No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Johnnie Franklin Wills, *Petitioner*,

v.

Karen Pszczolkowski, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a judicially crafted residual clause, which allows a life sentence to be imposed via a state recidivist statute only when certain underlying crimes meet the threshold of "(1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results," unconstitutional in light of this Court's holdings in *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2D 569 (2015); *Sessions v. Dimaya*, 584 U.S. 148, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), and *United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019)?

PARTIES TO THE PROCEEDINGS BELOW

1. Johnnie Franklin Wills.

    a. Mr. Wills was a criminal defendant and state post-conviction habeas petitioner in the Circuit Court of Hampshire County, West Virginia, and the petitioner in a direct appeal to the Supreme Court of Appeals of West Virginia in *State v. Wills*, No. 16-1199 (W. Va. Nov. 22, 2017). He was also the Petitioner in a state post-conviction habeas corpus proceeding, and subsequent appeal in *Wills v. Pszczolkowski*, No 20-0472, (W. Va. July 19, 2021), cert. denied (142 S.Ct. 794 (2022)).

    b. Mr. Wills was the Petitioner in a 28 U.S. Code § 2254 petition, No. 5:22-cv-00005, in the United States District Court for the Northern District of West Virginia, which was denied and subsequently appealed to the United States Court of Appeals for the Fourth Circuit, Docket No. 22-6704, in *Wills v. Pszczolkowski*, 125 F.4th 534 (4th Cir. 2025).

2. Karen Pszczolkowski.

    a. Ms. Pszczolkowski was the Superintendent of Northern Correctional Facility where Mr. Wills is housed, and was consequently the named Respondent in Mr. Wills' state post-conviction habeas proceedings in the Circuit Court of Hampshire County, West Virginia and subsequent appeal, as set forth above.

    b. Ms. Pszczolkowski was the Respondent in *Wills v. Pszczolkowski*, in the Northern District of West Virginia and the Fourth Circuit, as set forth above.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Johnnie Franklin Wills, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court ofAppeals for the Fourth Circuit, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

The United States Court ofAppeals for the Fourth Circuit issued a signed, published opinion in *Wills v. Pszczolkowski*, 125 F.4th 534 (4th Cir. 2025) (included in the Appendix to this Petition ["App."] at 1), which is the subject of the instant petition for writ of certiorari.

STATEMENT OF JURISDICTION

The denial of the Petitioner's petition filed under 28 U.S. Code § 2254 was affirmed on appeal by the Fourth Circuit on January 13, 2025. This Honorable Court has jurisdiction over final judgments of the United States Courts of Appeal pursuant to 28 U.S.C. § 1254. *This petition was previously submitted, and returned pursuant to Rule 14.5 on April 17, 2025.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019), cert. denied, 140 S. Ct. 2586 (2020), which judicially modified a subsequently-amended version of W. Va. Code § 61-11-18(c) (2016):

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

STATEMENT OF THE CASE

a. Recent legal developments affecting West Virginia's recidivist statute

In order to understand the question presented in this case, it is necessary to consider several recent developments surrounding West Virginia's recidivist statute. The statute, at the time of the Petitioner's convictions currently on federal collateral review, created the following standard:

> (a) Except as provided by subsection (b) of this section, when any person is convicted of an offense and is subject to confinement in the state correctional facility therefor, and it is determined, as provided in section nineteen of this article, that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the

> term of years otherwise provided for under such sentence.
>
> (b) […]
>
> (c) 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.

W. Va. Code § 61-11-18 (2016).

This statute was originally carried over from the laws of Virginia at the time of West Virginia's statehood, with subsequent amendments being procedural rather than substantive. The substance of the recidivist statute was upheld by this Court over a century ago in *Graham v. West Virginia*, 224 U.S. 616, 32 S.Ct. 583, 56 L.Ed. 917 (1912). However, the Supreme Court of Appeals of West Virginia eventually recognized a proportionality limitation based on West Virginia's constitution, and the following principle was applied from 1981 to 2019:

> 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.

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

The West Virginia Supreme Court clarified this standard in 2019:

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

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

This modification came during the pendency of the Petitioner's state habeas proceeding. However, the new standard in *Hoyle* is inclusive of the "actual or threatened violence" standard in *Beck*, while modifying it to add "substantial impact upon the victim such that harm results" and requiring that at least two of the felony convictions meet that standard.

In 2020, presumably in response to this Court's holdings in *Dimaya*, and *United States v. Davis*, 139 S. Ct. 2319 (2019), the West Virginia Legislature modified the recidivist statute so that it specified the individual crimes that could be a predicate for a life recidivist enhancement. W. Va. Code §61-11-18(a) (2019). Thus, the applicability of the *Hoyle* standard is significantly limited going forward. The new statute is not retroactive and has no bearing on the instant litigation, except to demonstrate that the universe of cases that would be affected by any holding on the *Hoyle/Beck* standards is substantially limited to a small class of persons already convicted.

b. Relevant Procedural History

In August of 2016, the Petitioner, Johnnie Franklin Wills, was convicted by jury verdict in West Virginia state court of two felony charges: grand larceny and conspiracy to commit grand larceny. App., at 61. The State filed a recidivist information pursuant to W. Va. Code § 61-11-18(c) (2016), alleging that the Petitioner had been previously convicted of numerous felonies: three separate convictions of third offense driving revoked for DUI, third offense DUI, attempted grand larceny, and two separate convictions of felon in possession of a firearm. App., at 61-62. The Petitioner admitted that he had been convicted of those crimes, and he was sentenced to life with the possibility of parole after fifteen years for the recidivized grand larceny charge, and a concurrent 1-5 year sentence for conspiracy. App., at 62.

The Petitioner's recidivist life sentence was affirmed on direct appeal in *State v. Wills*, No. 16-1199 (W.Va. November 22, 2017). App., at 61-64. The Petitioner had argued that his life sentence was constitutionally disproportionate under state constitutional principles, but the Supreme Court of West Virginia determined that burglary, grand larceny, and DUI are all crimes that involve a risk of violence, noting that the Petitioner was present while his co-defendant burgled the home in his most recent conviction. App., at 63-64.

The Petitioner subsequently filed a petition for post-conviction writ of habeas corpus in the trial court. He raised a number of grounds; however, the only ground relevant to the instant matter is whether or not this Court's rulings in *Johnson* and *Dimaya* rendered the application of the recidivist statute to his case unconstitutional. App., at 37-38. The trial court rejected the Petitioner's grounds for habeas relief, including the one predicated on the vagueness claim. App., at 30-60. On appeal to the West Virginia Supreme Court, the Petitioner alleged that the "actual or threatened violence" proportionality test employed by the Supreme Court of Appeals of West Virginia entailed a "residual clause" of the sort that this Court determined to be void for vagueness in *Johnson* and *Dimaya.* Relief was denied. App., at 25-29. A previous certiorari petition at that juncture was unsuccessful. *See*, 142 S.Ct. 794 (2022).

The Petitioner subsequently filed a Section 2254 petition in the United States District Court for the Northern District of West Virginia, asserting the same single claim that was raised on direct appeal, which was denied. App., at 15-24. Following the denial of that petition, with the granting of the Respondent's motion for summary judgment, the Petitioner filed a motion to alter or amend the judgment to grant a certificate of appealability, which was granted. App., at 12-14. The Fourth Circuit appeal commenced, and following oral argument

and a nearly two-year delay in deciding the case, the District Court's ruling was affirmed by published opinion. *Wills v. Pszczolkowski*, 125 F.4th 534 (4th Cir. 2025). App., at 1-11. It is from that decision that the Petitioner now seeks this Court's review.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, the Petitioner asserts that the United States Court of Appeals for the Fourth Circuit has decided an important question of federal law raised in this petition in a manner which is in conflict with relevant decisions of this Court. Because the specific question presented in this case is a *sui generis* issue arising from the unique landscape of West Virginia on this issue, there is no plausible split of authority among the states or the Courts of Appeal for this Court to resolve.

This Court has long held that a court cannot do what would be unconstitutional if done by a legislature. In *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), this Court considered a case in which a decision of South Carolina's high court expanded the scope of a facially narrow (i.e., unambiguous) trespassing statute, on *ex post facto* grounds (a fact pattern which, of course, differs from the instant case, but which implicates similar constitutional principles, as discussed *infra*). *Bouie* held that the manner in which the lower court *construed* the statute was constitutionally infirm, even if the statute on its face was acceptable. Discussing different scenarios in which state courts could violate federal *ex post facto* standards when construing statutes, this Court quoted *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), stating:

> Applicable to either situation is this Court's statement in *Brinkerhoff-Faris*, *supra*, that '(i)f the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious,' and 'The violation is none the less clear when that result is accomplished by the state judiciary

> in the course of construing an otherwise valid...state statute.' *Id.*, 281 U.S. at 679-680, 50 S.Ct. at 454.

Bouie, 378 U.S. at 355.

Brinkerhoff-Farris continued on to hold that "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Id.*, 281 U.S. at 679. This Court has also described that vagueness claims, such as those at the core of *Johnson*, *Davis*, and *Dimaya*, as discussed *infra*, are in the same category of "fair warning" due process protections implicated in the *ex post facto* challenge in *Bouie*. *See*, *U.S. v. Lanier*, 520 U.S. 259, 266-67, 117 S.Ct. 1219, 137 LEd.2d 432 (1997). The Petitioner asserts that this Court is well within its power to review the text of laws written by judges as opposed to legislators.

In 2015, this Court determined that the "residual clause" of the Armed Career Criminal Act , 18 U.S.C. § 924(e), ("ACCA") which provided that a person was subject to a minimum fifteen year penalty if he was a recidivist and convicted of a violent felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague and violated a defendant's due process rights. *Johnson v. United States*, 559 U.S. 133 (2015).

In *Johnson*, this court noted that it had always used the "categorical approach" in making that determination, that is, it looked at the crime "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Id.* at 136. (internal citations omitted). This Court held that "[w]e are convinced that the indeterminacy of the wideranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." *Id*., at 137.

This Court rejected abandoning the categorical approach, because having a judge determine facts would "[cause] Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Id*. at 1215;. See also *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (holding collectively that any fact which increases a statutory maximum penalty or increases a mandatory minimum penalty must be based upon facts found by a jury and not a sentencing judge).

"Those [Sixth Amendment] concerns… counsel against allowing a sentencing court to make a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Descamps v. United States*, 570 U.S. 254, 267, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) (internal punctuation omitted). Thus, it is impermissible to go behind the crime of conviction and look at particular facts not necessarily found by the jury in order to find facts for a larger sentence.

Following *Johnson*, in *Dimaya*, this Court considered a similar clause in 18 U.S.C. § 16(b), regarding the classification of crimes that may lead to deportation of legal aliens. The *Dimaya* plurality held, "[w]e can as well repeat here what we asked in *Johnson*: How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct?" *Dimaya*. 138 S.Ct. at 1225 (internal citations omitted). The Court thus held that a judicial determination of whether a crime is categorically violent is a violation of a defendant's due process rights and such a determination leads to arbitrary and standardless enforcement. *Id*.

In *Davis*, *supra*, this Court found that another facet of the ACCA, containing a "crime

of violence" residual clause similar to what was considered in *Johnson* and *Dimaya*, was unconstitutional for the same reasons advanced in those two previous cases. In doing so, this Court rejected an argument that would save the statute by permitting judges to examine the actual facts underlying the previous convictions, while noting that Congress could pass a law permitting a jury to make such a finding. *Davis*, 139 S.Ct. at 2327.

The Court has also held that rules regarding vagueness claims are retroactive to cases arising on collateral habeas corpus review. *Welch v. United States*, 578 U.S. 120, 136 S.Ct. 1257, 194 L. Ed. 2d 387 (2016) (analyzing the *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060; 103 L. Ed. 2d 334 (1989) rules for retroactivity). Because *Welch* determined that the *Johnson* rule was a new substantive rule, this class of rules survives the abolition of the "watershed" exception in *Edwards v. Vannoy*, 563 U.S. ___,140 S.Ct. 2737, 206 L.Ed.2d 917 (2021).

When viewed in light of the this Court's holdings, it is clear that the Fourth Circuit has erred in upholding the Supreme Court of Appeals of West Virginia's application of the judicially-authored residual clauses in *Beck*/*Hoyle* in precisely the manner prohibited by *Dimaya*. The state courts used the categorical approach to decide that the various felonies of which the Petitioner has been convicted, none of which include an element of violence, are nevertheless acts that "involve actual or threatened violence." Consider the following analysis by the West Virginia court on the Petitioner's direct appeal:

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

> approximately $6,000 in personal property. *State v. Housden*, 184 W.Va. 171, 175, 399 S.E.2d 882, 886 (1990). Petitioner admits to being on the victim's property while his codefendant burgled the victim's home; thus, the potential for harm or violence, had the property owner returned home, existed. See *id*. at 174, 399 S.E.2d at 885 ("The potential for threatened harm or violence to either the victim, had he returned home at the time the crime was committed or to another innocent person such as the victim's son, who testified that he was regularly checking on the home for his father, still existed at the time the appellant committed the crime.")
>
> However, even if we ignore the fact that petitioner was present during the burglary his codefendant was convicted of committing and accept petitioner's contention that his grand larceny neither threatened nor actually involved violence, we have also held that "sole emphasis cannot be placed on the character of the final felony" and that prior felonies must be "closely examined." In so doing, we note that petitioner, having twice been convicted of third offense DUI, has had no less than six DUI convictions. We have previously stated that "[t]he dangers inherent in driving on the public streets while under the influence of an intoxicant are obvious." *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 516, 583 S.E.2d 800, 813 (2002) (citation omitted). "[O]perating an automobile while under the influence is reckless conduct that places the citizens of this State at great risk of serious physical harm or death." Id. (internal quotations and citation omitted). Accordingly, we have had "little trouble in finding that driving under the influence is a crime of violence supporting imposition of a recidivist sentence." Id. Thus, given petitioner's numerous prior crimes, including these crimes of violence, we find no error in the imposition of a recidivist sentence.

State v. Wills, at *3-4 (page number and footnote omitted). App., at 63-64.

This is a blend of the sort of *post hoc* judicial fact-finding prohibited by *Alleyne*, and *Deschamps*, combined with the categorical ordinary-case speculation that is prohibited under *Dimaya* and *Johnson.* The findings about the Petitioner's co-defendant's having committed a burglary were never within the scope of facts determined by the jury in this case. Yet, even the burglary itself (a crime of which the Petitioner was never convicted) fails to be reasonably

definable by its elements as an act of violence. The court below has engaged in speculation about the dangerous nature of crimes such as burglary, grand larceny, and driving under the influence, and used that speculation to justify an increase in the Petitioner's sentence in a manner that wholly ignores the due process concerns underlying *Johnson*, *Dimaya*, *and Davis*.

It is the Petitioner's' burden to demonstrate the following to obtain relief on his federal habeas:

> "A state court's decision is contrary to clearly established federal law 'if the **state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law' or 'confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at' " an opposite result.** *Lewis*, 609 F.3d at 300 (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Further, a state court unreasonably applies federal law when it " **'identifies the correct governing legal rule from th[e] Court's cases but unreasonably** applies it to the facts of the particular ... case,' " or " 'unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably **refuses to extend that principle to a new context where it should apply.'** "

Decastro v. Branker, 642 F.3d 442, 449 (4th Cir. 2011) (citations omitted, emphasis added).

The text of the *Wanstreet/Hoyle*[1] standard authored by the Supreme Court of Appeals of West Virginia is, for practical purposes, materially indistinguishable from the standard struck down in *Dimaya:* "... a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U. S. C. §16(b). As stated most recently in Syl. Pt. 12 of *Hoyle*, the relevant West Virginia standard is "(1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results." Although worded differently, both standards require courts to go beyond merely assessing whether a crime contains an essential element of violence, instead putting courts in

1 *Wanstreet v. Bordenkircher*, 166 W.Va. 523,276 S.E.2d 205 (1981), *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019).

the position of imagining scenarios under which a given crime *risks* a person suffering harm. To that extent, the case on appeal and *Dimaya* are materially indistinguishable.

The Petitioner does not contest that the federal statutes in question in *Dimaya* and the related cases were authored by Congress, while the *Wanstreet/Hoyle* standard was authored by the Supreme Court of Appeals of West Virginia. The Petitioner does not contest that the plain language of West Virginia's recidivist statute passes constitutional muster. But it is not the plain language of the recidivist statute that is at issue in this case.

This Court, when considering whether a state law violated the rule against *ex post facto* enactments, observed that "[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*." *Weaver v. Graham*, 450 U.S. 24, 31 (1981). The *Weaver* Court, in Footnote 15, quoted an earlier case for a similar proposition:

> The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.

Cummins v. Missouri, 4 Wall. 277, 71 U. S. 325 (1867).

An *ex post facto* challenge, like a vagueness challenge, is fundamentally a complaint that a defendant has been deprived of notice, or "fair warning." The core of a due process complaint predicated on a deprivation of such fair warning is "whether the statute, either standing alone *or as construed*, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *U.S. v. Lanier*, 520 U.S. 259, 267 (1997) (emphasis added).

Relying on the trial courts and the state supreme court to determine what crimes "involve actual or threatened violence" (or the even vaguer "substantial impact" test from *Hoyle*) deprives a person of notice of what sorts of crimes will result in the imposition of a life

sentence, just as the ACCA's residual clause deprived an individual of notice of what would invoke the mandatory minimum, and just as the residual clause contained in 18 U.S.C. § 16(b) prevented legal aliens from knowing what sort of conduct could lead to deportation.

It is clear that the Supreme Court of Appeals of West Virginia uses the impermissible categorical approach in determining whether or not a predicate crime for a recidivist sentence is one that involves actual or threatened violence. The State Supreme Court has found the requirement of "actual or threatened violence" satisfied by a number of third-offense predicate convictions, regardless of the particular facts of the respective cases: burglary (*State v. Housden*, 399 S.E.2d 882, 184 W.Va. 171 (1990)); DUI (*State ex rel. Appleby v. Recht,* 213 W.Va. 503, 583 S.E.2d 800 (2002)); breaking and entering (*State v. Oxier*, 179 W.Va. 431, 369 S.E.2d 866 (1988), *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980)); jail escape (*State v. Wyne*, 460 S.E.2d 450, 194 W.Va. 315 (1995)); and sexual assault (*State v. Beck*, 286 S.E.2d 234, 167 W.Va. 830 (1981)). It also held that 3rd Offense Domestic Battery satisfies the newer *Hoyle* standard (which is inclusive of the *Wanstreet* standard). *State v. Mauller,* No. 19-0829 (W. Va., July 30, 2020) (memorandum decision).

These cases do not involve the state courts looking into the nature of the actual crimes previously committed. In its order granting summary judgment, the District Court reasoned that Justice Gorsuch's majority opinion in *Davis* observed that Congress would be permitted to establish a "case-specific" analysis for statutory sentence enhancement, examining the facts of each case. Such a rule would be in contrast to the test in the ACCA (18 U.S.C. 924(e)), that relied on analysis of whether a felony "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The problem with the District Court's reliance on that line of reasoning is that, as

discussed above, the Supreme Court of Appeals of West Virginia does not employ a "case-specific" examination of the facts. Moreover, for a court to employ the case-specific inquiry provisionally endorsed in dicta by Justice Gorsuch, could well run afoul of the prohibition on judicial fact-finding beyond the purview of the issues presented to the jury as set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Alleyne v. United States*, 570 U.S. 99 (2013) (holding collectively that any fact which increases a statutory maximum penalty or increases a mandatory minimum penalty must be based upon facts found by a jury and not a sentencing judge). Certainly such a case-specific analysis is beyond the scope of the factual inquiry for a jury in a West Virginia recidivist trial. This Court should consider Mr. Wills' appeal in light of the actual categorical approach employed by the West Virginia courts rather than the inapposite case-specific approach.

Ironically, in light of the above, in Mr. Wills' own case, the State Supreme Court did indulge in a degree of "case-specific" inquiry to bootstrap another crime that had previously been deemed to risk "actual or threatened violence" to the Petitioner's larceny conviction. Even though his conviction was for larceny,[2] the Court went so far as to ascribe responsibility to Mr. Wills under the recidivist statute for conduct of which he was not even convicted:

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

2 Larceny had never been deemed to be a standalone crime of "actual or threatened violence" in the absence of an additional conviction for burglary or breaking and entering by any prior decision of that Court; *see, e.g., Housden, supra*; and *Oxier*, *supra*.

> Petitioner admits to being on the victim's property while his codefendant burgled the victim's home; thus, the potential for harm or violence, had the property owner returned home, existed.

Wills I, at *3. Of course, the "potential for harm or violence" is all speculative here, as that scenario "had the property owner returned home" never came to pass. It is the precise sort of conjecture disdained by the *Dimaya* Court. The categorical approach in deciding whether the violation of a particular statute involves "actual or threatened violence" is clearly implicated by the holdings of *Johnson, Davis, and Dimaya.*

It should also be noted that in *Davis,* the United States Supreme Court did not disturb the "elements clause" of the ACCA, 18 U. S. C. §924(c)(3)(A), which allows an aggravated sentence based upon the prior commission of a crime that contains an element of force. The Supreme Court observed: "As this Court has long understood, the residual clause, read categorically, 'sweeps more broadly' than the elements clause—potentially reaching offenses, like burglary, that do not have violence as an element but that arguably create a substantial risk of violence." *Davis*, 139 S. Ct. at 2334.

The District Court, in denying Mr. Wills' motion to amend judgment, cited to the Fourth Circuit's recent opinion in *United States v. Jackson,* 2022 WL 1160391 (4th Cir. Apr. 20, 2022), noting the similarities between the language under which Mr. Jackson's conviction qualified for an enhancement under the ACCA, and the language employed in the *Wanstreet*/*Hoyle* standard. Yet this Court upheld Mr. Jackson's conviction precisely because the premeditated murder he perpetrated contained an element of "violent force — that is, force capable of causing physical pain or injury to another person." *Jackson*, at *13, quoting *Johnson*, 559 U.S. at 140.

None of the felonies for which the Petitioner was previously convicted have any

element of violence. To the contrary, the Petitioner's felony convictions are for grand larceny, attempted grand larceny, DUI, driving suspended for DUI, and felon in possession of a firearm, as described in the recidivist information. App., at 61-62. Not one of these crimes has an element of force or threatened force. They can only be deemed to involve actual or threatened violence based on the unconstitutionally conjectural categorical approach. Yet, under a judicially-crafted rule that would clearly be unconstitutionally vague if it had been authored by Congress or the Legislature, he continues to languish under a life sentence. To enhance the Petitioner's sentence based upon "actual" or "threatened" violence, rather than an actual element of violence, implicates the same vagueness standard that has plagued the ACCA's residual clause. Because the judicially-crafted rule that was applied to impose a life sentence upon the Petitioner clearly violates the principles of *Johnson* and *Dimaya*, the Petitioner respectfully requests that this Court grant certiorari, and consider this case fully on its merits.

Respectfully Submitted,

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by counsel,

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