IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0532

STATE OF WEST VIRGINIA,

Respondent,

v.

ADONNE A. HORTON,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the June 7, 2021, Order
Circuit Court of Marion County
Case No. 17-F-147

PATRICK MORRISEY
ATTORNEY GENERAL

MARY BETH NIDAY
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 9092
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: Mary.b.Niday@wvago.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules

Statutes

Other Authorities

INTRODUCTION

Respondent State of West Virginia, by counsel, Mary Beth Niday, Assistant Attorney General, respectfully responds to Adonne A. Horton's ("Petitioner's") Brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, his conviction and sentence should be affirmed.

ASSIGNMENT OF ERROR

Petitioner, by counsel, advances a single assignment of error in this appeal: "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." (Pet'r Br. 1.)

STATEMENT OF THE CASE

Petitioner was indicted on October 2, 2017, by a Marion County, West Virginia, grand jury of one count of Fleeing in a Vehicle with Reckless Disregard, in violation of West Virginia Code § 61-5-17(f). (App. 511.) The Indictment charged that on June 11, 2017, Petitioner intentionally fled in a vehicle from the Fairmont City Police Department "while operating said vehicle at high rates of speed, passing other vehicles in the opposing lane of traffic, disregarding traffic lights, driving through busy intersections without yielding, and then crashing his vehicle into a curb," after having been given clear visual and audible signals to stop by law enforcement. (App. 511.) On August 22, 2019, a jury convicted Petitioner of the single charge. (App. 425.)

Following this conviction, the State filed a Recidivist Information on September 4, 2019, charging Petitioner with Third or Subsequent Offense Felony Recidivist in violation of West Virginia Code §§ 61-11-18(c) and 61-11-19. (App. 532.) The Information alleged that (1) on

August 22, 2019, Petitioner was convicted of felony Fleeing in a Vehicle with Reckless Disregard in violation of West Virginia Code § 61-5-17(f); (2) on June 13, 2003, Petitioner was convicted of felony Wanton Endangerment Involving a Firearm in violation of West Virginia Code § 61-7-12; and (3) on April 7, 1999, Petitioner was convicted of felony Malicious Assault in violation of West Virginia Code § 61-2-9. (App. 532–33.)

Petitioner entered into an agreement with the State on April 8, 2021, whereby he admitted he was the individual who committed the three prior felonies as alleged in the Recidivist Information and, in exchange, the State dismissed other non-related criminal cases then pending against Petitioner. (App. 461, 464–65, 467.) The Circuit Court adjudged Petitioner guilty of the offense of Third or Subsequent Offense Felony Recidivist as charged in the Information. (App. 468.)

Petitioner submitted a Memorandum of Law Regarding Sentencing on May 7, 2021, (App. 513–24), arguing that despite the mandatory language of West Virginia Code § 61-11-18(c), any life sentence imposed under the recidivist statute "is subject to scrutiny under the proportionality clause of the Constitution" (App. 515). He asserted that a life sentence was disproportionate because the triggering offense— Fleeing in a Vehicle with Reckless Disregard—was not a crime of violence (App. 517–19), the underlying offenses occurred more than twenty years ago (App. 519–20), and the Circuit Court could impose a sentence alternative to a life sentence. (App. 520–23.)

The State filed its Memorandum of Law Regarding Sentencing on May 11, 2011. (App. 538–58.) Regarding the crime of violence issue, the State cited *State v. Hoyle*, 242 W.Va. 599, 836 S.E.2d 817 (2019), and argued that although all three of Petitioner's convictions are crimes of violence, only two of the three convictions needed to involve an element of violence. (App. 547–

48.) Regarding staleness or remoteness of the prior convictions, the State argued pursuant to the holding in *State v. Jones*, 187 W.Va. 600, 603–04, 420 S.E.2d 736, 739–40 (1992), that absent any statutory provision, the remoteness of a prior conviction is not to be considered. (App. 549.) Moreover, the State also cited *State v. Miller*, 184 W.Va. 462, 463, 400 S.E.3d 897, 898 (1990), noting the Court's rejection of a defendant's claim that it could not consider convictions from 1961 as compared to a 1986 triggering offense conviction date. (App. 550.)

Regarding Petitioner's convictions, the State asserted the circumstances surrounding the Fleeing in a Vehicle with Reckless Disregard conviction included Petitioner driving at least fifty miles per hour, passing a car, driving the wrong way down a one-way road by a grade school, running stop signs, and endangering motorists and others present at intersections. (App. 552–53.) The State opined that Petitioner's actions "threatened harm to the community at large, [and] that his use of his vehicle as a means of flight also created the potential for the use of the vehicle as a weapon to every individual who was on the walks or sidewalks of Fairmont at the time [Petitioner] fled with a reckless disregard for the safety of others[.]" (App. 554.) The State further argued that even under the amendments to the life recidivist statute in June 2020, Petitioner's three convictions are qualifying offenses that fall within the twenty-year provision. (App. 555–56.) Consequently, the State recommended that the Circuit Court impose a life recidivist sentence. (App. 556–57.)

Petitioner's sentencing hearing was held on May 21, 2021. (App. 472–510.) During the hearing, Petitioner introduced the testimony of three character witnesses and his own statement acknowledging his conduct and the efforts he had taken to change his behavior. (App. 476–91, 498–501.) Petitioner's counsel argued that a life recidivist sentence for Petitioner was disproportionate to the crimes committed. (App. 492.) Under a proportionality review, counsel asserted that the triggering offense of Fleeing with Reckless Disregard did not involve actual or

threatened violence. (App. 492–93.) Citing *State v. Miller*, for the proposition that a recidivist life sentence was disproportionate for a triggering offense that carried a one to ten year sentence, counsel argued that the instant triggering offense was subject to an even lesser sentence of only one to five years of imprisonment. (App. 493–94.) Counsel further argued pursuant to *Miller* that Petitioner's two prior offenses were too remote to be considered because they were eighteen and twenty-two years ago. (App. 494.) Counsel also objected to the Circuit Court's use of the June 2020 amendments to the life recidivist statute because the Recidivist Information was filed prior to the effective date of the amendments. (App. 495.) Finally, counsel highlighted Petitioner's successful participation in the work release program and various classes, including substance abuse classes, he took to obtain release on parole. (App. 496–97.) Counsel concluded by asking "[h]ow does an individual go from working six days a week in our community to facing a life sentence?" (App. 497.)

In response, the State asserted that a life recidivist sentence "is not for the triggering offense, which granted in this case is a one to five. It is for reconciling a life that is involved, the commission of offenses over a period of time." (App. 502.) In considering Petitioner's presentence investigation report ("PSI"), the State averred that it was clear that Petitioner's span of criminal history had been his entire life. (App. 502.) Regarding the triggering offense, the State asserted that it and the prior two offenses all were considered crimes of violence for recidivist purposes. (App. 502, 504.) The State, therefore, recommended a proportionate life recidivist sentence. (App. 505.)

The Circuit Court found that "based on the facts of [the three prior felony cases] and the clear language of the statute and the intention of the legislature the [life recidivist] sentence is not disproportionate to the character or degree of these offenses." (App. 506.) The Circuit Court,

therefore, by Order entered June 7, 2021, imposed a life sentence with mercy that provided Petitioner parole eligibility after fifteen years. (App. 507.)

Petitioner appealed.

SUMMARY OF THE ARGUMENT

Petitioner's sole contention that the Circuit Court erred in imposing a life recidivist sentence is without merit and should be dismissed. In so arguing, Petitioner's claim that the Circuit Court violated the Ex Post Facto Clause of the United States and West Virginia Constitutions cannot stand because any error the Circuit Court may have committed in applying the June 5, 2020, amendments to West Virginia Code § 61-11-18 to Petitioner's sentencing was harmless because such application was not to Petitioner's disadvantage.

Moreover, Petitioner has failed to demonstrate that his life recidivist sentence met the subjective or objective tests for disproportionality and, therefore, his recidivist sentence was constitutionally proportionate.

For these reasons, the June 7, 2021, Sentencing Order of the Circuit Court of Marion County should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent disagrees with Petitioner that oral argument is necessary and asserts that this case is not one of first impression and is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

STANDARD OF REVIEW

"[S]entencing orders are reviewed 'under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. Syllabus Point 1, in part, *State v. Lucas*,

201 W.Va. 271, 496 S.E.2d 221 (1997).' Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011)." *State v. Costello*, 245 W.Va. 19, __, 857 S.E.2d 51, 64 (2021).

ARGUMENT

Petitioner's assignment of error focuses on whether his life sentence with mercy, imposed by the Circuit Court pursuant to West Virginia Code § 61-11-18(c), violates the proportionality clause of the West Virginia Constitution. Petitioner first argues that the Circuit Court erred in relying upon the June 5, 2020, amendments of Section 61-11-18 because such application "violated the ex post facto clauses of both the United States and West Virginia Constitutions" and was contrary to the savings clause. (Pet'r Br. 7–9.) Second, Petitioner contends that the Circuit Court erred in relying on the language of the recidivist statute in rejecting the claim of constitutional disproportionality rather than applying the subjective and objective proportionality review standards. (Pet'r Br 9–14.) Finally, Petitioner asserts that his prior convictions are not qualifying offenses under the recidivist statute because only the 1999 conviction for assault involved any element of violence. (Pet'r Br. 14–17.)

1. The Circuit Court did not violate the Ex Post Facto Clauses of the United States and West Virginia Constitutions.

Petitioner first argues that the Circuit Court committed reversible error in applying the June 5, 2020, amendments to the recidivist statute because such application violated the ex post facto clauses of the United States and West Virginia Constitutions and violated the savings clause, West Virginia Code § 2-2-8. (Pet'r Br. 7–9.)

"'Under Ex post facto principles of the United State 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)." *State ex rel. Phalen v. Roberts*, 245

W.Va. 311, 858 S.E.2d 936, 945 (2021). Consequently, for a criminal statute to be considered ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must *disadvantage* the offender affected by it." *Id.* (emphasis added) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

"The statutory penalty in effect at the time of a defendant's criminal conduct shall be applied to the defendant's conviction(s). Where a statutory amendment mitigating punishment becomes effective *prior to sentencing*, West Virginia Code § 2-2-8 (2013) allows a defendant to seek application of the mitigated punishment before the trial court." *State v. Ingram*, No. 19-0016, 2020 WL 6798906, at *3 (W.Va. Nov. 19, 2020) (memorandum decision) (emphasis in original) (quoting Syl. Pt. 13, in part, *State v. Shingleton*, 237 W.Va. 669, 790 S.E.2d 505 (2016), *superseded by statute on other grounds, State v. Sites*, 241 W.Va. 430, 825 S.E.2d 758 (2019).

During the May 21, 2021, sentencing hearing, the Circuit Court recognized the "recent amendment to the West Virginia Code 61-11-18(a)," and found that all three of Petitioner's prior convictions were qualifying offenses under the recidivist statute and were not stale "because the conduct underlying the offenses all occurred within a 20 year period." (App. 506.) To the extent the Circuit Court's application of the June 5, 2020, amendments to § 61-11-18 to Petitioner's sentencing may have been error, such error was harmless because the amendments did not work to disadvantage Petitioner in violation of ex post facto principles.

A. Petitioner's three prior convictions were all qualifying offenses under § 61-11-18.

Respondent addresses first the Circuit Court's finding that all three of Petitioner's prior convictions were qualifying offenses under the recidivist statute. The 2000 version of § 61-11-18(c) in effect when Petitioner committed the act of Fleeing in a Vehicle with Reckless Disregard provided that "[w]hen it is determined in section nineteen of this article, that such person shall

have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility." Pursuant to this Court's jurisprudence,

> [f]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *State v. Hoyle*, 242 W.Va. 599, 836 S.E.2d 817 (2019).

Petitioner concedes that his 1999 conviction of Malicious Assault "was actually violent" and that his 2003 conviction of Wanton Endangerment Involving a Firearm "involved at most only a threat of violence." (Pet'r Br. 14.) Pursuant to the standard set forth in *Hoyle*, Petitioner's prior two convictions are qualifying convictions under § 61-11-18. Petitioner moreover concedes that his 2019 conviction for Fleeing in a Vehicle in Reckless Disregard "involved the possibility that something violent would occur." (Pet'r Br. 14.) The triggering offense thus also is a qualifying offense. In *State v. Norwood*, this Court found that a prior Virginia conviction of evading police "clearly carries with it the risk of violence." 242 W.Va. 149, 158–59, 832 S.E.2d 75, 84–85 (2019).

The Virginia statute at issue in *Norwood* provided that "[a]ny person who, having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful and wanton disregard of such signal so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger a person is guilty of a Class 6 felony." Va. Code Ann. § 46.2-817(B) (2002). Nearly analogous, West Virginia Code § 61-5-17(f) provides, in part:

> A person who intentionally flees or attempts 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 the

> person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others, is guilty of a felony[.]

W.Va. Code § 61-5-17(f) (2019). The indictment charged that Petitioner was operating his "vehicle at high rates of speed, passing other vehicles in the opposing lane of traffic, disregarding traffic lights, driving through busy intersections without yielding, and then crashing his vehicle into a curb," after having been given clear visual and audible signals to stop by law enforcement. (App. 511.) Clearly Petitioner's conduct amounted to a threat of violence as this Court found in *Norwood.*

Consequently, even though the Circuit Court may have found that Petitioner's three prior convictions were qualifying offenses under the June 5, 2020, amendments to § 61-11-18, the three prior convictions were also qualifying offenses under this Court's then-existing jurisprudence as they involved an element of violence. Any error the Circuit Court may have committed in applying the amended statute is, therefore, harmless as the prior offenses were qualifying under either version of the statute.[1]

B. Petitioner's prior convictions were not stale.

The June 5, 2020, amendments to § 61-11-18 also provide that if an offense constitutes a qualifying offense, it "shall not be considered if more than 20 years have elapsed between that offense and the conduct underlying the current charge." W.Va. Code § 61-11-18(d) (2020). At the May 21, 2021, sentencing hearing, the Circuit Court referenced this provision indirectly when it found that all three of Petitioner's prior convictions occurred within a twenty year period. (App.

[1] Petitioner "requests that this Court reconsider and change the current standard for determining proportionality 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." (Pet'r Br. 16–17.) Given that Petitioner's three prior offenses, however, involve an element of violence under the current law, there is no reason for the Court to revisit, yet again, an issue that has been resolved for purposes of the instant offenses.

506, 598.) Nevertheless, prior to the June 5, 2020, amendments to § 61-11-18, there was no time limit on prior convictions. Applying such a limitation could have been advantageous to Petitioner if his convictions had exceeded a period of twenty years, which they did not. The Circuit Court's reference to the twenty year limitation did not disadvantage Petitioner and, therefore, there was no ex post facto violation. Any error the Circuit Court may have committed in referencing the 2020 amendments was harmless.

2. Petitioner's life recidivist sentence is not constitutionally disproportionate.

Petitioner further argues that the Circuit Court "erred in considering and relying on the wording of either [recidivist] statute itself to determine whether a life sentence was disproportional from a constitutional standpoint." (Pet'r Br. 9.) The Circuit Court found that "based on the facts of [the three prior felony cases] and the clear language of the statute and the intention of the legislature the [life recidivist] sentence is not disproportionate to the character or degree of these offenses." (App. 506.)

Article III, Section 5 of the West Virginia Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence." *See also State v. Farr*, 193 W.Va. 355, 357, 456 S.E.2d 199, 203 (1995) ("[T]his Court has traditionally scrutinized the constitutionality of sentences in light of the proportionality principle."). Although the Eighth Amendment to the United States Constitution does not contain an explicit statement of proportionality, it is implicit in its prohibition against cruel and unusual punishment. *See Graham v. Florida*, 560 U.S. 48, 59 (2010) ("Embodied in the cruel and unusual punishments ban is the 'precept . . . that punishment for crime should be graduated and proportioned to [the] offense.'" (internal quotation omitted) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))). This

Court has recognized however, that the constitutional mandate of proportionality is not implicated by every sentence imposed, and is "basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist statute." Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

This Court has recognized two tests to determine if a sentence is so disproportionate to a crime that it violates the state constitution. The first test is subjective: In *State v. Cooper*, this Court held that "[p]unishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." Syl. Pt. 5, 172 W.Va. 266, 304 S.E.2d 851, 852 (1983). If a sentence shocks the conscience, it must be vacated without further inquiry. *See State v. Goff*, 203 W.Va. 516, 523, 509 S.E.2d 557, 564 (1998).

The second test is objective:

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

Syl. Pt. 5, *Wanstreet*, 166 W.Va. 523, 276 S.E.2d 205.

In *State v. Beck*, this Court fleshed out the factors governing consideration of the nature of the offense:

> The appropriateness of a life recidivist sentence under our constitutional provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.

Syl. Pt. 7, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Finally, in *Hoyle*, as stated above, this Court held:

> [F]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *Hoyle*, 242 W.Va. 599, 836 S.E.2d 817.

Petitioner's life recidivist sentence must be upheld. First, Petitioner's life recidivist sentence does not shock the conscience. In invoking the "shocks the conscience" test, Petitioner undertakes a heavy burden. *See* Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 Ariz. L. Rev. 241, 253 (2012) (recognizing that West Virginia's subjective test "sets a high bar for defendants to meet."). *Cf. State v. Tyler*, 211 W.Va. 246, 251, 565 S.E.2d 368, 373 (2002) (per curiam) (quoting *People v. Weddle*, 2 Cal.Rptr.2d 714, 718 (Ct. App. 1991)) ("It is indeed an 'exquisite rarity in Eighth Amendment jurisprudence where a sentence shocks the conscience and offends fundamental notions of human dignity."). "In making the determination of whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense." *State v. Adams*, 211 W.Va. 231, 233, 565 S.E.2d 353, 355 (2002). Regarding Petitioner's convictions, the State asserted the circumstances surrounding the Fleeing in a Vehicle with Reckless Disregard conviction included Petitioner driving at least fifty miles per hour, passing a car, driving the wrong way down a one-way road by a grade school, running stop signs, and endangering motorists and others present at intersections. (App. 552–53.) The State opined that Petitioner's actions "threatened harm to the community at large, [and] that his use of his vehicle as a means of flight also created the potential for the use of the vehicle as a weapon to every individual who was on the walks or sidewalks of Fairmont at the time [Petitioner] fled with a

reckless disregard for the safety of others[.]" (App. 554.) Petitioner has also been convicted of two prior violent felony offenses. Petitioner's recidivist sentence does not shock the conscience.

Second, Petitioner has failed to meet the subjective test and, therefore, must meet the objective test. Nevertheless, Petitioner has failed to address all four factors of the objective test in his brief and, therefore, Respondent does not address each issue. *See State v. Benny W.*, 242 W.Va. 618, 634, 837 S.E.2d 679, 694 (2019) (finding that a skeletal argument "unsupported by legal analysis and pertinent authorities" is not enough to preserve the issue for review).

Third, Petitioner's recidivist conviction satisfies the test established in *Hoyle*. As discussed above, Petitioner's triggering and two predicate offenses all involve an element of violence within the meaning of *Hoyle*. As this Court found in *State v. Ingram*, this finding is enough to establish that the life recidivist sentence is not constitutionally disproportionate. No. 19-0016, 2020 WL 6798906, at *5–6 (W.Va. Supreme Court, Nov. 19, 2020) (memorandum decision).

CONCLUSION

The June 7, 2021, Sentencing Order of the Circuit Court of Marion County should be affirmed.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,
By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

MARY BETH NIDAY
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar #: 9092
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Mary.B.Niday@wvago.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0532

STATE OF WEST VIRGINIA,

Respondent,

v.

ADONNE A. HORTON,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, December 21, 2021, and addressed as follows:

Gary A. Collias, Esq.
Public Defender Services
Appellate Advocacy Division
1 Players Club Drive, Suite 301
Charleston, WV 25311

Mary Beth Niday

Mary Beth Niday (State Bar No. 9092)
Assistant Attorney General