

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff-Below, Respondent

v.

JASON SWINDLER
Defendant-Below, Petitioner.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF
JACKSON COUNTY, WEST VIRGINIA
CIVIL ACTION NOS. CC-18-2020-F-33

OPENING BRIEF OF THE PETITIONER

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I. ASSIGNMENTS OF ERROR

On appeal Petitioner asserts the Circuit Court below erred as follows:

1. The Circuit Court erred under West Virginia Code §61-11-19 when it arraigned Mr. Swindler on the first day of the Term of Court following the Term of Court he was convicted of the triggering offense in, therefore rendering the recidivist enhancement void.

2. The application of the West Virginia Recidivist Act to this matter, where Mr. Swindler's current past qualifying offenses were not inherently violent, is unconstitutional as it violates the proportionality requirements of both the United States Constitution and the West Virginia Constitution, as applied.

3. The specific delineation of offenses under the newly revised West Virginia Recidivist Act is facially unconstitutional as it violates the proportionality requirements of both the United States Constitution and the West Virginia Constitution.

II. STATEMENT OF THE CASE

On or about February 25, 2020, Petitioner Jason Swindler ("Mr. Swindler") was indicted on a ten (10) Count indictment charging Mr. Swindler with three (3) counts of felony Breaking and Entering pursuant to West Virginia Code §61-3-12; three (3) counts of felony Grand Larceny pursuant to West Virginia Code §61-3-13; one (1) count of felony Attempt to Commit a Felony, to wit, violating West Virginia Code §61-10-31, pursuant to West Virginia Code §61-11-8; three (3) counts of misdemeanor Breaking and Entering pursuant to West Virginia Code §61-3-30. Appx. P. 31–36.

The State alleged that during the course of twelve days in January 2020, a series of break-ins had occurred in Jackson County, West Virginia. Appx. P. 425. The State sought to prove that on or about January 11, 2020 there was a break-in at EPC services in Millwood, West Virginia at which time a mini-excavator was stolen worth approximately \$48,000. *Id.* In addition to the excavator missing, the owner of the lot noticed the gate to the yard had been damaged. Appx. P. 428. Then on or about January 22, 2020, tools and window air conditioners worth more than \$1,000 were stolen from the Sears Building in Fairplain, West Virginia. Appx. P. 426. The same day, the State alleged that “thousands of dollars’ worth of metal” was stolen “from Energy Measurement & Control” in Sandyville, Jackson County, West Virginia.” *Id.* Then on or about January 23, 2020, the State alleged that Mr. Swindler attempted to steal several items from Sears. *Id.* The State further alleged that this offense amounted to only an attempt, as Mr. Swindler was apprehended at the store and stopped before he could complete the theft. *Id.*

The State further alleged that on or about January 22, 2020, Mr. Swindler sold 1500 pounds of metal scrap to a recycling center in Nitro, West Virginia for a payment of \$300. Appx. P. 434. Doing this, just before breaking into the Sears in Jackson County and being apprehended.

On June 8, 2021, trial began in the trial court below for Mr. Swindler on all ten counts. Appx. P. 354.

Upon the close of the State’s case in chief, counsel for Mr. Swindler raised orally a Rule 29 of the West Virginia Rules of Criminal Procedure Motion for Judgment of Acquittal. Appx. P. 627. Mr. Swindler’s counsel raised the issue that the truck in question captured on video at the EPC yard and at Energy Management “is not Jason Swindler’s truck” supporting this argument with the position that the truck shown on video had “no blemishes” where as law enforcement investigating this matter had described Mr. Swindler’s truck as an “old chevy truck that had seen

its better days.” *Id.* Further, there had been no pictures of Mr. Swindler’s truck introduced. To permit objective comparison. *Id.*

Counsel argued the State’s argument did not make sense as the series of events would require Mr. Swindler to essentially be “superhuman.” Appx. P. 628. That the State offered no evidence of “what was done with the air conditioner, tools, and Energy Management materials” which were stolen. *Id.* That tools found at an acquaintance of Mr. Swindler’s home could not be traced back to Sears. Appx. P. 629. Counsel argued that the State’s evidence also showed that the time between when Mr. Swindler allegedly passed a store with the mini-excavator and him allegedly returning without it, would not have been a realistic time frame as “an expert” testified that such an unloading would take far more time. *Id.*

Broadly, Counsel argued the State failed to prove, beyond a reasonable doubt that Mr. Swindler had committed these offenses. Appx. P. 633. The Court summarily denied the motion. Appx. P. 633-34. After inquiring as to whether Mr. Swindler intended to testify—which he did not—Mr. Swindler’s counsel informed the court he did not have any evidence to proffer. Appx. P. 636.

The State in closing argued a chronological summary of events based upon the evidence presented at trial. Appx. P. 671. The State laid out that on January 13, 2020, the owner of EPC testified he went to his lot and “noticed the gate to the lot to be broken and open in the wrong direction,” and this destruction was evidenced by exhibits 1 & 2. *Id.* That Deputy Varney investigated and that he was advised the mini-excavator had been stolen. *Id.* The Deputy then uncovered the location of the mini-excavator as it had a GPS locator on it, found footage along the route between that location and EPC and interviewed parties. *Id.* The Deputy, after speaking to the property owner, then sought out video footage from the

surrounding area and finds surveillance footage showing the mini-excavator being hauled by a truck and footage of it returning without the mini-excavator. *Id.* at 672–73. The State dismissed the defense theory that, where the surveillance footage indicated a 20-minute gap between the truck having the mini-excavator and not having it, that it would have been impossible for Mr. Swindler to unload the same in that amount of time. *Id.* at 673.

Next the State discussed the evidence of the theft of the scrap metal, having put on still frames from surveillance footage that they argued showed Mr. Swindler moving about the property. *Id.* at 674. As to the value of the items stolen, the State called Mark Fisher, owner of Energy Measurement and Control, who assessed the total value of the metal stolen at “3-to \$4,000.” *Id.* at 542. Finally, the State argued the evidence, in the form of testimony of law enforcement, forms the basis for the charge of breaking and entering and attempted grand larceny at the Sears location. *Id.* at 675.

At the conclusion of a three-day trial on June 10, 2021, Mr. Swindler was found guilty on all ten counts of the indictment. *Id.* at 705–06. On or about June 15, 2021, the State of West Virginia filed a recidivist information against Mr. Swindler. Appx. P. 012.

The State sought to prove that it was the same Mr. Swindler who had just been convicted in the current matter, as had been previously convicted of three prior felony offenses: (1) a 2009 conviction for possession with intent to deliver marijuana and driving while revoked for DUI, third offense (Jackson County Case No. 2009-F-80); (2) a 2009 conviction for breaking and entering a building other than a dwelling and an attempt to commit grand larceny (Jackson County Case No. 2009-F-81); and (3) a 2016 conviction for an attempt to commit a felony, specifically grand larceny (Jackson County Case No. 2016-F-31). Appx. P. 784.

On June 15, 2021, the Circuit Court ordered the same recidivist information filed. Appx. P. 012. The Circuit Court however did not bring Mr. Swindler before it for arraignment on the same until June 22, 2021. Appx. P. 216. Mr. Swindler was arraigned prior to the impaneling of the Grand Jury for the June 2021 term of court. *Id.* At that hearing, Defendant objected to the arraignment and sought dismissal because the date of his arraignment coincided with the beginning of the new June Term of Jackson County. *Id.*

Subsequently, Mr. Swindler was tried and found to be the same person who had previously been found guilty of three felony offenses. Appx. P. 253–55. The Court below then imposed sentence. Appx. P. 278. Specifically, sentences of not less than one (1) year nor more than ten (10) years for each breaking and entering charge and grand larceny charge; one year for each destruction of property charge, and of not less than one (1) year nor more than three (3) years on the Attempt to Commit Felony charge. *Id.* at 278–80. All to run consecutive. *Id.* at 280. Thus producing ten (10) years to sixty-six (66) years. *Id.* at 278–80. With the addition of the third recidivist enhancement, i.e. fifteen to life, Mr. Swindler is facing a sentence of twenty-five (25) years to life.

III. SUMMARY OF ARGUMENT

Mr. Swindler’s recidivist enhancement is void on its face as it is procedurally deficient. This Court has made clear that the application of the recidivist statute requires meticulous application of the procedural protections explicit in the Code. The failure to arraign Mr. Swindler in the same term within which he was found guilty of the triggering offense is fatal to the recidivist enhancement and it must therefore be declared void. *Quod erat demonstratum.*

Second, the application of the recidivist statute to Mr. Swindler's offenses violates the West Virginia's and United States' Constitution's prohibitions on cruel and unusual punishment where his offenses are clearly not violent in nature.

Finally, the recidivist statute, as newly constructed, is facially unconstitutional as it specifies broad offenses as triggering and qualifying offenses in such a way as it imposes such a harsh penalty for even minor offenses.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully request oral argument on the grounds that this matter meets the criteria set forth in Rule 20(a) of the West Virginia Rules of Appellate Procedure and involves issues of first impression. *See* W. VA. R. APP. P. 20(a). Petitioner requests twenty minutes of time for argument as permitted by Rule 20(e). *See* W. VA. R. APP. P. 20(e).

V. ARGUMENT

The Circuit Court below must be reversed for the following reasons.

A. Standard of review

When faced with a constitutional challenge of a statute, this Court has stated

[i]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *MacDonald v. City Hosp., Inc.*, 127 W. Va. 707, 715 S.E.2d 405 (2011). Where, this Court has reviewed a question of law or the interpretation of a statute, it has traditionally

reviewed the question under a *de novo* standard. See Syl. Pt. 1, *State v. Davis*, 236 W. Va. 550, 782 S.E.2d 423 (2015).

B. The Arraignment of Mr. Swindler on the State’s Recidivist Information was Untimely, Thereby Depriving the Circuit Court of Jurisdiction.

Pursuant to West Virginia Code § 61-11-18(d), upon the conviction of an individual of a qualifying felony, twice previously having been convicted of qualifying offenses, “the person shall be sentenced to imprisonment in a state correctional facility for life” This section of the Code is immediately followed by a section laying out the procedural process by which the state may seek to impose a recidivist enhancement:

A prosecuting attorney, when he or she has knowledge of a former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary, may give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the next term at which such person was convicted, 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 or she is the same person or not. If he or she says he or she is not, or remains silent, his or her plea, or the fact of his or her silence, shall be entered of record, and a jury shall be impaneled to inquire whether the prisoner is the same person mentioned in the several records. If the jury finds that he or she is not the same person, he or she shall be sentenced upon the charge of which he or she was convicted as provided by law; but if they find that he or she is the same, or after being duly cautioned if he or she acknowledged in open court that he or she is the same person, the court shall sentence him or her to such further confinement as is prescribed by §61-11-18 of this code on a second or third conviction as the case may be . . .

W. Va. Code § 61-11-19.

Importantly, Section 19 lays out temporal requirements:

- (1) “A prosecuting attorney . . . may give information thereof to the court ***immediately*** upon conviction and before sentence.”
- (2) The circuit court then must “before expiration of the next term at which such person was convicted” have the defendant “brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction[s] and sentence[s] . . . and alleging the identity of the prisoner with

the person named in each, shall require the prisoner to say whether he or she is the same person or not.”

If the person says they are not the same person, then a jury is impaneled and the matter of whether the person is the same person previously convicted of a qualifying offense, then the person is sentenced according to the dictates as laid out in the recidivist statute (W. Va. Code § 61-11-18). This Court has previously provided at the provisions of this section “are mandatory and must be fully complied with.” Syl. Pt. 1, *State ex rel. Albright v. Boles*, 149 W. Va. 561, 142 S.E.2d 725 (1965). Failure to comply with the precise requirements of West Virginia Code § 61-11-19, is fatal to the imposition of a recidivist enhancement:

Under the provisions of the habitual criminal statute, Code, 61-11-19, as amended, the trial court is required to cause the defendant to be confronted at the same term of court at which he is convicted of the principal offense with the previous convictions contained in the information filed by the prosecuting attorney, and if this provision of the statute is not complied with the additional sentence to the maximum statutory sentence for the principal offense is void.

Id. at Syl. Pt. 2. In *Boles*, Mr. Boles was arraigned on March 20, 1953 at which time he pled guilty to the counts contained in the indictment. *Boles*, 149 W. Va. at 562. The term ended on April 11, 1953. *Id.* He returned to Court on April 13, 1953, when the State “asked leave to file an information” for recidivist enhancement. *Id.* In that case, this Court stated “[t]he uncontradicted facts in this case clearly show that the petitioner was not confronted with the information at the same term at which he was convicted of the principal offense.” *State ex rel. Albright v. Boles*, 149 W. Va. 561, 563, 142 S.E.2d 725, 726 (1965). Further, the Defendant in *Boles*, “was here not confronted with the information of a previous conviction until the term after he had pleaded guilty.” *Id.* Based upon this, this Court deemed the recidivist enhancement void and unenforceable.

Here, Mr. Swindler was convicted on or about June 10, 2021 and the recidivist information was filed on or about June 15, 2021. Mr. Swindler was not formally arraigned on the recidivist

information charge until June 22, 2021. The West Virginia Trial Court Rule 2.05 provides that the beginning of terms of Court “shall commence...for the county of Jackson, on the fourth Tuesday in February, June and October...” *Rule 2.05, Trial Court Rules*. Specifically, the fourth Tuesday of June 2021 would have been June 22, 2021, meaning that the new term would have commenced on the day Mr. Swindler was arraigned on this recidivist information. The State countered that the arraignment occurred the same day as, and just before, the Grand Jury for the June 2021 Term of Court was impaneled, thus the new term had not yet begun. Appx. P. 917.

In support of the State’s position, it argued a series of 1800s cases essentially supporting the proposition that the beginning of the term is a flexible target: “A term of circuit Court of one county can, if necessary, prolong its session beyond 4 o’clock p.m. of the third day of the time fixed for a term in another county.” *First Nat. Bank v. Parsons*, 32 S.E. 271 (W.Va. 1898); and “A term of the circuit court does not necessarily begin on the day fixed by law, but may open before 4 o’clock in the afternoon of the third day thereafter...” *Boice v. State*, 1 W.Va. 329 (W.Va. 1865). However, the West Virginia Trial Court Rules are clear and unambiguous, the June Term of Jackson County Court begins “on the fourth Tuesday in . . . June.” West Virginia Code 61-11-19 is unambiguous and requires absolutely that: “The circuit court then must “before expiration of the next term at which such person was convicted” have the defendant “brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction[s] and sentence[s] . . . and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he or she is the same person or not.”

Accordingly, Mr. Swindler’s imposition of a life recidivist enhancement is void for want of procedural soundness and must be declared void by this Honorable Court.

C. The Recidivist Statute as Applied to Mr. Swindler is Violative of the West Virginia Constitution as it is Disproportionate to the Alleged Crimes Committed.

Article III, Section 5 of the West Virginia Constitution “has an express statement of the proportionality principal: ‘Penalties shall be proportioned to the character and degree of the offense.’” Syl. Pt. 6, *State ex. rel. Boso v. Hedrick*, 182 W.Va. 701, 391 S.E.2d 614 (1990). This Court in *State v. Cooper* “[t]here are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.” 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). If the sentence passes the subjective prong of the test, the Court will then apply an objective test:

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Wanstreet, 166 W.Va. at Syl. Pt 5. Here, the sentence of life imprisonment with parole eligibility after serving 15 years represents a disproportionate and unconstitutional application of W. VA. CODE § 61-11-18(c) in violation of Article III, Section 5 of the West Virginia Constitution and The Eighth Amendment to the U.S. Constitution. The West Virginia Constitution prohibits cruel and unusual punishment and establishes that a punishment must be proportional to the criminal conduct. The relevant portion of this provision states, “Excessive 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.**” W. VA. CONST. art. III, § 5.

A recidivist life sentence was applied: "When it is determined . . . that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life." W. VA. CODE § 61-11-18(c).

This Court has provided substantial guidance on how the proportionality standards apply to criminal penalties in West Virginia: "[O]ur constitutional proportionality standards . . . [are] applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." *Wanstreet* 166 W. Va. at Syl. Pt. 4. Furthermore, "[i]n determining whether a given sentence violates the proportionality principle found in Article III, Section 5 . . . , consideration is given to the nature of the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *Id.* at Syl. Pt. 5. In the case of a recidivist sentence, this Court has also provided some guidance on how to apply these proportionality principles focusing on whether or not the qualifying offenses involved violence:

The appropriateness of a life recidivist sentence under our constitutional proportionality provision . . . 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 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. 1, *State v. Miller*, 184 W. Va. 462, 400 S.E.2d 897 (1990) (quoting Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981)). While consideration is given to all felonies, "the

[triggering] felony is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence." *Wanstreet* at 534.¹

In *State v. Oxier* this Court directed the reviewing court should examine a several factors when evaluating a particular sentence and proportionality. *State v. Oxier*, 179 W. Va. 431, 369 S.E.2d 866 (1988). The *Oxier* Court cited the Fourth Circuit's decision in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), which further sets out factors considered in analyzing the proportionality of a sentence. In addition to the nature of the offenses, a court should consider the legislative purpose behind the punishment and how a defendant would have been punished in other jurisdictions. *Hart* at 140–42. The *Hart* Court poignantly noted the seriousness of a life sentence: "[l]ife imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others." *Id.* at 141.

Additionally, proportionality analysis is ever-changing: "There is woven throughout the proportionality principle, as well as the cruel and unusual punishment prohibition, the concept of 'evolving standards of decency,' . . . , a principle that we have recognized" *Wanestreet*, at 536, 276 S.E.2d at 213 (quoting *Trap v. Dulles*, 356 U.S. 86, 101 (1958) (citing *State ex rel. Pingley v. Coiner*, 155 W. Va. 591, 608, 186 S.E.2d 220, 230 (1972))). This Court has embraced this principle in decisions regarding the recidivist statute, noting that the statute has been viewed with "a rather strict and narrow construction." *State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867, 869 (2017).

While sentences in cases with seemingly similar circumstances to this case have been upheld, more recent decisions suggest that the strict and narrow construction is confining

¹ Pursuant to *Dye v. Skeen*, 135 W. Va. 90, 62 S.E.2d 681 (1950), multiple felony convictions entered on the same day are considered only a single predicate offense for the purpose of the recidivist enhancement. *Dye* at Syl. Pt. 4.

application of the statute to only defendants with a demonstrated history of violent offenses. *See Id.* (Recidivist life sentence **overturned** where defendant was convicted of unlawful assault and 2nd degree sexual assault in 2014 (triggering offenses), and 3rd offense driving revoked for DUI in 2010 and 2012); *Miller*, 184 W. Va. at 462 (Recidivist life sentence **overturned** in case where defendant was convicted of assault (the triggering offense), breaking and entering, forgery and uttering, and false pretenses); *but see Vance*, 164 W. Va. at 216 (Recidivist life sentence **upheld** in case where defendant was convicted of breaking and entering (triggering offense), and twice before); *Oxier*, 179 W. Va. at 431 (Recidivist life sentence **upheld** for defendant convicted of and breaking and entering (triggering offense), grand larceny and two separate breaking and entering). As discussed above, in *Oxier* and *Vance* both sentences were upheld because both cases involved guns, here, there was no evidence Mr. Swindler carried or employed any weapon.

Recently, this Court in *State v. Hoyle* set forth:

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).

Here, Mr. Swindler has three prior felony offenses: (1) a 2009 conviction for possession with intent to deliver marijuana and driving while revoked for DUI, third offense; (2) a 2009 conviction for breaking and entering a building other than a dwelling and an attempt to commit grand larceny; and (3) a 2016 conviction for an attempt to commit a felony, specifically grand larceny.

Although this Court has construed breaking and entering to be a crime involving the potential or threat of violence, it has done so looking specifically at the facts. *See e.g. Hedrick*, 182 W.Va. 701; *Vance*, 164 W. Va. 216; *Oxier*, 179 W. Va. 431. Here, when one looks at the specific circumstances of Mr. Swindler's property crime convictions it is painfully clear the offenses did not involve any violence or even the threat of possible violence.

Indeed, Mr. Swindler's case is distinguishable from the *Miller* and *Kilmer* cases because the convictions demonstrate a relative lack of criminality for a considerable period of time and no evidence of any violent tendencies. In both *Miller* and *Kilmer* the triggering offenses involved the actual use of violence. In *Miller*, the defendant threatened to shoot and kill his wife in the presence of a houseguest. When the houseguest attempted to leave the situation, the defendant shot him in his hand and stomach. He was subsequently found guilty of unlawful assault following a jury trial.

The defendant in *Miller* also had three prior felony convictions: a breaking and entering, forgery and uttering, and false pretenses. Importantly, the Court in *Miller* found that the underlying felonies, including the breaking and entering, "were all of a non-violent nature" *Miller* at 465, 400 S.E.2d at 900. Furthermore, the Court stated that "the propensity for violence is an important factor to be considered before applying the recidivist statute." *Id.* Additionally, Mr. Swindler's case is distinguishable from *Oxier* and *Vance* as discussed above.

In fact, this Court's own case law is seemingly conflicting on the point of whether breaking and entering is a crime of violence:

Neither delivery of a controlled substance **nor breaking and entering is per se a crime of violence**. Furthermore, the night-time burglary was committed in an unoccupied dwelling. **There is nothing in the record to indicate that any weapons were used** in these crimes or that there was a threat of violence to any person.

Hedrick, 182 W. Va. at 709. Importantly, this Court has looked to the record, which here closely tracks *Hedrick*, to wit: “there is nothing in the record to indicate that any weapons were used.” *Id.* As this Court’s own case law provides disparate answers to the question of whether breaking and entering is violent, the only reasonable explanation is this Court delves into the facts and assesses on violence of the crime on that basis or it is a fluid definition reflecting society’s belief (see the above which evinces society’s position on breaking and entering no longer being a violent crime meriting recidivist enhancement).

Mr. Swindler’s record does not demonstrate a propensity for violence, and importantly, the triggering offense did not involve the use of any violence. In the triggering offense, Mr. Swindler was convicted of breaking into buildings or yards during the early morning hours. He took steps to avoid detection and confrontation, and there was no evidence he possessed any kind of weapons at the time of the breaking and entering. It is clear upon an examination of the actual facts in Mr. Swindler’s case, his crime involved no actual or threatened violence, and would have actually been calculated to avoid just such a violent encounter. This is not the kind of offense that warrants the application of a life sentence.

The application of the recidivist life sentence enhancement in Mr. Swindler’s case represents an arbitrary and disproportionate application. The principles of justice and equity and the Constitutions of both this State and the United States of America demand that this sentence be overturned as disproportionate to the crimes.

D. The Recidivist Statute Delineating Specific Qualifying and Triggering Offenses as Listing Such Broad Categories of Offenses Risks Disproportional Punishment and Thus Violating the United States and West Virginia Constitutions' Prohibitions on Cruel and Unusual Punishment.

Article III, Section 5 of the West Virginia Constitution which requires "[p]enalties shall be apportioned to the character and degree of the offense." In fact, "[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." Syl. Pt.4, *Wanstreet v. Bordenkircher*, 166W.Va. 523, 523 (1981). "[I]gnoring the gravity of the underlying offenses in the context of an analysis of the proportionality clause 'would ignore the rationality of our criminal justice system where penalties are set according to the severity of the offense.'" *State v. Kilmer*, 240 W.Va. 185, 188 (2017).

While the "Legislature has the power to create and define crimes and fix their punishment" that power is subject to "certain constitutional limitations." See *State v. Butler*, 239 W.Va. 168, 173 (2017). The Supreme Court has clearly previously held that 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. Syl. Pt. 12, *State v.*

Hoyle, 242 W.Va. 599 (2019). "[E]ven if ... the predicate felony conviction involves violence, but none of the prior felony convictions involve actual or threatened violence, imposing a recidivist life sentence violated proportionality." *State v. Kilmer*, 240 W.Va. 185, 188 (2017) (referencing *State v. Miller*, 184 W.Va. 462 (2012)). It is also important that, "the third felony is entitled to more scrutiny than the previous felony convictions for purposes of proportionality 'since

it provides the ultimate nexus to the sentence[.] "' *State v. Lane*, 241 W.Va. 532, 538-39 (2019) (citing *Wanstreet v. Bordenkircher*, 166 W.Va. 523 (1981)).

Several crimes enumerated in W. Va. Code § 61-11-18(a) such as burning personal property of another of the value of five hundred dollars or more, grand larceny, attempt, and conspiracy do not require actual violence, a threat of violence, or substantial impact upon the victim such that harm results. Therefore, convictions for these "qualifying offenses" cannot constitutionally be used to enhance a defendant's sentence to life in prison without overruling the recent precedent of the Supreme Court requiring that an offense involve violence.

Another illustrative provision is West Virginia Code § 61-11-18(a)(1) which states that West Virginia Code § 60A-4-401(ii) is a qualifying offense for potential exposure to a sentence of life imprisonment. West Virginia Code § 60A-4-401(ii) applies to "[a]ny other controlled substance classified in Schedule I, II, or III[.]" This Court has stated that "many of the offenses under the Uniform Controlled Substances Act are relatively minor and involve little or no danger to others" and that, therefore, they "may be inappropriate for the more severe treatment under [recidivist statutes]." *State v. Lane*, 241 W.Va. 532, 541 (2019). Nevertheless, the Legislature cast a broad net to include all possible offenses against which the statute could apply as meriting a potential recidivist life sentence. In *State v. Deal*, the defendant was convicted of possession of a controlled substance (marijuana) with the intent to deliver and this Court found that his conviction "involved no violence or threat of violence to the person" and therefore did not warrant "the ultimate punishment available in this jurisdiction." *State v. Deal*, 178 W. Va. 142

Possession and distribution of drugs other than marijuana have been found to involve violence. For example, heroin sold to a confidential informant carried an inherent risk of violence because heroin is, in every circumstance, illegal. See *State v. Norwood*, 242 W. Va. 149 (2019).

Heroin is a known cause of overdose deaths in West Virginia. *Id.* Unlike heroin, West Virginia does not treat marijuana as a similarly dangerous drug. A person found guilty of their first offense of distributing less than fifteen grams of marijuana is entitled to a diversion. *See* W. Va. Code § 60A-4-407. Under the Industrial Hemp Development Act, farmers that grow even multiple acres of marijuana instead of the intended product hemp (despite the plants having identical genetic classifications) are granted a complete defense to prosecution for the possession or cultivation of marijuana. *See* W. Va. Code § 19-12E-9. Finally, the West Virginia Medical Cannabis Act was signed into law on April 19, 2017 and allows for marijuana to be used in certain instances of medical necessity. *See* W. Va. Code § 16A-2-1 et seq. These examples, illustrate that marijuana has not been deemed to have the same violent connotations that narcotic drugs such as heroin have. As such, it violates constitutional requirements of proportionality to use a possession or distribution of marijuana conviction as a crime that involves actual or threatened violence to qualify an individual for a life sentence enhancement under West Virginia Code § 61-11-18.

Here, Mr. Swindler is subjected to a facially unconstitutional law. His offenses, both triggering and qualifying in nature should be examined and the penalty ascribed to them should be “proportioned to the character and degree of the offence.” West Virginia Code § 61-11-18 is a hammer when the West Virginia Constitution mandates a scalpel. The protections of proportionality are rendered meaningless as a result. Therefore, this Section should be deemed facially unconstitutional, and Mr. Swindlers recidivist enhancement must be declared void.

VI. CONCLUSION

Based on the foregoing grounds, supported by the above facts and cited law, Petitioner respectfully requests that this Honorable Court reverse the Circuit Court's decision and remand.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,
Respondent,

v.

DOCKET NO: 23-390

Jason Swindler,
Petitioner.

CERTIFICATE OF SERVICE

I, Beverly Hall and Ronald N. Walters Jr., counsel for Petitioner, do hereby certify that service of the foregoing *Petitioner's Brief* in the above-styled matter have been made upon Counsel of Record for the State of West Virginia this 12th day of August, 2024, via electronic filing.

Jason Swindler
By Counsel

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