

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0254

STATE OF WEST VIRGINIA,  
PLAINTIFF BELOW, RESPONDENT,

VS.

RONALD D. W., JR.,  
DEFENDANT BELOW, PETITIONER

Appeal from a Final Order  
of the Circuit Court of Berkeley County  
(Crim. Action No. 11-F-96)

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Petitioner's Supplemental  
Statement and Order

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Counsel for Petitioner, Ronald D. W., Jr.

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RONALD D.W. JR.,  
DEFENDANT BELOW, PETITIONER.

PETITIONER'S SUPPLEMENTAL STATEMENT

NOW COMES the Petitioner, Ronald D. W., Jr., by counsel, Steven A. Greenbaum, Esq.,  
and states as follows:

1. That a subsequent hearing was held on December 20, 2012, in the Berkeley County Circuit Court on Petitioner's motion to modify his sentence.
2. That said Court did modify the Petitioner's sentence from forty (40) years to thirty (30) years by Order dated February 27, 2013. See Attached.
3. That the Circuit Court's Order modifying the Petitioner's sentence does not affect Petitioner's argument that said modified sentence is disparate and excessive.

RONALD D. W., JR., PETITIONER  
By counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of April, 2013, a true and accurate copy of the foregoing Petitioner's Supplemental Statement was hand delivered to the following counsel to this appeal:

Cheryl K. Saville, Assistant Prosecuting Attorney  
Berkeley County Prosecutor's Office  
380 W. South St.  
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## IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

V.

Case No. 11-F-96

Judge Yoder, Div. VIII

RONALD D. WHETZEL, JR.,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR REDUCTION/MODIFICATION  
OF SENTENCE IN PART, AND ORDERING THE DEFENDANT'S TRANSFER TO  
DEPARTMENT OF CORRECTIONS CUSTODY PURSUANT TO W.Va. CODE §49-5-  
16(b)**

On this December 20, 2012, came the State of West Virginia by Prosecuting Attorney Pamela Jean Games-Neely, and the Defendant in person and by counsel Steven A. Greenbaum, Esq. for a hearing. This matter originally came before the Court for review pursuant to W.Va. Code §49-5-16(b). The Defendant then filed a Motion for Reduction/Modification of Sentence pursuant to W.Va.R.Crim.P. 35(b).

Upon a review of the papers and proceedings formerly read and had herein, upon consideration of the testimony and evidence presented, upon hearing the argument of counsel, and upon a reading of applicable law, the Court hereby **GRANTS** the Defendant's Motion for Reduction/Modification of Sentence in part, **DENIES** it in part, and **ORDERS** the Defendant transferred to the custody of the Commissioner of the Department of Corrections for service of the imposed sentence.

**I. Motion for Reduction of Sentence****A. Applicable Law**

"A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon

affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.”

W.Va.R.Crim.P. 35(b).

“When considering West Virginia Rules of Criminal Procedure 35(b) motions, circuit courts generally should consider only those events that occur within the 120-day filing period; however, as long as the circuit court does not usurp the role of the parole board, it may consider matters beyond the filing period when such consideration serves the ends of justice.”

Syl. Pt. 5, State v. Head, 198 W.Va. 298, 480 S.E.2d 507 (1996).

## **B. Discussion**

The Court finds, and all parties agree, that the Defendant’s Motion for Reduction/Modification of Sentence herein was timely filed. The Defendant presented the testimony of Probation Officer Patrick Futrell and the Defendant’s grandmother, Carolyn Barrett. The parties also stipulated to the admission of the records of the Defendant from his commitment at the West Virginia Industrial Home for Youth at Salem. Because this Court was not the original sentencing court, the transcripts and evidence of prior proceedings in the matter were reviewed as well. In addition, since it is the practice of this Court to request the Probation Department to make recommendations for sentencing, and no such report was made for or requested by the original sentencing court, this Court asked for a supplemental reported from the Twenty-Third Judicial Circuit Probation Department making a recommendation as to sentencing/modification. This Court has also reviewed that supplemental report and taken it into consideration.

The Defendant was sentenced to a determinate term of 40 years of confinement on

the charge of first-degree (aggravated) robbery pursuant to W.Va. Code §61-2-12, and to the statutory term of not less than one nor more than 15 years of confinement on the charge of burglary pursuant to W.Va. Code §61-3-11. These sentences were ordered to be served concurrently. The Defendant was also ordered to pay restitution (joint and several with his co-defendant) in the amount of \$8,000.

The Defendant concedes that his statutory sentence of not less than one nor more than 15 years of confinement for the burglary conviction is within statutory limits. The Defendant instead devotes his efforts to arguing that the imposition of the 40-year sentence for the armed robbery conviction is disproportionate under the circumstances of his case and that the determinate sentence should be reduced. The Defendant also includes arguments that he should have been and should be granted alternative sentencing.

First, the Defendant argues that he should have been and should be remanded for juvenile disposition pursuant to W.Va. Code §49-5-13(e), or that he should have been and should be allowed an opportunity to participate in the Youthful Offender Program at the Anthony Center pursuant to W.Va. Code §25-4-6. The Court notes that a court's sentencing decisions under each of these provisions is completely discretionary.

In reviewing the sentencing court's decision, the Defendant's background, including his social, educational, and psychological history, was considered, as well as his progress and behavior during his prior commitment to the West Virginia Industrial Home for Youth at Salem. The Defendant was unable then, and is similarly unable now, to advance any argument as to why it is appropriate for the Court to recommit him to the custody of the Division of Juvenile Services when the Defendant has already been so committed with minimal progress. While the Defendant cites a discharge summary in case number 11-JD-22, indicating that the aftercare plan from that charge would be for him to return to his grandmother's care, that discharge plan was

prepared by the facility in consideration of the Petitioner maxing out his one year sentence on the escape charge as of January 17, 2012, was statutorily mandated pursuant to W.Va. Code §49-5-20, and was expressly not prepared because the Defendant had successfully completed the program at the Industrial Home. Additionally, since his sentencing, the Defendant was charged in the Circuit Court of Harrison County for a violent assault on a correctional officer at that facility. The safety and security needs of the Defendant continue to require his placement in a more secured environment. This Court concurs that the imposition of a juvenile disposition pursuant to W.Va. Code §49-5-13(e) is not an appropriate option for the Defendant.

The Defendant further cites in his argument for alternative sentencing under the Youthful Offender statute that his co-defendant was given the opportunity to participate in such a program pursuant to W.Va. Code §25-4-6. His co-defendant, Ian Derr, however, was not similarly situated after consideration of mitigating and aggravating factors. The Court also notes that the Defendant pleaded no contest while Mr. Derr entered a plea of guilty. It becomes clear in the transcripts of the sentencing hearings for both co-defendants that the sentencing court believed that Mr. Derr expressed genuine remorse for the offenses committed, took full responsibility for his actions, and had the sufficient tools to be successful without being an active danger to the community. The sentencing court noted, however, that Mr. Derr would be sentenced to a minimum of 40 years on the aggravated robbery charge (whether he successfully completed the program at the Anthony Center or not) because such a sentence is justifiable considering the serious circumstances surrounding the crime and the dramatic effects the crime has had on the victims and because it is the sentence that the Defendant received. In addition to the Defendant's failure to take full responsibility for his actions and their natural consequences, the sentencing court further found that the Defendant had orchestrated the robbery against the Beckmans, whom he knew personally, that his behavior while in the system demonstrated a need for increased

security to ensure his safety and the safety of others, and that a more lengthy term of incarceration and treatment would be required for the Defendant. The Defendant has failed to present to this Court any additional reasons, any new evidence, or any new legal arguments supporting why or how a commitment to a Youthful Offender Center would be safe or beneficial to the Defendant considering his lack of progress during his commitment at the West Virginia Industrial Home as well as the additional charges he has incurred for his assault on a correctional officer at that facility. As such, this Court concurs that the commitment of the Defendant to a Youthful Offender Program pursuant to W.Va. Code §25-4-6 is not an appropriate option for the Defendant.

The Defendant further argues that a determinate sentence of 40 years of incarceration is disproportionate under the facts and circumstances of his case and that the sentence should be reduced by this Court. The Court will first review the decision made by the sentencing court. In so doing, the Court finds it helpful to consider the West Virginia Supreme Court's guidance in reviewing sentencing orders.

“The Supreme Court of Appeals reviews sentencing orders...under an abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), the Supreme Court stated in Syllabus Point 5:

“Punishment may be constitutionally impermissible, although not cruel and unusual in its method, if it is so disproportionate to the

crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.”

Furthermore, the Court sets forth in State v. Glover, 177 W.Va. 650, 658, 355 S.E.2d 631, 639 (1987) the applicable tests for disproportionate sentence consideration:

“In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), we set forth two tests to determine whether a sentence is disproportionate to the crime that it violates W.Va. Const. art. III §5. The first test ‘is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.’ 172 W.Va. at 272, 304 S.E.2d at 857. Cooper then states the second test: If it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test spelled out in syllabus point 5 of Wanstreet v. Bordenkicher, 166 W.Va. 523, 276 S.E.2d 205 (1981):

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

The West Virginia Supreme Court of Appeals further noted its reluctance to apply the proportionality principle inherent in the cruel and unusual punishment clause as an expression of due respect for and in substantial deference to legislative authority in determining the types and limits of punishments for crimes. State v. James, 227 W.Va. 407, 710 S.E.2d 98, 106 (2011).

Focusing on the sentence for the robbery conviction, as the Defendant does, W.Va. Code §61-2-12(a) states as follows:

“Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to,

partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.”

The facts under which the Defendant was charged with this crime support his conviction under subsection (2) involving threat of deadly force by the presentation of a firearm or other deadly weapon.

The record is full of references to the terrible childhood of the Defendant. The State concedes that Defendant’s parents have been in and out of prison for the majority of his life such that custody of the Defendant was awarded to his grandmother, Carolyn Barrett. Ms. Barrett did her best to raise the Defendant and his siblings and had custody of the Defendant since he was approximately eight years old. Ms. Barrett even went as far as enrolling the Defendant in counseling services, hospitalizing him when his behavior became out of control and/or dangerous, and filing an incorrigibility questionnaire with the Twenty-Third Judicial Circuit Probation Office in order to obtain help for the Defendant when his behavior steadily deteriorated and he became unmanageable for her at home.

Despite his difficult upbringing and other issues, the Defendant became acquainted with the Beckmans who agreed to give the Defendant employment at their kennel. At both trial and sentencing, Deborah Beckman indicated that the Defendant only worked for them for a few months, but during that time, she also indicated that the Beckmans treated him “like family,” providing him with transportation, food, and an opportunity to earn a living even though they knew he “had problems.” Ultimately, though, the Defendant walked off the job.

The Defendant had not been complying with the diversion program. Probation Officer Futrell stated at the Defendant’s sentencing hearing and testified similarly at this hearing that the

Defendant had been having curfew violations, using drugs, and being defiant with his grandmother. Officer Futrell noted that there were at least two occasions on which the Defendant tested positive for illegal drugs while in the diversion program. Officer Futrell also described the Defendant actively seeking out and purposefully associating with adult criminals. Officer Futrell speculated that the Defendant behaved this way partially because of the “culture” he came out of where it is commonplace to be proud of and brag about your criminal lifestyle. Nevertheless, Officer Futrell did imply in his testimony at the modification hearing that based on his supervision and knowledge of Defendant Whetzel that he believed the 40-year sentence was excessive.

The record shows that while on continuing supervision of the diversion program through which both his grandmother and Probation Officer Futrell had been trying to help the Defendant and affect a change in himself through the offering of support and outpatient counseling services, the Defendant began to plan a robbery of the Beckman residence. The Defendant enlisted the help and firearm of Ian Derr for the commission of the robbery in exchange for giving Mr. Derr a cut of the money the Defendant knew from his employment with the Beckmans would be contained in the lockbox. Late on the evening of December 9, 2010, the Defendant and Ian Derr, dressed entirely in black wearing gloves and ski masks, forced Amy Edwards into the Beckman residence at gunpoint. Co-Defendant Derr held a 9mm handgun while the gun held by Defendant Whetzel was a pellet gun. Once inside, the two men began yelling at Amy Edwards and Wendy Beckman to give them money. Ian Derr kept Amy Edwards and Wendy Beckman in the office of the home at gunpoint while the Defendant brandished his weapon at Deborah Beckman, who was vacuuming the hallway of her home, causing her to flee her residence and hide terrified in an outbuilding of the property. The Defendant went directly back the hall to the

master bedroom and retrieved the portable safe. The Defendant then returned to the office, and the Defendant and Mr. Derr exited the property.

Ms. Beckman testified at the trial and at the sentencing hearing that, because the armed intruders only took the safe when there were other valuables in the house and because the intruders apparently knew the exact location of that safe, she believed the perpetrators to be someone familiar with her home, such as an employee or a responder who would have been in her home at the time of her husband's death just days earlier. It is clear from the record that upon finding out that the Defendant committed this offense against them that it profoundly affected the Beckmans.

Ms. Beckman gave statements regarding the impact that this crime had on her and her family, both emotionally and financially. She stated that she believed she would be forever impacted by the Defendant's crime. She described not being able to be alone and asking others to move in with her to provide an added sense of security. She also said she had lost a significant amount of weight and experiences trouble sleeping. She further reported that she, her daughter, and her stepdaughter were all left terrified of guns. Ms. Beckman also stated that because of her relationship with the Defendant prior to his commission of this crime against her, she does not know if she will ever be able to fully trust anyone again like she once did. To further complicate matters for Ms. Beckman, the Defendant stole her late husband's will when he took the portable safe from the home. This caused Ms. Beckman significant hardship in settling her husband's estate, especially as it related to their small business. Ms. Beckman also told the sentencing court about the increased need for Wendy Beckman to attend counseling and receive medication for her now exacerbated mental health issues. She further reported that Wendy was now also afraid to be alone and keeps a dog with her at all times. Ms. Beckman also reported to

the court that Amy Edwards had lost her husband, who had been battling cancer throughout the early stages of the proceedings, and she had installed a complete security system in her home due to her fear of re-victimization. Ms. Beckman was overcome with how “cold and calculated” the Defendant’s actions were.

Following this crime they committed which impacted the victims in these horrible ways, the Defendant split the money from the safe between himself and Ian Derr. The Defendant showed some cash to his family members who began to question where the money had come from since the Defendant was unemployed at the time. The Defendant’s grandmother also described a number of purchases the Defendant had made immediately following the time of the robbery, including a car and new tires and stereo system for the car. The Defendant and his co-defendant dumped the items that were worthless to them, including Mr. Beckman’s will, which was crucial to the Beckman family at the time, into a river.

In the course of the investigation, officers received an anonymous tip stating that the Defendant and Ian Derr were involved in the robbery at the Beckman residence. The Defendant denied all involvement to the officers. When officers spoke with Ian Derr, they received full cooperation and a complete confession implicating the Defendant. Even after officers recovered a drawing that the Defendant’s grandmother had found in the Defendant’s schoolbook showing the layout of the Beckman residence with the word “TARGET” written in capital letters in the corner of the master bedroom where the portable safe was kept, the Defendant continued to deny responsibility for the crime.

Once the officers detained the Defendant, the Defendant waived his preliminary and detention hearings, and a bond was set for the Defendant in the amount of \$250,000 cash or surety. The State was aware of the Defendant’s involvement in the diversion program as well as

factors concerning the Defendant's background. As such, the State began gathering information on the Defendant in order to make a determination as to whether a motion to transfer the Defendant to the adult criminal jurisdiction of the court would be filed or whether the matter should be allowed to proceed under the court's juvenile jurisdiction. Just two days after the court's initial status hearing in the Defendant's case where he put forth his hopes that his case would be left in the court's juvenile jurisdiction, the Defendant escaped from the Vicki Douglas Juvenile Detention Center, injuring a correctional officer in the process. Following this incident, the State believed that the Defendant would not be amenable to cooperating with further treatment services and filed the motion for transfer.

Throughout his placement at the West Virginia Industrial Home for Youth pursuant to the escape charges, the Defendant continued to act out behaviorally, in some instances violently assaulting other residents. This was despite his consistent participation in counseling services offered to the Defendant at the facility and despite the highly structured nature of the program at the Industrial Home.

In consideration of the particularly egregious circumstances surrounding the Defendant's preying on the Beckman family, who had offered him employment and taken him under their wing as an employee, and doing so by forcibly entering their home with guns pointed in their faces, yelling at them to give up their money, and in further consideration of the fact that the Defendant continued to make criminal choices in the face of individuals who were either actively helping him, had tried to help him or were willing to help him, a sentence of 40 years does not "shock the conscience." State v. Cooper, *supra.*, State v. Glover, *supra.*

Furthermore, the Defendant's sentence is not disproportionate under the objective test in Glover, *supra.* The offenses herein are serious felony offenses involving armed, violent

intrusion into the victims' home. The West Virginia Supreme Court of Appeals has previously observed that "aggravated robbery in West Virginia has been recognized as a crime that involves a high potentiality for violence and injury to the victim involved." State v. Ross, 184 W.Va. 579, 582, 402 S.E.2d 248, 251 (1990).

"As a result, the Legislature has provided circuit courts with broad discretion in sentencing individuals convicted of aggravated robbery or attempted aggravated robbery. In fact, '[t]he Legislature chose not to deprive trial courts of discretion to determine the appropriate specific number of years of punishment for armed robbery, beyond ten.' State v. Woods, 194 W.Va. 250, 254, 460 S.E.2d 65, 69 (1995), *quoting State ex rel. Fiarcloth v. Catlett*, 165 W.Va. 179, 181, 267 S.E.2d 736, 737 (1980).'

State v. Williams, 205 W.Va. 552, 555, 519 S.E.2d 835, 838 (1999). In West Virginia, "robbery has always been regarded as a crime of the gravest nature." State v. Glover, 177 W.Va. at 659, 355 S.E.2d at 640. West Virginia is not alone in this.

Jurisdictions are fairly uniform in their regarding of aggravated or armed robbery, seeing it as one of the most serious crimes of violence that one can commit against another person. Case law is uniformly replete with its regard to armed robbery being a "vicious crime." *See State v. Morris*, 661 S.W.2d 84 (Mo.App.1983), *quoted with approval by State v. Williams*, 205 W.Va. at 556-557, 519 S.E.2d at 839-840. In State v. Morris, *supra.*, the Missouri Court of Appeals upheld a life sentence for robbery in the first degree after Morris and an accomplice shoved the victim to the ground in a supermarket parking lot, held a gun to his side, and took his billfold. The West Virginia Supreme Court used that holding by the Missouri Court of Appeals as well as comparable cases from Alabama (*see, Jenkins v. State*, 384 So.2d 1135 (Ala.Crim.App.1979)), Louisiana (*see State v. Haskins*, 522 So.2d 1235 (La.App. 4 Cir. 1988) and State v. Dozier, 553 So.2d 931 (La.App. 4 Cir. 1989), *writ denied*, 558 So.2d 567 (La.1990)), and Nebraska (*see State v. Simpson*, 200Neb. 823, 265 N.W.2d 681 (Neb.1978)), in upholding the 50-year sentence in

the case of State v. Williams, *supra.*, which the State uses in furtherance of its argument that the Defendant's sentence remain at 40 years.

In the case of State v. Williams, the West Virginia Supreme Court upheld a 50-year determinate sentence for Williams' conviction of attempted aggravated robbery. At the time of the robbery, Tonya Williams was 18 years old and had no prior juvenile or adult record whatsoever. Ms. Williams and her friend had devised a plan to trick the victim out of his money by offering to give him a private dance in his home, allowing him to get intoxicated, and then stealing his money without providing any service. Prior to going to the victim's home, Ms. Williams and her friend encountered two male friends with whom they shared their plan to rob the victim. The male friends asked to come along, stating that if Ms. Williams and her friend were unable to steal the money through their trickery, they would take the money by force. Ms. Williams stated that she heard the two men mention the taking of a gun and told them not to bring the firearm as it would not be necessary. During the course of the evening, Ms. Williams went outside the victim's residence and was followed back in by the two male friends who brandished a firearm at the victim. A struggle ensued over the gun, and Ms. Williams ran out of the house and sped off in a vehicle after hearing the gun go off and seeing the victim laying in the front yard. Ms. Williams cooperated with police in the course of their investigation. It was also clear from the record that Ms. Williams was not in possession of the gun at any point nor was there evidence that disputed Ms. Williams' statement that she told her co-defendants not to bring the weapon.

In sentencing Ms. Williams to 50 years for an attempted aggravated robbery, the lower court found that the crime was a crime "of a violent nature. It was of dangerous proportions. It was clearly deliberate." *Id.* at 555, 838. In support of its sentencing decision, the court also

cited the fact that Ms. Williams knowingly associated with known felons and hardened criminals and concluded from her failure to fully accept responsibility for her conduct and lack of remorse that she was in need of a “structured correctional environment” to provide the services she required. *Id.* at 558-559, 841-842. Ms. Williams, like the Defendant herein, also alleged that the trial court erred by not applying the Youthful Offender Statute, W.Va. Code §25-4-6. The West Virginia Supreme Court of Appeals found specifically that “the application of this statute is discretionary.” *Id.* at 559, 842. The Court went on to say that, while the court had undoubtedly been aware of the facts that Ms. Williams was only 18 years old, had no juvenile or criminal history, and did not actually possess or necessarily know about the presence of the firearm, there were sufficient aggravating factors to justify the imposition of a determinate 50-year sentence. *Id.*

While the State concedes the victim in the Williams case was shot in a scuffle for the firearm and ultimately died as a result of his injuries, this Court agrees that the case has significant applicability to the facts at hand. Here, the Defendant and his co-defendant, like the Ms. Williams’ co-defendants, entered the home of the victim presenting guns. It should again be noted that Ms. Williams never possessed a weapon nor did she even necessarily know a weapon would be used, but she received a sentence of 50 years. As discussed above, the presentation of firearms in the commission of a crime is gravely serious and has the potential for tragedy should a victim try to flee or unarm a criminal or should the criminal get anxious and decide to utilize his weapon. That seriousness is only magnified by the forcible entry into the sanctity of the home of the victim. The Defendant did have a weapon and did enlist the help and firearm of Mr. Derr to commit this robbery. Further, while the Defendant and Ms. Williams were both teenagers at the time of their crimes, Ms. Williams, who received a 50-year sentence, had no

juvenile or adult criminal history at all. The Defendant, who received a 40-year sentence, was under the supervision of a probation officer when he committed this offense, and the Defendant further committed the crime of escape while in custody for these offenses for which he spent a year in the custody of the Division of Juvenile Services. There was also evidence, as there was in the Williams case, that the Defendant knowingly associated with felons and hardened criminals. Furthermore, the court had ample evidence to find a failure of the Defendant to fully take responsibility for his actions. The court did this through observing the Defendant as he sat through his hearings, by considering his statements and his demeanor, by acknowledging his escape from custody following his arrest, and by his plea of no contest. The court also had ample evidence, again even more than the court did in the Williams case, to find that the Defendant could best be provided services in a structured correctional institutional setting given his continued aggressive behavior during his commitment to the West Virginia Industrial Home for Youth.

Furthermore, in the case of State v. Phillips, 199 W.Va. 507, 485 S.E.2d 676 (1997), the defendant received a 45-year sentence on one conviction for aggravated robbery after he threatened employees at a fast food restaurant with an air pistol resembling a real gun, which was upheld by the West Virginia Supreme Court.<sup>1</sup> In State v. Woods, 194 W.Va. 250, 460 S.E.2d 65 (1995), the Court upheld a 36-year sentence for the robbery of a Go-Mart at gunpoint. In the appeal of the resentencing of State v. Buck, *supra.*, the Supreme Court upheld a 30-year sentence for a 23-year-old defendant for striking a store proprietor from behind and robbing him of \$1,200. State v. Buck, 178 W.Va. 505, 361 S.E.2d 470 (1987).

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<sup>1</sup> The defendant's aggregate sentence in State v. Phillips, *supra.*, was 140 years. The defendant also, that same night, robbed another restaurant with the air pistol and took one employee hostage to give him directions to the interstate. He was sentenced to 45 years of incarceration for each robbery and 50 years for the kidnapping charge.

Based upon the record of the case and applicable law, while this Court may not have imposed a 40-year sentence at that time, this Court does not believe that the Defendant's sentence is disproportionate to the crimes of conviction and finds that the sentence was properly imposed by the sentencing court. State v. Cooper, *supra.*, State v. Glover, *supra.*

Although this Court finds that the sentence does not "shock the conscience" and that it is not unconstitutionally disproportionate, it does have some concern about the disparate treatment of the two co-defendants and the appearance that the defendant in the instant case is being punished for the sins of his parents. Further, this Court has discretion to modify the sentence at this stage, given that a timely filed Rule 35(b) motion is under consideration.<sup>2</sup>

The Defendant Whetzel was age 16 at the time he committed the crime and was a juvenile, while his co-defendant, Ian Derr, was age 18 and therefore an adult at the time of the crime. In addition, the co-defendant is the one who held a lethal gun, while Defendant Whetzel held a non-lethal pellet gun. Despite these factors indicating that the Co-Defendant Derr should bear more responsibility, Co-Defendant Derr was given the benefit of being treated like a juvenile with commitment to the Youthful Offender Program at the Anthony Center, with the implied understanding that he would be given probation upon successful discharge from the program. Defendant Whetzel, on the other hand, was certified to be tried as an adult and then sentenced to 40 years in the penitentiary without any consideration of probation, with confinement in the West Virginia Industrial Home for Youth at Salem until reaching the age of 18.

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<sup>2</sup> See Walkowiak v. Haines, 272 F.3d 234 (C.A.4, 2001) ("Not only does a motion under West Virginia Rule 35(b) not allege that a legal error was committed by the court in which the original sentence was imposed, such motion does not allege any error at all. To the contrary, a Rule 35(b) motion is simply '*a plea for leniency from a presumptively valid conviction.*' West Virginia v. Head, 198 W.Va. 298, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring) (citing United States v. Colvin, 644 F.2d 703, 705 (8th Cir.1981)) (emphasis added). The only issue before the court on a Rule 35(b) motion is whether the defendant, although sentenced in conformity with applicable laws, nevertheless presents some compelling *non-legal* justification that warrants mercy.") (abrogated on other grounds).

This was a first time offense for the Defendant, no one was injured, and he did plead no contest rather than going to trial. Under these circumstances, there is an appearance that a 40-year sentence, as compared to a possible 10-year sentence for a first time offender in a situation where no one was injured, is unduly harsh—particularly given the much less harsh sentence given to the adult co-defendant who brandished the lethal gun.

A major rationale of the sentencing court and prosecution for the disparate treatment of defendant Whetzel from his co-defendant includes the fact that his co-defendant comes from a good home, and as a result of his good home and family support structure, he has a likelihood of succeeding on probation. On the other hand, both of Defendant Whetzel's parents spent time in prison, and he comes from a bad family with a criminal history. While this may be a valid and legitimate predictor of the likelihood of success on probation for the co-defendant, as compared to the Defendant, it also creates an appearance that the sins of the father are being visited upon the son with respect to the Defendant Whetzel.

While this Court is reluctant to modify the previous sentence imposed by the original sentencing court, the sentencing court was surely aware at the time of imposition of the original sentence that it could be modified when he reached the age of 18. As stated in the case of *State v. Johnson*, 213 W.Va. 612, 616, 584 S.E.2d 468, 472 (2003):

[T]he authority to reevaluate the Appellant's sentence in light of the Appellant's behavior since his conviction lies squarely in the lower court. As West Virginia Code § 49-5-16(b) provides, it is incumbent upon the lower court to conduct an adequate investigation of the facts concerning the Appellant's post-conviction behavior to assess the advisability of reduction in his sentence. This method of imposing a sentence upon a juvenile and requiring reconsideration upon reaching the age of eighteen is utilized in an attempt to balance the special circumstances of juvenile crime with the need to protect society from violent offenders. Indeed, the lower court's approach to sentencing the Appellant serves such a goal by initially imposing a substantial

sentence while reserving the opportunity to reevaluate and reduce that sentence when the Appellant reaches the age of eighteen years.

In addition, since the sentencing court had not yet sentenced the Co-Defendant Derr or heard the State's recommendation for less harsh treatment of the Co-Defendant Derr when the Defendant Whetzel was sentenced, the original sentencing court did not have the benefit of knowing how the Co-Defendant Derr would be sentenced when it sentenced Defendant Whetzel.

After consideration of all the relevant factors, including consideration of the sentencing recommendation of the Twenty-Third Judicial Circuit Probation Department, the Court hereby modifies the original sentence to reduce it from 40 years for the offense of robbery in the first degree to 30 years. All other sentences previous imposed will remain the same, and the request to transfer the defendant to the Youthful Offender Program at the Anthony Center is denied.

## **II. Review Pursuant to W.Va. Code §49-5-16(b)**

### **A. Applicable Law**

“No child who has been convicted of an offense under the adult jurisdiction of the circuit court shall be held in custody in a penitentiary of this state: Provided, That such child may be transferred from a secure juvenile facility to a penitentiary after he shall attain the age of eighteen years if, in the judgment of the court which committed such child, such transfer is appropriate: Provided, however, That any other provision of this code to the contrary notwithstanding, prior to such transfer the child shall be returned to the sentencing court for the purpose of reconsideration and modification of the imposed sentence, which shall be based upon a review of all records and relevant information relating to the child's rehabilitation since his conviction under the adult jurisdiction of the court.”

W.Va. Code 49-5-16(b).

### **B. Discussion**

The Defendant was 17 years of age at the time of sentencing and, as such, was remanded to the custody of the Director of the Division of Juvenile Services for housing at the West

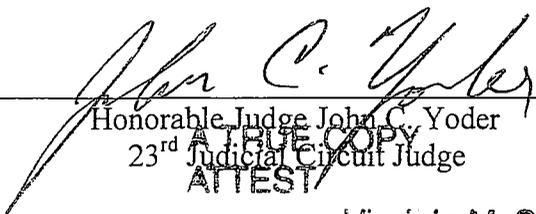
Virginia Industrial Home for Youth at Salem until such time as he attained the age of 18 years and could be transferred to the custody of the Commissioner of the Department of Corrections following a review by the Court pursuant to W.Va. Code §49-5-16(b).

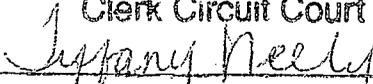
The Defendant turned 18 years of age on August 2, 2012.

Based upon and fully incorporating the above findings of fact and conclusions of law with regard to the Court's ruling on the Motion for Reduction/Modification of Sentence, the Court finds that transfer of the Defendant from the custody of the Director of the Division of Juvenile Services to the custody of the Commissioner of the Department of Corrections is appropriate under the facts and circumstances of this case.

Therefore, based upon the above, the Court hereby **GRANTS** the Defendant's Motion for Reduction/Modification of Sentence in part by reducing the sentence from 40 to 30 years for the robbery in the first degree. All other requests for relief or Reduction/Modification are **DENIED**. The Court further **ORDERS** the Defendant transferred to the custody of the Commissioner of the Department of Corrections for continued service of his sentence. A copy of the court's original sentencing order shall accompany this order.

The Clerk shall enter the foregoing as of the date first noted above and shall send attested copies of this order to all counsel of record, the Defendant, the Division of Juvenile Services, and the Department of Corrections.

  
Honorable Judge John C. Yoder  
23<sup>rd</sup> Judicial Circuit Judge

**ATTEST**  
Virginia M. Sine  
Clerk Circuit Court  
By:   
Deputy Clerk