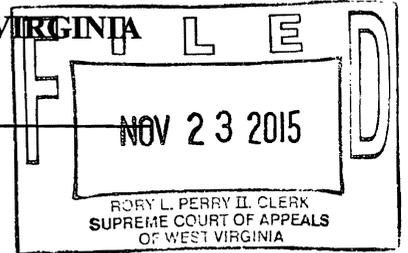

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0714



STATE OF WEST VIRGINIA,

Respondent,

v.

GERALD DOOM,

Petitioner.

RESPONDENT'S BRIEF

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ASSIGNMENT OF ERROR

Petitioner Gerald Doom (“Petitioner”) asserts a single assignment of error, which concerns the sentence he received for his felony shoplifting conviction. He contends that the Circuit Court of Braxton County abused its discretion by failing to grant his motion for alternative sentencing and subsequent decision to impose an indeterminate 1 to 10 year sentence. Petitioner alleges that the imposition of such a sentence violates the protection against “cruel and unusual punishment” provided by both the United States and West Virginia Constitutions.

STANDARD OF REVIEW

Sentencing orders are generally reviewed for abuse of discretion. *See* Syl. pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). However, a purely legal challenge, such as a question of statutory interpretation or the breadth of a constitutional command, is reviewed *de novo*. *See* Syl. pt. 1 *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995); *see also MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 714, 715 S.E.2d 405, 412 (2011)(“[C]onstitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review.”)

STATEMENT REGARDING ORAL ARGUMENT

The issue raised in Petitioner’s assignment of error is covered by settled law. The factual record is well developed in the Appendix and Supplemental Appendix, and the appropriate legal arguments are fully presented in the parties’ briefs. It is the position of Respondent that the decisional process would not be significantly aided by oral argument and that this case is suitable for disposition by memorandum decision.

STATEMENT OF THE CASE

1. Factual Background

On June 14, 2014, Petitioner attempted to steal a flashlight and three air fresheners from Fisher's Auto, a mercantile establishment in Braxton County. (Supplemental Appendix [hereinafter "Supp. App"] at 2-3). A store employee observed Petitioner put those items in his pocket as he was shopping. *Id.* The employee's explained that the flashlight turned on while it was in Petitioner's pants and the light it produced was visible through the fabric. *Id.* Petitioner was confronted by the store employee and asked to empty his pockets. *Id.* Petitioner did, producing the aforementioned items. *Id.* The employee called 911 and Petitioner was confronted by a responding officer. *Id.* Petitioner told the officer he had been in Fisher's Auto, but initially denied having shoplifted. *Id.* Several days after the incident, a criminal complaint was filed against Petitioner in Magistrate Court. (Appendix [hereinafter "App.,"] at 2). After he was subsequently indicted, Petitioner initially pled "not guilty." *See* (App. at 16-17, 18). However, following negotiations with the Braxton County Prosecutor, a plea agreement was reached. *Id.* at 23-26. Petitioner agreed to plead guilty to the shoplifting charge for which he was indicted in exchange for the prosecutor's promise that she would recommend that the sentence imposed would run concurrent to the sentence Petitioner was serving in another jurisdiction.¹ *Id.*

The incident at Fisher's Auto is not the first time Petitioner has been accused of or convicted for shoplifting. Since 2012, he has been convicted of (or pled no contest to) shoplifting four times, and at the time this incident occurred had three additional shoplifting charges pending, one

¹Respondent notes that the written plea agreement also stipulated that "[t]he State will dismiss the remaining counts in the Indictment returned against the Defendant." However, it appears that the Braxton County indictment of Petitioner contained only one count – the charge to which the Petitioner pled guilty – rendering unclear to which charges such language refers.

each in Ohio, Marion, and Harrison county. (Supp. App. at 4). Petitioner's criminal history also contains several instances of forgery, as well as a prior conviction for petit larceny. *Id.* At the time this incident occurred, Petitioner was serving a sentence of home confinement for his 2014 shoplifting conviction in Monongalia County. *Id.* at 8; *see also* (App. at 30).

2. Procedural History

The incident at Fisher's auto occurred on June 14, 2014. A criminal complaint was filed against Petitioner on June 18, 2014. (App. at 2). After being appointed counsel, Petitioner waived his right a preliminary hearing in Magistrate Court, and the matter was bound over to the Braxton County Circuit Court. *See Pet. Brief* at * 4. On February 3, 2015, Petitioner was indicted on a single felony count: Shoplifting – Third Offense. (App. at 16). At his arraignment six days later Petitioner pled “not guilty,” (App. at 18), but changed his mind after engaging in plea negotiations and he agreed to enter a guilty plea. A plea hearing was held on April 27, 2015 during which Petitioner's plea was accepted. *Id.* at 25-28.

Petitioner's sentencing hearing was held on June 22, 2015. *Id.* at 29. Petitioner moved for the imposition of alternate sentencing, and that motion was denied. *Id.* Relying on the presentence report, the Honorable Richard A. Facemire concluded that Petitioner was a poor candidate for alternative sentencing. In the sentencing order, Judge Facemire outlined the basis of his decision, stating he was “troubled by [Petitioner's] high risk of recidivism, his lack of candidness [sic] with [the] Probation Officer of this Court, his extensive substance abuse history, and the fact that [Petitioner] continues to shoplift, even after being arrested on these charges.” *Id.* at 30. He further found that “if granted probation or home confinement, [Petitioner] is highly likely to re-offend” and that “[Petitioner] is in need of correctional treatment in a correctional setting.” *Id.* Consequently, he ordered Petitioner to serve an indeterminate period of 1-to-10 years in the state

penitentiary. *Id.* That sentence was ordered to run consecutively with the sentence Petitioner was serving upon his prior Monongalia county conviction. *Id.* Other than the statutorily-mandated reimbursement to be paid to the mercantile establishment (in this case, the statutory minimum of \$50), no fine was imposed on Petitioner. *Id.*

On October 12, 2015, Petitioner filed a Rule 35 Motion for Reconsideration in Braxton County Circuit Court, which remains pending. *Pet. Brief* at * 6; *see also* (App, at 35-36). Petitioner perfected this appeal, challenging the sentencing order on constitutional grounds, on October 25, 2015.

SUMMARY OF THE ARGUMENT

Petitioner Gerald Doom is not a super-villain. He is, however, a habitual shoplifter. Since 2012 he has been charged with shoplifting on no fewer than eight (8) occasions. According to the presentence investigation report prepared in this case, Petitioner had previously been convicted of or pled guilty to five (5) such charges and at the time he was sentenced three (3) other charges were pending, each in a different county. Petitioner was even arrested on shoplifting charges less than one month after the arrest from which this case precipitates.

Petitioner pled guilty to third-offense shoplifting, a statutorily-defined felony. He does not challenge his conviction or that plea in any respect. In light of Petitioner's strong recidivist tendencies, the Honorable Richard A. Facemire determined that Petitioner was poorly suited for alternative sentencing, and imposed a sentence entirely within the parameters set by W. Va. Code § 61-3A-3, the appropriate statutory section. Petitioner challenges that sentence, an indeterminate 1-to-10 year term in prison, on the grounds that it is constitutionally disproportionate and thereby constitutes cruel and unusual punishment. It is not.

This court has previously examined the constitutional proportionality of sentences imposed under § 61-3A-3, and determined, by strong implication that, after the Legislature's 1994 Amendments permitting the consideration of alternative sentences upon a conviction for third-offense shoplifting, § 61-3A-3 is constitutional as it is currently written. This determination is consistent with this court's wider jurisprudence with respect to statutes that impose heightened penalties upon repeat criminal offenders. It also reflects the considerable deference this court has for the legislative prerogative to determine the appropriate sentence structure for criminal conduct, and the discretion afforded to sentencing judges to impose sentences within the legislatively established parameters.

Petitioner does not have a valid basis for his constitutional challenge against § 61-3A-3. Therefore, because the sentence he received was within the statutory parameters and was based on the information contained in the presentence investigation report and not any impermissible factor, that sentence is not subject to appellate review. Moreover, it is well settled that the availability of an alternative sentence is entirely within the discretion of the sentencing judge, and that the decision to forgo an alternative sentence is not an abuse of discretion. Accordingly, Petitioner's assignment of error has no merit, and his prayer for relief should be denied.

ARGUMENT

- 1) **W. Va. Code § 61-3A-3 is constitutionally valid on its face, therefore a sentence imposed that is fully within its statutory parameters cannot be a violation of the proportionality principle of either the Eight Amendment or Article III, Section 5 of the West Virginia Constitution.**

Although Petitioner nominally contends that the court below abused its discretion, the real thrust of this appeal is a constitutional challenge.² Petitioner contends that the 1-to-10 year

² As explained in section 2, *infra*, without the constitutional challenge, Petitioner has no colorable ground for review. Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 366, 287 S.E.2d

sentence he received for his third-offense shoplifting conviction constitutes “cruel and unusual punishment in violation of the Eighth Amendment . . . and Article II, Section 5 of the West Virginia Constitution.” *Pet. Brief* at * 7. Although both this court and the United States Supreme Court have recognized that a disproportionately severe sentence can violate one or both of these constitutional provisions, the statute under which Petitioner was sentenced is constitutionally valid on its face and the facts of this case clearly demonstrate that the sentence imposed is reasonable and proportionate in light of the defendant’s conduct.

Petitioner was convicted of shoplifting by guilty plea. Shoplifting is a specifically defined property crime proscribed by Chapter 61, Article 3A of the West Virginia Code. W. Va. Code § 61-3A-1 *et seq.* Article 3A contains a graduated penalty provision that escalates the punishment for repeated offenders. W. Va. Code § 61-3A-3. First-offense shoplifting is a misdemeanor with a statutory maximum sentence of 60 days in jail and a \$500 fine (plus the required reimbursement of double the stolen merchandise’s value, or \$50, whichever is higher³). W. Va. Code. § 61-3A-3(a). Second-offense shoplifting is also a misdemeanor which carries a maximum sentence of 6 months to 12 months in jail and a fine of no less than \$500. W. Va. Code § 61-3A-3(b). Imposition of the maximum penalty for either a first or second shoplifting offense requires proof that the defendant stole merchandise worth more than \$500; the penalties for “garden-variety” shoplifting of merchandise worth less than \$500 are less severe.⁴

504, 505 (1982)(“Sentences imposed by [a] trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.”).

³ W. Va. Code. § 61-3A-3(d)

⁴ No jail time can be imposed for first-offense shoplifting of merchandise worth less than \$500 – the maximum penalty is a \$250 fine. Jail time can be imposed for second-offense shoplifting of merchandise under \$500, but the maximum sentence is 6 months. The maximum fine for a second offense is \$ 500.

While the penalties for first and second offense shoplifting are comparatively mild, the penalty imposed for a third offense is ratcheted up significantly:

Upon a third or subsequent shoplifting conviction, ***regardless of the value of the merchandise, the person is guilty of a felony*** and shall be fined not less than five hundred dollars nor more than five thousand dollars, ***and shall be imprisoned in the penitentiary for not less than one year nor more than ten years. At least one year shall actually be spent in confinement and not subject to probation.*** Provided, That an order for home detention by the court pursuant to the provisions of article eleven-b, chapter sixty-two of this code may be used as an alternative sentence to the incarceration required by this subsection.

W. Va. Code § 61-3A-3(c)(emphasis added). Petitioner pled guilty to third-offense shoplifting. The circuit court's commitment order exactly tracked the language of the statute; Petitioner was sentenced to an indeterminate period of 1-to10 years in the state penitentiary. *See* (App. at 30).

“Great deference is given to the legislature's determination of what is necessary to achieve both the punitive and remedial goals served by criminal penalties. However, the legislature's powers are limited by the Eighth Amendment to the United States Constitution.” *State v. Day*, 191 W. Va. 641, 648, 447 S.E.2d 576, 583 (1994). “A criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. [Also], Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” Syl. pts. 7 & 8, *State v. Vance*, 164 W. Va. 216, 217, 262 S.E.2d 423, 425 (1980); *see also Wanstreet v. Bordenkircher*, 166 W. Va. 523, 528, 276 S.E.2d 205, 209 (1981)(stating that “[t]his principle of proportionality has been recognized in a number of our cases” and collecting authority).

In *Wanstreet*, this court articulated the objective factors⁵ that are considered⁶ during a challenge to the proportionality of a sentence. See Syl. pt. 5, *Wanstreet*, 166 W. Va at 523, 276 S. E.2d at 207. The *Wanstreet* court also held that:

While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

Syl. pt. 4, *Wanstreet, supra*. Notwithstanding *Wanstreet*'s apparent restriction of the category of sentences to which the proportionality principle readily applies, this court has overturned sentences as unconstitutionally disproportionate in various contexts outside the narrow range therein described. See e.g., *State v. David D. W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003)(per curiam)(cumulative 1,140 to 2660-year sentence for various sexual offenses); *State v. Lewis*, 191 W. Va. 635, 447 S.E.2d 570 (1994)(indeterminate 1-to-10-year sentence for third-offense shoplifting); *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983)(45-year sentence for unarmed robbery by 19 year-old). The *Lewis* decision is an important analog, as it concerned the statutory section that is at issue here. Although the outcome in *Lewis* seems, at first blush, to be

⁵ Those factors are: 1) the nature of the offense, 2) the legislative purpose behind the punishment, 3) a comparison of the punishment with what would be inflicted in other jurisdictions, and 4) a comparison with other offenses within the same jurisdiction.

⁶ This court has also recognized that some sentences are so egregiously disproportionate that no objective analysis of their proportionality is necessary. *State v. Cooper* 172 W. Va. 266, 272, 304 S.E.2d 851, 857. As the *Cooper* court explained in its fifth syllabus point:

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Id. at 267-68, 304 S.E.2d at 852; cf *Rummel v. Estelle*, 445 U.S. 263, 274 n. 11 (1980)(explaining that the “proportionality principle” would likely be implicated in an “extreme example” such as a statute which permitted a life imprisonment for overtime parking.). Respondent proffers that Petitioner’s failure to cite *Cooper* is acknowledgment that the sentence at issue here is not “so offensive that it cannot pass a societal and judicial sense of justice” and therefore not disproportionate as contemplated by *Cooper*.

favorable to Petitioner, there is a critical distinction – namely, the Legislature’s 1994 amendment of § 61-3A-3. The impact of that amendment, coupled with the logic and reasoning employed in *Lewis*, demonstrates the facial validity of § 61-3A-3 as it is currently written. Because § 61-3A-3 is constitutional on its face, a sentence that does not exceed the statutory parameters must be constitutionally valid.

In *Lewis*, this court evaluated the constitutional proportionality of a sentence identical to the one at issue here – a 1-to10-year sentence imposed upon a conviction for third-offense shoplifting. *Lewis*, 191 W. Va. at 636, 447 S.E.2d at 571. The facts in *Lewis* also bear a strong resemblance to the facts here: like Petitioner, the *Lewis* defendant had strong recidivist tendencies, *see id.* at 637 n. 2, 447 S.E.2d at 572, and was sentenced to the aforementioned period of incarceration despite having stolen merchandise worth less than \$10, *id.* at 637, 447 S.E.2d at 571-72. The legal posture is also similar: the *Lewis* defendant, like Petitioner, argued that the sentencing court had erred by “fail[ing] to consider and utilize alternative sentencing.” *Id.* at 638, 447 S.E.2d at 573; *cf Pet. Brief* at * 7. Addressing that alleged error, the *Lewis* court squarely considered the constitutionality of § 61-3A-3(c).

At the time the *Lewis* defendant was convicted, § 61-3A-3(c) contained an absolute restriction on the discretion afforded to sentencing judges. The statutory language, employing the declarative “shall,” mandated that individuals convicted of third-offense shoplifting serve an absolute minimum of one year not only in state custody, but incarcerated in a state facility. *Lewis*, 191 W. Va. at 639, 447 S.E.2d at 574-75 (referencing the statutory command that individuals convicted of third-offense shoplifting “shall be imprisoned in the penitentiary for not less than one year . . . [and] [a]t least one year shall actually be spent in confinement and not subject to probation.”). Commenting on the stiffness of the penalty imposed by this language, the

court “surmise[d] that the statute’s purpose was to create a strong deterrent against the commission of this particular crime.” *Id.* at 639, 447 S.E. 2d at 574. However, the court concluded that in its zeal to fashion a suitably coercive deterrent, the Legislature had overreached, specifically by completely foreclosing the possibility of alternative sentencing. *See id.* (explaining that by “expressly forbid[ing] the use of probation, [the statute] impliedly prohibits the use of [other] alternative sentence[s] such as home confinement.”). Taking note that some form of alternative sentencing option was available for the vast majority of crimes in West Virginia, even for offenses “viewed [by] societ[y] as warranting more severe penalties than shoplifting,” the court held that under “our holdings regarding the proportionality principle” the “penalty imposed by West Virginia Code § 61-3A-3(c) appears disproportionate in its removal of alternative sentencing from those penalties permitted for third offense shoplifting.” *Id.* at 639, 640, 446 S.E.2d. at 574, 575. This conclusion, the court noted, appeared to have already been independently reached by the Legislature, considering that the statute had been amended, in an enactment passed before the *Lewis* opinion was issued, making home detention a permissible alternative sentence for third-offense shoplifting convictions. *Id.*

Thus, *Lewis* stands for three propositions relevant to this appeal. The first is that although § 61-3A-3(c) was unconstitutional before the 1994 amendment, the amendment corrected the unconstitutionality and thereby rendered the statute facially valid. *See* Syl. pt. 5, *State v. Lewis*, 191 W. Va. 635, 447 S. E.2d 570. The second is that the obvious legislative purpose of § 61-3A-3(c)’s graduated penalty scheme is to deter serial shoplifters by imposing a significant penalty for third-offense shoplifting. *Id.* at 639, 447 S.E.2d at 574; *see also State v. Herbert*, 234 W. Va. 576, 592 n. 21, 767 S.E.2d 471, 487 (2014)(noting that “in a third-offense shoplifting charge” the presence of prior convictions “enhances the penalty for shoplifting”); *State ex rel. Chadwell v.*

Duncil, 196 W. Va. 643, 646, 474 S.E.2d 573, 576 (1996)(explaining that the purpose of a recidivist statute is deterrence). Finally, *Lewis* stands for the proposition that although constitutional principles require that some alternative sentencing option be available in third-offense shoplifting cases, the traditional discretion afforded to sentencing judges is undisturbed, and, thus, the ultimate decision concerning what sentence should be imposed is reserved for the circuit judge. *See Lewis*, 191 W. Va. at 640, 447 S.E.2d at 575 (remanding the case for “consideration of . . . alternative sentencing” unaccompanied by any order or instruction as to what sentence must be imposed)(emphasis added).

These propositions are consistent with this court’s broader jurisprudence. This court has long held that statutes which impose heightened penalties on repeat offenders are constitutional. *See e.g., Martin v. Leverette*, 161 W. Va. 547, 554, 244 S.E.2d 39, 43 (1978); *State v. Vendetta*, 86 W. Va. 186, 103 S.E. 53 (1920); *State v. Graham*, 68 W.Va. 248, 69 S.E. 1010 (1910), *aff’d*, 224 U.S. 616 (1912); *see also Justice v. Hedrick*, 177 W. Va. 53, 55, 350 S.E.2d 565, 567 (1986)(noting “[t]his Court has upheld the validity of the state recidivist statute against various constitutional challenges”); *State v. Layton*, 189 W. Va. 470, 491, 432 S.E.2d 740, 761 (1993)(a prior conviction can be used to enhance a sentence upon a criminal defendant). And this court has acknowledged that when evaluating the proportionality of a penalty imposed by a recidivist statute, the inquiry goes beyond the specific offense which led to the conviction (and recidivist-enhanced sentence); instead it necessarily involves consideration of the predicate offenses which permit the imposition of the heightened penalty. *See Wanstreet*, 166 W. Va. at 533, 276 S.E.2d. at 212. As the *Wanstreet* court succinctly explained:

We do not believe that the sole emphasis [of a proportionality assessment] can be placed on the character of the final [conviction] which triggers the . . . recidivist sentence since a recidivist statute is also designed to enhance the penalty for persons with repeated . . . convictions, i. e., the habitual offenders.

Id. Finally, this court has held on numerous occasions the mere existence of alternative sentencing options does create an entitlement to receive such a sentence, and that the decision to impose (or not impose) an alternative sentence in any particular case “is entirely within the circuit court’s discretion.” *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997); *see also State v. Shaw*, 208 W. Va. 426, 541 S.E.2d 21 (2000); *State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981); *State v. Simon*, 132 W.Va. 322, 52 S.E.2d 725 (1949); *cf* Syl. pt. 2 *State v. Shafer*, 168 W. Va. 474, 284 S.E.2d 916 (1981)(“The decision of a trial court to deny probation will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion.”).

These propositions, acting in concert, doom Petitioner’s proportionality challenge. *Lewis* demonstrates that § 61-3A-3 is constitutional as currently written.⁷ The statute’s text expressly permits the imposition of the exact sentence ordered by the circuit court. Such a penalty, as relatively harsh as it may appear devoid of context, is clearly intended to deter habitual shoplifters – and this court has long recognized the constitutionality of statutes designed to deter

⁷ It should be noted that Syllabus Five of *Lewis* explicitly states that § 61-3A-3 was unconstitutional before the 1994 amendment but does not expressly state the converse. However, as discussed above, the basis for the *Lewis* court’s holding that the section was unconstitutional was corrected by the amendment, thereby impliedly eliminating any problem. Moreover, from a practical perspective, *Lewis* represented a perfect vehicle for the court to address any structural unconstitutionality inherent in § 61-3A-3’s sentencing scheme: the value of the merchandise stolen was very low, and the remedial effort effectuated by the 1994 amendment demonstrated that the Legislature was cognizant of the potential constitutional infirmity of its prescribed sentencing structure. The *Lewis* court, had it deigned it proper, could have determined the Legislature’s remedial efforts did not do enough to eliminate any lingering constitutional concerns. The decision not to do so is telling. Moreover, it is consistent with the vast host of this court’s jurisprudence concerning the doctrines of separation of powers and judicial restraint. *Cf* Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 740, 143 S.E.2d 351, 353 (1965); Syl. pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 629, 153 S.E.2d 178, 179 (1967).

recidivism and enhance the punishment of repeat offenders. All told, there is no constitutional infirmity with Petitioner's sentence or the statute that permits its imposition.

2) The circuit court did not abuse its discretion by forgoing alternative sentencing and imposing a sentence consistent with the statutory parameters of § 61-3A-3

Having demonstrated that § 61-3A-3 is constitutional, Petitioner's claim that the circuit court abused its discretion is easily swept aside. It has been the consistent refrain of this court that, "[s]entences imposed by [a] trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 366, 287 S.E.2d 504, 505 (1982). Unless a petitioner can point to a constitutional infirmity or establish that the trial court relied on an impermissible factor, the import of *Goodnight* is crystal clear: sentences within the range permitted by the statute are valid and will not be overturned. *Accord State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995)("[W]e will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute.").

Petitioner pled guilty to third-offense shoplifting. At sentencing, the circuit court, relying upon the presentence report, took note of Petitioner's recidivist tendencies (including "the fact that [Petitioner] continues to shoplift, even after being arrested on these charges,") and imposed a 1-to10 year sentence. (App. at 30). As outlined in the previous section, the criminal statute prohibiting shoplifting allows for the imposition of such a sentence. There is no question that the presentence report can be properly relied on by a court during sentencing. *See* W. Va. Code § 62-12-7; W. Va. R. Crim. P. 32. As discussed above, Petitioner has no valid constitutional challenge. Thus, because Petitioner's sentence is based on permissible factors and fully consistent with the statutory language, it is valid. From a legal perspective, nothing further need be said.

However, Respondent would be remiss not to briefly address the policy-based arguments which constitute the primary thrust of Petitioner's argument. Petitioner concedes that the legislative intent imbued in § 61-3A-3 "is clear." *Pet. Brief.* at * 10. In Petitioner's own words:

By increasing the severity of a crime that is a misdemeanor . . . as a first offense to a felony . . . as a third offense, the legislature was attempting to deter repeat shoplifters from offending again.

Id.

Having acknowledged the unmistakable intent behind the statute, Petitioner attacks the manner by which that intent was actualized. Petitioner posits that it "seems blaringly obvious that the intent of the legislature could be carried out with a far less severe sentence," *Pet. Brief* at * 10-11, and cites *Furman v. Georgia*, 408 U.S. 238 (1972)(per curiam), for the proposition that "if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." 409 U.S. at 279 (Brennan, J. concurring)(internal citations omitted). Despite Petitioner's claim, it is not "blaringly obvious" that the threat of some lesser sentence (such as the term of home confinement prayed for in this appeal) has a comparable deterrent effect to the specter of a 1-to-10-year prison sentence. Moreover, it hardly need be said that very few people – including those in possession of a license to practice law – can recite with any considerable degree of accuracy the full range of penalties and sentences set forth for the multitude of criminal offenses contained in the West Virginia code. That reality admitted, it cannot be denied that a significant portion of § 61-3A-3's deterrent effect comes into play after an individual is charged with and faces the penalty provision set forth therein. That is, it is not unreasonable to suggest that after having served the sentence imposed in this case, Petitioner, if again seized by the desire to steal something off the shelves of a retail establishment, will harken back to his time in the state penitentiary and resist that criminal impulse. Nor is it unreasonable to suggest that the effect on

Petitioner's future behavior would be less pronounced if home confinement was substituted for prison time. Of course, this court is hardly bound by the undersigned's secondhand conjecture concerning the effects of a particular sentence on Petitioner; fortunately, the court does owe deference to, and can reasonably rely upon the conclusions reached by Judge Facemire. Judge Facemire, who interacted directly with Petitioner, heard testimony and considered all the available evidence, specifically determined that if given an alternate sentence, Petitioner was likely to reoffend. That conclusion, standing alone, should be sufficient to rebut Petitioner's contention that a lesser penalty would have the same deterrent effect as the period of incarceration provided for in § 61-3A-3. Accordingly, this court can disregard Petitioner's unsupported claim that his sentence was unconstitutional because it was greater than necessary to achieve the statutory objective of deterrence.

Finally, Petitioner attempts to demonstrate the disproportionality of § 61-3A-3 by comparing its penalty provision to penalty provisions of "numerous violent offenses" and the analogous provisions for the crimes of petit and grand larceny. *Pet. Brief* at * 11. Petitioner argues that because the West Virginia Code imposes "less severe sentence[s]" upon a conviction for such crimes, the disproportionality of the sentencing scheme of § 61-3A-3 (therefore of the sentence he received) is laid bare. *Id.* Petitioner's comparison is one of apples to oranges. While the penalty for third-offense shoplifting might be marginally⁸ more severe than the various

⁸ The sentencing structures Petitioner claims demonstrate this facial disproportionality are not all that different from the range contained in § 61-3A-3. For instance, Petitioner highlights the penalties for non-malicious assault (up to 6 months in jail) and simple battery (up to twelve months), both crimes against a person, and argues that the harsher penalties capable of being imposed for third-offense shoplifting, a crime against property, reveals a constitutional disproportionality. Petitioner fails to mention that both listed crimes are *misdemeanors*, more directly comparable to first and second offense shoplifting (also misdemeanors), which are punished by a maximum of 60 days and 12 months in jail respectively. Third-offense shoplifting is a felony, and thus the more apt comparison is to the crime of "malicious wounding" – a battery

penalties which can be imposed for these offenses, Petitioner fails to take into account that, as discussed *supra*, the punishment for third-offense shoplifting is recidivist enhanced. While the sentencing structures associated with the crimes listed in Petitioner’s brief are designed to reflect the severity of a single criminal offense, the relatively more severe penalty permitted by § 61-3A-3 is only imposed upon a showing of repeated criminality. When one makes a direct comparison between the penalties that can be imposed upon a conviction for Petitioner’s listed crimes and those for first-offense shoplifting – a direct, like-to-like comparison – faith in Legislature’s ability to create a sensible hierarchy of punishment is restored. Such a comparison reveals that the penalties that can be imposed after a conviction for each of the offenses highlighted by Petitioner are all more severe than those for shoplifting. This difference is further illuminated when one takes into account the impact of West Virginia’s general recidivist statute. *See* W. Va. Code § 61-11-18. In most cases, where an individual convicted of more than once of the offenses listed in Petitioner’s brief, the individual would be eligible for a sentence enhancement that would render the penalty for the repeated offense as great or greater than the penalty which can be imposed for third-offense shoplifting. Therefore, Petitioner’s attempt to show disproportionality by comparison actually demonstrates the opposite.

committed “with intent to maim, disfigure, disable or kill” – which is contained in the same statutory section as misdemeanor assault and battery. *See* W. Va. Code § 61-2-9. Malicious wounding, a felony, is punishable by up to 10 years in prison, unless the criminal act is done “unlawfully, but not maliciously” in which case the maximum penalty is five years. This penalty gradient – circumscribed punishment for misdemeanor conduct of the same general kind and a significantly enhanced penalty for similar but felonious conduct – is substantially similar to the penalty structure set forth in § 61-3A-3.

CONCLUSION

Neither Petitioner's constitutional argument nor his claim that the sentencing judge abused his discretion have merit. For this reason, and for all those articulated above, the court should deny Petitioner's appeal in its entirety.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0714

STATE OF WEST VIRGINIA,

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v.

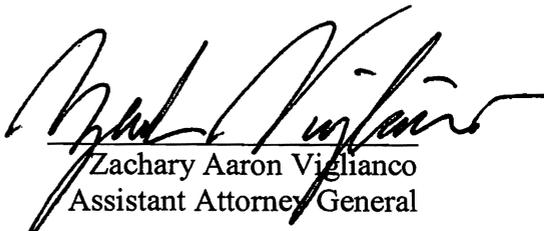
GERALD DOOM,

Petitioner.

CERTIFICATE OF SERVICE

I, Zachary Aaron Viglianco, counsel for the Respondent, do hereby certify that I caused a true copy of the foregoing *RESPONSE BRIEF* to be served on all parties and the court by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each on this 23 day of November, 2015.

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