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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

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No. 23-390

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STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

V.

JASON SWINDLER,
Defendant Below, Petitioner.

Appeal from the Circuit Court of Jackson County
The Honorable Lora A. Dyer, Judge
Criminal Action Nos. CC-18-2020-F-33 and 21-F-40

REVERSED AND REMANDED

Submitted: September 23, 2026
Filed: November 12, 2026

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CHIEF JUSTICE BUNN delivered the Opinion of the Court.

JUSTICE TRUMP dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo.* However, 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." Syllabus Point 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009).

2. "Under the provisions of the habitual criminal statute, [West Virginia Code § 61-11-19 (eff. 1943 through June 4, 2020)], the trial court is required to cause the defendant to be confronted at the same term of court at which he is convicted of the principal offense with the previous convictions contained in the information filed by the prosecuting attorney, and if this provision of the statute is not complied with the additional sentence to the maximum statutory sentence of the principal offense is void." Syllabus Point 2, *State ex rel. Albright v. Boles*, 149 W. Va. 561, 142 S.E.2d 725 (1965).

3. "The procedural recidivist requirements of W. Va. Code § 61-11-19 (1943) (Repl. Vol. 2010) are mandatory, jurisdictional, and not subject to harmless error analysis." Syllabus Point 1, *Holcomb v. Ballard*, 232 W. Va. 253, 752 S.E.2d 284 (2013).

4. "A procedural change in a criminal proceeding does not violate the *ex post facto* principle found in the *W. Va. Const.* art. III, § 4 and in the *U.S. Const.* art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed." Syllabus Point 7, *State ex rel. Collins v. Bedell*, 194 W. Va. 390, 460 S.E.2d 636 (1995).

5. "The primary purpose of our recidivist statutes, W. Va. Code, 61-11-18 (1943), and W. Va. Code, 61-11-19 (1943), is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses. 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." Syllabus Point 3, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992).

BUNN, Chief Justice:

This case concerns the timeliness of defendant Jason Swindler's arraignment on a recidivist information. On June 10, 2021, during the February term of court, a Jackson County jury convicted Mr. Swindler of all counts of a ten-count indictment charging various crimes, including grand larceny. These crimes were alleged to have occurred in January 2020. Shortly after the jury convicted Mr. Swindler, on June 15, 2021, the State filed a recidivist information alleging he had previously been convicted of certain predicate felonies. However, the circuit court did not arraign Mr. Swindler until June 22, 2021, which, pursuant to West Virginia Trial Court Rules 2 and 2.05, was the same day that the June term of court began in Jackson County. Mr. Swindler moved the court to dismiss the recidivist information on the basis that he was not timely arraigned during the same term of court as his conviction, as was required by West Virginia Code § 61-11-19 (eff. 1943 through June 4, 2020). The court denied his motion, finding that the June term of court had not begun until the grand jury was sworn in on the afternoon of June 22, after his arraignment. After a jury trial on the recidivist information, where he was found to be the person who committed numerous earlier felonies as alleged in the recidivist information, the court sentenced him for the crimes in the ten-count indictment and included a life sentence enhancement relating to the recidivist conviction. On appeal, Mr. Swindler asserts

that the circuit court erred by denying his motion to dismiss. We agree and reverse his recidivist conviction and remand for resentencing.[1]

I.

FACTUAL AND PROCEDURAL HISTORY

In February 2020, a Jackson County grand jury indicted Mr. Swindler in a ten-count indictment, including three counts of breaking and entering (Counts 1, 5, and 8),[2] three counts of grand larceny (Counts 2, 4, and 6),[3] three counts of misdemeanor destruction of property (Counts 3, 7, and 10),[4] and one count of attempt to commit a felony (Count 9).[5] The indictment alleged that all the crimes occurred in January 2020. Mr. Swindler's trial began in June 2021 during the February term of court in Jackson County. The jury returned a guilty verdict on all counts on June 10, 2021.

[1] Because we resolve Mr. Swindler's appeal on the ground relating to his untimely arraignment, we do not address his argument that the predicate offenses in the recidivist information did not qualify as felonies that would require a life sentence pursuant to West Virginia Code § 61-11-18.

[2] *See* W. Va. Code § 61-3-12.

[3] *See* W. Va. Code § 61-3-13.

[4] *See* W. Va. Code § 61-3-30.

[5] *See* W. Va. Code § 61-11-8.

On June 15, 2021, the State moved the court to file a recidivist information against Mr. Swindler, which the court granted on the same day and set June 22, 2021, as the date for the "return" of the recidivist information.[6] On the morning of June 22, 2021, the circuit court arraigned Mr. Swindler on that information via teleconference. However, because the Trial Court Rules established that a new term of court began in Jackson County on the fourth Tuesday of June—in this case June 22, 2021—Mr. Swindler moved to dismiss the recidivist information. He argued that the February term of court in which he was convicted expired on June 21, 2021, and that the procedural requirements of West Virginia Code § 61-11-19, discussed more herein, required him to be arraigned on the recidivist information during the same term of court in which he was convicted of the triggering offense.[7] In response to Mr. Swindler's motion, the State urged the circuit court to find that the February term of court did not end until the grand jury was impaneled for the new term of court on June 22, 2021, which occurred after Mr. Swindler's arraignment that morning.

The circuit court denied Mr. Swindler's motion to dismiss. In an August 24, 2021 order, the court found that "[t]he February 2021 term of the [c]ourt expired in the afternoon of June 22, 2021, at the time the June 2021 Grand Jury was impaneled by this

[6] The motion and recidivist information do not appear in the appendix, although the circuit court's order granting the motion is included.

[7] Again, the appendix does not contain the transcript of the arraignment, nor does it contain the motion Mr. Swindler filed later. This information is gleaned from the circuit court's order denying his motion to dismiss.

[c]ourt." The court then recited the 1943 version of West Virginia Code § 61-11-19 and concluded that Mr. Swindler was timely arraigned "within the term of the [c]ourt in which he was convicted[.]" The court reasoned that "the February 2021 term of the [c]ourt was not concluded until the afternoon of June 22, 2021, when the June 2021 Grand Jury was [impaneled]."

A jury subsequently found that Mr. Swindler was the same individual previously convicted of certain felonies as alleged in the recidivist information. In a sentencing order filed in November 2022,[8] the court sentenced Mr. Swindler, with the sentences for Counts 1 through 5 and Counts 7 through 10 to be served consecutively.[9] For Count 6, grand larceny, the court applied the recidivist enhancement and ordered that Mr. Swindler be "committed to the custody of the Commissioner of the Division of Corrections for life." The court ordered that his life sentence was to run concurrently with the

[8] The sentencing order indicates that the hearing occurred on October 4, 2022. The sentencing transcript was not included in the appendix.

[9] The consecutive sentences were as follows: Count 1, breaking and entering, imprisonment for one to ten years; Count 2, grand larceny, imprisonment for one to ten years; Count 3, misdemeanor destruction of property, one year in custody; Count 4, grand larceny, imprisonment for one to ten years; Count 5, breaking and entering, imprisonment for one to ten years; Count 7, misdemeanor destruction of property, one year in custody; Count 8, breaking and entering, imprisonment for one to ten years; Count 9, attempt to commit a felony, imprisonment for one to three years; and Count 10, misdemeanor destruction of property, one year in custody.

consecutive sentences. An order resentencing Mr. Swindler for the purposes of appeal was filed on June 1, 2023, and he subsequently appealed.

II.

STANDARD OF REVIEW

We review a circuit court's denial of a motion to dismiss an indictment—or here, an information—de novo:

> This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo.* However, 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.

Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009).

III.

DISCUSSION

We first discuss when a term begins, determine that Mr. Swindler was not timely arraigned on the recidivist information, then find that the circuit court erred by denying Mr. Swindler's motion to dismiss the information on that basis. We finally reject the State's argument, raised for the first time on appeal, that the June 5, 2020 version of the statute, rather than the 1943 version of West Virginia Code § 61-11-19, applied.

While the statutory eligibility for recidivist sentences is described in West Virginia Code § 61-11-18, West Virginia Code § 61-11-19, entitled "Procedure in trial of persons for second or third offense[,]" regards the specific procedure applicable to recidivist proceedings. In January 2020, when Mr. Swindler committed the underlying crimes as alleged in the indictment that gave rise to the recidivist information, the language of § 61-11-19 provided, in relevant part, the following:

> It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, *before expiration of the 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 is the same person or not.

W. Va. Code § 61-11-19 (eff. 1943 through June 4, 2020) (emphasis added).

The Court has held that the timing provision in § 61-11-19 relating to the defendant's arraignment is mandatory and, for the 1943 version of the statute, requires that a defendant be "confronted at the same term of court at which he is convicted":

> Under the provisions of the habitual criminal statute, [West Virginia Code § 61-11-19 (eff. 1943 through June 4, 2020)], the trial court is required to cause the defendant to be confronted at the same term of court at which he is convicted of the principal offense with the previous convictions

> contained in the information filed by the prosecuting attorney, and if this provision of the statute is not complied with the additional sentence to the maximum statutory sentence of the principal offense is void.

Syl. Pt. 2, *State ex rel. Albright v. Boles*, 149 W. Va. 561, 142 S.E.2d 725 (1965). Likewise, the Court has emphasized the mandatory nature of these procedural requirements, holding that "[t]he procedural recidivist requirements of W. Va. Code § 61-11-19 (1943) (Repl. Vol. 2010) are mandatory, jurisdictional, and not subject to harmless error analysis." Syl. Pt. 1, *Holcomb v. Ballard*, 232 W. Va. 253, 752 S.E.2d 284 (2013); *see also* Syl. Pt. 1, *Albright*, 149 W. Va. 561, 142 S.E.2d 725 ("The provisions of the habitual criminal statute, Code, 61-11-19, as amended, are mandatory and must be fully complied with."). In *Albright*, the Court considered the legality of an additional five-year habitual criminal sentence, pursuant to West Virginia Code § 61-11-18, when the defendant "was not confronted with the information at the same term at which he was convicted of the principal offense." 149 W. Va. at 563, 142 S.E.2d at 727. The defendant earlier pled guilty to a burglary charge contained in an indictment, which was considered in that case to be a conviction. *Id.* at 563-64, 142 S.E.2d at 727. In the next term of court, the prosecuting attorney filed an information alleging that the defendant had a prior felony conviction. *Id.* at 562, 142 S.E.2d at 727. The Court, finding that the defendant was not timely confronted with the information, reasoned that

> the trial court did not comply with the requirements of [West Virginia Code §] 61-11-19, as amended, in that it failed to cause the defendant to be confronted at the same term of court at which he was convicted of the principal offense with the

> previous conviction contained in the information filed by the prosecuting attorney.

Id. at 564, 142 S.E.2d at 727. The Court then resolved that "the additional sentence to the maximum statutory sentence for the principal offense is void[.]" *Id.*; *see generally Holcomb*, 232 W. Va. 253, 752 S.E.2d 284 (collecting cases reversing recidivist sentences when defendants were arraigned in the following term of court).

Similarly, in *Holcomb*, the State filed a recidivist information during the same term of court as the defendant's conviction and served a copy of the information on him, yet the defendant did not appear before the trial court on the information until a new term. 232 W. Va. at 254-55, 752 S.E.2d at 285-86. The Court recognized that, pursuant to West Virginia Code § 61-11-19, "a trial court is obligated to arraign a defendant on a recidivist information during the term of court in which the defendant is convicted." *Id.* at 256, 752 S.E.2d at 287. Finding that "the State failed to comply with the requirements of W. Va. Code § 61-11-19 insofar as [the defendant] was not arraigned on the information during the term of court in which he was convicted of the principal offense[,]" the Court voided the recidivist life sentence. *Id.* at 260-61, 752 S.E.2d at 291-92.

Certainly, based upon this Court's precedent, a defendant's arraignment on the information must occur within the same term of court as the conviction of the triggering offense. Whether Mr. Swindler was timely arraigned, however, depends upon when one

term of court is said to end and the next begins. The Trial Court Rules provide an unequivocal answer: the term of court is a day certain as opposed to dependent upon the timing of swearing in the grand jury. Trial Court Rule 2, entitled "Terms of Court[,]" states that, "The terms of the circuit courts shall commence and be held each year as provided in this rule." Rule 2.05 explains that for Jackson County, the circuit court term begins "on the fourth Tuesday in February, June, and October[.]"[10] In accordance with Rule 2.05, the June term began on June 22, 2021—the fourth Tuesday in June.

The State argues, in part, that the lower court did not abuse its discretion in determining when the term of court began. We disagree.[11] The simplicity of the issue before

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[10] This Rule states:

> Rule 2. Terms of Court.
>
> The terms of the circuit courts shall commence and be held each year as provided in this rule.
>
> . . . .
>
> Rule 2.05. Fifth Circuit.
>
> . . . for the county of Jackson, on the fourth Tuesday in February, June, and October[.]

[11] The State implies that West Virginia Code § 61-11-19 is ambiguous as to when a term begins by arguing that the circuit court did not abuse its discretion when it determined that when a term of court begins is based on certain occurrences (i.e., swearing in the grand jury) during that day. However, even if we agreed with the State's position regarding the flexibility of the statutory language, we note that any ambiguity must be construed in favor of a defendant. *See* Syl. Pt. 5, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d

the circuit court and this Court—when the term begins—seems obvious. However, in an apparent effort to cure the evident procedural defect, the circuit court reached for a statute allowing extension of the time for opening court where necessary and an inapplicable case from 1865 dealing with executions. Similarly, the State argued, for the first time on appeal, that a new version of West Virginia Code § 61-11-19 applied to Mr. Swindler's recidivist information. We address each in turn.

A. Mr. Swindler's arraignment was untimely pursuant to West Virginia Code § 61-11-19

As we discussed, Trial Court Rule 2 and Rule 2.05 establish that, in 2021, the circuit court's June term began June 22, 2021. The circuit court arraigned Mr. Swindler the morning the new June term began, at which point he was confronted by the recidivist information. Like the defendant in *Holcomb*, he was not arraigned during the term in which he was convicted, the February term. Thus his arraignment was untimely and disregarded the mandatory procedural requirements set forth in the statute. The circuit court's inquiry should have ended there. The circuit court erred by denying Mr. Swindler's motion to

257 (1995) ("In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant."). We have also "historically adopted a rather strict and narrow construction of our recidivist statute." *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 525, 276 S.E.2d 205, 207-08 (1981). Recognizing that "[h]abitual criminal proceedings" are "wholly statutory[,]" the Court has held that "[i]n such proceedings, a court has no inherent or common law power or jurisdiction[,]" and "such statutes are generally held to require a strict construction in favor of the prisoner." Syl. Pt. 2, in part, *id.* (quoting *State ex rel. Ringer v. Boles*, 151 W. Va. 864, 871, 157 S.E.2d 554, 558 (1967)).

dismiss the recidivist information pursuant to West Virginia Code § 61-11-19 and Syllabus Point 2, *Albright*, 149 W. Va. 561, 142 S.E.2d 725.

Furthermore, the circuit court's legal gymnastics erroneously justified Mr. Swindler's late arraignment based on the fact that Mr. Swindler happened to be arraigned before the court swore in the grand jury for the June term of court. The court erred when it relied on a statute regarding the administration of the courts and further determined that it could extend a term "when necessary," citing a syllabus point addressing the timing of executions. The court based its determination in part on West Virginia Code § 51-3-10, which notes that court need not be held "on the first day of a term" and a term may be "opened" before 4 p.m. on the third day of the term:

> Though court be not held on the first day of a term, it may nevertheless be opened on any subsequent day; provided, in the case of any court of record for any county, the same be done before four o'clock in the afternoon of the third day. If, after a court is opened, it fails to sit on any day, it may nevertheless sit on any subsequent day of the term: Provided, That in the case of any court of record for any county, there be not more than thirty consecutive days of such failure.

W. Va. Code § 51-3-10. The circuit court failed to explain its reliance on § 51-3-10, yet this reliance operates to create ambiguity where none exists in the text of the statute or the applicable Rule.[12] The statute specifies that court need not be held on the first day of the

[12] Further, neither the Trial Court Rule 2 nor West Virginia Code § 51-3-10 contemplates the grand jury's role in determining when a term opens. Under the circuit court's analysis, the term in which a defendant is arraigned depends on what time the

term and provides a distinction between the first day of the term and when the term must be *opened*—by 4:00 p.m. on the third day—thus implying that the first day of the term was, indeed, the first day of the term. *See* W. Va. Code § 51-3-10.

When refusing to dismiss the recidivist information, the circuit court, without further analysis, also claimed that *Boice v. State*, 1 W. Va. 329 (1865), "confirms the extension of a term of court if necessary." The court quoted, in part, *Boice*'s syllabus point regarding the execution of prisoners, which provides in full:

> A term of the circuit court does not necessarily begin on the day fixed by law, but may open before four o'clock in the afternoon of the third day thereafter; and therefore it is not error in a circuit court to enter judgment and order execution, against prisoners, who have been convicted for murder in one county, on the second day after the time fixed for the beginning of a term in an adjoining county of the same circuit.

Syl. Pt. 1, *Boice*, 1 W. Va. 329. The circuit court here relied on *Boice* to argue that extending the term was necessary, but fails to explain why this extension was necessary here. The court made no findings on that matter other than to note that it was "not subsequently in session to hold hearings" between the filing of the information on June 15, 2021, and June 22, 2021. In sum, the circuit court determined when the term began based upon an inapplicable statute, West Virginia Code § 51-3-10, and inexplicably relied on *Boice*. Yet, when the court arraigned Mr. Swindler, the February term had already ended, the June term

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arraignment hearing is set. This position is unsupported in the law and unworkable in practice.

had begun, and the court's determination and reliance on these authorities were merely an attempt to avoid its procedural errors in timely arraigning Mr. Swindler.

B. The 1943 version of West Virginia Code § 61-11-19, in effect when Mr. Swindler committed the triggering offense, applies

Having established that the circuit court erred in finding that it timely arraigned Mr. Swindler and by failing to dismiss the recidivist information, we now turn to the State's argument, submitted for the first time on appeal, that the June 5, 2020 version of West Virginia Code § 61-11-19 applies and provides other grounds for this Court to affirm the circuit court's refusal to dismiss the recidivist information. The State urges us to apply the amended version of the statute in effect at the time that the State filed the recidivist information as opposed to the time the triggering offense was committed. *See* W. Va. Code § 61-11-19 (eff. June 5, 2020). The amended statute provides, in relevant part, that

> A prosecuting attorney, when he or she has knowledge of a former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary, may give information thereof to the court immediately upon conviction and before sentence. Said court shall, *before expiration of the* ***next term*** *at which such person was convicted*, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he or she is the same person or not.

Id. (emphasis added). In arguing that this Court should affirm the circuit court by applying the amended statute that became effective months after Mr. Swindler committed the triggering offense, the State's position violates ex post facto principles.[13]

This Court has recognized that, "[u]nder *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). The Court has outlined when a *procedural* change in a criminal proceeding would be prohibited under ex post facto principles:

> 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.*

State ex rel. Collins v. Bedell, 194 W. Va. 390, 401, 460 S.E.2d 636, 647 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 42 (1990)). In discussing *Collins v. Youngblood*, the *Bedell* Court noted that the United States Supreme Court's *Collins* analysis means that "if

[13] The State admits that applying the amended statute would be a retroactive application of the statute, arguing that although "[t]he Legislature did not specifically direct that this amendment be applied retroactively, . . .it should nonetheless receive retroactive application." The State seeks the amended statute's use in an outcome-determinative approach, stating that "retroactive application" of the amended statute "aligns with ex post facto principles, applies here, and eliminates any question whether the procedural requirements of the 1943 version of the statute [were] satisfied."

the questioned procedural change does not fit into the above framework, then the procedural change in the criminal proceeding is not prohibited as *ex post facto*[.]" 194 W. Va. at 401, 460 S.E.2d at 647. The *Bedell* Court memorialized this analysis from *Collins* in a Syllabus Point, holding that

> A procedural change in a criminal proceeding does not violate the *ex post facto* principle found in the *W.Va. Const.* art. III, § 4 and in the *U.S. Const.* art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

Syl. Pt. 7, *id*.

Mr. Swindler committed the grand larceny triggering offense in January 2020, which ultimately gave rise to the recidivist information.[14] The commission of the triggering offense is what gives rise to recidivist prosecution. We have repeatedly recognized that the recidivism statute aims at deterring repeat offenders' conduct:

[14] Although the recidivist information was not included in the joint appendix, the court sentenced Mr. Swindler in accordance with the recidivist enhancement on a grand larceny charge arising out of an offense committed in January 2020. Furthermore, all the conduct in the underlying indictment, including the triggering offense or offenses, was alleged to have occurred in January 2020. We have recognized that "[w]here multiple sentences are imposed on a defendant arising out of multiple convictions rendered in the same criminal proceeding, and where there is a concomitant recidivist conviction, only one of the sentences may be subjected to a recidivist enhancement[,]" and the trial court has the discretion to select the sentence to be enhanced. Syl. Pt. 10, in part, *State v. Lewis*, 235 W. Va. 694, 776 S.E.2d 591 (2015).

> The primary purpose of our recidivist statutes, W. Va. Code, 61-11-18 (1943), and W. Va. Code, 61-11-19 (1943), is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses. 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.

Syl. Pt. 3, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992). A defendant's eligibility under the recidivist statutory scheme is not dependent upon when a defendant is *convicted* of the triggering offense. Rather, the recidivist statutes aim to deter him from *committing* that offense.

The State's alternate approach—applying the amended version of West Virginia Code § 61-11-19—would have extended the time frame for Mr. Swindler to have been arraigned, as he could have been arraigned during the *next* term of court. W. Va. Code § 61-11-19 (eff. June 5, 2020). Yet as discussed above, when Mr. Swindler committed the triggering grand larceny, the procedural statute mandated that he be arraigned during the same term of court. W. Va. Code § 61-11-19 (eff. 1943 through June 4, 2020). Again, this Court has previously described compliance with the recidivist procedural statute, West Virginia Code § 61-11-19, as "mandatory and jurisdictional[.]" *See* Syl. Pt. 1, in part, *Holcomb*, 232 W. Va. 253, 752 S.E.2d 284. Thus, in January 2020, when he committed the offense giving rise to the recidivist information, Mr. Swindler had a defense to the recidivist prosecution if he was not properly arraigned during the same term as the

conviction. Yet, had the later procedural statute been applied to his criminal proceeding, as the State now urges, he would no longer have this defense to prosecution under the recidivist statute. The June 5, 2020 version of the statute was not in effect when he committed the January 2020 triggering offense, and to apply the later version to his prosecution would "deprive" him of a "defense available according to law at the time when the act was committed." *See* Syl. Pt. 7, in part, *Bedell*, 194 W. Va. 390, 460 S.E.2d 636 (1995) (recognizing that "a procedural change in a criminal proceeding" violates ex post facto principles when it "deprives the accused of a defense which existed when the crime was committed").

IV.

CONCLUSION

For the reasons explained above, we reverse the June 1, 2023 order of the Circuit Court of Jackson County sentencing Mr. Swindler to a recidivist life sentence and remand the case to the circuit court to resentence Mr. Swindler in accordance with this opinion.

Reversed and remanded.