No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Johnnie Franklin Wills, *Petitioner*,

v.

Karen Pszczolkowski, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Johnnie Franklin Wills,
Petitioner Below, Petitioner

vs.) No. 20-0472 (Hampshire County 18-C-29)

Karen Pszczolkowski, Superintendent,
Northern Correctional Facility,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Johnnie Franklin Wills, by counsel Jeremy B. Cooper, appeals the Circuit Court of Hampshire County's May 27, 2020, order denying petitioner's petition for a writ of habeas corpus following his convictions for grand larceny and conspiracy to commit grand larceny, in addition to receiving an enhanced sentence under a recidivist information. Respondent Karen Pszczolkowski, Superintendent, Northern Correctional Center, by counsel Gordon L. Mowen II, filed a response to which petitioner submitted a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

In March of 2016, petitioner and another individual broke into a residence and stole property located therein. Petitioner was indicted in May of 2016 of the felony offense of burglary; the felony offense of conspiracy to commit burglary; the felony offense of grand larceny; the felony offense of conspiracy to commit grand larceny; and the misdemeanor offense of destruction of property. Following a jury trial on August 24 and 25, 2016, petitioner was found guilty of the felony offenses of grand larceny and conspiracy to commit grand larceny. However, he was acquitted of burglary, conspiracy to commit burglary, and destruction of property. On August 26, 2016, the State filed a recidivist information against petitioner, and on October 21, 2016, petitioner admitted that he was the same person charged in the recidivist information and that he had previously been convicted of two qualifying offenses. On November 10, 2016, petitioner was sentenced to life imprisonment with parole eligibility for the felony offense of grand larceny and not less than one nor more than five years for the felony offense of conspiracy to commit grand larceny, with the sentences to run concurrently to one another. Petitioner appealed his sentences to this Court, and this Court affirmed in a memorandum decision. *State v. Wills*, No. 16-1199, 2017

WL 5632127 (W. Va. Nov. 22, 2017) (memorandum decision) ("*Wills I*").

Acting as a self-represented litigant, petitioner filed a petition for a writ of habeas corpus on June 1, 2018. The circuit court appointed Jason T. Gain to represent petitioner and file an amended petition; following several extensions, the amended petition was filed on January 14, 2019. On August 22, 2019, the circuit court held an omnibus evidentiary hearing, during which petitioner appeared via video conference without objection to that appearance. The court reviewed the checklist of grounds for post-conviction habeas corpus relief with petitioner, and an amended *Losh* list was filed on August 22, 2019, which included additional claims.[1] The court reviewed petitioner's constitutional rights regarding the amended *Losh* list, and evidence was presented. In addition, the parties stipulated that the records in Hampshire County Case No. 16-F-57 and this Court's memorandum decision be made a part of the record in the instant matter. During the omnibus hearing, petitioner's trial counsel offered testimony.

On September 27, 2019, the circuit court granted petitioner's motion for leave to file a second amended petition; on that date, it also continued the final omnibus hearing. During the second omnibus hearing on November 7, 2019, petitioner appeared and provided testimony in support of his habeas petition. During that hearing, a transcript of the closing arguments from the underlying criminal trial was admitted. The parties were asked to submit proposed findings of fact and conclusions of law for the circuit court's consideration. Before issuing its May 27, 2020, order denying petitioner's habeas petition, the circuit court also "review[ed] and fully consider[ed] the records contained in Hampshire County Circuit Court Case No.: 16-F-57; [*Wills I*]; and exhibits that were admitted into the evidentiary record on August 22, 2019[,] and November 7, 2019."

In its thirty-one-page order denying petitioner's request for habeas relief, the circuit court addressed each of the grounds petitioner asserted in his second amended petition for habeas corpus. However, as explained below, only one of those grounds is relevant to this Court's review of the error alleged by petitioner—the constitutionality of the recidivist statute. In addressing that issue, the circuit court found that "to date[,] the recidivist statute remains in effect and constitutional in the State of West Virginia. Therefore, [p]etitioner is entitled to no relief upon this ground." Petitioner appeals from the circuit court's May 27, 2020, "Order Denying Habeas Corpus."

This Court reviews a circuit court order denying a habeas petition under the following standard:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

[1] *Losh v. McKenzie,* 166 W. Va. 762, 277 S.E.2d 606 (1981).

On appeal, petitioner sets forth argument in support of only one assignment of error: The circuit court erred by denying relief on petitioner's claim that the application of the West Virginia recidivist statute, under the facts of his case, is illegal based upon favorable changes in the law since his original sentencing.[2] At the outset, petitioner admits that an assignment of error attacking his recidivist sentence would, under normal circumstances, be res judicata in the underlying habeas proceeding and in the context of this appeal because it was already ruled upon in petitioner's direct appeal. However, he asserts that there is an exception in Syllabus Point 4 of *Losh v. McKenzie,* 166 W. Va. 762, 277 S.E.2d 606 (1981), that permits successive collateral litigation in the context of a "change in the law, favorable to the applicant, which may be applied retroactively." Thus, he contends that this Court may properly consider the issue in the context of this appeal. Petitioner goes on to argue that the recidivist statute in effect at the time of petitioner's sentencing, as interpreted by this Court, is unconstitutionally void for vagueness so his life recidivist sentence is illegal under *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), which was issued after petitioner's recidivist sentence was handed down and affirmed by this Court. Petitioner further asserts that his sentence is disproportionate in violation of Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution.

Petitioner admits that in *State v. Mauller*, No. 19-0829, 2020 WL 4355079 (W. Va. July 30, 2020) (memorandum decision), this Court considered and rejected an appeal on similar grounds to the instant appeal; he contends, however, that the facts in *Mauller*, which specifically involved the underlying felonies, differ in key ways from the instant case. Petitioner asks that this Court "simply modify the [*State v.*] *Hoyle*[, 242 W. Va. 599, 836 S.E.2d 817 (2019), *cert. denied*, 140 S. Ct. 2586 (2020),] test to pass federal constitutional muster, by requiring an 'elements' test for violent offenses rather than a 'residual clause.'"

In *Hoyle*, this Court set forth the following:

> "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syllabus Point 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).
>
> "The appropriateness of a life recidivist sentence under our constitutional proportionality 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

[2] Petitioner also alleged that the circuit court erred by denying relief on his other grounds for habeas relief. On October 2, 2020, petitioner's counsel filed a "Motion to Permit Filing of a *Pro Se* Supplemental Brief" requesting that petitioner be permitted to file a separate brief addressing the second assignment of error as a self-represented litigant, pursuant to Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure. This Court granted that motion by order entered on November 12, 2020. Pursuant to that order, petitioner's brief on that issue was to be filed no later than December 4, 2020. Petitioner did not submit a brief addressing that issue. Therefore, pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, we decline to address the unargued assignment of error.

> 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 statute." Syllabus Point 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).
>
> For 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.

Hoyle, 242 W. Va. at 603, 836 S.E.2d at 821, Syl. Pts. 10, 11, and 12.

We note that recidivist statutes are designed "to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense from committing subsequent felony offenses." Syl. Pt. 3, in part, *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) (citation omitted). Petitioner does not dispute that he was convicted of multiple charges of driving under the influence ("DUI"), third offense; multiple charges of driving revoked for DUI, third offense; DUI, second offense; domestic battery; escaping while in custody; grand larceny; conspiracy to commit grand larceny; and being a felon in possession of a firearm. West Virginia Code § 61-11-18(d) provides for the imposition of a life sentence "[w]hen it is determined . . . that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary . . . ." *Id.*; *accord Hoyle*, 242 W. Va. at 614, 836 S.E.2d at 832. As indicated above, *Hoyle* requires that, "[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." *Hoyle*, 242 W. Va. at 603, 836 S.E.2d at 821, Syl. Pt. 12, in part.

This Court has long recognized that the proportionality principle embedded in the West Virginia Constitution prohibits the imposition of a life recidivist sentence where the defendant's underlying conduct did not involve violence or the threat of violence. *See generally Wanstreet*, 166 W. Va. at 537, 276 S.E.2d at 214. This analysis is precisely what this Court undertook when it evaluated petitioner's claim on direct appeal in *Wills I*.

We disagree with petitioner's contention that his sentence is unconstitutional under *Dimaya*. As we recently found in *State v. Plante*, No. 19-0109, 2020 WL 6806375, at *5, n.11 (W. Va. Nov. 19, 2020) (memorandum decision),

> [w]e find this argument unavailing for two significant reasons. First, we have already determined that the language of our recidivist statute, West Virginia Code § 61-11-18, is plain and unambiguous. *See State ex rel. Appleby v. Recht*, 213 W. Va. 503, 519, 583 S.E.2d 800, 816 (2002)(quoting *State ex rel. Chadwell v. Duncil*,

> 196 W.Va. 643, 647, 474 S.E.2d 573, 577 (1996))(providing "[w]e have previously recognized that West Virginia Code § 61-11-18 is 'plain and unambiguous. . . .'"). Second, neither *Johnson* nor *Sessions*, the Supreme Court decisions relied upon by petitioner, involve a recidivist statute, and the principles of statutory construction contained in those cases are inapplicable to resolve the issue presented herein: whether, under the facts and circumstances of this case, the imposition of a life sentence under our recidivist statute is constitutionally disproportionate.

Plante, 2020 WL 6806375, at *5.

For the reasons set forth in our prior holdings, there is no need to modify our recent holding in *Hoyle*. Therefore, we find that the circuit court did not err in denying petitioner's petition for habeas corpus relief related to the imposition of the recidivist statute or petitioner's sentence under that statute.

Affirmed.

ISSUED: July 19, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton

IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA
DIVISION II

STATE OF WEST VIRGINIA ex rel.
JOHNNIE FRANKLIN WILLS,
Petitioner,

vs. **Civil Action No.: 18-C-29**

KAREN PSZCZOLKOWSKI, Superintendent,
Northern Correctional Facility,
Respondent.

ORDER DENYING HABEAS CORPUS

On the 7th day of November, 2019, came the Petitioner, Johnnie Franklin Wills, in person and by his counsel, Jason T. Gain; and, the State of West Virginia by Assistant Prosecuting Attorney Rebecca L. Miller. All parties appeared for the purpose of holding a final hearing upon the Petitioner's *Second Amended Petition for a Writ of Habeas Corpus ad Subjiciendum* which was filed by the Petitioner on September 23, 2019.

STANDARD OF REVIEW

Both case law and statute set out the appropriate standard of review to be applied to writs of habeas corpus. "When considering whether such a petition requesting post-conviction habeas corpus relief has stated grounds warranting the issuance of the writ, courts typically are afforded broad discretion." *Valentine v. Watkins*, 208 W.Va. 26, 31, 537 S.E.2d 647, 652 (2000). Furthermore, the grounds for relief must state a violation of the Petitioner's constitutional rights, show that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law. *W.Va. Code* § 53-4A-1(a) [1967]. If a petition for habeas corpus does not meet these standards, it will be summarily dismissed as legally insufficient and without merit.

PETITIONER'S GROUNDS FOR HABEAS CORPUS RELIEF

In accordance with *Losh v. McKenzie*, 277 S.E.2d 606, 166 W.Va. 762 (1981), the Petitioner advances the following grounds for relief in his *Second Amended Petition for a Writ of Habeas Corpus ad Subjiciendum*, as set forth in the Losh List; and, all other Grounds not asserted are Waived by the Petitioner:

1. Statute Under Which Conviction Obtained Unconstitutional;
2. Ineffective Assistance of Counsel;
3. More Severe Sentence than Expected;
4. Excessive Sentence;
5. Mistaken Advice of Counsel as to Probation or Parole Eligibility;
6. Involuntary Guilty Plea;
7. Language barrier to understanding the proceedings;
8. Coerced confessions;
9. State's knowing use of perjured testimony;
10. Unfulfilled Plea Bargains;
11. Claims Concerning use of Informers to Convict;
12. Claims of Prejudicial Statements by Prosecutor;
13. Sufficiency of Evidence;
14. Improper Communications between Prosecutor and Witness and Jury; and,
15. Questions of Actual Guilty Upon an Acceptable Guilty Plea.

FINDINGS OF FACT and CONCLUSIONS OF LAW

The Court does hereby make the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

1. A Petition for a Post-Conviction Writ of Habeas Corpus was electronically filed on June 1, 2018 by the Petitioner, Johnnie Franklin Wills, *pro se*.

2. An *Order Granting Leave to Proceed In Forma Pauperis; Appointing Counsel to File Amended Petition; and Directing Respondent to File Answer* was electronically filed on August 2, 2018, wherein the Order appointed Jason T. Gain, Esquire to represent the Petitioner, Johnnie Wills and directed that the Petitioner file an Amended Petition no later than September 20, 2018, with the Respondent's reply due no later than October 25, 2018.

3. An *Agreed Order Extending Time Period for Filing Amended Petition* was electronically filed on October 19, 2018, wherein the Order directed that the Petitioner be given additional time to file an Amended Petition and that said Petition shall be filed with the Court no later than November 19, 2018, with the Respondent's reply due on or before December 24, 2018.

4. An Order Granting Petitioner's *Motion for an Extension of Time to File Amended Petition* was electronically filed on November 26, 2018, wherein the Order directed that the Petitioner be given additional time to file an Amended Petition and that said Petition shall be filed with the Court no later than January 16, 2019, with the Respondent's reply due on or before February 20, 2019.

5. That Petitioner's *Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum* was electronically filed on January 14, 2019 by Counsel for the Petitioner, Jason T. Gain.

6. That the Checklist of Grounds for Post-Conviction Habeas Corpus Relief was electronically filed on January 14, 2019 by Counsel for the Petitioner, Jason T. Gain.

7. That Respondent's Answer to Petitioner's **Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum** was electronically filed on February 19, 2019.

8. An *Order Setting Scheduling Conference Hearing* was electronically filed on April 1, 2019, wherein a scheduling conference hearing was scheduled to occur on April 15, 2019, at the hour of 11:00 a.m.

9. An *Order Following Scheduling Conference* from the hearing on April 15, 2019 was electronically filed on April 19, 2019, wherein the matter was set for an Omnibus Evidentiary Hearing on June 12, 2019, at the hour of 1:00 p.m.

10. An *Order Granting Continuance/Transport Order* was electronically filed on June 19, 2019, wherein the Omnibus Evidentiary Hearing was continued until August 22, 2019.

11. That the Petitioner filed a *Motion to Supplement Pleadings* with attached handwritten *pro se* pleading from the Petitioner on August 13, 2019.

12. On August 22, 2019, this matter came before the Court upon the appearance of the Petitioner, Johnnie Franklin Wills, by video conference and by his counsel, Jason T. Gain, in person and upon the appearance of the Respondent by its Assistant Prosecuting Attorney, Rebecca L. Miller for Commencement of an Omnibus Evidentiary Hearing.

13. On August 22, 2019, upon inquiry by the Court, all parties informed the Court that there was no objection to the matter proceeding with Petitioner appearing via video conferencing.

14. The Court then reviewed the Checklist of Grounds for Post-Conviction Habeas Corpus Relief (Losh List) with the Petitioner and an Amended Losh List was filed on August 22, 2019, which included additional claims.

15. Upon review of the Amended Losh List, the Court reviewed the Petitioner's constitutional rights regarding the Amended Losh List with him and proceeded with the presentation of evidence.

16. Counsel for the Petitioner advised the Court that the parties had stipulated that the records contained in Hampshire County Circuit Court Case No.: 16-F-57 and the West Virginia Supreme Court of Appeals Memorandum Decision-State of West Virginia v. Johnnie Franklin Wills, Docket No.: 16-1199 filed November 27, 2017, shall be made part of the record in this case.

17. The Court then took judicial notice of the records contained in Hampshire County Circuit Court Case No.: 16-F-57 and the West Virginia Supreme Court of Appeals Memorandum Decision-State of West Virginia v. Johnnie Franklin Wills, Docket No.: 16-1199 filed November 27, 2017.

18. Attorney Jonie Nelson then appeared before the Court on August 22, 2019, to provide testimony in this matter. Ms. Nelson, after first being duly sworn, then proceeded to provide testimony in this matter, which was subject to both direct and cross-examination; and, the same is set forth more fully on the record herein.

19. Upon no objection by the parties, Pay Orders dated December 22, 2016, April 5, 2017, and December 7, 2017 (17 pages) were **ADMITTED** into the evidentiary, as Petitioner's Exhibit #1 on August 22, 2019.

20. Upon no objection by the parties, a Petition to Enter Plea of Guilty dated June 7, 2006 was **ADMITTED** into the evidentiary record as Respondent's Exhibit #1 on August 22, 2019.

21. Upon no objection by the parties, CD-Jail calls April 28, 2016 to August 1, 2016 were **ADMITTED** into the evidentiary record as Petitioner's Exhibit #2A on August 22, 2019.

22. Upon no objection by the parties, CD-Jail calls May 2, 2016 to June 13, 2016 were **ADMITTED** into the evidentiary record as Petitioner's Exhibit #2B on August 22, 2019.

23. At the conclusion of the August 22, 2019 hearing, the Court continued the matter to October 9, 2019, to allow Petitioner to appear in person to provide testimony, as he was not transported to the hearing.

24. On September 27, 2019, the Court granted the Petitioner's *Motion for Leave to File a Second Amended Petition*, which was electronically filed on September 23, 2019 and continued the Finalization of the Omnibus Hearing to November 7, 2019 to allow the Respondent to file a response on or before Friday, October 18, 2019.

25. That Respondent's *Answer to Petitioner's Second Amended Petition for a Writ of Habeas Corpus Ad Subjiciendu*m was electronically filed on October 17, 2019.

26. That this matter then proceeded with the finalization of the Omnibus Hearing on November 7, 2019.

27. On November 7, 2019, Petitioner Johnnie Wills appeared before the Court to provide testimony in this matter. Mr. Wills, after first being duly sworn, then proceeded to provide testimony in this matter, which was subject to both direct and cross-examination; and, the same is set forth more fully on the record herein.

28. Upon no objection by the parties, a Transcript of Closing Arguments from August 25, 2016 was **ADMITTED** into evidentiary record as Respondent's Exhibit #2.

29. The Court then afforded the parties an opportunity to submit proposed findings of fact and conclusions of law for the Court's consideration on or before December 16, 2019, which the Court has fully considered. In addition, the Court has now had an opportunity to review and fully consider the records contained in Hampshire County Circuit Court Case No.: 16-F-57; the West Virginia Supreme Court of Appeals Memorandum Decision-State of West Virginia v.

Johnnie Franklin Wills, Docket No.: 16-1199 filed November 27, 2017; and exhibits that were admitted into the evidentiary record on August 22, 2019 and November 7, 2019.

30. The Court **FINDS** that the Petitioner was indicted by the May 2016 Grand Jury for the felony offense of Burglary in violation of West Virginia Code §61-3-11; for the felony offense of Conspiracy to Commit Burglary in violation of West Virginia Code §61-10-31; for the felony offense of Grand Larceny in violation of West Virginia Code §61-3-13; for the felony offense of Conspiracy to Commit Grand Larceny in violation of West Virginia Code §61-10-31; and for the misdemeanor offense of Destruction of Property in violation of West Virginia Code §61-3-30(a).

31. The Court **FINDS** that the Indictment stemmed from an incident that occurred on March 17, 2016 at which time it was alleged that the Petitioner in conjunction with another individual broke into a residence and stole property located inside.

32. The Court **FINDS** that the matter proceeded to a Jury Trial on August 24, 2016 and August 25, 2016 wherein the jury returned a verdict of guilty for the felony offenses of Grand Larceny and Conspiracy to Commit Grand Larceny and acquitted the Petitioner on the felony offenses of Burglary and Conspiracy to Commit Burglary and the misdemeanor offense of Destruction of Property.

33. The Court **FINDS** that thereafter, on August 26, 2016, the State then filed a Recidivist Information against the Petitioner; and, on October 21, 2016, the Petitioner admitted that he was the same person charged in the Recidivist Information and that he had been previously convicted for two qualifying offenses, which would make him eligible for a life sentence, after first being advised of his rights and the consequences thereof.

34. Subsequently, on November 10, 2016, the Court sentenced the Petitioner to life imprisonment with parole eligibility after fifteen (15) years for the felony offense of "Grand

Larceny;" the Court sentenced the Petitioner to not less than one (1) nor more than five (5) years for the felony offense of "Conspiracy to Commit Grand Larceny;" and, the Court then Ordered said sentences to run concurrent.

Statute Under Which Conviction Obtained Unconstitutional

35. The first ground asserted by Petitioner is that the Statute under which his conviction was obtained was unconstitutional. Specifically, Petitioner argues that the recidivist statute is unconstitutional.

36. West Virginia Code §61-11-18 (c), known as the recidivist statute, provides that "[w]hen it is determined, as provide in section nineteen of this article, that such person 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 for life." West Virginia Code § 61-11-19 provides the procedure for a recidivist action.

37. The primary purpose of the recidivist statute is "to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." Syl. Pt. 3, in part, *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002) (citation omitted.)

38. The Court **FINDS** that the West Virginia Supreme Court of Appeals (WVSCA) previously considered and addressed the issues of "proportionality" and the nature of the conviction "triggering" the recidivist statute raised by Petitioner on appeal of his sentence to the WVSCA; and, the WVSCA upheld the trial court's imposition of a life sentence for the felony offense of "Grand Larceny." See *State v. Wills*, 2017 WL 5632127 (2017).

39. The Court **FINDS** that the trial court properly applied the recidivist law to the facts in the underlying criminal case when it determined that Petitioner's conviction for "Grand

Larceny" was an offense triggering the recidivist statute.

40. This Court **FINDS** that to date the recidivist statute remains in effect and constitutional in the State of West Virginia. Therefore, the Petitioner is entitled to no relief upon this ground.

Ineffective Assistance of Counsel

41. The Sixth Amendment to the United States Constitution and Article III, § 14 of the West Virginia Constitution not only assure the "assistance of counsel" to a defendant in a criminal proceeding but also assure that such a defendant receive competent and effective assistance of counsel. *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 152, 469 S.E.2d 7, 11 (1996); see also *Cole v. White*, 180 W.Va. 393, 395, 376 S.E.2d 599, 601 (1988). "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. pt. 5, State v. *Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

42. The West Virginia Supreme Court has held:

> In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of defense counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Id. at syl. pt. 6. The burden of proof is on the defendant. *Id.* A court is not required to address both prongs of the *Strickland/Miller* test if it can dispose of ineffective assistance of counsel claims on the failure to meet either prong of the test. State ex rel. *Daniel v. Legursky*, 195 W. Va. 314, 465

S.E.2d 416 (1995).

43. "Where counsel's performance, attacked as ineffective, arises form occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interest, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 290, 700 S.E.2d 489, 501 (2010) (citing syl. pt. 21, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)).

44. The *Hill v. Lockhart* test is applicable to guilty pleas. 474 U.S. 52 (1985); *State v. Sims*, 248 S.E.2d 834, 838 (W. Va. 1978). Under *Hill*, the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. *Ostrander v. Green*, 46 F.3d 347, 352 (4th Cir. 1995). A guilty plea is valid only if it represents a knowing and voluntary choice among alternatives; therefore, a client's expressed intent to plead guilty does not relieve counsel of their duty to investigate possible defense and advise the defendant so he can make an informed decision. *See Savino v. Murray*, 82 F.3d 593, 599 (4th Cir. 1996); *State ex rel. Vernatter* v. Warden, 207 W. Va. 11, 528 S.E.2d 207 (1999).

45. In the context of guilty pleas, the first half of the *Stricktland v. Washington* test is the same. The first prong of the test requires that a petitioner "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistances." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. The petitioner's burden in this regard is heavy, as there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Id.* at 689, 104 S.Ct. at 2065.

46. Syllabus point 6 of *Miller* further explains:

> In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of defense counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

47. The second, or "prejudice" requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination of whether the error "prejudiced" the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, at 56-60; see also *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999). With regard to a conviction resting upon a plea of guilty, the prejudice element "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have instead on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

48. " '[P]rejudice' is a reasonable probability that the defendant would have insisted on going to trial had he not received the ineffective assistance, and a 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' " *Ostrander v. Green*, 46 F.3d 347,

355 (4th Cir. 1995) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068), overruled on other grounds by *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). While *Hill*'s prejudice requirement focuses on a subjective question, "the answer to that question must be reached through an objective analysis." *State ex rel Vernatter v. Warden, West Virginia Penitentiary*, 207W. Va. 11, 17-18, 528 S.E.2d 207, 213-14 (1999) (quoting *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir.), cert. denied, 488 U.S. 843, 109 S.Ct. 117, 102 L.Ed.2d 91 (1988)).

49. Here, it is the Petitioner's contention that Counsel was ineffective for several reasons, some of which are intertwined with other grounds asserted by the Petitioner, which the Court has addressed individually in this order. Specifically, the Petitioner alleges that Defense Counsel was ineffective because she failed to advise him that upon entering a plea of guilty to the recidivist information that it meant that he was agreeing that the nature of two prior felonies were "violent." Petitioner further argues Defense Counsel did not investigate issues concerning a search warrant that was executed at the victim's home prior to the occurrence of the crimes for which Petitioner was charged, which Petitioner believed would have cast some doubt upon Petitioner's case at trial.

50. In the case at bar, this Court **FINDS** the Petitioner's argument that he was not advised that upon entering a plea of guilty to the recidivist information that he was agreeing that two prior felonies were "violent" to be without merit. Specifically, this Court **FINDS** that the Petitioner's case was set for a jury trial; and, that at a status hearing on October 21, 2016, the Petitioner informed the Court of his desire to enter a plea to the recidivist information in lieu of proceeding with the jury trial, which was already scheduled to occur. This was not done as part of any plea agreement. Furthermore, this Court **FINDS** that the Petitioner clearly and unequivocally acknowledged his understanding that DUI, 3rd Offense has been found by our Supreme Court to

be a violent crime. (*Tr.* 8 at lines 22-24, Oct. 21, 2016).

51. The Court **FINDS** that the Petitioner has not met his burden of identifying what acts or omissions Defense Counsel made that were not the result of professional judgment. As such, the Petitioner has not met the first prong of *Miller*; and, therefore, this Court is not required to address the second prong of the *Miller* test.

52. The Court **FINDS** the remainder of Petitioner's argument that Defense Counsel was ineffective to be without merit.

53. The Court **FINDS** that the Petitioner has failed to show that the performance of Defense Counsel at the jury trial below was deficient in any manner.

54. The Court **FINDS** that Defense Counsel exercised due diligence during her representation of the Petitioner in the underlying criminal matter.

55. The Court **FINDS** that Defense Counsel appeared for the Co-Defendant's plea hearing and was able to effectively utilize the transcripts of that proceeding during cross-examination of the Co-Defendant at the Petitioner's jury trial, in an attempt to discredit the Co-Defendant during his testimony.

56. The Court **FINDS** that the Petitioner's argument that Defense Counsel failed to investigate another incident regarding the broken doorjamb at the victim's residence to be without merit and moot, as the Petitioner was acquitted of the misdemeanor offense of Destruction of Property as charged in the indictment.

57. The Court **FINDS** that Defense Counsel, through due diligence, was able to create doubt in the jury's mind, which ultimately led to the Petitioner being acquitted of the felony offenses of Burglary and Conspiracy to Commit Burglary as well as the misdemeanor offense of Petit Larceny.

58. The Court **FINDS** that Defense Counsel was prepared to move forward with a jury trial on the Recidivist Information, however, the Petitioner advised that he did not desire to do so and that in lieu of a jury trial, he wished to admit to the Recidivist Information.

59. The Court **FINDS** that Petitioner's testimony that Defense Counsel only met with him on three occasions is not credible based upon the testimony of Defense Counsel and her Public Defender Services Defense Counsel Voucher Information that indicated she met with the Petitioner on eighteen (18) occasions prior to the jury trial in the underlying criminal matter.

60. The Court **FINDS** that Petitioner has failed to meet his burden of showing that Defense Counsel's performance was deficient in any manner. Furthermore, this Court is not required to address both prongs of the *Strickland* test where the Petitioner has failed to meet one prong.

61. For the foregoing reasons, this Court does hereby **FIND** and **DETERMINE** that the Petitioner has not met his burden of identifying what acts or omissions Defense Counsel made that were not the result of professional judgment. As such, the Petitioner has not met the first prong of *Strickland/Miller* test. Therefore, this Court does hereby **FIND** and **DETERMINE** that the Petitioner did not have ineffective assistance of counsel and that Petitioner is not entitled to any relief on this ground.

More Severe Sentence than Expected

62. The Court **FINDS** that Petitioner did not provide any supporting facts, evidence, or argument with respect to this ground. The Court further **FINDS** that the Petitioner was properly advised of the potential consequences, to include sentence that he may receive if convicted at a trial on each of the offenses pled in the underlying indictment as well as the potential sentence he could receive under the recidivist information. Therefore, the Court does hereby **FIND** and

DETERMINE that Petitioner is not entitled to any relief with respect to this ground.

Excessive Sentence

63. A claim for relief in post-conviction habeas corpus can only be based on "contentions . . . not . . . previously and finally adjudicated . . . [.]" W.Va. Code § 53-4A-1(a) [1967], in part. "[A] contention . . . shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong." W.Va. Code, § 53-4A-1(b) [1967], in part.

64. The WVSCA has already reviewed Petitioner' sentence on appeal and found there to be no reversible error. Specifically, the WVSCA addressed the "proportionality" and the nature of the offense triggering the recidivist statute. As such, said matter was previously and finally adjudicated; and, the Petitioner is barred from now asserting that his sentence was excessive.

65. Although the WVSCA has already addressed Petitioner's sentence on appeal, this Court **FINDS** that the Petitioner was sentenced in accordance with West Virginia law and that the trial court properly applied the recidivist statute in imposing a life sentence in the underlying criminal case.

66. The Court further **FINDS** that the Petitioner was advised of the potential sentence he would be facing under the recidivist statute. Specifically, the Petitioner was advised and

cautioned concerning the same, in court, on August 29, 2016, October 21, 2016, and November 10, 2016. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Mistaken Advice of Counsel as to Parole or Probation Eligibility

67. The Court **FINDS** that Petitioner did not provide any supporting facts or argument with respect to this ground. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Involuntary Guilty Plea

68. According to Rule 11(c) of the West Virginia Rules of Criminal Procedure: Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
> (2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
> (3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that the defendant has the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, the right against compelled self-incrimination, and the right to call witnesses; and
> (4) That if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
> (5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false swearing.

69. Rule 11(d) of the West Virginia Rules of Criminal Procedure states as follows: [t]he court shall not accept a plea of guilty or nolo contendere without first, by

addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendant or the defendant's attorney.

70. "Due process only requires that a guilty plea be voluntary, knowing and intelligent. The requirements of Rule 11, while they assist in ensuring that guilty pleas comport with this basic constitutional requirement, are not of themselves of constitutional significance. Accordingly, the United States Supreme Court in *United States v. Timmreck,* 441 U.S. 780, 784, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979), held that assertions of Rule 11 error are generally not cognizable in the analogous federal context of post-conviction motions brought pursuant to 28 U.S.C. § 2255. Under the approach set forth in *Timmreck,* a habeas petitioner may successfully challenge a guilty-plea conviction based upon an alleged violation of Rule 11 only by establishing that the violation constituted a "constitutional or jurisdictional" error, 441 U.S. at 783, 99 S.Ct. at 2087 (citing *Hill v. United States,* 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962)); or by showing that the error resulted in a " 'complete miscarriage of justice,' " or in a proceeding " 'inconsistent with the rudimentary demands of fair procedure,' " 441 U.S. at 784, 99 S.Ct. at 2087 (quoting *Hill,* 368 U.S. at 428, 82 S.Ct. at 471). Moreover, the petitioner must also demonstrate that "he was prejudiced in that he was unaware of the consequences of his plea, and, if properly advised, would not have pleaded guilty." *Id. Cf. Pugh v. Leverette*, 169 W.Va. 223, 234, 286 S.E.2d 415, 421 (1982). Thus, a prisoner may not collaterally attack a guilty plea under Rule 11 where "all that is shown

is a failure to comply with the formal requirements of the Rule." *Id.* at 785, 99 S.Ct. at 2088." *State ex rel. Vernatter v. Warden, W. Virginia Penitentiary*, 207 W. Va. 11, 19–20, 528 S.E.2d 207, 215–16 (1999).

71. Whether a guilty plea is voluntary depends upon information known by the defendant at the time the plea was entered, including what was learned out of court. *Henderson v. Morgan*, 426 U.S. 637, 647, 96 S.Ct. 2253. 2258, 49 L.Ed.2d 108 (1976); cf. syl. pt. 2, *State v. Sims*, 162 W.Va. 212, 217, 248 S.E.2d 834, 838 (1978) ("The controlling test as to the validity of a guilty plea, when it is attacked in a habeas corpus proceeding on grounds that fall within those on which counsel might reasonably be expected to advise, is the competency of the advice given by counsel").

72. "Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error." Syl. pt. 3, *State v. Sims*, 162 W.Va. 212, 212, 248 S.E.2d 834, 835 (1978).

73. The burden of proving that a plea was involuntarily made rests upon the pleader. Syl. pt. 3, *State ex rel. Clancy v. Coiner*, 154 W. Va. 857, 857, 179 S.E.2d 726, 727 (1971).

74. The Court **FINDS** that the Petitioner did not enter into any plea agreement in this case. The Petitioner appeared before the Court on October 21, 2016, for a status hearing prior to the jury trial on the Recidivist Information. During the October 21, 2016 hearing, the Petitioner's Counsel informed the Court that the Petitioner no longer wished

to proceed with a jury trial on the Recidivist Information; and, the Petitioner confirmed that he wished to proceed and make admissions to the Recidivist Information. The Court **FINDS** that the State did not object to the Petitioner's request to move forward without a jury trial and made admissions to the Recidivist Information.

75. The Court further **FINDS** that on October 21, 2016, the trial court specifically informed the Petitioner, in part, as follows:

> The Court: What I will be asking you then here in a few moments is whether you admit that you are the same individual that was convicted of those offenses that are named in the Recidivist Information. But before I do that, I want to make sure that you again understand that you have the option of admitting, denying, or remaining silent as to your identity for each conviction. I further caution you that if you acknowledge that you were the same person, that you would be subject to a life sentence in the state penitentiary pursuant to West Virginia Code 61-11-18(c).
>
> The Court also would inform you that if you choose to remain silent or deny the allegations as you did before, that we would have a trial; and we would impanel a jury which we will do and could have that next Wednesday and that – the inquiry of that is to determine whether or not you're the same person that was – had those convictions.
>
> So do you understand those are your rights?
>
> The Defendant: Yes, sir.
>
> The Court: Okay. And if you do --- and I want to make sure that you do understand that if you admit that you are that person, that the penalty for that, if there are two prior felony qualifying convictions, would be that you would be – you would be as a third-time conviction. It would be life in prison. Do you understand that?
>
> The Defendant: Yes, sir.
>
> The Court: I know you want to argue as far as proportionality but that doesn't –
>
> Ms. Nelson: It does not.
>
> The Court: It does not – I mean, you would have to understand that if you – that's why I go over these cautions with you. In all likelihood, it could result in you being confined to the penitentiary for life which makes you parole eligible in 15 years under the statute. Do you understand that?

The Defendant: Yes, sir.

See Tr. 6 at lines 1-24, 7 at lines 1-24, 9 at lines 1-11, Oct. 21, 2016.

76. The Court further **FINDS** the following excerpts from the October 21, 2016, hearing to be important:

> The Court: Okay. And DUI third has been found by our Supreme Court to be a violent crime. Do you understand that?
>
> The Defendant: Yes, sir.

See Tr. 8 at lines 22-24.

> The Court: Okay. I guess what I'm telling you is that if you do this, then in all reasonable likelihood that you will be sentenced to life – to the life sentence that's required by the recidivist statute. Do you understand that?
>
> The Defendant: Yes, sir.
>
> The Court: Ms. Nelson, you have told him that?
>
> Ms. Nelson: Yes, Your Honor.
>
> The Court: And you can argue proportionality, but I've looked into that and with these offenses that he is facing, they do qualify.
>
> Ms. Nelson: I understand.
>
> The Court: Is that clear to everyone?
>
> Mr. James: I think he has fully been informed by the Court, Your Honor.
>
> The Court: Mr. Wills, I just want to make sure you understand that before you do this.
>
> The Defendant: Yes, sir.

See Tr. 9 at lines 5-21.

77. The Court **FINDS** that the Petitioner was fully apprised of the consequences of entering a plea to the Recidivist Information by both the trial court and Defense Counsel.

78. In light of the foregoing, the Court **FINDS** that the Petitioner has failed to

prove that his guilty plea to the Recidivist Information was involuntarily made. Furthermore, the Court **FINDS** that the Petitioner proceeded to a two (2) day jury trial with respect to the original indictment on August 24, 2016, and August 25, 2016; and, Petitioner did not enter a guilty plea with respect to the underlying criminal charges. Accordingly, the Court does hereby **FIND** and **DETERMINE** that Petitioner is entitled to no relief under this ground.

Language Barrier to Understanding the Proceedings

79. The Court **FINDS** that Petitioner did not provide any supporting facts or argument with respect to this ground. Furthermore, the Court **FINDS** that, upon review of the jail recordings, the Petitioner appeared to understand the nature of the proceedings against him, based upon his discussions with others. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Coerced Confessions

80. "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admission of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975). "Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability." Syl. Pt. 6, *State v. Worley*, 179 W. Va. 403, 369 S.E.2d 706 (1988).

81. Here, Petitioner argues that the Co-Defendant was coerced into providing a confession implicating Petitioner at the time the Co-Defendant entered a guilty plea. The Court **FINDS** the Petitioner's argument to be without merit. Furthermore, this Court **FINDS** that Defense

Counsel utilized the transcripts of testimony provided by the Co-Defendant at the Petitioner's jury trial and was able to successfully cross-examine the Co-Defendant, which led to the Petitioner's acquittal for the felony offenses of Burglary, Conspiracy to Commit Burglar, and the misdemeanor offense of Destruction of Property.

82. The Court **FINDS** that Petitioner did not provide any supporting facts or argument that Petitioner was subjected to a coerced confession. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

State's Knowing Use of Perjured Testimony

83. "[P]rosecutors have a duty to the court not to knowingly encourage or present false testimony." *State v. Rivera*, 210 Ariz. 188, 109 P.3d 83, 89 (2005). *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 379, 701 S.E.2d 97, 101 (2009).

84. "[I]n order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 379-80, 701 S.E.2d 97, 101-002 (2009).

85. In the present case, Petitioner argues that the State procured false testimony from the Co-Defendant in this case because the Co-Defendant provided differing versions of what had occurred.

86. The Court **FINDS** the Petitioner's argument to be without merit. This Court **FINDS** that, to the contrary, the State initially made a plea offer to the Co-Defendant. The State was prepared to move forward with a trial and believed he had sufficient evidence to do so. When the Co-Defendant was providing a recitation of facts, which the State knew to be false based upon all

the evidence gathered in the case (i.e. photographs of both the Co-Defendant and Petitioner at the residence with gloves on, statement of the victim, statement of the Petitioner's son, etc..), the State indicated that the State wished withdraw the plea and proceed to trial to allow the jury to make a determination of guilt or innocence. The Court then afforded the parties a recess to discuss the same. The Court **FINDS** the following excerpts from the plea hearing on July 25, 2016, to be particularly noteworthy:

> The Court: Why don't you all –
>
> The Defendant: -- want to leave it to the Courts that his son did go in with me, too, and help carry some things out.
>
> The Court: Well, you didn't say that earlier.
>
> Mr. James: He didn't even say his son was there.
>
> The Court: So the State is withdrawing the plea at this time?
>
> Mr. James: Your Honor –
>
> The Court: Maybe you all should talk, see if you and Ms. Wilson can talk and see what – and try to deduce what you think the truth is and see what it is before we try to just broadly – it doesn't sound like there's – I mean, I'm not going to –
>
> Mr. James: I'll be more than happy to go back with Ms. Wilson and her client. I don't want it to be perceived like I'm forcing him to take a plea in any manner, but –
>
> The Court- That's why we won't.
>
> Mr. James: -- the State believes that this is not what the evidence is going to be in this case at all.
>
> The Court: All right.
>
> Mr. James: And certainly, if a jury believes otherwise and they wish to acquit him, then so

be it. The State is fine with the jury making that finding. We are prepared to do so.

See Tr. 11 at lines 22-24, 12 at lines 1-20, July 25, 2016.

87. The Court **FINDS** that the Co-Defendant ultimately entered a guilty plea to all counts of the indictment on August 19, 2016, for which he received no concessions. At the plea hearing, the Co-Defendant was represented by counsel. Counsel for the Co-Defendant inquired into his client regarding the crimes for which he was entering a plea, to which the Co-Defendant provided a factual basis. The State was also afforded to ask questions of the Co-Defendant concerning the crimes for which the Co-Defendant was entering a plea. The Court **FINDS** that the Co-Defendant was not procured into providing false testimony and that there was no apparent motive for the Co-Defendant to lie, as he received no concessions and entered a plea of guilty to all counts of the indictment.

88. The Court further **FINDS** that Defense Counsel for Petitioner was able to effectively use the transcripts of testimony of the Co-Defendant during cross-examination; and, the Petitioner was ultimately convicted of several counts of the indictment.

89. The Court **FINDS** that the Petitioner has failed to prove that the State used false testimony or that he used any testimony that he "knew or should have known" to be false. Accordingly, the Court **FINDS** that the Petitioner is entitled to no relief upon this ground.

Unfulfilled Plea Bargain

90. The Petitioner alleges that he was offered a plea, in which he would serve a sentence of not less than two (2) nor more than fifteen (15) years in the penitentiary if he provided truthful testimony against his co-defendant. Petitioner asserts that he provided truthful statements and that the State failed to honor the plea agreement.

91. The Court further **FINDS**, upon review of the record, that the Petitioner appeared

before the trial court on June 17, 2016. At that time, it was represented to the trial court that two (2) different plea offers had been made to the Petitioner and that the Petitioner had rejected both plea offers. Petitioner acknowledged on the record that he had received both plea offers and that he had rejected both plea offers; and, Petitioner was advised of the potential penalties and consequences of rejecting the plea and proceeding to trial. Thereafter, on June 28, 2016, the trial court was advised that no plea agreement had been reached and reminded the court that the matter had been set for a jury trial.

92. Furthermore, the Court **FINDS** that Defense Counsel reviewed with the Petitioner the proposed Petition to Enter Plea of Guilty, which outlined the potential plea agreement, the Petitioner's rights, and the consequence of accepting a plea agreement.

93. The Court **FINDS** that Petitioner did not provide any supporting facts or argument with respect to this ground. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Claims Concerning Use of Informers to Convict

94. The Court **FINDS** that Petitioner did not provide any supporting facts or argument with respect to this ground. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Claims of Prejudicial Statements by Prosecutor

95. The Supreme Court has stated that:

> The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing, he must not abandon the quasi-judicial role with which he is cloaked under the law.

State v. Kendall, 219 W. Va. 686, 690-91, 639 S.E.2d 778, 782-83 (2006) (quoting *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977)).

96. Syllabus point 6 of *State v. Sugg*, also provides as follows:

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

193 W. Va. 388, 456 S.E.2d 469 (1995).

97. Here, Petitioner alleges that during closing arguments the State referred to him as something to the effect of "a B&E artist" despite the fact that he had no criminal history of breaking and entering into houses or other structures, which Petitioner contends was improper and prejudicial.

98. The Court, upon reviewing the transcripts of closing arguments, finds no mention and/or reference of Petitioner being a "B& E artist." Nonetheless, this Court **FINDS** that even if the Prosecutor had made such a statement, the Petitioner has failed to show the same was prejudicial to him. To the contrary, the evidence shows that the Petitioner was acquitted of the felony offenses of Burglary and Conspiracy to Commit Burglary; and, this Court fails to see how an "acquittal" could be considered as "prejudicial" to the Petitioner.

99. The Court **FINDS** that the Prosecutor did not make any prejudicial statements concerning the Petitioner and that all statements made by the Prosecutor involved his theory of the case.

100. The Court **FINDS** that Petitioner did not provide any supporting facts or argument

with respect to this ground. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Sufficiency of evidence

101. "Except in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of evidence." *Cannellas v. McKenzie*, 160 W. Va. 431, 236 S.E.2d 327, 331 (W. Va. 1977) (citing *Riffle v. King*, 302 F.Supp. 992 (N.D. W. Va. 1969), and *Young v. Boles*, 343 F.2d 136 (4th Cir. 1965)).

102. The Supreme Court has provided guidance with regard to considering the sufficiency of the evidence on an appeal:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

103. Further,

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *Id.*

104. In the present case, the Petitioner contends that the trial court committed reversible

error after allowing the State to introduce still photographs of video that was taken from the surveillance camera at the victim's residence.

105. "When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure* 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of it's duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of other evidence produced at the trial to sustain the conviction." Syllabus pt. 2, *State v. Osakalumi*, 194 W.Va. 758, 759, 461 S.E.2d 504, 505 (1995).

106. The Court **FINDS** that the trial court properly reviewed the circumstances presented in this case as it relates to the application of *Osakalumi* and determined that it was appropriate to include an instruction to the jury concerning the video surveillance footage, which was not preserved in this case. The trial court properly instructed the jury as follows: "[i]f you find that the State has lost, destroyed, or failed to preserve any evidence whose contents or quality are material to the issues in this case, then you may draw an inference unfavorable to the State which in itself may create reasonable doubt as to the Defendant's guilt." (*Jury Instructions and Charge*, 7 at lines 15-17, Aug. 25, 2016).

107. In the present case, the Court **FINDS** that no extraordinary circumstances exist in

this case to warrant the Court to consider sufficiency of the evidence. However, assuming *arguendo* that such circumstances did exist, this Court **FINDS** that there was sufficient evidence upon which to convict the Petitioner.

108. Specifically, this Court **FINDS** that the State offered testimony of the following witnesses at the jury trial in this matter: Deputy First Class Chad Hott; Rhonda Lease, victim; Deputy Scott R. Lemon; Chief Deputy Nathan Sions; Jenny Strickland; Melissa Whitacre; Scott Whitacre; and, Robert Twigg, Co-Defendant. The Court further **FINDS** that the Petitioner then testified in his own defense at the jury trial.

109. In the present case, in viewing the evidence in light most favorable to the prosecution, the Court **CANNOT FIND** that there is insufficient evidence in this case for a rational trier of fact to find the essential elements of the crimes for which the Petitioner was convicted of were proven beyond a reasonable doubt. To the contrary, the Court **FINDS** that, even in the absence of the still photographs that were introduced into evidence, there was testimony and evidence presented to establish the elements of the crimes of Grand Larceny and Conspiracy to Commit Grand Larceny, for which the Petitioner was convicted. Therefore, this Court does hereby **FIND** and **DETERMINE** that the Petitioner is not entitled to any relief upon this ground.

Improper Communications between Prosecutor and Witness and Jury

110. The Court **FINDS** that Petitioner did not provide any supporting facts, evidence, or argument with respect to this ground. Therefore, the Court does hereby **FIND** and **DETERMINE** that Petitioner is not entitled to any relief with respect to this ground.

Question of Actual Guilt upon Accceptable Guilty Plea

111. The Court **FINDS** that the Petitioner proceeded to a two (2) day jury trial in this matter with respect to the charges in the underlying criminal case. Following the jury trial in the

underlying criminal case, the Petitioner was scheduled to proceed to a jury trial upon a Recidivist Information; however, on October 21, 2016, the Petitioner informed the Court that he no longer wished to proceed to a jury trial and wished to make admissions to the Recidivist Information. The trial court thoroughly reviewed each crime identified in the Recidivist Information with the Petitioner, on the record. This Court **FINDS** that there was one crime for which Petitioner thought was dismissed against him. The Court took a brief recess to allow the State to obtain contact information to the Clarke County Circuit Clerk's office. Upon returning from recess, the trial court called the Office of the Circuit Clerk of Clarke County, Virginia, and made inquiry as to the status of the offense, which Petitioner initially thought had been dismissed against him. Both the State and Defense Counsel were permitted to question the Clerk. Thereafter, the Petitioner admitted that he, in fact, was the person convicted of the felony DUI Offense in question, as was alleged in the Recidivist Information and that the charge was not dismissed. This Court further **FINDS** that the record is clear that the Petitioner was fully aware that the prior convictions for DUI, 3rd Offense were considered to be "violent" crimes.

112. The Court **FINDS** that the Petitioner has failed to demonstrate that he was prejudiced; that he was unaware of the consequences of entering a plea to the Recidivist Information; and, that he would not have entered a plea had he known the consequences. To the contrary, this Court specifically **FINDS** that Petitioner was fully aware of the consequences of entering a plea to the Recidivist Information, and did so voluntarily.

113. For the foregoing reasons, the Court does hereby **FIND** and **DETERMINE** that there is no basis for the granting relief to Petitioner under this ground.

CONCLUSION

Based upon the foregoing, the Court does hereby **ORDER** and **ADJUDGE** as follows:

A. The Petitioner's *Second Amended Petition for a Writ of Habeas Corpus ad Subjiciendum* is hereby **REFUSED** and **DENIED**.

B. Accordingly, the Petitioner's *Second Amended Petition for a Writ of Habeas Corpus ad Subjiciendum* shall be and is hereby **DISMISSED**, with prejudice.

C. If the Petitioner desires to appeal this dismissal to the WVSCA and seeks leave to prosecute that appeal *in forma pauperis* and/or seeks the appointment of counsel, the Petitioner shall file with this Court a properly completed Notice of Intent to Appeal/Request for Appointment of Counsel form and a properly completed Application to Proceed *In Forma Pauperis* and Affidavit as set forth in Appendix B of the Rules Governing Post-Conviction Habeas Corpus Proceedings. These materials shall be filed with this Court no later than four months from the entry date this Order.

D. **This is a Final Order.**

Nothing further remaining to be done in this matter, the Clerk of the Court is directed to remove this matter from the active docket of the Court and place it among those matters ended.

The Circuit Clerk is directed to send an official copy of this Order to all counsel of Record via the West Virginia e-Filing System; and, a copy to the Petitioner.

Entered this the 27th day of May, 2020.

C. CARTER WILLIAMS, JUDGE

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 16-1199 (Hampshire County 16-F-57)

Johnnie Franklin Wills,
Defendant Below, Petitioner

FILED
November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Johnnie Franklin Wills, by counsel Jonie E. Nelson, appeals the Circuit Court of Hampshire County's December 7, 2016, order sentencing him as a recidivist to life imprisonment with mercy following his grand larceny conviction. Petitioner was also sentenced to an indeterminate term of not less than one year nor more than five years of incarceration for his conspiracy to commit grand larceny conviction, which was ordered to run concurrently with his life sentence. The State of West Virginia, by counsel Benjamin F. Yancey III, filed a response in support of the circuit court's order. On appeal, petitioner argues that the circuit court's imposition of a life sentence is unconstitutionally disproportionate to his crimes.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

On May 3, 2016, petitioner was indicted on one felony count each of burglary, conspiracy to commit burglary, grand larceny, and conspiracy to commit grand larceny, and one misdemeanor count of destruction of property.[1] Petitioner proceeded to trial on these charges on August 24, 2016. A jury found petitioner guilty of grand larceny and conspiracy to commit grand larceny, but he was acquitted of the other charges.

Following the jury's verdict, the State filed a "Recidivist Information" detailing petitioner's prior felony convictions. Specifically, in addition to his grand larceny and conspiracy to commit grand larceny felonies, petitioner was convicted on October 28, 2013, of the felony

[1]These charges stemmed from an incident during which petitioner and a codefendant entered onto another individual's property without permission. Petitioner claimed that while he was looking for a spare car part, his codefendant burgled the individual's home. Petitioner's codefendant was charged with the same crimes as petitioner, pled guilty to all of them, and testified against petitioner at petitioner's trial.

offense of third-offense driving on a license revoked for driving under the influence ("DUI").[2] On April 18, 2011, petitioner was convicted of the felony offense of attempted grand larceny. On January 24, 2007, petitioner was convicted of the felony offense of third offense DUI.[3] On March 6, 2006, petitioner was convicted of the felony offense of being a felon in possession of a firearm. Again, on June 6, 2006, petitioner was convicted of the felony offense of being a felon in possession of a firearm. On April 22, 2002, petitioner was convicted of three separate felonies that arose from separate incidents: one third offense DUI conviction and two driving while on a license revoked for DUI, third offense, convictions. Due to these prior felony convictions, the State requested that petitioner be sentenced to life in prison for his most recent grand larceny conviction.

On October 21, 2016, the circuit court held a hearing on the "Recidivist Information." Petitioner admitted that he was the same person convicted of the crimes listed above. On November 10, 2016, due to petitioner's prior felony convictions, the circuit court sentenced petitioner to life imprisonment with parole eligibility after fifteen years for his grand larceny conviction. Petitioner was also sentenced to an indeterminate term of not less than one year nor more than five years of incarceration for his conspiracy to commit grand larceny conviction. This sentence was ordered to run concurrently with his life sentence. The circuit court entered its "Sentencing Order" memorializing petitioner's sentence on December 7, 2016. It is from this order that petitioner appeals.

On appeal, petitioner argues that his recidivist life sentence is disproportionate to his crimes. Petitioner argues that the triggering offenses of grand larceny and conspiracy to commit grand larceny were nonviolent offenses. Although he was originally charged with burglary and his codefendant pled guilty to burglary, petitioner states that he did not break into the home from which the goods were stolen and that he "was at another area of the property looking for a piece of pipe to fix his muffler." Petitioner recognizes that "a propensity for violence may have existed" while petitioner's codefendant burgled the home, but states that "no violence occurred." Petitioner also argues that he "does not have a conviction for actual crimes of violence." Petitioner urges this Court to give "minimal weight" to his felony DUI convictions because of the age of some of his convictions. In sum, petitioner argues that his criminal record "only involves convictions that demonstrate a propensity for violence."[4]

The portion of our recidivist statute applicable to petitioner's case provides that "[w]hen it is determined . . . 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 for life." W.Va. Code § 61-11-18(c). This Court has previously stated that the primary purpose of this statute "is to deter felony offenders, meaning

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[2]At this same time, petitioner was also convicted of the misdemeanor offenses second-offense DUI, domestic battery, and escaping while in custody.

[3]Petitioner was also then convicted of the misdemeanor offense of driving on a suspended license. These convictions were obtained in Virginia.

[4]Petitioner also admits to "numerous misdemeanors that involve crimes of violence[.]"

persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses." Syl. Pt. 3, in part, *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002) (citation omitted). Further, "West Virginia Code § 61-11-18 is designed to deter those who are incapable of conforming their conduct to legitimately enacted obligations protecting society[,]" and we have noted that "[s]tates have a valid interest in deterring and segregating habitual criminals[.]" *Appleby*, 213 W.Va. at 517, 583 S.E.2d at 814 (citations omitted).

Nonetheless, sentences imposed may not run afoul of Article III, § 5 of the West Virginia Constitution, which provides, in relevant part, that "[e]xcessive 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 offense." We have held that "a criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eight Amendment of the United States Constitution and Article III, § 5 of the West Virginia Constitution." *State v. Davis*, 189 W.Va. 59, 61, 427 S.E.2d 754, 756 (1993) (citations omitted). Therefore, we utilize the following framework to determine whether a life sentence imposed pursuant to our recidivist statute violates the proportionality principle:

> We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the 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, in part, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981). "[A]lthough sole emphasis cannot be placed on the character of the final felony, it is entitled to closer scrutiny than the other convictions, 'since it provides the ultimate nexus to the sentence.'" *State v. Miller*, 184 W.Va. 462, 465, 400 S.E.2d 897, 900 (1990) (citations omitted). We also "generally require that the nature of the prior felonies be closely examined. While not exclusive, the propensity for violence is an important factor to be considered before applying the recidivist statute." *Id.*

Applying these pronouncements to petitioner's case, we do not find that petitioner's life sentence violates the proportionality principle. We begin by noting petitioner's ten prior felony convictions and that the purpose of our recidivist statute is to "deter those who are incapable of conforming their conduct to legitimately enacted obligations protecting society." *Appleby*, 213 W.Va. at 517, 583 S.E.2d at 814. In other words, the recidivist statute was designed to deter and put a stop to habitual criminals.

In analyzing petitioner's specific convictions, and looking first to his triggering offense of grand larceny, we note that while petitioner was not convicted of burglary, his codefendant pled guilty to that charge. Petitioner acknowledges that his codefendant burgled the victim's home while he was at a different spot on the victim's property and that "a propensity for violence may have existed." We have previously held that "burglary and grand larceny [are] crimes that by their very nature involve[] the threat of harm or violence to innocent persons[,]" where the defendant burgled a home and took approximately $6,000 in personal property. *State v. Housden*,

184 W.Va. 171, 175, 399 S.E.2d 882, 886 (1990). Petitioner admits to being on the victim's property while his codefendant burgled the victim's home; thus, the potential for harm or violence, had the property owner returned home, existed. *See id.* at 174, 399 S.E.2d at 885 ("The potential for threatened harm or violence to either the victim, had he returned home at the time the crime was committed or to another innocent person such as the victim's son, who testified that he was regularly checking on the home for his father, still existed at the time the appellant committed the crime.")

However, even if we ignore the fact that petitioner was present during the burglary his codefendant was convicted of committing and accept petitioner's contention that his grand larceny neither threatened nor actually involved violence, we have also held that "sole emphasis cannot be placed on the character of the final felony" and that prior felonies must be "closely examined."[5] In so doing, we note that petitioner, having twice been convicted of third offense DUI, has had no less than six DUI convictions. We have previously stated that "[t]he dangers inherent in driving on the public streets while under the influence of an intoxicant are obvious." *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 516, 583 S.E.2d 800, 813 (2002) (citation omitted). "[O]perating an automobile while under the influence is reckless conduct that places the citizens of this State at great risk of serious physical harm or death." *Id.* (internal quotations and citation omitted). Accordingly, we have had "little trouble in finding that driving under the influence is a crime of violence supporting imposition of a recidivist sentence." *Id.* Thus, given petitioner's numerous prior crimes, including these crimes of violence, we find no error in the imposition of a recidivist sentence.

For the foregoing reasons, the circuit court's December 7, 2016, sentencing order is hereby affirmed.

Affirmed.

ISSUED: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker

[5]We also reiterate that, while the propensity for violence is an important factor to consider in applying the recidivist statute, it is not the exclusive factor. *Miller*, 184 W.Va. at 465, 400 S.E.2d at 900.