

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-390

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STATE OF WEST VIRGINIA,

Petitioner,

v.

JASON ROBERT SWINDLER,

Respondent.

BRIEF OF RESPONDENT

**Appeal from the June 1, 2023, Order
Circuit Court of Jackson County
Case No. CC-18-2020-F-33**

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INTRODUCTION

Petitioner Jason Swindler was convicted of three counts of breaking and entering buildings, three counts of grand larceny, and one count of attempt to commit a felony. A jury found him guilty as charged. The State filed a recidivist information five days after Petitioner's conviction based on his lengthy history of similar felony convictions. Petitioner now confuses the issue, arguing that the recidivist information was untimely because the procedural provisions of West Virginia Code § 61-11-19 are mandatory. Respondent agrees that they are mandatory; however, the issue before this Court is whether the circuit court abused its discretion in how it drew the line between one term of court and the next. The circuit court did not; it followed Trial Court Rule 2.05 in finding that the February term of court ended with Petitioner's arraignment and the June term of court began when the grand jury was empaneled thereafter.

Petitioner also argues that even though he has over two decades of felony criminal history his recidivist life sentence is disproportionate. Petitioner argues that his multiple convictions for grand larceny and breaking and entering are not violent when this court has found the opposite. Petitioner also argues that the specific delineation of offenses under the 2020 amendment to West Virginia Code § 61-11-18 is facially unconstitutional. Petitioner, however, lacks standing to raise such challenge because the amended statute does not apply to him.

ASSIGNMENTS OF ERROR

Petitioner advances three assignments of error:

- I. 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 [], therefore rendering the recidivist enhancement void.
- II. 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.

III. 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.

Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner has spent his adulthood committing criminal offenses. Suppl. App. 8-13. A Jackson County grand jury indicted him in February 2020 on his most recent whirlwind of thefts, charging him with three counts of felony breaking and entering, three counts of grand larceny, one count of attempt to commit a felony, and three counts of misdemeanor breaking and entering. App. 31-36.

The indictment relates to a series of break-ins committed over the course of twelve days in January 2020. App. 425. On January 11, 2020, Petitioner broke into EPC services in Millwood, West Virginia, and stole a mini-excavator worth approximately \$48,000. App. 425. Petitioner also damaged the gate while stealing the mini excavator. App. 428. On January 22, 2020, Petitioner stole tools and window air conditioners from the Sears Building in Fairplain, West Virginia. App. 426, 17. The same day, he stole metal from Energy Measurement & Control, a business located in Sandyville, West Virginia. App. 426. He then sold fifteen hundred pounds of stolen scrap metal to a recycling center in Nitro, West Virginia. App. 434. On January 23, 2020, Petitioner attempted to steal more items from Sears. App. 426, 17. Law enforcement interrupted the theft and located Petitioner hiding in the ceiling. App. 433, 71. On June 10, 2021, following a three-day trial, the jury found Petitioner guilty on all ten counts of the indictment. App. 705-06.

Five days later, on June 15, 2021, the State filed a recidivist information.¹ App. 12. The State alleged that Petitioner was the same person previously convicted in: (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 in an attempt to commit grand larceny; and (3) a 2016 conviction for attempt to commit a felony, grand larceny. App. 252-55, 784-85. The court arraigned Petitioner on June 22, 2021, prior to impaneling the grand jury for the June 2021 term of court. App. 216. Petitioner filed a motion to dismiss the recidivist information as untimely. *See* App. 216. Petitioner argued that per Trial Court Rule 2.05, the February term of court ended the day before Petitioner was arraigned on the recidivist information and, therefore, it must be dismissed pursuant to West Virginia Code § 61-11-19. *See* App. 216. The State argued that the circuit court concluded the February term of court with Petitioner's arraignment on the recidivist information prior to beginning the June term of court with empaneling the June grand jury later that same day. App. 917-21. The circuit court agreed with the State and denied the motion. App. 216-18.

1. Recidivist Offenses and Convictions

Petitioner's lengthy criminal history as it relates to the recidivist enhancement is apparent from the record. In 2016, Petitioner was charged in Case No. 16-F-31 with grand larceny and destruction of property. App. 254-55, 304. He pled guilty to attempt to commit a felony. App. 304-16, 794-99.

In 2009, Petitioner was indicted in Case No. 09-F-80 on possession of a controlled substance with intent to deliver, marijuana; conspiracy to commit a felony, to wit: delivery of a

¹ It does not appear Petitioner included the recidivist information in the Appendix. Respondent references the recidivist charges set forth in the recidivist trial transcript and the circuit court's trial order.

controlled substance; fleeing on foot from law enforcement; fleeing in a vehicle; and driving while license revoked for DUI 3rd offense. App. 317-32, 801-02. Petitioner pled to possession of a controlled substance with intent to deliver and driving while license revoked for DUI, third offense. App. 326, 802-07.

In 2009, in Case No. 09-F-81, Petitioner was charged with two counts of breaking and entering a building other than a dwelling; one count of attempt to commit a felony, to wit: grand larceny; two counts of petit larceny; three counts of destruction of property; one count of driving while license revoked for DUI third offense. App. 333-38. He pled guilty to two counts of breaking and entering other than a dwelling; and one count of attempt to commit a felony. App. 332-53, 812.

In addition to the charges above, Petitioner has incurred a variety of charges and convictions including felony escape and driving under the influence. Suppl. App. 8-13.

2. Recidivist Conviction

Following a trial on the recidivist information, Petitioner was found to be the same person as charged in the information. App. 253-55. The circuit court denied Petitioner's motion for acquittal or mistrial, motion for mistrial, and motion for release from custody. App. 277. The presentence investigation (PSI) report demonstrated Petitioner's extensive criminal history, with Petitioner incurring his first convictions of grand larceny and breaking and entering in 2001. Suppl. App. 8-13. Petitioner steadily continued to commit both felonies and misdemeanors over the next twenty years. Suppl. App. 8-13. The PSI informed the court that Petitioner's "pro-criminal attitude" included no remorse or acceptance of responsibility for the crimes. Suppl. App. 17.

The court imposed a sentence of not less than one nor more than ten years for each breaking and entering charge and each grand larceny charge, with the recidivist enhancement applied to the

sentence on one grand larceny conviction; one year for each destruction of property charge; and not less than one nor more than three years for the attempt to commit felony charge, with all sentences run consecutively. App. 278-80. It is from this sentence that Petitioner appeals, challenging the circuit court's denial of his motion to dismiss the indictment as untimely and the recidivist enhancement flowing from the recidivist conviction.

SUMMARY OF ARGUMENT

I. The circuit court did not err in finding that Petitioner was timely arraigned on the recidivist information. It abided by Trial Court Rule 2.05 and complied with West Virginia Code § 61-11-19, because it arraigned Petitioner on the recidivist information prior to beginning the next term of court which began with impaneling a grand jury later that same day. Additionally, the 2020 procedural amendment to West Virginia Code § 61-11-19 extends the period for arraignment on a recidivist information to the “next” term of court. This procedural amendment applies to Petitioner, thus eliminating any question about the timeliness of his arraignment.

II. Petitioner's recidivist life sentence is proportional to his decades-long criminal history. Because of the sheer volume of Petitioner's crimes and his continuous refusal to abide by the law, a recidivist life sentence does not shock the conscience. Nor is a recidivist sentence objectively unreasonable. Petitioner's convictions of grand larceny, breaking and entering a non-dwelling, and possession with intent to deliver a controlled substance carry a risk of violence and, therefore, warrant the recidivist life sentence. Additionally, Petitioner was also convicted of driving under the influence and escaping from law enforcement, two crimes which also carry a risk of violence. A recidivist life sentence was the nature consequence of Petitioner's undeterred life of crime.

III. Petitioner's facial challenge to the constitutionality of West Virginia Code § 61-11-18 (2020) fails on its face because Petitioner lacks standing. Standing requires a litigant to have a

“personal stake” in the outcome of the controversy, and litigants can only challenge the constitutionality of a statute insofar as it affects them. Because Petitioner’s offenses were committed approximately six months before the effective date of the amendments to Section 18, the amended code section does not apply to him. Therefore, he has no standing to mount an attack.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

STANDARD OF REVIEW

The standard of review for each assignment of error will be set forth in the corresponding argument.

ARGUMENT

- I. The circuit court soundly concluded that Petitioner was timely arraigned in accordance with the procedural requirements of West Virginia Code § 61-11-19 and, therefore, it did not err in denying Petitioner’s motion to dismiss the recidivist information.**

Petitioner claims the circuit court erred in denying his motion to dismiss the recidivist indictment as untimely because it did not arraign Petitioner on the charges in the indictment in the same term of court as his conviction. Pet’r’s Br. 7-9. Petitioner appears to suggest that the term of court in which he was convicted ended on June 21, 2021, the day before the next term of court began on June 22, 2021. See Pet’r’s Br. 8-9. The circuit court heard and rejected this argument, finding that the February term of court in which Petitioner was tried by jury and adjudged guilty ended after the Circuit Court of Jackson County arraigned Petitioner on the recidivist information, and that the June term of court began thereafter when the circuit court impaneled the grand jury. App. 216-17. That both events occurred on the same day did not violate Trial Court Rule 2.05

because the June term of court did, in fact, begin on the day required by Rule 2.05 upon the grand jury being empaneled. App. 217-18.

A. Standard of Review

This Court reviews a motion to dismiss an indictment *de novo*. Syl. pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009). In addition to the *de novo* standard, “where the circuit court conducts an evidentiary hearing upon the motion, this Court’s ‘clearly erroneous’ standard of review is invoked concerning the circuit court’s findings of fact.” *Id.*

B. The circuit court did not contravene Trial Court Rule 2.05 when it delineated the end of one term of court and the beginning of the next term of court with the impaneling of the grand jury.

West Virginia Code § 61-11-19² establishes the procedural requirements for a recidivist information. *State ex rel. Delligatti v. Cohee*, No. 22-921, 2023 WL 3676890, at *5 (W. Va. Supreme Court, May 26, 2023) (memorandum decision). It provides that “[a] prosecuting attorney, [with] 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 immediately³ upon conviction and before sentence.” W. Va. Code § 61-11-19. It then requires a court to arraign the accused on the information “before expiration of the next term at which such person was convicted.” *Id.*

West Virginia Trial Court Rule 2 sets the terms of court by judicial circuit. W. Va. Trial Ct. R. 2. Jackson County rests in the Fifth Circuit. See W. Va. Trial Ct. R. 2.05. Per Trial Court Rule 2.05, the Fifth Circuit terms of court begin on the fourth Tuesday of February, June, and

² This statute is titled “Procedure in trial of persons for second or third offense.”

³ The “immediacy requirement is satisfied if the State files the information before sentencing and prior to the end of the term of court within which the defendant was convicted.” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 510, 583 S.E.2d 800, 807 (2002).

October. *Id.* Petitioner was convicted on June 10, 2021, App. 257-60, the State timely filed a recidivist information with the circuit court on June 15, 2021, App. 209, and the circuit court was not again in session until June 22, 2021, App. 216. In 2021, the June term of court began on June 22. App. 217. On June 22, the court arraigned Petitioner on the recidivist information *before* beginning the next term of court with the impaneling of a grand jury later that same day. App. 216-17. Relying on West Virginia Code § 51-3-10 and Syllabus Point 1, *Boice v. State*, 1 W. Va. 329, 1865 WL 728 (1865), which demonstrate that the time of day a term of court begins is flexible, and Rule 2.05 designating the day but not the time that the next term of court begins, the circuit court denied Petitioner's motion to dismiss the indictment as untimely. App. 216-18.

Petitioner disagrees with the circuit court's ruling but does not demonstrate that the circuit court abused its discretion in denying the motion. Pet'r's Br. 7-9. Petitioner relies on *State ex rel. Albright v. Boles*, 149 W. Va. 561, 142 S.E.2d 725 (1965), and argues that the procedural provisions of West Virginia Code § 61-11-19 are mandatory. Pet'r's Br. 8. In *State ex rel. Albright*, this Court deemed a recidivist enhancement information void and unenforceable because the State did not file it until *days* after the expiration of the term in which Albright was convicted. 149 W. Va. at 563, 142 S.E.2d at 726-27. The circuit court, therefore, could not confront Albright in the same term of court in which he was convicted of the principle offense as required by West Virginia Code § 61-11-19. Accordingly, because the procedural requirement could not be satisfied, the circuit court lacked jurisdiction to impose an enhanced sentence. *Id.*

State ex rel. Albright does not speak to whether the circuit court in the present case abused its discretion in ruling that the June term of court began with the empanelment of the grand jury. The issue here is not whether the procedural provisions are mandatory—because they are—the question is whether the circuit court abused its discretion in how it drew the line between one term of court and the next. It did not. Under an abuse of discretion standard, this Court will not disturb

a court's decision unless the court made a clear error of judgment or exceeded the bound of permissible choices in the circumstances. *State v. Allen*, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999). Nor will this Court substitute its judgment for the circuit court's. *Id.* Rather, this Court asks only if the circuit court ignored a material factor deserving substantial weight, relied on an improper factor, or made a serious mistake in weighing the material factors. *Id.* Determining if a circuit court made a serious mistake in weighing the material factors is "limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that [the lower court] can be said to have abused its discretion." *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). "A decision is 'arbitrary and irrational' only if it 'cannot be supported by reasonable argument.'" *State v. Taylor*, 215 W. Va. 74, 83, 593 S.E.2d 645, 654 (2004) (Davis, J., dissenting).

Here, unlike *State ex rel. Albright*, the State filed the recidivist information in the February term of court. The circuit court recognized its procedural obligation to arraign Petitioner in the same term of court. It assessed Trial Court Rule 2.05 and the dearth of legal authority on this issue, and concluded that nothing precluded the February term of court from ending on the same day the June term of court began. App. 216-18. Although not directly on point, the circuit court in *State v. Hedrick*, 204 W. Va. 547, 550-51, 514 S.E.2d 397, 400-01 (1999), similarly delineated between terms of court with grand jury proceedings. In *Hedrick*, a bonding company sought the return of the previously forfeited bond it posted on behalf of a defendant who failed to appear for arraignment. *Id.* at 549-50, 514 S.E.2d at 399-400. Once the defendant surrendered himself weeks later and appeared in court, the circuit court refused to return the bond because "everyone here knew, including the bonding company, that *this term of court started with the Grand Jury action* on March the 3rd; that arraignment date was the following day; and that trials would be this

month.” *Id.* at 550-51, 514 S.E.2d at 400-01 (emphasis added). This Court affirmed the circuit court’s decision. *Id.* at 558, 514 S.E.2d at 408.

The circuit court’s decision was neither arbitrary nor irrational, and it satisfied the procedural requirements of West Virginia Code § 61-11-19 by arraigning Petitioner in the February term of court on June 22, 2021. It also complied with Trial Court Rule 2.05 because the June grand jury was empaneled *after* the court ended the February term with Petitioner’s arraignment. For these reasons, the circuit court soundly exercised its discretion in denying Petitioner’s motion to dismiss the recidivist information, and its decision should be affirmed.

C. The 2020 amendment to West Virginia Code § 61-11-19 (2020), that extends the period for arraignment on a recidivist information to the “next” term of court, is a procedural amendment applicable to this case.

West Virginia Code § 61-11-19 sets forth the procedure to impose a recidivist sentence pursuant to West Virginia Code § 61-11-18. *SER Delligatti*, 2023 WL 3676890, at *5; *Appleby*, 213 W. Va. at 512, 583 S.E.2d at 809; Pet’r’s Br. 7 (“West Virginia Code § 61-11-18(d) . . . is immediately followed by a section laying out the procedural process by which the state may seek to impose a recidivist enhancement.”; then quoting W. Va. Code § 61-11-19). Until 2020, West Virginia Code § 61-11-19 required a circuit court to arraign a defendant on a recidivist information in the same term of court as the conviction of the primary offense. In 2020, effective June 5, 2020, the Legislature amended Section 19 to extend the period in which a circuit court must arraign a person on a recidivist information from the same term of court as the conviction to the *next* term of court:

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.

W. Va. Code § 61-11-19 (2020) (emphasis added to the new language). The Legislature did not specifically direct that this amendment be applied retroactively, but it should nonetheless receive retroactive application.

Generally, “statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 92, 576 S.E.2d 807, 819 (2002) (citing *Loveless v. State Workmen’s Comp. Comm’r*, 155 W. Va. 264, 266, 184 S.E.2d 127, 129 (1971)). “Despite this general rule of prospectiveness, [this Court] ha[s] nevertheless determined that ‘[s]tatutory changes that are purely procedural in nature will be applied retroactively.’” *Id.* (citing syl. pt. 1, *Joy v. Chessie Emps. Fed. Credit Union*, 186 W. Va. 118, 411 S.E.2d 261 (1991)). Because West Virginia Code § 61-11-19 is procedural, the 2020 amendment applies to this case and eliminates any question whether the circuit court timely arraigned Petitioner.

Further, retroactive application aligns with ex post facto principles. “Under Ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.” Syl. pt. 1, *Adkins v. Bordenkircher*, 164 W. Va. 292, 262 S.E.2d 885 (1980). In *State ex rel. Collins v. Bedell*, this Court addressed a similar issue involving the retroactivity of an amendment to the procedure for criminal appeals from magistrate court, which removed an appealing defendant’s right to a de novo jury trial in circuit court. 194 W. Va. 390, 460 S.E.2d 636 (1995). Collins appealed his conviction in magistrate court. He asserted that since he waived his right to a jury trial in the magistrate court before the amended statutes changing the appeal procedure were enacted, it would violate ex post facto principles if the amended appeal procedure was applied to his case. *Id.* at 400, 460 S.E.2d at 646.

This Court disagreed. Relying on *Collins v. Youngblood*, 497 U.S. 37 (1990), it held that if a procedural change does not fit into the following framework, then the procedural change is not prohibited as *ex post facto*:

It is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

SER Collins, 194 W. Va. at 401, 460 S.E.2d at 647 (citation omitted). In so ruling, the Supreme Court explained that “[t]he right to jury trial provided by the Sixth Amendment is obviously a ‘substantial’ one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause.” *Id.* (quoting *Collins*, 497 U.S. at 51); *Cf. City of Seattle v. Hesler*, 653 P.2d 631 (1982) (After the State of Washington eliminated the *de novo* appeal procedure from courts of limited jurisdiction, the Supreme Court of Washington held that a change in the method of review on appeal does not offend the *ex post facto* clauses of the state and federal constitutions.).

Just like in *State ex rel. Collins* and *Collins v. Youngblood*, the 2020 amendment to West Virginia Code § 61-11-19 does not fit into the pronounced framework as the amendment has nothing to do with the definition of crimes, defenses, or punishments. Instead, the amendment “altered the methods employed in determining whether the [recidivist] penalty was to be imposed,” which is the kind of procedural change that can be applied retroactively without impugning the Ex Post Facto Clause. *Pethel v. McBride*, 219 W. Va. 578, 597 n.43 638 S.E.2d 727, 746 n.43 (2006) (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-294 (1977)). The only question is whether the 2020 amendment deprived Petitioner of a “defense available under the laws at the time of his offense.” *Pnakovich v. SWCC*, 163 W. Va. 583, 591, 259 S.E.2d 127, 131 (1979); *See SER Collins*, 194 W. Va. 390, 460 S.E.2d 636. It did not. A defense based on the timeliness of arraignment on

a recidivist information was not a defense available to Petitioner at the time he committed the crimes in January 2020. The defense would arise, if at all, at the time the relevant term of court expired. The relevant term of court here—February 2021—expired on June 22, 2021, more than one year *after* the effective date of the 2020 amendment extending the period for arraignment on a recidivist information to the “next” term of court. Accordingly, retroactive application of West Virginia Code § 61-11-19 aligns with ex post facto principles, applies here, and eliminates any question whether the procedural requirements of the 1943 version of the statute was satisfied.

Applying this provision here means that even if this Court dismisses the idea that the term did not begin until the grand jury was convened the recidivist arraignment was not improper. The arraignment, if not within the same term of court as argued above, was clearly within the “next” term as contemplated by the 2020 change in the procedural statute. Petitioner has not satisfied his heavy burden of demonstrating that the circuit court abused its discretion in denying his motion to dismiss the recidivist indictment. This Court should affirm that decision.

II. The circuit court did not abuse its discretion by imposing a recidivist life sentence.

A. Standard of Review.

This Court reviews sentencing orders “under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. pt. 1, *State v. Adams*, 211 W. Va. 231, 565 S.E.2d 353 (2002). When an issue is of a constitutional dimension, the question of law is reviewed de novo. Syl. pt. 1, *State v. Finley*, 219 W. Va. 747, 639 S.E.2d 839 (2006).

B. Petitioner’s recidivist life sentence is proportionate to his laundry-list of crimes spanning two decades.

West Virginia Code § 61-11-18(c) (2000) provided that when a person has “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.” *State v. Horton*,

248 W. Va. 41, 46, 886 S.E.2d 509, 514 (2023) (internal quotation omitted), *cert. denied sub nom. Horton v. West Virginia*, 143 S. Ct. 2683 (2023). Petitioner contends that his recidivist life sentence constitutes an abuse of discretion by the circuit court and is disproportionate to his crimes. Pet’r’s Br. 1, 10-15.⁴

This Court has previously held that “[while] 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.” *State v. Hoyle*, 242 W. Va. 599, 611, 836 S.E.2d 817, 829 (2019). The Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution set forth the proportionality principle, mandating that, “[p]enalties . . . be proportioned to the character and degree of the offence.” Syl. pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980) (recognizing that Article III, Section 5 of the West Virginia Constitution is the counterpart to the Eighth Amendment to the United States Constitution). In analyzing the proportionality of a life recidivist sentence:

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.

⁴ Petitioner fails to satisfy the requirements of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, which requires the brief to “contain an argument” that “*contain[s] appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.*” W. Va. R. App. P. 10 (emphasis added). The lengthy record combined with Petitioner’s lack of citations to it demonstrate the importance of Rule 10 compliance. The Court may—and should—disregard alleged errors that are not adequately supported by specific references to the record on appeal.

Wanstreet v. Bordenkircher, 166 W. Va. 523, 537, 276 S.E.2d 205, 214 (1981). At the same time, “we have traditionally held that the Legislature has a broad power in defining offenses and prescribing punishments, limited in severity only by the constitutional prohibition against cruel or unusual or disproportionate sentences.” *Id.* at 533, 276 S.E.2d at 211. Even though the proportionality principle is implicit in the cruel and unusual punishment clause of the Eighth Amendment, courts have been reluctant to apply it in practice. *Vance*, 164 W. Va. at 232, 262 S.E.2d at 432. Such reluctance is an expression of due respect for legislative authority. *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011). Hence, appellate courts yield “substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.” *Solem v. Helm*, 463 U.S. 277, 290 (1983).

When analyzing whether a sentence violates the proportionality requirement, the Court applies two tests. *State v. Mann*, 205 W. Va. 303, 314-15, 518 S.E.2d 60, 71-72 (1999). The first test is subjective and requires the Court to determine whether the sentence “shocks the conscience and offends fundamental notions of human dignity.” Syl. pt. 5, *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983). In determining whether a sentence shocks the conscience, the Court considers all of the circumstances surrounding the offense, the information contained in the presentence investigation report, and findings made by the circuit court. *State v. Phillips*, 199 W. Va. 507, 513, 485 S.E.2d 676, 682 (1997). If the Court decides the sentence is so offensive that it cannot pass a societal and judicial sense of justice, then the Court need not proceed to the second test. *Mann*, 205 W. Va. at 315, 518 S.E.2d at 72. If, however, the sentence is not subjectively unconstitutional then the Court must examine the sentence using an objective test. *Id.* The objective test requires that the Court consider (1) the nature of the offense, (2) the legislative purpose behind the punishment, (3) how the punishment compares with what would be inflicted

in other jurisdictions, and (4) how the punishment compares to the punishments of other offenses within the same jurisdiction. *Id.* (citing syl. pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205).

1. Subjective test

Petitioner fails to address, let alone demonstrate, that his sentence shocks the conscience, and thus fails to establish entitlement to relief. Additionally, because of Petitioner's lengthy criminal history and demonstrated inability to conform his behavior to the law, a recidivist life sentence does not shock the conscience or offend the purpose of the recidivist statute. See Suppl. App.⁵

The primary purpose of our recidivist statutes is "to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." *State v. Norwood*, 242 W. Va. 149, 157, 832 S.E.2d 75, 83 (2019) (quoting syl. pt. 3, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992)). "The statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice, as the case may be, on a penitentiary offense." *Id.* To determine if a sentence shocks the conscience, this Court should consider all the circumstances surrounding the offense, the information contained in the presentence investigation report, and findings made by the circuit court. *Phillips*, 199 W. Va. at 513, 485 S.E.2d at 682.

Here, the PSI reflects Petitioner's long criminal history beginning in 1996 and continuing steadily to the instant offenses in January 2020. Suppl. App. 8-13. Petitioner has been convicted of eight felony offenses, ten misdemeanor offenses, and numerous citations, including but not limited to driving under the influence, escape, grand and petit larceny, possession with intent to deliver a controlled substance, breaking and entering, and attempts to commit a felony. *Id.*

⁵ Because the full scope of Respondent's criminal history is relevant, Respondent has moved to permit the filing of a Supplemental Appendix.

Petitioner's string of offenses leading to the current convictions further demonstrate his flagrant disregard of the law. Given that Petitioner's criminal conduct spans nearly twenty-five years and punishment has not yet deterred him from committing additional crimes, a recidivist life sentence does not shock the conscience.

2. *Wanstreet* test

a. Nature of the offense and comparison with punishment of other offenses in West Virginia.

When reviewing the appropriateness of a recidivist life sentence, this Court gives initial emphasis to the nature of the triggering offense and whether the prior offenses involved actual or threatened violence and, therefore, justify application of the recidivist statute. Syl. pt. 11, *Hoyle*, 242 W. Va. 599, 836 S.E.2d 817. Petitioner's triggering felony convictions in 20-F-33 include three counts of breaking and entering a building other than a dwelling; three counts of grand larceny; three counts of destruction of property (a misdemeanor), and one count of attempt to commit a felony. App. 278-80.

Petitioner points to a number of cases falling on both sides of the coin of offenses deemed violent or carrying an inherent threat of violence. Pet'r's Br. 13. Recently, however, this Court found that a recidivist life sentence predicated on convictions of burglary, grand larceny, breaking and entering and felony destruction of property was not unconstitutionally disproportionate. *State v. Blackburn*, No. 19-0962, 2021 WL 1232088, at *1 (W. Va. Supreme Court, Mar. 2, 2021) (memorandum decision). It explained that "burglary and grand larceny [are] crimes that by their very nature involve[] the threat of harm or violence to innocent persons." *Id.* at *3 (citing *State v. Housden*, 184 W. Va. 171, 175, 399 S.E.2d 882, 886 (1990)). In so holding, the Court was clear that the imposition of a life recidivist sentence for burglary and grand larceny does "not violate the proportionality doctrine nor [does] it constitute cruel and unusual punishment as prohibited by the

West Virginia Constitution and the United States Constitution.” *Housden*, 184 W. Va. at 175, 399 S.E.2d at 886; *see also State v. Wills*, No. 16-1199, 2017 WL 5632127, at *2 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision) (affirming a recidivist life sentence predicated on a history of numerous convictions, including convictions of grand larceny, conspiracy to commit grand larceny, and driving under the influence). Like *Blackburn*, the facts in the present case support the assumption that a threat of violence existed because Petitioner broke into businesses at night, where either security or an employee could have been present or could have—and did—interrupt Petitioner’s criminal activity. *See, e.g.*, App. 70-71.

Added to the threat of violence posed by the triggering offenses, the predicate convictions also included offenses recognized as violent or carrying a threat of violence: one felony offense of possession with intent to deliver a controlled substance, marijuana; one count of felony conspiracy to commit a felony; two counts of the felony offense of breaking and entering a building other than a dwelling, App. 252-56, 303-53; two felony offense of driving while license revoked for DUI, third offense; and two felony offenses of attempt to commit a felony, grand larceny, App 253-54, 283, 314. *See, e.g., Housden*, 184 W. Va. 171, 399 S.E.2d 882 (affirming recidivist life sentence where offenses included grand larceny and burglary); *Blackburn*, 2021 WL 1232088, at *3 (affirming recidivist life sentence predicated on grand larceny and burglary); *State v. Harris*, 226 W. Va. 471, 702 S.E.2d 603 (2010) (upholding recidivist life sentence on convictions for delivery of controlled substances, aiding and abetting, conspiracy, and sexual assault); *Daye v. McBride*, 222 W. Va. 17, 658 S.E.2d 547 (2017) (upholding recidivist life sentence predicated on offenses involving controlled substances); *but see State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867 (2017) (reversing recidivist sentence on convictions of felony offense of driving while license revoked for driving under the influence does not involve actual or threatened violence).

In addition to the predicate offenses included in the recidivist information, Petitioner has additional convictions of offenses that involve violence or the threat of violence. Petitioner was convicted of the felony offense of “escape” in 2002. Suppl. App. 12. Although this Court has not specified whether “escape” from law enforcement carries a risk of violence, in *Norwood* this Court determined that “evading police” is an offense that “clearly carries with it the risk of violence.” 242 W. Va. at 158, 832 S.E.2d at 84. Because “escape” likewise demonstrates an offender’s determination to evade custody, it, too, carries an inherent risk of violence.

Petitioner was convicted of DUI in 2001, and “[t]he dangers inherent in driving on the public streets while under the influence of an intoxicant are obvious.” *Wills*, No. 16-1199, 2017 WL 5632127, at *3 (citing *Appleby*, 213 W. Va. at 516, 583 S.E.2d at 813). “[O]perating an automobile while under the influence is reckless conduct that places the citizens of this State at great risk of serious physical harm or death.” *Id.* (internal quotations and citation omitted). Accordingly, this Court has had “little trouble in finding that driving under the influence is a crime of violence supporting imposition of a recidivist sentence.” *Id.* The Court, “given petitioner’s numerous prior crimes, including these crimes of violence,” it found no error in the imposition of a recidivist sentence. *Id.* So, too, should it uphold the recidivist life sentence here.

b. Legislative purpose behind the punishment

Next, the Legislature has “substantive power to define crimes and prescribe punishments.” *State ex rel. Lorenzetti v. Sanders*, 235 W. Va. 353, 358, 774 S.E.2d 19, 24 (2015) (citing syl. pt. 3, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996)); see, e.g., *Helm*, 463 U.S. at 290 (noting deference of courts to legislatures’ authority to define crimes and punishment). The legislature’s primary purpose in enacting the recidivist statute is “to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses.” Syl. pt. 5, *Norwood*, 242 W. Va. 149, 832 S.E.2d 75 (quoting syl.

pt. 3, *Jones*, 187 W. Va. 600, 420 S.E.2d 736). “The statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice, as the case may be, on a penitentiary offense.” *Id.*

Petitioner exemplifies the reason the West Virginia legislature enacted the recidivist statute. He has a criminal history spanning his entire adult life, and despite multiple terms of imprisonment and home confinement, *see* Suppl. App. 8-13, Petitioner remains unable or unwilling to comply with the law. A recidivist life sentence was the natural consequence of Petitioner’s habitual criminality.

c. A recidivist life sentence predicated on grand larceny and breaking and entering aligns with punishment in other jurisdictions.

Lastly, the recidivist life sentence also is commensurate with other jurisdictions. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 263 (1980) (affirming the recidivist life sentence imposed upon petitioner in Texas following convictions of fraudulent use of a credit card, uttering, and obtaining money by false pretenses did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments); *Glasscock v. State*, 570 S.W.2d 354 (1978) (affirming recidivist life sentence predicated on grand larceny and burglary).

Petitioner has not and cannot satisfy either the subjective or objective assessment of the triggering and predicate offenses. The circuit court, therefore, neither erred nor abused its discretion in sentencing Petitioner to a recidivist life sentence.

III. Petitioner’s facial challenge to the constitutionality of West Virginia Code § 61-11-18 (2020) is not properly before the Court because Petitioner lacks standing to pursue it.

A. Standard of Review

“The constitutionality of a statute is a question of law which this Court reviews *de novo*.” Syl. pt. 2, *James*, 227 W. Va. 407, 710 S.E.2d 98 (quoting syl. pt. 1, *State v. Rutherford*, 223 W.

Va. 1, 672 S.E.2d 137 (2008)). Nonetheless, “[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.” Syl. pt. 3, *Willis v. O’Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967).

B. Because West Virginia Code § 61-11-18 (2020) does not apply to Petitioner, he lacks standing to challenge its constitutionality.

Petitioner mounts a facial challenge to the constitutionality of West Virginia Code § 61-11-18 (2020), asserting that the “broad categories of offenses risks disproportional punishment” and violates the state and federal prohibitions on cruel and unusual punishment. Pet’r’s Br. 16-18.⁶ Petitioner identifies some enumerated qualifying offenses in West Virginia Code § 61-11-18(a) (2020) that he believes “cannot constitutionally be used to enhance a defendant’s sentence.” Pet’r’s Br. 17. But West Virginia Code § 61-11-18 (2020) does not apply to Petitioner and he, thus, lacks standing to challenge its constitutionality.

“Standing” refers to one’s ability to bring a lawsuit based upon a personal stake in the outcome of the controversy. *State ex rel. Dodrill Heating & Cooling, LLC v. Akers*, 246 W. Va. 463, 874 S.E.2d 265 (2022). Litigants may only challenge the constitutionality of a statute insofar as it affects them. *Harshbarger v. Gainer*, 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991); *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009) (reiterating that “courts [will not] resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies.”).

Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a)

⁶ Petitioner again fails to include a single citation to the record demonstrating when and how this issue was presented and resolved in the lower court.

concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Syl. pt. 3, *Dodrill*, 246 W. Va. 463, 874 S.E.2d 265. *Second*, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. *Id.* Third, it must be likely that the injury will be redressed through a favorable decision of the court. None of these factors are satisfied in the present case because the statute Petitioner challenges—West Virginia Code § 61-11-18 (2020)—does not apply to him.

The 2000 amendments to West Virginia Code § 61-11-18, *not* the 2020 amendments to West Virginia Code § 61-11-18, apply to Petitioner. “The statutory penalty in effect at that time of the defendant’s criminal conduct shall be applied to the defendant’s conviction(s).” Syl. pt. 3, *Horton*, 248 W. Va. 41, 886 S.E.2d 509. Petitioner committed the criminal offenses giving rise to these proceedings in January 2020. App. 31-36. Because West Virginia Code § 61-11-18 (2020) was not in effect until June 4, 2020, the prior version of this statute is applicable to Petitioner. West Virginia Code § 61-11-18 (2000), unlike the 2020 amended version, does *not* contain the list of qualifying offenses with which Petitioner takes issue.⁷ Compare W. Va. Code § 61-11-18 (2000) with W. Va. Code § 61-11-18 (2020). Because Petitioner committed the offenses in this case approximately five months before the effective date of West Virginia Code § 61-11-18 (2020), the list of enumerated offenses does not apply to him.

Because the 2020 amendments to Section 61-11-18 do not apply to Petitioner, Petitioner has not suffered an injury-in-fact; there is no causal connection between “an injury” to Petitioner

⁷ It also has been upheld as facially constitutional. See, e.g., *U.S. ex rel. Clark v. Skeen*, 126 F. Supp. 24 (N.D. W. Va. 1954) (West Virginia Habitual Criminal Act is constitutional); Syl. pt. 1, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205 (“[T]he habitual criminal statute, W. Va. Code, 61-11-18, and the enhanced sentence provided thereunder, are not per se violative of the Equal Protection or Cruel and Unusual Punishment Clauses of the West Virginia or the United States Constitutions.”).

and West Virginia Code § 61-11-18 (2020); and the nonexistent injury will not be redressed through a favorable decision of this Court. Petitioner, therefore, lacks standing to challenge the constitutionality of Section 61-11-18 (2020). This claim fails because as “[this Court] frequently ha[s] said before, [it] cannot issue an advisory opinion with respect to a hypothetical controversy.” *State ex rel. Perdue v. McCuskey*, 242 W. Va. 474, 479 n.13, 836 S.E.2d 441, 446 n.13 (2019) (citing *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W. Va. 525, 533 n.13, 514 S.E.2d 176, 184 n.13 (1999)).

CONCLUSION

This Court should affirm the June 1, 2023, Order of the Circuit Court of Jackson County.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-390

STATE OF WEST VIRGINIA,

Petitioner,

v.

JASON ROBERT SWINDLER,

Respondent.

CERTIFICATE OF SERVICE

I, Holly M. Mestemacher, do hereby certify that the foregoing **Brief of Respondent** is being served on the below-listed individual via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure this 10th day of October, 2024:

Beverly Hall, Esq.
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And upon Petitioner, who is not an e-filing user, by depositing a copy of the same in the United States mail, postage prepaid, addressed as follows:

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/s/ Holly M. Mestemacher
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