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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

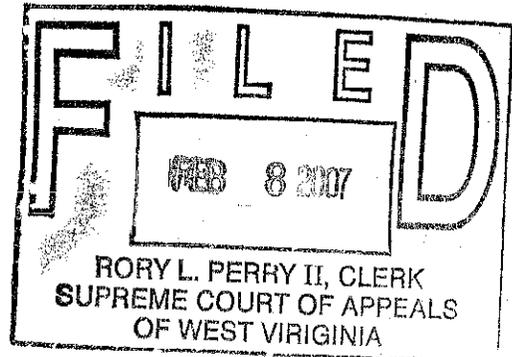
CORNELL F. DAYE,

Appellee,

v.

STATE OF WEST VIRGINIA,
THOMAS McBRIDE, WARDEN,
WEST VIRGINIA STATE PENITENTIARY,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CORNELL F. DAYE,

Appellant,

v.

STATE OF WEST VIRGINIA,
THOMAS MCBRIDE, Warden,
West Virginia State Penitentiary,

Appellee.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The State agrees with the Appellant's procedural recitation, with one exception: on page 2 of the Appellant's Brief, counsel states that ". . . the trial court granted this motion [to correct sentence] and increased Appellant's sentence to life, although he has never been convicted of any violent offense." This is legal argument masquerading as fact. First, the trial court did not increase the sentence, in the sense that he deemed the initial sentence too lenient and decided upon reflection to hit the long ball; rather, he corrected the sentence, for the straightforward reason that it did not comply with the applicable law. Second, the cemeteries are filled with individuals giving mute testimony that the distribution of narcotics is indeed an offense involving violence or the threat of violence.

II.

STATEMENT OF FACTS

The State agrees with the Appellant's statement of facts, but wishes to apprise this Court of additional facts that support the prosecutor's decision to charge the Appellant as an habitual offender pursuant to West Virginia Code § 61-11-19.

As set forth in the Presentence Investigation (R. at ___):

1. On July 3, 1997, the Appellant was convicted of petit larceny and possession with intent to deliver. Consecutive terms of imprisonment were suspended and the Appellant was sentenced to a term at the Anthony Center, from which he was released less than a year later and placed on three years' probation.

2. In April, 1998, the Appellant's probation was transferred to Ohio, where he had relocated. Ohio authorities ultimately declined to continue their supervision of the Appellant, on the grounds that he had failed to report, failed to keep his probation officer apprised of his place of residence, failed to attend a clinic as ordered, and produced a dirty urine sample.

3. On March 22, 1999, the Appellant was convicted of possession (crack cocaine) with intent to deliver. His term of imprisonment was suspended and he was given four months in jail, followed by two years of probation to run concurrent with the existing probation.

4. Within six months of his release from jail, the Appellant failed to report to his probation officer and a capias was issued.

5. On December 2, 1999, the Appellant was arrested in Orange County, Florida, and subsequently on March 2, 2000, pleaded *nolo contendere* to possession of a controlled substance.¹ He was sentenced to six months in the Orange County Jail.

6. On May 19, 2000, the Appellant was booked at the Southern Regional Jail on the *capias*,² and also charged with being a fugitive from justice. On February 15, 2001, he was found guilty of probation violation and his 1-15 year prison sentence was re-imposed.

7. On January 10, 2001, the Appellant was charged with possession of crack cocaine with intent to deliver, and on August 21, 2001 he was found guilty of the charge by a jury.

8. The Appellant “. . . admitted that he supported himself in West Virginia for quite some time by selling drugs and other illegal activities, such as stealing, and breaking into homes. . . .”

9. The “Individual Arrest Listing” for the Appellant is an impressive eighteen pages long, although to be fair it does contain a number of redundancies.

III.

ISSUES

1. The trial court properly imposed a sentence of life upon the Appellant’s conviction under the habitual criminal statute, W. Va. Code § 61-11-18(c).

2. The Appellant’s sentence under the habitual offender statute was constitutionally proportional.

¹As Appellant notes in his brief at fn.9, this was a Class III felony under Florida law, although (probably) a misdemeanor under West Virginia law.

²The six month term in Florida included credit for time served; thus, the Appellant discharged his sentence in Orange County Jail approximately two months after his conviction.

3. In the event the court's decision with respect to the previous issues is not dispositive of all claims the Appellant may have, the State agrees that the Appellant is entitled to a remand for appointment of counsel and development of any remaining issues pursuant to *Losch v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981).

IV.

ARGUMENT

A. THE TRIAL COURT PROPERTY IMPOSED A SENTENCE OF LIFE UPON THE APPELLANT'S CONVICTION UNDER THE HABITUAL CRIMINAL STATUTE, W. VA. CODE § 61-11-18(c).

1. The Trial Court Did Not Increase the Appellant's Sentence After He Had Begun To Serve It; Rather, The Court Corrected An Illegal Sentence.

As set forth in the Statement of Facts, prior to his conviction in the Circuit Court of Raleigh County on August 21, 2001, of possession of crack cocaine with intent to deliver, the Appellant had two prior drug-related convictions: July 3, 1997, petit larceny and possession of crack cocaine with intent to deliver; and March 22, 1999, possession of crack cocaine with intent to deliver.³ Additionally, on December 2, 1999, the Appellant pleaded *nolo contendere* to a Class III felony drug possession charge in Florida.

Accordingly, the day after the jury returned its guilty verdict in the instant case, the State filed an information pursuant to West Virginia Code §§ 61-11-18 & 19.

West Virginia Code § 61-18-18(c) provides that:

³The Appellant argues that because the sentencing order in that case referred to a "PLEA OF GUILTY to POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: 'CRACK' COCAINE," with no reference to any "intent to deliver," this created an ambiguity that requires evidentiary development. See Argument III, *infra*.

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. (Emphasis supplied)

West Virginia Code § 61-18-19 provides, in relevant part, that:

It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence ... If the jury finds that he is not the same finds that he is not the same person [who was convicted on previous occasion or occasions], he shall be sentenced upon the charge of which he was convicted as provided by law; but if they find that he is the same, or after being duly cautioned if he acknowledged in open court that he is the same person, the court shall sentence him to such further confinement as is prescribed by section eighteen of this article on a second or third conviction as the case may be. (Emphasis supplied)

This Court has held that the mandatory life sentence language of the statutes is just that: mandatory. Syl. Pt. 5, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966); Syl. Pt. 3, *State ex rel. Cobb v. Boles*, 149 W. Va. 365, 141 S.E.2d 59 (1965). Thus, any sentence imposed after an habitual criminal conviction that does not comport with W. Va. Code § 61-11-18 is an illegal sentence; in the words of Syllabus Point 5 of *Combs* and Syllabus Point 3 of *Cobb*, "... the court is without authority to impose any sentence other than as prescribed in Code, 61-11-18, as amended."

The Appellant claims, in effect, that once the trial court refused to impose the mandatory life sentence, despite his conviction as an habitual criminal, the court lost the power to correct its mistake because the result would be an increase in the sentence. None of the cases cited in the Appellant's brief support this position; rather, all of them stand for the well-established proposition that there's no judicial equivalent to buyer's remorse after a too-lenient sentence is imposed. *See, e.g., State ex rel. Williams v. Riffe*, 127 W. Va. 573, 34 S.E.2d 21 (1945), and *Sellers v. Broadwater*,

176 W. Va. 232, 342 S.E.2d 198 (1986) (in both cases, trial court attempted to set aside plea and sentencing after protests by victim's families); *State ex rel. Roberts v. Tucker*, 143 W. Va. 114, 100 S.E.2d 550 (1957) (trial court attempted to increase original sentence after defendant escaped from jail).

In *Williams*, *Sellers* and *Roberts*, the initial sentences were all legal although, in the opinion of the respective trial courts for reasons appearing after the fact, too lenient. Therefore, the constitutional prohibition against double jeopardy, W. Va. Const., art. III, § 5, barred imposition of an increased sentence. In this case, in contrast, the Appellant's initial sentence was illegal; therefore, the trial court had a duty to correct the sentence no matter what it thought about concepts of harshness or lenience.⁴

Nothing in this Court's double jeopardy jurisprudence dealing with resentencing, *see, e.g.*, *State ex rel. Kincaid v. Spillers*, 165 W. Va. 380, 268 S.E.2d 137 (1980); *State ex rel. Gillespie v. Kendrick*, 164 W. Va. 599, 265 S.E.2d 537 (1980), suggests that an illegal sentence cannot be corrected if this would result in an increased sentence. Further, the Court's jurisprudence dealing with mistrials suggests the opposite conclusion. If there was manifest necessity for granting a mistrial and it was not occasioned by either prosecutorial misconduct or judicial overreaching, then double jeopardy does not bar retrial. *See, e.g.*, *State v. Bennett*, 157 W. Va. 701, 203 S.E.2d 699 (1974). This is the case regardless of whether the State or the defendant moves for the mistrial, or the court grants it *sua sponte*. *See, e.g.*, *State v. Swafford*, 206 W. Va. 390, 524 S.E.2d 906 (1999)

⁴The record does not disclose, either directly or by inference, why the trial court refused to impose a life sentence per the recidivist conviction at the initial sentencing

(State's motion); *State v. Clements*, 175 W. Va. 463, 334 S.E.2d 600 (1985) (defendant's motion); *State v. Ward*, 185 W. Va. 361, 407 S.E.2d 365 (1991) (*sua sponte* declaration).

With respect to resentencing, the imposition of an illegal sentence gives rise to a manifest necessity for resentencing. All sentences in West Virginia are determined by the Legislature, and some sentences, including habitual criminal sentences, are mandatory. In this case, the Appellant is not entitled to a gotcha! as a result of the trial court's initial failure to impose the sentence mandated by the Legislature in West Virginia Code § 61-18-18(c).

2. **The Appellant's Sentence Was Properly Imposed Pursuant to W. Va. Code § 61-18-18(c) Rather Than W. Va. Code § 60A-4-408.**

The Appellant contends that in a case where all of a defendant's convictions are drug-related, the habitual offender statute, W. Va. Code § 61-18-18(c), must give way to the multiple offenses enhancement provisions of the Uniform Controlled Substances Act, W. Va. Code § 60A-4-408. Otherwise, says the Appellant, the latter statute would be rendered a nullity since an offender with multiple offenses is by definition an habitual offender.

The problem with the Appellant's logic is that a prosecutor has discretion as to whether he or she will file a recidivist information. *Griffin v. Warden, West Virginia State Penitentiary*, 517 F.2d 756 (4th Cir. 1975). In the experience of the undersigned, the filing of such an information is an infrequent occurrence, and there is no danger whatsoever of W. Va. Code § 60A-4-408 being nullified by W. Va. Code § 61-18-18(c).

The Appellant also contends that the penalty section of the Uniform Controlled Substances Act is specific and therefore takes precedence over the habitual offender statute, which is general.

The problem with this argument is that the rule of statutory construction upon which the Appellant relies, that a specific statute should be given precedence over a general statute relating to the same subject matter, contains a limiting phrase: *where the two cannot be reconciled*. Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984); Syl. Pt. 3, *State v. Turley*, 177 W. Va. 69, 350 S.E.2d 696 (1986). The statutes at issue in this case, W. Va. Code § 60A-4-408 and W. Va. Code § 61-18-18(c), can certainly be reconciled. The U.C.S.A. statute provides a lesser, and discretionary, enhancement in any case involving a repeat drug offender. It applies both to misdemeanor and felony offenses. It does not require the filing of an information or a jury trial. In contrast, the habitual criminal statute is utilized only in cases where the totality of defendant's criminal history conduct makes a mandatory sentence of life imprisonment an appropriate punishment. It requires the filing of an information within certain time limits, and the defendant has a right to a jury trial with attendant procedural safeguards.

In this regard, the Appellant's reliance on *State v. Turley*, 177 W. Va. 69, 350 S.E.2d 696 (1986), is misplaced. The Appellant cites *Turley* for the proposition that "the more specific probation statute applicable to youthful offenders was controlling over the more general probation statute." This is not a fair summation of the case, since the Court held as a threshold matter that "... the legislature has authorized the courts to consider special treatment of youthful offenders, and this policy should be followed unless expressly foreclosed by the legislature. The legislature could foreclose eligibility for youthful offender treatment by expressly providing in the aggravated robbery statute for a maximum sentence of life imprisonment. Until it does so, we will not infer such an intent to thwart the obvious purpose of the legislature to treat most youthful offenders in a special manner, with the overriding concern being reformation or rehabilitation of such offenders." *Id.*, 177

W. Va. at 72, 350 S.E.2d at 700 (emphasis supplied and footnote omitted). The Court ultimately ruled that the case would be remanded “. . . for the trial court to exercise sound discretion as to whether the appellant should be sentenced as a youthful offender.” *Id.*, 177 W. Va. at 73, 350 S.E.2d at 701.⁵

In the case at bar, the habitual criminal statute not only expressly provides for a maximum sentence, it mandates it. Further, there is no indication that the Legislature intended to treat drug offenders “in a special manner, with the overriding concern being reformation or rehabilitation of such offenders.” Therefore, this Court’s decision in *Turley* is inapposite.

The Appellant’s brief contains a string cite of cases from other jurisdictions which allegedly stand for the proposition that the specific enhancements contained in states’ equivalents of the U.C.S.A., rather than those contained in their general habitual criminal statutes, control. A review of these cases reveals that most of them are easily distinguishable, and *State v. Ray*, 166 Wis.2d 855, 481 N.W.2d 288 (1992), clearly supports the State’s position in this case, not the Appellant’s position.

In *Ex Parte Chambers*, 522 So.2d 313 (Ala. 1987), the court held that because the habitual criminal statutes provided penalties “*unless otherwise specifically provided by law*,” and because the official commentary to the statute stated that “*drug offenses are not covered in this Criminal code, but are governed by the Alabama Uniform Controlled Substances Act, §20-2-1, et seq., which specifically provides for special penalties*,” it was clear that the Alabama Legislature did not intend

⁵The appeal in *Turley* was from “. . . the trial court’s determination that it had no authority to suspend the appellant’s sentence and to commit him to a youthful offender center . . . because the appellant had pleaded guilty to aggravated robbery, a criminal offense punishable by life imprisonment.” *Id.*, 177 W. Va. at 71, 350 S.E.2d at 698.

for drug crime penalties to be governed by the habitual criminal statute. 522 So.2d at 315 (emphasis in original).

In *Lloyd v. State*, 139 Ga. 625, 229 S.E.2d 106 (1976), the Court of Appeals of Georgia, Division Three, found that since the state's statute governing narcotics offenses was enacted subsequent to its habitual criminal statute, the Georgia Legislature intended the former to govern in cases where increased punishment was sought for drug offenses.

In *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1976), the Supreme Court of Kansas held that the state's narcotics law, which provided enhanced penalties for repeat offenders, was a "self contained habitual criminal act." 221 Kan. at 161, 557 P.2d at 1233.

In *People v. Fetterly*, 229 Mich. App. 511, 583 N.W.2d 199 (1998), the Court of Appeals of Michigan held that the specific narcotics statute enhancements applied rather than the habitual criminal statute enhancements because the narcotics enhancements were mandatory while the habitual criminal enhancements were permissive. "[T]he Legislature may have been concerned that a judge reluctant to impose a mandatory sentence provided in the Public Health Code might utilize the habitual offender provisions to eliminate the mandatory sentence. . . ." 229 Mich. App. at 538-39, 583 N.W.2d at 212.

In *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980), the Supreme Court of Nebraska first held that offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute felonies within the meaning of the habitual criminal statute. This is directly contrary to this Court's holding in *State v. Williams*, 196 W. Va. 639, 474 S.E.2d 569 (1996).

In *State v. Heyward*, 90 N.M. 780, 568 P.2d 616 (1977), the Court of Appeals of New Mexico held that the penalty provisions and legislative history of the state's Controlled Substances Act evidenced legislative intent that the Act's penalty provisions, rather than those of the Habitual Offender Act, governed in narcotics cases.

In *Bluff v. State*, 538 P.2d 1117 (Ct. Crim. App. Okla. 1975), and *Blunt v. State*, 743 P.2d 145 (Ct. Crim. App. Okla. 1987), the Court of Criminal Appeals of Oklahoma held that where all of a defendant's convictions are for narcotics offenses, the enhancement provisions of Oklahoma's Uniform Controlled Substance Act clearly apply and the provisions of the state's Habitual Offenders Act do not.

In *State v. Ray*, 166 Wis.2d 855, 481 N.W.2d 288 (1992), the Court of Appeals of Wisconsin held that where all of a defendant's convictions are for narcotics offenses, the trial court may apply either the narcotics enhancement or the habitual offender enhancement, but not both.

To recap: the cases from Kansas and Oklahoma squarely support the Appellant's position; the decisions in the Alabama, Georgia, Michigan and New Mexico cases were all based on clear expressions of legislative intent – something missing in the instant case; the case from Nebraska decides a different question, *to-wit*, whether an offense which is a felony because the defendant has previously been convicted of the same crime is a felony within the meaning of the habitual criminal statute, and decides it in direct opposition to this Court's decision in *State v. Williams, supra*; and the case from Wisconsin squarely supports the State's position.

As the Appellant concedes, this issue has never been decided in West Virginia and has only been raised once, forty years ago, in a habeas corpus petition filed in the United States District Court for the Northern District of West Virginia. *Harper v. Boles*, 278 F. Supp. 618 (N.D. W. Va., 1967).

Judge Maxwell's opinion provides no guidance, as he found that the issue had no factual basis in that the petitioner's prior felony convictions were not drug-related.

3. **The Trial Court Properly Used Rule 35(a) To Correct An Illegal Sentence.**

The Appellant's argument that his initial sentence was "legal," and therefore not subject to correction under Rule 35 of the West Virginia Rules of Criminal Procedure, is a melange of his other arguments. The State will address the prongs of the argument seriatim.

First, the Appellant contends that the initial sentence was legal because it was a proper sentence under W. Va. Code § 60A-4-408. This argument simply ignores the facts of the case: after the Appellant's conviction of possession with intent to distribute crack cocaine, the State filed a recidivist information based on two prior convictions for possession with intent. The Appellant was convicted on the recidivist information. Therefore, on the day of the Appellant's sentencing the trial court had the authority to sentence him only to the recidivist term of life imprisonment. *State v. Pratt*, 161 W. Va. 530, 244 S.E.2d 227 (1978), citing *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966); Syl. Pt. 3, *State ex rel. Cobb v. Boles*, 149 W. Va. 365, 141 S.E.2d 59 (1965).

Second, the Appellant contends that the term of life imprisonment was constitutionally disproportionate, an argument that is dealt with separately hereinafter. Although the Appellant speculates that "... one explanation for the trial court's decision not to impose a life sentence in the original sentencing order correctly could have been based upon this constitutional impediment ...," this is belied by the court's subsequent imposition of the sentence after considering the parties' post-sentencing submissions.

Third, the Appellant contends (in essence) that once the court below had imposed sentence pursuant to W. Va. Code § 60A-4-408, he was stuck with it. This argument is dealt with separately hereinbefore.

Fourth, the Appellant contends that the court below misled the Appellant by informing him that he “could be sentenced to a period of life in the penitentiary . . . ,” prior to the Appellant’s admission of his two prior felony convictions. (Emphasis supplied.) The Appellant states that had he realized that a life sentence was mandatory under W. Va. Code § 61-18-18(c), he “. . . very well may have chosen a different strategy and required the State to prove his identity before a jury.” This is an attack on the validity of the habitual criminal conviction, not on the validity of the sentence. And in any event, the issue could have been, and should have been, raised in the Rule 35 proceedings and on appeal. Since it was not, it has been waived. This Court termed it “axiomatic” that:

To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. the rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely to bound forever to hold their peace . . . It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

State v. Rodoussakis, 204 W. Va. 58, 64, 511 S.E.2d 469, 475 (1998), citing *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996).

B. THE APPELLANT’S SENTENCE UNDER THE HABITUAL OFFENDER STATUTE WAS CONSTITUTIONALLY PROPORTIONAL.

The West Virginia Constitution, art. III, §5, provides that “[p]enalties shall be proportioned to the character and degree of the offense.” In this case, the Appellant contends that his sentence of life imprisonment is disproportionate because the recidivist crimes were not violent, i.e., no one carried a weapon and no one got killed.

“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 with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows:

We give initial emphasis to the nature of the final offense which triggers 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 most 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).

It should be noted that in *Wanstreet*, the defendant’s triggering conviction was for forgery of a \$43.00 check. His prior felony convictions were for arson of a hay barn twenty-five years earlier, and another check forgery conviction almost thirty years earlier. On such facts, it is not surprising that this Court found a life sentence to be disproportionate to the crime.

With respect to the Appellant’s “violence” argument, this Court has never held that a life sentence offends proportionality principles if the triggering felony did not involve actual violence. In *State v. Housden*, 184 W. Va. 171, 174, 399 S.E.2d 882, 885 (1990), the court found that the felony offense of burglary carried the *potential* for violence, even though the defendant had taken steps to ensure that the victim would not be present when the burglary was committed.

Consequently, even though the appellant asserts that he ascertained that the victim was not present before he burglarized his home and took some \$6,000.00 in personal property, that did not render the crime nonviolent in nature. 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.

Similarly, in *State v. Adams*, 311 W. Va. 231, 565 S.E.2d 353 (2002), the Court noted that “[a]lthough . . . there was no injury to the victim in this case, this fact does not diminish the inherent potential for injury or even death that can occur in an aggravated robbery crime.” And in *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 515, 583 S.E.2d 800, 812 (2002), where the defendant challenged the proportionality of a recidivist sentence imposed following his conviction for DUI, third offense, this Court stated that:

[The Appellant] cites *Solem v. Helm*, 463 U.S. 277, 296-297, 103 S.Ct. 3001, 3-13, 77 L.Ed.2d 637, 653 (1983) for the proposition that crimes such as burglary and DUI, third offense, are ‘relatively minor.’ We strongly disagree with the *Solem* majority. We join in the recognition of the *Solem* dissenters that ‘[a]t the very least, respondent’s burglaries and his third offense drunk driving posed a real risk of serious harm to others. It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel.’ *Id.* at 315-16, 103 S.Ct. at 3023, 77 L.Ed.2d at 665 (Burger, C.J., Renquist, O’Connor & White, JJ., dissenting)

See also State v. Williams, 196 W. Va. 639, 474 S.E.2d 569 (1996), holding that a recidivist statute may be applied in a DUI case despite the fact that the felony conviction resulted from an enhanced misdemeanor.

In the case at bar, it is beyond argument that possession with intent to distribute crack cocaine is a crime that poses a real risk of serious harm to others, especially where, as here, the Appellant has multiple convictions for this offense within a short span of years and admits that he “supported himself in West Virginia for quite some time by selling drugs and other illegal activities, such as stealing, and breaking into homes.” (Presentence Investigation, R. at ___)

The Appellant relies on *State v. Deal*, 178 W. Va. 142, 358 S.E.2d 226 (1987) and *State ex rel. Boso v. Hedrick*, 182 W. Va. 701, 391 S.E.2d 614 (1990).

In *Deal*, it is true that this Court said “. . . the appellant’s most recent conviction [possession with intent to distribute 125.4 grams of marijuana] involved no violence or threat of violence to the person.” 178 W. Va. at 147, 358 S.E.2d at 231. The Court went on to note that Mr. Deal’s unlawful wounding conviction occurred sixteen years earlier and “. . . that in the 16 years that followed, the appellant demonstrated no propensity toward violent or severe crimes.” *Id.* The Court’s ultimate holding was that “[w]e do not believe *the facts in this case* warranted imposition of the ultimate punishment available in this jurisdiction.” *Id.* (emphasis supplied).

In *Boso*, the defendant was convicted of burglary. His previous convictions, both years earlier, were for delivery of twenty grams of marijuana and for breaking and entering into a Super X drug store. The Court, finding that [n]either delivery of a controlled substance nor breaking and entering is per se a crime of violence,” concluded that Mr. Boso’s life sentence was disproportionate to the severity of the offenses upon which it was based. 182 W. Va. at 820, 391 S.E.2d at 622.⁶

In this case, in contrast to *Deal* and *Boso*, the Appellant has been convicted of four crack cocaine offenses committed within a four and one-half year period. He was a probation violator and a fugitive from justice. He admits that he has supported himself for “quite some time” by selling

⁶It is difficult to reconcile *State v. Housden*, 184 W. Va. 171, 174, 399 S.E.2d 882, 885 (1990), upon which the State relies, with *State ex rel. Boso v. Hedrick*, 182 W. Va. 701, 391 S.E.2d 614 (1990), upon which the Appellant relies. The cases say diametrically opposed things: that burglary is per se a crime of violence even if the defendant knew no one would be home at the time of the crime (*Housden*); and that burglary is not per se a crime of violence if committed in an unoccupied dwelling (*Boso*). The Court in *Housden* did not overrule, distinguish, or even mention *Boso*, which it had decided ten months earlier. Rather, the Court cited a number of cases that predated *Boso* as support for its holding that burglary is per se a crime of violence.

drugs and engaging in other crimes such as theft and burglary. He appears to have been nothing more or less than a career criminal from 1997 through 2001. In short, his history is far different from Mr. Deal's and Mr. Boso's histories, and the facts of this case fully warrant an habitual criminal sentence.

In addition to *Wanstreet*, *Deal* and *Boso*, the Appellant cites two other cases where recidivist sentences were reversed by this Court on proportionality grounds: *State v. Davis*, 189 W. Va. 59, 427 S.E.2d 754 (1993), and *State v. Lewis*, 191 W. Va. 635, 447 S.E.2d 570 (1994). The Appellant does not discuss these cases, for obvious reasons.

In *Davis*, the defendant's triggering conviction was for breaking and entering into an unoccupied business and stealing \$10.00 from the cash box. The defendant had prior convictions for receiving stolen property and breaking and entering yet another unoccupied business. The Court found that a life sentence under these facts was disproportionate, citing *Boso* for the proposition that where "... all the crimes committed by a defendant were non-violent and focused on property, life sentences violate[] the proportionality principle." 189 W. Va. at 62, 427 S.E.2d at 757 (emphasis supplied). Interestingly, the Court went on to hold that because "... the record shows beyond any doubt that the defendant is a recidivist . . .," he was subject to a five year enhancement of his sentence under W. Va. Code § 61-11-18. *Id.*

In *Lewis*, the defendant's triggering conviction was for shoplifting pork chops and garlic powder having a collective value of \$8.83. This being a third shoplifting offense, the defendant was charged with a felony and sentenced to a mandatory term of 1-10 years in the penitentiary. Not surprisingly, this Court reversed, holding that:

Without intending to minimize the criminal aspect of shoplifting and its attendant costs to society, we cannot, with a clear collective conscience, conclude that

Appellant deserves to be imprisoned for a minimum of one year for failing to pay for \$8.83 worth of groceries.

191 W. Va. at 640, 447 S.E.2d at 575.

In this case, in contrast to *Deal* and *Boso*, the Appellant has been convicted of four crack cocaine offenses committed within a four and one-half year period. Trafficking in narcotics cannot be characterized as a crime "focused on property,"⁷ and there is nothing disproportionate in a life sentence imposed after three trafficking convictions in a short period of time.

C. IN THE EVENT THE COURT'S DECISION WITH RESPECT TO THE PREVIOUS ISSUES IS NOT DISPOSITIVE OF ALL CLAIMS THE APPELLANT MAY HAVE, THE STATE AGREES THAT THE APPELLANT IS ENTITLED TO A REMAND FOR APPOINTMENT OF COUNSEL AND DEVELOPMENT OF ANY REMAINING ISSUES PURSUANT TO *LOSCH v. MCKENZIE*, 166 W. VA. 762, 277 S.E.2d 606 (1981).

As set forth in the Appellant's Statement of Facts, the court below summarily denied the Appellant's *pro se* habeas corpus petition and denied the Appellant's request for appointment of counsel to file an appeal. Thereafter, this Court granted the Appellant's *pro se* petition for appeal and appointed one of the State's finest criminal lawyers to represent him.

Under the facts and circumstances of this case, the State agrees that any issues raised in the Appellant's *pro se* petition that have not been argued by counsel because of the inadequacy of the *pro se* record, should not be addressed by the Court at this time. Rather, the Court should remand this case so that the Appellant, this time proceeding by counsel, can properly frame his issues and develop his record.

⁷Even the Appellant concedes, in a masterpiece of understatement, "the many personal and social problems associated with the possession of illegal drugs."

Additionally, the State agrees that the Appellant is entitled to a remand for a *Losch* hearing⁸ on any issues he may have that are not decided in this appeal, and further entitled to have counsel appointed to file an amended habeas corpus petition and represent him in the *Losch* proceedings.

The State does not believe that counsel must be appointed in every proceeding filed under the Post-Conviction Habeas Corpus Act, W. Va. Code § 53-4A-1 *et seq.*, and this case does not present the proper vehicle for deciding the broad issue since the State concedes that appointment of counsel is necessary under the specific facts and circumstances presented here:

1. The Appellant has been sentenced to a term of life imprisonment;
2. The Appellant's initial appeal was denied without comment, not on the ground that the lower court's judgment or order was plainly right; and
3. Counsel should have been appointed to represent the Appellant from the outset, since the statutory issue he raised is not only an important issue but also one of first impression in West Virginia, and the constitutional issue he raised is quite complex and requires careful exposition of cases that are difficult to reconcile.

V.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the Appellant's appeal from the Circuit Court of Raleigh County, West Virginia should be denied insofar as the Appellant attacks the validity of his sentence. Thereafter, the Appellant's case should be remanded to the court below for appointment of counsel, the filing of an amended habeas corpus

⁸*Losch v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981).

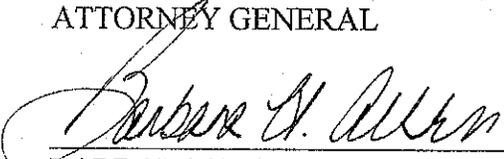
petition on any remaining issues, and the development of an evidentiary record pursuant to *Losch*
v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981).

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

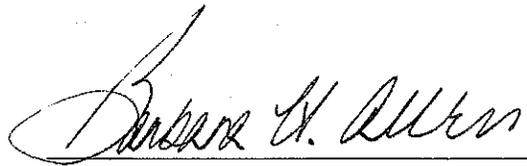


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 8th day of February, 2007, addressed as follows:

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