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STATE OF WEST VIRGINIA, Plaintiff Below, Respondent,
v.
ANDREW MILLER, Defendant Below, Petitioner.

No. 23-318

Supreme Court of Appeals of West Virginia

May 28, 2025

Submitted: March 18, 2025

Appeal from the Circuit Court of Raleigh County The Honorable H.L. Kirkpatrick III, Judge Case No. 22-F-361

Matthew Brummond, Esq. Public Defender Services Appellate Advocacy Division Charleston, West Virginia Attorney for the Petitioner

John B. McCuskey, Esq. Attorney General Spencer J. Davenport, Esq. Assistant Solicitor General Michael R. Williams, Esq. Solicitor General Charleston, West Virginia Attorney for the Respondent

JUSTICE ARMSTEAD dissents and may write separately.

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SYLLABUS BY THE COURT

1. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

2. "In a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Syllabus point 3, *State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727 (2012).

3. "Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syllabus point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

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OPINION

BUNN, JUSTICE

Petitioner Andrew Miller appeals the Circuit Court of Raleigh County's April 4, 2023 order sentencing him to life imprisonment with the possibility of parole after a jury convicted him of wanton endangerment, malicious wounding, and felony prohibited person in possession of a firearm, then found that he was a recidivist felon. At trial, the State asserted that Mr. Miller shot Anthony Goard, while Mr. Miller testified that he saw another individual shoot Mr. Goard. In this appeal, Mr. Miller claims that his constitutional right to silence was violated when the State cross-examined him about his post-arrest silence. We agree that the circuit court erred by permitting the State to repeatedly question Mr. Miller about his post-arrest silence, and that this error was not harmless beyond a reasonable doubt.[1] For these reasons, we vacate Mr. Miller's convictions and remand this case for a new trial.

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I.

FACTUAL AND PROCEDURAL HISTORY

On June 2, 2022, Mr. Miller, Niesha Dotson, and J. Thompson ("J.T.") [2] were in Ms. Dotson's apartment on Hargrove Street in Beckley, West Virginia. When Anthony Goard

arrived at her apartment that day, Ms. Dotson and Mr. Goard used heroin or fentanyl together. Shortly after Mr. Goard arrived, Mr. Miller and Ms. Dotson got into a disagreement about the location of certain drugs. While Ms. Dotson was in her room, Mr. Goard was shot. The State contends that Mr. Miller shot him, while Mr. Miller claims that he saw Mr. Thompson shoot Mr. Goard. Mr. Goard left the apartment to seek care. Mr. Thompson and Mr. Miller also left the apartment. On a road near the apartment Mr. Miller encountered Patrolman Sweetser, a Beckley Police Department officer, and gave him a false name. Later that day, near where Mr. Miller encountered the officer, law enforcement found a 9 millimeter firearm.

A grand jury indicted Mr. Miller in a four-count indictment, alleging that he committed the following crimes on June 2, 2022: two counts of wanton endangerment with

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a firearm;[3] one count of malicious wounding;[4] and one count of felony possession of a firearm by a prohibited person.[5] We recount the evidence and argument presented to the jury in five categories: (1) witnesses at the apartment, present at the time of the shooting; (2) investigation witnesses; (3) firearms testimony; (4) Mr. Miller's testimony; and (5) closing arguments. [6]

1**. Apartment witnesses.** The State called Ms. Dotson, who lived in the apartment where the shooting occurred. She claimed that she was in a romantic relationship with Mr. Miller, who stayed at her apartment from time to time. On June 2, 2022, Mr. Miller had been at the apartment for four days. At some point during the day, Ms. Dotson left the apartment and picked up a person, whom she only knew as J.T., so J.T. could sell marijuana. On cross-examination, she noted that was the first time J.T. had come to her apartment, and admitted that he sold different kinds of drugs, not just marijuana, also listing "[c]rack, coke, [h]eroin, [f]entanyl." At different occasions during her testimony, she also told the jury that Mr. Miller and Mr. Goard, Ms. Dotson's friend, also sold drugs.

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Two or three hours after J.T. arrived, Mr. Goard came to her apartment. She explained that Mr. Goard also occasionally stayed at her apartment. According to Ms. Dotson, when Mr. Goard arrived, Mr. Miller was in the bedroom. She went into the kitchen with Mr. Goard and used drugs with him, then Mr. Miller came out of the bedroom and talked with J.T. She stated that Mr. Miller was upset with her about a bag of drugs: "I think he thought I gave [Mr. Goard] the bag, that we decided that we were going to sell." She stated she "didn't" and she "wouldn't" have given the bag to Mr. Goard. Mr. Miller asked her to give back the bag, which she refused to do, telling Mr. Miller, "No, because every time you give me something you take it back[,]" and explained that she was "upset" with Mr. Miller, and he was upset with her.

When the prosecutor asked whether Mr. Miller was "bothered" Mr. Goard was at Ms. Dotson's apartment, she responded "[n]o," telling the jury that Mr. Miller and Mr. Goard would leave her apartment together "and go hustle, or whatever they would do when they leave my apartment together." She believed Mr. Goard and Mr. Miller were friends.

Ms. Dotson stated that she went into the bathroom, came out, did drugs, went back into the bathroom, and then heard Mr. Miller twice ask Mr. Goard a question

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regarding the bag.[7] According to Ms. Dotson, Mr. Goard said "I don't have anything," then she heard her table shuffle, two stools fall over, and a gunshot. She shut her room door then, the "door flew open" and Mr. Miller came in the room, turned around, and went back out the door. She asked him, "What did you do?" He did not answer. She also saw Mr. Goard leave, and J.T. was still on the couch.[8] She then cleaned up a small amount of blood from the floor.

When asked whether she saw Mr. Miller

with a gun that day, Ms. Dotson responded that "[h]e has a gun every day[,]" and that "[i]f you are living over in Hargrove, everyone carries a gun." She also testified that J.T. always carried a gun, though she did not see it that day. Ms. Dotson disclosed that after the shooting, she picked up a shell casing but was not sure what she did with it; she thought she put it in a drawer. She said she lied to law enforcement about the casing earlier, although explained that she did not know it was evidence of the crime. She confirmed that she still loved Mr. Miller. The State asked her twice if she hid the casing "to protect him," and once she answered yes, and once she answered no.

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On cross-examination, Ms. Dotson denied that her heroin use affected her memory, but admitted her drugs of choice were fentanyl and methamphetamine. Ms. Dotson admitted that when she spoke with law enforcement, she did not tell law enforcement about the bag of drugs that was in dispute or her use of heroin. She also explained that Mr. Goard brought the drugs she and Mr. Goard used that day, and that J.T. and Mr. Miller did not "do foil."[9] Also, when asked on cross-examination whether Mr. Goard and J.T. were competitive drug dealers she said "Possible. I mean, I'm not sure." She saw J.T. pick up something when he picked up his book bag, but she was not sure what it was.

The State also called Mr. Goard to testify about the events at the apartment. He said he visited Ms. Dotson's apartment on June 2, 2022, to "hang out." Mr. Goard also testified that he and Ms. Dotson began to use drugs after he arrived; he asked Ms. Dotson whether she wanted to smoke; she agreed.[10] He "put some stuff on a foil and hit it," then passed it to her, eventually naming heroin as the drug. Mr. Goard said that Mr. Miller, Ms. Dotson, and another man were in the apartment-"[s]ome guy that I don't -- I never met

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him before." When the prosecutor asked if he had "any idea what his name [was]," Mr. Goard responded that he did not. When asked whether he could describe the man, Mr. Goard said, "I didn't even really look at him."

After he and Ms. Dotson used heroin, Mr. Goard testified that Mr. Miller came into the kitchen and asked him, "Is that my bag?" When Mr. Goard, who was confused, told him no, Mr. Miller asked, "Where my bag at, Nie?" to Ms. Dotson, who replied, "That's eff'd [sic] up, Drew. You bought that bag for me." Ms. Dotson then went to the back room, and Mr. Miller followed her. Mr. Goard testified that he sat there, confused.

Ms. Dotson was in her room when Mr. Miller "pop[ped] around the corner" and said, "Hey, fam, I need everything" to Mr. Goard. Mr. Goard told the jury that he replied, "'I don't have nothing,' and [Mr. Miller] just shot me." When asked whether Mr. Miller held the gun when he came around the corner, Mr. Goard confirmed that Mr. Miller had it in his hand. Mr. Miller did not say anything else to him before he shot him, and while Mr. Goard did not know the other man in the living room ("I didn't know him at all"), that man did not ever move, nor did he threaten, intimidate, or render aid to Mr. Goard. After he was shot, Mr. Goard ran out the door to another apartment, while Mr. Miller went to the back bedroom.

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On cross-examination, Mr. Goard explained that a bag "can be anything, like drugs." He also stated that Mr. Miller thought Mr. Goard had drugs, and that Ms. Dotson and Mr. Miller got into an argument about the bag. Regarding his use of drugs on that day, he believed that the "one hit" of heroin did not affect his behavior or memory.

Also on cross, Mr. Goard stated that after Mr. Miller said "I need everything," and Mr. Goard told him he did not have anything, Mr. Miller "went to shoot, and the gun clicked, and [Mr. Miller] said 'What the hell?'" Then, Mr. Miller pointed the firearm back at Mr. Goard. Mr. Goard stated, "it was like, 'Boom.'" Mr. Goard, without explanation, also said that he

gave Mr. Miller sixty dollars then.

Mr. Goard acknowledged that his statements regarding the identity of the shooter changed. During cross-examination, Mr. Goard said that he remembered telling people at the hospital that he did not know who shot him, but explained that he did not want to cooperate initially.[11] He agreed that when he met with Detective Deems, an investigator with the Beckley Police Department, he "wasn't going to cooperate, because [he] was going to take it upon [him]self," but he "decided to change [his] life around." Mr. Goard also admitted he had a domestic battery conviction and that on June 2, 2022, he was "on the run" from authorities in Fayette County, West Virginia.

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2**. Investigation witnesses.** Patrolman Sweetser with the Beckley Police Department testified that he responded to the shooting. Dispatch gave a general direction where the suspect went and described the suspect as a "black male wearing blue jeans and a gray jacket hoodie." When he arrived in the area, Patrolman Sweetser saw a person who met the suspect's description and approached him. The person, who gave his name as Antonio Jones, allowed Patrolmen Sweetser to do a pat-down search, and the officer found no firearm.[12] Patrolman Sweetser explained to the jury that he later learned that person was Mr. Miller.

Detective Deems responded to the shooting as well. When he arrived at the Hargrove Apartments, he spoke with Ms. Dotson and eventually took a recorded statement from her. Detective Deems stated that Ms. Dotson told him that she had cleaned up the apartment, did not tell him about the shell casing, and indicated she still had romantic feelings for Mr. Miller. Detective Deems noted that law enforcement never found a shell casing and explained that it is "unpredictable where a bullet will go after it is fired from a weapon and strikes an object."

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Detective Deems also testified that he reviewed a video taken from the apartments' surveillance camera, and explained how it assisted in his investigation. In addition to describing an article of clothing and shoes later found with Mr. Miller, Detective Deems explained that the video depicted another person leaving the apartment that police identified to be Mr. Thompson.

On cross-examination, Detective Deems explained that after Mr. Miller's arrest, Detective Deems took a statement from Mr. Goard at the hospital-almost two weeks later. Detective Deems informed Mr. Goard that "an arrest had been made in his case." Mr. Goard then identified the man who shot him as "Drew," then "Andrew Miller," and then Detective Deems offered to show him a driver's license photo of Mr. Miller to confirm that Mr. Goard referred to Mr. Miller. Mr. Goard told Detective Deems he did not know why he was shot.

When asked whether he took a statement from Mr. Thompson, Detective Deems said that he did not. He said he had talked to Mr. Thompson and agreed that there was a warrant for Mr. Thompson's arrest and that he was "on the run." Detective Deems explained that Mr. Thompson did not want to provide him with a statement and "partly" refused to speak with him. Defense counsel asked whether Detective Deems was able to find anyone who saw where Mr. Thompson went after he left the apartment, and Detective Deems said he had not. On redirect examination by the State, Detective Deems explained

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that Mr. Thompson "did not want to cooperate and come to the Beckley Police Department," and Mr. Thompson said to him, "You already got the guy. Why do you need me?"

3. Testimony regarding firearms. After Patrolman Sweetser responded to the shooting, he returned to the area where he had initially stopped Mr. Miller, and found nearby an SR-9 Ruger firearm loaded with fourteen rounds in the magazine and one round in the chamber,

which the circuit court admitted into evidence. This firearm was described by other witnesses and counsel at trial as a Ruger 9 millimeter ("9 millimeter"). Patrolman Sweetser estimated the distance between where he found the 9 millimeter and where he first saw Mr. Miller to be between fifty and one-hundred feet.

Patrolman Justice of the Beckley Police Department testified regarding a second firearm, a .45 caliber Hi-Point handgun, found during the investigation two days after the shooting. When law enforcement eventually went to arrest Mr. Miller at another location, Patrolman Justice waited outside of the back of that residence. He watched a jacket be thrown out a window, then found that second firearm in the jacket's pocket.[13]Over Mr. Miller's objection that the firearm was inadmissible pursuant to West Virginia

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Rule of Evidence 404(b), the circuit court admitted the .45 caliber firearm (".45 caliber") into evidence.

An employee of the West Virginia State Police Forensic Laboratory, who the circuit court qualified as an expert in the field of DNA science, testified that she found DNA that matched Mr. Miller's DNA from a swab of the grip of the 9 millimeter and from a swab of the slide pull buttons and trigger of that firearm. She did not testify about finding any DNA on the other firearm.

During Ms. Dotson's testimony, the State showed her the 9 millimeter, and she confirmed that she had seen Mr. Miller "carry a gun like that." On cross-examination, defense counsel showed Ms. Dotson the .45 caliber, and she testified that it looked the same as the other firearm (the 9 millimeter) that the State showed her. She also testified that Mr. Miller usually carried a .45 caliber, but she did not see anyone with a gun in her apartment on June 2, 2022.

The jury also heard some testimony regarding the size of the caliber of bullets from a 9 millimeter. The doctor who treated Mr. Goard also testified and described Mr. Goard's injuries. When asked about "the perforations or the holes" in Mr. Goard, the doctor noted that they were about the size of a dime. The State attempted to qualify Detective Deems as an expert regarding the type of firearm used to shoot Mr. Goard, but the circuit

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court refused to allow him to testify as to his opinion regarding the type of firearm used or the caliber of bullet that struck Mr. Goard. He did testify, however, that he agreed that a 9 millimeter round is "roughly equivalent to the size of a dime," as did a firearms expert who test fired the 9 millimeter.

Outside the presence of the jury, after Detective Deems and Ms. Dotson testified, but before Mr. Goard testified, the circuit court recognized that the second gun admitted into evidence, the .45 caliber, had "no relevance to the crime at hand," was improperly admitted, and violated Rule 404(b) of the West Virginia Rules of Evidence. The circuit court noted that it planned to instruct the jury that it must not consider that firearm and would read an instruction regarding Rule 404(b) at trial and at the jury charge. The court acknowledged that it had expected that second firearm to be tied into the crime, but as the evidence unfolded, instead the firearm was "just a completely separate and irrelevant incident." The defense attorney agreed that providing the instruction to the jury would be acceptable.

Also before Mr. Goard testified to the jury, the judge and the attorneys examined him in camera. During this hearing, the prosecutor acknowledged that he had shown Mr. Goard a photograph of the 9 millimeter and Mr. Goard indicated to the prosecutor that it was the firearm used to shoot him. However, the defense attorney alleged that during Mr. Goard's interview with law enforcement, he simply described the gun as

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silver and black. The defense attorney asked Mr.

Goard whether he remembered saying that he could identify the gun to the detective. Mr. Goard testified in camera that he told the detective that it was silver and black, and that it was a 9 millimeter. The defense attorney also asked, "you have never seen the gun? You saw a photo?" and Mr. Goard responded, "No, I seen the gun plenty of times before he shot me."

When the jury returned, the circuit court explained that the exhibit of the .45 caliber firearm and its accompanying exhibits were now being disallowed by the court and the court was changing its ruling. The court directed the jury "not to consider them now or during your deliberations in deciding your verdicts in this case." The court also directed the jury to not "speculate" on the court's reasoning.

Mr. Goard testified that Mr. Miller used a silver and black gun. When the prosecutor showed him the 9 millimeter, Mr. Goard said that the firearm was not the firearm Mr. Miller used to shoot him. At a sidebar, the prosecutor requested to display the .45 caliber, which the court had recently withdrawn from evidence, to Mr. Goard. The court dismissed the jury, and at another in camera hearing, the prosecutor showed Mr. Goard the .45 caliber, which he recognized as "[t]he gun that shot me."

After the circuit court called the jury back, Mr. Goard testified that he recognized the .45 caliber as "[t]he gun that shot me." The prosecutor asked, "You are

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certain?" He replied, "Yes, sir." Mr. Goard also said he had seen that gun before, two or three times, in Mr. Miller's possession. The circuit court, over the defendant's objection, admitted the firearm into evidence again.

Mr. Goard explained that he was "kind of" familiar with the different calibers of handguns and confirmed that he knew the difference in size between a 9 millimeter and a .45 caliber handgun. Yet, the prosecutor asked whether Mr. Goard had "an appreciation for" the difference between the rounds of ammunition for firearms, asking, "if I set a .22, a 9 millimeter, a .38, and a .45 round here on the desk, could you pick between each of them without looking at the bottom?" Mr. Goard then replied, "No, sir."

4**. Mr. Miller's testimony.** After the State closed its case, Mr. Miller testified on his own behalf. He explained to the jury that on June 2, 2022, he was asleep at Ms. Dotson's apartment,[14] and "J.T." was there when he woke up, stating that "there was a black male in there that I ain't never seen before in my life." J.T. told Mr. Miller that he "was just there chilling," and Ms. Dotson reminded Mr. Miller that she had mentioned J.T. previously. Mr. Miller said that he talked with J.T. in a friendly manner, and eventually, Ms. Dotson called him to the back bedroom.

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Mr. Miller also explained that he knew Mr. Goard prior to June 2, 2022, and that his relationship with Mr. Goard involved "selling drugs." When Mr. Goard arrived, Mr. Goard and Ms. Dotson began using drugs in the kitchen; Mr. Miller described the drugs as either fentanyl or heroin. J.T. remained in the living room. Mr. Miller asked Ms. Dotson "exactly where was J.T.'s narcotics that I gave her" because he had given Ms. Dotson "the drugs that J.T. gave me to sell." Mr. Miller explained to the jury that Ms. Dotson "left, came back and she didn't have it, and her and [Mr. Goard] are getting high." Mr. Miller and Ms. Dotson then got into an argument about where J.T.'s drugs were; when she went into the bathroom, he yelled at her through the door, "Where them drugs at? You got his drugs?" while J.T. "pursued talking to Mr. Goard."

Mr. Miller denied shooting Mr. Goard or having a firearm in his possession on June 2, 2022. Rather, Mr. Miller was in the living room when Mr. Goard got shot and "J.T. shot him" with what Mr. Miller believed was a 9 millimeter "[o]ut of [J.T.'s] book bag." He described where people were during the shooting, noting that. J.T. "came into the living room" after he shot Mr. Goard, then put the gun back in his book bag. When counsel asked Mr. Miller whether he "was fearful that J.T. was going to shoot" him, Mr.

Miller replied that he was, "[s]o I told him I didn't have nothing to do with it."

After being shot, Mr. Goard ran out of the apartment, then Mr. Miller left. Mr. Miller confirmed that after he left the apartment, he encountered Officer Sweetser and

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did not give the officer his name. He explained that he did not give the officer his name because he was on parole and "would have been arrested and taken to jail."

On cross-examination by the State, Mr. Miller denied that Ms. Dotson told him about the shell casing she picked up. He admitted that he did not assist Mr. Goard after he was shot and did not check on him after leaving the apartment. He explained that he left the apartment because "[a] crime was just committed[,]" he "didn't want to be there with J.T.[,]" and he "didn't want to be shot." Mr. Miller also admitted that the State found his DNA on the 9 millimeter.

He also reiterated on cross-examination that, after he left the apartment and encountered Patrolman Sweetser, he lied about his name, because he did not want to be arrested "for being on parole and around a crime that just took place," and that he could not be around guns. He acknowledged that he did not tell Patrolman Sweetser that J.T. just shot Mr. Goard.

Then, the prosecutor continued the line of questioning regarding what Mr. Miller did and did not tell others: p>

> [Prosecutor]. . . . [Y]ou could have called 911 and told law enforcement that you had valuable information about who, in fact, shot Anthony Goard. You didn't do that, did you?
>
> [Mr. Miller]. No.

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> [Prosecutor]. No. Let's see, you had a lawyer for some time; correct?
>
> [Mr. Miller]. Yes.
>
> [Prosecutor]. And you could have told your lawyer who would have told --

Mr. Miller's attorney then objected, arguing that this line of questioning violated attorney-client privilege. The circuit court sustained the objection. Then the prosecutor continued questioning Mr. Miller:

> [Prosecutor]. Well, let me ask you this: During the
>
> preliminary hearing there were police officers around weren't there?
>
> [Mr. Miller]. Correct.
>
> [Prosecutor]. You could have told them?
>
> [Mr. Miller]. Correct

Mr. Miller's attorney objected, arguing that the prosecutor was "trying to assert that [Mr. Miller] doesn't have a Fifth Amendment right against self-incrimination." The prosecutor responded that they "covered that issue in the in-camera proceeding . . . [.]"[15] Mr. Miller's attorney disagreed, noting that they "didn't cover the

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conversations he had with his attorney at the preliminary hearing." The prosecutor responded, "I didn't say 'attorney.' I said he could speak to law enforcement." The circuit court overruled the objection, and the prosecutor continued:

> [Prosecutor]. You could have spoke [sic] to law enforcement; correct?
>
> [Mr. Miller]. Yes, on the 2nd.
>
> [Prosecutor]. So, really, between June 2nd and this afternoon, you had all kinds of opportunities to tell this

story, didn't you?

[Mr. Miller]. Correct.

[Prosecutor]. You didn't do it?

[Mr. Miller]. I did.

[Prosecutor]. Oh, just now?

Again, Mr. Miller's counsel objected, arguing that the State was violating Mr. Miller's Fifth Amendment right and his right to counsel. The circuit court overruled the objection. The State continued:

[Prosecutor]. Answer.

[Mr. Miller]. What was your last question?

[Prosecutor]. You had ample opportunity?

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[Mr. Miller]. Correct.

[Prosecutor]. And you didn't do it?

[Mr. Miller]. No.

Oh, yeah, yeah, I did.

Mr. Miller's counsel again objected on the grounds that the answer could regard attorney-client privilege. The court overruled the objection. The prosecutor then moved on to another line of questioning.

5. Closing. At closing, the State asked the jury to convict Mr. Miller, yet argued that the victim, Mr. Goard, was mistaken about which gun was used to shoot him, that the firearms were similar in appearance, and that "[t]here's next to zero evidence" that the .45 caliber firearm was used. Instead, the State argued that Mr. Miller used the 9 millimeter to shoot Mr. Goard and Mr. Miller threw that gun when he saw the police. The State also argued that Ms. Dotson, "a drug user," was "awful" and "terrible" and that Mr. Miller "knowingly" associated with her. The State argued that she tried to lie to the jury but eventually testified that she picked up a shell casing to protect Mr. Miller, "the man that she loves." And, the State argued that Mr. Miller and Ms. Dotson had a disagreement about some missing drugs, and it was ongoing when Mr. Goard arrived at the apartment.

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Mr. Miller's attorney argued at closing that the missing piece of the trial was J.T., noting that he was in the apartment surveillance video and that he left with a bookbag, "a good place to hide a gun." He outlined problems in the State's prosecution: that everyone was lying, that two witnesses were using drugs, that there was an argument about drugs, multiple drug dealers, and confusion about which firearm was used. He noted that only Mr. Goard testified that Mr. Miller had a firearm in his hand, and Mr. Goard asserted it was the .45 caliber, not the 9 millimeter. He reasoned that "[i]f you believe Mr. Miller is telling the truth, you heard what he said." Counsel also questioned whether the witnesses were "afraid of J.T.," recounting an episode from a television show where witnesses were unable to describe a shooter because "they didn't want to get involved and they didn't want to say who did it."

The jury found Mr. Miller guilty of wanton endangerment with a firearm, malicious wounding, and felony prohibited person in possession of a firearm, but acquitted him on the second count of wanton endangerment with a firearm. Then, the State filed a recidivist information seeking lifetime imprisonment pursuant to West Virginia Code § 61-11-18 due to Mr. Miller's two prior violent felony convictions. The jury for the recidivist trial found that Mr. Miller was the person convicted of the prior offenses. The circuit court imposed a recidivist life sentence, and Mr. Miller appeals from the court's sentencing order.

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II.

STANDARD OF REVIEW

Mr. Miller claims that the circuit court erred by allowing the State to improperly cross-examine him about his post-arrest silence in violation of his constitutional rights. We review a circuit court's evidentiary rulings at trial, "including those affecting constitutional rights," under an abuse of discretion standard. *State v. Marple*, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996). Still, "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975); *accord* Syl. pt. 6, *State v. Hoard*, 248 W.Va. 428, 889 S.E.2d 1 (2023); Syl pt. 5, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977). Here, the State bears the burden of proving harmless error. "In a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Syl. pt. 3, *State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727 (2012).

III.

DISCUSSION

Both Mr. Miller and the State agree that the State improperly cross-examined Mr. Miller about his post-arrest silence, yet they disagree as to whether this error was harmless beyond a reasonable doubt or requires reversal and a new trial. We agree that the circuit court erred when it allowed the State to repeatedly question Mr. Miller-over his

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attorney's objection-regarding his silence after arrest. And because we cannot find this error was harmless beyond a reasonable doubt, Mr. Miller's convictions must be vacated.

The United States Constitution, as well as the West Virginia Constitution, protect a person's right to silence. The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Section Five, Article III of the West Virginia Constitution similarly notes that a person in a criminal case cannot "be compelled to be a witness against himself."

Impeaching a defendant at trial with his or her post-arrest silence violates the defendant's due process rights under both the United States and West Virginia Constitutions.[16] Regarding a defendant's due process rights under the United States Constitution, in *Doyle v. Ohio*, the Supreme Court of the United States explained that, because every person taken into custody must be advised of his *Miranda* rights,[17] including the right to remain silent and that anything he says may be used against him, and although the *Miranda* warnings do not expressly provide that "silence will carry no penalty," this "assurance is implicit to any person who receives the warnings." *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976).

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Thus, the Supreme Court reasoned, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id*. at 617, 96 S.Ct. at 2245, 49 L.Ed.2d 91. Ultimately, the *Doyle* Court held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id*. at 619, 96 S.Ct. at 2245, 49 L.Ed.2d 91.

This Court followed the *Doyle* Court's reasoning in *State v. Boyd*, where it extended *Doyle*'s protections to a defendant's due process rights under the West Virginia Constitution, holding in in Syllabus point one:

> Under the Due Process Clause of the *West Virginia Constitution*, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard

> to his pre-trial silence or to comment on the same to the jury.

160 W.Va. 234, 233 S.E.2d 710 (1977). The *Boyd* Court recognized that "[t]he constitutional right to remain silent also compels the State to remain silent about such silence." *Id.* at 241, 233 S.E.2d at 716. In *Boyd*, the defendant made some pretrial statements but remained silent on other issues. *See id.* at 235-36, 233 S.E.2d at 713. The Court concluded that the State may, at trial, question a defendant regarding *voluntary* pretrial statements that are "inconsistent with [the defendant's] trial testimony," but the

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trial court must prevent impeachment that would "compel the defendant to acknowledge or justify [the defendant's] pre-trial silence" when the defendant was silent regarding "substantial areas of relevant facts." *Id.* at 241, 233 S.E.2d at 716. The Court warned that "[i]mpeachment cannot cross into constitutionally prohibited territory." *Id.*

Here, the circuit court allowed the State's impeachment to "cross into constitutionally prohibited territory." *Boyd*, 160 W.Va. at 241, 233 S.E.2d at 716. The circuit court abused its discretion by overruling defense counsel's objections to the State's multiple cross-examination questions inquiring into Mr. Miller's post-arrest silence and allowing the State to repeatedly ask Mr. Miller whether he had the opportunity, at his preliminary hearing and afterward, to tell law enforcement that Mr. Thompson shot Mr. Goard. By overruling defense counsel's objections to these questions, the circuit court required Mr. Miller to answer improper questions regarding his post-arrest silence. Both parties admit that the circuit court erred.

The error was not harmless beyond a reasonable doubt, based upon the specific nature and circumstances of this case. *See Hoard*, 248 W.Va. at 440, 889 S.E.2d at 13 (applying the beyond a reasonable doubt harmless error standard where the defendant's post-arrest silence was referenced at trial); *State v. Byers*, 247 W.Va. 168, 179, 875 S.E.2d 306, 317 (2022) (noting that, in determining whether an error was "harmless beyond a reasonable doubt," "we examine the specific circumstances in [the]

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matter"). In discussing the application of the beyond a reasonable doubt harmless error standard, the Court has recognized the Supreme Court of the United States's framing of the inquiry: "The question a reviewing court must ask is this: Absent the . . . [error], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *State v. Barrow*, 178 W.Va. 406, 410-11, 359 S.E.2d 844, 848-49 (1987) (quoting *United States v. Hasting*, 461 U.S. 499, 510-11, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983) (alterations in original)). In *Barrow*, the Court reversed convictions for attempted murder and malicious wounding where the circuit court admitted evidence of a defendant's statement that the Court found violated the defendant's Sixth Amendment right to counsel. *Id.* at 410-12, 359 S.E.2d at 848-50. The Court determined that on review, the Court must "consider the evidence properly admitted before the jury and then . . . assess the probable impact of the admission" of the statement obtained in violation of the defendant's constitutional right. *Id.* at 411, 359 S.E.2d at 849. In *Barrow*, the statement at issue was "factual information not otherwise before the jury which [was] relevant as to whether the defendant had the requisite criminal intent for attempted murder and malicious wounding." *Id.* Ultimately, the Court concluded "it is not clear beyond a reasonable doubt that the jury would have convicted the defendant of attempted murder and malicious wounding if his incriminating oral statement had not been introduced into evidence[,]" yet recognized that the statement "did not have the same bearing" on the defendant's misdemeanor offenses because "[t]he direct and circumstantial evidence of these offenses was substantial and these did not involve any specific criminal intent." *Id.* at 412, 359 S.E.2d at 850. Certainly,

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Barrow addressed a different constitutional violation, yet we apply the same analysis to consider the potential impact of the constitutionally infirm evidence on the jury's verdict, in light of the proper evidence the jury received.

The State's injection of post-arrest silence into a trial may also directly affect a defendant's defense. In *State v. Walker*, the defendant was accused of shooting a man, but on direct examination, the defendant testified that the man pulled a knife on him, cut him, and threatened him. 207 W.Va. 415, 417, 533 S.E.2d 48, 50 (2000) (per curiam). The defendant admitted to shooting the man's shoulder but further testified that the second shot, which killed the man, was an accident that occurred when other people nearby attacked him. *Id*. The State erroneously questioned him on cross-examination regarding his silence to law enforcement about these events and also erroneously discussed his silence at closing, stating that the defendant never told law enforcement because it never happened. *Id*. at 420-21, 533 S.E.2d at 53-54. Although the Court analyzed these errors separately, the *Walker* Court considered the prosecutor's closing comments to be "highly prejudicial" because the defendant's "defense was self-defense." *Id*. at 421, 533 S.E.2d at 54. The Court recognized that by attacking the defendant's silence, "[t]he state told the jury, in essence, that the shooting was not in self-defense[,]" because had the shooting been in self-defense, "according to the State, [the defendant] would have so advised the police." *Id*.

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Turning to the circumstances before this Court, we cannot conclude that it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" without the constitutional error. *Barrow*, 178 W.Va. at 410-11, 359 S.E.2d at 848-49 (quoting *Hasting*, 461 U.S. at 511, 103 S.Ct. at 1981, 76 L.Ed.2d 96). The context of the State's reference to Mr. Miller's silence affects our determination that the error was not harmless, as it occurred during his testimony and was prejudicial to Mr. Miller's defense, particularly in light of the issues with the State's evidence discussed below. *See Byers*, 247 W.Va. at 179, 875 S.E.2d at 317 (applying the beyond a reasonable doubt harmless error standard and noting that, "[i]n conducting a harmless error analysis, the inquiry is fact specific").

As the State acknowledges, Mr. Miller's "central theory" of the case was that Mr. Thompson shot Mr. Goard. If the jury believed Mr. Miller's explanation of the events on June 2, 2022, it could have acquitted him, as Mr. Miller's defense was that Mr. Thompson was the shooter. Yet, the State's questions to Mr. Miller regarding his post-arrest silence-essentially requiring him to confirm that, after his arrest, he failed to identify Mr. Thompson as the shooter despite having plenty of time and opportunity to do so-impeached Mr. Miller's credibility and directly prejudiced his main defense. Through these questions, the State intimated to the jury that Mr. Miller fabricated the story, because had Mr. Thompson *actually* shot Mr. Goard, according to the State, Mr. Miller "would have so advised the police." *See Walker*, 207 W.Va. at 421, 533 S.E.2d at 54. Like the

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State's closing argument in *Walker* that "told the jury, in essence" if the defendant's defense was true, he would have told law enforcement, the State's repeated questions on cross-examination *here* had the same effect as the prosecutor's closing statements in *Walker*. *See id*. By highlighting Mr. Miller's constitutionally protected silence, the prosecutor's questions implied that Mr. Miller falsely identified the shooter during his direct testimony and, instead, recently fabricated this information. *See id*.

Furthermore, given the State's problematic trial evidence, which was at times conflicting and inconsistent, the State cannot prove that its improper impeachment of Mr. Miller regarding his post-arrest silence was harmless beyond a reasonable doubt. The State argues that it presented "extensive evidence" that Mr. Miller shot Mr. Goard, yet only one person-Mr. Goard-testified to seeing Mr. Miller commit the

shooting. Problematically, Mr. Goard both changed his initial statement that he did not know who shot him and identified the firearm used during the shooting as the firearm without Mr. Miller's DNA. The rest of the State's case was circumstantial. Furthermore, the State's witnesses in the apartment at the time of the shooting, including Mr. Goard, had consistency and reliability issues, and the State lacked physical evidence connecting Mr. Miller to the crime. Finally, it is not clear beyond a reasonable doubt that the impeachment of Mr. Miller regarding his main defense-that Mr. Thompson was the shooter-did not affect the jury's verdict because the consistent evidence that there was a fourth person in the apartment, Mr. Thompson, could have led the jury to believe Mr. Miller's version of events.

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Regarding Mr. Goard and Ms. Dotson, they both testified that Ms. Dotson and Mr. Miller had a disagreement about a bag of drugs, denoting involvement with criminal activity and controlled substances, and, furthermore, both witnesses also admitted they used heroin at the time of the shooting. Ms. Dotson also testified that she allowed her residence to be used as a base for drug use and drug dealing.

The evidence concerning Mr. Goard also indicated reliability and consistency issues. While Mr. Goard was the only witness to identify Mr. Miller as the shooter, in addition to his admitted contemporaneous use of heroin, the jury heard evidence that Mr. Goard told hospital staff "he did not know who shot him." Further, Mr. Goard testified insistently that the .45 caliber was the firearm Mr. Miller used to shoot him, while other witnesses and evidence focused on the 9 millimeter. The State's closing not only acknowledged this inconsistency in Mr. Goard's testimony, but it went so far as to encourage the jury to believe that Mr. Goard was confused, arguing that the 9 millimeter (from which Mr. Miller's DNA was recovered), not the .45 caliber, was the firearm Mr. Miller used to shoot Mr. Goard.

The State's physical evidence-and lack thereof-also compromises the State's case, thereby enhancing the potential prejudicial effect the court's constitutional error had on Mr. Miller's defense. Although the jury heard evidence that Mr. Miller's DNA was on the 9 millimeter, the State never decisively connected that firearm to the shooting.

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As previously noted, Mr. Goard testified that Mr. Miller used another firearm in the shooting. Officers recovered no bullets or casings at the scene of the shooting (although Ms. Dotson admitted she picked up a shell in her apartment and may have placed it in her drawer). There was some testimony regarding the size of Mr. Goard's wounds and the size of a 9 millimeter bullet, but no conclusive expert testimony related the size of the wounds to the caliber size of the bullet that caused the wounds.

Finally, when reviewing the evidence regarding Mr. Thompson, it is not clear beyond a reasonable doubt that the State's improper impeachment of Mr. Miller did not affect the jury's verdict because the impeachment directly concerned his main defense- that Mr. Thompson was the shooter. The jury could have reasonably believed Mr. Miller's defense that J.T. shot Mr. Goard. Ms. Dotson acknowledged that Mr. Thompson sold many types of drugs, including marijuana, crack, cocaine, heroin, and fentanyl, yet she was unsure whether Mr. Thompson and Mr. Goard were competitive drug dealers. Mr. Goard could not even describe him, claiming at trial that the other man in the apartment was someone Mr. Goard did not know and he "didn't even really look at him." Ms. Dotson recalled that Mr. Thompson just sat on the couch after the shooting took place, which could be considered an unusual response to a shooting. While Mr. Miller left the apartment after the shooting, so did Mr. Thompson, and neither of them assisted Mr. Goard. The jury also heard testimony that Mr. Thompson refused to cooperate with the State and had a warrant

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out for his arrest. Additionally, the State

presented no evidence from Mr. Thompson himself, the only other purported eyewitness to the shooting.

The State points to *State v. Hoard* to argue that the constitutional error in this case was harmless. In *Hoard*, the Court upheld the defendant's conviction when the defendant's right to silence was implicated in the prosecutor's opening statement and by a single question asked of the defendant during the State's cross-examination. 248 W.Va. at 440, 889 S.E.2d at 13. *Hoard* is distinguishable because there, the defendant never answered the question regarding his silence. 248 W.Va. at 435-36, 889 S.E.2d at 8-9. Furthermore, the *Hoard* Court determined that it was unclear as to whether the defendant's pre- or post-arrest silence was being referenced. *Id.* at 438, 889 S.E.2d at 11. Still, the Court reasoned that the error was harmless, as the references were brief and the State presented "overwhelming evidence" of guilt against the defendant. *Id.* at 440-41, 889 S.E.2d at 13-14. The present case lacks similarity to the facts of *Hoard*: the evidence against Mr. Miller is not overwhelming and is primarily circumstantial, for the reasons listed above; the references to Mr. Miller's silence were decidedly related to his silence after his arrest; Mr. Miller was required to answer the State's multiple questions about his silence; and Mr. Miller was prejudiced because these questions directly related to his defense that Mr. Thompson was the shooter.

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Likewise, another case the State relies on, *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996), is distinguishable. In *Marple*, the Court upheld the conviction of a defendant after the first of twenty-eight witnesses for the State, a law enforcement officer, testified that the defendant would not speak to law enforcement after being read his *Miranda* rights. *See* 197 W.Va. at 52-53, 475 S.E.2d at 52-53. The *Marple* Court employed a plain error analysis, as the defendant failed to object at trial, and found the officer's testimony violated the defendant's right to silence. *Id.* at 53, 475 S.E.2d at 53. Applying the plain error analysis, the defendant had the burden to show that "the jury verdict in this case was actually affected by the assigned but unobjected to error."[18] *Id.* Still, the Court affirmed the conviction, noting the overwhelming evidence of the defendant's guilt of first-degree murder.[19] *Id.* at 54, 475 S.E.2d at 54 ("In view of all the admissible evidence introduced by the State, we believe the jury would have reached the same verdict absent

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the post-*Miranda* silence testimony, and we are in no way persuaded that the assigned error contributed to the conviction."). Here, the State's evidence was considerably weaker than the testimonial and physical evidence that the State presented in *Marple*.

In acknowledging that impeachment concerning Mr. Miller's post-arrest silence was error, the State also argues that, because it permissibly asked about Mr. Miller's pre-arrest silence, any additional questions about his post-arrest silence were merely cumulative, as his silence was already permissibly before the jury. *See Hoard*, 248 W.Va. at 438, 889 S.E.2d at 11 (recognizing permissible impeachment of pre-arrest silence). In other words, the additional erroneous impeachment was not harmful enough to require reversal. We disagree. The State urges us to apply the reasoning from *Brecht v. Abrahamson*, 507 U.S. 619, 639, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993), which briefly considered the cumulative effect of references to a defendant's pre-and post-arrest silence and upheld a conviction. However, *Brecht* concerned a federal habeas case on collateral review from a state court, where the Supreme Court considered, then applied, a "less onerous standard on habeas review of constitutional error." *Brecht*, 507 U.S. at 637, 113 S.Ct. at 1722, 123 L.Ed.2d 353. The *Brecht* Court specifically noted that it was *not* applying the stricter harmless error standard for constitutional error that is applicable on

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direct review, such as the review we employ here. *See id.* at 636-38; 113 S.Ct. at 1721-22,

123 L.Ed.2d 353. *Brecht*'s cumulative analysis is not persuasive, or applicable, here.[20]

As we are bound to consider whether this error was harmless beyond a reasonable doubt, we reject the State's contention that the error was merely cumulative, particularly in light of all the reasons we have previously recited regarding the weaknesses in the State's case and the prejudicial effect of the impeachment. *See* Syl. pt. 3, *Frazier*, 229 W.Va. 724, 735 S.E.2d 727. Furthermore, adopting this view of cumulative evidence would erode *Miranda*'s protections and allow the State to remedy constitutional error by simply asking permitted questions about a defendant's pre-arrest silence, essentially eviscerating a defendant's right to silence.

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Here, when Mr. Miller's counsel objected to the State's improper cross-examination inquiry into Mr. Miller's post-arrest silence, the circuit court overruled the objection and required Mr. Miller, the defendant on trial, to answer the prosecutor's multiple questions, directly impeaching his defense and theory of the case. Particularly given the relative inconsistencies in the State's case, we find that it is not clear beyond a reasonable doubt that without this error, the jury would have returned a verdict of guilty. *See Barrow*, 178 W.Va. at 410-11, 359 S.E.2d at 848-49. We, therefore, conclude that the State failed to meet its burden of proving that this constitutional error was harmless beyond a reasonable doubt.

IV.

CONCLUSION

For the reasons stated above, this Court vacates Mr. Miller's convictions and the April 4, 2023 order sentencing Mr. Miller to life imprisonment and remands the case for a new trial.

Vacated and remanded.

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Armstead, Justice, dissenting:

Petitioner Andrew Miller ("Petitioner") and the State agree that the circuit court erred by permitting the prosecutor to briefly cross-examine Petitioner about his post-arrest silence during Petitioner's trial. The State argued that this error was harmless and highlighted what it deemed to be "overwhelming evidence" demonstrating that Petitioner shot the victim. The majority disagrees with the State's argument, concluding that the error was not harmless beyond a reasonable doubt. Therefore, the majority vacates Petitioner's convictions for felony malicious wounding, wanton endangerment, and felon in possession of a firearm. I disagree with the majority's conclusion[1] and believe that this case is similar to *State v. Hoard*, 248 W.Va. 428, 889 S.E.2d 1 (2023), and *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996). In *Hoard* and *Marple*, this Court weighed brief references to a defendant's post-arrest silence against overwhelming evidence of guilt, and found harmless error.

Additionally, I would reject Petitioner's second assignment of error in which he asserts that the State failed to establish that he had two qualifying offenses to justify the imposition of the recidivist life sentence.[2] Our recidivist statute, West Virginia § 61-11-18,

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provides that a person who has "been twice before convicted . . . of [certain crimes] punishable by confinement in a penitentiary shall be sentenced to . . . life" in prison upon a third conviction. *Id.* Petitioner had been convicted and sentenced on two felony offenses prior to his convictions in the instant case. Therefore, the recidivist life sentence was properly imposed against him. In arriving at this conclusion, I agree with the State's argument that this Court should overrule *State v. McMannis*, 161 W.Va. 437, 242 S.E.2d 571 (1978), because it is inconsistent with the plain language of our recidivist statute.

A. Harmless Error

I agree with the majority's finding that the circuit court erred by allowing the prosecutor to question Petitioner about his post-arrest silence. As the majority notes, impeaching a defendant at trial with his or her post-arrest silence violates the defendant's due process rights under both the United States and West Virginia Constitutions. *See* Syl. Pt. 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977); *Doyle v. Ohio*, 426 U.S. 610 (1976). While the State concedes that it was error for the circuit court to permit the prosecutor to question Petitioner about his post-arrest silence, this is not the end of the inquiry. Instead, this Court has applied our harmless error test under these circumstances. "[H]armless error [is] firmly established by statute, court rule and decisions as salutary aspects of the criminal law of this State." Syl. Pt. 4, in part, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975). The United States Supreme Court has recognized that "[m]ost errors, including constitutional ones are subject to harmless error analysis." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Where there is "grave doubt" regarding

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the harmlessness of errors affecting substantial rights, reversal is required. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). As Justice Cleckley noted, "[h]armless error analysis in the appeal of a criminal case asks not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered . . . was surely unattributable to the error." *State v. Marple*, 197 W.Va. at 53, 475 S.E.2d at 53 (internal citation omitted). In conducting a harmless error analysis, the inquiry is fact specific. *See State v. Blake*, 197 W.Va. 700, 709, 478 S.E.2d 550, 559 (1996) ("Assessments of harmless error are necessarily content-specific.").

My review of the specific facts of this case reveals that the State introduced overwhelming evidence that Petitioner shot the victim, Mr. Goard ("victim"). First, the victim testified that Petitioner shot him. The victim described in detail the events leading up to the shooting, the shooting itself, and what he did after Petitioner shot him. Further, the State showed that Petitioner had a motive for shooting the victim because the two were involved in a drug dispute prior to the shooting. Petitioner's girlfriend, Ms. Dotson, testified that she got into an argument with Petitioner over her possibly giving the victim a bag of drugs. Ms. Dotson also testified that while she was in the bathroom and did not see the shooting, she heard Petitioner ask the victim about the drugs and then heard a gunshot. It is undisputed that immediately after the shooting, Petitioner fled the scene and was questioned by police officers who noted that he matched the description of the suspected shooter and that he gave the officers a fake name. Police later found a gun with Petitioner's DNA on it in the area where the officers stopped him.

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Weighing this evidence against the brief questioning regarding Petitioner's post-arrest silence, I would find that the error was harmless. I believe this finding is consistent with our recent *Hoard* decision, in which this Court found harmless error where the State made brief references to the defendant's post-arrest silence during the trial. In *Hoard*, the Court found that "the brevity of [the] references, coupled with the overwhelming evidence," meant that the "error was harmless." 248 W.Va. at 438, 889 S.E.2d at 11. Similarly, in *Marple*, this Court affirmed a defendant's conviction where the investigating officer commented on the defendant's post-*Miranda* silence. *Marple*, 197 W.Va. at 53, 475 S.E.2d at 53. In *Marple*, this Court noted that the officer only made a "few remarks" and that the post-Miranda silence was never used during closing argument. *Id.* Weighing the brief remarks against the substantial evidence establishing the defendant's guilt, the Court in *Marple* concluded that the "jury would have reached the same verdict absent the post-*Miranda* silence testimony[.]" 197 W.Va. at 54, 475 S.E.2d at 54.

Consistent with *Hoard* and *Marple*, and in view of the overwhelming evidence introduced by the State, I would find that the error was

harmless because I believe the jury would have reached the same verdict absent the post-arrest silence testimony because the evidence demonstrated that (1) the victim identified Petitioner as the shooter; (2) Ms. Dotson heard Petitioner and the victim arguing about drugs right before the shooting; (3) Petitioner fled the scene immediately after the shooting; (4) Petitioner was detained by police officers after fleeing the scene and gave the officers a fake name; and (5) a gun with Petitioner's DNA on it was found in the area where the officers detained

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him. Weighing this evidence against the brief questioning about Petitioner's post-arrest silence, I find no reversible error.

Because I would have affirmed Petitioner's convictions in the instant case, I will proceed to address Petitioner's second assignment of error.

B. Recidivist Issue

After the jury convicted Petitioner of felony malicious wounding, wanton endangerment, and felon in possession of a firearm, the State filed a recidivist information alleging that Petitioner had two prior felony convictions. During the recidivist trial, the State presented evidence that Petitioner pled guilty to burglary, wanton endangerment with a firearm, kidnapping, and conspiracy to commit first-degree murder on February 26, 2010, in the Circuit Court of Raleigh County, West Virginia. The Raleigh County crimes occurred on May 7, 2009. Petitioner was sentenced for these offenses on April 12, 2010. Next, the State presented evidence that Petitioner was convicted and sentenced for attempted first-degree murder with a firearm on April 19, 2010, in the Circuit Court of Kanawha County, based on an offense that Petitioner committed in April of 2009. The recidivist jury found that Petitioner had been convicted of these prior offenses, and the circuit court imposed a recidivist life sentence.

On appeal to this Court, Petitioner argues that the State did not establish that he had two qualifying offenses sufficient to justify the imposition of the recidivist life sentence. He states that he committed his second offense before his first offense's conviction and sentence were final; thus, Petitioner asserts that under this Court's holding

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in *State v. McMannis*, 161 W.Va. 437, 242 S.E.2d 571, the circuit court erred by imposing a recidivist life sentence. In syllabus point one of *McMannis*, the Court held:

> Where a prisoner being proceeded against under the habitual criminal statute remains silent or says he is not the same person who was previously convicted and sentenced to the penitentiary offense or offenses alleged in the information, a circuit court has no jurisdiction to impose an enhanced sentence under the statute where the State fails to prove beyond a reasonable doubt that each penitentiary offense, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence. W.Va.Code §§ 61-11-18, 19.

Id.

The State concedes that under this Court's holding in *McMannis*, the recidivist statute does not apply to Petitioner. However, the State argues that *McMannis* was wrongly decided and not supported by the plain language of the recidivist statute. According to the State:

> *McMannis* read an additional requirement into the recidivist statute: requiring each offense to be committed "subsequent to each preceding conviction and sentence." . . . *McMannis* was wrong in 1978 and remains wrong now: it ignores the statutory text and context of the recidivist statute, and the legislative purpose it invoked to rewrite the

> statute does not support that outcome, either. Reliance interests are also particularly low in this area where the precedent governs simply how severe punishment may be, instead of giving West Virginians notice what conduct is-or is not-criminal. So, the stare decisis factors weigh in favor of overturning *McMannis* to avoid giving defendants like [Petitioner] a technical out that the recidivist statute does not support.

This issue, whether *McMannis* was wrongly decided, requires an examination of the recidivist statute, West Virginia Code § 61-11-18. This Court has held

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that in deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of W.Va.*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995); *see also* Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). Additionally, this Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

The recidivist statute provides, in relevant part:

> (d) When it is determined, as provided in § 61-11-19 of this code, that **the person has been twice previously convicted** in the United States of a crime punishable by imprisonment in a state or federal correctional facility which has the same or substantially similar elements as a qualifying offense, **the person shall be sentenced to imprisonment in a state correctional facility for life**: Provided, That prior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section: Provided, however, That the most recent previous qualifying offense which would otherwise constitute a qualifying offense for purposes of this subsection may not be considered if more than 20 years have elapsed between: (1) The release of the person from his or her term of imprisonment or period of supervision resulting from the most recent qualifying offense or the expiration of a period of supervised release resulting

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> from the offense; and (2) the conduct underlying the current charge.

W.Va. Code § 61-11-18(d) (emphasis added).[3]

The first step in analyzing this statute is determining whether the plain language resolves the inquiry or whether the statute is ambiguous. This Court has previously recognized that our recidivist statute is "plain and unambiguous." *State ex rel. Chadwell v. Duncil*, 196 W.Va. 643, 647, 474 S.E.2d 573, 577 (1996). *See also State ex rel. Appleby v. Recht*, 213 W.Va. 503, 519, 583 S.E.2d 800, 816 (2002). I agree and believe that the plain, unambiguous language of our recidivist statute should be applied as written: if the defendant has been twice previously convicted of a qualifying offense, and subsequently commits a third qualifying offense, he or she falls within the scope of West Virginia Code § 61-11-18.

The Court in *McMannis* went beyond the plain language of West Virginia Code § 61-11-18 and held that before a circuit court may impose the recidivist enhancement, the State must prove beyond a reasonable doubt "that the second conviction for a penitentiary offense was for an offense committed after the first conviction and

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sentence on a penitentiary offense, and that the principal penitentiary offense was committed after the second conviction and sentence on a penitentiary offense." *McMannis*, 161 W.Va. at 442, 242 S.E.2d at 575. In so ruling, the Court in *McMannis* committed a number of errors. First, it did not identify any ambiguity in the statute, nor did it explain why it was departing from the unambiguous language of the statute to include an additional requirement that is clearly not contained in the statute's plain language. As set forth above, this Court has repeatedly held that our duty is to apply the plain language of a statute and that a statute is only open to construction if its meaning is ambiguous. The Court's ruling in *McMannis* failed to adhere to this rule. In fact, the Court in *McMannis* entirely omitted *any* discussion of the actual language of West Virginia Code § 61-11-18. Instead, the Court concluded that

> the primary purpose of the statute 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. If the deterrent purpose of the statute is to be furthered, it is essential that the alleged conviction or convictions, except for the first offense and conviction, were for offenses committed after each preceding conviction and sentence.

161 W.Va. at 441, 242 S.E.2d at 574-75.

Again, the Court in *McMannis* did not cite any portion of the actual language contained in West Virginia Code § 61-11-18 to support its conclusion. Instead, the Court added a judicially created mandate to the statute by finding that this additional requirement would deter felony offenders from committing subsequent felony offenses. This Court has

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previously recognized that we must apply a statute's plain language, rather than "attempt to make it conform to some presumed intention of the Legislature not expressed in the statutory language." *Cart v. Gen. Elec. Co.*, 203 W.Va. 59, 63 n.8, 506 S.E.2d 96, 100 n.8 (1998). Similarly, this Court has held that "[i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." Syl. Pt. 11, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013). If the Legislature intends for the recidivist statute to contain the additional requirement included by *McMannis*, it is free to add this language to West Virginia Code § 61-11-18. However, this Court may not read into West Virginia Code § 61-11-18 that which it does not say. Indeed, the Legislature has amended the recidivist statute multiple times since *McMannis* was decided and it has never added such language to the statute.

Further, the instant case illustrates why *McMannis's* holding, in addition to being unsupported by West Virginia Code § 61-11-18's plain language, does not accomplish the purported deterrent effect it was meant to serve. Petitioner "persisted in criminality" after having been convicted of two felonies in 2010. Despite being convicted and sentenced on two prior felonies in 2010, he continued to engage in criminal activity and was convicted of multiple felonies in the instant matter in 2022. The clear deterrent effect the Legislature intended in order to combat such continuing criminal activity is served by the plain language of the

recidivist statute, i.e., if a person with two felony

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convictions commits an additional felony, he or she is subject to a life sentence. I do not see how the additional requirement *McMannis* added to the statute furthers this purpose. Instead, the additional *McMannis* requirement would spare defendants, like Petitioner herein, from facing a life sentence under the recidivist statute based on a technicality. Under *McMannis*, because a defendant commits a second felony before the conviction and sentence for the first felony is final, the defendant only has one qualifying offense. This result defeats, and indeed is in direct conflict with, the purpose of the recidivist statute.

With all of the foregoing in mind, I acknowledge that *McMannis* was decided in 1978 and has not been overruled. In general, "the doctrine of stare decisis requires this Court to follow its prior opinions" State Farm Mut Auto Ins Co v Rutherford, 229 W Va 73, 83, 726 S.E.2d 41, 51 (2011) (Davis, J., concurring, in part, and dissenting, in part). This Court has recognized that

> [s]tare decisis . . . is a matter of judicial policy. . . . It is a policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted.

Woodrum v. Johnson, 210 W.Va. 762, 766 n. 8, 559 S.E.2d 908, 912 n. 8 (2001) (internal quotations and citations omitted). In *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), Justice Cleckley observed that "a precedent-creating opinion *that contains no extensive analysis of an important issue is more vulnerable to being overruled* than an opinion which demonstrates that the court was aware of

conflicting decisions and gave at

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least some persuasive discussion as to why the old law must be changed." 194 W.Va. at 679 n. 28, 461 S.E.2d at 185 n. 28 (emphasis added).

As previously stated, *McMannis* did not engage in *any* analysis of the actual language contained in our recidivist statute. It did not declare that the statute was ambiguous, nor did it explain why the Court failed to apply the statute's plain language and, instead, added an additional requirement to the statute that the Legislature did not include. Under these circumstances, I believe that *McMannis* is one of the "rare case[s] when it clearly is apparent that an error has been made." *Woodrum*, 210 W.Va. at 766 n. 8, 559 S.E.2d at 912 n. 8. Therefore, I believe *McMannis* should be overruled.[4]

C. Conclusion

Based on all of the foregoing, I would find that the error in this case related to Petitioner's post-arrest silence was harmless beyond a reasonable doubt. Further, I would have affirmed Petitioner's life sentence that was imposed pursuant to our recidivist statute and, in doing so, I would overrule *McMannis*. Therefore, I respectfully dissent.

Notes:

[1] Mr. Miller also asserts that the circuit court erroneously sentenced him to life imprisonment based on his third-offense recidivist conviction pursuant to West Virginia Code § 61-11-18. He alleges that the State failed to prove that his second predicate offense occurred after the conviction and sentencing for his first predicate offense. Because we vacate his convictions on his first assignment of error, we do not address this assignment of error.

[2] The record is unclear whether Mr. Thompson's first name is Josh or Jason. At trial, witnesses and counsel used different names and he did not

testify. In its brief, the State refers to him as Josh Thompson, while Mr. Miller uses the name J.T. Mr. Miller and Ms. Dotson called him J.T. at trial. We refer to him as J.T. or Mr. Thompson throughout this opinion.

[3] *See* West Virginia Code § 61-7-12.

[4] *See* West Virginia Code § 61-2-9.

[5] *See* West Virginia Code § 61-7-7.

[6] Because we are vacating Mr. Miller's convictions and remanding for a new trial, we recite the facts from the record of the original trial for purposes of appeal only. We make no conclusions regarding these facts and have not included recitations of fact relating to the entirety of the State's case.

[7] Ms. Dotson recited Mr. Miller's statement differently throughout her testimony, saying that he asked "[w]here's my bag" and "[w]here's the bag" and said "[g]ive me my bag."

[8] On cross-examination, she explained that she saw Mr. Goard leave, then Mr. Miller, then J.T. She was then alone in the apartment.

[9] Mr. Miller, Mr. Goard, and Ms. Dotson all described this as a method of ingesting drugs during the trial.

[10] On cross-examination, Mr. Goard admitted that he had gone upstairs to get heroin from another individual before he went to visit Ms. Dotson. He also admitted that he and Ms. Dotson commonly "smoked together," sometimes in payment for him staying with her.

[11] The jury also heard testimony from a doctor who treated Mr. Goard after the injury indicating that Mr. Goard told hospital staff he did not know who shot him.

[12] The jury was shown dashboard camera footage and a photograph depicting that encounter.

[13] Other witnesses, including Mr. Goard, testified that Mr. Miller wore this jacket, which had a paint stain on it, on the day of the shooting.

[14] Mr. Miller told the jury that while he had "relations" with Ms. Dotson, he did not have a romantic relationship with her.

[15] During the pretrial motions phase of the case, the State sought to preclude "inadmissible evidence of guilt of another." Before the jury was sworn, the State again asked the Court "to prevent the defense from eliciting testimony" that another person shot Mr. Goard. The circuit court revisited that issue and noted that if Mr. Miller testifies at trial as an eyewitness, that another person shot Mr. Goard, it was permissible. The prosecutor asked whether he could then question Mr. Miller "as to why he did not render aid to the victim and why he did not alert authorities that this purported other individual committed this crime[.]" The court said that line of questioning would be "fair game."

[16] *See* Syl. pt. 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977); *see also Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

[17] This Court discussed *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), a defendant's right to remain silent, and the related procedural safeguards in *Boyd*, 160 W.Va. 234, 233 S.E.2d 710.

[18] This Court has explained that the plain error doctrine may be used to correct "particularly egregious errors." *State v. Miller*, 194 W.Va. 3, 18, 459 S.E.2d 114, 129 (1995) (citation omitted). "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. pt. 7, *id*. "Once a defendant has established the first three requirements of *Miller*, we have the authority to correct the error, but we are not required to do so unless a fundamental miscarriage of justice has occurred." *State v. Marple*, 197 W.Va. 47, 52, 475 S.E.2d 47, 52 (1996).

[19] The State's evidence in *Marple* included the following: the victim was in defendant's bed, an EMT overheard the defendant say "I didn't want to kill her," a gun was found near the apartment and a test fire connected the gun to the bullet in the victim's brain, a contractor had seen and handled that gun in the defendant's bedroom, and there was gunshot residue on the defendant's hand and his pants. 197 W.Va. at 53-54; 475 S.E.2d at 53-54.

[20] Additionally, the facts here show that Mr. Miller's silence is distinguishable between his pre- and post-arrest silence, making any potential cumulative evidence argument unconvincing. Mr. Miller's pre-arrest silence regarding the identity of the shooter, when he encountered Patrolman Sweetser and gave a false name, occurred while he was on parole. Mr. Miller had purportedly just witnessed a shooting, which, in his view, could result in the revocation of his parole because he was not supposed to be around crime or firearms. Mr. Miller's explanation for his pre-arrest silence likely lessened its impeachment value. However, as Mr. Miller points out in his brief, the impeachment based on his post-arrest silence from the time of his preliminary hearing until trial, which he could not explain, was "far more damaging." The pre- and post-arrest silences were not equivalent, and we have long recognized a distinction between those types of silences. *See, e.g.*, *State v. Walker*, 207 W.Va. 415, 419 n.2, 533 S.E.2d 48, 52 n.2 (2000) (recognizing that "the protections afforded a defendant for post-*Miranda* silence are generally not available for pre-arrest silence" and explaining precedent).

[1] I commend the majority for thoroughly analyzing the evidence and clearly explaining its conclusion that the error was not harmless. While the majority opinion is thorough and well-written, I disagree with its ultimate conclusion that the error in this case requires reversal of Petitioner's convictions.

[2] Because the majority reversed and vacated Petitioner's convictions based on his first assignment of error, it did not address Petitioner's second assignment of error.

[3] This language is contained in the current version of West Virginia Code § 61-11-18. While the recidivist statute has been revised multiple times since *McMannis* was decided in 1978, the key language in the statute providing that a recidivist life sentence applies to a person convicted of a third felony who has been "twice previously convicted," has remained consistent across the multiple versions of the statute. When *McMannis* was decided in 1978, West Virginia Code § 61-11-18 provided, in relevant part: "When it is determined, as provided in section nineteen hereof, *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 penitentiary for life." (Emphasis added).

[4] While I believe this Court should overrule *McMannis*, I also recognize that it is within the purview of the Legislature to consider whether West Virginia Code § 61-11-18 should be amended to explicitly reject the Court's ruling in *McMannis*.
