IN THE UNITED STATES SUPREME COURT OF APPEALS

No._____

ADONNE HORTON,
PETITIONER

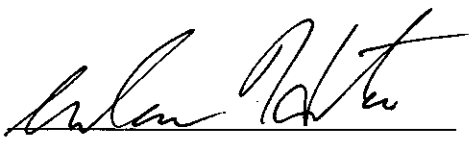
VS.

STATE OF WEST VIRGINIA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITIONER'S APPENDIX RECORD

Filed By:



Adonne Horton, *pro se*
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia 25185

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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

OCTOBER 2017 TERM

STATE OF WEST VIRGINIA,

Plaintiff,

v.

CASE NO.: 17-F-147

OFFENSE:
FLEEING IN A VEHICLE WITH RECKLESS DISREGARD
W.Va. Code § 61-5-17(f)

ADONNE ANTHONY HORTON

Defendant.

INDICTMENT

OFFENSE NAME: **FLEEING IN A VEHICLE WITH RECKLESS DISREGARD**

W.Va. Code: §61-5-17(f)

PENALTY: Shall be fined not less than One Thousand Dollars ($1,000.00) nor more than Two Thousand Dollars ($2,000.00), and shall be imprisoned in a state correctional facility not less than One (1) nor more than Five (5) years.

The Grand Jurors for the State of West Virginia, in and for the citizens of Marion County, upon their oaths, charge that on or about the 11th day of June, 2017, in the County of Marion, State of West Virginia, **ADONNE ANTHONY HORTON** committed the felony offense of **FLEEING IN A VEHICLE WITH RECKLESS DISREGARD** by intentionally fleeing or attempting to flee in a vehicle from any law-enforcement officer, probation officer or parole officer acting in his or her official capacity, after the officer has given a clear visual or audible signal directing the person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others, to-wit: by fleeing in a vehicle from Patrolman K. Joseph of the Fairmont City Police Department while operating said vehicle at high rates of speed, passing other vehicles in the opposing lane of traffic, disregarding traffic lights, driving through busy intersections without yielding, and then crashing his vehicle into a curb, after Patrolman K. Joseph gave him clear visual and audible signals to stop by turning on the emergency lights and sirens of his cruiser, in violation of W.Va. Code § 61-5-17(f), against the peace and dignity of the State.

Found upon the sworn testimony of Patrolman K. Joseph on this the 2 day of October, 2017.

A TRUE BILL

Jeffrey L. Freeman,
Prosecuting Attorney
Marion County West Virginia

Foreperson

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

STATE OF WEST VIRGINIA,

PLAINTIFF,

v. **CASE NO. 19-F-_____**

ADONNE ANTHONY HORTON,

DEFENDANT.

INFORMATION

THE PROSECUTING ATTORNEY CHARGES:

OFFENSE: THIRD OR SUBSEQUENT OFFENSE FELONY (RECIDIVIST)

W.VA. CODE: §§ 61-11-18(c) & 61-11-19

PENALTY: The person shall be sentenced to be confined in the state correctional facility for life.

That on or about the 22nd day of August, 2019, in the County of Marion, State of West Virginia, ADONNE ANTHONY HORTON was convicted in Case No. 17-F-147 of FLEEING IN A VEHICLE WITH RECKLESS DISREGARD, a felony offense pursuant to the provisions of W.Va. Code §61-5-17(f), and is subject to a fine of not less than One Thousand Dollars nor more than Two Thousand Dollars ($2,000.00) and to imprisonment in a state correctional facility upon such conviction for not less than one (1) year nor more than five (5) years.

Further, ADONNE ANTHONY HORTON was previously convicted on or about the 13TH day of June, 2003, in the Circuit Court of Marion County, West Virginia, Division II, of the offense of Wanton Endangerment Involving A Firearm, a felony offense punishable by confinement in a penitentiary pursuant to the provisions of West Virginia Code §61-7-12; and on or about the 7th day of April 1999, in the in the Circuit Court of Marion County, West Virginia, Division II, of the offense of Malicious Assault, a felony offense punishable by confinement in a

penitentiary pursuant to the provisions of West Virginia Code §61-2-9, against the peace and dignity of the State.

/s/ Joseph T. Hodges, III
Joseph T. Hodges, III, #8556
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Joseph T. Hodges, III, do hereby certify that on the 4th day of September, 2019, I delivered a true copy of the foregoing INFORMATION to the Circuit Court using the West Virginia E-Filing system, which will send notification of such filing to defendant's counsel, David DeMoss, Esq.

/s/ Joseph T. Hodges, III
Joseph T. Hodges, III, #8556
Assistant Prosecuting Attorney
213 Jackson Street
Fairmont, WV 26554

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

Case No.: 17-F-147
Judge: David R. Janes

ADONNE ANTHONY HORTON,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW REGARDING SENTENCING

Defendant Adonne Anthony Horton ("Mr. Horton"), by counsel, Nicholas C. Idler, hereby files this Memorandum of Law requesting this Honorable Court to exercise its discretion to impose a sentence other than a sentence of life imprisonment in this matter. In support of this Memorandum, Mr. Horton states as follows:

I. INTRODUCTION

This matter comes before the Court following the August 22, 2019 conviction of Mr. Horton for the offense of Fleeing in a Vehicle with Reckless Disregard ("Fleeing") in violation of Section 61-5-17(f) of the West Virginia Code. On September 4, 2019, the State of West Virginia subsequently filed an Information charging Mr. Horton with Third or Subsequent Offense Felony (Recidivist) in violation of Sections 61-11-18(c) and 61-11-19 (2019) of the West Virginia Code, wherein the State alleged Mr. Horton was previously convicted of Malicious Assault and Wanton Endangerment Involving a Firearm on separate occasions.

In 1999, Mr. Horton was convicted of the felony offense of Malicious Assault. Four years later, in 2003, Mr. Horton plead guilty to the offense of Wanton Endangerment Involving a Firearm in violation of Section 61-7-12 of the West Virginia Code. Approximately fourteen years later, the facts underlying the third and triggering offense were alleged to have taken place.

On June 11, 2017, Mr. Horton was arrested for the underlying charge of Fleeing. In short, this arrest spurred from a conversation with Officer Kai Joseph, who had identified Mr. Horton at a local gas station and informed Mr. Horton of an outstanding warrant. After brief conversation, Mr. Horton entered his vehicle, left the gas station, and a pursuit took place until Mr. Horton's vehicle was rendered disabled and Mr. Horton was subsequently arrested. Thereafter, Mr. Horton was incarcerated pending the disposition of this charge and the discharge of a sentence stemming from a plea agreement entered in Monongalia County Case Number 19-F-135. During his incarceration, Mr. Horton was granted the privilege to participate in the work release program supervised by the West Virginia Department of Corrections. From November 17, 2019, until April 14, 2020, Mr. Horton worked full-time at Pactiv in Mineral Wells, West Virginia, while incarcerated at the Parkersburg Correctional Center. Mr. Horton would continue to successfully work at Pactiv until he was granted release on parole on April 14, 2020. However, due to the pending Marion County detainer in this matter, Mr. Horton was never released and, instead, was removed from his gainful employment and transferred back to the North Central Regional Jail pending disposition of this case.

Eventually, Mr. Horton was convicted of Fleeing on August 22, 2019, and the recidivist Information was filed by the State on September 4, 2019. On April 8, 2021, following the selection of a jury, but prior to opening statements in the trial for the charge of Third or Subsequent Offense Felony (Recidivist), Mr. Horton admitted that he was, in fact, the individual identified in the Information.[1] Now, twenty-two years after Mr. Horton's first felony conviction, the State seeks to impose a recidivist life sentence against Mr. Horton as a habitual offender,

[1] As stated at the April 8, 2021 Hearing, Mr. Horton's admission to being the same individual identified in the Information was not, and should not be construed as, an admission of guilt to the underlying offenses set forth in the Information.

despite the noticeable gap of time between the conviction of the triggering offense and the prior felonies set forth in the Information. For the reasons set forth herein, Mr. Horton requests this Honorable Court utilize its discretion to impose a proportionate sentence other than the sentence of life, with mercy, sought by the State of West Virginia.

II. STATEMENT OF LAW

The Eighth Amendment of the United States Constitution forbids cruel and unusual punishment and carries an implicit requirement that a sentence should not be disproportionate to the crime committed. U.S. Const. amend. VIII; *State ex rel Boso v. Hedrick*, 391 S.E.2d 614, 622, 182 W. Va. 701 (1990) (citing *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983)). Article III, Section 5 of the West Virginia Constitution adopts the counterpart to the Eighth Amendment and sets forth that "[p]enalites shall be proportioned to the character and degree of the offense." In this regard, the West Virginia Supreme Court of Appeals has specifically recognized that sentences enhanced under West Virginia's recidivist statute are just as susceptible to violate the proportionality principle set forth in Article III, Section 5, as ordinary sentences. *State v. Davis*, 427 S.E.2d 754, 756, 189 W. Va. 59 (1993) (citing *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980)).

Under Section 61-11-18(c), "[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) (2019). However, despite the mandatory language that an individual "shall" serve a life sentence, the West Virginia Supreme Court of Appeals has upheld that any life sentence imposed by the circuit court under the recidivist statute is subject to scrutiny under the proportionality clause of the Constitution. *State v. Lane*, 826 S.E. 2d 657, 663, 241 W. Va. 532

(2019) (holding a life sentence was disproportionate for defendant previously convicted of two counts of delivery of a controlled substance, unlawful wounding, and conspiracy to commit the felony of transferring stolen property); *State v. Hoyle*, 836 S.E.2d 817, 242 W. Va. 599 (2019) (imposition of a recidivist life sentence was disproportionate for triggering offense of second offense failure to register as a sex offender).

When evaluating the proportionality or imposition of a life sentence, West Virginia's recidivist statute is viewed in a restrictive fashion favorable to the defendant to mitigate its harshness. *State v. Kilmer*, 808 S.E.2d 867, 869 (2017); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 209, 166 W. Va. 523, 528 (1981) ("It has been pointed out . . . that our recidivist statute is among the most draconian in the nation."). Accordingly, the appropriateness of a recidivist life sentence under the proportionality provision found in Article III, Section 5 of the West Virginia Constitution is analyzed as follows:

> [The Court] give[s] initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.

Syl. Pt. 7, *State v. Beck*, 286 S.E.2d 234, 244, 167 W. Va. 830, 831 (1981). As set forth above, the proportionality evaluation requires a close examination of the prior felonies when determining the appropriateness of a life sentence; however, the Court's proportionality analysis is not limited to solely the nature of the prior offenses. Specifically, the Court's evaluation has included other factors such as the amount of time that has passed between the underlying offenses and the penalty for the third and triggering felony. *State v. Miller*, 400 S.E.2d 897 900, 184 W. Va. 462, 465 (1990)

(concluding a life sentence was disproportionate because the three crimes spanned a period of twenty-five years and the maximum penalty for the triggering felony was only ten years).

Ultimately, sentencing rests exclusively with the trial court and so long as the sentence imposed is within statutory limits and not based on impermissible factors, the sentence is not subject to appellate review. Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). For the reasons set forth below, this Court should utilize its discretion to impose a sentence other than a life sentence because a recidivist life sentence would be disproportionate and violate Mr. Horton's right to not be subjected to cruel and unusual punishment.

III. ANALYSIS

A. Imposition of a life sentence would be disproportionate because the triggering offense did not demonstrate actual or threatened violence.

The facts in this matter do not demonstrate the triggering offense consisted of "actual or threatened violence." When evaluating the appropriateness of a recidivist life sentence, the primary analysis of the triggering and underlying 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, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981); *State v. Norwood*, 242 W.Va. 149, 832 S.E.2d 75 (2019); *Davis*, 427 S.E.2d at 757, 189 W. Va. at 62 (1993) (setting aside recidivist life sentence because there was no evidence that any individual was either harmed or threatened with harm); *State v. Boso*, 391 S.E.2d 614, 182 W. Va. 701 (1990) (concluding life sentence was disproportionate for the triggering offense of night-time burglary because the crime was committed in an unoccupied dwelling and nothing in the record indicated any weapons were used in the commission of the crime); *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817, 834 (2019) (reversing the Circuit Court's imposition of a life sentence, in part, because the triggering felony did not

involve a substantial impact to be imposed on a victim, other than the State). Further, "[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. Deal*, 178 W. Va. 142, 147, 358 S.E.2d 226, 231 (1987) (citing *Wanstreet*, 166 W. Va. at 534, 276 S.E.2d at 212) (internal quotations omitted).

In this instance, the facts of the triggering offense do not demonstrate actual or threatened violence. At the time of his arrest, Mr. Horton was not found in possession of any weapons or drugs, nor did his actions cause anybody to be injured or property to be damaged. Moreover, there were no victims to this crime as there were no passengers in the vehicle with Mr. Horton, nor was any evidence presented at the trial to show others were placed in harm's way. Specifically, there was no evidence or testimony elicited by anybody at trial to show actual harm was caused, nor was there any testimony that Mr. Horton threatened harm, or placed others in apprehension of harm. Moreover, Mr. Horton was not under the influence of any drugs or alcohol which inhibited his ability to operate the vehicle. Thus, based upon the evidence presented at trial and the record in this matter, neither actual or threatened harm resulted from Mr. Horton's arrest in the triggering felony.

Additionally, when evaluating the charge of Fleeing, the Court will note the maximum sentence for this offense is not less than one year nor more than five years of imprisonment. W. Va. Code 61-5-17(f) (2017). In this instance, enhancement of the sentence to a life sentence would result in a minimum sentence of fifteen years – more than triple the maximum penalty for Fleeing.[2] Consequently, the imposition of a life sentence would cause Mr. Horton to serve the same sentence as somebody sentenced to life, with mercy, for first-degree murder, when,

[2] Individuals sentenced to a recidivist life sentence pursuant to Section 61-11-18(c) are not eligible for parole for at least fifteen years.

in Mr. Horton's case, the crime in question involved no victims, injuries, weapons, or drugs.[3] W. Va. Code §62-3-15; *See State v. Miller*, 400 S.E.2d 897, 184 W. Va. 462 (concluding that "because the maximum penalty for the triggering felony is itself only ten years, we do not believe that the application of the recidivist statute . . . is justified in this case."). Implementation of such sentence would no doubt shock the conscious that somebody convicted of first-degree murder could serve a sentence equivalent to that of an individual incarcerated for a victimless crime.

Therefore, even when applying the heightened scrutiny to the triggering offense, this Court should find that a life sentence is not appropriate because the triggering felony did not involve actual or threatened violence and a life sentence would be unduly harsh given the facts of this case and the original sentence for the underlying offense.

B. A life sentence is disproportionate because the underlying offenses set forth in the Information occurred over the course of more than twenty years.

A recidivist life sentence is only appropriate when the State can meet the threshold requirement by demonstrating "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

[3] If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years: Provided, however, That if the accused pleads guilty of murder of the first degree, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve, and, if the court so provides, such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if such person had been found guilty by the verdict of a jury and the jury had recommended mercy, except that, notwithstanding any provision of said article twelve or any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years. W. Va. Code §62-3-15

harm results." *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817, 833 (2019). However, establishing the nature of the prior offenses is merely a threshold evaluation, not an automatic prompt to impose a life sentence. *See State v. Miller*, 400 S.E.2d 897, 184 W. Va. 462 (overturning recidivist life sentence and noting the three felonies prior to the triggering felony occurred over a period of twenty-five years); *State v. Deal*, 358 S.E.2d. 226, 178 W. Va. 142 (1987) (holding recidivist life sentence was disproportionate when triggering felony did not involve actual or threatened violence and previous conviction occurred sixteen years prior). As such, the West Virginia Supreme Court of Appeals has considered other factors when deciding if a recidivist life sentence is proportionate to the crime charged.

Here, the State will presumably argue that a life sentence is appropriate due to the nature of the two underlying offenses set forth in the Information. The two other felonies set forth in the Information consist of a conviction in 1999, and a guilty plea entered in 2003. Over twenty-two years have passed since Mr. Horton's first conviction, and more than eighteen years past since the guilty plea was entered for the second offense. Notably, those two offenses carried more severe sentences than the charge of Fleeing, further cautioning the imposition of the ultimate penalty. Given the lapse in time between the triggering felony and the underlying felonies, a life sentence would be inappropriate for the charge of Fleeing because the convictions for the three felonies set forth in the Information span over twenty-two years in time.

C. <u>This Court can implement a sentence other than a life sentence.</u>

The universal rule is that punishment is the trial court's role and is not a proper matter for the jury. *State v. Guthrie*, 461 S.E.2d 163, 184, 194 W. Va. 657 (1995); *State v. Massey*, 178 W. Va. 427, 432, n.2, 359 S.E.2d 865, 870 (1987). Moreover, sentencing rests exclusively with the trial court and so long as the sentence imposed is within statutory limits and not based on

impermissible factors, the sentence is not subject to appellate review. Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). In utilizing such discretion, this Court can look beyond the nature of the offenses set forth in the Information to evaluate the appropriate sentence for this case. For example, consideration should be afforded to Mr. Horton's likelihood of success upon reentry to society and evaluate his propensity for violence. *State v. Miller*, 400 S.E.2d 897, 184 W. Va. 462 ("While not exclusive, the propensity for violence is an important factor to be considered before applying the recidivist statute."); *State ex rel. Appleby v. Recht*, 583 S.E.2d 800, 814, 213 W. Va. 503 (2002) ("West Virginia Code §61-11-18 is designed to deter those who are incapable of conforming their conduct to legitimately enacted obligations protecting society.").

In this case, the Court can be assured that Mr. Horton is not considered to be violent or a concern for reentry to society based upon the evaluations previously made by the West Virginia Department of Corrections ("Department of Corrections") and West Virginia Parole Board ("Parole Board"). Prior to the 2019 trial in this case, Mr. Horton was serving a sentence pursuant to a plea agreement entered in Monongalia County Case Number 19-F-135. During this time the Department of Corrections approved Mr. Horton to partake in the work release program pursuant to Section 62-11A-1 of the West Virginia code – a privilege afforded to a only small fraction of inmates. From November 17, 2019, until April 14, 2020, Mr. Horton was gainfully employed, full-time, at Pactiv in Mineral Wells, West Virginia, as an assembly line worker where he worked four, twelve-hour shifts per week at the rate of $12.00 per hour. Furthermore, Mr. Horton would work an additional two, twelve-hour shifts of overtime every week at a rate of $18.00 per hour, working a total of six shifts per week for six months.

To obtain such privileges, Mr. Horton had to demonstrate that he was a low-risk offender by undertaking courses in drug treatment/substance abuse, behavioral therapy, and

reentry to society, completing community service with Habitat for Humanity, and undergoing a review process before the Department of Corrections. Upon successful admission, Mr. Horton was transferred to Parkersburg Correctional Center where he was trusted for six months to go to work six times a week, traveling from Parkersburg to Mineral Wells, to work at Pactiv and function as a contributing member of society. Ultimately, Mr. Horton was requested by Pactiv to continue to work at their facility following his release because of his satisfactory work performance.

During this time, Mr. Horton was drug tested regularly by Pactiv and the Department of Corrections, rendering no positive tests and demonstrating his commitment to sobriety and maintaining his gainful employment. Furthermore, in his more than two years of incarceration, Mr. Horton has not been cited in violation of any rules of the Department of Corrections. In essence, Mr. Horton's efforts during the work release program demonstrate that he has conformed his conduct to assimilate and act amongst society and should not viewed as violent.

Furthermore, and as a result of his efforts, in April 2020, Mr. Horton was granted release on parole following a successful review by the Parole Board deeming him fit to reenter society.[4] However, following the Parole Board's decision, but before he was released on parole, Mr. Horton was transported back to the North Central Regional Jail pending the trial in this matter. Effectively, Mr. Horton went from being viewed as a low-risk offender who was trusted to go into

[4] When rendering their decision, the Parole Board shall consider the following factors: offense severity, risk assessment, program participation/completion and misconduct history; whether the inmate has satisfactorily participated in institutional education, work, therapeutic or treatment programs; whether the inmate has previously been on home confinement, parole, probation, community corrections, or other supervisions, and if so how the inmate behaved thereon and any violations; sentiment expressed by members of the community; the facts and circumstances of the crime; demeanor of the inmate during the interview and the attitudes expressed with regard to prior criminal behavior, to social morals and law; the inmate's prior criminal record; results of any physical, mental, or psychiatric examinations; risk assessment performed based upon the Parole Board's criteria; suitability of the inmate's proposed release plan; whether the inmate has been convicted of a new crime while incarcerated or found guilty of Class I or Class II institutional disciplinary rules; and any other factor which may tend to indicate whether or not the inmate constitutes a reasonable risk to safety or property if released on parole. W. Va. Code R. §92-1-6.1(a)-(l).

society every day to work a sustainable, good-paying job, to facing life imprisonment overnight. This, simply put, is a confounding turn of events to subject Mr. Horton to a life sentence when a year ago he was gainfully employed and establishing himself to reenter society. Notably, the Department of Corrections and the Parole Board evaluated the same information and similar factors when rendering their respective decisions, that is now before the Court to evaluate the appropriateness of a life sentence. Thus, this Court should consider all of the factors set forth herein, and not just the nature of the underlying offenses, and utilize its discretion to enter a sentence proportionate for this matter, rather than imposing a life sentence.

IV. CONCLUSION

WHEREFORE, Defendant Adonne Anthony Horton respectfully requests that this Honorable Court exercise its discretion to impose a proportionate sentence other than that of a life sentence, and afford any other relief this Court deems just and proper.

Submitted this 7th day of May, 2021.

/s/ Nicholas C. Idler
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Counsel for Adonne Anthony Horton

CERTIFICATE OF SERVICE

I, Nicholas C. Idler, counsel for Adonne Anthony Horton, hereby certify that on the 7th day of May, 2021, I filed the foregoing *Defendant's Memorandum of Law Regarding Sentencing* using the WV E-File system upon which a true and accurate copy was automatically sent to the following:

APA Joseph T. Hodges, III, Esq.
Office of Marion County Prosecuting Attorney
213 Jackson Street
Fairmont, WV 26554

/s/ Nicholas C. Idler

In the Circuit Court of Marion County, West Virginia

State of West Virginia,
Plaintiff,

vs.)

Adonne Anthony Horton,
Defendant

Case No. CC-24-2019-F-184

SENTENCING ORDER

On the 21st day of May, 2021, came the State of West Virginia, Joseph T. Hodges, III, its Assistant Prosecuting Attorney, and came the Defendant, ADONNE ANTHONY HORTON in person and by his counsel, Nicholas C. Idler, and came also Heather Campbell of the Marion County Probation Office, all for the purpose of a Sentencing Hearing in the above-styled case.

Whereupon, the Court, advised that it was in receipt of the pre-sentence investigation and proceeded prepared by the Probation Office, that it had reviewed both sets of objections filed by the Defendant and the responses thereto prepared by the Probation Officer and, thereupon heard of a final objection from the Defendant regarding the inclusion of an arrest date of the Defendant for the present, to which the State advised it had no objection to removing the arrest date as the report indicates the date of filing of the Recidivist Information in this matter, to all of which the Court Ordered that the arrest date would be removed.

Hearing no further objections to the pre-sentence investigation and report, the Court proceeded to hear the testimony of William Horton, Shellie Hess, and Lambert Q. Horton in support of the Defendant, and heard from the Defendant, himself, regarding sentencing.

Thereupon, the Court advised that it was in receipt of the Sentencing Memoranda prepared by Counsel for the Defendant and for the State addressing the issues of proportionality and remoteness (staleness) of the offenses charged in the Information and then proceeded to hear

the representations of counsel regarding sentencing following all of which the Court found that:

1. The Defendant admitted to being the same person who was convicted of committing the offenses of:
    a. Fleeing in a Vehicle with Reckless Disregard, a felony, on August 22, 2019;
    b. Wanton Endangerment Involving A Firearm, a felony, on June 13, 2003; and
    c. Malicious Assault, a felony, on April 7, 1999; all as charged by the Information;
2. That the triggering offense, Fleeing in a Vehicle with Reckless Disregard, involved actual violence or the threat of violence, as did each of the underlying offenses charged by the Information;
3. That each of the offenses charged in the Information are "qualifying offenses" identified by the Legislature under the new recidivist statute found in West Virginia Code §61-11-18;
4. That the convictions are not stale as all the conduct occurred within a twenty-year period of time; and
5. That the sentence imposed by W. Va. Code §61-11-18(d), or old §61-11-18(c), imprisonment for life, is not disproportionate based on the facts of each of the cases charged in the Information as each involved actual violence or threats of violence, is therefore not unconstitutionally disproportionate. It is also appropriate based on the clear language of the statute.

Whereupon, the Court, in consideration of the same, and of all matters of record, herein, ORDERED that Defendant be, and hereby is, sentenced upon the sole count of the Indictment in Case No. 17-F-147 charging the offense of FLEEING IN A VEHICLE WITH RECKLESS DISREGARD, a felony, as enhanced by operation of West Virginia Code§§ 61-11-18(c) and 61-11-19 by virtue of the Court's Order in Case No. 19-F-184, to imprisonment in the penitentiary

for life, with eligibility for parole only after serving fifteen (15) years. Defendant shall receive credit for time served from the 11th day of June, 2017, through the 26th day of June, 2017, in the amount of Sixteen (16) days in the regional jail; from the 29th day of June, 2017 through the 9th day of August, 2017, in the amount of Forty-two (42) days in the regional jail; from the 7th day of October, 2018 through the 8th day of January, 2019, in the amount of Ninety-three (93) days, in the regional jail; from the 8th day of January, 2019 through the 23rd day of January, 2019, in the amount of Fifteen (15) days on home confinement; and from the 23rd day of January, 2019 through the 21st day of May, 2021, in the amount of Eight Hundred Fifty (850), for a total of One Thousand Sixteen days (1,016) days previously served.

CONVICTION DATE: August 22, 2019

SENTENCE DATE: May 21, 2021

EFFECTIVE SENTENCE DATE: August 9, 2018

Whereupon, Counsel for the Defendant moved the Court to consider alternative sentences of probation or home confinement for the Defendant, to which the State objected, and to all of which the Court DENIED.

The Court further ORDERED that Defendant pay the costs of this proceeding in the amount of $827.00 for Case No. 17-F-147 and in the amount of $477.00 for Case No. 19-F-184 and attorney fees as taxed by the Marion County Circuit Clerk's Office to be paid within five (5) years of Defendant's release from incarceration, to and through the Marion County Circuit Clerk's Office, Marion County Courthouse, Fairmont, WV 26554.

The State moved to incorporate Magistrate Case No. 17-M24F-00211 and Boundover Case No. 17-B-182 into Case Nos. 17-F-147 and 19-F-184 and to dismiss any additional charges contained in said numbers, and hearing no objection, the Court does hereby ORDER the same be incorporated.

Defendant is hereby advised of the following rights concerning his conviction and

sentence:

(1) Within sixty (60) days from the date of your sentence, you may petition the presiding judge of the Circuit Court of Marion County, pursuant to West Virginia Code §62-12-3, for suspension of the execution of your sentence and release on probation.

(2) Within one hundred twenty (120) days from the date of your sentence, you may petition the judge of the Circuit Court of Marion County, pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, for correction or reduction of your sentence.

(3) Pursuant to Rule 32 of the West Virginia Rules of Criminal Procedure, you can appeal your conviction and/or sentence to the West Virginia Supreme Court of Appeals in Charleston, West Virginia. In order to protect and keep this right of appeal you must:

A. Within thirty (30) days from the date of your sentence, file with the Clerk of the West Virginia Supreme Court of Appeals in Charleston, West Virginia, your notice of intent to appeal, and;

B. Within four (4) months from the date of your sentence, file your petition for writ of error with the West Virginia Supreme Court of Appeals in Charleston, West Virginia.

(4) If you are an indigent and cannot afford an attorney, then this Court will appoint an attorney to represent you to protect your appellate rights as set out in paragraph three (3) above.

A. You must notify the Court in writing of your request to have an attorney appointed for you to exercise these rights.

(5) You are further notified that failure to pay court-imposed assessments, including, but not limited to, fines, costs, restitution, et cetera, shall result in the suspension of your license or privilege to operate a motor vehicle in the State of West Virginia and that such suspension could result in the cancellation of, the failure to renew, or the failure to issue an automobile insurance policy providing coverage for yourself or your family.

The foregoing notice was read in open court, and a blue copy of same given to the Defendant on the 21st day of May, 2021.

It is further ORDERED that the Clerk of this Court shall provide a copy of this Order upon entry to: the State of West Virginia, Joseph T. Hodges, III, via electronic notification; Counsel for Defendant, Nicholas Idler, Esq., via electronic notification; Marion County Adult Probation Office, via electronic notification; West Virginia Division of Corrections, 112 California Avenue, Building 4, Room 300, Charleston, West Virginia 25305. and to the North Central Regional Jail, 1 Lois Lane, Greenwood, WV26415.

All until further Order of the Court.

Prepared By:

/s/Joseph T. Hodges, III
Joseph T. Hodges, III, #8556
Assistant Prosecuting Attorney

Approved By:

/s/Nicholas C. Idler
Nicholas C. Idler, Esq.
Counself for Defendant

/s/ David R. Janes
Circuit Court Judge
16th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

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

STATE OF WEST VIRGINIA,

V.

FELONY NO. 17-F-147
19-F-184

ADONNE ANTHONY HORTON,

Defendant.

COPY

TRANSCRIPT OF SENTENCING HEARING held before the Honorable David R. Janes, Judge, in the above-styled matter on Friday, May 21, 2021, at 10:35 a.m.

APPEARANCES:

On Behalf of the State of West Virginia:
J. T. HODGES, ESQUIRE
Assistant Prosecuting Attorney
213 Jackson Street
Fairmont, West Virginia 26554

On Behalf of the Defendant:
NICHOLAS IDLER, ESQUIRE
330 Scott Avenue, Suite 3
Morgantown, West Virginia 26508

Also Present: HEATHER CAMPBELL, Adult Probation

CAROL A. ASHBURN, CCR, CVR-CM
Official Court Reporter, Division II
P.O. Box 1611
Fairmont, WV 26555-1611

I N D E X

THE COURT: We're on the record now in cases 17-F-147 and 19-F-184. Both cases are captioned State of West Virginia versus Adonne Anthony Horton. In both cases the state's represented by J. T. Hodges, Assistant Prosecuting Attorney for Marion County. The defendant, Adonne Anthony Horton, is here in person with his attorney, Nicholas Idler. Also present is Heather Campbell, the court's probation officer. In this case -- in case number 19-F-184, on April 8, 2021, Mr. Horton waived his right to trial by jury, admitted he was the same person convicted in the cases mentioned in the information in 19-F-184. Those cases specifically are 17-F-147 in which he was convicted on August 22, 2019, in Marion County, West Virginia, of the offense of fleeing in a vehicle with reckless disregard, a violation of West Virginia Code §61-5-17(f). He also admitted he was the person previously convicted in Case No. 02-F-153 on or about June 13, 2003, in the Circuit Court of Marion County, West Virginia, of the offense of wanton endangerment involving a firearm, a felony offense in violation of West Virginia Code §61-7-12. Also admitted he was the person convicted in Case No. 98-F-81 on April 7, 1999, in the Circuit Court of Marion County, West Virginia, that offense being malicious assault.

Following his admission the Court commissioned a presentence investigation report in Case No. 19-F-184. Ms. Campbell has prepared that presentence investigation report. It is dated April

30, 2021. Ms. Campbell had previously prepared a presentence investigation report in Case No. 19-F-147. It's dated September 30, 2019. I understand Mr. Idler and Mr. Hodges have both had the benefit of those presentence investigation reports.

Mr. Idler, have you had the opportunity to discuss and review those presentence investigation reports with Mr. Horton?

MR. IDLER: Yes, Your Honor, I have.

THE COURT: I know you had some initial objections or corrections that were addressed by Ms. Campbell. Are there any additional objections, corrections, or matters to address not previously addressed by Ms. Campbell with respect to those presentence investigation reports?

MR. IDLER: The only correction, Your Honor, that still need to -- in our opinion that still needs corrected is that on page 21 of the amended presentence investigation report that Ms. Campbell prepared it still lists that the arrest date for a third or subsequent felony offense was that of June 11, 2017. Given that that statute doesn't require an arrest, an information cannot be filed until a subsequent third conviction, we would still object that the date not be June 11, 2017, that the September 4, 2019, would be the appropriate and only date that should be listed.

THE COURT: Mr. Hodges, do you have a position with respect to that issue?

MR. HODGES: Your Honor, I don't have any objection to that. The information was filed, as the record shows, on September 4, 2019. He was not arrested for that offense. This was merely an information filed for sentencing purposes.

THE COURT: The Court will observe that correction.

MR. IDLER: Thank you, Your Honor.

THE COURT: Thank you, Mr. Idler. Anything else?

MR. IDLER: No, Your Honor. Ms. Campbell has made all the other corrections.

THE COURT: All right. Good. Is there anything then you'd now like to offer on behalf of Mr. Horton before the Court proceeds to sentencing?

MR. IDLER: Your Honor, we do have several witnesses that would like to testify today if the Court would like to proceed with their testimony first.

THE COURT: It's your case to present. Present them in the order you prefer.

MR. IDLER: I would ask that Mr. William Horton be called to testify.

THE COURT: William Horton.

* * * * *

(Witness, WILLIAM HORTON, sworn.)

DIRECT EXAMINATION.

BY MR. IDLER:

Q. Good morning, sir. Could you please introduce yourself to the Court.

A. William Michael -- William Michael Horton.

Q. And how do you know Adonne, sir?

A. He's my nephew.

Q. And how long have you known Adonne?

A. All his life.

Q. And how would you describe your relationship with Don?

A. I helped raise Don.

Q. So you know Don very well then?

A. Very well.

Q. And do you still communicate with Don currently?

A. Yes, I do.

Q. So you're familiar with his past and his current situation?

A. Yes.

Q. Could you please explain to us who Adonne is. Give us a little insight as to who he is as a man.

A. Well, Adonne is a good young man. He had his hard times. Growing up he had little hard times. He worked. He got a job. But they took all the money for child support. He tried to do the right thing. You know, he -- like I say, he ain't killed nobody. He ain't hurt nobody. He did things, you know, some bad things. He did a lot of good things in his life. He had a hard

life. It wasn't easy for him. I'm not trying to make no excuse for him saying he all goody goody. But ain't -- he didn't have a good life. He lost his mother. He just lost his mother, my sister. And things has went sideways for him. He tried to do everything. He tried to do right. Uncle Billy, I'm trying to make it. I know, I see you trying to make it. You got to listen, son. You've got to do it right. You've got to pay attention to what you're doing. You've got to obey the law. I try to tell him to do right. But he slips along the way. Like I say, he ain't murdered nobody. This don't seem right to me. I don't understand this. How could he get 15 years? I could see five years. I could see him getting five years. But 15 years, that's a lot long time. That's a long time for people doing all kinds of stuff in this world. And to get 15 years for running from the police or something like that, I can't understand it. I just can't see it. I'm not trying to make no excuses for him or nothing. I just don't -- I can't see him getting 15 years. That's a long time. That's a long time of your life. Fifteen years for things that, I mean, you don't really seem right.

I talked to the prosecutor, I talked to him, he's a friend of mine. I talked to him. I said, "Jeff, do you believe in God?" He said, "Yes, Billy." I said, "God forgives." He said, "I don't want to talk about that." He's like, "He's a criminal, he's a criminal to society." He talked to me like Adonne was

dirt. He's not dirt. That's the way he made me feel, like my nephew wasn't a piece of dirt. I said, "He ain't killed nobody, Jeff." I said, "Jeff, he didn't kill nobody." He said, "I've been working 24 years and he's been a pain in my (indicating) for 21 years." I said, "Jeff, man, God forgives. You've got to forgive." He didn't kill nobody. I just don't understand it, why he is facing 15 years, 15 years, for what? He didn't kill nobody. He didn't hurt nobody. He didn't shoot nobody. I don't understand it. I just can't see it. I'm sorry.

Q. Thank you, Mr. Horton.

A. I'm sorry.

Q. Now, you mentioned a couple of times throughout there that Adonne's tried to make corrections in the past.

A. Yes.

Q. Just like all of us, Mr. Horton's not perfect.

A. Right.

Q. Have you continued to speak to him over the last couple of years while he's been incarcerated?

A. Yes, I have.

Q. And have you noticed any changes in Adonne's behavior or attitude towards life?

A. Yes, I have.

Q. Could you explain that to us?

A. He's calling upon God. That's the man. That's the man

that you've got to call on. His life has changed a lot. And I'm proud -- I'm proud of my nephew. I'm proud. I'm very proud of him. He's called upon God. That's the man you've got to call. Because we are fighting against something we can't see. We can't see. We can't understand. We can't see nothing what's going on the world right now today. We can't see. We can't understand. Nobody understands. Nobody can understand what's happening to us but God. That's all I know. That's all I know.

Q. Thank you, sir. This change and founding of God that you've spoken of, do you believe that that's been a good change for Adonne?

A. Say that again, sir.

Q. Do you believe this change you just spoke of, do you think that's been a good change for Adonne in --

A. A wonderful change. The best change. That's the best way. I was out there in the world. I was doing everything I was big enough to do. I changed my life around. I gave my life to Jesus. And I've been better in my life. I've been out there. I did everything that I was big enough that I could do. Everything. But I gave my life to God. It changed my whole life around. He did the best thing. That's the thing I always talk to my kids and my family about. They'll tell you, I told them you got to give yourself to God. You've got to come. You all ask God to forgive you. What have you done for me lately? That's

the main thing. God says, "What have you done for me lately?" You want me to do this, you want me to do that. You got to change your life. You've got to turn it around. You've got to change.

Q. Thank you, sir. Is there anything else you'd like the Court to know today?

A. No. I ask, please, have justice, be lenient on my nephew, please. Please.

MR. IDLER: Thank you, sir. I have no more questions, Judge.

THE COURT: Mr. Hodges, do you have any questions for Mr. Horton?

MR. HODGES: I have no questions, Your Honor.

THE COURT: Thank you. Mr. Horton, return to your seat. Please be careful. Watch your step.

(Witness excused.)

MR. IDLER: Your Honor, I would next ask that Shelly Hess be called to testify.

THE COURT: Shelly Hess?

MR. IDLER: Yes, Your Honor.

* * * * *

(Witness, SHELLY HESS, sworn.)

DIRECT EXAMINATION

BY MR. IDLER:

Q. Good morning, ma'am. Could you please introduce

yourself to the Court.

A. I'm Shelly Hess.

Q. And how do you know Adonne?

A. That's my husband.

Q. How long have you known Adonne?

A. Probably over 30 years.

Q. So you know him pretty well then. We just heard from his uncle, Mr. Horton, explain to us and give us a little insight to who Adonne is as a person. Could you give us a little more insight as to who Adonne is as a person?

A. Adonne is a good person. Adonne is somebody who doesn't judge other people, takes them as they are. We all have hard times. We all do things wrong. We all make changes. If you look at his history, all you've got to do is look at it and you can tell that he has done different. Go from getting in trouble quite often to not as often at all. When his mom passed things went down hill. We got separated and his mom passed and that was a hard time for him.

Q. Was his mother somebody that he cared for?

A. Basically the only parent figure that he had in his life other than his aunts and uncles.

Q. So I understand. So her passing took a hard toll on him?

A. Took a very hard toll on him. We went down there quite

often before she passed. She was in South Carolina. It seemed like the more we visited and the further down hill that she went the more we lost touch with each other. Anybody goes through a hard time when they lose their parents.

Q. So it sounds like over the course of your 30 years you two have been together through the ups and the downs then?

A. He was my best friend for 30 years before we got married.

Q. Have you stayed in contact with Adonne over the last couple of years?

A. Yes.

Q. And have you noticed any changes in him over the last few years?

A. I noticed the biggest change when he was working in Parkersburg. He just seemed to be happier. He was happier when he was working here. But, like I said, when his mom got sick we started making trips, different things.

Q. Did he ever talk to you about his time working in Parkersburg?

A. Yeah. Actually, if he was released he had all intentions on going back there to work.

Q. And for clarification you're referring to his job at Pactiv through the Department of Correction work release program; correct?

A. Yes.

Q. Was that something that Adonne seemed to look forward to at that time?

A. Yeah. A lot. Probably more than anything else.

Q. So he had something to look forward and work towards at this time, being this job?

A. Yeah.

Q. Would you say that was a good thing for Adonne at that time?

A. I would say it's one of the best things for him.

Q. Could you explain a little bit on that for me, please?

A. It's simple. Idle hands are the devil's playground. But when you have something to look forward to on a daily basis, those thoughts seem to leave your mind.

Q. Do you still speak with Adonne currently?

A. Yeah. Two or three times a week.

Q. And how's his demeanor been?

A. Honestly, if I went back 20 years, even the people in the jail were timid of him because of his attitude. He doesn't have that anymore. He doesn't argue and fight in the jail. He doesn't, you know, he just tries to get by with his time.

Q. It sounds like he's made a big change then?

A. Yes.

Q. Do you have any concern of Mr. Horton being a member of

our community?

A. No.

Q. Is there anything else that you would like the Court to know today about Adonne?

A. I think you'd be making a big mistake to put him away that long. I know that he needs to do some time, but I think that that would just be too much, especially knowing -- I mean, if you look at the records you can see it was a dark time. That has passed. He has come to grips with the past, with the fact that his mom has passed and stuff. It just took a little bit of time.

MR. IDLER: Thank you, ma'am. I have no more questions, Your Honor.

THE COURT: Mr. Hodges, do you have any questions of Ms. Hess?

MR. HODGES: I have no questions, Your Honor.

THE COURT: Thank you, ma'am. Return to your seat, please.

(Witness excused.)

MR. IDLER: Finally, Your Honor, I would call Lambert Horton to testify.

* * * * *

(Witness, LAMBERT HORTON, sworn.)

DIRECT EXAMINATION

BY MR. IDLER:

Q. Good morning, sir. Could you please introduce yourself.

A. My name is Lambert Q. Horton.

Q. And how do you know Adonne?

A. Adonne is my first cousin.

Q. So you've known Adonne his entire life then?

A. Yes, sir.

Q. How would you describe your relationship with Adonne?

A. I have two friends. One is behind me, and one I'm going to bury in about a half hour, so. Adonne is a brother to me, as well as a friend.

Q. You've heard from William Horton and Shelly Hess to give us a little insight to who Adonne is as a man. You seen to know him the best of anyone in this courtroom. Could you enlighten us on who Adonne Horton is.

A. Growing up he was always bigger than me. All of this other friends bigger than me. Slept in the same bed together. Raced cars together, remote control cars. His mother, my aunt, would prepare separate meals for us because we didn't eat onions. He was always with me. We grew up close. We had a tightknit family. Our fathers were present, but my uncle was always there. So all through grade school, high school, even being incarcerated together. So.

Q. You guys took care of each other?

A. Absolutely. I'm still taking care of him.

Q. Growing up, who looked after Adonne? Who was his care giver?

A. Friend wise or --

Q. Parent wise.

A. It would have been collectively my aunts and uncles. Individually, my Aunt Nicki. Adonne was her only son, and he was her favorite.

Q. We've just heard from Shelly about the passing of Adonne's mother and how that took a toll on him. Did you experience that impact on Adonne?

A. My Aunt Benita was -- had passed amid driving. Not sure if it was a heart attack or the crash killed her. But we went down to North Carolina to the funeral. Adonne showed up. I got there a little earlier. He wasn't as dressed as cool as me, but he was dressed pretty good. And I remember him telling me she's next, referring to his mother. And within two years she was deceased. And about six months prior to that I started noticing him going down hill. I was in Maryland and he was here. And I would always hear stories about him acting irate, doing certain things, crashing, and he was always high. And I believe that that was a coping mechanism for him. He hid it from me, being his big cousin and the one who would kick his ass if he got out of line. And I know drugs was a factor of it.

Q. So when his mother passed that only impacted his substance abuse more?

A. Absolutely. I never even heard of him ever having substance abuse until the death of Aunt Nicki. In fact, I was mad at him, and still mad at him, for not even attending the funeral, because I don't know where he was. And I'm sure he doesn't even know where he was as well.

Q. So would you say that his substance abuse impacted his decision-making during this time?

A. Yes. From 2015 until the present. Adonne, he always had temper. I'm getting up here and making it as if he was a choirboy. None of us was. We did everything we could get away with. Sometimes he followed my lead. Most times he did. Nevertheless, it wasn't until that time -- I'm not here in Fairmont, so I'm on a different ledge. When I come in town I see him. I see him different. I can see right then something's going on. Partly the reason why we're here is that the policeman came to my home and told me that he had a warrant for Adonne. And I let him know that he had a warrant. And Adonne was high when I told him that. And in my opinion, that had he not been high the day the policeman chased him or tried to apprehend him, you know, we wouldn't even be here now.

Q. Have you continued to talked to Adonne over the last couple of years?

A. I will always continue to talk -- to answer your question, yes.

Q. How often would you say you talk to him?

A. Roughly, three times a week. Depending on my work schedule. He always seems to call when I'm at work.

Q. So it's safe to say that you know everything that's going on in Adonne's life right now?

A. Yeah, I'm familiar with. I was at his wedding. I'm familiar with his situation. Gotten him out of jail. Saw everything that's with him, I'm there.

Q. You just described that you believe his substance abuse issue was a key factor in some of his decision-making. Do you believe he's gotten his substance abuse issue under control?

A. In my opinion, yes, and here's the reason why. I've never done a drug, but I've seen several people on them. And for him to confront his fear that makes him use drugs is all I need, because I believe that sobriety starts there. And when you can admit that you have an issue or had an issue, I think that's 99 percent of the battle, in my opinion. You know, I pay a lot of taxes in this state, local and state taxes, and I would like to see my tax dollars going to some kind of substance abuse. For him to go to prison, I mean, he deserves whatever he deserves or whatever he has coming. Fifteen years or whatever the sentence is, it doesn't warrant that in my opinion. He needs some form of

substance abuse to couple his sentence so he can get out here and be productive, like I know he can.

Q. To you knowledge has Adonne stayed sober over the last couple of years while he's been incarcerated?

A. Yes.

Q. Do you believe he's now in a better position to make better decisions in life?

A. Absolutely.

Q. Have you seen any type of change in Adonne over the last couple of years?

A. Yes. Adonne has never told me that he loved me until now. So I see the difference. If he was home I could really use his shoulder to cry on when we go bury our friend today. I don't really mean to be emotional. But there's a fellow that's over at Domico Funeral Home, and he, myself, and Adonne were inseparable, you know, coming up. So I'm here speaking on his behalf, and then I have to go to a funeral and lay him to rest. So it's a dual hurt.

Q. So it sounds like through it all, thick and thin, you two are staying together?

A. No matter what.

Q. Is there anything else you'd like to tell the Court today, sir?

A. In addition to what I said, I'd just like to see Adonne

be given a chance as he did when he was in work release a couple of months back. I would like to see him be given the chance to right his wrongs. Being in prison, the hardest thing about being in prison is not the guards, it's not the food, it's not other inmates. The hardest thing is staying positive amid a glass ceiling. And I think Adonne needs and deserves a chance for him to show that he can, you know, take constructive criticism, he can be productive, he can work as he's done. I think that he needs a chance to get out and correct all the wrongs that he's done, all the people that he's hurt, go visit his mother. And I just appeal to this Court's human side for my cousin, for my brother, for my real friend.

MR. IDLER: Thank you, sir. I appreciate your testimony. I have no further questions, Judge.

THE COURT: Mr. Hodges, do you have any questions of Mr. Horton?

MR. HODGES: I do not, Your Honor.

(Witness excused.)

THE COURT: Anything else, Mr. Idler?

MR. IDLER: No further witnesses, Your Honor.

THE COURT: All right. Mr. Idler was kind enough to submit to the Court a sentencing memorandum, which the Court received. It was filed on May 7, 2021. Excellent work, Mr. Idler, with respect to that memorandum. I would also note that Mr.

Hodges submitted a sentencing memorandum on behalf of the state on May 11, 2021. So, Mr. Idler, is there anything you'd like to submit in addition on behalf of Mr. Horton before the Court pronounces sentence?

MR. IDLER: Yes, Your Honor, I would like to speak to that. This Court has the discretion and the authority to implement a sentence lesser than a life sentence. Today we are asking that this Court exercise its discretion to impose a sentence less than the statutory sentence set forth.

In the state's memorandum they have rightly cited that the statute says an individual shall serve a life sentence. Our Supreme Court, however, has continued to evaluate that phrase in the statute and found that that mandatory language of "shall" is not a one size fits all to every case. It still undergoes a proportionality evaluation for the triggering felony in the underlying offenses. Primarily when looking at the proportionality portion of a life sentence imposed under the recidivist statute the Court looks at the nature of those underlying offenses, giving additional scrutiny to the triggering offense.

In this instance the triggering offense involves fleeing with reckless disregard that Mr. Horton was convicted of in 2019. If we look at the facts in that case, and we utilize the Supreme Court's case precedent which says we look to determine the fact

charged involved in an actual or threatened violence. Neither of those two prongs are satisfied in this instance. There's no evidence of actual violence in this case. Nobody was harmed. No injuries were reported. No victims testified at the trial, nor are there any victims testifying today. There's no demonstration of actual violence in that scenario, Judge.

As it relates to the second prong of threatened violence, we'll see here there were no weapons involved in this case. He was found with no drugs on him. Nobody testified that they were put in harms way, that they were threatened. To my knowledge there's been no introduction of evidence into the record that anybody was interviewed as far as feeling threatened. There was no passengers in Mr. Horton's vehicle. There are no bystanders here today testifying or providing any form of victim impact. When we look at the facts of that charge, Judge, there's no actual or threatened violence.

The nature of the offenses though is simply a threshold evaluation. The Court's taken into other factors, such as the time that's passed between the other felonies set forth in the information that they also have looked at, factors such as the underlying penalty for the triggering offense. In this instance the triggering offense of fleeing involves a one to five sentence. I would direct the Court's attention to State v. Miller in which the Court found -- or took into consideration its

conclusion that the recidivist life sentence was disproportionate for a triggering offense that carried a one to ten sentence. In this case we've heard from the witnesses referencing a 15 year period. For the record, that's referencing the first time an individual is eligible for parole under the statute. To impose a life sentence under the recidivist statute would more than triple the maximum penalty of the underlying offense at this point.

If Mr. Horton was afford good time as the West Virginia Code affords, it would be more than six times the ultimate penalty he could receive for this. The penalty for first degree murder with mercy, Judge, allows for parole after 10 years. This is a victimless crime. He did not harm anybody. There's been no evidence of such. It's quite shocking to think that somebody could serve more time for this charge where there's been no victims identified than somebody who's been accused and convicted of first degree murder. But in that same breath, Judge, the other factors we can look at are the time that's passed between the triggering offense and the other two offenses set forth in the information. In this instance the other convictions for Mr. Horton are in 1999 and 2003 respectively. We're now looking at 22 and 18 years since those times have passed.

In State v. Davis the Court found that 16 years had passed was part of their reasoning to find that a recidivist life

sentence was disproportionate. In State v. Miller they found that almost 25 years had passed between the first felony and the triggering offense, using that as part of their rationale for finding that a sentence was disproportionate. In this instance we can see there's been a large period of time that's passed since Mr. Horton's triggering offense and his first offense.

The state in their memorandum has set forth the amended statute that was passed in June of 2020 and has indicated that there is now a 20 year provision set forth in that statute. Well, that statute is not the appropriate statute today being that the information was filed in September of 2019. That amended statute shows that the legislature has taken into consideration the Court's previous evaluation that time needs to be looked at between the first offense and the triggering offense. I would just ask the record note we object to the use of that statute, but there's certainly been policy adapted through that.

Courts have looked into other factors as well in evaluating the proportionality of the recidivist sentence. Some of that really boils down to an individual's propensity of violence. In this case, Judge, the Department of Corrections and the parole board has undertaken this evaluation for the Court already. Mr. Horton was given the privilege to be introduced onto the Department of Correction work release program. Through my conversations with Mr. Horton I've learned that's not an easy

privilege to obtain. That requires him to undertake multiple classes, including substance abuse classes, rehabilitation classes, reentry into society classes. He had to undertake community service hours with Habitat for Humanity just to be warranted a review by the Department of Corrections. This review took place in 2019. The Department of Corrections had the same facts and similar factors that it took into place when they decided Mr. Horton should be afforded the privilege to be released on work release, something that only a fraction of inmates in this state are afforded.

During this time, Mr. Horton was transported to Parkersburg Correctional Facility where he essentially lived in dormitory-style housing and he was afforded the ability to go amongst our community, obtain a job, schedule appointments, go to Walmart, go to convenience stores. He successfully obtained employment at Pactiv, a job that you've heard from multiple witnesses he thoroughly enjoyed. Something he hadn't had in life before. He was working six shifts a week at 12 hours a shift. He was trusted every day to go into our community to work there. And based off his work performance he was even asked to continue to work there. He was making $18 a hour on overtime. A well-paying job, something that would have allowed him success. During this entire time he's also being drug tested by both Pactiv, because he's an assembly line worker, and the Department of Corrections. There

are no indications that he failed any of those drug tests, demonstrating his commit to sobriety and bettering himself and readying himself for reentry to society.

In April of 2020 the parole board undertook a similar evaluation in which Mr. Horton was put before them. They considered all the same facts we have. They would have had access to his criminal record, his DOC record, any other victim statements they wanted to hear from, and they thought Mr. Horton was an eligible candidate to be released on parole. But for the detainer in the underlying fleeing charge, Mr. Horton would have been reentered into society at that time.

This is a question he's posed to be regularly throughout my representation, Judge, that I quite simply struggle to answer for him. "How does an individual go from working six days a week in our community to facing a life sentence?" It's shocking when you dive into the facts of this case. With all that said, Judge, we would ask that the Court take into consideration the underlying offense, the testimony you've heard today, you can see he's got numerous aunts and uncles and cousins and family members here to support him. And we would ask this Court to utilize its discretion and its authority to impose a sentence that proportionate and proper in this matter and less than a life sentence. Thank you.

THE COURT: Thank you, Mr. Idler. Mr. Horton, is there

anything you would like to say on your own behalf before the Court imposes sentence in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Please stand if you intend to address the Court.

THE DEFENDANT: To be honest with you, I'm happy I went to jail, because I deserved it. I broke the law. And I went to jail to better myself. I'm glad. I'm happy I was there. I will not argue at all. And I didn't try to, you know, get help when I was on the street. I didn't want to go to no rehab. I didn't even try. But once I was incarcerated I seen that that's what I needed. And when I got to the DOC they offered it, and I took full advantage of it. And a lot of the classes that they taught, the scenarios didn't make sense to me. But I learned if you remove some of their scenarios and place your own in there, put your own feelings in there, you'll learn how to better work the class and to progress. And that's what I did.

I was moved from two or three facilities. Certain places you take class. Classes, you know, crime victim awareness, reentry into society, and I went through a lot of things. And I worked my levels down. Because when you come in you start out on a level four, which is a high security. And I worked my level down to a one by participating and wanting to help myself. And then once I did that I was evaluated before a board, just like maybe three

people up there, and they felt that I had worked down far enough to try to reentry into society. And that's what they did. They put me in a program where I had to go to Habitat for Humanity, and I had to do 80 hours of community service. And just by being in Habitat, you know, we took a lot of giving people furniture and stuff that people gave, and we refurbished it, and we put it out. And then when people came to purchase it we helped them load it and got familiar with the community. And then I was able to go get a job. I went to Pactiv and got a job. I worked 12 hours shifts six days a week. And when I would come back to the work release center I was allowed to take a pass and go to Walmart or go to town. Or on the weekend I would take six hour passes and go watch a movie at the Parkersburg Mall in Vienna.

I'm just -- I understand that I know what I did was wrong. I should have never ran. I can't argue about that at all. And it was one of the dumbest things that I did. I ran. But I didn't hurt nobody. I didn't kill nobody. And I know I need to do some time, but to give me a life sentence, to take me off the street where I was finally doing good, and tell me your life isn't worth being out here, when I was just there and wasn't in any trouble and tell me -- snatch it away from me and say we're going to throw you to the wolves, this is where you need to be. Then what was I working for? What was I trying to better my life for? If you're going to remove me and then give me life in prison for

fleeing when no one got injured. I understand that I need to do some time. Maybe a few more years. I don't know. But to take me out of society, which you're telling me that I can't function in, when I'm functioning, and put me in prison for the rest of my life. Fifteen years is a long time. I was just figuring out my work schedule, packing my lunches. And then for that to be taken away from you and tell you're not fit for society, that's something I've been struggling with since I got this. I can't understand it at all.

Yes I need to pay for that I did. But to pay with the rest of my life when you're finally getting your life right. And then I seen the parole board and they was like you've done everything we've asked you to reenter society. And they grant me parole. Now, you may not understand their workings, but that's a big job, because they don't have to give it to you. And if you've got a bad attitude and don't participate in a lot of activities, they won't let you go home. But I did that. I worked to the lowest level to where I was on the street. I could see you walking down the street every day and talk to you. I'm socializing with people. That's a good feeling. Even though I'm still incarcerated I still have to prove myself. But to take me away from that and tell me you're not fit for society, we're going to go ahead and send you to the maximum prison, I'm just at a disbelief. Like I said, I know I need to pay for what I did. I'm not asking not to

pay for that. I've been paying for the last two and a half years. And for the last two and a half years I've worked my way down. And I've proven myself. And now to take me out of that situation and tell me your life isn't worth anything, that's -- I'm just struggling with that. I really am. So thank you, Your Honor.

THE COURT: You're welcome, sir. Please be seated. Mr. Hodges, does the prosecutor's office have any recommendations or other matters to bring to the Court's attention prior to sentencing?

MR. HODGES: Your Honor, the state has no witnesses to present in this matter. The state would stand on its memorandum submitted to the Court and not belabor the issue. Although I would say, to correct one thing, and I think I misheard, somebody who is convicted of first degree murder gets a life sentence and it's up to somebody to make a recommendation as to whether that individual receives mercy or not. Mercy makes an individual eligible for parole after 15 year, not 10 years. I know the Court's very much aware of that. And I think in this case it's a recognition that mercy is applicable after a period time. And that 15-year period seems to have been recognized by the legislature. It's not been overruled by our state Supreme Court either from the standpoint of the first degree murder offense or from the standpoint of the recidivist offense.

Very clearly the legislature and the courts have had the

opportunity to look at the statute. They could have found it unconstitutional. They've raised issues along the way, though not with its constitutionality. They've addressed that and found it to be very constitutional. They've recognized that the sentence that's imposed is not for the triggering offense, which granted in this case is a one to five. It is for reconciling a life that is involved, the commission of offenses over a period of time. That question has evolved over time to how long should that span be. But when you take a look at Mr. Horton's PSI it's very clear that span has been his entire life.

His offenses range from misdemeanors to felonies to cases that have been pled out, cases that have been tried and convicted. Misdemeanors where he's pled guilty. They've involved crimes of violence. They've -- as set forth in the information, wanton endangerment, malicious assault. There's no question about the nature of those offenses. When it comes to fleeing with reckless disregard, the Supreme Court has addressed the reckless disregard issue in many many different instances for involving our DUI laws, involving our fleeing DUI laws, and has pretty much found that this is a crime that puts a lot of people at risk. The testimony of the officers indicated that people's lives were put at risk.

I think the triggering offense in this case is a valid reason to use the recidivist statute in recognition of the three

offenses that have been cited, but also I think from a sentencing perspective when considering the defendant's entire criminal history. I think that it's good that Mr. Horton has the support that he has and that folks have shown up here for him today to offer their thoughts, their concerns, and express their love for Mr. Horton. I have to wonder where that was with all the different offenses that were committed along the way prior to being here today. And I wonder if some of that had come out earlier if we might be looking at something entirely different here.

Given that consideration, those concerns and everything that the Court has before it in its records, the state would recommend that Mr. Horton be sentenced in 17-F-147 to life with eligibility of parole after 15 years in accordance with the statute in this matter. I would ask that he be required to pay court costs and attorney fees. And regarding the 17-F-147 case we'd move to incorporate the magistrate and bound over cases, 17-B-182, 17-M-24, F-211. Thank you.

THE COURT: Mr. Hodges, let me just ask you a couple of questions.

MR. HODGES: Yes, sir.

THE COURT: With respect to the proportionality issue, I know you addressed it in your memorandum. What's your position with respect to the proportionality issue that Mr. Idler

addressed?

MR. HODGES: From the standpoint in this case, a lot of the cases that were looked at by our Supreme Court in regards to proportionality, looked at the fact that offenses had to rise to a certain level. They had to demonstrate that basically the offenses involve some act of violence or some threat of actual violence. And as the Court has even evolved in its opinions over a course of time, where at one time they didn't look at drug offenses, certain drug offenses as constituting those threats of violence, their position in the past few years has actually moderated significantly and started to recognize possession with intent or delivery of controlled substances. So they see harm in different things that have evolved. And I think when the harm is present the threat to the community is present. They have found these life sentences to be proportionate to the acts which have been charged that defendants have either been convicted of or found guilty of through the pleas that they have entered.

I don't think that there is anything in this matter that would say this is not in proportion to the character and degree of the offense as was stated in Wanstreet versus Bordenkircher. Malicious assault in this case, you're one step away from a murder. The wanton endangerment, the gun was fired at an individual. There were other charges that were dismissed as a result of that. Taking a vehicle and driving it down the streets

of Fairmont and putting untold numbers of people's lives at risk, as testified to by the officers engaged in the pursuit, indicates a disregard for human life entirely. It's certainly something that individual is focused on. And I think that's what the Court had in mind when it said that these sentences would be proportional with crimes of violence.

The other crimes that are present within the defendant's PSI, and I know we're speaking basically of what's alleged in the information, but from a sentencing standpoint I think it's permissive for the Court to take into consideration those other events as well. Certainly demonstrates that Mr. Horton has been involved in a series of crimes over the years that have essentially disregarded the value of human life.

THE COURT: And is the state of the opinion that there's any reasonably appropriate alternative sentence other than the sentence provided in the statute?

MR. HODGES: I certainly don't believe that probation is an option. At this time I'm not prepared to recommend to the Court home confinement for Mr. Horton. I don't know of any suitable accommodations or arrangements that have met in that circumstance, and I'm not sure what guidance would be there that would appropriate for him.

THE COURT: Okay. Anything else?

MR. HODGES: No, sir.

THE COURT: All right. Okay. In this case the triggering offense of fleeing in a vehicle with reckless disregard and the prior mentioned offenses in the information, the wanton endangerment involving a firearm and the malicious assault, are all involved -- all involve the actual violence or threats of violence that's been recognized by the legislature in the recent amendment to the West Virginia Code §61-11-18(a), the recidivist statute, in so far as all three of these offenses are now recognized as qualifying offenses under the recidivist statute. The Court's of the opinion that these convictions are not stale because the conduct underlying the offenses all occurred within a 20 year period. In 98-F-81, the malicious assault is alleged to have occurred on March 26, 1998. In 02-F-153, the wanton endangerment is alleged to have occurred on April 17, 2002. In 17-F-147, the fleeing is alleged to have occurred on June 11, 2017.

The sentence is provided by the legislature in West Virginia Code §61-11-18(d). It is a sentence of imprisonment in the state correctional facility for life. The Court has considered the proportionality issue raised by Mr. Idler, both here today and in his sentencing memorandum, is of the opinion that based on the facts of these cases and the clear language of the statute and the intention of the legislature the sentence is not disproportionate to the character or degree of these offenses. So

the sentence to be imposed by the Court will be a sentence of imprisonment in a state correctional facility for life, understanding that he will be eligible for parole after 15 years. He'll receive credit against that sentence for any time he spent while incarcerated on the case in 17-F-147. He'll be required to pay court costs and attorney fees within five years of his release from incarceration. The magistrate and bound over cases will be incorporated.

Deputy Davis, will you provide this blue sheet of paper to Mr. Horton, please. Mr. Hodges, you do the sentencing orders, please.

MR. HODGES: I will, Your Honor.

THE COURT: Submit it to the Court within 10 days with a copy to Mr. Idler as provided in the trial court rules.

Mr. Horton, I'm now obligated to advise you of your post-conviction rights, and they are as follows:

Within 60 days from the date of your sentence, you may petition the presiding judge of the Circuit Court of Marion County pursuant to West Virginia Code §62-12-3 for suspension of the execution of your sentence and release on probation.

No. 2. Within 120 days from the date of your sentence, you may petition the judge of this court pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure for correction or reduction of your sentence.

No. 3. Pursuant to Rule 37 you can appeal your conviction and/or sentence to the West Virginia Supreme Court of Appeals in Charleston, West Virginia. In order to protect and keep this right of appeal you must within 30 days from the date of your sentence file with the clerk of the Supreme Court of Appeals your notice of intent to appeal, and within four months from the date of your sentence file your petition for writ of error with the West Virginia Supreme Court of Appeals in Charleston, West Virginia.

No. 4. If you are indigent and cannot afford an attorney, this Court will appoint an attorney to represent you to protect your appellate rights as set out in paragraph 3 above. You must notify the Court in writing of your request to have an attorney appointed for you to exercise these rights.

And, Mr. Idler and Mr. Hodges, the court costs in 17-F-147 are $827; 19-F-184 $477. Mr. Idler, submit your voucher for attorney fees, please, within 10 days.

MR. IDLER: Yes, Your Honor.

THE COURT: Thank you all.

(Hearing adjourned 11:30 a.m.)

* * * * *

STATE OF WEST VIRGINIA,

COUNTY OF MARION, TO-WIT:

I Carol A. Ashburn, Official Reporter of the Circuit Court of Marion County, West Virginia, and Certified Verbatim Reporter-Certificate of Merit, do hereby certify that the foregoing is a true and correct transcript of the proceedings had and testimony taken in the action of State of West Virginia versus Adonne Anthony Horton, Felony Numbers 19-F-184 and 17-F-147, on Friday the 21st day of May 2021.

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto as promulgated by the Supreme Court of Appeals.

Given under my hand this the 28th day of July 2021.

Carol A. Ashburn

Official Reporter

STATE OF WEST VIRGINIA,

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Given under my hand this the 28th day of July 2021.

Carol A. Ashburn

Official Reporter

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

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

ADONNE A. HORTON,

Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

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

STATEMENT OF THE CASE

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

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

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

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

At the sentencing hearing the court stated as follows:

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

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

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

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

A.R. 598.

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Sentence of the Petitioner Shocks the Conscience

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

CERTIFICATE OF SERVICE

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

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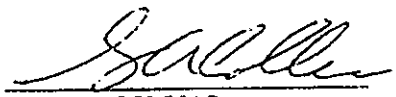
language of either the new or old statute in determining whether a life sentence was disproportionate in this case.

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

Respectfully Submitted,

Adonne A. Horton,

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0532

STATE OF WEST VIRGINIA,

Respondent,

v.

ADONNE A. HORTON,

Petitioner.

RESPONDENT'S BRIEF

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

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INTRODUCTION

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

ASSIGNMENT OF ERROR

Petitioner, by counsel, advances a single assignment of error in this appeal: "The circuit court erred in imposing a life sentence on Petitioner under the West Virginia recidivist statute for the triggering offense of 'Fleeing in a Vehicle with Reckless Disregard,' punishable by one to five years imprisonment, when it conducted the wrong disproportionality of sentence analysis." (Pet'r Br. 1.)

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

Petitioner appealed.

SUMMARY OF THE ARGUMENT

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

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

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

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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

"'Under Ex post facto principles of the United State and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused cannot be applied to him.' Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980)." *State ex rel. Phalen v. Roberts*, 245

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

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

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

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

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

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

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

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

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

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

> A person who intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer, or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing the

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

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

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

B. Petitioner's prior convictions were not stale.

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

[1] Petitioner "requests that this Court reconsider and change the current standard for determining proportionality of life sentences under the West Virginia recidivist statute. Given the fact that effective in 2020 there was a new recidivist statute such a reconsideration at this time is particularly appropriate. The Petitioner further requests that the new standard require at least two of the three offenses be determined by the circuit court to have involved actual violence or at least the offense was such that actual violence was likely." (Pet'r Br. 16–17.) Given that Petitioner's three prior offenses, however, involve an element of violence under the current law, there is no reason for the Court to revisit, yet again, an issue that has been resolved for purposes of the instant offenses.

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

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

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

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

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

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

The second test is objective:

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

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

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

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

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

> Finally, in *Hoyle*, as stated above, this Court held:
>
> > [F]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.
>
> Syl. Pt. 12, *Hoyle*, 242 W.Va. 599, 836 S.E.2d 817.

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

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

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

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

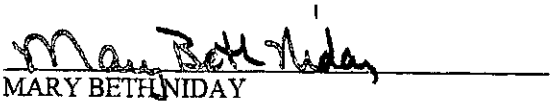
CONCLUSION

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

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,
By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 21-0532
Case No. 17-F-147/19-F-184
Circuit Court of Marion County

ADONNE A. HORTON,

Petitioner.

PETITIONER'S REPLY

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The State's Response brief addresses some of the issues raised in the Petitioner's brief and leaves others unaddressed. In this Reply the Petitioner will discuss each of these issues in turn.

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

In its response the State argues that it was not a violation of the Petitioner's rights under the *ex post facto* clauses of the United States and West Virginia Constitutions to apply the new version of the W.Va. Code § 61-11-18 recidivist statute since the new version was not to the detriment or disadvantage of the Petitioner. Respondent's Brief at 6-7. This argument is simply wrong. As pointed out in the Petitioner's brief the circuit court expressly referred to the "recent amendment to the West Virginia Code § 61-11-18(a), the recidivist statute, in so far as all three of these offenses are now recognized as qualifying offenses under the recidivist statute" during the sentencing hearing and later in the sentencing order. A.R. 506, 598. Pet. Br. at 7. Furthermore, the court stated at the sentencing and in the sentencing order that it was of the opinion that the convictions of the petitioner were not stale *because* the conduct underlying the offenses all occurred within a 20-year period. A.R. 506, 598. This was a reference to the 20 year "look back" period contained in the new version of the recidivist statute. Finally, the court cites subsection (d) as authority for imposing a life sentence. A.R. 506. Subsection (d) did not exist in the old version of the recidivist statute. All the above demonstrates the circuit court's reliance upon the new version of the statute in rejecting the Petitioner's staleness argument and in determining that the three convictions of the Petitioner were qualifying offenses was to the disadvantage and detriment of the Petitioner. Since it is undisputed that all three of the Petitioner's convictions and corresponding offense conduction took place before the new version of the recidivist statute become effective on June 5, 2020, the Petitioner's *ex post facto* rights under both the West Virginia and United States Constitutions were violated.

In response to the Petitioner's argument that the circuit courts reliance upon the new version of the recidivist statute violated his rights under the "savings clause" at W.Va. Code § 2-2-8, the State simply cites a case that in footnote 7 states that the amendments to the recidivist statute do not apply to cases in which the sentencing took place before the effective date of the § 61-11-18 amendments. Resp. Br. at 7. *State v. Ingram*, No. 19-0016, 2020 WL 6798906, at *3, n. 7 (W.Va. Nov. 19, 2020) (Memo. Dec.). In the present case the sentencing hearing took place on May 21, 2021, long after the new version of the statute became effective on June 5, 2020. Moreover, the Petitioner's lawyer expressly objected to the new version being used in the sentencing of the Petitioner. A.R. 495. Even if Petitioner's counsel had not objected the law is clear that when a defendant is entitled to elect pursuant § 2-2-8 the law under which he is to be sentenced that "...it must appear from the record that he has been fully advised of his right to elect and he must be given an opportunity to exercise that right by the court." *State ex rel. Arbogast v. Mohn*, syl. pt. 3, 164 W.Va. 6, 260 S.E.2d 820 (1979).

It is interesting to note that while the State quotes two cases with regard to the *ex post facto* issue and quotes one case regarding the "savings clause" issue, it never actually *argues* that the sentencing of the Petitioner based upon the new version of the law does not violate his rights. Resp. Br. at 6-7. The State does not argue this because it cannot. The law and the record of this case make it absolutely clear that the circuit court erroneously relied on the new version of the W.Va. Code § 61-11-18. As a fallback position the State argues that even if the circuit court erred in applying the June 5, 2020 amendments to the Petitioner, such error was harmless because the amendments did not work to the disadvantage of the Petitioner in violation of *ex post facto* principles. Resp. Br. at 7. For the reasons set forth above and in the Petitioner's brief such is not the case. This is particularly true with regard to the staleness issue. As set forth in detail in the Petitioner's brief at page 12-13, the Petitioner's first conviction was for conduct in 1998 when he was 22 years old and the Petitioner was 45 when in 2021 he was sentenced to life imprisonment by the court based on the belief that that 20 year "look back" period applied to him. This was more than 23 years later, although the offense conduct for all three crimes took

place in a 20 years period. It is impossible to know what sentence the circuit court might have imposed had it believed it was free from the 20 year "look back" period set forth in the new recidivist statute. The State did not even bother the argue that the violation of the Petitioner's rights under the "savings clause" was harmless. For all the same reasons as the *ex post facto* violation, it was not harmless.

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

The circuit court at the sentencing hearing and in the sentencing order erred when it justified the life sentence imposed on the Petitioner as not unconstitutionally disproportionate based on the language of the recidivist statute itself. Pet. Br. at 9-11. A.R. 506, 598. In its Response the State does not address this argument. The State does mention the Petitioner is making this argument but does not say anything further. Resp. Br. at 6, 10. Once again the State cannot argue that the circuit court did not err when it relied on the wording of the statute to determine whether a sentence imposed pursuant to that statute was constitutionally disproportionate. Whether the court was relying on the old or the new statute the answer to the question of whether a sentence is constitutionally disproportionate cannot be found in the statute itself. Constitutional provisions trump statutes. The circuit court in sentencing the Petitioner repeatedly referred to the language of the statute itself to justify the life sentence imposed. A.R. 506, 598. This argument and the references to the record that support it are set out in detail in the Petitioner's brief and need out be repeated here. See Pet. Br. 9-11. The fact that the circuit court relied on the statute itself indicates that the court completely misunderstood the constitutional argument of the Petitioner, and it is impossible to know how the court might have ruled and sentenced the Petitioner had the court conducted the proper analysis.

C. The Sentence of the Petitioner Shocks the Conscience

The Petitioner argues in his brief that his sentence is constitutionally disproportionate since it shocks the conscience. The State disagrees but gives no reasons in its brief. Resp. Br. 12-13. After citing numerous cases providing the legal standard, about which there is no disagreement between the parties, the State describes the circumstances of the Petitioner's final triggering offense, reckless fleeing in a vehicle. Resp. Br. 12. It is undisputed that the actions of the Petitioner were reckless but no one was injured and there was no property damage other than slight damage to the Petitioner's car when it struck a curb. A.R. 231-41. The Petitioner was convicted of reckless fleeing in a vehicle in violation of W.Va. Code § 61-5-17(f). This is punishable by one to five years imprisonment. The Petitioner's prior convictions were a 1999 conviction for malicious assault in violation of W.Va. Code § 61-2-9 for assaulting his girlfriend in 1998, punishable by two to ten years imprisonment, and a 2003 conviction for wanton endangerment in violation of W.Va. Code § 61-7-12 for pointing a gun at a man in 2002 that was punishable by one to five years imprisonment. The conduct involved in these convictions extends from 1998 to 2017. A period of 19 years. When the Petitioner was sentenced to life in May of 2021 at age 45 it had been more than 23 years since the offense conduct underlying his first offense in 1998 when he was 22 years of age. See Pet. Br. at 11-13 for citations to the record all of these dates and convictions.

The Petitioner's argument is simple. A sentence of life in prison with the *chance* of parole after 15 years is disproportionality severe when the triggering offense of reckless fleeing is only punishable by one to five years imprisonment and only involved reckless behavior. This is particularly true when the two other qualifying offenses are so stale and remote in time. In 1998 the Petitioner assaulted his girlfriend, in 2002 he pointed a gun at a man, and in 2017 he recklessly fled the police. Furthermore, the seriousness of the Petitioner's crimes seems to be declining. The first offense, malicious assault, involved actual violence. The second offense, wanton endangerment, involved, at most, a threat. The Petitioner's third and triggering offense only involved a risk that harm might come unintentionally to a person. This Court has ruled that

"initial emphasis" should be given to the final triggering offense. *State v. Costello*, syl. pt. 6, 245 W.Va. 19, 857 S.E.2d 51 (2021); *State v. Hoyle*, syl. pt. 11, 242 W.Va. 599, 836 S.E.2d 817 (2019). In response to this argument the State only points out that the actions of the Petitioner in fleeing the police were reckless, as they were, and that the Petitioner has two prior felonies. Resp. Br. at 12-13. The State describes the prior felonies as "violent," although one, the wanton endangerment conviction, involved only pointing a gun at a man. A.R. 574.

It is for this Court to decide if the life sentence of the Petitioner shocks the conscience based upon his record of convictions and conduct spread over the time involved. It is the Petitioner's position that it does shock the conscience. This is the same sentence the Petitioner could have received for first degree murder. W.Va. Code § 62-3-15. No reasonable member of the public would accept a life sentence to be appropriate punishment for the crimes of the Petitioner. The sentence of life imprisonment would certainty shock the conscience of the jurors that convicted the Petitioner of reckless fleeing.

D. The Petitioner's Convictions Should Not Qualify under the Recidivist Statute

The State argues in its response that all three of Petitioner's prior convictions were qualifying offenses under § 61-11-18. Resp. Br. at 7-8. The State sets forth the current case law that provides that for purposes of a life sentence under the recidivist statute two of the three felony convictions considered must have involved either actual violence, a threat of violence, or substantial impact upon the victim such that harm results. *State v. Hoyle*, syl. pt. 12, 242 W.Va. 599, 836 S.E.2d 817 (2019). The Petitioner does not disagree with this and cites the same case in his brief. Pet. Br. at 14.

The State does not address the actual argument of the Petitioner on this issue. The Petitioner requested that this Court reconsider this current "two out of three" standard, particularly in light of the newly enacted version of the recidivist statute. Pet. Br at 14. The Petitioner argues in his brief and this reply that the current standard as set forth in the *Hoyle* case is vague, subjective, and not based on firm principles. Pet. Br. at 14-17. In support of this

argument the Petitioner cited the United States Supreme Court case of *Johnson v. U.S.*, 576 U.S. 591, 596-99 (2015) for the proposition that the language, "or otherwise involves conduct that presents a serious potential risk of physical injury to another" is so vague in defining a "violent felony" that it violates a criminal defendant's right to due process. *Id.* The State in its brief does not respond to or address this argument. The entirety of this argument is set forth in the Petitioner's brief and need not be repeated here. Pet. Br. at 14-17. The Petitioner does, however, respectfully request that this court adopt a more objective and principled standard for all the reasons provided in his opening brief.

CONCLUSION

The Petitioner received a life sentence in 2021 with eligibility for parole in 15 years. His crimes were assault in 1998, wanton endangerment in 2002, and reckless fleeing in 2017. In all the circumstances of this case this is an outrageous sentence and shocks the conscience. The Petitioner is not asserting that given his criminal history an enhanced sentence was not appropriate, but rather that a sentence under which the Petitioner is not even *eligible* for parole for 15 years is excessive. A defendant is normally eligible for parole after serving one fourth of a determinate sentence. W.Va. Code § 62-12-13(b)(1)(A). Had the court imposed a 50 year sentence the Petitioner would have been eligible for parole in twelve and a half years. Had the sentence been 40 years he could have been paroled in ten years. A 30 year sentence would have made him parole eligible in seven and a half years. The point is that the circuit court could have sentenced the Petitioner to a much greater sentence than the normal one to five years for reckless fleeing and still not imposed the clearly excessive sentence of life with a chance of parole after 15 long years. This sentence shocks the conscience.

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

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

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

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2023 Term

No. 21-0532

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

ADONNE A. HORTON,
Defendant Below, Petitioner.

Appeal from the Circuit Court of Marion County
Honorable David R. Janes, Judge
Criminal Action No. CC-24-2017-F-147

AFFIRMED

Submitted: March 22, 2023
Filed: April 10, 2023

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JUSTICE HUTCHISON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'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 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)." Syl. Pt. 11, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019).

2. "'Under Ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.' Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980)." Syl. Pt. 5, *Frazier v. McCabe*, 244 W. Va. 21, 851 S.E.2d 100 (2020).

3. "The statutory penalty in effect at that time of the defendant's criminal conduct shall be applied to the defendant's conviction(s)." Syl. Pt. 13, in part, *State v. Shingleton*, 237 W. Va. 669, 790 S.E.2d 505 (2016), *superseded by statute on other grounds, as stated in State v Sites*, 241 W. Va. 430, 825 S.E.2d 758 (2019).

4. "In the absence of any provision in the habitual criminal or recidivist statutes, W.Va. Code, 61-11-18 (1943), and W.Va. Code, 61-11-19 (1943), the remoteness of the prior convictions sought to be used in a recidivist trial need not be considered." Syl. Pt. 2, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992).

5. "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980).

6. "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." Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

7. "For purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c) [(2000)], two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution." Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019).

HUTCHISON, Justice:

The petitioner, Adonnc A. Horton, appeals the June 7, 2021, order of the Circuit Court of Marion County sentencing him to life in prison pursuant to the habitual criminal statute, West Virginia Code § 61-11-18.[1] The triggering offense for the petitioner's life recidivist sentence was his August 22, 2019, conviction for fleeing in a vehicle with reckless disregard in violation of West Virginia Code § 61-5-17(f) (2014).[2] The petitioner was previously convicted of malicious assault in 1999 and wanton endangerment involving a firearm in 2003.

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[1] West Virginia Code § 61-11-18, also known as the recidivist statute, has been amended three times since 2020 with the latest version becoming effective on June 9, 2022. Prior to June 5, 2020, the 2000 version of the statute was in effect. At issue herein are the 2000 and 2020 versions of the statute. For clarification purposes, we will refer to the effective date of the statute when discussing specific statutory language.

[2] West Virginia Code § 61-5-17(f) (2014), which was in effect when the petitioner committed this offense, provided:

> A person who intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others, is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $2,000 and shall be imprisoned in a state correctional facility not less than one nor more than five years.

This statute was amended in 2019 and again in 2020, but this subsection was not altered.

In this appeal, the petitioner contends that the circuit court erroneously applied the 2020 version of West Virginia Code § 61-11-18, rather than the 2000 version of the statute, in violation of the ex post facto clauses of the West Virginia and United States Constitutions[3] and West Virginia Code § 2-2-8 (1923).[4] He also argues that his sentence is unconstitutionally disproportionate to the crimes he has committed, particularly his triggering offense. Having carefully considered the parties' briefs and oral arguments, the submitted record, and the pertinent authorities, we affirm the circuit court's sentencing order for the reasons set forth below.

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[3] Article III, Section 4 of the West Virginia Constitution provides: "No bill of attainder, ex post facto law, or law impairing the obligation of a contract shall be passed." The same provision is found in Article I, Section 10, clause 1 of the United States Constitution, which reads as follows: "No State shall ... pass any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts[.]"

[4] West Virginia Code § 2-2-8 provides:

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

I. Facts and Procedural Background

The petitioner was indicted by a Marion County grand jury on October 2, 2017, on one count of fleeing in a vehicle with reckless disregard. According to the indictment, on June 11, 2017, the petitioner intentionally fled from a law enforcement officer after being directed to stop by "operating [a] vehicle at high rates of speed, passing other vehicles in the opposing lane of traffic, disregarding traffic lights, driving through busy intersections without yielding, and then crashing his vehicle into a curb." The petitioner was convicted of this offense on August 22, 2019, following a jury trial. Thereafter, the State filed an information against the petitioner charging him as a recidivist with three felony convictions. In addition to his 2019 conviction, the information alleged that the petitioner had been convicted of malicious assault in 1999 and wanton endangerment involving a firearm in 2003.

After the recidivist information was filed against the petitioner, the Legislature amended the habitual criminal statute and made the changes effective on June 5, 2020. Relevant to this appeal, the 2020 amendments to West Virginia Code § 61-11-18 enumerated a list of qualifying offenses for a recidivist sentence, which included the petitioner's triggering offense and his prior crimes.[5] The amended statute also

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[5] West Virginia Code § 61-11-18(a) (2020) provided, in pertinent part:

> For purposes of this section, "qualifying offense" means any offenses or an attempt or conspiracy to commit any of the offenses in the following provisions of this code:

implemented a twenty-year look back provision regarding previous convictions. *See* W. Va. Code § 61-11-18(d) (2020) ("[A]n offense which would otherwise constitute a qualifying offense for purposes of this subsection and subsection (b) of this section shall not be considered if more than 20 years have elapsed between that offense and the conduct underlying the current charge.").

Subsequently, the petitioner reached an agreement with the State whereby he waived his right to a jury trial on the recidivist charge and admitted that he was the same person listed in the recidivist information who had been convicted of malicious assault and wanton endangerment. In exchange for the petitioner's admission, the State agreed to dismiss other unrelated criminal charges pending against him. The circuit court accepted the agreement and proceeded to sentencing on May 21, 2021.

At his sentencing hearing, the petitioner argued that his two prior felony convictions were too remote in time to be considered under the recidivist statute. The circuit court rejected this argument, referencing the twenty-year look back provision in the 2020 version of the statute and noting that all the offenses committed by the petitioner had

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> . . . .
> (11) § 61-2-9a [malicious assault];
> . . . .
> (43) . . . §61-5-17(f) [fleeing in a vehicle with reckless disregard] . . . ;
> . . . .
> (47) § 61-7-12 [wanton endangerment involving a firearm][.]

occurred within a twenty-year period. The petitioner also argued that his triggering offense—fleeing in a vehicle with reckless disregard—did not involve actual or threatened violence, and therefore, the circuit court should exercise its discretion and impose a sentence less than the statutory sentence of life in prison. The circuit court rejected this argument as well, finding that all three felony offenses committed by the petitioner involved actual violence or threats of actual violence. The circuit court also observed that all three of the petitioner's crimes were qualifying offenses under the 2020 recidivist statute. The circuit court then imposed a sentence of life imprisonment upon the petitioner with parole eligibility after he serves fifteen years. The sentencing order was entered on June 7, 2021, and this appeal followed.

II. Standard of Review

The petitioner is challenging his life recidivist sentence. Generally, we review "'sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, in part, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011). "Where the issue involves the application of constitutional protections, our review is de novo." *State v. Patrick C.*, 243 W. Va. 258, 261, 843 S.E.2d 510, 513 (2020). Regarding sentences imposed under the habitual criminal statute, we have specifically held that

> "[t]he 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 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).

Syl. Pt. 11, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019). With these standards in mind, we consider the parties' arguments.

III. Discussion

The petitioner first argues that the circuit court violated the ex post facto clauses of the West Virginia and United States Constitutions and West Virginia Code § 2-2-8 by applying the 2020 version of the recidivist statute when it imposed his life sentence. It is well established that "'[u]nder Ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.' Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980)." Syl. Pt. 5, *Frazier v. McCabe*, 244 W. Va. 21, 851 S.E.2d 100 (2020). Similarly, West Virginia Code § 2-2-8 requires that "[t]he statutory penalty in effect at the time of the defendant's criminal conduct shall be applied to the defendant's conviction(s)." Syl. Pt. 13, in part, *State v. Shingleton*, 237 W. Va. 669, 790 S.E.2d 505 (2016), *superseded by statute on other grounds, as stated in State v. Sites*, 241 W. Va. 430, 438, 825 S.E.2d 758, 766 (2019).

The petitioner contends that the 2000 version of the recidivist statute was clearly applicable to his case because it was in effect at the time that he committed the offense of fleeing in a vehicle with reckless disregard and remained in effect at the time the recidivist information was filed against him. He argues that the circuit court nonetheless erroneously considered the provisions in the 2020 version of the statute when it imposed his sentence. In support of his contention, he points to the circuit court's references to the newly enumerated list of qualifying offenses and the newly implemented twenty-year look back provision in the 2020 version of the statute during his sentencing hearing. He also points to the circuit court's citation in the sentencing order to subsection (d) of the recidivist statute as the authority for imposing a life sentence, noting that this subsection did not exist in the 2000 version of West Virginia Code § 61-11-18.

Conversely, the State argues that to the extent the circuit court considered the 2020 amendments to West Virginia Code § 61-11-18, it did not violate the petitioner's constitutional or statutory rights because no harsher penalty was imposed as a result. The State further argues that the petitioner was not disadvantaged by any reference to the new provisions in the 2020 statute because this Court's jurisprudence under the 2000 version of the statute allowed for a recidivist life sentence to be imposed on a person in the petitioner's particular circumstances. We agree.

Certainly, "the ex post facto prohibition[] . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished

occurred." *State ex rel. Phalen v. Roberts*, 245 W. Va. 311, 320, 858 S.E.2d 936, 945 (2021), *quoting Weaver v. Graham*, 450 U.S. 24, 30-31 (1981). There was no ex post facto violation in this case, however, because the 2020 amendments to the recidivist statute neither increased the punishment nor lengthened the sentence for a person determined to have been convicted of three felonies. Although a new subsection (d) was added to the statute through the 2020 amendments, the penalty to be imposed following a third felony conviction—life in prison—remained the same.

The petitioner was not disadvantaged by the circuit court's finding that the offenses he committed are among those enumerated in the 2020 statute as crimes that "qualify" a person to receive a recidivist sentence because the 2000 version also provided for the imposition of a life sentence for a person convicted of the three specific offenses committed by the petitioner. West Virginia Code § 61-11-18(c) (2000) provided: "When it is determined, as provided in section nineteen of this article, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life." As this Court observed in *State v. Norwood*, 242 W. Va. 149, 832 S.E.2d 75 (2019),

> [t]he sentencing provisions of our recidivist statute, contained in West Virginia Code § 61-11-18 (2000) are "free from ambiguity [and] its plain meaning is to be accepted and applied without resort to interpretation." Syllabus Point 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). This procedure provides:

> Where an accused is convicted of an offense punishable by confinement in the penitentiary and, after conviction but before sentencing, an information is filed against him setting forth one or more previous felony convictions, if the jury find or, after being duly cautioned, the accused acknowledges in open court that he is the same person named in the conviction or convictions set forth in the information, the court is without authority to impose any sentence other than as prescribed in Code, 61–11–18, as amended.
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> Syllabus Point 3, *State ex rel. Cobb v. Boles*, 149 W.Va. 365, 141 S.E.2d 59 (1965)[.]

Norwood, 242 W.Va. at 157, 832 S.E.2d at 83 (additional citation omitted). Because all three felonies committed by the petitioner were punishable by confinement in the penitentiary, he was subject to the recidivist life sentence mandated by the 2000 version of the statute. As such, the circuit court's reference to the enumerated qualifying offenses set forth in the 2020 version of the statute did not operate to the petitioner's detriment.

Likewise, the petitioner was not disadvantaged by the circuit court's reference to the new provision in the 2020 version of the statute precluding consideration of prior offenses that occurred more than twenty years before the conduct underlying the current charge. Prior to the 2020 amendment, there was no remoteness limitation with respect to prior felony convictions. Indeed, this Court previously held:

> In the absence of any provision in the habitual criminal or recidivist statutes, W.Va. Code, 61-11-18 (1943), and W.Va. Code, 61-11-19 (1943), the remoteness of the prior convictions sought to be used in a recidivist trial need not be considered.

Syl. Pt. 2, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992). In so holding, this Court reasoned:

> Obviously, when the life recidivist statute is invoked, the defendant will have at least two prior felony convictions. If they are serious felonies, the defendant will have served lengthy prison sentences. This means that at the time of the life recidivist trial, one or more of the earlier convictions may be rather old. Yet, the deterrent purpose of the recidivist statute would hardly be served if earlier felony convictions could be excluded because of their ages.

Id. at 604, 420 S.E.2d at 740. Because of the lack of a remoteness limitation in the 2000 version of the statute, the circuit court's reference to the new twenty-year look back provision in 2020 version of the statute was not detrimental to the petitioner. Accordingly, based on all the above, we find no merit to the petitioner's claim that the circuit court violated ex post facto principles or West Virginia Code § 8-8-2.[6]

The petitioner next argues that his life recidivist sentence is unconstitutionally disproportionate. "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of

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[6] The petitioner has argued that not only did the circuit court fail to apply the statute in effect at the time that he committed the triggering offense, but it further erred by not giving him the option of choosing which version of the statute he wished to be applied at sentencing as required by West Virginia Code § 2-8-8. We find no merit to this argument because as discussed above, the 2020 amendments did not mitigate the punishment imposed by the recidivist statute.

the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). This Court has long held that "[w]hile 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." Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

As set forth above, when reviewing the appropriateness of a life recidivist sentence, we consider the nature of the triggering offense and whether the prior offenses involved actual or threatened violence. *Beck*, 167 W. Va. at 831, 286 S.E.2d at 236, syl. pt. 7. In syllabus point twelve of *Hoyle*, we made clear that

> [f]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c) [(2000)], 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 604, 836 S.E.2d at 822. In so holding, we recognized "the need for consistency in our law" that could only be achieved by defining the parameters for imposition of a life recidivist sentence. *Id.* at 615, 836 S.E.2d at 833.

Here, the petitioner focuses his argument on his triggering offense, pointing out that it carries a maximum penalty of only five years in prison and was less serious in nature than his prior crimes. He contends that, given these facts and the remoteness of his

two prior offenses, his life sentence is unconstitutionally disproportionate. The State maintains, however, that the petitioner's life recidivist sentence satisfies the *Hoyle* test because all three of the petitioner's felony offenses involved an element of violence. As the State notes, even the petitioner recognizes that his two prior felonies—malicious assault and wanton endangerment—involved actual violence or at least a threat of violence. The State further argues that the triggering offense also had a threat of violence as it involved operating a vehicle at a high rate of speed, disregarding traffic lights, driving through busy intersections without yielding to other vehicles, and ultimately crashing the vehicle into a curb. Such conduct the State contends clearly amounts to a threat of violence. Again, we agree.

Our focus when considering proportionality challenges to recidivist sentences has always been on the violence involved in all the offenses at issue because "crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute." *Beck*, 167 W. Va. at 830, 286 S.E.2d at 236. The petitioner has asserted that because the "seriousness" of his offenses declined and because the triggering offense only has a penalty of five years imprisonment, he should not have been given a life sentence. However, we simply cannot ignore the violence involved in the petitioner's two previous crimes. As this Court explained long ago, "[w]e do not believe that the sole emphasis can be placed on the character of the final felony which triggers the life recidivist sentence since a recidivist statute is also designed to enhance the penalty for persons with repeated felony convictions, i.e., the habitual offenders."

Wanstreet, 166 W. Va. at 533-34, 276 S.E.2d at 212. Moreover, the petitioner's claim that his triggering offense was not "as serious" and that he just "got in his car and drove away" from the police officer trying to arrest him on some outstanding warrants is unavailing.

We determined in *Norwood* that "evading police" is an offense that "clearly carries with it the risk of violence." *Id.* at 158, 832 S.E.2d at 84. In that case, the petitioner had been previously convicted under a Virginia statute analogous to West Virginia § 61-5-7(f).[7] Given that an essential element of the Virginia statute was "endanger[ing] the operation of a law enforcement vehicle or person," we concluded that the crime "carried with it the potential for actual violence." *Norwood*, 242 W. Va. at 159, 832 S.E.2d at 85. The same is true here. The petitioner was convicted of violating West Virginia Code § 61-5-7(f) because his conduct "show[ed] a reckless indifference to the safety of others." Indeed, the evidence presented at trial indicated that the petitioner drove at a high rate of speed through several busy intersections without yielding to other vehicles and disregarding traffic lights, placing other drivers and pedestrians at serious risk of injury.

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[7] The Virginia statute at issue in *Norwood* provided:

> Any person who, having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful and wanton disregard of such signal so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger a person is guilty of a Class 6 felony.

Id. at 159, 832 S.E.2d at 85.

The chase only ended because the petitioner crashed his vehicle. Without question, this crime involved a threat of violence and the petitioner's prior crimes of malicious assault[8] and wanton endangerment involving a firearm[9] obviously involved actual violence. Therefore, we find no merit to the petitioner's claim that his sentence is unconstitutionally disproportionate.

IV. Conclusion

For the foregoing reasons, the June 7, 2021, order of the Circuit Court of Marion County sentencing the petitioner to life in prison under the habitual criminal statute is affirmed.

Affirmed.

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[8] According to the pre-sentence report in the record, the petitioner "caused bodily injury to his girlfriend . . . by repeatedly hitting her in the face and body, causing her to sustain a concussion, a hematoma to her forehead, and a broken finger."

[9] This conviction resulted from the petitioner pointing a gun at an individual and then discharging it into the air.