

No. ____

IN THE
Supreme Court of the United States

TRAVIS RAY NORWOOD,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The West Virginia legislature, like many state legislatures, has determined in light of the opioid crisis that crimes involving prescription opioids like oxycodone should be treated for punitive purposes the same as crimes involving other opioids like heroin. In this case, however, Petitioner Travis Ray Norwood was sentenced to life imprisonment under West Virginia's recidivist statute, a determination upheld by the West Virginia Supreme Court, while just a few weeks earlier, that same court had ruled that such a sentence was impermissible for an almost identically situated defendant. The only difference, acknowledged by the West Virginia Supreme Court, was that Mr. Norwood was convicted of an offense involving heroin, while the other defendant, Lane, was convicted of the very same offense involving Oxycodone.

The decision below deepens a substantial divide, strongly implicating constitutional equal protection and due process principles, between jurisdictions that treat heroin and other opioids the same and those that treat them differently. It presents an especially stark example of differential treatment that affects perhaps millions of defendants.

The question presented is:

Whether, and under what circumstances, can defendants charged with crimes involving Schedule I opioids such as heroin be constitutionally treated differently for punitive purposes from defendants charged with the same crimes involving Schedule II opioids such as oxycodone.

**PARTIES TO THE PROCEEDING
AND RELATED CASES**

Petitioner is Travis R. Norwood, an individual. He was the Petitioner-Defendant below.

Respondent is the State of West Virginia. It was the Plaintiff-Respondent below.

There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

Supreme Court of Appeals of West Virginia:

State v. Norwood, No. 17-0978 (Opinion filed May 30, 2019)

Circuit Court of Greenbrier County, West Virginia:

State v. Norwood, Criminal Action No. 16-F-136 (Sentencing filed May 19, 2017)

Norwood v. Ames, Civil Action No. 19-C-130 (Order Denying Petition for Writ of Habeas Corpus filed January 2, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Travis R. Norwood respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The Supreme Court of West Virginia's opinion (Pet. App. 1a–39a) is reported at 832 S.E.2d 75. The Circuit Court of West Virginia's judgment is unreported but is available at 2017 WL 10752281.

JURISDICTION

The Supreme Court of West Virginia entered judgment on May 30, 2019 (Pet. App. 1a) and denied rehearing on September 5, 2019. Pet. App. 40a. On November 25, 2019, Chief Justice Roberts extended the time to file a petition for a writ of certiorari until January 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted at Pet. App. 41a–46a.

INTRODUCTION

In light of the opioid crises that has affected millions of Americans, there has developed a substantial disparity in how defendants charged with crimes involving Schedule I opioids such as heroin are treated for punitive purposes compared to defendants charged with crimes involving Schedule II opioids such as oxycodone. Some of this disparity has been ordered by state legislatures and courts, as well as the federal sentencing guidelines, while some of this disparity has been forbidden by state legislatures and courts.

This case involves a blatant example of such disparate treatment in direct contravention of the West Virginia legislature's mandate that defendants charged with crimes involving Schedule I opioids be treated the same for punitive purposes as defendants charged with crimes involving Schedule II opioids in a way that plainly violates constitutional principles of equal protection and due process.

This Court's intervention is essential to make clear that the disparate treatment involved in this case is constitutionally impermissible and to provide guidance in potentially millions of drug cases as to whether and under what circumstances defendants charged with crimes involving Schedule I opioids can be treated differently from defendants charged with the same crimes involving Schedule II opioids.

The petition should be granted.

STATEMENT

A. Under West Virginia law, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." W. Va. Code § 60A-4-401 (a). "Controlled substances" are

defined in various “Schedules,” and heroin, oxycodone, and other opioids are included in Schedules I and II, which are reserved for the most serious and dangerous drugs. W. Va. Code Ann. § 60A-2-204(c) (including heroin in Schedule I); *Id.* § 60A-2-206 (including oxycodone in Schedule II); *Id.* § 60A-2-203, § 60A-2-205 (explaining that both Schedule I and II drugs have a “high potential for abuse”). West Virginia’s criminal code specifically provides that “[a]ny person who violates” the law against selling a “controlled substance classified *in Schedule I or II*” shall receive the same sentence (“not less than one year nor more than fifteen years” for first time offenders). *Id.* § 60A-4-401(a)(i) (emphasis added). In other words, West Virginia’s criminal code requires that Schedule I and II drugs be treated equally for sentencing purposes.

B. West Virginia also has a habitual offender statute that requires a mandatory life sentence when its conditions are satisfied. In particular, a person that has “been twice before convicted in the United States of a crime punishable by confinement in a penitentiary . . . shall be sentenced to be confined in the state correctional facility for life.” *Id.* § 61-11-18 (c). A defendant charged with violating this recidivism statute is entitled to a jury trial to decide if the defendant is the same person who was convicted of the previous felonies. *Id.*

C. In the present case, the defendant, Mr. Norwood, was convicted of selling a controlled substance under West Virginia Code § 60A-4-401. Pet. App. 5a. The basis for the conviction was that he had made arrangements to sell 3.5 grams of heroin, a “Schedule I” drug in West Virginia, for \$221 to a confidential informant who Mr. Norwood met in a Pizza Hut parking

lot. Pet. App. 5a–10a. He had two prior convictions in another state, one for selling marijuana and another for “eluding police,” for which he merely received probation after short terms in jail. Pet. App. 9a–10a, 32a–34a. Nonetheless, Mr. Norwood received a *life sentence* for his new controlled substance offense under the state’s habitual offender statute, West Virginia Code § 61-11-18. Pet. App. 10a. The court affirmed the life sentence, rejecting Mr. Norwood’s argument that it was impermissibly disproportionate. Pet. App. 16a–24a.

D. Notably, the majority admitted that the *Norwood* decision squarely conflicts with the Court’s earlier decision in *State v. Lane*, 826 S.E.2d 657 (W. Va. 2019), decided less than two months before *Norwood*. In *Lane*, the defendant was convicted of the same crime as Mr. Norwood, selling a controlled substance. *Id.* at 662 (citing West Virginia Code § 60A-4-401). The facts were substantially the same as in *Norwood*: Mr. Lane sold an opioid, in his case the “Schedule II” drug Oxycodone, in controlled buys to a confidential informant. *Id.* at 660. Mr. Lane likewise had two prior felony convictions for which he received “not serious” penalties, like probation. *Id.* at 664. And he also initially received a life sentence under West Virginia’s habitual offender law for his offense of selling a controlled substance. *Id.* at 660. But, unlike in *Norwood*, the West Virginia Supreme Court reversed Mr. Lane’s sentence. *Id.* at 660. “[T]he facts surrounding” Mr. Lane’s final offense for selling a controlled substance, the court explained, “did not involve any actual or threatened violence.” *Id.* at 664. Accordingly, the court held that the life sentence “violates the proportionality clause” and was impermissible. *Id.*

As the dissent in *Norwood* explained, “[t]he only difference between the charge in *Lane* and the charge in the case at bar is that *Lane* involved the drug Oxycodone and, here, it was heroin.” Pet. App. 31a. (Workman, J., concurring in part and dissenting in part). The majority decision below thus “unquestionably conflicts with” the West Virginia Supreme Court’s own law and “undeniably treats two similarly situated individuals disparately.” Pet. App. 35a. (Workman, J., concurring in part and dissenting in part). The sole basis the majority in *Norwood* offered for reaching opposite conclusions was its unsupported surmise that “due to the nature of heroin itself, heroin trafficking clearly warrants application of the recidivist statute.” Pet. App. 19a.

Moreover, *Norwood*’s disparate treatment of heroin and Oxycodone is inconsistent with West Virginia’s criminal code. The West Virginia Legislature specifically provided that “[a]ny person” who sells a “*Schedule I or II*” drug like heroin or Oxycodone is supposed to receive the same sentence. Yet Mr. Norwood’s life sentence was affirmed while Mr. Lane’s was reversed.

* * * * *

Accordingly, absent this Court’s review, Travis Norwood will remain in prison for the rest of his life for distributing a small amount of heroin instead of Oxycodone, despite the West Virginia Legislature’s express directive otherwise.

REASONS TO GRANT THE PETITION

The petition should be granted. *First*, this Court’s review is essential to make clear that the blatantly differential treatment by the West Virginia Supreme

Court violates equal protection and due process protections and to provide guidance to the lower courts as to whether and under what circumstances defendants charged with crimes involving Schedule I opioids such as heroin can be treated differently from defendants charged with the same crimes involving Schedule II opioids such as oxycodone. *Second*, the question is important and recurring, as potentially millions of defendants are affected by the current regime that includes substantial disparities in treatment of defendants charged with crimes involving opioids. *Third*, this case is an ideal vehicle for this Court to address the question presented, given the stark disparate treatment involved here that contradicts the West Virginia legislature's mandate to treat crimes involving Schedule I opioids such as heroin the same for punitive purposes as crimes involving Schedule II opioids such as oxycodone; this case also has no mootness or other vehicle problems. *Finally*, the decision below violates both equal protection, given the unjustified differential treatment with no rational basis, and due process, given that the West Virginia Supreme Court plainly misapplied its own prior precedent to impermissibly give Mr. Norwood a life sentence.

I. The State and Federal Courts Are Deeply Divided on the Disparate Sentencing of Opioids

The lower courts are deeply divided about the circumstances in which it is constitutionally permissible to impose vastly harsher sentences on defendants convicted of selling heroin as compared to defendants convicted of identical crimes involving similar opioids like Oxycodone.

A. The West Virginia Supreme Court Has Contradicted Itself On Opioid Sentencing

To begin with, the West Virginia Supreme Court has squarely contradicted itself *and circumvented the will of its own legislature* to hold that (1) it is *permissible* to impose a life sentence under a habitual offender statute on a defendant convicted of selling a controlled substance, in particular heroin; but (2) it is *impermissible* to impose such a sentence on a defendant convicted of the identical crime, except involving the controlled substance Oxycodone. In other words, according to the West Virginia Supreme Court, the constitution permits two defendants convicted of the exact same crime under materially identical circumstances to receive vastly different sentences despite an express legislative directive to the contrary.

1. As discussed above, in the present case, Mr. Norwood was convicted under West Virginia law, for selling a small amount of heroin to a confidential informant. Pet. App. 5a. He had two prior convictions in another state for which he received primarily probation. Pet. App. 9a–10a, 32a–34a. Nonetheless, Mr. Norwood received a *life sentence* for his new controlled substance offense under West Virginia’s habitual offender statute. Pet. App. 10a. The court affirmed the life sentence, rejecting Mr. Norwood’s argument that it was unconstitutionally disproportionate. Pet. App. 16a–24a.

2. The West Virginia Supreme Court’s decision that Mr. Norwood’s life sentence was permissible is squarely contrary to that Court’s own precedent. In *State v. Lane*, the West Virginia Supreme Court held that a recidivist life sentence is impermissible in circumstances materially identical to Mr. Norwood’s case.

Mr. Lane was convicted of the same controlled-substance crime as Mr. Norwood. 826 S.E.2d at 662. And, like Mr. Norwood, Mr. Lane sold a small amount of an opioid, in his case Oxycontin, to a confidential informant. *Id.* at 660. Mr. Lane likewise had two prior convictions for which he received light sentences. *Id.* at 664. Nonetheless, Mr. Lane received a life sentence under West Virginia’s habitual offender law for his new controlled substance offense. Unlike in *Norwood*, however, the West Virginia Supreme Court reversed Mr. Lane’s sentence, reasoning that the sentence was disproportionate because the facts surrounding the offense “did not involve any actual or threatened violence.” *Id.*

Lane should have controlled the outcome in *Norwood*, as the facts were materially identical. In both cases, the defendant’s final offense for selling an opioid to a confidential informant “did not involve any actual or threatened violence.” *Id.* Yet the West Virginia Supreme Court reached opposite conclusions. As the dissent in *Norwood* explained, “[t]he only difference between the charge in *Lane* and the charge in the case at bar is that *Lane* involved the drug Oxycodone and, here, it was heroin.” Pet. App. 31a. (Workman, J., concurring in part and dissenting in part). The majority decision below thus “unquestionably conflicts with” the West Virginia Supreme Court’s own law and “undeniably treats two similarly situated individuals disparately.” Pet. App. 35a. (Workman, J., concurring in part and dissenting in part). The sole basis the majority in *Norwood* offered for reaching opposite conclusions was its unsupported surmise that “due to the nature of heroin itself, heroin trafficking clearly warrants application of the recidivist statute.” Pet. App.

19a. But such judicial speculation cannot be the difference between a recidivist life sentence that comports with the constitution and one that does not, particularly given that heroin and Oxycodone are both deadly opioids.

3. Not only did the West Virginia Supreme Court contradict its own precedent in *Norwood*, but it is also circumvented the West Virginia Legislature’s specific directive to treat Schedule I and II drugs as equals for sentencing purposes. West Virginia’s criminal code specifically provides that “[a]ny person who violates” the law against selling a “controlled substance classified in Schedule I or II”—including both heroin and Oxycodone—shall receive the same sentence. W. Va. Code Ann. § 60A-4-401(a)(i). Hence, “under the express statutory language with which both the defendant in *Lane* and the petitioner in this case were charged, both Schedule I and Schedule II drugs are treated the same.” Pet. App. 31a. (Workman, J., concurring in part and dissenting in part). But the majority in *Norwood* simply ignored this plain legislative directive. In doing so, the West Virginia Supreme Court did not even attempt to explain how circumventing its own legislature to require vastly different sentences for similarly situated defendants convicted of identical crimes could possibly comport with constitutional principles of equal protection and due process.

B. Federal Courts Have Deepened The Division of Authority on Disparate Opioid Sentencing

In addition to contradictory outcomes in West Virginia, the federal courts have deepened the division of authority regarding the constitutionality of disparate opioid sentencing.

The ultimate outcome of the West Virginia Supreme Court's inconsistent decisions is that defendants convicted of selling a controlled substance are treated more harshly when the substance is heroin instead of Oxycodone. The federal courts, however, do just the opposite. Under the federal sentencing guidelines, Oxycodone is treated *6.7 times more harshly* than heroin. Compare U.S.S.G. 2D1.1 (drug conversion table providing that "1 gm of Oxycodone (actual) = 6700 gm") with U.S.S.G. 2D1.1 (drug conversion table providing that "1 gm of Heroin = 1 kg"). The Fourth Circuit has held that this disparate treatment is constitutional. *United States v. Lewis*, 521 F. App'x 109, 111 (4th Cir. 2013) (rejecting argument that harsher treatment of Oxycodone and oxymorphone as compared to heroin under federal sentencing guidelines is an "unsupported distinction" that "violates" "due process"). A similar case is currently pending in the Ninth Circuit, where the defendant was convicted of distributing Oxycodone and now challenges the "unwarranted disparities" in the federal sentencing of opioids. *United States v. Dennis McPherson*, No. 19-10024, Appellant's Opening Brief (Sept. 25, 2019); cf. *Kimbrough v. United States*, 552 U.S. 85, 110 (2007) (holding that district courts have discretion to conclude that federal guidelines' crack cocaine/powder cocaine disparity yields sentence "greater than necessary").

C. Other States Have Likewise Deepened The Division of Authority on Disparate Opioid Sentencing

Other states further demonstrate a nationwide division of authority on the disparate sentencing for crimes involving Schedule I opioids like heroin and Schedule II opioids like Oxycodone.

1. In addition to the West Virginia Supreme Court and federal guidelines' opposite approaches, many states have charted still a third path: At least 12 states and the District of Columbia require that Schedule I and II opioids, including heroin and Oxycodone, be treated equally for sentencing purposes. *See* Colo. Rev. Stat. Ann. § 18-18-405; D.C. Code Ann. § 48-904.01; Ga. Code Ann. § 16-13-30(b) & (d); Haw. Rev. Stat. Ann. § 712-1240; Idaho Code Ann. § 37-2732; Ill. Comp. Stat. Ann. 570/401; Ind. Code Ann. § 35-48-4-1; Mich. Comp. Laws Ann. § 333.7401; Miss. Code Ann. § 41-29-139; Nev. Rev. Stat. Ann. § 453.321(2); Okla. Stat. § 2-401; R.I. Gen Laws § 21-28-4.01; Utah Code Ann. § 58-37-8. *See also* *People v. Berry*, 140 Ill. App. 3d 994 (1986)) (affirming sentence where defendant received same term for selling Schedule I controlled substance and for selling Schedule II controlled substance).

2. Other states, however, treat heroin more harshly than other opioids, including Oxycodone. One such state is Louisiana. *Compare* La. Stat. Ann. § 40:966(B)(3) (heroin) *with* La. Stat. Ann. § 40:967(B)(3) (Oxycodone); *see also* *State v. Ellison*, 255 So. 3d 568, 571 (La. 2018) (Johnson, C.J., dissenting) (criticizing as “inconceivable” the “stark disparity” in Louisiana between defendants who use “legally prescribed opioids” and those who use “unlawfully obtained heroin”); *State v. Lewis*, 468 So. 2d 557, 560 (La. 1985) (affirming life sentence for heroin possession under habitual offender statute and holding that such a sentence is not disproportionate under United States Constitution). Likewise, a number of additional states similarly treat heroin more harshly. *Compare* Nev. Rev. Stat. Ann. § 453.3385 *with* Nev. Rev. Stat. Ann. § 453.3395; *compare* Or. Rev. Stat. Ann. § 475.850 *with*

Or. Rev. Stat. Ann. § 475.830; *compare* Vt. Stat. Ann. tit. 18, § 4233(b)(1) *with* Vt. Stat. Ann. tit. 18, § 4234(b)(1); *see also* Iowa Code Ann. § 124.401; Cal. Health & Safety Code § 11352.5.

* * * * *

In sum, there is a nationwide division of authority among the state and federal courts on the question of whether and under what circumstances identical drug crimes may be sentenced differently solely on the basis that one crime involved heroin and the other Oxycodone. The Court should therefore grant this Petition to make clear that West Virginia’s disparate treatment of similarly-situated offenders is constitutionally impermissible and to provide much-needed guidance on whether and under what circumstances defendants charged with crimes involving opioids such as heroin can be treated more harshly than defendants charged with the same crimes involving other opioids such as Oxycodone.

II. Disparate Opioid Sentencing Is A Nationally Important And Recurring Issue

Questions about opioid sentencing disparities are recurring and of national importance, thus warranting this Court’s review.

A. “The nonmedical use of prescription opioids is a major public health issue in the United States.” Wilson M. Compton et al, *Relationship Between Nonmedical Prescription-Opioid Use and Heroin Use*, 374 N. ENGL. J. MED. 154, 154 (Jan. 14, 2016). Opiates activate neurological opioid receptors in order to block nerve conduction and diminish the sensation of pain. Matthew R. Pincus, et al, *Henry’s Clinical Diagnosis and Management by Laboratory Methods, Toxicology*

and Therapeutic Drug Monitoring (23 ed. 2016). There are four primary types of opioids; Oxycodone is classified as a semisynthetic painkiller, while heroin gets its own category. Julie A. Warren, *Defining the Opioid Crisis and the Limited Role of the Criminal Justice System Resolving it*, 48 U. Mem. L. Rev. 1205, 1210–11 (2018). Heroin is nevertheless “pharmacologically similar to prescription opioids.” Compton, et al. at 154. Indeed, “[i]n head to head comparisons, most studies have failed to show relevant differences between [opioids] . . .” Asbjorn M. Drewes, et al., *Differences between opioids: pharmacological, experimental, clinical and economic perspectives*, British Journal of Clinical Pharmacology (May 3, 2012).

B. As a historical analogy, the crack epidemic of the 1980s drew public fear and sensational media coverage. Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abuse of 1986 and Retroactive Application of the Fair Sentencing Act of 2010*, 37 Temp. L. Rev. 645 (2015). With the Anti-Drug Abuse Act, crack was sentenced at a 100:1 rate of cocaine. U.S.S.G. § 2D1.1(c) (1986). The Fair Sentencing Act of 2010 lightened the crack to cocaine ratio to 18:1. U.S.S.G. § 2D1.1(c) (2010). There is still a widespread belief that crack makes users more dangerous than cocaine users. Fabens-Lassen, at 661. But, as is shown by the reduction in sentencing, the rate of violence is not 100 times that of cocaine. This disparity between sentencing has plagued the courts and society for decades and is still a prevalent issue.

C. As most pertinent here, the opioid epidemic has ravaged many parts of the United States, and prosecutors have taken notice. Rachel L. Rothberg & Kate Stith, *Symposium: Law and the Opioid Crisis: The*

Opioid Crisis and Federal Criminal Prosecution, 46 J. L. Med. & Ethics 292 (2018). Similar to crack and cocaine, opioids come in many different forms. This case deals with disparities between heroin and Oxycodone. In this instance, the West Virginia Supreme Court defied its own legislature's mandate and has decided that heroin offenses deserve a heavier sentence based on an unsubstantiated perceived risk of violence inherent in such offenses. *See* Pet. App. 19a–21a. But unlike with crack and powder cocaine, there is no support for the notion that crimes involving heroin are more likely to involve violence than those involving other opioids such as oxycodone. That is why numerous state legislatures, including West Virginia's, have mandated that crimes involving heroin and other opioids be treated the same for punitive purposes.

D. The disparate sentencing of opioid crimes has potentially affected millions of Americans already and stands to affect millions more unless this Court intervenes. In 2018 alone, there were more than 1.6 million arrests for drug abuse violations—the highest number of any category of crime. 2018 FBI Uniform Crime Report, Table 29, *available at* <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-29>. Of these arrests, more than 400,000 related to heroin, cocaine, or their derivatives, such as oxycodone. *See* 2018 FBI Uniform Crime Report, Arrests Table, *available at* <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/persons-arrested>.

The state and federal courts have similarly been flooded with thousands of criminal cases involving opioids. *See generally* American Law Reports, Review For Excessiveness of Sentence in Narcotics Case, 55 A.L.R.3d 812 (compiling thousands of cases reviewing

narcotics sentences for excessiveness); *see also* American Law Reports, Imposition of Enhanced Sentence Under Recidivist Statute As Cruel and Unusual Punishment, 27 A.L.R. Fed. 110 (similarly compiling cases). This incredible volume of criminal cases further underscores the need for this Court to address opioid sentencing disparities.

E. In sum, the nation is riddled with drug crime related to the opioid epidemic. The disparate sentencing of opioid crimes affects millions and will continue to do so until this Court intervenes. At present, the sentence a defendant receives for an opioid crime depends not on the offense, but on the state in which the offense occurs. Federal guidelines do not provide clarity on the issue. In fact, as discussed above in Section I, the federal guidelines provide for the harsher treatment of crimes involving Oxycodone than heroin, while some state courts treat the two drugs the same, and still others treat heroin more harshly than Oxycodone. It is vital that this Court provide clarity to the lower courts. The need for review is especially stark in this case, given that the West Virginia Supreme Court has circumvented the express directive of its legislature by treating heroin and oxycodone unequally for sentencing purposes.

III. This Case Provides An Ideal Vehicle To Resolve Arbitrary Disparate Sentencing of Opioids

Review is further warranted, as this case provides an ideal vehicle to resolve the division of authority on the disparate sentencing of defendants charged with offenses involving opioids.

A. The West Virginia Supreme Court's Disregard For Precedent Is Clear

This case provides a blatant example of a state supreme court disregarding its own precedent and circumventing its own legislature to arbitrarily treat similarly situated criminal defendants disparately.

1. As discussed above, *Norwood* directly contradicted the West Virginia Supreme Court's prior decision in *State v. Lane*. 826 S.E.2d 657. *Norwood* also circumvented the express wishes of the West Virginia Legislature to treat Schedule I and II drugs—including heroin and Oxycodone—equally for purposes of sentencing. The result is the arbitrarily disparate treatment of similarly situated defendants convicted of identical crimes. This egregious outcome violates equal protection and due process, and this case presents the perfect vehicle to correct the West Virginia Supreme Court's grave error.

2. The lower court's disregard for precedent starkly and squarely presents an unresolved equal protection issue of arbitrary, disparate treatment.

A clearer example of treating “two similarly situated individuals disparately” based solely on an arbitrary drug distinction would be hard to imagine. In fact, the West Virginia Supreme Court itself acknowledged that in *State v. Norwood* and *State v. Lane* the “[c]ourt arrived at two different conclusions,” despite the fact that the cases presented “nearly identical facts.” *State v. Hoyle*, 836 S.E.2d 817, 832–33 (W. Va. 2019). Critically, the court noted that the underlying offenses in *Lane* and *Norwood* were essentially equivalent: “one violent and one nonviolent underlying felony” in each case. *Id.* at 833. Although the *Hoyle* court

attempted to find “consistency in [its] law” by attempting to clarify proportionality requirements under the state constitution, it did nothing to address the arbitrary drug distinction in *Norwood* that was unsupported by the legislature. *Id.* The court simply held that “for purposes of a life recidivist conviction, . . . 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.” *Id.* Thus, after *Hoyle*, Mr. Norwood’s sentence still stands, and all future heroin deliveries will be irrebuttably presumed violent in sharp contrast with Oxycodone deliveries.

B. This Case Has No Mootness Concerns Nor Other Vehicle Problems.

This case is also an ideal vehicle because Mr. Norwood will be serving his life sentence while the question is litigated, and, thus, the case is very unlikely to become moot after being selected for review. Additionally, as the state supreme court answered all pending questions before it, there are no alternative grounds on which to resolve the case.

This case squarely presents the question presented and is an ideal vehicle to provide guidance as to whether and under what circumstances defendants charged with crimes involving Schedule I opioid such as heroin can be treated differently from defendants charged with the same crimes involving Schedule II opioids such as oxycodone.

IV. The Decision Below Is Incorrect and Unconstitutional

Finally, this Court's review is warranted because the Supreme Court of West Virginia's decision is incorrect and violates equal protection and due process. This Court should grant the Petition and reverse.

A. The West Virginia Supreme Court's Decision Denies Mr. Norwood Equal Protection

The Fourteenth Amendment prohibits states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. As interpreted by this Court, the Equal Protection Clause is “a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). An individual can establish a successful equal protection claim by “alleg[ing] that [he] has been intentionally treated differently from others similarly situated and that this is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citing *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster Cty.*, 487 U.S. 336 (1989)).

Here, Mr. Norwood's rights to equal protection were violated because the West Virginia Supreme Court applied the recidivist statute to him differently than the court had applied that statute to another, similarly situated defendant. As discussed at length above, in *State v. Norwood*, the West Virginia Supreme Court reversed the life sentence of a similarly situated criminal defendant convicted of delivery of Oxycodone, a

Schedule II drug, under the same recidivist statute. Notwithstanding the result in *Lane* less than two months earlier, the West Virginia Supreme Court upheld Mr. Norwood's conviction of one count of delivery of heroin—a Schedule I controlled substance—in violation of West Virginia Code § 60A-4-401(a) and his resulting life recidivist sentence. Pet. App. 5a–6a.

In drawing opposing conclusions, the West Virginia court treated other materially similar underlying facts differently. For example, although both cases involved confidential informants who recorded a controlled buy from the defendant, only in *Norwood* did the majority place great weight on the supposed substantial risk of violence to that informant: “Had those recording devices been discovered, or the fact that the Task Force been revealed, there would have been a substantial risk of violence to the C.I.” Pet. App. 19a. Furthermore, although both cases involved the possibility of a child's presence in the home during a drug transaction, the *Lane* majority concluded that the drug transaction did not involve actual or threatened violence. See *Lane*, 826 S.E.2d at 664.

Additionally, Mr. Norwood and Mr. Lane both have two prior convictions. As in *Norwood*, the West Virginia Supreme Court concluded that one of Mr. Lane's prior convictions was a violent offense and one was not. The majority in *Lane*, however, dismissed Mr. Lane's conviction for the violent felony of unlawful wounding because “that conviction occurred twenty years prior to the drug offense.” *Id.* In West Virginia, however, “in the absence of any provision in the habitual criminal or recidivist statutes, the remoteness of the prior conviction sought to be used in a recidivist trial need not be considered.” *State v. Jones*, 420

S.E.2d 736, 739 (W. Va. 1992). “Common sense would dictate that the age of a prior conviction should have little bearing in a recidivist proceeding, when the underlying purpose of the statute is considered.” *Id.* Thus, Mr. Norwood and Mr. Lane each have a conviction that involved either actual violence or the threat of violence.

Nor did the West Virginia court reasonably distinguish *Norwood* from *Lane*. For example, the *Norwood* majority relied on a case upholding a life sentence under the recidivist statute for three felony convictions for delivery of crack cocaine—*State ex rel. Daye v. McBride*, 658 S.E.2d 547 (W. Va. 2007)—that the majority in *Lane* rejected for having very limited application to the *Lane* case because *Lane* did not involve multiple convictions under the Uniform Controlled Substances Act and there was no constitutional proportionality clause challenge to the life sentence imposed in *Daye*. *Lane*, 826 S.E.2d at 666.

The contradictory outcomes the West Virginia Supreme Court reached in *Norwood* and *Lane* accordingly lack a rational basis. The only genuine difference upon which the West Virginia court based its opinion was that Mr. Norwood’s third conviction involved heroin but Mr. Lane’s involved Oxycodone. The court drew its distinction on this ground, but such a distinction is not rational considering the West Virginia legislature’s intent for Schedule I and Schedule II drugs to be treated similarly, for sentencing and punishment purposes. Indeed, the West Virginia court acknowledged as much in *State v. Hoyle* where, as discussed above, it agreed that it had “arrived at two different conclusions” in *Norwood* and *Lane* even though the

cases presented “nearly identical facts.” *Hoyle*, 836 S.E.2d at 832–33.

B. The West Virginia Supreme Court’s Decision Denies Mr. Norwood Due Process

The Fourteenth Amendment of the Constitution prohibits any state from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. Such protected liberty interests “encompass freedom from bodily restraint and punishment.” *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977). Under this requirement, “the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977). “The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result in the sentencing process.” *Id.* Further, “[i]f an individual is successfully prosecuted as an habitual criminal, a greater penalty than that attaching to the underlying crime is imposed.” *State v. Vance*, 262 S.E.2d 423, 429 (W. Va. 1980). Especially relevant to this case, “courts have required substantial due process protection in recidivist proceedings.” *Id.* (citations omitted). A determination of what process is due “requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government’s interest, including the function involved and the fiscal and adminis-

trative burdens that the additional substitute procedural requirement would entail.” *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

At issue here are all of the proceedings related to Mr. Norwood’s recidivist sentencing, as the application of a life sentence would further deprive him of his interest in his liberty. Prior to Mr. Norwood’s case, the West Virginia Supreme Court had established precedent that defendants similarly situated to the defendant in *State v. Lane* would not have life recidivism sentences upheld. And Mr. Norwood was similarly situated to the defendant in *Lane*. Accordingly, when the West Virginia court upheld Mr. Norwood’s life sentence, Mr. Norwood was deprived of due process in the form of having the law accurately and fairly applied to his case. Under the *Matthews* factors, Mr. Norwood’s freedom from further imprisonment is indisputably a liberty interest of utmost importance. Additionally, inaccurate and inconsistent application of a state’s law carries a high risk of depriving a person such as Mr. Norwood of such an important interest. Finally, accurate application of the law would not pose any significant burdens on the state but would instead serve only to enhance the state’s legitimacy as a government institution that justly applies the law. Accordingly, when the Supreme Court of Appeals of West Virginia improperly applied existing law in deciding his case, it violated Mr. Norwood’s Constitutional due process rights.

In conclusion, the West Virginia court’s decision to uphold a life sentence under the state’s recidivist statute violates Mr. Norwood’s constitutional rights under the Equal Protection and Due Process Clause, where

the court treated similarly situated criminal defendants differently and incorrectly applied its own law.

C. The Decision Below Is Incorrect and Unconstitutional Because It Circumvented The West Virginia Legislature

The decision below further violates the constitution because it is inconsistent with the directive of the West Virginia legislature to treat Schedule I and Schedule II drugs the same for sentencing purposes.

Despite the West Virginia criminal code's requirement that Schedule I and Schedule II drugs be treated the same for sentencing purposes, the court in *Norwood* made its own determination that the "delivery and ultimate use of heroin carries with it an inherent risk of violence to a person." Pet. App. 19a; see W. Va. Code § 60A-2-204(c), § 60A-2-206. The court emphasized the illicit nature of heroin: "From the moment of its clandestine creation, heroin is illegal, and is a silent scourge that has saturated our State." Pet. App. 19a–20a. In doing so, the *Norwood* court ignored the legislature's classification of the drugs and instead imposed its own views on the relative danger of heroin and opioids.

Unlike the majority in *Norwood*, however, the West Virginia legislature has found both drugs to have a "high potential for abuse[.]" W. Va. Code § 60A-2-203 (setting forth Schedule I drug criteria); W. Va. Code § 60A-2-205 (setting forth Schedule II drug criteria). Additionally, in limiting the eligibility for expungement of nonviolent felony offenses under West Virginia Code § 61-11-26(c), the legislature did not include violations of § 60A-4-401(a) among the enumerated offenses excluded from the definition of "nonviolent felonies."

Considering legislative intent is crucial when conducting a proportionality review of a recidivist sentence. See *Wells-Yates v. People*, 454 P.3d 191 (Colo. 2019) (holding that “in determining the gravity or seriousness of the triggering offense and the predicate offenses, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively”); see also *Melton v. People*, 451 P.3d 415 (Colo. 2019) (reversing judgment because the court failed to consider the relevant legislative amendments to the drug laws and the habitual criminal statute). Therefore, the court below erred in disregarding the will of its own legislature and affirming Mr. Norwood’s life sentence.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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