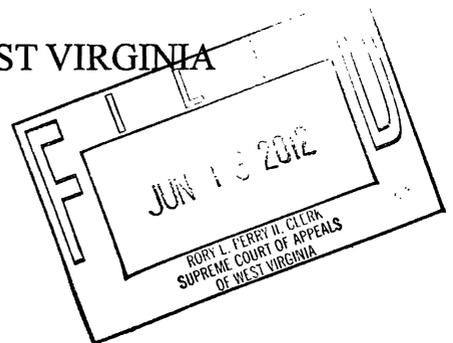


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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)

Petitioner's Brief

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ASSIGNMENT OF ERRORS

1. THE BERKELEY COUNTY CIRCUIT COURT, SITTING AS A JUVENILE COURT, COMMITTED MULTIPLE STATUTORY, PROCEDURAL AND CONSTITUTIONAL DUE PROCESS VIOLATIONS WHICH PREJUDICED PETITIONER'S CASE BY:
 - a. holding critical proceedings despite the involuntary absence of the Petitioner from such proceedings, which resulted in possible, if not probable, prejudice to Petitioner;
 - b. permitting the State to file its motion to transfer the Petitioner's case to the criminal jurisdiction of the Berkeley County Circuit Court outside the timelines mandated by West Virginia Code § 49-5-10 and Rule 20, West Virginia Rules of Juvenile Procedure and effecting multiple "good cause" continuances resulting in the passage of 79 days before Petitioner's Transfer Hearing was finally held; and
 - c. by finding probable cause to support the transfer of Petitioner's case to the adult criminal jurisdiction of the trial court, pursuant to West Virginia Code § 49-5-10(d)(1), based upon wholly inadequate evidence other than inadmissible hearsay testimony.

2. THE BERKELEY COUNTY CIRCUIT COURT COMMITTED MULTIPLE ERRORS, IN VIOLATION OF W.VA. CODE § 49-5-13(e), AND BOTH THE CONSTITUTIONS OF WEST VIRGINIA AND THE UNITED STATES, WITH REGARD TO ITS IMPOSITION OF A DETERMINATE SENTENCE OF FORTY (40) YEARS UPON PETITIONER, BY:
 - a. abusing its discretion by failing to make findings as to the possibility of the rehabilitation of Petitioner or to fully consider sentencing Petitioner pursuant to the authority of W.Va. Code § 49-5-13(e);
 - b. committing error of constitutional magnitude by its imposition of a sentence on Petitioner that is grossly disproportionate to that imposed by the same court and same judge upon Petitioner's adult co-defendant convicted of the identical offenses and upon identical factual circumstances; and
 - c. committing Constitutional error by imposing a sentence so excessive for the circumstances of the case as to mandate being held to be "cruel and unusual" punishment.

STATEMENT OF THE CASE

On December 9, 2010, two white males, wearing all black clothing, black ski masks and wearing gloves entered the residence of Ms. Deborah Beckman, where she operated Beck's Kennels. Ms. Beckman was there with Wendy Beckman and Amy Edwards, her daughter and step-daughter. One of the men held the women at gunpoint, in the kitchen, while the other man went into the family's office and

exited with a small safe located there. The men then exited the residence and drove away. (App. Rec. 7, pp. 23-25)

Berkeley Co. Sheriff's Deputy K. Huffman responded to the scene and noted that there were no signs of forced entry. Ms. Beckman indicated that the safe was of nominal value, approximately \$30.00, and that it contained a certified or cashier's check of uncertain amount, approximately \$2,000.00 in cash, and the Last Will and Testament of her recently deceased husband. With no visual identification of the men and no fingerprints being found, there was insufficient information for an NCIC entry and no leads to pursue, other than the apparent fact that the men had prior knowledge of the location of the small safe. Consequently, the case was transferred to the Sheriff's Criminal Investigation Division. (*Id.*)

On January 11, 2011, Deputy St. Clair and Lt. Harmison, of the Berkeley Co. Sheriff's Dept., received an anonymous tip that a "Georgie W." may have been involved in the December robbery at Beck's Kennels. Deputy St. Clair and Lt. Harmison proceeded to speak with "Georgie W.," who lived with his grandmother, who was his adoptive mother. She gave the officers permission to speak with Petitioner, aka "Georgie," who was 16 years of age, having a birthdate of August 1, 1994. After being provided his Miranda rights by Deputy St. Clair, he agreed to talk with the officers. (App. Rec. 7, p. 26)

During his interview, Georgie denied involvement in the robbery but said he did have some information about it. He then advised that his friend "Derrski" told him that he and "Alex" got money from a house. Georgie further said that "Derrski" had spent all of his money on car stereo equipment and guns. As to "Derrski's" last name, Georgie said that he believed his name was "Darren" but didn't know his last name. He denied knowing "Alex's" full name. (*Id.*)

On January 14, 2011, Deputy St. Clair went to speak with Georgie's former girlfriend and cousin, Ashley W., 14 years of age. He was met by Elizabeth McClain, Ashley's grandmother, who told him that "Georgie" had come into a lot of money in December from unknown sources. She also told the deputy that "Georgie" had bought a car, along with new rims and a car stereo, with the money. Ms. McClain also spoke of "Georgie" trying to give her a necklace which he claimed to have bought at Kay's Jewelry Store, but that it looked old and used and the box which it was in looked worn. Ms. McClain advised Deputy St.

Clair that Ashley was not at home but that he could come back later to speak with her. She also mentioned wanting to show the deputy a drawing that might be important. (*Id.*)

Deputy St. Clair then went to Alex Salazar, the owner of the vehicle reportedly purchased by Georgie. Mr. Salazar advised the deputy that he had sold the car to Georgie on December 10, 2010 for \$1,500.00 but had subsequently gotten it back from an impound lot because Georgie got into trouble and no longer wanted the car. Mr. Salazar also told Deputy St. Clair that Georgie had replaced the tires, rims and put in a new stereo system. (*Id.*)

Deputy St. Clair then went to Bob's Tires and spoke with the owner, Doug Stotler, who advised that Georgie had ordered new tires and rims costing about \$850.00 on December 10, 2010. (*Id.*)

On January 14, 2011, Deputy St. Clair and Lt. Harmison went to Shepherdstown, WV to speak with "Derrski," who was later identified as Ian Michael Derr (hereinafter "Derr.") After being advised of his Miranda rights, Derr admitted his participation in the December 9, 2010 robbery. Derr advised the officers he had been asked by "Ronald" if he wanted to make some quick money from some old people he knew had a safe with money in it. After agreeing to be involved, on the date in question, he and "Ronald" drove to Beck's Kennels and parked. Derr said that Ashley W. was with them but stayed in the car. Derr then related that he and "Ronald" entered the Beckman residence; that he was carrying a 9mm handgun; and that "Ronald" was carrying a pellet gun. Derr said he told the women in the home to sit down in the kitchen and be quiet and no one would get hurt. He said "Ronald" then ran into a back room and grabbed a little safe, after which the two of them ran back to Derr's vehicle and left. (App. Rec. 7, pp.26-27)

Derr said that "Ronald" gave Ashley W. a necklace from the residence. After prying the safe open, Derr said that "Ronald" gave Ashley about \$300 "for being there with them" and counted out between \$5,000 and \$7,000. Derr said the safe also had some papers and a check for \$5,000. He also told the deputies that Ronald gave him \$2,500 and kept the rest of the money. Derr then drove to the "Ruins" on River Road, Shepherdstown, WV, where he threw the safe into the Potomac River. When Derr took the police there, they were unable to recover the safe, but found an envelope apparently from Beck's

Kennels. Deputy St. Clair seized the 9mm handgun used by Derr in the robbery, but Derr said he had spent the money from the robbery on a car stereo, marijuana and had paid his rent. (App. Rec. 7, p. 27)

At Ashley W.'s residence later that evening, Deputy St. Clair spoke with her and her grandmother, Elizabeth McClain. While Ashley admitted being with Ronald W. and "Derrski" on the evening of December 9, 2010, she denied knowing they were going to rob anyone that evening. She further said she was "stuck" in the car when they decided to rob Beck's Kennels. Upon their return to the vehicle following the robbery, she said that "Derrski" gave her \$100.00 but that she gave it to Ronald because she didn't want any part of the incident. (*Id.*)

Ms. McClain then gave Deputy St. Clair a drawing of the Beck's location and indicated she believed "Georgie" had drawn it. It was then discovered, however, that he had Ashley draw it about a week before the actual robbery. Ashley said he had told her then he intended to rob the Beckmans; but Ashley claimed she thought she had talked him out of it and was surprised when it actually happened. The "picture" was a rough sketch of the Beck's property, with a floor plan of the residence and an area labeled "TARGET." (*Id.*)

After the investigatory activities of January 11-14, 2011, Deputy St. Clair filed a Criminal Complaint against Ian Derr for 1st Degree Robbery (App. Rec. 7, pp. 32-35) and, in conjunction with the Berkeley County Prosecutor's Office initiated an Emergency Pick-up Order and Juvenile Petition against Petitioner, who was 16 years old. (App. Rec. 7, pp. 37-42; 1, pp. 1-4) The Petition charged Petitioner with robbery in the first degree, burglary and conspiracy to commit robbery. (App. Rec. 1, pp. 1-4)

After being taken into custody on January 17, 2011, Petitioner was provided a Juvenile Custody/Detention Hearing in Berkeley County Magistrate Court on January 18, 2011. (App. Rec. 2, pp. 7-12) At that hearing, John H. Lehman, Esquire, of the Public Defender Corporation, was appointed to represent Petitioner. (*Id.*, p.7) Upon the advice of counsel, a Waiver of Preliminary Hearing was executed (App. Rec. 3, p.13); Bail Bond was set in the amount of \$250,000, with surety required; and Petitioner was detained in the Vicki Douglas Juvenile Center in Martinsburg, WV. (App. Rec. 2, p. 11; 4. Pp. 14-17)

On the same day, an initial hearing was held for the Petitioner in the Circuit Court of Berkeley County, WV, Sitting as a Juvenile Court, Division VIII (hereafter "Juvenile Court"), Circuit Judge John C. Yoder presiding. The case was designated as Delinquent Case No. 11-JD-3 and a Status/Agreed Adjudication hearing was scheduled for Monday, February 7, 2011, at 8:30 a.m. (App. Rec. 8/9, p65-66) On February 7, 2011, however, John Lehman, Esquire, appeared on his behalf, but without his client being present, and the State appeared by Cheryl K. Saville, Berkeley Co. Assistant Prosecuting Attorney. (App. Rec. 12/13, p. 67) Upon discussion of counsel, and the State's request for a continuance, the court concluded that "insufficient time existed to properly hear the matter;" consequently, the hearing was rescheduled for Monday, February 14, 2011, at 8:30 a.m. (*Id*; App. Rec. 112, pp. 3-7)

On February 9, 2011, however, the Defendant, along with another resident of the Vicki Douglas Juvenile Center, attempted an escape from that facility. Although the Staff was successful in preventing the other resident's escape from the building, Petitioner did initially elude capture. Consequently, a Motion for Emergency Capias was filed against Petitioner in the Juvenile Court. (App. Rec. 14, p.68-70) Petitioner was again detained by U.S. Marshalls on February 10, 2011 and he was transported to and detained in the Chick Buckbee Juvenile Detention Center.

On February 11, 2011, the Berkeley County Prosecutor's Office filed an Amended Petition in Delinquent Case No 11-JD-3. Such Amended Petition essentially reiterated the same allegations as the initial Petition with minimally additional assertions of details involving the same alleged offenses, with no material effect. (App. Rec. 21, pp.71-74) On the same date, the State, by Assistant Prosecuting Attorney Cheryl K. Saville and only Petitioner's Counsel, John H. Lehman, Esq., appeared before the Juvenile Court in his original case and jointly moved the court to continue the hearing previously set for February 14, 2011, due to an asserted scheduling conflict involving Mr. Lehman and to schedule a transfer hearing. It was represented by counsel that the previously scheduled hearing had been set for the purpose of scheduling a transfer hearing upon the filing of a Motion to Transfer by the State or to possibly take a juvenile plea if a decision to not transfer had been made. (App. Rec. 22/23, pp.75-76) Upon review of the case and upon the Juvenile's aforesaid alleged escape, for which charges would be filed, however,

the State decided to file a Motion to Transfer on February 10, 2011, one day before the amended Petition was filed. (App. Rec. 24, p.77-80) Accordingly, counsel jointly moved the court to cancel the previously scheduled status hearing and to schedule a transfer hearing (App. Rec. 25/26, p.81), to which the Juvenile's counsel, without discussion with his client or family, waived the seven (7) day statutory time frame for holding a transfer hearing in the interests of having the requisite time "to be able to fully and meaningfully prepare for such hearing." Counsel further advised the court that the transfer hearing may require a full day to complete. (App. Rec. 22/23, pp.75-76)

Accordingly, the Juvenile Court continued the hearing set for February 14, 2011, and scheduled a Transfer Hearing for February 28, 2011. (*Id.*) On that date, however, the Juvenile, again only by Counsel and the State, appeared in Juvenile Court, whereupon Judge Yoder noted that another date must be scheduled "to allow the necessary time to hear the matter properly" and ordered the next hearing to be held on March 22, 2011, at 9:00 a.m., for a Transfer Hearing. (App. Rec. 25/26, P. 81)

On March 9, 2011, the State filed its List of Witnesses and List of Exhibits, which included the "Hi Point 9 mm" handgun used by Derr in the robbery, but did not include the Pellet Gun allegedly possessed by Petitioner. (App. Rec. 40, pp. 82-83; 41, pp.84-86)

On March 16, 2011, Judge Yoder, *sua sponte*, reportedly due to pressing Abuse and Neglect case priority, again issued an Order Rescheduling Hearing and continued the Transfer Hearing from March 22, 2011, at 9:00 a.m. until April 6, 2011, at 1:30 p.m. (App. Rec. 50/51, p.87)

On April 6, 2011, a Transfer Hearing, the hearing was held by Judge John C. Yoder, Sitting as the Berkeley County Juvenile Court. The State presented its evidence through a number of witnesses, including members of the Berkeley County Sheriff's Department and the three female victims of the underlying robbery. None of these witnesses, however, could provide any direct testimony as to either the identity or specific descriptions of the two men involved. Ian Michael Derr, the co-defendant, upon advice of his counsel, Nicholas F. Colvin, Esquire, exercised his Fifth Amendment right, was declared unavailable by the court, and did not testify. Similarly, Ashley W., the former girlfriend and cousin of the Petitioner, and uncharged co-conspirator, who drew the floor plan of the Beckman's residence, appeared

with her father and grandmother. Upon being Mirandized on the witness stand, Ashley W. and her father requested that she be allowed to speak with an attorney prior to answering any questions. Consequently, she was declared unavailable as a witness for the Transfer Hearing with the agreement of counsel and excused by the Court. (App. Rec. 61/62/63, pp. 88-91; 120, pp. 11-62)

Consequently, neither of the only two people who could directly connect the Defendant to the underlying crime testified. Therefore, the substance of Derr's and Ashley W.'s statements to the Berkeley Co. Sheriff's Department was provided through the testimony of Lt. Harmison. (*Id.*, 61/62/63 at 91-93; 120 at 62- 73)

Upon the conclusion of such testimony, the Court, pursuant to WV Code §49-5-10(d)(1) found there was probable cause to believe the Defendant, being older than 14 years, had committed the crime of robbery involving the use or presenting of firearms or other deadly weapons. Accordingly, Judge Yoder granted the State's Motion for Transfer and Ordered that all three charges against the Defendant in Delinquent Case No.11-JD-3 be transferred to adult criminal jurisdiction of the court. (App. Rec. 61/62/63, pp.94-95; 120, pp.104-105)

Thereafter, on May 17, 2011, Ian M. Derr and Petitioner were indicted by the Berkeley County Grand Jury for Robbery in the 1st Degree, Felony Conspiracy to Commit Robbery and Burglary. (App. Rec. 64, pp.96-97) On May 26, 2011, the Petitioner appeared, in person and by Counsel, John Lehman, Esquire, before the Berkeley County Circuit Court, Judge Gina M. Groh, and was arraigned; a trial was set for September 27, 2011. (App. Rec. 79, pp. 98-99)

In the interim, Progress Letters, dated 03 June 2011 and 27 July 2011, respectively, were provided by the WV Division of Juvenile Services, WV Industrial Home for Youth, where the Petitioner was being held, to Judge John C. Yoder and made part of the record of the instant case. Such reports reflected generally acceptable behavior performance by the Petitioner, although clearly needing improvement in certain areas, but having made overall improvement from the first report to the second. Of particular note is the fact that Petitioner received his fourth nine week report card prior to the second Progress Letter and was selected for the Regular Honor Roll. (App. Rec. 80, pp. 100-101; 82, 102-103)

By its letter of September 9, 2011, the State, by Pamela Jean Games-Neely, Berkeley Co. Prosecuting Attorney, provided Petitioner's Counsel, a Plea Offer aimed at resolution of the charges. The offer provided that the Defendant would plead no contest to one count of Robbery in the 1st Degree and one count of Burglary, with the remaining charge to be dismissed by the State. The plea also provided that both sides were free to argue sentencing but that the State would bind to concurrent sentencing. Such offer was designated to expire on September 14, 2011, at 9:00 a.m. (App. Rec. 90, pp. 104-105) At the Status Hearing held on September 15, 2011, the parties advised the court that a plea agreement had been reached, the terms of which were spread upon the record. Accordingly, the Probation Department was ordered to prepare a pre-plea investigation report and the case was set for a potential plea and sentencing on November 17, 2011. (App. Rec. 91, p. 106)

The requested Pre-Plea Investigation Report, dated November 9, 2011 and prepared by Carolyn A. Williams, Probation Officer, was duly filed with the court on that date. (App. Rec. 92, pp.107-117) Additionally, a Discharge Summary, dated 02 November 2011, again from the WV Industrial Home for Youth, regarding the Defendant, was filed with the court on November 15, 2011. Such report provides a "mixed bag" as to the performance of Mr. Whetzel, with behavior issues and instances of physical assault on other residents being reported. Although he continued "acceptable to good" performance in most areas of school, he was failing at least one subject. His counseling performance, however, was generally considered to be favorable, with the completion of the majority of his goals and objectives. In conclusion, and with awareness of his pending criminal charges, the Unit Management Team of the WV Industrial Home for Youth recommended that Petitioner "return to reside with his grandmother and guardian in her Martinsburg home," which would be shared with his four younger sisters. (App. Rec. 95, 118-119)

On November 17, 2011, the Petitioner and his Counsel, John Lehman, Esq., duly presented to the court an executed No Contest Plea to the prescribed offenses, resulting in an immediate conviction. (App. Rec. 96, p.120) Although the Order was entitled Plea and Sentencing Order, only the Petitioner's pleas were accepted and a separate Sentencing Hearing was set for December 15, 2011. (App. Rec. 102, pp.121-123)

At the Petitioner's Sentencing Hearing, Petitioner's Counsel generally argued that the primary difference between himself and the defendant were their different backgrounds. Whereas Counsel's father was an attorney and his mother a teacher, with himself being an attorney and part-time instructor at Blue Ridge Community College, his client's parents were both drug addicts and alcoholics who were currently incarcerated, having been convicted multiple times for felony offenses. In fact, Petitioner's father's current incarceration is for Robbery in the 1st Degree for which he was given a 20 year determinate sentence. Without trying to minimize the seriousness of his client's conduct, Mr. Lehman argued the virtues of giving a young man an opportunity to stop the revolving cycle of crime by his parents; instead of surrounding him with hardened criminals for the next few decades of his life, which would fully "institutionalize" him. He further asked the Court to, instead, take the middle road and sentence him to the Anthony Center so that he could have an opportunity to turn his life around, learn to live productively and avoid a life similar to his parents. (App. Rec. 118, pp.6-9)

Mr. Lehman also pointed out that the difference between his client's No Contest pleas and pleas of "Guilty" were solely his choosing and in no way reflected his client's lack of responsibility or remorse for his conduct. Consequently, he suggested that if the court was inclined to impose a substantially long sentence on his client, to at least suspend it and give him the opportunity of being able to redeem his life by proving his capacity to change through the Anthony Center program. (*Id.*, at 9-13)

Mr. Lehman then called Patrick H. Futrell, Probation Officer for the 23rd Judicial Circuit, who had served as the Defendant's Juvenile Diversion Officer for approximately six months prior to the December 2010 crime. Mr. Futrell testified to the Petitioner's very rough life experienced with his parents, a drug addicted, alcoholic mother and a drug addicted, alcoholic, physically abusive father. Officer Futrell reported that Petitioner was understood to have witnessed his mother's second husband sexually assault one of his younger sisters when he was too little to be able to stop it. Mr. Futrell further related the psychological issues which Petitioner suffered, including multiple attempts at suicide and self-mutilation; overdosing on psychotropic drugs and having been diagnosed as being bi-polar. Mr. Futrell opined that, while he had not seen test results (although he had requested them), he believed that

Petitioner suffered from diminished capacity, but he had been unable to arrange either psychiatric or psychological evaluations for him due to the constraints of the diversion program's authority and budget. (*Id*, pp. 14-21)

The State, through Pamela Jean Games-Neely, Berkeley County Prosecutor, addressed the fact that she had prosecuted both of the Petitioner's parents and other relatives in her 20 years as prosecutor. Indeed, she found it interesting that "at the same age, I heard the same speech from his dad. I heard the same speech from his mom." (*Id*, pp. 24-25)

She then focused on the choices he had made with regard to his conduct and the fact that the victim would never really obtain restitution from the Defendant; at least, not soon enough to help her in any real way. The Prosecutor further pointed out that the victims would never feel safe again. (*Id*, p.26)

Consequently, in light of the determinate nature of the sentence to be imposed and the impact of "good time" thereon, the State requested a sentence of 40 years for the conviction of Robbery in the 1st Degree which "gives him 20." She stated further that he could learn whatever he wanted in the penitentiary; either a GED and a career, if he wants it, or how to live with a bunch of thugs. She stated "his mom and dad didn't learn, and I'm not sure that Georgie wants to either." (*Id*, pp.26-27)

Accordingly, the Trial Judge stated that under the circumstances of the case and what had been presented, no sentence other than a sentence of incarceration would be appropriate in this case. Whereupon the court sentenced Petitioner, then aged 17, to not less than one, nor more than fifteen years in prison for burglary; and 40 years on the first-degree robbery, said sentences to run concurrently, in accordance with the plea agreement. (*Id*, pp.27-28; 103, p.124; 110/111, pp.140-142)

The Court in summing up its rationale for its judgment stated that she was not sentencing this juvenile because of his family's "track record," but "the offense that he committed, the circumstances surrounding the offense, the fact that he was already in the system and had been in the system at a time that he committed the offense, the severity of the offense, the impact on the victim, and the Court's concern with protecting the safety of this community." (App. Rec. 118, p.28) She continued in her reasoning that "and I don't see if he is sent to the Anthony Center and comes out six months to two years

how he'll be able to reverse that trend and that will jeopardize the safety of the community and these victims." She concluded her reasoning by claiming that "the Court finds that any benefit he can receive at the Anthony Center after he would leave Salem can also best be accommodated from the penitentiary system." (*Id.*)

On February 9, 2012, the co-defendant, Ian Derr, appeared before Judge Gina M. Groh for his sentencing hearing, having pled to identical charges as your Petitioner. App. Rec. 129, pp.146-149) Ian Derr, who was six years older than the Petitioner and who possessed the 9mm handgun during the commission of the crime and whose actions were otherwise as severe and would have caused the same effect on the victims, had his sentencing date deferred and was remanded to the Anthony Center for Youthful Offenders to be treated accordingly. (*Id.*) The Court drew a couple of distinctions between the Petitioner and Mr. Derr but those mostly pertained to actions that occurred at their respective sentencing hearings. For one, the Court seemed to note that Mr. Derr was genuinely remorseful as opposed to the Petitioner being non-reactive, although each made their apologetic statements to the victims (App. Rec. 130, pp.24-25) and secondly, the fact that Mr. Derr had pled guilty in contrast to the Petitioner's no contest plea, an arbitrary fact since the Petitioner was offered a no contest plea by the prosecutor. The only other distinctive feature of Mr. Derr's sentencing hearing was the disclosure by the Prosecuting Attorney that her daughter went to school with Mr. Derr and that she, the prosecutor, also knew him and his family and that they were a good family. (*Id.* at pp.20-21) Whereas the prosecutor said that Mr. Derr "had a shot" at rehabilitation, she was convinced the Petitioner did not. (*Id.* at p. 22)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the nature and fundamental public importance of the issues raised in this appeal, as well as the constitutionality of the conduct in and by the Berkeley County Circuit Court are appropriate for oral argument pursuant to Rev. R.A.P. 20(a), if not required by the interests of justice in this appeal.

SUMMARY OF ARGUMENT

Petitioner asserts that his statutory and constitutional entitlements were repeatedly violated by the Berkeley County Circuit Court's handling of his case. Such violations involved significant procedural errors by said court, Sitting as a Juvenile Court, including holding critical hearings and making important processing decisions despite Petitioner's involuntary absence from numerous proceedings; repeated and minimally justified continuances of his required Transfer Hearing; and an utter failure to abide by the applicable standards established by law and the Supreme Court of Appeals of West Virginia with regard to the admission of hearsay statements of co-defendants, especially when allegedly justified by their declared "unavailability" without following the prescribed step-by-step analysis mandated by this Honorable Court. Such errors are considered to have probably denied him due process, which severely prejudiced his case, that it is considered to be impossible for the State to meet its burden of proving a lack of prejudice beyond a reasonable doubt. Furthermore, Petitioner asserts that the determination for the transfer of his charges to the criminal jurisdiction of the court was based virtually only on inadmissible hearsay evidence and mere suspicion. Petitioner asserts that a reasonably objective and legally fair analysis of such proceedings can only lead to a conclusion that his conviction must be reversed and remanded.

Additionally, Petitioner asserts that, upon his felony convictions upon his voluntary plea, the Berkeley County Circuit Court committed further statutory violations by failing to adequately consider alternative sentencing pursuant to Juvenile standards, especially in light of his personal factors which establish that he has not only suffered a nightmare of a childhood that has, almost undeniably, severely impacted him psychologically, as evidenced by his history of self-mutilation and attempted suicides, as well as being diagnosed with bi-polar disorder. Despite all of this reality, however, the Sentencing Judge not only ignored such mitigating factors, without sufficient findings to justify such lack of consideration, she also ignored the propriety of ordering psychological and psychiatric evaluations of Petitioner before passing sentence upon him.

Finally, the Sentencing Judge, denied him assignment to a center for housing youthful offenders and imposed a 40 year determinate sentence upon Petitioner, a first time juvenile criminal offender,

despite the undeniably mitigating factors in his life and in the case itself, while deferring sentencing upon his, at least, equally culpable adult co-defendant, who actually had a prior criminal record and who possessed and used a real 9 mm firearm in the robbery. Such disparate sentencing, especially in the face of the respective circumstances of the co-defendant's cases, not only reflect such biased and unfair treatment as to shock the conscience of virtually all who are aware of it and bring discredit on the concept of "justice" in the courts of the State of West Virginia, but is considered to rise to the level of a clear instance of unconstitutional violation of the proportional sentencing principle.

Consequently, it is firmly asserted by Petitioner that an objective review of the different sentencing treatments afforded these two equally culpable defendants will lead to no other conclusion except that Petitioner's sentence must be reversed and remanded.

ARGUMENT

Your Petitioner asserts that throughout the conduct of the proceedings of his case before the Berkeley County Circuit Court, Sitting as a Juvenile Court, the Honorable Judge John C. Yoder committed multiple errors of law and consistently denied your Petitioner the benefit of his statutory and constitutional entitlement to "due process," which must, either standing alone or in their cumulative effect, result in a reversal of his conviction and remand for further proceedings as deemed applicable by this Honorable Court.

1. ALLEGED PROCEDURAL AND DUE PROCESS ERRORS COMMITTED BY THE BERKELEY COUNTY CIRCUIT COURT SITTING AS A JUVENILE COURT:
 - a. holding critical proceedings despite the involuntary absence of the Petitioner from such proceedings, which resulted in possible, if not probable, prejudice to Petitioner;
 - b. permitting the State to file its motion to transfer the Petitioner's case to the criminal jurisdiction of the Berkeley County Circuit Court outside the timelines mandated by West Virginia Code § 49-5-10 and Rule 20, West Virginia Rules of Juvenile Procedure and effecting multiple "good cause" continuances resulting in the passage of 79 days before Petitioner's Transfer Hearing was finally held; and
 - c. by finding probable cause to support transfer of Petitioner's case to the adult criminal jurisdiction of the trial court, pursuant to West Virginia Code § 49-5-

10(d)(1), based upon wholly inadequate evidence other than inadmissible hearsay testimony.

Argument on Assignment of Error 1(a):

Your Petitioner was initially detained by State authorities on January 17, 2011, in connection with his alleged involvement in offenses committed on December 9, 2010. The required Preliminary Hearing, pursuant to the State's Petition on the same date, was waived on January 18, 2011. On that same date, the Juvenile Court issued an Order scheduling a Status/Agreed Adjudication Hearing for February 7, 2011. On January 21, 2011, Petitioner's appointed Counsel from the Public Defender's Corporation filed a Demand for Jury Trial and an Omnibus Discovery Motion. The State provided the requested Discovery on January 25, 2011.

Despite the foregoing actions, on the date of the scheduled Status/Agreed Adjudication Hearing, February 7, 2011, the State, by the Berkeley County Prosecutor's Office, indicated that "I have a lot of excuses I could offer up to the Court as to why I'm not ready to do it today;" but, instead, indicated that it was because she hadn't yet been able to discuss with "her boss" the issue of transfer and requested a continuance, noting that Petitioner was in detention (and absent from the proceedings.) Despite the continuing detention of his client and his involuntary absence from the proceeding, which was set as a possible agreed adjudicatory hearing, Petitioner's counsel was fully cooperative with the State's request, despite indicating that he had not "talked with him (Petitioner) since the prosecutor made an offer this morning." The court's Order noted that the hearing was rescheduled "to allow the necessary time to hear the matter properly;" good cause having been found.

Following Petitioner's escape from detention, on February 11, 2011, and his recapture, shortly thereafter, the State filed an Amended Petition which paralleled the original Petition, albeit for changes in the language related to the first offense, Aggravated Robbery and the third offense, Conspiracy. On the same date, again without the presence of the Petitioner, the State and Petitioner's counsel entered an Agreed Order rescheduling the hearing set for February 14, 2011 and setting a Transfer Hearing for February 28, 2011, pursuant to the State's Motion to Transfer filed on February 10, 2011. Based solely

upon the agreement of Petitioner's counsel and without any discussion with Petitioner, the aforesaid Order waived the requisite seven (7) day statutory timeframe for holding a Transfer Hearing.

Despite the clear language of the aforesaid Order which scheduled a Transfer Hearing for February 28, 2011, on that date, again with only the State and Petitioner's counsel being present, the Juvenile Court classified it as having been scheduled as a "status hearing" and noted that it needed to be rescheduled "to allow for necessary time to hear the matter properly," and set March 22nd, 2011, at 9:00 a.m., for a Transfer Hearing. Prior to this date, the State duly filed its Exhibit and Witness Lists, as well as the State's Request for Discovery.

On March 16, 2011, the Honorable John C. Yoder, *sua sponte*, ordered that "due to time standards in Abuse and Neglect cases and the priority that those cases take over others, along with the volume of cases the Court has to hear..." Judge Yoder stated that it was necessary to again reschedule Petitioner's Transfer Hearing and set it for April 6, 2011, at 1:30 p.m., on which date the said hearing was finally held.

As this Supreme Court of Appeals of West Virginia made clear in the case of State ex rel Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975), Syl. Pts. 2, "correlative with the constitutional right of confrontation is the right of presence which requires that an accused charged with a felony shall be present in person at every critical stage of a criminal trial where *anything* may be done which affects the accused; the right of presence, originating in the common law, is secured to an accused by W.Va. Code 62-3-2." (Emphasis added), *Id*, 158 W.Va. 647, 214 S.E.2d 331. Furthermore, this Honorable Court stated in Grob, in Syl. Pt. 3, "W.Va. Code 1931, 62-2-3, requires that one accused of a felony shall be present at every stage of the trial during which his interest may be affected; and if *anything* is done at trial in the accused's absence which *may* have affected him by *possibly* prejudicing him, reversible error occurs." (Emphasis added), Grob, *Id*, 158 W.Va. 648, 214 S.E.2d 331. Finally, the Supreme Court of Appeals of West Virginia indicated the magnitude of importance of such right by stating, in Syl. Pt. 5, "failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *Id*, 158 W.Va. 648, 214 S.E.2d 330.

Additionally, pursuant to Rule 10(b) of the West Virginia Rules of Juvenile Procedure “the juvenile shall have the right to be present at all hearing.”

Indeed, in clarification of the possible diminution of the magnitude of the burden imposed upon the State with regard to an analysis of a deprivation of constitutional rights, due to some different language used in State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), this Supreme Court of Appeals stated in State v. Boyd, “[i]n order to clear up any ambiguity that exists between the holding in the opinion and the 8th syllabus point of Grob, it is now reaffirmed that the right of the accused to be present follows any critical stage in the criminal proceeding.” *Id*, 160 W.Va. 234, 245-46, 233 S.E.2d 710, 718 (1977); *See also* State v. D.M.M., 169 W.Va. 276, 286 S.E.2d 909 (1982).

In light of the far-reaching consequences of the transfer of a juvenile’s case to the adult criminal jurisdiction of a circuit court, your Petitioner asserts that there should be little, to no, question that any proceeding that is part of that process is a “critical stage” in his criminal proceeding. Petitioner further asserts that it is abundantly clear that the State cannot establish beyond a reasonable doubt that he may not have suffered prejudice from his absence from all of the aforesaid proceedings. Indeed, if he had been present to require his Counsel to object to the continuance of the first scheduled Agreed Adjudicatory hearing, and had that hearing actually occurred, the transfer motion would never have been filed by the State and in the alternative, it appears from the transcript of February 7, 2011, hearing that the State had made an offer, to potentially resolve this case without the need nor desire to transfer the Petitoiner to adult jurisdiction. Therefore, the Petitioner would never have been sentenced to 40 years of incarceration for his first criminal offense.

With the State’s burden of proof, beyond a reasonable doubt, requiring it to prove that the Juvenile Court’s repeated holding of hearings and its dealing with important due process issues in his absence did not violate his constitutional rights and did not prejudice him, Petitioner asserts that the aforesaid Juvenile Court clearly deprived him of constitutional rights and that such deprivations did prejudice him. Consequently, Petitioner asserts that it should be clear that the Berkeley County Circuit Court, Sitting as a Juvenile Court, erred and his subsequent conviction must be reversed.

Argument on Assignment of Error 1(b):

West Virginia Code §49-5-10(a) specifies that “upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing...” and that “[a]ny hearing held under the provisions of this section is to be held within seven days of the filing of the motion for transfer unless it is continued for good cause.” Rules 20 of the West Virginia Rules of Juvenile Procedure, Subparagraphs (b) and (e), respectively, are parallel to and reiterate such procedural mandates. Petitioner asserts, therefore, that there can be no question that such requirements are part of the “due process” entitlements of a juvenile facing a Transfer Hearing in the State of West Virginia. Petitioner asserts, therefore, that these statutory mandates and procedural rules enjoy constitutionally protected status. Consequently, they cannot be ignored by either the State or a Circuit Court Sitting as a Juvenile Court, either in order to accommodate the State’s shortage of preparation time or as a matter of convenience for the court. While recognizing an Appellate Court’s deference to the management of a trial court’s docket, Petitioner asserts that the concept of “good cause” for a continuance requires a reasonably objective analysis and not merely a court’s “unfettered discretion.” To require less would involve a grant of *carte blanche* to a trial court to ignore the due process rights of a defendant, to his probable prejudice, and eviscerate the entire line of cases requiring the State to prove, beyond a reasonable doubt, that the deprivation of a defendant’s constitutional rights did not work to his prejudice.

In the case at hand, the initial Agreed Adjudicatory hearing, set for 21 days after the Petitioner’s detention began, was continued for another week because the Assistant Prosecutor had not yet decided how to handle the case of a 16 year old who had neither a prior record of criminal conduct nor extensive involvement with the juvenile probation officers. Since it was set as a possible Adjudicatory Hearing, any Motion to Transfer intended by the State should have been filed eight (8) days prior thereto... which did not occur. Following the State’s filing of its Motion to Transfer on February 11, 2011, a series of continuances (as identified specifically in the foregoing section’s argument), including two (2) which

were specifically scheduled as the “Transfer Hearing,” despite their “re-designation” in subsequent orders of the Juvenile Court, were effected with minimal to no objective justification.

While Petitioner is aware of this Honorable Court’s decisions in State ex rel Cook v. Helms, 170 W.Va. 200, 292 S.E.2d 610 (1981) and State v. Gary F., 189 W.Va. 523, 432 S.E.2d 793 (1993), Petitioner asserts that the circumstances existing in those cases that influenced this Honorable Court to find no error in the continuances are not the same in the case at hand and that the resulting delays in his case are much more egregious. There were none of the interstate logistical issues involved in the Cook case and the delay in the Gary F. case was but a few days outside the prescribed seven day period and involved no continuances. In Petitioner’s case, we have a series of thinly “justified” continuances, some of which misstate the reality of the prior court Orders which resulted in the Transfer Hearing finally being held 79 days after the filing of the State’s Motion to Transfer.

In the absence of a definition for “reasonably objective” standards for “good cause” continuances, one must wonder how long of a delay, or how many continuances must be involved, before a detained juvenile defendant may claim to have suffered constitutional deprivation and possible prejudice?

Your Petitioner asserts that the instant circumstances, especially when viewed in conjunction with the overall procedural handling of his case by the Juvenile Court, provide a solid foundation upon which this Supreme Court of Appeals may establish objective procedural standards for the implementation of continuances of a juvenile’s Transfer Hearing. Consequently, your Petitioner asserts and that this Honorable Court find that the Berkeley County Circuit Court, Sitting as a Juvenile Court, erred by granting multiple “good cause” continuances that “excused” the State’s unprepared status in conjunction with the initially scheduled Adjudicatory Hearing and, ultimately, resulted in a 79 day delay in holding his Transfer Hearing from the date the State’s Motion to Transfer was filed. Such a failure to adhere to the procedural mandates of the West Virginia Code, as well as the Rules established by this Honorable Court to regulate the procedures applicable to juvenile cases, should not be allowed to stand. Therefore, your Petitioner asserts that his conviction must be reversed due to multiple violations of his constitutionally protected “due process” rights.

Argument on Assignment of Error 1(c):

At the Transfer Hearing, the State presented its case through the testimony of a number of witnesses, whose summarized testimony is asserted by Petitioner to reasonably be:

Berkeley County Deputy Sheriff Kevin Huffman: He was the initial officer on the scene, arriving only a few minutes after a radio report of a robbery in progress. Upon examination of the scene and interviewing of the victims, in conjunction with subsequently arriving police officers, it was discovered that there was no evidence of the perpetrators' identities since they wore masks and gloves and there were no surveillance tapes. He never spoke with the Petitioner at any time regarding this case.

Deborah Beckman; Wendy Beckman; and Amy Edwards: All three testified that the robbers were dressed in all black, from mask to pants, with black guns, and that they could only identify them as males by their voices. As to identity, they could only specify that one was shorter and stockier, while the other was taller and thinner. Deborah Beckman, upon being confronted by the robbers, immediately ran out the door to a storage building where she stayed until the event was over. Although she had made no such statement to the police at the time of the robbery, nor even a suggestion of such idea, Mrs. Beckman testified that she "knew it had to be a former employee or somebody there the night of her husband's death because they knew exactly where to go...." Wendy Beckman had been familiar with the Petitioner prior to the robbery, because of his brief employee status, but had no inclination as to him being one of the robbers. She testified that the entire event lasted only a few minutes and she was immobile in the office throughout the robbery, but that she saw both men go into the house through the "baby gate" Amy Edwards, Mrs. Beckman's step-daughter who lives in Ohio, had no familiarity with the Petitioner whatsoever. After being ordered inside by the robbers, she stayed in the office with Wendy during the robbery. She confirmed one robber was about her height (5' 4") and heavy and the other one was taller and skinny.

Ashley W.: She can only appropriately be designated as an uncharged "co-conspirator" who was present before, during, and after the instant offense. Upon calling her as a witness, the State also

requested that she be accompanied to the witness box by her father. The State advised Judge Yoder that Ms. W. had given a statement to the police in the presence of her Guardian at the time, her grandmother; but that she had not been charged nor offered or agreed to immunity for her testimony. The State then requested that Ms. W. be Mirandized in the presence of her father in order to see if she would testify. Petitioner's attorney expressed his discomfort with the situation and that Ms. W. should be appointed counsel. The court denied the request to Mirandize her but stated that if she so requested or her father so advised, she would be entitled to one.

Upon questioning by the State, Ms. W. acknowledged that she had spoken with Deputy Sinclair and Lieutenant Harmison regarding their investigation. Upon being advised of her rights to such, Ms. W. and her father requested she not testify without benefit of counsel. The State asserted, and Petitioner's counsel wholly agreed, that such position made Ms. W. "unavailable" and allowed the presentation of the substance of her discussions with the police by way of their hearsay declarations.

Ian Michael Derr

Derr was arrested and indicted as a co-defendant in the underlying offenses of December 9, 2010. Accordingly, at Petitioner's Transfer Hearing the State called Derr as a witness, at which time the State noted the presence of Nicholas Colvin, Esq., his Defense Counsel. After Derr was sworn and took the stand, the State asked some basic identification questions and then inquired whether Mr. Colvin had advised him with regard to his testimonial rights. Not surprisingly, therefore, upon the initial question as to the facts of the underlying offense, namely, whether he knew Petitioner, Derr invoked his right against self-incrimination. Although the State acknowledged that "normally... it's done question by question, but if he can't even answer if he knows (the co-defendant), I don't want to go through my whole examination... to get the same answer." Petitioner's counsel, remained consistent with his support for his client to assert his right against self-incrimination during the questions of him during Petitioner's hearing.

Whereupon the State requested, and the Court declared, that Derr was "unavailable" as a witness ... which Petitioner's counsel not only approved but thanked the court for avoiding "the long way around the mountain."

Having established the “unavailability” of the only two witnesses with *any firsthand* knowledge of your Petitioner’s alleged involvement with the underlying offenses, the State presented its case in support of its Motion to Transfer through one (1) of the primary investigating officers.

Lieutenant Gary Harmison: A member of the Investigative Unit of the Berkeley County Sheriff’s Department, Lt. Harmison testified that he came to know your Petitioner in conjunction with his investigation of the underlying robbery following an anonymous telephone call stating that “Georgie W.” may have been involved in the robbery. At that time, Lt. Harmison and Deputy Sinclair proceeded to the home of “Georgie W.” and interviewed your Petitioner. Lt. Harmison further testified that your Petitioner denied knowing anything about the underlying robbery. After tracking down Ian Derr, however, they obtained a confession to the robbery which implicated Petitioner. (On cross-examination, Lt. Harmison indicated that he had no memory of how they identified and located Derr.)

Lt. Harmison testified that Derr’s confession claimed that he and your Petitioner, along with Ashley W., were riding around when Petitioner suggested they rob Beck’s Kennel’s, which they did. Lt. Harmison’s rendition of Derr’s confession indicated that Derr and your Petitioner were dressed all in black, with ski masks and gloves (despite the assertion that Petitioner just then suggested the robbery), and that while your Petitioner had a “BB or pellet gun,” Derr had a 40-caliber pistol. Derr’s reported confession asserted that they entered the Beckman’s home, got the lock box and left. Afterwards, they proceeded to divide up the cash in the box, with Derr using his portion to buy a radio for his car, along with a few other things, pay rent and buy marijuana. Derr’s confession asserted that the division of the money included Ashley W. Lt. Harmison further testified that Derr took them to where he and his co-conspirators allegedly disposed of the Beckman’s lockbox, but that they only found an envelope “that may have had the Beckman’s address on it.” Although the lockbox was not recovered, they did obtain from Derr a handgun he claimed to have used in the underlying robbery.

Lt. Harmison then testified that they spoke with Ashley W. and took a statement from her, wherein she admitted being present in the vehicle at the time of the robbery but denied prior knowledge or involvement. Although Lt. Harmison’s testimony was that Ashley provided the police with a drawing she

had done for “Georgie” of the scene of the robbery, his investigatory notes indicate that it was Ashley’s grandmother/guardian that provided such drawing to the police. He further testified that Ashley had acknowledged making the drawing before the night of the robbery but that she claimed to have talked “Georgie” out of the robbery. The drawing was admitted as evidence. Lt. Harmison reiterated his testimony that your Petitioner had always denied any involvement in the robbery when he questioned him or was present during his questioning and had never made any incriminating statements. Lt. Harmison’s testimony also provided that they had identified from whom the Petitioner had, allegedly, purchased a vehicle shortly after the date of the underlying offense, which he later returned after putting new tires on it and a stereo in it, but that the police did not have any registration or insurance documentation connecting your Petitioner to the said vehicle. A purported brief hand-written “agreement” between Petitioner and Alex Salazar for the purchase of a 1993 Honda Accord on December 16, 2010, or, possibly December 10, was admitted into evidence.

The State then concluded the presentation of its case through the testimony of a grandmother of your Petitioner,

Elizabeth McClain: She testified that from around October 2010, Petitioner had started spending nights at her home, while he spent his days with his other grandmother (who was his adoptive mother.) She testified that Petitioner had showed her a “roll of money,” which she said Petitioner had claimed to have received from a variety of sources (none of which involved a robbery... it is also noted that the police investigatory report regarding their discussions with Mrs. McClain do not indicate any such prior assertion of such to them), but that she really had no idea of where the money originated... but that he had it in December 2010.) She further testified that she had provided the police with the aforesaid drawing of the scene of the crime, which she said she took from a school book of your Petitioner. Although Mrs. McClain stated she had no firsthand knowledge of Petitioner buying anything, she testified that Petitioner had told her of things he claimed to have purchased. She also provided testimony as to what her granddaughter, Ashley W., had told her about the underlying incident. She also testified that Petitioner

had given her a necklace for Christmas 2010, but that she wouldn't wear it because the box looked older than it.

In summary, but for the hearsay testimony of Lt. Harmison as to Ian Derr's confession regarding your Petitioner and the alleged statements of Ashley W. regarding the underlying robbery, together with the hearsay statements of Ashley W. and your Petitioner to Elizabeth McClain, the only "evidence" presented by the State in support of its Motion to Transfer Petitioner's case to adult criminal jurisdiction are assertions that he spent some money on certain purchases in December, 2010 (at a time when the State's evidence established he had been earning money working for the victims' kennels). None of the victims could provide any identification of the robbers and the police investigation discovered no evidence indicating the identity of the robbers.

Your Petitioner asserts that there was wholly inadequate evidence from which the Berkeley County Circuit Court, Sitting as a Juvenile Court, could validly find there was sufficient probable cause upon which a legitimate transfer of Petitioner's case to the adult criminal jurisdiction of such circuit court. Consequently, your Petitioner asserts that it is clear that this Supreme Court of Appeals should hold that the trial court clearly committed error in effecting the transfer of Petitioner's case to adult criminal jurisdiction and that his subsequent conviction must be reversed.

The standard of proof applicable to a decision to transfer a juvenile case to the adult criminal jurisdiction of a circuit court, pursuant to W.Va. Code § 49-5-10, is well-established; namely, that the foundation for such a transfer must be grounded upon probable cause that the accused committed the charged crime. Specifically, "[P]robable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the *facts* and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it." Syl. Pt. 1, Moss, in Interest of, 170 W.Va. 543, 544, 295 S.E.2d 33, 35 (1982). *See also* State ex rel. Cook v. Helms, 170 W.Va. 200, 292 S.E. 610 (1981); In re E.H., 166 W.Va. 615, 276 S.E.2d 557 (1981); State v. Sonja B., 183 W.Va. 380, 395 S.E.2d 803 (1990) Furthermore, this Honorable Court has made it

abundantly clear that W.Va. Code § 49-5-10(d) “requires the circuit court (sitting as a juvenile court) make an independent determination of whether there is probable cause to believe that a juvenile has committed one of the crimes specified for transferring the proceeding to criminal jurisdiction.” In re Moss, *supra*, 170 W.Va. 544, 295 S.E.2d 35 Syl. Pt.4, quoting Syllabus, In re Clark, 168 W.Va. 493, 285 S.E.2d 369 (1981).

Of particular importance in the instant case is this Court’s consistent position that “the probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence.” Syl. Pt. 3, In re Moss, *supra*; In re S.M.P., 168 W.Va. 626, 285 S.E.2d 408 (1981). In all of the foregoing cases this Honorable Court concluded that the errors by the trial court required reversal of the subsequent adult jurisdiction convictions.

In State v. Largent, 172 W.Va. 281, 304 S.E.2d 868 (1983), this Supreme Court of Appeals noted that “mere conclusory statements by witnesses, without going into the circumstances of the crime which would link the juvenile to its commission, cannot be the basis for a finding of probable cause.” *Id*, 172 W.Va. at 283, 304 S.E.2d at 870. In the face of no valid evidence of the defendant’s involvement with the charged offenses, again this Honorable Court reversed the subsequent adult criminal jurisdiction conviction. Even in the case of Stephon W., Matter of, 191 W.Va. 20, 442 S.E.2d 717 (1994), where the defendant juveniles had confessed to the involved murder, because the State did not present admissible proof at the Transfer Hearing, and even though the judge at the hearing had conducted the Preliminary Hearing and heard the presentation of the State’s evidence, this Court reversed the conviction due to the absence of a valid foundation for an independent determination of probable cause at the Transfer Hearing. In its discussion of the process, the Court noted that the transfer of a juvenile to adult criminal jurisdiction under W.Va. Code § 49-5-10 is a matter of substantial gravity because if the transfer is made, the juvenile loses the beneficial protection of our juvenile laws and is treated the same as an adult criminal. *Id*, 191 W.Va. at 23, 442 S.E.2d at 720. Clearly, therefore, rather than being treated as some inconsequential, routine proceeding, the Supreme Court of Appeals of West Virginia considers the transfer of a juvenile to adult criminal jurisdiction to be a matter worthy of high scrutiny. Unfortunately, as has all too often been

found, as with Petitioner's case, the transfer hearing process is treated by the State and trial courts as an endeavor where the easiest and most convenient manner of presenting evidence if permitted.

Your Petitioner asserts that the case of Anthony Ray Mc. In Interest of, 200 W.Va. 312, 489 S.E.2d 289 (1997), wherein this Honorable Court provided exhaustive analysis and guidance with respect to the presentation and admissibility of confessional hearsay testimony of "unavailable" co-conspirator witnesses' self-serving statements to the police about the defendant's purported involvement in the alleged criminal offense, is particularly applicable to this appeal. Essential to the Court's analysis was the over-lapping issues of exceptions to the hearsay rule versus the Confrontation Clause of the Constitution. As the Court noted, in the case of State v. James Edward S., 184 W.Va. 408, 400 S.E.2d 843 (1990), Justice Miller specifically cautioned that merely because a hearsay exception allows the introduction of evidence, the Confrontation Clause question is not necessarily resolved. Indeed, the Court reiterated that while the hearsay rules and Confrontation Clauses tend to protect similar values, it is essentially critical to not consider them to be the same. In other words, it is necessary to recognize that the Confrontation Clause bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. In its analysis of these, sometimes, competing standards, this Honorable Supreme Court incorporated its prior decision in State v. Mason, 194 W.Va. 221, 460 S.E.2d 36 (1995), in which it clearly articulated that two separate analysis are generally necessary to satisfy the admissibility requirement of out-of-court statements... one pursuant to Rule 804(b)(3) and one under the Confrontation Clause.

Upon conducting its analysis pursuant to Rule 804(b)(3), the Court concluded, "[i]n the final analysis, by restricting statements to those that are self-inculpatory and excluding all other non-self-inculpatory statements, we are permitting Rule 804(b)(3) to fulfill its intended purpose. That purpose does not include permitting the rule to be twisted out of recognition. Anthony Ray Mc., *supra*, 200 W.Va. at 322, 489 S.E.2d at 299. '[C]ourts are not justified in admitting self-serving statements merely because they accompany [against penal interest] statements, and a neutral collateral statement should fare no better.... [I]t would be more reasonable to confine the use of statements against interest in all cases to the

proof of the fact which is against interest, since the reliability of other parts of the statement is conjectural.” *Id.*, quoting Jefferson, “Declarations Against Interest,” 58 Harv. L.Rev. at 60-62.

Consequently, in reversing and remanding the case, this Honorable Court mandated that the circuit court redact and exclude from evidence all hearsay statements which were not against the declarant’s penal interests, including statements collateral to any self-inculpatory statements. Accordingly, your Petitioner asserts that the application of such a process to the evidence presented at his Transfer Hearing must result in a comparable holding. In the absence of the hearsay testimony of Lt. Harmison of the statements attributed to Ian Derr and the uncharged co-conspirator juvenile, Ashley W., which was the only evidence of any nature which directly implicated Petitioner’s involvement with the underlying charges, the Juvenile Court was left with only the testimony of the victim/eye-witnesses, who could provide no real identification of the robbers whatsoever; an utter absence of physical evidence from the crime scene regarding the identity of the robbers, and some testimony that the Petitioner spent money in the month of the robbery. While his alleged expenditure of money *may* be considered to be “suspicious,” it must be found to fall far short of the legal standard of “probable cause” of a crime, especially when the State’s witnesses had established that Petitioner had been employed and earned money for months prior to the underlying robbery. Thus, there should be little question that the instant Juvenile Court’s finding of fact and conclusions of law justifying the transfer of the charges then pending against Petitioner to the adult criminal jurisdiction of the Berkeley County Circuit Court was clearly wrong and against the plain preponderance of the evidence and, therefore, must be reversed.

Your Petitioner believes and asserts, however, that the case of Anthony Ray Mc. provides a second basis for the reversal of his conviction by the Berkeley County Circuit Court, due to wholly insufficient valid findings of fact and conclusions of law to justify the transfer of his charges to adult criminal jurisdiction of said court. In said case, this Court noted that the Supreme Court of Appeals of West Virginia had not previously established a bright line test regarding invocation of the privilege against self-incrimination. In adopting the requirement for such test, the Court, essentially, adopted the test ascribed by Professor Cleckley in his Handbook on Evidence, §5-2(D)(1)(d), at 508-509. In

determining the “unavailability” of a witness, the lower court must follow a multi-step process in order to conclude that the privilege against self-incrimination supports a finding of “unavailability” of a witness.

Since the Berkeley County Circuit Court, Sitting as a Juvenile Court, undertook no such stepped process and merely “accepted” representations that the anticipated invocation of the right of self-incrimination made both the uncharged co-conspirator juvenile, Ashley W., and Ian Derr “unavailable,” which scenario was actively “orchestrated” by the State with regard to the uncharged juvenile, there should be little question that the instant Juvenile Court’s finding of fact and conclusions of law justifying the transfer of the charges then pending against Petitioner to the adult criminal jurisdiction of the Berkeley County Circuit Court was clearly wrong and against the plain preponderance of the evidence and, therefore, must be reversed.

Indeed, even a cursory review of the transcript of Petitioner’s Transfer Hearing pertaining to these witnesses clearly establishes that the State was merely creating a scenario whereby it could implicate Petitioner with the underlying crimes through the hearsay testimony of Lt. Harmison attributable to them, without such statements being subject to Petitioner’s right of confrontation. Therefore, your Petitioner asserts that any and all hearsay statements attributed to Ian Derr and the uncharged co-conspirator juvenile, Ashley W., based upon the Juvenile Court’s conclusion as to them being “unavailable” must be excluded. In light of the fact that such statements provided the only evidence which directly implicated Petitioner with the underlying charges, your Petitioner asserts that there should be little question that the instant Juvenile Court’s findings of fact and conclusions of law justifying the transfer of the charges then pending against Petitioner to the adult criminal jurisdiction of the Berkeley County Circuit Court were clearly wrong and against the plain preponderance of the evidence and, therefore, must be reversed.

Finally, your Petitioner asserts that the more recent case of State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006), albeit not involving the issue of hearsay evidence in a Juvenile Transfer Hearing, is supportive of the exclusion of the hearsay testimony of Lt. Harmison attributable to the uncharged co-conspirator juvenile, Ashley W., and Ian Derr. Since the questioning or interrogation of

such witnesses was not related to any emergency circumstance and can only be construed as being intended for use in conjunction with subsequent criminal prosecution, this Honorable Court's analysis therein and application of holdings of the U.S. Supreme Court with regard to the application of the Confrontation Clause to hearsay testimony, the hearsay testimony of Lt. Harmison must be excluded. Again, in the absence of this "evidence," there was wholly insufficient evidence implicating your Petitioner with the charged offenses to support their transfer to the adult criminal jurisdiction of the Berkeley County Circuit Court. Consequently, his resulting adult conviction must be reversed and remanded.

II. THE BERKELEY COUNTY CIRCUIT COURT COMMITTED MULTIPLE ERRORS, IN VIOLATION OF W.VA. CODE § 49-5-13(e), AND BOTH THE CONSTITUTIONS OF WEST VIRGINIA AND THE UNITED STATES, WITH REGARD TO ITS IMPOSITION OF A DETERMINATE SENTENCE OF FORTY (40) YEARS UPON PETITIONER.

Next, your Petitioner asserts that Berkeley County Circuit Court's imposition of a forty (40) year determinate sentence, for the crime of aggravated robbery, but in which no actual physical injury was involved, upon Petitioner for his initial criminal act and its failure to fully consider sentencing him as a juvenile pursuant to W.Va. Code §49-5-13(e.), provides a clear case of abuse of judicial discretion which rises to the level of constitutional impropriety. Such an abuse of discretion is especially egregious when said court subsequently assigned the adult co-defendant, Ian Derr, to the Anthony Center, a facility for youthful offenders. By such disparate action, Ian Derr may be placed upon probation after completion of the program there (for as little as six months but not more than two years); despite the fact that the adult defendant was the robber in possession of, and using, an actual firearm during the commission of the underlying offense; as opposed to Petitioner being in possession of a "pellet pistol." (Although Petitioner accepts the decisions of this Honorable Court that have upheld convictions of "aggravated" or "first degree" robbery under such circumstances and does not attack the legal propriety of his conviction on such grounds, the comparative distinction is considered worthy of consideration for sentencing purposes, especially when such disparate sentencing is present as between Petitioner and Co-

Defendant Derr.) Comparing the State's position at the respective sentencing hearings, where the State opposed consideration of a youthful offender assignment for Whetzel because his imprisoned parents never learned a lesson and didn't think he would either, but acquiesced that Derr, who the Prosecutor well knew and even vouched that he came from a "good family," and said that "I can't honestly look at the court, as I did with the codefendant and believe he doesn't have a shot because he does...." is truly a "night and day" result.

The court's reception was as equally disparate as its treatment of the two co-defendants. Despite the Petitioner being only 16 years of age when he committed his *first* criminal act [but still eligible for assignment pursuant to W.Va. Code § 25-4-6, State v. Turley, 177 W.Va. 69, 350 S.E.2d 696 (1986)], only seventeen when sentenced, and who must survive ten (10) years of imprisonment with "hardened," violent criminals before he is even eligible for parole, the court disregarded all mitigating factors in his life, the fact that he accepted responsibility for his misconduct and expressed regret and remorse for his actions (although not as eloquently as Mr. Derr), and solely focused on the negative aspects of his case. With regard to Mr. Derr, however, and in response to the State's different attitude, the court disregarded that Mr. Derr, who DID have a prior criminal record, albeit minimized by the State and court, and the fact that all of his actions in the offense were, at least, as culpable as your Petitioner, the court chose to focus on its ability to discern the sincerity of his remorse by virtue of his demeanor and the look on his face when the victim was speaking, as justification for allowing this bright, strapping, adult of 22 years a chance to redeem his life through the benefit of a center for housing youthful offenders, i.e., the Anthony Center. Therefore:

a. The Berkeley County Circuit Court abused its discretion by failing to make findings as to the possibility of the rehabilitation of Petitioner or to fully consider sentencing Petitioner pursuant to the authority of W.Va. Code § 49-5-13(e).

During the sentencing hearing for your Petitioner, the lower court was presented with the testimony of Patrick H. Futrell, a Diversion Officer for the 23rd Judicial Circuit Probation Department and in which capacity he supervised your Petitioner as a "status offender" prior to his commission of the

underlying offenses. Based upon his involvement with your Petitioner and his knowledge of Petitioner's background life, he related Petitioner's "nightmare" childhood, where he suffered intense physical and mental abuse by his career criminal, drug and alcohol addicted, and in the case of his father, violent parents. When your Petitioner was but a fetus, his mother intensely abused both alcohol and drugs, causing unknown impact upon him psychologically. In fact, when he was merely little more than a toddler, his parents would place him through open windows of homes and order him to open the door so they could burglarize it. Additionally, your Petitioner's step-father was physically violent and abusive towards Petitioner and his sisters, including Petitioner experiencing the sexual assault of a sister by the step-father while being too young to intervene. Officer Futrell further related Petitioner's history of psychological issues, including self-mutilation (cutting) and multiple suicide attempts, as well as Petitioner having been diagnosed with bi-polar condition. Officer Futrell also opined that, although he had no financial capacity to have Petitioner professionally evaluated, he suspected that he has diminished capacity and is unduly influenced by others... a follower, not a leader. Consequently, he opined that assignment of your Petitioner to a center for youthful offenders, i.e., The Anthony Center, would be an appropriate effort at rehabilitation of your Petitioner.

In contrast, the State suggested that your Petitioner's expressed remorse for his misdeeds was unworthy of belief because she had heard the same from his parents (and yet his recidivist, violent criminal father is only serving a 20 year sentence for aggravated robbery) and that he should be sentenced to forty (40) years incarceration, in order to ensure he would serve, at least, twenty (20) years... during which time he could obtain "a GED...(and) give him his career...(and) make him better if wants it."

Despite being aware of the Petitioner's nightmare childhood and apparent significant psychological conditions (which had not been adequately addressed and treated by "the juvenile system"), the Honorable Judge Gina M. Groh focused on Petitioner having "started his adult criminal record (at 16) at the very top with a first-degree robbery," and concluded that "no sentence other than a sentence of incarceration would be appropriate in this case." In justifying Petitioner's sentence, Judge Groh focused on the circumstances of the offense, the severity of the offense, the impact upon the victims, the Court's

concern with protecting the safety of the community and “the fact that he was already in the system and had been in the system (as a status offender only) at the time he committed the offenses. Judge Groh also expressed that assignment to the Anthony Center would not reverse such a trend and that it would jeopardize the safety of the community and the victims; and that “any benefit he could receive at the Anthony Center can best be accommodated from the penitentiary system.” Apparently, Judge Groh does not appreciate the significance of W.Va. Code § 49-5-13(e), upon which “safety valve” this Supreme Court of Appeals concluded that the mandatory transfer provision of W.Va. Code § 49-5-10, which served as the basis for Petitioner’s transfer from juvenile jurisdiction, did not unconstitutionally divest and deprive a circuit court of its ability to meaningfully consider and weigh personal factors going to the suitability and amenability of a juvenile for the rehabilitative purposes of the court’s juvenile jurisdiction and which authorizes a juvenile’s return to juvenile jurisdiction after conviction as an adult. State v. Robert K. McL., 201 W.Va. 317, 496 S.E.2d 887 (1997). It further appears that Judge Groh neither recognizes the intent of the West Virginia Legislature in its authorization of the Centers for Housing Youthful Offenders, which is consistent with the long-standing approach of West Virginia to focus on the rehabilitation of juvenile offenders; nor the perspective of this Honorable Court with regard to the rehabilitative purpose of such statute expressed in its decision in State ex rel. Hill v. Zakaib, 194 W.Va. 688, 461 S.E.2d 194 (1995). *See also* State v. Turley, *supra*; and State v. Ball, 175 W.Va. 652, 337 S.E.2d 310 (1985).

Your Petitioner offers that such a biased and unenlightened evaluation of the potentiality of rehabilitation through alternative sentencing opportunities provided by the State, which have been held by this Honorable Court to apply even in a case of homicide, State v. Ball, *supra*, would be merely sad, but for the fact that when sentencing Petitioner’s adult co-defendant, Ian Derr, for the SAME offenses; with the SAME circumstances; the SAME severity; the SAME impact upon the victims; and, apparently, despite the SAME concern for protecting the safety of the community and the victims, but without anywhere close to a similar “nightmare” of a childhood, Judge Groh, in accordance with the acquiescence of Prosecutor Pamela Games-Neely (which could be considered to be a result of her long personal

acquaintance with Ian Derr and his family), determined that Ian Derr was worthy of assignment to the Anthony Center! Your Petitioner must strongly assert, therefore, that Judge Groh's failure to fully consider sentencing of Petitioner under W.Va. Code § 49-5-13(e) and to a center for housing youthful offenders, or even to order that Petitioner be psychologically and mentally evaluated before imposing sentence, especially in light of the clear indication of unresolved questions pertaining to such factors and his involvement in the instant offenses, must be held to be a clear and unacceptable abuse of judicial discretion that mandates reversal and remand.

b. The Berkeley County Circuit Court committed error of constitutional magnitude by its imposition of a sentence on Petitioner that is grossly disproportionate to that imposed by the same court and same judge upon Petitioner's adult co-defendant convicted of the identical offenses and upon identical factual circumstances.

On December 9, 2010, when Ian Michael Derr was a legal adult and your Petitioner was 16 years of age, and while Derr was armed with a 40 caliber handgun and Petitioner had a pellet pistol, they robbed the home of Deborah Beckman. After investigation by the Berkeley County Sheriff's Department, Derr was arrested and charged with three (3) felony counts, including "aggravated" or "first degree" robbery; similarly, Petitioner was detained and a juvenile petition was filed against him alleging the same felony offenses. In due course, both co-defendants entered into plea agreements with the State, the only distinction being that Derr entered a plea of guilty while, due to his counsel's request, Petitioner entered a plea of *nolo contendere*. The Berkeley County Circuit Court, by the Honorable Gina M. Groh, imposed a sentence on Petitioner of not less than one, but no more than fifteen years in prison on the burglary conviction; and for first-degree robbery, forty (40) years in prison, with the sentences to run concurrently. For the same offenses, Judge Groh afforded Derr the opportunity to redeem his life through successful completion of a youthful offender program at the Anthony Center.

Despite their identical criminal conduct (except that Derr had a real firearm); the fact that Derr was an adult at the time while Petitioner was a 16 year old juvenile with no prior criminal record; and the fact that Petitioner not only had suffered an acutely abusive and damaging childhood but also was diagnosed with a psychological disorder and had a history of self-mutilation and multiple suicide

attempts, Judge Groh determined to assign Ian Derr to a Center for Housing Youthful Offenders, i.e., the Anthony Center; but refused to assign your Petitioner there. Consequently, while his, at least, equally culpable adult defendant will be eligible for probation upon successful completion of the program which could last not less than six (6) months nor more than two (2) years, your 17 year old Petitioner will have to *survive*, at least, ten (10) years of incarceration with hardened, violent criminals, many of whom will be recidivists, before he will be eligible for parole and could conceivably serve twenty (20) years before discharging his sentence, provided he does not lose any good time reduction. Such a disparity in sentencing by a trial court under the circumstances presented in the instant case should and can only be construed as a gross abuse of discretion that rises to the level of an unconstitutional sentence.

Petitioner recognizes that this Court, in State v. Buck, 176 W.Va. 505, 508, 361 S.E.2d 470, 473 (1987), stated “[d]isparate sentences for codefendants are not *per se* unconstitutional. Courts consider many factors such as each codefendant’s respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, *age* and *maturity*), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.” *E.g.*, People v. Godinez, 47 Ill. Dec. 311, 92 Ill. App. 3d 523, 415 N.E.2d 36 (1980); People v. Catalano, 101 Misc.2d 436, 421 N.Y.2d 310 (1979). Although in Buck (the Court’s third consideration of sentencing in the case), evaluation of the enumerated factors persuaded this Honorable Court that the disparate sentences between Mr. Buck and his codefendant were justified on the grounds that Buck was the one who severely beat the victim with a tire iron, the codefendant attempted to prevent the beating, and that the codefendant had pled guilty and testified against Buck... despite the similarities in their juvenile and adult records. Your Petitioner most strongly asserts, however, that application of the enumerated factors to the circumstances of this case, at worst, do not provide a foundation of justification for such disparate sentences. Application of such factors to the Petitioner’s and Derr’s cases should be expected to result in just the opposite conclusion and warrant a lesser sentence for Petitioner. Similarly, Petitioner asserts that the factors which led this Honorable Court to reject an argument of disproportionality of sentences between co-defendants in the case of State v. Booth, 224

W.Va. 307, 685 S.E.2d 701 (2009) are wholly absent from the circumstances of this case and that application of the Court's evaluation process in affirming the disparate sentences of the codefendants in that case can only lead to the opposite conclusion in the instant case.

Smoot v. McKenzie, 166 W.Va. 790, 277 S.E.2d 624 (1981) is often cited as standing for this Court's recognition that disparate sentences of codefendants that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates the West Virginia Constitution, which specifically includes the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the U.S. Constitution. Consequently, in State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Honorable Court concluded that the 19 year old's sentence of forty-five years for robbery, in which the victim was somewhat battered, was so disproportional to his co-defendant's one (1) year sentence in jail for a plea to petit larceny as to be an affront to its sensibilities and contrary to the principle of proportionality as to demand correction. Indeed, the Court stated that it was so offensive and a clear violation of the subjective test of disproportionality, i.e., that it "shocks the conscience," and did not even require consideration under the objective Wanstreet test. Under a comparable analysis, Petitioner asserts that in light of the fact that his adult codefendant can anticipate being placed upon probation in no more than two (2) years of placement at the Anthony Center, the fact that your 17 year old Petitioner, who had no prior criminal record, will have to *survive* from ten to twenty years of incarceration with hardened criminals cannot pass any reasonable standard for fair and humane treatment and must be held to be so offensively disparate as to violate the proportionality requirement of the West Virginia Constitution and requires its reversal.

c. The Berkeley County Circuit Court committed Constitutional error by imposing a sentence so excessive for the circumstances of the case as to mandate being held to be "cruel and unusual."

It is well recognized that a large number of appeals have been heard by the Supreme Court of Appeals of West Virginia which, at least in part, were grounded upon claims of long sentences being imposed by the trial courts amounting to "cruel and unusual" punishment in violation of Article III,

Section 5 of the West Virginia Constitution requirement for sentences to be “proportionate to the character and degree of the offense,” which section incorporates what has been implicitly held to exist under the Eighth Amendment to the U.S. Constitution. A considerable number of these appeals have involved extended sentences imposed upon individuals convicted of “aggravated” or “first degree” robbery.

Petitioner acknowledges the many appeals where this Honorable Court has held that the appealed sentences were NOT sufficiently “disproportionate” to the character and degree of the offense(s) as to amount to constitutionally prohibited “cruel and unusual” punishment. See State v. Brown, 177 W.Va. 633, 355 S.E.2d 614 (1987); State v. Glover, 177 W.Va. 650, 355 S.E.2d 631 (1987); State v. Spence, 182 W.Va. 472, 388 S.E.2d 498 (1989); State v. Ross, 184 W.Va.579, 402 S.E.2d 248 (1990); State v. Phillips, 199 W.VA. 507, 485 S.E.2d 676 (1997); State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999); State v. Williams, 205 W.Va. 552, 519 S.E.2d 835 (1999); State v. Adams, 211 W.Va. 231, 565 S.E.2d 353 (2002); State v. Johnson, 213 W.Va. 612, 584 S.E.2d 468 (2003); State v. Booth, 224 W.Va. 307, 685 S.E.2d 701 (2009); and State v. Minnick, No. 11-0563 (W.Va. 2/14/12). Your Petitioner asserts, however, that there are recognizable common factors present in those cases which are not consistent with the circumstances of his case. Namely, (1) the defendants in such cases had an extensive criminal record and/or were already on parole for a felony conviction, and in the case of juveniles, usually involved prior offenses of a violent nature; (2) the aggravated robbery charges were in combination with other serious felony offenses, i.e., kidnapping, 1st degree sexual assault; or the defendants were deliberately preying on the elderly or helpless; or (3) the circumstances involved actual physical violence, often of a severe nature and with significant injury to victims and even death, or, a high potential risk of harm (actually discharged firearms, kidnapping, flight from police, dangerous driving, etc.)

On the other hand, we present your Petitioner, who, at the time of the offense was only 16 years of age; had no prior criminal record whatsoever; and whose only prior involvement with the juvenile system was as a “status offender” in conjunction with a petition initiated by his grandmother/adoptive mother as a means of trying to gain control of him, due to his failure to take his psychological

medications and general “rule-breaking.” Additionally, although Petitioner acknowledges that there is an inherently “violent nature” in the display of a firearm during the commission of a robbery, particularly in the victim’s home, it must be noted that there was no physical harm to any victim or even testimony of any physical touching of any victim; and absolutely no discharge of any weapon during the commission of the crime. Furthermore, although of “anecdotal” value only, it is not considered inconsequential that the Berkeley County Prosecutor, who brought the criminal history of Petitioner’s parents into Petitioner’s sentencing hearing as part of the justification for his sentence, and asked the Berkeley County Circuit Court, and received a sentence of FORTY (40) YEARS of incarceration in the West Virginia Penitentiary on this 17 year old first time offender, had only sought and successfully had a court impose a sentence of Twenty (20) years on his recidivist, violent father for an aggravated robbery understood to have involved actual physical violence. Surely, the sins of the father (or parents) should not be visited up on, and relevant to a first offense of, the son. Finally, as addressed by Diversion Officer Patrick Futrell, there can be little question that your Petitioner suffered a simply horrendous childhood at the hands of alcohol and drug addicted parents, and step-parents, who were psychologically abusive and physically violent, or worse with regard to the step-father, with their children. Indeed, your Petitioner was subjected to forced involvement with burglaries when he was a mere toddler and subjected to the distress of watching his parents steal from his grandmother, as well as being subjected to the practice of receiving Christmas presents... only to have his parents take them away from him and his siblings so they could return them and obtain cash refunds. While we cannot fathom the devastatingly negative impact of such experiences on a small child... there is no denying that your Petitioner suffers from significant psychological disorders, including having been diagnosed with “bi-polar disorder,” subjecting himself to “self-imposed cutting,” and multiple attempts at suicide.

As this Honorable Court has reflected, in another case involving the horrendous childhood circumstances of the defendant, “[w]e have noted that the law treats juveniles differently than others. “From the earliest times infants were regarded as entitled to special protection for the State. “” State v. Arbaugh, 215 W.Va. 132, _____, 595 S.E.2d 289, 293-94 (2004), quoting State ex rel Garden State

Newspapers, Inc. v. Hoke, 205 W.Va. 611, 618, 520 S.E.2d 186, 193 (1999). This Court has also recognized “[w]e have also articulated the duty we have as a Court to those society might choose to forget or ignore, [p]risoners are no one’s constituents and wield little, if any, political clout. Consequently, society frequently forgets about, or even ignores these people, its unfortunate charges. It is therefore incumbent upon this Court ever to be vigilant in the protection of their legal rights.” Arbaugh, supra, 215 W.Va. 132, _____, 595 S.E.2d 289, 294, quoting State ex rel. Riley v. Rudloff, 212 W.Va. 767, 779, 575 S.E.2d 377, 389 (2002).

Consequently, your Petitioner urges this Honorable Court to apply the same reasonable analysis to his case as was applied to the following cases wherein the Supreme Court of Appeals of West Virginia held that the sentences imposed were so excessive, under the circumstances of the case, as to be clearly disproportionate to the character and nature of the crime and, therefore, the prohibition of the U.S. and West Virginia Constitutions’ to “cruel and unusual” punishment required that such sentences must be reversed and remanded... often with instructions as to a fair and reasonable sentence.

Indeed, in State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Honorable Court concluded that a 48 year sentence for aggravated robbery imposed upon a 19 year old defendant, where there was no serious or permanent injury to the victim, only a minor prior arrest record, and an obvious need for guidance and structure in the defendant’s life was unjustified and reversed it. Although the Court considered the applicable two-prong test for determining the existence of disproportionate sentencing, namely, a subjective “shocks the conscience” standard and the objective Wanstreet test, it concluded that under such circumstances a 48 year sentence “is so offensive to a system of justice in which proportionality is constitutionally required that we need not even reach the objective Wanstreet test.” *Id.*, 172 W.Va. at 272, 304 S.E.2d at 857. Petitioner asserts that application of such an analysis to the case at hand cannot reasonably lead to a different conclusion.

In the case of State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984), which involved a 23 year old defendant with a substantial juvenile record, but no adult record, and wherein the victim had been hit in the back of the head with a tire iron by the defendant during the robbery, this Court, in consideration of

the defendant's expression of remorse and the disparity of his co-defendant's sentence of one year on a larceny charge, found a 75 year sentence to be constitutionally disproportionate before affirming a resentencing of 30 years... a 60% reduction in sentence. Considering the reduced age of Petitioner, his nightmare of a life, the lack of any physical contact with the victims, let alone the complete absence of any physical injury, Petitioner asserts that constitutional proportionality must require an even greater comparative reduction in Petitioner's sentence in order to garner this Honorable Court's affirmation.

In the case of State v. Johnson, 213 W.Va. 612, 584 S.E.2d 468 (2003), this Court expressed concern for the disproportionality of a 48 year sentence imposed upon a 16 year old juvenile tried and convicted as an adult and clearly only did not reverse the sentence because the trial court had specifically committed to reviewing the sentence upon the defendant reaching the age of 18 years and the Court expressed its "confidence" that the 48 year sentence was likely to be reduced. (Since there appears to be no subsequent appeal of that case, it is presumed that the trial court did, indeed, reduce the sentence considerably upon its review thereof.)

Similarly, in the case of State ex rel. Ballard v. Painter, 213 W.Va. 290, 582 S.E.2d 737 (2003), Defendant Ballard drove two women and a man to a convenience store; while he stayed in the car, the three others went inside and robbed the store, with the use of a firearm and with the store clerk being hit in the head. The Defendant was indicted for aiding and abetting robbery, while the three were indicted on aggravated robbery charges (one of the women brandished a gun) but were allowed to plead to lesser offenses, including the gun brandisher. The male co-defendant was sentenced to 1-5 years imprisonment, which was suspended and he placed upon probation. A female co-defendant, who actually brandished the firearm, was sentenced to 5-18 years. Ballard, however, who did have an extensive prior criminal record (albeit not involving violence) was sentenced to 50 years incarceration. In consideration of the denial of his Writ of *Habeus Corpus*, wherein the disparity of his sentence was attacked, although this Court concluded that it did not "shock the conscience" because of defendant's criminal history, it did express concern that the sentence was not only disparate with his co-defendants but was disproportional because of his limited involvement in the commission of the offense. But, finding other grounds which required

reversal of the conviction and an award of a new trial, the Court concluded it need not rule on the actual propriety of the sentence.

Consequently, Petitioner asserts (and Counsel may affirmatively state that virtually every citizen with whom this sentence has been discussed has expressed shock over the duration of the sentence for a juvenile first-time offender) that a fair and reasonable consideration of the sentence imposed, under the constitutional principle of proportionality, particularly in light of the disparity of the sentence in comparison with the sentencing treatment of his co-defendant, who was, at least, equally culpable, can only lead to a conclusion of an abuse of discretion which rises to a constitutional violation by the Berkeley County Circuit Court.

Finally, as this Court has noted, disparate sentences of co-defendants that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates our constitution. See State v. Buck, 170 428, 294 S.E.2d 281 (1982); State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982); Smoot v. McKenzie, 166 W.Va. 790, 277 S.E.2d 624 (1981); and State v. Cooper, 172 W.VA. 266, 304 S.E.2d 851 (1983). While Petitioner accepts that it is firmly established that disparate sentences between co-defendants are not *per se* unconstitutional, when justified by differing involvement in the underlying offense, differing prior records, lack of remorse, and potential for rehabilitation, he believes that even a cursory review of the sentencing circumstances of his case and that of his co-defendant, Ian Derr, will clearly demonstrate that it is a gross miscarriage of justice, rising to an unconstitutional abuse of discretion by the Berkeley County Circuit Court, to deny him the same *chance* at “saving his life” by taking advantage of the rehabilitative programs, including the opportunity for real treatment of his psychological disorder(s), offered by the Anthony Center for Youthful Offenders that is being provided to his adult co-defendant, who is not believed to have anywhere close to the mitigating life factors as are present in your Petitioner.

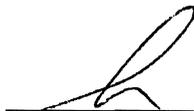
Therefore, Petitioner urges, and asserts that it would be a gross miscarriage of justice for this Supreme Court of Appeals of West Virginia to not hold that the 40 year determinative sentence imposed upon him, and the trial court’s refusal to assign him to a rehabilitative Center for Youthful Offenders,

while making such an assignment to his adult co-defendant, are impermissible abuses of discretion which must be reversed and remanded... hopefully, with instructions as to an acceptably reasonable sentence.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner believes and strongly asserts that the Berkeley County Circuit Court, Sitting as a Juvenile Court, so deeply and completely violated his constitutional rights of due process, by holding critical hearings in his involuntary absence; by failing to abide by the applicable rules of procedure with regard to acceptance and consideration of impermissible hearsay and denial of confrontation of witnesses; and by the transfer of his case to adult criminal jurisdiction upon wholly insufficient evidentiary grounds that his conviction must be reversed and remanded to the juvenile jurisdiction of the Berkeley County Circuit Court.

In the alternative, should this Honorable Court deny Petitioner's procedural claim to the propriety of his transfer from the Juvenile Jurisdiction of the Berkeley County Circuit Court to its criminal jurisdiction, Petitioner asserts that in light of his personal circumstances and no prior criminal involvement and the absence of physical injury in the commission of the underlying offense, that the trial court's imposition of a determinate sentence of 40 years for a first offender (twice that imposed by the same court on his violent, recidivist criminal father) and denial of any opportunity for rehabilitation by participation and, hopefully, completion of the programs provided by this State's Centers for Youthful Offenders, especially when providing such opportunity to his adult co-defendant, must be held to be a violation of the constitutional principle of proportionality and so disparate in comparison to his co-defendant as to mandate a holding of an abuse of discretion by the sentencing judge which requires reversal and remand of his sentence.

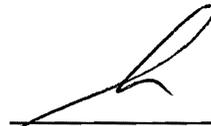


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Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of June, 2012, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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