheless, is subject to scrutiny under the proportionality clause of our Constitution. *See* W. Va. Const. art. III, § 5; U. S. Constitution amend VIII." *State v. Lane*, 241 W.Va. at 538, 826 S.E.2d at 663 (2019). In syllabus point four of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981), this Court held that "[w]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Significantly, "we have consistently viewed the West Virginia recidivist statute in a restrictive fashion in order to mitigate its harshness." *Id.* at 528, 276 S.E.2d at 209. This Court further stated in *Wanstreet* that:

[w]hen we analyze a life recidivist sentence under proportionality principles, we are in effect dealing with a punishment that must be viewed from two distinct vantage points: first, the nature of the third offense and, second, the nature of the other convictions that support the recidivist sentence. This duality is occasioned by the fact that the punishment for the third felony conviction is an automatic life sentence regardless of the nature of the penalty for the underlying third felony.

...

We do not believe that the sole emphasis can be placed on the character of the final felony which triggers the life recidivist sentence since a recidivist statute is also

designed to enhance the penalty for persons with repeated felony convictions, i.e., the habitual offenders. However, for purposes of proportionality, the third felony is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence.

Id. at 533-34, 276 S.E.2d at 212 (footnote omitted). Then shortly after *Wanstreet*, this Court held:

The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.

Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 831, 286 S.E.2d 234 (1981) (emphasis added); *accord Kilmer*, 240 W. Va. at 185, 808 S.E.2d at 867-68, Syl. Pt. 3.

I. Judge Cohee did not err as a matter of law by imposing a lesser sentence enhancement because she reasoned that to impose a life sentence in this case would have violated the proportionality principle found in Article III, Section 5 of the West Virginia Constitution

West Virginia Code § 61-11-18(d), expressly provides that if a defendant has “been twice previously 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, the person shall be sentenced to imprisonment in a state correctional facility for life.” The State’s position is that the word “shall” eliminates all discretion by the sentencing judge to apply the proportionality principle. Petitioner’s Brief, Page 9.

However, the State’s interpretation has already been explicitly rejected by this Court in *State v. Lane*. See *State v. Lane*, 241 W.Va. 532, 826 S.E.2d 657 (2019). “Despite the statute providing that a life sentence ‘shall’ be imposed where a defendant has been convicted of three felonies, any life sentence imposed by the circuit court under the recidivist statute, nonetheless, is

subject to scrutiny under the proportionality clause of our Constitution. *See* W. Va. Const. art. III, § 5; U. S. Constitution amend VIII.” *Id.* at 538, 826 S.E.2d at 663 (2019). Under the proportionality clause of the West Virginia Constitution as set forth in article III, section 5, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. ***Penalties shall be proportioned to the character and degree of the offence.***” (Emphasis added). Therefore, Judge Cohee did not err as a matter of law by refusing to impose the statutory sentence set forth in West Virginia Code § 61-11-18(d) merely because the statute included the word “shall”.

This Court set out the test for determining when prohibition should issue in *State ex rel. Hoover v. Berger*. Specifically, “[a]lthough all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Syl. pt. 4, in part, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Here, it is the State’s argument, not the lower tribunal’s order, that is clearly erroneous as a matter of law. Therefore, the Petition for Writ of Prohibition should be denied.

The State further misapprehends this Court’s holding in *State v. Hoyle*.

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) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019). The State contends that “[o]nce the *Hoyle* threshold is met, the sentence becomes a creature of statutory application.” Petitioner’s Brief, Page 13. However, this is yet again a gross misunderstanding of the jurisprudence on the proportionality principle. The test set forth in *Hoyle* does not overrule or abrogate all of the recidivist jurisprudence that came before it. *Hoyle* merely adds one more restriction to the many

limitations already placed upon the recidivist statute by this Court to ensure its conformity with Article III, Section 5 of the West Virginia Constitution. Contrary to the State's interpretation, *Hoyle* is not some special limit on the proportionality analysis a Circuit Court may conduct before imposing a life recidivist sentence.

Finally, the State erroneously relies on the inapposite *State ex rel. Daye v. McBride* to claim Judge Cohee exceeded her lawful authority. Petitioner's Brief, Page 14-16. *See State ex rel. Daye v. McBride*, 222 W. Va. 17, 658 S.E.2d 547 (2007). As this Court rejected the State's reliance upon *State ex rel. Daye v. McBride*, in *State v. Lane*, so too should it reject the State's reliance here for the same reason. *See State ex rel. Daye v. McBride*, 222 W. Va. 17, 658 S.E.2d 547 (2007); *See also State v. Lane*, 241 W.Va. 532, 826 S.E.2d 657 (2019).

[I]t is clear that *Daye* has very limited application to the case at bar, which does not involve multiple convictions under the Uniform Controlled Substances Act. Furthermore, there was no constitutional proportionality clause challenge to the life sentence imposed in *Daye*. The Court, therefore, did not engage in any analysis of whether the life sentence imposed upon Mr. Daye violated the proportionality clause of our constitution.

State v. Lane, 241 W.Va. 532, 826 S.E.2d 657 (2019).

The State further contends that “[a]llowing [Judge Cohee’s] method to take hold would create a landscape of chaos and piecemeal justice, a system comprised of thirty-one circuits with seventy-five definitions of proportional sentencing.” Petitioner’s Brief, Page 16. Setting aside the histrionic polemics of the State, this is the precise purpose of this Court’s jurisprudence on the topic of recidivist life sentences. These are not merely automatic statutory sentences but are subject to significant constitutional scrutiny, based upon the character and degree of the offenses, as they should be. Judge Cohee stated during the sentencing hearing, “in seven-and-a-half years on the bench this is the first recidivist action that the State has pursued.” App. 60. Obviously, a circuit

court judge should examine a recidivist conviction very carefully before sentencing a defendant to prison for life. This is especially the case when this is the first and only life recidivism case Judge Cohee has encountered in almost eight years on the bench, in a circuit as populous as the Twenty-Third Judicial Circuit.

Therefore, Judge Cohee did not err as a matter of law. Contrary to the State's assertions and erroneous interpretations of the statute and case law, Judge Cohee upheld her constitutional duty to only impose a sentence that was proportionate to the character and degree of the offenses.

II. Judge Cohee employed a recognized proportionality analysis because she followed this Court's case law and even specifically relied upon this Court's recent holdings in *State v. Hoyle* and *State v. Horton* in support of her ruling.

Judge Cohee began her ruling by noting that the State's position was that she had no discretion at all and that she must sentence the defendant to life in prison. Judge Cohee further stated that she "spent a lot of time reading the case law to determine whether that is correct or not." App. 59. Judge Cohee began her legal analysis in support of her sentence, as this Court often does when evaluating the proportionality of a sentence, by citing Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution. *Id.* Next, she cited the relevant constitutional language, that "penalties shall be proportioned to the character and the degree of the offense." App. 59-60. Then she analyzed the final offense which triggered the recidivist life sentence in accordance with *Wanstreet v. Bordenkircher* and syllabus point seven in *State v. Beck*. App. 60; *See Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981); Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 831, 286 S.E.2d 234 (1981). Finally, Judge Cohee ends her analysis by addressing the most recent developments in proportionality jurisprudence made by this Court in *State v. Horton* and *State v. Hoyle*. App. 60-61. Judge Cohee even goes as far as to cite the syllabus points from those cases. *Id.*

The State makes much to do about the fact that Judge Cohee said “arbitrary and capricious” during the sentencing hearing. App. 60. However, Judge Cohee said, “I want to clearly state that I think the recidivism statute as currently employed is being employed . . . in an arbitrary and capricious manner and that **is the basis of me finding that I have discretion.**” App. 63 (emphasis added). Judge Cohee only mentioned that phrase specifically in relation to the State’s argument that Judge Cohee had no authority to consider proportionality to begin with. At no point did Judge Cohee rely on a standard of arbitrary and capricious in her analysis of the proportionality of the defendant’s sentence itself. App. 59-62. Judge Cohee engaged in the same legal analysis and application of the proportionality principle this Court has since *Wanstreet* in 1981. Therefore, Judge Cohee employed a recognized proportionality analysis, consistent with the analysis this Court has engaged in for over fifty years.

III. West Virginia Code § 61-11-18(b) authorizes the sentence in this case because it provides for a sentence enhancement of twice the minimum term of years otherwise provided for under the regular sentence.

West Virginia Code § 61-11-18(b) provides,

any person [who] is convicted of a qualifying offense and is subject to imprisonment in a state correctional facility for the qualifying offender and it is determined, as provided in §61-11-19 of this code, that the person had been previously convicted in the United States of a crime punishable by imprisonment in a state or federal correctional facility, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. *Whenever in that case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under the sentence.*

(Emphasis added). Judge Cohee ultimately sentenced the defendant to an indeterminate term of “not less than two nor more than ten” years. App. 62. The statutory penalty for the final offense in this case, reckless fleeing, is imprisonment for “not less than one nor more than five.” W. Va. Code

§ 61-5-17(f). Accordingly, Judge Cohee likely interpreted West Virginia Code § 61-11-18(b) to double the statutory one to five year sentence to be two to ten years. To the extent that West Virginia Code § 61-11-18(b) only permits an indeterminate sentence of not less than two nor more than five years, this could easily be corrected by the State filing a motion pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. Defendant would have no objection to such a motion.

CONCLUSION

Judge Cohee applied the proportionality principle to a life recidivist conviction and imposed a lawful sentence on the Defendant. Judge Cohee did not abuse her discretion, nor was her ruling clearly erroneous as a matter of law. Therefore, the State's Petition for Writ of Prohibition should be denied because the State has failed to meet the factors set forth in syllabus point 4 of *Hoover*, 199 W. Va. 12, 483 S.E.2d 12.

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CERTIFICATE OF SERVICE

I, Cameron LeFevre, Esq., do hereby certify that the foregoing Respondent's Brief is being served on counsel of record by File & Serve Xpress this 4th day of September 2024.

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