
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-620

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STATE OF WEST VIRGINIA,

Respondent,

v.

THOMAS M. VALENTINE,

Petitioner.

RESPONDENT'S BRIEF

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INTRODUCTION

Of all the ways to get caught illegally possessing a firearm and dangerous drugs, a broken taillight seems like one of the unluckiest. But that is exactly what happened here. Petitioner Thomas Valentine was stopped because the Jeep he was driving (and had recently started to pay off) had a busted taillight and a mismatched license plate. When a police dog signaled that he smelled narcotics, police searched the vehicle and found that and more: a loaded firearm concealed in the center console, over 40 grams of methamphetamine, drug trafficking paraphernalia, tools and supplies for measuring and transporting controlled substances—it was all there. Petitioner went to trial and a jury of his peers convicted him of all but one criminal charge associated with the stop. And because this marked Petitioner’s third felony conviction, the circuit court imposed a recidivist life sentence. He now challenges his most recent convictions and sentence here on appeal, but no basis exists to disturb them. Petitioner challenges the sufficiency of the evidence for his convictions for the first time on appeal, so the issue is waived. And even if he had properly raised the challenge below, the record contains sufficient evidence for a reasonable jury to convict. As for his sentence, the Court has nothing to correct there, either. All three of Petitioner’s convictions satisfy this Court’s clear standard for a constitutionally proportionate sentence. The Court should affirm.

ASSIGNMENTS OF ERROR

The appeal presents the following two assignments of error:

1. The Circuit Court Erred in Denying the Defendant’s Rule 29 Motion for Judgment of Acquittal following the close of the State’s case-in-chief.
2. The Circuit Court Abused its Discretion by Imposing a Life Sentence Under the Recidivist Statute as it Violates the Proportionality Principle of the West Virginia Constitution.

Pet’r’s Br. 5.

STATEMENT OF THE CASE

1. Petitioner's streak of felony crimes stretches back over half a decade. On April 9, 2017, a Marion County deputy sheriff arrested Petitioner "for the [felony] offense of strangulation." App. Vol. VI, 22. Petitioner later pled guilty to that crime. App. Vol. VI, 23-24. And on February 6, 2019, in Marion County Circuit Court, Petitioner was "convicted ... of the offense of Strangulation, a felony offense" under "W. Va. Code § 61-2-9d, punishable by confinement in a state correctional facility." App. Vol. II, 005-006 ("First Conviction").

On July 4, 2019, less than six months after Petitioner's conviction for strangulation, a patrolman for the Fairmont City Police Department arrested Petitioner for fleeing in a vehicle with reckless indifference to the safety of others. App. Vol. VI, 29. Petitioner would later enter a guilty plea for that felony, as well. *Id.* at 30-31. And on August 8, 2019, in Marion County Circuit Court, Petitioner was "convicted ... of the offense of Fleeing [from an officer] in a Vehicle With Reckless Disregard For the Safety of Others, a felony offense" under "W. Va. Code § 61-5-17(f), punishable by confinement in a state correctional facility." App. Vol II, 005 ("Second Conviction").

2. On October 4, 2022, the State filed an eight-count indictment against Petitioner. App. Vol. 1, 007-011. Five counts centered on controlled substances: one for conspiracy to manufacture, deliver, or possess with the intent to manufacture or deliver between 5 and 50 grams of methamphetamine, W. Va. Code § 60A-4-414(c), one for possessing methamphetamine with the intent to deliver it, W. Va. Code § 60A-4-414(a), and one each for possessing methamphetamine, cocaine, and heroin with the intent to deliver them, W. Va. Code § 60A-4-401(a)(i). *Id.* at 007-010. The remaining three counts were firearm-related: one for the use or presentment of a firearm in the commission of a felony, W. Va. Code § 61-7-15a, one for carrying a concealed firearm as a prohibited person, W. Va. Code § 61-7-7(e), and one for possessing a

firearm as a prohibited person, W. Va. Code § 61-7-7(b). *Id.* at 010-011. The State later moved to modify two counts to account for changed statutory language and test results showing that Petitioner was caught with “fentanyl mixed with tramadol” and not heroin. App. Vol. 1, 024-025, 028-029. The indictment stemmed from a traffic stop in 2022 performed by Marion County deputy sheriff Brandon Clyde, and concluded with a trial on March 29 and 30, 2023. The following details come from those trial proceedings, including the testimony and exhibits introduced at that time.

On February 10, 2022, Deputy Clyde was on patrol when he noticed a Jeep Commander with a busted taillight. App. Vol. IV, 110:19-22; *see also id.* at 60:8 (Garrett). When he pulled behind it, the vehicle abruptly changed lanes, so he looked up the license plate and confirmed that it belonged to a different vehicle. *Id.* at 110:23-111:3; *see also id.* 73:7-11 (Garrett). He pulled the Jeep over and made contact with Petitioner (the driver), who was accompanied by a woman in the front passenger seat whose identification named her as Crystal Haggerty. *Id.* at 112:6-15; *see also id.* at 60:1-6 (Garrett). Petitioner stated that the Jeep “did not belong to him” and confirmed that he did not have registration or insurance for the vehicle. *Id.* at 112:16-20. Already suspicious, Deputy Clyde took down Petitioner’s information and confirmed that he did not have a valid driver’s license. *Id.* at 113:10. When he went back to inform Petitioner, Petitioner “was very distant” and “nervous.” *Id.* at 113:14-19. “At that time [Deputy Clyde] had asked him if there was anything illegal I needed to worry about,” and Petitioner told him, “not that he was aware of.” *Id.* at 113:19-21.

Around this time, Deputy Clyde’s supervisor—14-year sheriff Sargeant Russell Garrett—arrived on the scene to assist with the stop, *id.* at 58:19-23, 59:8-9, and Petitioner called Lakeisha Watkins—purportedly the vehicle’s owner—to say he had been pulled over. *Id.* at 113:24-114:1, 73:12-21 (Garrett), 95:10-19, 96:15-24. When Ms. Watkins arrived on the scene, she noticed

plenty of clothes in the vehicle and told the police that it “‘looks lived in.’” *Id.* at 99:3-8. Ms. Watkins told Sergeant Garrett that she knew Petitioner because he is her husband’s cousin and “‘a longtime friend of [her] daughter’s.” *Id.* at 93:9-13. She also stated that she had given Petitioner control of the Jeep a few weeks before the police stop as part of an arrangement in which Petitioner would buy the Jeep from Petitioner through installment payments, made “‘as often as he could,” totaling \$1,500. *Id.* at 94:1, 10-17, 95:2-3. At the time of the stop, Petitioner “‘was behind on the payments,” and had made \$300 worth so far. *Id.* at 95:7-8, 105:21-106:1; *see also id.* at 73:24-74:5 (Garrett testimony). And at the time she gave Petitioner possession of the Jeep, Ms. Watkins testified that it contained no drugs or drug paraphernalia, but that—unbeknownst to her—it contained a handgun that belonged to her ex-boyfriend. *Id.* at 100:3-101:14, 103:1-21.

With Ms. Watkins on the scene, Deputy Clyde asked for but was denied permission to search the Jeep, so he instructed Petitioner to shut it off so he could run his narcotics-detection-trained “‘canine partner[] around the vehicle.” *Id.* at 114:20-115:4. The canine performed an “‘open air sniff” of the exterior of the Jeep and “‘provided a positive indication” that he smelled narcotics “‘on the passenger side compartment.” *Id.* at 116:3-22. Deputy Clyde then returned the canine to his patrol car and he and Sergeant Garrett removed Petitioner and Ms. Haggerty from the Jeep in order to search it. *Id.* at 117:1-4. Deputy Clyde patted Petitioner down and located \$1,863 in cash on his person. *Id.* at 117:12-13, 129:17-130:1. The occupants were supervised by Fairmont police Sergeant Tyler Hall. *Id.* at 61:2-12. And Deputy Clyde proceeded to search the driver’s side of the Jeep, locating a small baggie of marijuana. *Id.* at 117:7, 126:24-127:3.

Meanwhile, Sergeant Garrett was searching the passenger side of the vehicle. As he did so, he located a .45 caliber Hi-Point firearm in the closed center console between the front passenger and front driver seats—up to that point “‘concealed from view.” *Id.* at 61:18-62:7, 64:11-

13; *see also id.* at 117:17-18, 118:2-13 (Clyde). The firearm was loaded “with two rounds in the magazine.” *Id.* at 62:14. When he found the firearm, Sergeant Garrett “asked [Petitioner] about it, trying to confirm who the owner of the firearm was,” and Petitioner said, “‘It’s not mine. I know it’s in there, but it’s not my firearm,’ or words to that effect[.]” *Id.* at 74:8-11. This led Sergeant Garrett to conclude that Petitioner “knew [the firearm] was in the console.” *Id.* at 74:12-14, 86:22-24.

Sergeant Garrett then moved to the passenger-side glove compartment where he found “a multicolored ... zipper pouch” containing “some drug paraphernalia, [a] methamphetamine pipe, ... small plastic bags” and red straws “which would be used for packaging material for controlled substances,” “a set of scales,” “[t]hree lighters,” “a silver metallic container,” and “other paraphernalia”—some of which were contained or were covered with drug residue. *Id.* at 65:5-13, 66:1-8, 68:7-18, 89:12-21. Sergeant Garrett would later testify that the drug-residue-covered scales found in the vehicle are the sort that, “in the drug trade,” are “used to weigh out drugs” as part of the packaging process, and the “large quantity of bags” are “indicative of somebody who’s dealing controlled substances.” *Id.* at 66:16-22, 67:11-21, 88:14-89:5.

As Sergeant Garrett moved to the back of the Jeep, he found a black backpack containing male clothing, “one item of mail” with Petitioner’s name on it—both of which were not recovered and instead left in the trunk area—and “baggies with different substances in it,” five of which were of “various weights” totaling 42 grams of “a substance consistent with methamphetamine,” and others that contained what Sergeant Garrett believed to be cocaine and heroin. *Id.* at 70:7-71:13; *see also id.* 119:2-10 (Clyde).

The Jeep was later impounded and Deputy Clyde obtained a search warrant in order to perform a more thorough search. *Id.* at 119:5-120:6; *see also id.* at 75:8-12 (Garrett). During that

search, Deputy Clyde discovered more drug paraphernalia, more scales, more plastic baggies, and a holster for the firearm. *Id.* at 120:16-21. One of the items was a black and purple bag located near the black backpack in the rear of the vehicle, and filled with—among other things—a digital scale, four vials (two of which had either residue or a “white powdery substance in the bottom”), a “Smokezilla metal container” with white residue on it, a straw, a plastic baggie with residue at the bottom of it, and a lighter. *Id.* at 121:21-122:12. Deputy Clyde would later testify that this bag—along with another that contained another scale and unused plastic baggies—was similar to the one Sergeant Garrett found in the glove box, and it had “both personal use paraphernalia, as well as trafficking paraphernalia.” *Id.* at 122:18-20, 126:2-8.

Deputy Clyde later submitted the bags of controlled substances found in the vehicle to the West Virginia State Police Lab for forensic analysis. *Id.* at 130:20-131:1. The report confirmed that the bags contained methamphetamine in several of the bags, as expected, and fentanyl and tramadol in another, instead of what was initially suspected to be heroin. *Id.* at 132:7-14; *see also id.* at 148:9-151:1 (testimony from forensic scientist Tara Hayslip confirming weight and contents of the lab submissions).

Deputy Clyde would also go on to testify that he followed Petitioner’s case as it made its way through the court system, including reviewing an affidavit Petitioner submitted for an appointment of an attorney on which he claimed no source of income, no assets, and no employment. *Id.* at 132:15-133:23.

3. The evidence introduced at trial included exhibits from the State and testimony from State witnesses Deputy Clyde, Sergeant Garrett, Ms. Watkins, and Ms. Hayslip. Just before the jury charge, the State rested its case and moved to dismiss a count from the indictment. *Id.* at 153:1-3. Petitioner’s counsel did not object to the motion, so the court granted it and dismissed

the count. *Id.* at 153:6-7. The court then noted that the State rested its case, “[r]eserve[d] a spot on the record for *any appropriate motions* at this time, which we’ll discuss out of the hearing of the jury,” and confirmed that Petitioner’s counsel had no “evidence to present on behalf of the [Petitioner].” *Id.* at 153:7-11 (emphasis added). The court and the prosecutor then discussed how to go about striking the dismissed count from the indictment, and the court stated its desire “to get as much done today as [it] can” by moving forward with “charg[ing] [the jury]” so “they can come back tomorrow morning and [hear] closing [statements] and then ... begin deliberations.” *Id.* at 153:12-24. The jury then exited the courtroom and the court went into recess. *Id.* at 154:7-8. The jury returned 14 minutes later and the court proceeded to the jury charge. *Id.* at 154:7-17. The court concluded the charge by sending the jury home with instructions to return the next morning for closing arguments. *Id.* at 175:10-14.

Once the jury had left the courtroom, the circuit court asked both attorneys if they had “anything else to address on the record at this time.” *Id.* at 175:16-17, 19. Both attorneys answered in the negative, *id.* at 175:18, 20 (“MR. WILSON: No, sir.”), and the court adjourned for the day, *id.* at 175:21. The jury returned the next morning, the attorneys gave their closing arguments, *id.* at 176:1-220:18, and the court instructed the jurors to begin their deliberations, *id.* at 221:2-223:23. With the jury gone, the trial court circled back to the point it made after the State rested its case the day before:

THE COURT: “I reserved, at the close of the state’s evidence, I reserved a spot on the record for any appropriate motions. The Court’s of the opinion that the evidence in the light most favorable—considered in the light most favorable to the state was sufficient—would be sufficient to sustain a conviction on each of the remaining seven counts. So the defense motion for judgment of acquittal *would be overruled* for those reasons. But you can express any objection or objections to the verdict form or the charge on the record with Mrs. Ashburn while the jury deliberates. *Anything else to address at this time*, Mr. Freeman?”

MR. FREEMAN: No, Your Honor.

THE COURT: Mr. Wilson?

MR. WILSON: *No, sir.*

Id. at 223:24-224:13 (emphases added). During deliberations, the jury submitted a question to the court and neither attorney objected to the court’s response. *See id.* at 224:20-225:19. The jury then returned from deliberations to announce their verdict: guilty on all of the remaining counts except for Count VI (use or presentment of a firearm in the commission of a felony). *See id.* at 225:22-227:21. Immediately following the verdict, both attorneys declined to poll the jury or object to the verdict from, and the judge dismissed the jury. *See id.* at 227:22-229:21. The court then discussed the presentence investigation and concluded by asking both attorneys if they had “[a]nything else to address on the record at this time.” *Id.* at 229:22-230:21. Both attorneys answered in the negative, so the court adjourned. *See id.* at 230:22-231:3.

4. The court later memorialized the proceedings in a trial order. App. Vol. I, 030. And the State filed a recidivist information listing Petitioner’s First Conviction and Second Conviction—both from 2019—and adding Petitioner’s latest conviction from the recent trial for Possession of a Firearm By a Prohibited Person, W. Va. Code § 61-7-7(b)(2) (“Third Conviction”), as the third or subsequent offense felony for a potential recidivist life sentence. *See* App. Vol. II, 005-006. The circuit court entered an order filing the information, held an arraignment, and conducted a trial on the recidivist information. App. Vol. II, 007-012 & App. Vols. V-VI. On August 8, 2023, the jury convicted Petitioner in connection with the recidivist information. *See* App. Vol. VI, 055-058. And on September 21, the court sentenced Petitioner to a definite term of five years for Count I; not less than one year nor more than fifteen years for Count II; a definite term of five years for Count III; not less than one year nor more than fifteen years for Count V; a

definite term of five years for Count VII; and life with eligibility for parole after fifteen years for Count VII (associated with the recidivist information and conviction). The court set Counts I, II, III and V to run concurrently, and Counts VII and VIII to run concurrently, but consecutive to Counts I, II, III and V. App. Vol. II, 016-020.

This appeal followed.

SUMMARY OF THE ARGUMENT

Petitioner's first assignment of error fails out of the gate because he never preserved the challenge during the proceedings below. So the Court can only look at his sufficiency-of-the-evidence arguments under plain error review. But no error exists to correct at all, much less one "so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent" the Petitioner's "timely assistance in detecting it." *State v. David K.*, 238 W. Va. 33, 43, 792 S.E.2d 44, 54 (2016). Even if Petitioner had moved for acquittal below, he would still face (and fail) an uphill climb on appeal by challenging the sufficiency of the evidence for his convictions: the standard requires the Court to view all "direct and circumstantial" evidence "from the prosecutor's coign of vantage" and in the "light most favorable to the prosecution," and affirm if "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. pt. 1 & 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Under that standard *and* plain error review, more than enough exists in the record for the Court to affirm.

Petitioner's second assignment of error gains no traction, either. This Court's standard for a proportional recidivist sentence is clear: only two of the three convictions need to involve actual violence, a threat of violence, or substantial victim impact causing harm. The problem for Petitioner is that all three of his convictions—for strangulation, for fleeing from law enforcement

in a vehicle with reckless disregard for others’ safety, and for reckless disregard for the safety of others—satisfy that standard. As a result, the constitutional challenge to his sentence falls.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and arguments are adequately presented in the briefs and record. Oral argument is not necessary, and this case can be resolved by memorandum decision. *See* W. Va. R. App. P. 18(a)(3), (4).

STANDARD OF REVIEW

“The Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence.” *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011). In doing so, the Court “examine[s] the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt.” Syl. pt. 1, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. “Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” *Id.*

The Court generally reviews “sentencing orders ... under a deferential abuse of discretion standard.” *State v. Horton*, 248 W. Va. 41, 45, 886 S.E.2d 509, 513 (2023), *cert. denied sub nom. Horton v. W. Virginia*, 143 S. Ct. 2683, 216 L. Ed. 2d 1250 (2023) (cleaned up). That’s because “[i]t is not the proper prerogative of this Court to substitute its judgment for that of the trial court on [such] matters, so long as the appellant’s sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles.” *State v. Georgius*, 225 W. Va. 716, 722, 696 S.E.2d 18, 24 (2010). But where, as here, a petitioner argues that his

sentence invokes “the application of constitutional protections,” the Court’s “review is de novo.” *Horton*, 248 W. Va. at 45, 886 S.E.2d at 513.

ARGUMENT

I. Petitioner’s First Assignment Does Not Justify Reversal.

Petitioner contends that the circuit court “abused its discretion” and “erred in not addressing or, alternatively, presumptively denying the Rule 29 Motion for Judgment of Acquittal,” because insufficient evidence showed that Petitioner “conspired with another individual” and “possessed any of the substances found in the subject vehicle with the intent to deliver the same,” or that he “was knowingly in possession of a firearm at the time of the traffic stop at issue in this matter.” Pet’r’s Br. at 10, 17. But Petitioner never made these arguments (or any others) through a motion for acquittal below, so the Court need not take them up here. And even if the Court considers them, Petitioner cannot satisfy the plain error doctrine.

A. The Court should decline to hear this assignment because Petitioner waived it by failing to move for acquittal below.

Before Petitioner can ask the Court to hear his first assignment of error, he has a hurdle to clear (and it’s a big one): nothing in Petitioner’s brief or appendix shows that his counsel made a Rule 29 motion through voice or paper at *any* point during the proceedings below. The excuses he gives here notwithstanding, that means Petitioner has waived the assignment, and “cannot now complain about” it on appeal. *State v. Whittaker*, 221 W. Va. 117, 132, 650 S.E.2d 216, 231 (2007).

1. Put bluntly, nothing in the record indicates that Petitioner’s counsel even announced his *intent* to file a motion for acquittal, much less actually made such a motion: not at the end of the State’s case, App. Vol. IV, 153:1-3; not after confirming that Petitioner had no evidence to present, *id.* at 153:8-11; not when the circuit court reserved a spot for “any appropriate motions”

to be filed, *id.* at 153:8; not before the court began the jury charge, *id.* at 154:11; not in response to the circuit court’s explicit request for “anything else to address” after the jury charge, *id.* at 175:16-20; not after the State’s closing argument or rebuttal, *id.* at 176:1-212:20, 220:18-19; not after the jury left the courtroom to begin deliberations, *id.* at 223:23-24; neither before nor after the circuit court forecasted that “the defense motion for judgment of acquittal”—that is, if one were to be made—“would be overruled,” *id.* at 223:24-224:13; and not after the jury rendered its verdict, *id.* at 227:22-230:24. This explains why Petitioner never cites in his brief or includes in his appendix any record evidence that his counsel affirmatively made a motion for acquittal below—because he did not.

But this is exactly what the Rules of Appellate Procedure require. Petitioner’s appendix, for example, needed to include all “orders applicable to the assignments of error,” material motions and excerpts “in connection with” them—including all “averments upon which the petitioner relies”—and other necessary parts of the record. W. Va. R. App. P. 7(d)(1), (2), (5), (8). The appendix includes no “Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial.” Pet’r’s Br. 10. Unlike Petitioner’s actual assignment of error, which implies that he made a “Motion for Judgment of Acquittal following the close of the State’s case-in-chief” and that “[t]he Circuit Court Erred in Denying” it, Pet’r’s Br. at 5; *see also id.* at 10 (stating that “[t]he Circuit Court abused its discretion in denying the Defendant’s Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial”), he should have phrased it “in such a fashion as to alert” the Court “to the fact that” “the issue was not presented to the lower tribunal” and thus “plain error is asserted” on appeal. W. Va. R. App. P. 10(c)(3). Unlike Petitioner’s Statement of the Case, which does not mention a motion for acquittal or new trial made below, Petitioner had to include “appropriate and specific references to the appendix or designated record” and “the procedural

history ... that are relevant to the assignments of error.” *Id.* 10(c)(4). And likewise, Petitioner’s Argument section needed (but failed) to include “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.” *Id.* 10(c)(7). So, similar to the way it has before, the Court should find that “Petitioner has failed to direct this Court’s attention to the portion of the record where he requested (if, indeed, he did) a” judgment of acquittal, and “deem this issue waived” on appeal. *State v. Tilley*, No. 17-0155, 2018 WL 3005946, at *5 (W. Va. Supreme Court, June 15, 2018) (memorandum decision) (citing W. Va. R. App. P. 10(c)(7)),

2. Instead of complying with these Rules, Petitioner deploys vague language and excuses meant to imply both that he made a Rule 29 motion below, and that even if he hadn’t, his counsel’s mistake should be excused. *See, e.g.*, Pet’r’s Br. 5, 10, 12. He does this by describing a special “manner in which Rule 29 motions are handled at the close of the State’s case-in-chief” during criminal trials in Marion County. *See* Pet’r’s Br. 12 (explaining the process). Petitioner says the circuit court employed this process here but in a rushed manner in order to account for “some pre-existing obligations of some jurors” that were coming the following day. *Id.* It was “[i]n th[is] rush to get through the charge before the end of the [current] day,” says Petitioner, that “neither the [circuit court] nor counsel realized that the [circuit court] had not made its usual findings with regard to Rule 29 motions. *Id.* And “[i]t wasn’t until the transcript had been prepared during the appeal process that [Petitioner’s] counsel realized the omission.” *Id.* Several glaring problems, though, show with Petitioner’s description here.

First, Petitioner states that the court’s “only” mention of “its usual findings with regard to Rule 29 motions” or “th[e] motions” themselves was immediately after the State rested, *see id.* at 12 (citing App. Vol. IV, 153:7-9). But this statement is both wrong and incomplete. In fact, the

court provided *three more* chances for Petitioner’s counsel to address the matter of acquittal: once after the jury had left the courtroom that day, *see App. Vol. IV*, 175:16-20 (asking the attorneys if they had “anything else to address on the record at this time”); again after the jury left to start deliberations, *see id.* at 223:24-224:13 (forecasting that “the defense motion for acquittal would be overruled” and asking both attorneys again if they had “[a]nything else to address at this time”); and a third time after the jury announced its verdict, *see id.* 227:22-230:24 (similar). In reality, Petitioner never says when (much less how) he filed a Rule 29 motion to which the court supposedly gave a rushed decision—and it certainly was not “at the close of the State’s case-in-chief,” as he suggests with the wording of his assignment of error and accompanying argument. Pet’r’s Br. 5, 12. This failure is fatal to his assignment on appeal. W. Va. R. App. P. 10(c)(7) (requiring “specific [record] citations ... that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal”).

Second, Petitioner cannot shift the focus away from his waiver and to the circuit court by citing the special “manner in which Rule 29 motions are handled at the closes of the State’s case-in-chief” during criminal trials in Marion County. Pet’r’s Br. at 12. This is not the first time this Court has seen this sort of recitation from a Marion County circuit court judge. In *State v. Uphold*, “[a]t the close of the State’s case, the circuit court, outside the presence of the jury, informed the parties that ... was the time the defense typically makes a motion for judgment of acquittal.” No. 20-0983, 2022 WL 855687, at *2 (W. Va. Supreme Court, Mar. 23, 2022) (memorandum decision). The Court then quoted the trial judge’s recitation at length, including the statement that the judge was “of the opinion that the [S]tate has presented ... a prima facie case of evidence as to each of the elements of each count of the indictment” and “any motions by the defense for directed verdict or judgment of acquittal will be overruled.” *Id.* But what happened next is critical: “after

the jury began deliberating, petitioner *argued to the circuit court* that he was *entitled to a judgment of acquittal*” on one of the charges because the State failed to meet its evidentiary burden, and “[t]he circuit court denied petitioner’s motion.” *Id.* (emphasis added). Then, after “the jury found petitioner ... guilty” of that same count, “Petitioner *renewed* his [Rule 29] motion for *judgment of acquittal* ... and *moved for a new trial* under Rule 33.” *Id.* (emphasis added). “The circuit court held a hearing on” those motions, “the circuit court denied the motion orally during the hearing and by order entered” later on, and this Court affirmed those rulings on appeal. *Id.* at *2, *5.

Here, unlike in *Uphold*, Petitioner never moved and argued for acquittal or a new trial—not at the close of the State’s case, and not after the jury’s verdict—so the circuit court never had reason to hold a hearing on the motion, respond to any specific arguments on the record, or mention those motions in its trial order. *See* App. Vol. I, 030-031 (trial order only mentioning motions from the State to modify two counts in the indictment).

Third, nothing was “rushed” about the proceedings below, much less were any proceedings irregular enough to trigger the Court’s correction on appeal. *See* Pet’r’s Br. 12. After the State rested its case, the circuit court explained its preference to complete the jury charge before the jurors left that day given that a few of them had afternoon schedule conflicts the following day. *See* App. Vol. IV, 153:18-154:7. That’s it. At no point did Petitioner’s counsel indicate to the court he felt that its decision to manage the remaining proceedings in this way deprived him of the chance to file a motion or make arguments. If anything, the opposite was true. Again, the court asked the attorneys three times between the State resting and the trial ending whether they had “anything else to address” on the record “at this time,” and both attorneys answered in the negative all three times. *Id.* at 175:16-20, 223:24-224:13, 227:22-230:24; *cf.* *State v. Colin*, No. 11-1387, 2013 WL 3242762, at *1-2 (W. Va. Supreme Court, June 28, 2013) (holding that it was harmless

error where petitioner argued that “the circuit court’s [alleged] eagerness to finish the trial ... prohibit[ed] petitioner to present a motion for acquittal after the State rested its case”).

3. Finally, this case shows why it was so important for Petitioner to have raised “his ... objection contemporaneously with the trial court’s” recitation forecasting the denial of any acquittal motion filed. *Whittaker*, 221 W. Va. at 131-32, 650 S.E.2d at 230-31. “The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court’s attention affords an opportunity to correct the problem before irreparable harm occurs.” *Id.* (quoting *State v. LaRock*, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996)). The rule also “prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error,” specifically, and “serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice,” in general. *Id.* Straying outside of these lines means being “forever barred from asserting that that ruling was in error.” *Id.*

Here, Petitioner failed to preserve the issue in his first assignment of error both by failing to make the appropriate motion below and then by failing to “articulate [the error] with such sufficient distinctiveness to alert [the trial] court to the nature of the claimed defect.” *Id.* (quoting *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996)). “The rule in West Virginia is that parties must speak clearly in the [trial] court on pain that, if they forget their lines, they will likely be bound forever to hold their peace.” *Id.* This is “[o]ne of the most familiar procedural rubrics in the administration of justice” there is, and by falling short of it here as to his first assignment of error, Petitioner must face “the imposition of a procedural bar to an appeal of that issue.” *State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114, 128 (1995). The Court thus can and should reject Petitioner’s first assignment as procedurally barred. See *State v. Fleming*, 237 W.

Va. 44, 54, 784 S.E.2d 743, 753 (2016) (“we decline to invoke the plain error rule” given “petitioner[’s] fail[ure]to object regarding the sufficiency of the evidence to support a charge of attempted murder” in the proceedings below); *State v. Henson*, 239 W. Va. 898, 908 n.16, 806 S.E.2d 822, 832 n.16 (2017) (“We also decline to invoke the plain error doctrine regarding this alleged error.”); *State v. Rogers*, 231 W. Va. 205, 216, 744 S.E.2d 315, 326 (2013) (“we decline to invoke the plain error doctrine regarding alleged misstatement of law made by the prosecutor.”).

B. Petitioner cannot show plain error—or any error—to justify reversal on sufficiency-of-the-evidence grounds.

If the Court considers this assignment of error nonetheless, it should reject it because Petitioner cannot show plain error.

1. Although Petitioner “does not ask the Court to notice plain error, the Court can sua sponte apply the plain error doctrine if the record below is sufficient for such analysis,” *State v. Lively*, 226 W. Va. 81, 93, 697 S.E.2d 117, 129 (2010), and if it is “in the interest of justice” to do so, *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129 (discussing option to “notice error to which no objection has been made”). See also *State v. Spence*, 182 W.Va. 472, 481, 388 S.E.2d 498, 507 (1989) (“The plain error rule presupposes that the record is sufficiently developed to discern the error.”). Specifically, “[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. pt. 7, *Miller*, 194 W.Va. 3, 459 S.E.2d 114. “In criminal cases, plain error is error which is so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it.” *David K.*, 238 W. Va. at 43, 792 S.E.2d at 54. In other words, the doctrine “is to be used sparingly,” Syl. pt. 2, *State v. Thompson*, 220 W. Va. 398, 400, 647 S.E.2d 834 (2007), and “only to avoid a miscarriage of justice,” Syl. pt. 7, *LaRock*, 196 W.Va. 294, 470 S.E.2d 613.

The circuit court committed no error below in letting the case go to the jury, much less a plain one that affected Petitioner's substantial rights and tainted the proceedings. Indeed, even if Petitioner had raised to the circuit court the acquittal arguments he now raises on appeal, he would not have been able to show anything close to a basis for reversal.

As this Court has made clear, it is a "heavy burden" to "challeng[e] the sufficiency of the evidence." Syl. pt. 3, *Guthrie*, 194 W.Va. 657, 461 S.E.2d 163. Any appellate review must consider "all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution." *Id.* "The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." *Id.* And "a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* It is in that posture that the Court must "examine the evidence admitted at trial" against Petitioner "to determine whether such evidence, if believed, [was] sufficient to convince a reasonable person of [Petitioner's] guilt beyond a reasonable doubt." Syl. pt. 1, *id.* And that evidence, viewed "in the light most favorable to the prosecution," offered more than enough for a "rational trier of fact [to] have found the essential elements of the crime proved beyond a reasonable doubt." *Id.*

2. Facing this "uphill climb," *State v. Scott*, 206 W. Va. 158, 167, 522 S.E.2d 626, 635 (1999), Petitioner argues, first, that "the totality of the evidence was insufficient to sustain a conviction on any charge of conspiracy or intent to deliver on the part of" Petitioner. Pet'r's Br. 15. Specifically, he argues that the State put on no evidence—electronic messages, cell data, or otherwise—to establish "the relationship between the Petitioner and Ms. Haggerty" to prove a conspiracy; that the police dog hit on the vehicle "on the passenger side where Ms. Haggerty and

her belongings were situated,” not Petitioner’s side; that the record contains no testimony about “how the drugs first entered the car,” “which occupant had control of them, nor anything that would show that either occupant had the intent to distribute the drugs to any other individual”; and that no evidence outweighed the fact that the “drugs were located in or near the passenger compartment and that [Petitioner] did not have any drugs or drug paraphernalia on his person.” Pet’r’s Br. 14-15. All of these arguments fall short, and the Court’s decision in *State v. Cutright* explains why.

Like Petitioner here, Cutright was charged with conspiracy and possession with intent to deliver methamphetamine alongside an alleged female co-conspirator. *State v. Cutright*, No. 20-0332, 2021 WL 5033687, at *1 (W. Va. Supreme Court, Oct. 29, 2021) (memorandum decision); *cf.* App. Vol. 007-011. Like here, Cutright and the woman were sitting in a parked car when a deputy sheriff approached, asked if “any illegal substances [were] in the car,” and noticed that petitioner “got nervous.” *Id.* at *1; *cf.* App. Vol. IV, 112:6-15, 113:14-19, 60:1-6. Like here, the sheriff removed them both from the vehicle, searched the vehicle, and found, among other things, a controlled substance that a State Police expert forensic analyst later confirmed to be methamphetamine, and “a set of scales containing [drug] residue” and “several small baggies” that together “indicated that [Cutright] was selling the methamphetamine.” *Id.*; *cf.* App. Vol. IV, 65:5-13, 66:1-22, 67:11-21, 68:7-18, 88:14-89:5-21, 120:16-21, 121:21-122:20, 126:2-8, 132:7-14, 148:9-151:1. And “because neither [the woman] nor [Cutright] took responsibility for the drugs, [the deputy sheriff] believed that both were involved with the drugs.” *Id.*

After the close of his case-in-chief, Cutright moved for a judgment of acquittal on the counts, making arguments near-identical to those that Petitioner makes for the first time here on appeal; namely that “the only evidence of a conspiracy between himself and [the woman] was that

they were together in the car”; “that there was no evidence linking him to the car he was found in at the time of his arrest”; “there was no evidence linking him to the drugs which were found on the passenger side of the car where [the woman] was seated”; that “because the drugs were found closer to [the woman], it was more likely that she possessed the drugs”; “that the State failed to produce any evidence of a boyfriend-girlfriend relationship between himself” and the woman; and several “non-drug-related reasons why the scale and the baggies were found in the car.” *Id.* at *2. The circuit court denied the motion as to those counts, the jury found Cutright guilty on both counts, and Cutright appealed.

This Court rejected each of Cutright’s arguments on appeal. Citing the “highly deferential” standard from *Guthrie*, the Court looked at the elements of Cutright’s crimes, summarized all of the same evidence the deputy sheriff provided, and deemed it as having “satisfied the elements of the crimes charged,” and justifying the lower court’s denial of Cutright’s acquittal motion. *Id.* at *4-5. Moreover, the Court held that “the jury clearly rejected” Cutright’s “arguments that he was guilty only of possession given that they found him guilty of possession with intent to deliver methamphetamine,” as well as his “argument that there was no evidence that he conspired with [the woman] to commit the offense of possession with intent to deliver.” *Id.* at *5. “Weighing evidence,” held the Court, “is the exclusive function of the trier of fact.” *Id.* (citing *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175). And in that case, the jury weighed the evidence and found petitioner guilty of conspiracy and possession with intent to deliver methamphetamine “beyond a reasonable doubt.” *Id.*

So too, here. The sheer amount of paraphernalia and supplies for weighing, packaging, and dealing drugs, App. Vol. IV, 65:5-13, 66:1-22, 67:11-21, 68:7-18, 88:14-89:21, 120:16-21, 121:21-122:12, 122:18-20, 126:2-8; the large sum of cash Petitioner had on his person (with no

apparent legal source to explain it), *id.* at 117:12-13, 129:17-130:1, 132:15-133:23; the backpack with male clothing and “one item of mail” with Petitioner’s name on it alongside the large amount of illegal controlled substances, *id.* at 70:7-71:13, 119:2-10, 148:9-151:1; the concealed firearm Petitioner knew was there, *id.* at 61:18-62:7, 64:11-13, 74:8-14, 86:22-24, 117:17-18, 118:2-13—all of this (and more) was plenty enough to overcome Petitioner’s apparent counter-narrative that the drugs belonged to Ms. Haggerty and not him, or that he had no intent to distribute them. Though the jury was not *required* to find the essential elements of the crime proved beyond a reasonable doubt, enough evidence existed that a jury reasonably could have reached that conclusion. Syl. pt. 1, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163; *see also* Syl. pt. 3, *id.*

Put simply: if the Court felt comfortable affirming convictions based on nearly identical facts and nearly identical *preserved* arguments in *Cutright*, it can feel orders of magnitude more comfortable affirming here, where those motions were never made, and the Court is limited to plain error review.

3. Petitioner’s last-gasp sufficiency-of-the-evidence argument is that the State did not present enough evidence at trial for the jury to convict Petitioner of possessing the firearm that was located in the center console of the vehicle. Pet’r’s Br. 15-17. The gist of his argument is that Petitioner could only have had constructive possession of the firearm, seeing as he did not own it. And even that, he says, is not enough, because the unrecorded, “spurious, uncorroborated[,] and apparently presumptuous testimony” of Sergeant Garrett is the only “mention [below] that [Petitioner] had knowledge of the firearm.” *Id.* at 16.

Petitioner does not cite any authority to support this argument. *See Uphold*, 2022 WL 855687, at *5 (lamenting that “petitioner fails to cite a single case in support of this assignment of error, continuing to fail to comply with Rule 10(c)(7) of the West Virginia Rules of Appellate

Procedure”). But it is no mystery why: his argument depends entirely on the question of Sergeant Garrett’s credibility. And “[w]hen a criminal defendant undertakes a sufficiency challenge” on appeal, “this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, [and] resolve all credibility disputes in the verdict’s favor.” *LaRock*, 196 W. Va. at 304, 470 S.E.2d at 623. When faced with “competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution’s theory of guilt.” *Id.* at 304, 470 S.E.2d at 623. “[T]his Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict’s favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt.” *Uphold*, 2022 WL 855687, at *5. “When viewing the evidence in the light most compatible with petitioner’s conviction” for felonious prohibited possession of a firearm and, “resolving credibility determinations in favor of that verdict,” the Court should “find that a rational jury could find guilt beyond a reasonable doubt, particularly in light of Petitioner’s failure to point this Court to any supporting authority.” *Id.* Here, testimony from just one witness is (and was) enough for the jury to convict Petitioner. The jury was not required to believe Sergeant Garrett, but it was entitled to. And apparently, that’s exactly what it did. There is no basis for the Court to overturn that decision on appeal. *See* syl. pt. 1 & 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163.

II. Petitioner’s Sentence Was Constitutionally Sound.

A. The legal standard governing Petitioner’s challenge is clear.

Petitioner contends that his recidivist life sentence constituted an abuse of discretion by the trial court and a violation of West Virginia’s “constitutional proportionality provision found in Article III, Section 5.” *Horton*, 248 W. Va. 45, 886 S.E.2d at 513 (quoting syl. pt. 11, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019)); *see* Pet’r’s Br. at 10, 17-19. This provision,

“which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” Syl. pt. 3, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981) (quoting syl. pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980)). These standards “are basically applicable to ... a life recidivist sentence” like Petitioner’s sentence here. Syl. pt. 4, *id.*

This sentence took form through West Virginia’s recidivist statute, which—at the time Petitioner committed the acts underlying his triggering Third Conviction—stated: “[w]hen it is determined ... that such person shall have been twice before convicted ... of a crime punishable by imprisonment in a state correctional facility which has the same or substantially similar elements as a qualifying offense” as defined by the statute, “the person shall be sentenced to imprisonment in a state correctional facility for life.” W. Va. Code § 61-11-18(d) (2021). The punishment “is ... automatic ... regardless of the nature of the penalty for the underlying third felony.” *State v. Lane*, 241 W. Va. 532, 539, 826 S.E.2d 657, 664 (2019). And for calculation purposes, the statute treats two prior felony convictions as “a single offense” if they arose from “the same transaction or series of transactions,” and does not count an offense “if more than 20 years have elapsed between” the “conduct underlying the current charge” and “an offense which would otherwise constitute a qualifying offense.” W. Va. Code § 61-11-18(d) (2021).

The Legislature amended the statute in 2020 not to “increase[] the punishment” or “lengthen[] the sentence for a person determined to have been convicted of three felonies” but to add the “twenty-year look back provision” and provide an “enumerated ... list of qualifying offenses for a recidivist sentence.” *Horton*, 248 W. Va. 44-46, 886 S.E.2d at 512-14. The “qualifying offenses” include “offenses or an attempt or conspiracy to commit ... offenses” in

certain “provisions of th[e] code” that punish, as relevant here, strangulation, W. Va. Code § 61-11-18(a)(14) (citing W. Va. Code § 61-2-9d), fleeing from an officer in a vehicle with reckless indifference to the safety of others, *id.* § 61-11-18(a)(43) (citing W. Va. Code § 61-5-17(f)), and felonious prohibited possession of a firearm, *id.* § 61-11-18(a)(46) (citing the felony provisions of W. Va. Code § 61-7-7).

When a petitioner challenges a recidivist life sentence as unconstitutionally disproportionate, the Court’s de novo review considers “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.” Syl. pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. In 1981, the Court got more specific, emphasizing “the nature of the final offense which triggers the recidivist life sentence” and “the other underlying convictions ... to determine if they involve actual or threatened violence to the person ... and therefore justify application of the [recidivist] statute.” *Horton*, 248 W. Va. 45, 886 S.E.2d at 513 (quoting syl. pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981)). In other words, the triggering conviction receives “closer scrutiny” as “the ultimate nexus to the sentence,” alongside a “close[] examin[ation]” of “the nature of the prior felonies.” *State v. Miller*, 184 W. Va. 462, 465, 400 S.E.2d 897, 900 (1990) (citing *State v. Deal*, 178 W. Va. 142, 147, 358 S.E.2d 226, 231 (1987)).

More recently, the Court has refined this assessment further to require a determination of whether “two of the three felony convictions considered ... involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results” before upholding a recidivist life sentence. *Hoyle*, 242 W. Va. at 615, 836 S.E.2d at 833. The reasoning for the update was straightforward: “A discernible pattern [had] emerge[d] from [the Court’s]

prior cases that two of the three felonies considered for purposes of a recidivist conviction must be violent in nature to justify the imposition of a life sentence under” the recidivist statute “in the face of a proportionality challenge.” *Id.* at 614, 836 S.E.2d at 832. This change ensures that future cases kept in line with the past pattern.

It is against this legal standard that Petitioner challenges his life recidivist sentence.

B. Petitioner’s sentence was correct under this standard.

At the outset, Petitioner’s recidivist life sentence undoubtedly complies with the recidivist statute itself. Petitioner’s triggering felony Third Conviction was a “qualifying offense” under the statute. *See* W. Va. Code § 61-11-18(a)(46) (2021) (citing the felony provisions of W. Va. Code § 61-7-7); App. Vol. II, 005-006, 016-017. And his two earlier convictions both qualify as “crime[s] punishable by imprisonment in a state correctional facility which [have] the same or substantially similar elements as a qualifying offense” under the statute. W. Va. Code § 61-11-18(d) (2021); *see id.* § 61-11-18(a)(14) (citing W. Va. Code § 61-2-9d) and *id.* § 61-11-18(a)(43) (citing W. Va. Code § 61-5-17(f)). Petitioner only contends that his Second Conviction (for fleeing from law enforcement in a vehicle with reckless disregard for the safety of others) and his triggering Third Conviction (for felonious prohibited possession of a firearm) did not “involve[] (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results.” Pet’r’s Br. 17. Because Petitioner’s First Conviction for strangulation satisfies *Hoyle*’s standard, and only “two of [his] three felony convictions” need to qualify for his recidivist life sentence to stand, *see* syl. pt. 12, *Hoyle*, 242 W. Va. 599, 836 S.E.2d 817, Petitioner must show that *neither* of his other two convictions satisfies *Hoyle*’s standard. As it turns out, they *both* do.

As for Petitioner’s Second Conviction for fleeing from law enforcement in a vehicle with reckless disregard for the safety of others, W. Va. Code § 61-5-17(f), the Court made clear in *State*

v. Norwood that “evading police” is an offense that “clearly carries with it the risk of violence.” 242 W. Va. 149, 158, 832 S.E.2d 75, 84 (2019); *accord Horton*, 248 W. Va. at 48, 886 S.E.2d at 516. “In that case, the petitioner had been previously convicted under a Virginia statute analogous to” West Virginia Code § 61-5-17(f), and “[g]iven that an essential element of the Virginia statute was ‘endanger[ing] the operation of a law enforcement vehicle or person,’” the Court “concluded that the crime ‘carried with it the potential for actual violence.’” *Horton*, 248 W. Va. at 48, 886 S.E.2d at 516 (citing *Norwood*, 242 W. Va. at 159, 832 S.E.2d at 85). “The same is true here.” *Id.* Petitioner pled guilty to and was convicted of violating West Virginia Code § 61-5-17(f), which, by definition, means Petitioner fled or tried to flee “in a vehicle from a law-enforcement officer, probation officer, or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing [Petitioner] to stop,” and did so in a way that “show[ed] a reckless indifference to the safety of others.” W. Va. Code § 61-5-17(f). This conviction “clearly carrie[d] with it the risk of violence,” *Norwood*, 242 W. Va. at 158, 832 S.E.2d at 84, such that it supports a recidivist life sentence, *Hoyle*, 242 W. Va. at 615, 836 S.E.2d at 83.

Petitioner’s triggering Third Conviction for felonious prohibited possession of a firearm, W. Va. Code § 61-7-7(b), satisfies *Hoyle*’s test, as well. The Court has held before that “possession of a firearm by a prohibited person is *certainly* a crime that involves a threat of violence.” *State v. Gaskins*, No. 18-0575, 2020 WL 3469894, at *4 (W. Va. Supreme Court, June 25, 2020) (memorandum decision) (emphasis added) (citing *Redman v. Ballard*, No. 14-0894, 2014 WL 5125826 (W. Va. Supreme Court, Aug. 31, 2015) (memorandum decision)). That is especially true here given “the facts surrounding petitioner’s possession of a firearm [as] a prohibited person” in the underlying case. *Id.* Several bags of multiple types of dangerous drugs, a large collection of drug trafficking paraphernalia, a gun holster, numerous scales (and some with drug residue on

them), a large quantity of small empty plastic bags meant for distributing drugs, a large wad of cash with no explainable source for it—all of this “implies the firearm was to be used for a nefarious purpose.” *Id.* at *4 (memorandum decision) (upholding recidivist life sentence because in part because his “firearm was found in a backpack and wrapped in a ‘waistband holster,’ which indicates the firearm could be easily concealed and carried on petitioner's person,” and “the firearm was found along with drug paraphernalia, plastic bags, and ammunition, which are all common to the drug trade”). And it leaves no doubt that the conviction itself satisfies *Hoyle*’s standard.

In the event the Court decides to look at Petitioner’s First Conviction for strangulation as a tiebreaker, that conviction satisfies *Hoyle*’s standard, too. Petitioner pled guilty to this offense. And a conviction for it means that the violator “strangle[d], suffocate[d] or asphyxiate[d] another without that person’s consent and thereby cause[d] the other person bodily injury or loss of consciousness.” W. Va. Code § 61-2-9d(b). As used in that statute, “bodily injury” means “substantial physical pain, illness or any impairment of physical condition”; “strangle,” “suffocate,” “and asphyxiate” mean “knowingly and willfully restricting” “another person’s air intake or blood flow by the application of pressure on the neck or throat,” “the normal breathing or circulation of blood by blocking the nose or mouth of another,” and “the normal breathing or circulation of blood by the application of pressure on the chest or torso,” respectively. *Id.* § 61-2-9d(a). The Court has yet to consider a strangulation conviction within the *Hoyle* framework, specifically, but it is difficult to see how this statutory language would not count as a crime that “involve[s] either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results.” Syl. pt. 12, *Hoyle*, 242 W. Va. 599, 836 S.E.2d 817.

Other authorities show the same. The West Virginia Code, for example, punishes any person who “commits or attempts to commit robbery by ... [c]ommitting *violence* to the person,

including, but not limited to, partial *strangulation*.” W. Va. Code § 61-2-12(a)(1) (emphasis added). In an abuse-and-neglect case, this Court mentioned strangulation in the context of domestic violence. See *In re T.S.*, No. 19-0835, 2020 WL 2043423, at *4 (W. Va. Supreme Court, Apr. 28, 2020) (memorandum decision) (“petitioner engaged in domestic violence ... and was charged with a myriad of crimes as a result, including ... strangulation”). And other courts have held that violations of strangulation statutes similar to West Virginia’s are crimes of violence for purposes of state and federal recidivism sentences. See, e.g., *State v. Theophile*, 2019-0467 (La. App. 4 Cir. 12/11/19), 287 So. 3d 53, 61-62, writ denied, 2020-00075 (La. 11/10/20), 303 So. 3d 1047 (battery involving strangulation is a crime of violence); *United States v. Batey*, No. 22-5339, 2023 WL 2401193, at *4 (6th Cir. Mar. 8, 2023) (holding that a Tennessee statute penalizing intentional or knowing assault involving strangulation or attempted strangulation “clearly qualifies as a violent felony under the [Armed Career Criminal Act’s] use-of-force clause,” and noting that the Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits “have also found assault involving strangulation or attempted strangulation to satisfy this use-of-force language”); *United States v. Howell*, 838 F.3d 489, 502 (5th Cir. 2016) (Texas assault-by-strangulation statute punished a crime of violence); *Blackeagle v. United States*, No. 3:16-CV-245, 2017 WL 442774, at *3-7 (D. Idaho Feb. 1, 2017) (Idaho strangulation statute “fit[] the definition of employing violent force” (cleaned up)). The bottom line is that Petitioner’s convictions—all three of them—confirm that his recidivist life sentence was not unconstitutionally disproportionate.

CONCLUSION

The Court should affirm.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-620

STATE OF WEST VIRGINIA,

Respondent,

v.

THOMAS M. VALENTINE,

Petitioner.

CERTIFICATE OF SERVICE

I, Grant A. Newman, do hereby certify that I served the foregoing document upon all counsel of record via the E-Filing System this 11th day of March 2024.

/s/ Grant A. Newman
Assistant Solicitor General