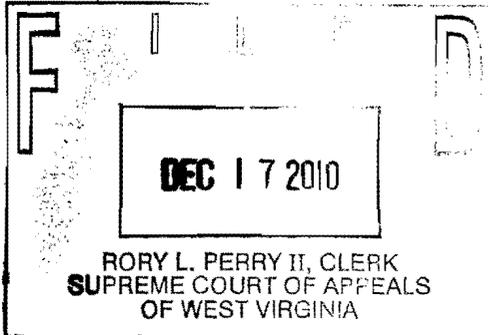


No. 35762

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

VS.

UNDERLYING PROCEEDING BELOW
CASE NO. 08-F-77-P
LOGAN COUNTY CIRCUIT COURT

STEVEN DANIELS,
DEFENDANT BELOW, APPELLANT

APPELLANT'S BRIEF

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I. PROCEEDINGS AND RULINGS BELOW

A. KIND OF PROCEEDING

This is an Appeal pursuant to Rule 37 of the West Virginia Rules of Criminal Procedure. This Brief is filed pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and briefing scheduled signed November 22, 2010 by the Office of the Clerk for the Supreme Court of Appeals of the State of West Virginia. This appeal arises from a sentencing order entered July 20, 2010.

B. NATURE OF RULINGS BELOW

The Petitioner was originally charged with multiple counts of "Third Degree Sexual Assault" (Statutory Rape) and in a separate complaint charged with Possession of Marijuana with Intent to Deliver. A plea was agreed upon and entered on or about October 6, 2008. The Defendant was sent to Anthony Center and sentencing was held in abeyance until June 30th, 2010. The Circuit Court sentenced Steven to not less than one nor more than five years in the penitentiary then imposed the 10 year enhanced supervision period which imposes the possibility of an additional ten years in prison. This is reflected in the Order entered July 20, 2010 that is subject of this appeal and attached to the original petition. Ultimately, the defendant received a suspended sentence with probation and is currently on probation and enhanced supervision so that he has two probation officers and can potentially receive the remainder of the one to five year sentence for statutory rape and the enhanced 10 year period.

The Circuit Court believed this matter should be reviewed by a higher Court relating to the Constitutionality of the Enhanced Supervision and Punishment Provisions of the Sex Offender Statute. Counsel for the Appellant originally filed this as a “Writ of Prohibition” and this Court granted appeal as a direct appeal of the July 20, 2010 Order.

II. STATEMENT OF FACTS

1. The Petitioner, Steven Daniels, pled guilty to one count of Sexual Assault in the Third Degree on October 6, 2008;¹
2. At the time of the underlying offense, Mr. Daniels was twenty (20) years old and his girlfriend was fourteen (14) years old;²
3. The nature of the relationship is reported in the Pre-Sentence Report. Although Steven and the victim/girlfriend gave somewhat different accounts of quantity of sexual encounters, it is uncontested that the two were dating and the sexual relationship between them was consensual.³
4. The girlfriend/victim has a child as result of the relationship and Steven is currently seeking authority to get a parenting plan;⁴

¹ Steven also entered a plea to possession of marijuana with intent, but that sentence is not being challenged herein.

² The original petition for writ contains a misstatement that Steven was 19, I simply did not catch the mistake until reviewing the sentencing information. We did originally attach the original sentencing order with the Petition which had the correct age in it.

³ Initially counsel started to attach the victim’s statement in this matter that was with the P.S.I. which reflects her strong love for Steven and desire to have long term relationship with Steven up until the time he was sent to Anthony Center. However, given the nature of the charge it would be inappropriate to attach the same to a public document. Counsel asks this Court to review her statement attached to the P.S.I.

⁴ The defendant was originally planning on marrying the victim. (see Transcript of April 15, 2009 hearing page 4) Time has changed Steven’s plans and counsel must advise that there is no longer any plan to marry and a parenting plan will be sought.

5. As a result, by ORDER entered July 20th, 2010 the defendant was sentenced to one to five years in the penitentiary and 10 years post release supervision which creates the potential of an additional 10 years in prison;
6. The Honorable Judge Roger Perry invited a Writ of Prohibition be filed;⁵
7. This Court directed that this would proceed as an appeal of the July 20, 2010 order pertaining to the enhanced supervision period imposed by the Circuit Court pursuant to W.Va. Code § 62-2-12-26.

ASSIGNMENTS OF ERRORS AND MANNER DECIDED BELOW

A. THE ENHANCED SUPERVISION PERIOD AND PUNISHMENT FOR SEX OFFENDERS IS CONTRARY TO ARTICLE THREE SECTION FIVE OF THE WEST VIRGINIA CONSTITUTION.

1. The Trial Court actually agreed that the matter enhanced supervision and punishment should be reviewed by the Supreme Court. The Circuit Court applied the minimum period it could apply in the case at hand.

B. THE ENHANCED SUPERVISION PERIOD AND PUNISHMENT FOR SEX OFFENDERS IS CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

1. The Circuit Judge was not clear on whether he believed there was any distinction in violation of the West Virginia Constitution but clearly agreed there was an issue with “Cruel and Unusual Punishment” and that counsel should petition for appeal.

⁵ The Court remarked that it agreed with filing an appeal (see Transcript of June 30th, 2010 hearing page 4)

IV. POINTS AND AUTHORITIES

A) Article III, Section 5 of the West Virginia Constitution prohibits Cruel and Unusual Punishment and specifically precludes Cruel and Unusual Punishment and requires that Penalties shall be proportioned to the degree of the offence.

B) The Supreme Court of Appeals of West Virginia precedent requires that sentencing which Shocks the Conscience be set aside on initial subjective analyses. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 91981), *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

C) Proportionality Review is an objective test that requires the Court to look at the following: nature of the offense; the legislative purpose behind the punishment; a comparison of the punishment with what would be inflicted in other jurisdiction; and a comparison with other offenses with the same jurisdiction. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 91981), *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

D) Review under an Eighth Amendment analyses may be under “Grossly Disproportionate” standard but the test is very similar to the West Virginia objective test. *Rummel v. Estelle.*, 445 U.S. 263, 100 S.Ct. 1133 63 L.Ed.2d 382, (1980), *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 2001, 77 L.Ed.2d 637 (1987), *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 77 L.Ed.2d 637(1987), *Graham v. Florida*, 130 S.Ct. 2011, 176 S.Ct. 2011, 176 L.Ed.2d 825 (2009)

IV. ARGUMENT
(Discussion of the Law)

A. THE SEX OFFENDER ENHANCEMENTS ARE CRUEL AND UNUSUAL ON THEIR FACE AND THE ENTIRE ENHANCEMENT PROVISIONS SHOULD BE DEEMED UNCONSTITUTIONAL.

1. The Subjective Test Established By the Supreme Court of Appeals for the State of West Virginia should require the extended supervision provisions be deemed unconstitutional.

A close look at the Sex Offender Enhancement Provisions in issue should lead to only one conclusion and that is that the enhancement provisions shock the conscience. It is undeniable that they are long reaching in punishment and extremely broad in mandatory application.

West Virginia Code § 62-12-26(a) states as follows:

Any defendant convicted after the effective date of this section of a violation of section twelve [§ 61-8-12], article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b [§ § 62-8D-1 et seq.], eight-c [§§ 62-8C-1 et seq.] or eight-d [§§ 62-8D-1 et seq.] of said chapter shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to fifty years.

The statute goes on in 62-12-26(g)(3) to say the court may:

Revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release.

The Supreme Court of Appeals for the State of West Virginia has long recognized that statutes and punishment that Shock the Conscience of the court and society should be stricken.

The test from *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983) is stated as follows:

The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass societal and judicial sense of justice, the inquiry need not proceed further.

We recognize that this Court may be reluctant to deem a penal statute shocking to the conscience that does not result in death or life without mercy or does not have an obvious open end to it, but suggest the scenario's that the enhancement provisions create should in fact *SHOCK THE CONSCIENCE* of the court and society if this Court will apply the subjective test. Counsel for the Appellant acknowledges the Supreme Court of Appeals of West Virginia has made rulings which the State may assert precludes the Court from reviewing the Statute including but not limited to *State v. Goodnight*, 169 W.Va. 366, 287 S.E. 2d 504 (1982) wherein this Court held in syllabus pt. 4 that "Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not open to appellate." However, the enhanced supervision and punishment provisions in issue are like no other West Virginia Statute before them and if this Court will look at true implementation impact of the sex offender enhancement provisions, we believe the Court will find we are correct. If we look at the case at hand it is *Shocking to Conscience* because the following scenario could easily play out: The defendant and victim had consensual sex in 2007. The supervision period of ten years began in 2010. Steven could violate in 2019

and be sentenced to 10 years in the penitentiary so that his sentence would not end until approximately the year 2024 if he discharged and didn't parole out and that is assuming "good time" credit. Paroling out could manipulate that scenario but it is nonetheless shocking to the conscience because a consensual sexual relationship is now punished by a 1-5 plus potentially 10 years and it allows the potential punishment to be drug out over a shocking amount of time. The Supervision and Penalty are locked together. The length of supervision and length of potential punishment work together. Counsel realizes that West Virginia Code 62-12-26(g)(3) allows for the Circuit Judge to impose part or all of the term of supervised release in prison, but Circuit Courts are likely to impose sentencing in the way they are accustomed which is if someone violates probation they impose the underlying sentence.

Further, since the statute must first be analyzed under the subjective shocking to conscience standard Counsel believes it appropriate to completely review the worst case scenarios that this statute allows. The Circuit Judge Could have sentence Steven or someone like Steven to a 50 year supervision period which could become 50 years in prison and the sentence could begin 50 years after the supervision period was imposed. Even a scenario of an individual committing the worst sex crime of first degree sexual assault the potential sentence is shocking to the conscience because it could easily result in the equivalent of a life sentence and likely often will because the supervision part of the statute cannot truly be separated from the potential punishment portion. A person convicted under these enhancement provisions could pull their underlying sentence then twenty years later violate and get a another fifty years.

If the Court does not deem it proper to look at worst case scenario's under the enhanced supervision provisions, the facts of the case at hand remain shocking to conscience. It should not be overlooked in the case at hand that it Shocked the judicial conscience of the Circuit Judge. When he was sentencing he stated the following in the record: **“..I’m going to sentence you to something that I don’t agree with. Which is I’m going to have to sentence you to ten years of post-release supervision that has bad consequences if you mess up.”** (See Transcript of June 30th hearing at page 5 emphasis added.) In fact a review of this file and comments by the Court can only lead to the conclusion that the Circuit Judge believed that the enhancement provisions are “Draconian” in nature and are contrary to the Constitution. We believe the Circuit Judge is correct and the Enhanced Supervision and Punishment Provisions should not stand after fair and full review. The Legislature attempted to use a shotgun approach to situations that require a scalpel and worse, they tied the Circuit Judges hands so that they also must use Shotgun Justice when they need to use a scalpel. It is a known and undeniable fact to all that routinely handle sex crimes whether in criminal context or abuse and neglect that **not everyone who commits a sex crime is a sexual predator**. The enhancement provisions eliminate a Circuit Judges ability to meaningfully separate violent sexual predators from offender who are non-predators. If these provisions in issue are left intact, Circuit Judges will be forced to ignore the individual differences in cases at impose the Draconian punishment designed to insure that sexual predators are monitored while in our communities. Monitoring true sexual predators is necessary, but can otherwise be accomplished. The appellant is asking this Court to reject the Judge Roy Bean method of justice that the Enhanced Supervision and Sentencing provisions appear to require.⁶

⁶ This is intended as reference to the infamous statement attributed to said infamous Judge of “hang them

B. THE SENTENCES IMPOSED BY THE SEX OFFENDER ENHANCEMENTS ARE NOT PROPORTIONAL TO THE CRIME CHARGED AND THUS MUST BE DEEMED UNCONSTITUTIONAL

1. If the Objective Test for proportionality review established by the West Virginia Supreme Court of Appeals is applied to the enhanced supervision provisions, then the enhanced sentence should be set aside.

If the Court doesn't think that ten years for a consensual sex crime is so obviously shocking to the conscience that the inquiry should end there, then the Constitutional Review moves to the next level of analysis which is an objective proportionality review. The Objective test was spelled out again recently in *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009) citing Syllabus pt. 5 *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)⁷

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

The West Virginia Supreme Court of Appeals has historically reviewed using the proportionality review largely in open ended sentencing scenario's. However, the sex offender enhancement statutes have totally changed sentencing on sex offender crimes in the State and effectively created the distinct possibility of double sentencing that could be the equivalent of a life sentence. In fact it is patently obvious that many people falling under this statute could be sentenced again years later when there is a different Circuit Judge, different probation officer,

all and let God sort them out." It is probably the most infamous example of the Shotgun approach to justice but it is the style of justice that we believe is happening under the enhancement provisions. Obviously, we realize no person is being subjected to the death penalty here but it does require extreme punishment for every sex offender regardless of whether he/she is a predator or not and drags the potential penalty over huge periods of time in a way unprecedented in this state.

⁷ Counsel is aware of the limitations announce on review of sentencing including Syllabus pt 4. of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981) wherein this Court held "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. However, a ten to 50 year sentence tacked onto an underlying sentence could easily put people in prison for their entire life.

different prosecutor and different defense lawyer. This level of postponed punishment is truly unprecedented in this state and the potential delayed double sentencing and real life ramifications of that should not be overlooked. The objective test should be applied.

First, the nature of the offense at hand unlike in *Booth, id* is in fact disproportionate to the nature of the offense. At its worst this was a consensual sex scenario where an older male took advantage of a young female who was not old enough to understand the ramifications of sex, and she is now left with a child to raise as a teenager. At best this was a boyfriend and girlfriend relationship known to the guardians of the victim that does not match modern perceptions of appropriate relationships but could have easily resulted in a traditional family unit, but instead resulted in a couple separated by incarceration and threat of incarceration in the future so that their relationship was doomed to failure. Either way the punishment is Draconian, shocking to the conscience and certainly far from proportional to the crime committed.

Second, the nature of the offense in issue in this case is clearly a consensual boyfriend girlfriend relationship. There is no disagreement that this was a consensual boyfriend girlfriend relationship. When representations were made by original counsel in this case about the underlying circumstances, there was no real disagreement by the State. It was presented to the Court as a boyfriend girlfriend relationship. The Pre-Sentence Report does contain differences in what the grandmother and mother said, but interestingly the grandmother was insistent that they both needed to grow up and take responsibility. There was simply nothing to convince the State or Judge that this was anything other than a girlfriend and boyfriend who were beyond the

age gap established by statute. The State did not aggressively seek anything other than Anthony Center in this case which likely had more to do with the drug charge than the sex charge.⁸

Third, the legislative purpose behind the punishment must be reviewed. The enhanced punishment provisions in issue were passed as part of the “Child Protection Act of 2006” and when passing this act, the legislature described an admirable goal of protecting children and on first blush it might appear that the provisions the appellant has challenged were designed to simply protect children.⁹ However, a more complete view of the legislative purpose can be seen in the provisions creating the public-private task force as codified in W.Va. Code § 62-11E-1(1)-(4). The language therein reflects that the legislature’s intent was to deal aggressively with “sexual predators”. The section starts off by proclaiming: “That a small but extremely violent group of sexually violent offenders exist...” and continues “That the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high.” This language is awesome for public response, but the problem with the overall changes in the sex offender laws and specifically the enhanced punishments for sex offenders is that it sweeps everyone convicted of a sex crime into a pool where some do not belong. Therefore, if the central legislative purpose is to monitor this small group of sexual predators who are likely to repeat their violent acts, this intent has nothing to do with Steven Daniels yet the statute has reached out and sucked him in against the wishes of the Circuit Judge. The Judge clearly believed that the mandatory use of the enhancement provisions in case of consensual sex defied the idea of proportionality. Frankly, it encompasses scenarios that exist in most family trees in our State and all states where marriages

⁸ The prosecutor didn’t object to Steven going to Anthony Center and didn’t give a huge summary of why he was agreeable.

⁹ The Federal Adam Walsh Child Protection and Safety Act of 2006 has similarities and probably some of the same legislative intent. However, if the intent is to more greatly punish sexually violent predators who are likely to re-offend, then that intent really doesn’t apply to Steven Daniels and the case at hand even if an analogy is drawn to the Adam Walsh Child Protection and Safety Act and the West Virginia Act.

happened with mothers at early teens 14 and 15 marrying men in there late teens and early 20s. Counsel is not suggesting that kids who are 14 -16 should not be protected, but I am saying that if you take an over all look at the legislative intent when making these new laws and creating a task force to accompany them, then these provisions were primarily aimed at violent sexual predators not a person like Steven Daniels who could have easily ended up marrying this girl, getting a job in the coal mines and having kids and grandkids had the relationship proceeded without sex until the appropriate age.¹⁰

Fourth, a comparison of the punishment for this crime in other jurisdictions also further illustrates that disproportional sentencing is caused by the enhancement provisions. Counsel acknowledges that this analysis is somewhat difficult as many of our neighboring jurisdictions use classification systems for their crimes. It appears in our surrounding jurisdictions there is significant disparity in how the Steven would have been sentenced for exactly the same offense. The range of punishments for the equivalent crime in surrounding states encompasses a one year misdemeanor sentence to a ten year felony sentence. A review of surrounding similar statutes illustrates the following potential penalties: In Virginia this crime would be a class four felony which is punishable by two to ten years in the Penitentiary. Va. Code Ann. § 18.2-10, § 18.2-63. In Pennsylvania this crime would be a second degree felony and punishable by a fixed term of not more than ten years. 18 Pa. C.S. § 3122.1, § 1103(2). In Ohio this crime would be a fourth degree felony and punishable anywhere from six months to eighteen months. ORC Ann. § 2907.04(A), § 2907.04(B)(1). In Tennessee this crime would be a Class E Felony and punishable up to two years in prison. Tenn. Code Ann. § 39-13-506(b)(1), § 40-2-101(b)(1).

¹⁰ Obviously, Steven's choice of using drugs helped land him in Anthony Center and counsel is not trying to say Steven should not have been held accountable for his acts including having consensual sex with an underage girl. However, the fact remains that it could have just as easily created a family tree that exists in many families and he simply is not a pedophile or sexually violent predator.

Interestingly, in both Kentucky and Maryland it appears that Steven would have only been convicted of a misdemeanor because the age of 21 for the perpetrator is a key separation age. Md. Criminal Law Code Ann. § 3-308(b)(3), § 3-308(d)(1), § 3-307(a)(4), § 3-307(b); Kentucky Criminal Code § 510.140(1)(2), § 510.020(3)(a), § 510.060(1)(b).¹¹

It is important to note that although the most egregious of the surrounding state sentencing guidelines do provide for the possibility of Ten year sentences, they are clearly at their worst less egregious than the scenario at hand where Steven has successfully completed the Anthony Center Correctional Center for Youthful Offenders which is a D.O.C. facility, has the remainder of a 1-3 hanging over his head, plus supervision for 10 years, plus if he violates he can get another 10 year prison sentence. Therefore, comparison and contrast can only support the overall conclusion that the sex offender enhancement provisions go far beyond any other surrounding jurisdiction in punishment for consensual sex based upon the enhancement provisions.

Fifth, we must compare the punishment for other crimes in our State. The stark contrast can be seen in a 1st degree Robbery Comparison where Judges often give the ten year minimum sentence for first time and young offenders. So for a violent, potentially life jeopardizing crime the punishment can be less than for consensual sex with a girlfriend. Similarly, Malicious Assault is a two to ten in the penitentiary which in real life application certainly can be less than a one to five followed by a ten years in the penitentiary as the supervision time followed by potential punishment is obviously greater when you consider the potential lag in punishment. Further, DUI causing Death, Manslaughter, could easily be less than what Steven Could get for

¹¹ Maryland and Kentucky each appear to recognize a difference in scenarios where the perpetrator is below age 21 and the victims are 14 and 15. This distinction recognizes the consensual interaction between males and females in the age group of 14- 20.

consensual sex in the event that he was maxed out. The undeniable reality is that intentionally violent crimes and crimes that result in death can be punished less in our State than a sex offender who had consensual sex with an underage partner and is not a violent sexual predator.

Therefore, when the objective proportionality review occurs all the following conclusions should be reached: The nature of the underlying offense was nonviolent and there is no proof in this case that Steven was a pedophile or violent sexual predator;¹² The Legislative Intent appears to have primarily been aimed at violent sexual predators and protecting children; Other surrounding jurisdictions are inconsistent in how they punish this type of crime, but overall the punishment is much more severe; and In our jurisdiction there are some violent crimes and crimes resulting in death that are now punished less severely than consensual sex with minor. Under this analyses this case should be remanded and the Enhancement Provisions in issue deemed Unconstitutional.

2. The Supreme Court of Appeals of West Virginia has examined a statute under proportionality review that was not an open ended sentencing statute or life sentence and that logic is applicable to the case at hand.

In the Case of *State v. Lewis*, 191 W.Va. 635, 447 S.E.2d 570 (1994) the now modified statute setting the punishment for Shoplifting Third came under attack by proportionality review and did not survive such amylases. At that time the Shoplifting Third statute eliminated the Circuit Judge's ability to give an alternative sentence for third offense shoplifting and mandated a minimum of one year incarceration. After applying the tests of *Bordenkircher*, id this Court stated:

¹² Reviewing the transcript of June 30th it cannot be reasonably asserted that the Circuit Judge viewed him as a sexual predator or that there was any evidence put into the record that he was sexually violent predator.

We cannot conceive of any rational argument that would justify the sentence in light of the nonviolent nature of this crime and the similar nature of the two previous crimes, unless we are to turn our backs on the command of our proportionality clause and merely conclude that regardless of the gravity of the underlying offenses the maximum life sentence may be imposed. This would ignore the rationality of our criminal justice system where the penalties are set according to the severity of the offense.

Id at 640 and 575 citing *State v. Bordenkircher*, 166 W.Va. at 537-538, 276 S.E.2d at 214.

The logic of *Lewis* should clearly apply to the case at hand because although the crime is certainly more serious than Shoplifting, it is still a nonviolent crime of consent. The Circuit Judge clearly did not believe the Enhanced Supervision and Enhanced Sentence matched the facts of the case and felt forced to apply a Cruel and Unusual Sentence.

3. Even under “grossly disproportionate” standard of the Federal Court System the enhanced supervision and punishment provisions should be deemed Unconstitutional.

It is clear after review of the series of United States Supreme Court cases on proportionality review ranging from *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382 (1980) through *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 2001, 77 L.Ed. 2d 637 (1987) to *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed. 2d 836 (1991) and *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2009) that there is disagreement among the Supreme Court Justices of the United States and the Circuits as to whether there can properly be proportionality review for any sentence less than life imprisonment without the possibility of parole. The Fourth Circuit unlike some other Circuit has consistently held that Eighth Amendment proportionality review is not available for cases other than life imprisonment without the possibility of parole. *United States v. Malloy*, 568 F.3d 166, 180 (4th Cir. 2009), *United States v. Rhodes*, 779 F.2d. 1019 (4th Cir. 1985). The Fourth Circuit has in fact interpreted *Solem* as requiring extensive proportionality review analyses only in cases involving

life without Parole Sentences. Prior to *Harmelin*, the United States Supreme Court had allowed review of sentences other than life without the possibility of parole. For example: The United States Supreme Court deemed a ninety day sentence for the crime of being addicted to narcotics a violation a violation of Cruel and Unusual Punishment. *Robinson v. California*, 370 U.S. 660, 82 S.Ct.1417, 8 L.E. 2d 758 (1962). In more recent decisions like *Harmelin* and *Lockyer* it appears that the United States Supreme Court is reluctant to use proportionality review in any but cases other than those that are capital offenses. The United States Supreme Court in *Graham* again acknowledged that they “have not established a clear or consistent path for courts to follow” in applying the highly deferential “narrow proportionality” analysis. *Graham* at 2937 and 854 citing *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S.Ct. 1166, 155 L.Ed. 2d 144 (2003). The Court went on to say again that the Eighth Amendment “does not require strict proportionality between crime and sentence” rather, “it forbids only extreme sentences that are “grossly disproportionate to the crime. *Graham* at 2937 and 854 citing *ewing* supra, at 23, 123 S.ct. 1179, 155 L.E.2d 108 (plurality opinion) quoting *Harmelin*, supra at 1001, 111 S.ct. 2680, 115 L.Ed. 2d 836 (Opinion of Kennedy J.)

Given the above cases and self acknowledged inconsistencies in United States Supreme Court decisions, counsel has to acknowledge it would be questionable whether the Enhanced Supervision and Sentencing Provisions would be scrutinized by the United States Supreme Court under Eighth Amendment Analysis and probably not by the Fourth Circuit short of a case with a life sentence or equivalent life sentence under the Enhanced Provisions. However, it is important to note that the proportionality review under the “grossly disproportionate” standard is very similar to the proportionality review that this Court has deemed proper. Actually, the test remains basically the same test over the decades. The controversy and disagreement is on

whether it should be applied to non-capital cases. To that extent Counsel believes that because the objective analysis for proportionality review and review under the “grossly disproportionate” standard is basically the same, then the result should be the same. After all the sentence under scrutiny here is a one to five year penitentiary sentence suspended after Anthony Center, then a potential ten year sentence penitentiary sentence after most of 10 years of supervision for the crime of statutory rape is in fact “Grossly Disproportionate” and should be deemed Unconstitutional even under that more stringent guideline.¹³

Finally and Fortunately, this Court obviously does not have to engage in the unclear path of the Federal System because our State Founding Fathers who drafted our Constitution clarified how to gauge what is Cruel and Unusual Punishment by stating clearly that “Penalties shall be proportioned to the character and degree of the offence.” The shotgun approach to justice for sex offenders should be rejected because it ignores that very important Constitutional Protection that is really at the heart of our Criminal Justice System. We have moved away from hanging pickpockets and locking the poor who stole food in prison. Unfortunately, with perhaps good intentions, the West Virginia Legislature has moved us back in the direction of Draconian Sentencing and Shotgun Justice at a time when our prisons are bursting at the seams and the cost to the average citizen for incarcerating their fellow citizens has accelerated at an astounding rate.

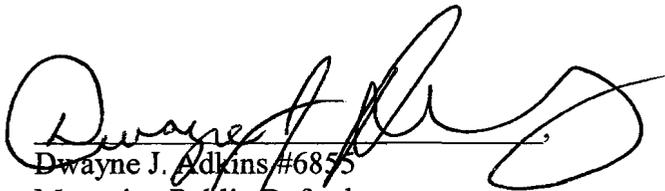
REQUEST FOR RELIEF

Wherefore, the Appellant requests that for some or all of the afore-stated reasons that this Court deem the extended supervision and punishment provisions of W.Va. Code § 62-12-26

¹³ Obviously, an Eighth Amendment analyses is applicable via the Fourteenth Amendment making it applicable to West Virginia, however, the West Virginia Constitution itself appears to give more protections on the issue of cruel and unusual punishment.

Unconstitutional due to being contrary to Article III, section 5 of the West Virginia Constitution and reverse and remand the above referenced matter so that the Circuit Judge may impose the true sentence he clearly deemed fair given the totality of the circumstances. Alternatively, the Appellant requests that this Court rule that Circuit Judges may apply proportionality analyses to cases which fall under the Sex Offender Enhancement Provisions so that they are not hamstrung into treating people like violent sexual predators who are not and for such other and further relief the Court deems just and proper.

Respectfully submitted this the 16th day of December 2010.



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Steven Daniels,
By Counsel.

No. 35762
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

VS.

UNDERLYING PROCEEDING BELOW
CASE NO. 08-F-77-P
LOGAN COUNTY CIRCUIT COURT

STEVEN DANIELS,
DEFENDANT BELOW, APPELLANT

CERTIFICATE OF SERVICE

I, Dwayne J. Adkins, Counsel for Appellant/Defendant, Steven Daniels, do hereby certify that I have this day served a copy of the attached Appellant's Brief; upon John W. Bennett, by hand delivery a true and exact copy thereof to them at the following address:

John W. Bennett
Prosecutor
Office of the Prosecuting Attorne
Judicial Annex
Logan, WV 25601

on this the 16th day of December, 2010.


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