IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 21-0532
Case No. 17-F-147/19-F184
Circuit Court of Marion County

ADONNE A. HORTON,

Petitioner.

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ASSIGNMENT OF ERROR 1

The circuit court erred in imposing a life sentence on Petitioner under the West Virginia recidivist statute for the triggering offense of "Fleeing in a Vehicle with Reckless Disregard," punishable by one to five years imprisonment, when it conducted the wrong disproportionality of sentence analysis.

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

STATEMENT REGARDING ORAL ARGUMENT 5

ARGUMENT 5

The circuit court erred in imposing a life sentence on the Petitioner under the West Virginia recidivist statute for the triggering offense of "Fleeing in a Vehicle with Reckless Disregard," punishable by one to five years imprisonment, when it conducted the wrong disproportionality of sentence analysis.

STANDARD OF REVIEW: The standard of review for appeals regarding the constitutional proportionality of sentences is *de novo*. *State v. Hoyle*, syl. pt. 8, 242 W.Va. 599, 836 S.E.2d 817 (2019)("The Supreme Court of Appeals reviews sentencing orders, ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.") See also *State v. Kilmer*, syl. pt. 1, 240 W.Va. 185, 808 S.E.2d 867 (2017); *State v. Booth*, syl. pt. 1, 224 W.Va. 307, 685 S.E.2d 701 (2009) and *State v. Lucas*, syl. pt. 1, 201 W.Va. 271, 496 S.E.2d 221 (1997). 6

A. The Court Erred in Applying the New Recidivist Statute to the Petitioner. 7

B. The Court Erred in Relying on the Language of the Recidivist Statute in Rejecting the Claim of Constitutional Disproportionality 9

C. The Sentence of the Petitioner Shocks the Conscience 11

D. The Petitioner's Convictions should not Qualify Under the Recidivist Statute 14

CONCLUSION 17

TABLE OF AUTHORITIES

Calder v. Bull,
3 U.S. 386 (1798) 8

Johnson v. U.S.,
76 U.S. 591 (2015) 16

Solem v. Helm,
463 U.S. 277 (1983) 6, 10

State ex rel. Arbogast v. Mohn,
164 W.Va. 6, 260 S.E.2d 820 (1979) 8, 9

State ex rel. Boso v. Hedrick,
182 W.Va. 701, 391 S.E.2d 614 (1990) 6, 10

State v. Arbogast,
133 W.Va 672, 57 S.E.2d 715 (1950) 8, 9

State v. Blackburn,
2021 WL 1232088, (W.Va. 2021) (memorandum opinion) 15

State v. Booth,
224 W.Va. 307, 685 S.E.2d 701 (2009) 6

State v. Cline,
206 W.Va. 445, 525 S.E.2d 326 (1999) 4, 8, 9

State v. Cooper,
172 W.Va. 266, 304 S.E.2d 851 (1983) 7, 11

State v. Costello,
__ W.Va. __, 857 S.E.2d 51 (2021) 6, 7, 13, 14

State v. Davis,
189 W.Va. 59, 427 S.E.2d 754 (1993) 6

State v. Housden,
184 W.Va. 171, 399 S.E.2d 882 (1990) 15

State v. Hoyle,
242 W.Va. 599, 836 S.E.2d 817 (2019) ..... *passim*

State v. Kilmer,
240 W.Va. 185, 808 S.E.2d 867 (2017).....6

State v. Lane,
241 W.Va. 532, 826 S.E.2d 657 (2019).....14

State v. Lucas,
301 W.Va. 271, 496 S.E.2d 221 (1997).....6

State v. Miller,
184 W.Va. 462, 400 S.E.2d 897 (1990).....13

State v. Norwood,
242 W.Va. 149, 832 S.E.2d 75 (2019).....14

State v. Vance,
164 W.Va. 216, 262 S.E.2d 423 (1980).....6

State v. Wright,
91 W.Va. 500, 113 S.E. 764 (1922).....8

Wanstreet v. Bordenkircher,
166 W.Va. 523, 276 S.E.2d 205 (1981).....6

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 10 .....4, 8

U.S. Const. Amend. VIII 4, 10

W.Va. Const., Art III., § 4 .....4, 8

W.Va. Const., Art III., § 5 .....4, 6, 10

LEGISLATIVE MATERIALS

W.Va. Leg. 1994, c. 38. 17

STATUTES AND RULES

18 U.S.C. § 924.....16

W.Va. Code § 2-2-8 .....4, 8, 9

W.Va. Code § 15-12-8 15

W.Va. Code § 61-2-1 15

W.Va. Code § 61-2-7 15

W.Va. Code § 61-2-9 ..... 1, 11

W.Va. Code § 61-5-17 ..... 1, 11

W.Va. Code § 61-7-12 ..... 1, 11

W.Va. Code § 61-11-18 ..... 1, 3, 6, 7

W.Va. Code § 61-11-18 (2020) ..... *passim*

W.Va. Code § 61-11-19 1

W.Va. Code § 62-3-15 13

ASSIGNMENT OF ERROR

The circuit court erred in imposing a life sentence on Petitioner under the West Virginia recidivist statute for the triggering offense of "Fleeing in a Vehicle with Reckless Disregard," punishable by one to five years imprisonment, when it conducted the wrong disproportionality of sentence analysis.

STATEMENT OF THE CASE

The Petitioner, Adonne Horton, (referred to below as the Petitioner or Defendant) was indicted in Marion County on October 2, 2017, for one count of "fleeing in a vehicle with reckless disregard" in violation of W.Va. Code § 61-5-17(f). A.R. 511. The crime was alleged to have occurred on June 11, 2017. A.R. 511. The Petitioner was convicted after a jury trial on August 22, 2019. A.R. 425. The offense was punishable by a maximum of one to five years imprisonment. On September 4, 2019, the State filed an Information alleging that the Petitioner was a recidivist as a result of his reckless fleeing conviction being a third or subsequent felony offense pursuant to W.Va. Code §§ 61-11-18(c) and 61-11-19. A.R. 532. The information set forth that the penalty was confinement in the state correctional facility for life. The information alleged two prior convictions. The first was a June 13, 2003, conviction for wanton endangerment involving a firearm in violation of W.Va. Code § 61-7-12, and the second was a conviction on April 7, 1999, for malicious assault in violation of W.Va. Code § 61-2-9.

In response to the recidivist information, on April 8, 2021, the Petitioner admitted that he was the same person who was convicted of the two qualifying offenses, malicious assault and wanton endangerment, in 1999 and 2003 respectively. A.R. 463-65. This left the sentence to be imposed as the only issue. In between the time that the State filed the recidivist information on September 4, 2019, and the Petitioner's sentencing on May 21, 2021, the Legislature enacted a new version of the recidivist statue effective on June 5,2020. W.Va. Code § 61-11-18. This new

enactment, among other things, listed all the criminal offenses that served as triggering or qualifying offenses for recidivism purposes and provided a requirement that the triggering offense and both qualifying offenses must occur within a 20 year period. W.Va. Code § 61-11-18(a) and (d).

During the sentencing hearing on May 21, 2021 defense counsel argued to the circuit court that the new version of the recidivist statute was not the proper statute to be applied in this case since the recidivist information was filed in September 2019, prior to the enactment of the new law, and therefore the defendant objected to the use of that statute. A.R. 495. The Court ruled at the sentencing hearing that the triggering offense, reckless fleeing, and both prior qualifying offenses, wanton endangerment and malicious assault, were crimes that involved actual violence or threats of violence. A.R. 506. The court explained that all three offenses are listed as qualifying offenses in the newly enacted version of the recidivist statute, W.Va. Code § 61-11-18, that went into effect on June 5, 2020. A.R. 506. The court further opined that the 1999 and 2003 convictions were not stale since they both occurred within a 20 year period of the triggering offense. A.R. 506. This was an obvious reference to the new requirement in §61-11-18(d) of the June 5, 2020 version of the recidivist statute that the qualifying offenses and the triggering offense all occur within a 20 period. Finally, the court ruled that the sentence of life imprisonment is provided by W.Va. Code § 61-11-18(d). A.R. 506. This too was a reference to the new June 2020 version of the statute since the previous version did not contain a subsection (d), but the new version does.

At the sentencing hearing the court stated as follows:

> The Court has considered the proportionality issue raised by [defense counsel] Mr. Idler, both here today and in his sentencing memorandum, is of the opinion that based on the facts of these cases and the *clear language of the statute and the intention of the legislature* the sentence is not disproportionate to the charter or

> degree of these offenses. So the sentence to be imposed by the Court will be a sentence of imprisonment in the state correctional facility for life, understanding that he will be eligible for parole after 15 years. [emphasis added]

A.R. 506-07. In its sentencing order the court once again ruled that the triggering offense, reckless fleeing, and the prior qualifying offenses of wanton endangerment and malicious assault, involved violence or the threat of violence. A.R. 598. The court further ruled that "each of the offenses charged in the Information were 'qualifying offenses' identified by the Legislature under the new recidivist statute found in West Virginia Code §61-11-18." A.R. 598. The court continued by finding that the convictions were not stale or remote "as all the conduct occurred within a twenty-year period of time." A.R. 597-98. Finally, the court wrote the following:

> That the sentence imposed by W.Va. Code §61-11-18(d) or old §61-11-18(c), imprisonment for life, is not disproportionate based on the facts of each of the cases charged in the information as each involved actual violence or threats of violence, is therefore not unconstitutionally disproportionate. It is also appropriate based on the clear language of the statute.

A.R. 598.

The court never addressed the objection of the Petitioner to the court relying on the provisions of the new version of the recidivist statute either in its sentencing order or at the sentencing hearing. A.R. 495. The circuit court clearly relied on the new version a W.Va. Code § 61-11-18 when it rejected the staleness (remoteness) claim of the Petitioner and when it found that all of the Petitioner's convictions were qualifying offenses. A.R. 506, 597-98.

SUMMARY OF ARGUMENT

The Petitioner was sentenced to life in prison for reckless fleeing in a vehicle, an offense punishable by a maximum of one to five years imprisonment.

In this case the circuit court erred when it applied the newly enacted version of the recidivist statute since all of the Petitioner's offense conduct and convictions took place before its enactment and effective date. This violated the Petitioner's rights under the *ex post facto* clauses of the United States and West Virginia Constitutions. U.S. Const., Art. I, Sec. 10; W.Va. Const., Art III., § 4. Using the new statute also violated the Petitioner's rights under W.Va. Code § 2-2-8, known as the "savings clause," to have the version of a law in effect at the time of the commission of an offense govern the punishment. *State v. Cline*, 206 W.Va. 445, 451, 525 S.E.2d 326, 332 (1999).

The circuit court further erred when it relied on the specific language of either the old or the new statute in ruling on the issue of constitutional disproportionality. The petitioner's claim of disproportionality rests upon the West Virginia and U.S. Constitutions that prohibit disproportionally severe sentences. U.S. Const., 8th Amend.; W.Va. Const., Art. III, § 5. These Constitutional provisions are superior to, and trump, any statutes. The circuit court could only consider these constitutional provisions and the cases that interpret them, but could not deny a claim of disproportionality because of the wording of the statute itself.

Given the nature and time period covered by the Petitioner's convictions, the life sentence imposed by the court was so disproportionate as to shock the conscience of the Court and society. As such it was unconstitutional. *State v. Hoyle*, 242 W.Va. 599, 611-12, 836 S.E.2d 817, 829-30 (2019).

The circuit court also erred by never properly evaluating the staleness or remoteness claim of the Petitioner. The court simply rejected that claim for the reason that the new statute provided for a 20 year time frame in which all the offenses must have occurred. A.R. 506, 598. Accordingly, the circuit court did not conduct the proper analysis of this issue.

Finally, the court below erred in finding that a life sentence was not disproportionate since all of the Petitioner's convictions involved either actual violence, threatened violence, or had a substantial impact upon the victim such that harm results. This standard and test is vague, subjective and impossible to consistently apply. Therefore, the Petitioner seeks to have this Court adopt a new more objective test that would require at least two of the Petitioner's convictions to involve actual violence or at the minimum be offenses that are more likely than not going to be violent.

For all of these reasons this case should remanded to the circuit court for resentencing.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 20 oral argument, as counsel believes that a Rule 20 argument would be helpful to this Court and this case presents a question of first impression as to whether the recidivism statute in effect at the time of the Petitioner's triggering offense is applicable to his case, or whether a subsequently enacted statute governs his case. Furthermore, this appeal deals with unsettled issues concerning how circuit courts should deal with issues of remoteness or staleness in disproportionality challenges to the recidivism statute and what offenses qualify for purposes of the statute in light of the Legislature's decision to provide in 20 year "look back" period and list "qualifying offenses" in the new version of the statute. This case is appropriate for a published and signed opinion.

ARGUMENT

The circuit court erred in imposing a life sentence on the Petitioner under the West Virginia recidivist statute for the triggering offense of "Fleeing in a Vehicle with Reckless Disregard," punishable by one to five years imprisonment, when it conducted the wrong disproportionality of sentence analysis.

STANDARD OF REVIEW: The standard of review for appeals regarding the constitutional proportionality of sentences is *de novo*. *State v. Hoyle*, syl. pt. 8, 242 W.Va. 599, 836 S.E.2d 817 (2019)("The Supreme Court of Appeals reviews sentencing orders, ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.") See also *State v. Kilmer*, syl. pt. 1, 240 W.Va. 185, 808 S.E.2d 867 (2017); *State v. Booth*, syl. pt. 1, 224 W.Va. 307, 685 S.E.2d 701 (2009) and *State v. Lucas*, syl. pt. 1, 201 W.Va. 271, 496 S.E.2d 221 (1997).

The 8th Amendment to the United States Constitution forbids cruel and unusual punishment and carries an implicit requirement that a sentence should not be disproportionate to the crime committed. *State ex rel. Boso v. Hedrick*, 182 W.Va. 701, 708-09, 391 S.E.2d 614, 621-22 (1990) citing *Solem v. Helm*, 463 U.S. 277, 286 (1983). The Constitution of West Virginia also provides that criminal "[p]enalties shall be proportioned to the character and degree of the offence." W.Va. Const. Art. III, § 5. *State v. Vance*, syl. pt. 8, 164 W.Va. 216, 262 S.E.2d 423 (1980). This Court has recognized that sentences enhanced under the West Virginia recidivist statute are just as susceptible to violate the proportionality requirement as set forth in the West Virginia Constitution as an ordinary sentence. *State v. Davis*, 189 W.Va. 59, 61, 427 S.E.2d 754, 756 (1993) citing *State v. Vance, supra.*

At the time of the Petitioner's two qualifying offenses and his triggering offense the recidivist statute in effect was W.Va. Code § 61-11-18. This was one of the most draconian recidivist statutes in the United States. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 536, 276 S.E.2d 205, 213 (1981). In recent years this Court has ruled for purposes of a life sentence under this statute that two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) a substantial impact upon the victim such that harm results. *State v. Costello*, syl. pt. 7, __ W.Va. __, 857 S.E.2d 51 (2021); *State v. Hoyle*, syl. pt. 12, 242 W.Va. 599, 836 S.E.2d 817 (2019). In doing this analysis initial emphasis is given to

the nature of the final offense which triggers the recidivist life sentence. *Costello*, *supra*, syl. pt. 6; *Hoyle, supra*, syl. pt. 11.

Finally, any sentence, recidivist or otherwise, is unconstitutionally disproportionate under both the West Virginia Constitution and the U.S. Constitution if it shocks the conscience of the Court and society and offends fundamental notions of human dignity. *State v. Cooper*, syl. pt. 5, 172 W.Va. 266, 272, 304 S.E.2d 851, 856-57 (1983); *State v. Hoyle, supra*, 242 W.Va. at 611-12, 836 S.E.2d at 829-830. If the sentence is so offensive that it cannot pass this societal and judicial sense of justice the inquiry need not proceed further. The sentence is unconstitutionally disproportionate. *Id.*

A. The Court Erred in Applying the New Recidivist Statute to the Petitioner

The circuit court, in sentencing Petitioner to life in prison, made it clear that it was relying upon the new version of W.Va. Code § 61-11-18 that went in effect June 5, 2020, even though Petitioner had objected to it being applied to him since it was enacted after all of the Petitioner's convictions. A.R. 495, 506. The court expressly referred to the "recent amendment to the West Virginia Code §61-11-18(a), the recidivist statute, in so far as all three of these offenses are now recognized as qualifying offenses under the recidivist statute" during the sentencing hearing (A.R. 506) and later in the sentencing order. A.R. 598. Furthermore, the court stated at sentencing and in the sentencing order that it was of the opinion that these convictions are not stale because the conduct underlying the offenses all occurred within a 20 year period. A.R. 506, 598. This was a reference to the 20 year "look back" period contained in the new version of W.Va. Code § 61-11-18(d). Finally, the court cites subsection (d) as authority for imposing a life sentence. A.R. 506. Subsection (d) did not exist in the old version of § 61-11-18.

In applying the new recidivist statute to Petitioner's case the circuit court erred for two reasons. First, using the June 5, 2020 effective version of the statute that was enacted during the 2020 session of the Legislature violated the *ex post facto* clauses of both the United States and West Virginia Constitutions. U.S. Const., Art. I, Sec. 10; W.Va. Const., Art. III, § 4. See *Calder v. Bull*, 3 U.S. 386, 390 (1798). This is plain blackletter law. The new version of the sentencing statute was enacted and became effective June 5, 2020. All three of Petitioner's convictions and all of the offense conduct took place before this date. When Petitioner was sentenced on May 21, 2021 the circuit court erred when it, over the objection of the Petitioner, applied the new statute to his case.

Second, W.Va. Code § 2-2-8, generally known as the "savings statute" or "savings clause," "establishes a general rule that the statute in effect at the time of the commission of an offense governs the character of the offense and, generally, the punishment prescribed thereby." *State v. Cline*, 206 W.Va. 445, 451, 525 S.E.2d 326, 332 (1999); *State ex rel. Arbogast v. Mohn*, 164 W.Va. 6, 9, 260 S.E.2d 820, 822 (1979); *State v. Wright*, syl. pt. 4, 91 W.Va. 500, 113 S.E. 764 (1922). W.Va. Code § 2-2-8 in its entirety reads as follows:

> The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall confirm as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specially provided; and that *if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect.* [emphasis added]

The *Arbogast* case also holds that "[W]hen a criminal defendant is entitled to elect the law under which he is to be sentenced, it must appear from the record that he has been fully advised of his right to elect and he must be given an opportunity to exercise that right by the court." *State v. Arbogast, supra*, syl. pt. 3.

In the present case the circuit court used and relied upon the new recidivist law in imposing the Petitioner's sentence. Not only did the court fail to offer the Petitioner an opportunity to elect either the old law or the new law, but it actually applied the new law to his case over the objection of his counsel. A.R. 495. The new version of the statute was disadvantageous to the Petitioner with respect to the remoteness or staleness argument made by his counsel based on the fact that the qualifying convictions were from 1999 and 2003, since the offenses were all within the 20 year "look back" period contained in the new law. A.R. 493-95, 519-20. The new statute was also disadvantageous to the Petitioner since the court relied on it for rejecting the argument that his convictions were not qualifying offenses under the old law, since they were expressly listed under the new statute. A.R. 492-94, 517-19.

The facts of this case and the applicable law make it clear that the circuit court erred when it applied and relied upon the new recidivist statute in sentencing the defendant and rejecting his constitutional disproportionality claim. The Petitioner's rights were violated under the State and Federal *ex post facto* clauses and under W.Va. Code § 2-2-8 and the *Cline* and *Arbogast* cases. This case should be remanded to the circuit court for proper sentencing.

B. The Court Erred in Relying on the Language of the Recidivist Statute in Rejecting the Claim of Constitutional Disproportionality

The circuit court at the sentencing hearing and in its sentencing order justified the life sentence imposed on the Petitioner as not constitutionally disproportionate based on the language of the recidivist statute itself. A.R. 506, 598. Whether the court was relying on the old or new version of the recidivist statute the court erred in considering and relying on the wording of either statute itself to determine whether a life sentence was disproportional from a constitutional standpoint. The entire point of a constitutional challenge to a sentence is that the sentence

provided by the statute is unconstitutionally severe and disproportionate as applied in a given case to a given defendant. The answer to this question cannot be found in the statute itself. The requirement that criminal sentences "shall be proportioned to the character and degree of the offence" is found in the West Virginia Constitution. W.Va. Const. Art III, § 5. Likewise, the 8th Amendment to the U.S. Constitution carries an implicit requirement that a sentence not be disproportionate to the crime committed. *State ex rel. Boso v. Hedrick, supra,* and *Solem v. Helm, supra.* These constitutional provisions are superior to, and trump, any statutory provisions in either West Virginia's old or new recidivist statute.

At the sentencing hearing, the court stated that all of the Petitioner's convictions involved "actual violence or threats of violence that's been recognized *by the legislature* in the recent amendment to the West Virginia Code §61-11-18(a), the recidivist *statute*, in so far as all three of these offenses are now recognized as qualifying offenses under the recidivist *statute*." [emphasis added] A.R. 506. The court also spoke of the 20 year period in the new version of the statute. A.R. 506. The court went on the say that "[t]he sentence is provided *by the legislature* in West Virginia Code §61-11-18(d). It is a sentence of imprisonment in the state correctional facility for life." [emphasis added] A.R. 506. The court concludes with the statement that it is "of the opinion that based on the facts of these cases and the *clear language of the statute* and the *intention of the legislature* the sentence is not disproportionate...." [emphasis added] A.R. 506. The court makes similar statements indicating reliance upon the wording of the statute and the intention of the legislature in the sentencing order. A.R. 598.

With regard to a challenge to a sentence based on unconstitutional disproportionality the clarity of the language of a statute and the intention of the legislature are simply irrelevant. The circuit court was free to consider the constitutional provisions themselves and the State and

Federal case law interpreting and applying those provisions, but was not allowed to answer the question of disproportionality by reference to the recidivist statute, either old or new, itself. In doing so the circuit court erred, and accordingly, this case should be remanded for a proper sentencing.

C. The Sentence of the Petitioner Shocks the Conscience

The Petitioner was convicted of the final triggering offense of reckless fleeing in a vehicle in violation of W.Va. Code § 61-5-17(f) in 2019. This is ordinarily punishable by one to five years imprisonment. His prior qualifying offenses were a malicious assault conviction (W.Va. Code § 61-2-9) from 1999, punishable by two to ten years imprisonment, and a 2003 conviction for wanton endangerment (W.Va. Code § 61-7-12) punishable by one to five years. A.R. 532-33. The malicious assault took place on March 26, 1998. A.R. 573. The wanton endangerment took place on April 17, 2002. A.R. 574. The final triggering reckless fleeing happened on June 11, 2017. A.R. 511, 582. The Petitioner received a life sentence for the final triggering offense of reckless fleeing pursuant to the recidivist statute on May 21, 2021. A.R. 598-99.

As indicated above, any sentence, recidivist or otherwise, is unconstitutionally disproportionate under both the West Virginia and U.S. Constitutions if it shocks the conscience of the Court and society and offends fundamental notions of human dignity. *State v. Hoyle, supra*, 242 W.Va. at 611-12, 836 S.E.2d at 829-30; *State v. Cooper, supra*, syl. pt. 5. The sentence imposed in this case should shock the conscience of the Court and society and is offensive to fundamental notions of human dignity. The Petitioner in effect received a life sentence for recklessly fleeing the police in his automobile. A crime punishable by one to five years imprisonment.

The evidence at trial was simple. A police officer attempted to arrest the Petitioner at a gas station for some outstanding municipal misdemeanor warrants. A.R. 231-32. The Petitioner got in his car and drove away. A.R. 232. The police pursued him for several minutes. A.R. 232-240. He drove through several stop lights and signs and at one point went the wrong way down a one-way street. A.R. 232-40. He was arrested after his car struck a curb and was damaged. A.R. 240-41. Trial exhibits 1 through 5 appear in the record and are photographs of the car. A.R. 526-30. Exhibit 4 reflects that the car's front passenger side wheel appears the damaged. A.R. 529. The car does not appear to be otherwise damaged. There was no evidence that there was any other property damage or that anyone was injured. The Petitioner's actions did create a danger of personal injury or greater property damage, but none occurred.

The Petitioner's qualifying offense of malicious assault that occurred in 1998 when he was 22 years old and involved him hitting his girlfriend causing her to sustain a concussion, a bruise to her forehead and a broken finger. A.R. 573. The Petitioner's qualifying offense of wanton endangerment that occurred in 2002 when he was 26 years old and involved him pointing a pistol at a man. A.R. 574. The Petitioner is currently 45 years of age. A.R. 562. Petitioner's malicious assault conduct occurred about 19 years and two and half months before his reckless fleeing triggering conduct occurred, and about 23 years and two months before he was sentenced to life for the triggering reckless fleeing conduct on May 21, 2021. Likewise, his wanton endangerment conduct occurred about 15 years and two months before the triggering conduct and about 19 years and one month before he was sentenced to life in prison.

Petitioner's counsel below argued to the court that the two qualifying offenses were so stale or remote in time as to render a life sentence disproportionate. A.R. 493-95, 519-20. This argument had merit. The circuit court however resolved this issue by simply finding that all

three offenses occurred within the 20 year time period set forth in the newly enacted version of the recidivist statute. A.R. 506, 598. For the reasons set forth above this was impermissible and irrelevant. It is also important to note that the seriousness of the Petitioner's offenses seem to be declining. The first offense, malicious assault, involved actual violence against a person. The second offense, wanton endangerment, involved, at most, a threat. And finally, the last trigging offense, reckless fleeing, involved grossly negligent or reckless behavior. This Court has made it clear that it will give "initial emphasis" to the nature of the final triggering offense. *State v. Costello, supra*, syl. pt. 6; *State v. Hoyle, supra*, syl. pt. 11. Given the nature of the triggering offense and the remoteness in time and nature of the qualifying offense this is a compelling argument. This Court has agreed with this argument before. In *State v. Miller*, 184 W.Va. 462, 465, 400 S.E.2d 897, 900 (1990) this Court concluded that a life sentence was disproportionate in part because the offenses spanned a period of 25 years and the maximum penalty for the triggering offense was only ten years. Here the triggering offense carries a maximum penalty of only five years. But the circuit court never adequately considered these factors since it simply relied on the 20 year time period set forth in the new version of the recidivist statute.

Given the circumstances of the triggering offense of reckless fleeing and the remoteness and nature of the qualifying offenses the life sentence imposed upon the Petitioner is shocking and is grossly disproportional to culpability. It is hard to believe that any of the jurors who convicted the Petitioner at his trial would have thought a life sentence to be a reasonable, fair or just punishment for the Petitioner's conduct, even if they were aware of his past record. The life sentence imposed on the Petitioner is the same as that imposed for first degree murder, with mercy (W.Va. Code § 62-3-15), when in the Petitioner's case the triggering offense involved no victims, injuries, weapons, drugs or any other aggravating circumstance.

Accordingly, given the nature and circumstances of the Petitioner's convictions, especially the final triggering offense, and given the remoteness in time of the qualifying offenses, which the court never properly considered, the life sentence of the Petitioner is shocking to the conscience and unconstitutionally disproportionate. This case should be remanded to the court below to reconsider these matters and resentence the Petitioner.

D. The Petitioner's Convictions should not Qualify Under the Recidivist Statute

The current law is that for purposes of a recidivist life sentence two out of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. *State v. Costello, supra,* syl. pt. 7; *State v. Hoyle, supra*, syl. pt. 12. Of the Petitioner's convictions only the 1999 conviction for the 1998 assault was actually violent. The 2003 conviction for the 2002 wanton endangerment involved at most only a threat of violence. The Petitioner's 2019 conviction for the 2017 reckless fleeing involved the possibility that something violent would occur. Even under this current law, for the reasons set forth above, this case should be remanded to the circuit court so it can properly weigh the various factors specific to the Petitioner in determining whether to impose a life sentence.

This case also presents an opportunity for this Court to reconsider the current "two out of three" standard, particularly in light of the newly enacted version of the recidivist statute. The present standard is vague, subjective and not based on firm principles. In essence any felony that involves even the potential for violence will qualify. In addition to obviously violent crimes, this Court has held delivery of heroin to qualify, while ruling that delivery of oxycodone does not qualify. *State v. Norwood*, 242 W.Va. 149, 832 S.E.2d 75 (2019) (heroin); *State v. Lane,* 241 W.Va. 532, 826 S.E.2d 657 (2019) (Oxycodone). The Court has also included offenses such as

burglary and even grand larceny. *State v. Blackburn*, 2021 WL 1232088, p. 3 (Memo. Opinion) (W.Va. 2021); *State v. Housden,* 184 W.Va. 171, 175, 399 S.E.2d 882, 886 (1990). In *State v. Hoyle, supra*, two Justices of this Court, concurring in part and dissenting in part, expressed the opinion that second offense failure of a sex offender to update in violation of W.Va. Code § 15-12-8(c) was a qualifying offense because it involved a risk of threatened violence. *State v. Hoyle*, 184 W.Va. at 617, 836 S.E.2d at 835. The point is not that these two Justices were wrong. The point is that they may have been right considering the vague standard being applied. It is not even clear from the current state of the law whether circuit courts in applying the standard should use a categorical approach and only consider the elements of an offense or if courts should look behind the mere elements and determine if the crime actually did involve violence or its threat. In at least one case the presence of a tire iron with the Petitioner's DNA was relied upon in finding that an offense qualified. *State v. Blackburn, supra*, p. 3. Given the present standard no judge, lawyer or defendant could possibly know in advance with reasonable certainty which offenses qualify, and which do not. The new version of the recidivist statute will partly solve this problem going forward by excluding certain offenses from the list contained in the statue. But the problem will still exist for constitutional disproportionally challenges to violations of the listed offenses.

Another problem is determining what exactly "violent" means. For example, an attempt to kill by poison in violation of W.Va. Code § 61-2-7 would not involve any violence, threat of violence or impact a victim if the intended victim did not ingest the poison. For that matter, actually murdering a person by poison in violation of W.Va. Code 61-2-1 would not involve any violence. It would involve death by a non-violent means. Petitioner's counsel suspects that what the Court means in its decisions is that there must be physical injury or threat of physical injury.

But that is not what the case law says. The bottom line is that the present "two out of three" violent offense standard requires this Court and circuit courts to often make subjective determinations as to what offenses qualify. Under this standard, what circuit courts find to be offenses that threaten violence will vary from judge to judge.

In the case of *Johnson v. U.S.*, 576 U.S. 591 (2015) the United States Supreme Court found that 18 U.S.C. § 924(e)(2)(B)(ii) in defining a "violent felony" was in part so vague as to violate a criminal defendant's right to due process. The Court held that the language, "or otherwise involves conduct that presents a serious potential risk of physical injury to another," was unconstitutionally vague. *Id.* at 597-99. The current standard for determining disproportionality under the West Virginia recidivist statute suffers from the same problem. While a crime that involves actual violence can be reasonably determined, one that only involves potential risk of violence cannot be, as evidenced by the dissent in the *Hoyle* case, *supra*. Furthermore, the decision as to what sentence is disproportionate cannot be left to the Legislature. While the Legislature may definitively exclude certain offenses from being a qualifying crime, it cannot determine in a particular case whether a life sentence imposed on a defendant who has three statutorily qualifying convictions is disproportionate. That determination will always be left to the courts, as interpreters of the West Virginia and United States Constitutions.

The Petitioner requests that this Court reconsider and change the current standard for determining disproportionality of life sentences under the West Virginia recidivist statute. Given the fact that effective in 2020 there was a new recidivist statute such a reconsideration at this time is particularly appropriate. The Petitioner further requests that the new standard require at least two of the three offenses be determined by the circuit court to have involved actual violence

or at least the offense was such that actual violence was likely. The Petitioner's three offenses involved one violent crime, that being a 23 year old assault. There are many possible new standards that would be more objective, principled and would yield greater predictability than the current vague and subjective rule. Finally, in adopting a new standard the Petitioner requests the Court reverse and set aside his life sentence and remand this case to the circuit court for reconsideration of the constitutional disproportionality issue with regard to the Petitioner's sentence in light of any new standard set forth by the Court.

CONCLUSION

The life sentence of the Petitioner is based on three instances of felonious conduct from as far back as more than 23 years before his sentencing hearing. The most serious offense in terms or punishment is his 1998 assault case. It was punishable by two to ten years imprisonment. The Petitioner then had a 2003 conviction for a wanton endangerment in 2002, punishable by one to five years imprisonment. Wanton endangerment did not even exist as an offense in West Virginia until 1994. Acts of the W.Va. Leg. 1994, c. 38. Finally, the Petitioner recklessly fled from the police in his car in 2017 and was convicted in 2019. This would normally be punishable by one to five years. The Petitioner received a life sentence, with eligibility for parole in 15 years. This sentence is outrageous. It shocks the conscience. It is disproportionate to the culpability of the Petitioner.

The current standard for determining constitutional disproportionality which provides that two of the three qualifying convictions be for actual violence or threatened violence is vague and unworkable. The circuit court erred in relying on the new version of the recidivist statute, particularly in relation to the claim of remoteness or staleness, and further erred in relying on the

language of either the new or old statute in determining whether a life sentence was disproportionate in this case.

For all the reasons set forth above this case should be remanded to the circuit court with direction to resentence the Petitioner and reconsider the issue of constitutional disproportionality in light of this Court's decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Gary A. Collias, counsel for Petitioner, Adonne Horton, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *"Appendix Record"* to the following:

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