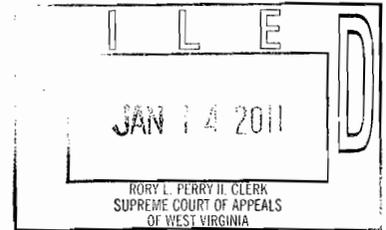


ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35762



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Appellee,*

v.

STEVEN DANIELS,

*Defendant Below,
Appellant.*

APPELLEE'S BRIEF

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*Plaintiff Below,
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STEVEN DANIELS,

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APPELLEE'S BRIEF

I.

STATEMENT OF THE CASE

The Appellant, Steven Daniels, entered into a plea agreement with the State of West Virginia and, on October 6, 2008, entered pleas of guilty to the separate felony offenses of possession with intent to deliver a controlled substance, marijuana, and to sexual assault in the third degree. (Plea Order, 47-51, Oct. 6, 2008.) In exchange for his plea of guilty to one count of sexual assault in the third degree, which was by way of information, separate offenses of approximately 47 additional counts of sexual assault, and distribution of obscene material to a minor, for which Appellant had been arrested were not pursued. (R. at 3-6.) The Appellant initially failed to appear for his original disposition on November 3, 2008, and while on home confinement awaiting disposition was believed to have violated the terms and conditions of home confinement by using cocaine. (R. at

58-69, 84-86.) On April 15, 2009, the Appellant was sentenced to the Anthony Center for Youthful Offenders. (R. at 91-93.) Following completion of the Anthony program, on June 30, 2010, the Appellant was sentenced to a indeterminate term of not less than one nor more than five years in prison for the offense of third degree sexual assault, and further sentenced to ten years post-supervisory release because of the nature of that offense. (R. at 103-05.) On August 19, 2010, the Appellant's concurrent sentences on his felony offenses were suspended, and the Appellant was placed on probation for a period of three years, with the previously noted ten-year period of supervised release pursuant to West Virginia Code § 62-12-26. (R. at 119-20.) The Appellant filed a notice of intent to appeal/seek writ of prohibition, which was granted by this Honorable Court as a direct appeal.

II.

SUMMARY OF ARGUMENT

The Appellant complains that the ten-year period of supervised release, imposed by the court pursuant to West Virginia Code § 62-2-16 is cruel and unusual punishment and violative of both the West Virginia and United States Constitutions, and that the sentence violates proportionality. The State asserts that the sentencing scheme in question, that is a period of supervised release for sexual offenders upon their release from prison or from a probationary period does not shock the conscience of the court, does not constitute cruel and unusual punishment, violates neither the West Virginia nor the United States Constitutions, and that the sentence is not disproportionate to the offense. The State asserts that the sentencing provisions enacted by the Legislature are constitutional and fall within the Legislature's prerogative to enact statutes reasonably designed to protect the public.

III.

ARGUMENT

A. THE SEX OFFENDER SUPERVISED RELEASE PROVISIONS DO NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT ON THE FACE OF THE STATUTE AND THE SUPERVISION PROVISIONS ARE CONSTITUTIONAL.

Counsel for Appellant asserts that the post-release supervision provisions contained in West Virginia Code § 62-12-26 constitute cruel and unusual punishment, and that they subjectively shock the conscience of the court and society. It is clear that a period of supervised release for a convicted sex offender, which entails little more than ensuring that the offender adheres to the provisions of the statutory scheme regarding sexual offender registration and being a law abiding citizen cannot be said to shock the conscience of the court, and certainly not the conscience of society. The legislative trends over the past 25 years have been to increase penalties for sexual offenders, and to increase post-release registration and supervision of sexual offenders released from prison in order to better protect the public by ensuring that the addresses, and other data about sexual offenders are readily available to the police and to the public. The State asserts that the post-release supervision provisions are another administrative mechanism to safeguard the public from sexual offenders, not unlike the Sexual Offender Registry provisions.

West Virginia Code § 15-12-2 provides that a person who has been convicted of the felony offense of sexual assault in the third degree must register as a sex offender at the state police detachment in the county of residence, where he owns or leases real property, the county of his or her employment, the county where he attends school and must provide at a minimum his or her full name, including aliases, nicknames and other names, the addresses where he resides and regularly visits, the name and address of the employer and anticipated future employers or places of

occupation, and the address of any school that the registrant is currently attending or expecting to attend. Also, the registrant must provide his social security number, a photograph, fingerprints, information related to any motor vehicle operated by the registrant, information as to internet accounts, telephone and paging devices. The registry is maintained by the state police and the information as to the offender's name and general location is available to the public. Pursuant to West Virginia Code § 15-12-3, a registrant must update any changes in the required information within ten business days of such change. Each separate failure to register each separate bit of information is a criminal offense, pursuant to West Virginia Code § 15-2-4, and repeated failures to update such information can result in a prison sentence of up to 25 years. The West Virginia Sexual Offender Registration scheme has been deemed to be constitutional. *Haislop v. Edgell*, 215 W. Va. 88, 593 S.E.2d 839 (2003).

West Virginia Code § 62-12-26 provides for extended supervision for certain sex offenders. An individual who commits a felony sexual offense as prohibited by Article 8B of the West Virginia Code, which Mr. Daniels did repeatedly (according to the aforementioned criminal complaint, at least 48 times), although he was permitted to plead guilty to only one act of sexual assault, SHALL be required to serve a period of supervised release of up to 50 years, with a minimum term of supervised release of ten years. The specific prohibitions in the statute require sexual offenders to live and work at least 1000 feet away from a school or his victim, not having a child in his household, and in general, may be subject to any of the terms of probation.

Of note, however, the statutory scheme provides that the supervised release may be terminated after the expiration of two years, if the court is satisfied that such early termination is warranted by the conduct of the defendant and the interest of society. Similarly, if the conduct of

the defendant warrants, the period of supervised release may be revoked, upon clear and convincing evidence that the defendant has violated the supervised release.

It is the prerogative of the Legislature to determine statutory schemes, including classification of crimes and punishments, subject to principles that punishment should be proportionate to the offense, and punishment may not be cruel and unusual.

This Honorable Court has oft stated its principles in reviewing a sentence which is asserted to be cruel and unusual, disproportionate to the offense, and shocking to the conscience of court and society. In general, a sentence which is within statutory limits is not subject to appellate review. *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Further, claims that a sentence violates the prohibition against cruel and unusual punishment and is disproportionate to the offense charged are generally limited to sentences that have no maximum limit provided by statute. *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). As delineated by the holding in *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983), the first test is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test set forth in *Wanstreet*. A reviewing court then gives consideration to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with other jurisdictions and a comparison with other offenses within the same jurisdiction.

Appellant's counsel attempts to turn the supervised release for a term of years, which can be terminated as soon as two years after it actually begins, into a life sentence by proposing a

number of hypothetical situations apparently including a defendant, either Appellant, or even a defendant who committed first degree sexual assault, living life on the straight and narrow for, in Appellant's situation for 119 of the 120 months, and then being incarcerated for ten years for inappropriate comments on Facebook.

That simply is not the case with this provision of supervised release. The statute was passed by the Legislature. It provides an additional mechanism, in conjunction with the sexual offender registry to monitor persons who have been convicted of felony sexual offenses. Despite the comments of both defense counsel, and most disappointingly the trial judge, that the relationship between the 14-year-old minor and the then 20-year-old Appellant was at one point accepted by the culture and that this relationship could easily have developed into the couple going arm in arm through their golden years, and the fact that Appellant's counsel repeatedly refers to the crime as a non-violent consensual act, the Appellant committed a crime. Although the victim's precise age is not provided in the record, it is undisputed that she was 14 at the time the offense occurred, and that the Appellant was more than four years older than she. It is noteworthy that the crime of first degree sexual assault, which carries a minimum of 15 years of prison, can be committed by having "consensual" sexual intercourse with a child who is 11 years old or less. W. Va. Code § 61-8B-3. This Court has clarified that a child who is 11 years old or less is one who has not reached his 12th birthday. Therefore, a 14-year-old, assuming she has just turned 14, is virtually as close to the statutory age limit of first degree sexual assault as she is to the statutory age limit of third degree sexual assault.

The victim in this case is a child. The Appellant is an adult. It was not a consensual act because by law the victim cannot consent to sexual activity at her age. It was a felony, and

according to the police information, one that was committed multiple times. Had the Appellant been convicted of each of the 48 alleged counts of sexual activity, his sentence could have been 48 years to 240 years.

Instead, Appellant effectively served a sentence of 14 months at the Anthony Center for not one, but two felony offenses, the other offense being a felony drug conviction, was placed on three years' probation, and a term of supervised release which may terminate as soon as two years after it begins.

This Court has often held that sentences imposed by the trial court, if within statutory limits and not based on some impermissible factor, are not subject to appellate review. *State v. Goodnight, supra*. The period of supervised release is clearly within the statutory limits and the Appellant does not assert that the sentence was based upon any impermissible factor. The Appellant simply asserts that the supervised release is subjectively shocking to the conscience of the court, cruel and unusual punishment, and disproportionate to the offense.

Most of the cases dealing with sentences which are alleged to shock the conscience of the court and society, to be disproportionate to the offense, and to be cruel and unusual punishment deal with defendants being sentenced to incarceration, some for lengthy periods of time. For example, in *State v. Booth*, 224 W. Va. 307, 685 S.E.2d 701 (2009), a 20-year-old defendant was sentenced to a prison sentence of eighty years. The Court, noted that claims that sentences violate state and federal constitutional provisions against cruel and unusual punishment and are disproportionate to the offense, are upon review generally limited to sentences that have no maximum limit provided by statute. Referring to Syllabus Point 5 of *Wanstreet*, the *Booth* court on page 316 points out that while proportionality standards theoretically can apply to any criminal sentence they are basically

applicable to those situations in which either no fixed maximum set by statute, or where there is a life recidivist statute. Further, the Court turned to its decision in *State v. Cooper*, 172 W. Va. at 272, 304 S.E.2d at 857, and restated that the first test in looking at a sentence is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is viewed objectively, giving consideration to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions and a comparison with other offenses in the same jurisdiction.

The supervised release statute under attack does NOT sentence a defendant to incarceration. In fact, by its terms, it only becomes effective after the defendant has served his sentence. In fact, rather than being incarcerated, the supervised release is analogous to parole. As the Court is well aware, for all sentences that do not carry the sentence of incarceration for life without mercy, a sentence which is limited to kidnapping and first degree murder, all other offenses are subject to the parole considerations contained in Chapter 62 of the West Virginia Code. Those parole provisions have been changed from time to time. For example, parole eligibility for the offense of murder in the first degree was changed from 10 years to 15 years, and parole eligibility for certain offenses in which a firearm was used, was changed from one-fourth of the determinate sentence to one-third. Parenthetically, West Virginia Code § 62-12-13, which deals with the classification of offenses for parole consideration, defines all violations of West Virginia Code § 61-8B *et seq.* as crimes of violence. Therefore, for purposes of parole supervision, the offense of third degree sexual assault is defined as a crime of violence, despite the repeated assertions of defense counsel that the crime

in question was a non-violent consensual act. The Appellant violated West Virginia Code § 61-8B-5. West Virginia Code § 62-12-18 currently provides that parole supervision shall terminate no later than the maximum sentence of the offense. However, should the Legislature desire to do so, nothing in either the West Virginia or United States Constitutions prohibits the Legislature from extending the maximum term of parole supervision for any or all offenses, increasing the amount of time which must be served before parole consideration, or abolishing parole altogether, requiring defendants to serve the sentence imposed in full.

Subjectively, it cannot be said that a supervisory scheme which has a maximum of fifty years, and which can be terminated after two years, shocks the conscience of either the court or society. The purpose of the supervised release is to protect society from repeat offenders. Although the State agrees with the statement contained in the Appellant's brief that not all sexual offenders fit the classification of sexually violent predators, many sexual offenders are sexually violent predators, and all sexual offenders have committed acts which have been prohibited by society. Additionally, the public is all too aware that sexual offenders are particularly likely to re-offend. A period of supervision in order to ensure that a particular defendant is willing to follow the terms of release, and has not committed another sexual offense is a reasonable legislative response to the victimization of children and adults.

This statutory scheme is not a term of incarceration, and if someone violates the terms of supervised release, he is not punished by incarceration for life. Therefore, the statutory scheme is not a life recidivist sentence, does have a maximum sentence and is not therefore subject to a proportionality review pursuant to *Booth* and *Wanstreet, supra*.

However, even if one objectively examines the statutory sentencing scheme for the offense of sexual assault in the third degree, one cannot find that the sentence imposed upon the Appellant constitutes cruel and unusual punishment, nor is it disproportionate to the offense.

The Appellant entered guilty pleas to two felony offenses. He had been charged, by warrant in magistrate court, with the felony offense of displaying obscene material to a minor, felony possession with intent to deliver a controlled substance, and 48 counts of sexual assault in the third degree, the victim being 14 years of age. (R. at 4-6.) After entering into a plea agreement, the Appellant pled guilty to two felonies, one count of third degree sexual assault, and one count of possession with intent to deliver a controlled substance, marijuana. (R. at 23-27, 31-41.) The Appellant was sentenced to the Anthony Center as a youthful offender, returned to court, sentenced to an indeterminate term of one to five years on each felony, and placed on probation for a term of three years, to be followed by the contested supervised release. (R. at 91-93, 103-05, 119-20.) Following the Appellant's arrest and before his sentencing, he was placed on home confinement. During that period of home confinement, it was alleged that he violated the terms and conditions of home confinement by using cocaine, and by having continued contact with the victim even after being warned by the probation officer that he was to have no contact with the minor child. Further, the Appellant was not cooperative and missed scheduled appointments. (R. at 96.) Therefore, as noted above, the Appellant's actual sentence of incarceration, which was suspended and the Appellant placed on probation followed by supervised release is not cruel and unusual punishment for this Appellant for these acts.

The legislative purpose behind the supervised release of sexual offenders was clearly to provide, or attempt to provide, another layer of protection for society from persons who commit

sexual offenses. While defense counsel notes that reference is made by the Legislature to the need to protect individuals, particularly children from sexually violent predators, anecdotally it must be pointed out that some individuals who commit what is defined in West Virginia as third degree sexual assault, are individuals who are fixated on children below the age of consent as their desired sexual companions, and therefore are sexual predators.

West Virginia's statutory scheme regarding sexual offenses against children also contains separate prohibitions against sexual activity committed by an adult who is the parent, guardian, or person in position of trust of a minor child. W. Va. Code § 61-8D-5. It provides that sexual intercourse with a child in his care, notwithstanding the willing participation by the child in such act, is punishable by a determinate term of years of not less than 10 nor more than 20. Therefore, if, rather than being the young lovers as characterized by defense counsel and by the trial judge, the Appellant had been a computer aide at the victim's school, the exact same act, committed by Appellant at the exact same age, could have subjected him to a term of incarceration ten times as harsh as he was actually exposed to. Therefore, in comparison with other sexual offenses, the sentence received by the Appellant was not disproportionate to his offense. Nor, in comparing the sentencing received by Appellant to other criminal offenses, can the sentence be said to be disproportionate to the offense. The Legislature delineates between offenses committed against person and offenses committed against property, reserving, in general lengthier sentences for offenses committed against the person.

Possession with intent to distribute controlled substances, grand larceny, obtaining under false pretenses and even burglary are defined as crimes against property and each carries the possibility of an indeterminate sentence of not less than one year to not more than ten (or 15) years

in the penitentiary depending on the offense. The Appellant's sentence is certainly proportional to those in terms of the actual, and even potential term of incarceration.

Crimes against the person such as robbery, kidnapping, and murder carry much more severe sentences. Although defense counsel attempts to characterize that somehow the sentence for third degree sexual assault is greater than the mandatory minimum sentence for first degree robbery, in fact the minimum sentence for robbery is a term of years not less than ten. Although the sexual offense does carry the possibility of revocation of the post-release supervision and additional incarceration, so, in fact, does the robbery sentence, if the defendant is placed on probation or paroled and violates the term of probation and parole. Upon clear and convincing evidence that term of probation or parole can be revoked, and the defendant serves additional time behind bars. The same is true with the supervised release. Upon clear and convincing evidence that the defendant violated the terms of supervised release, the defendant can serve additional time in the penitentiary. Obviously, the spectre of additional penitentiary time only becomes reality if the defendant actually violates his supervised release, a notice of violation is filed, a hearing is held, clear and convincing evidence as to the violation is presented, and the court, in its discretion, believes that the offender should receive actual incarceration. West Virginia Code § 62-12-26 does not require that an individual be sentenced to incarceration for any and all violations of supervised release. It states in section (g)(3) that the court MAY revoke a term of release and sentence the defendant to prison. Such revocation and sentencing is not mandatory. Therefore, under the terms of the supervised release statute, the supervised release term may be terminated after the passage of as little as two years, and disposition of the offender should a violation of the supervised release period be

committed and proven is within the discretion of the sentencing court, including spending all, part or none of the term of supervised release in prison.

Comparing the West Virginia sexual offender sentencing scheme both in terms of initial incarceration, probation, parole and supervised release to our surrounding jurisdictions, and even to other states, is difficult, as noted by defense counsel in his brief. The best that can be said is that some jurisdictions impose greater prison sentences for the crime defined in West Virginia as third degree sexual assault, and some jurisdictions impose lesser sentences, finding the act to be a misdemeanor.

In terms of requiring supervision after the service of sentence of incarceration, probation, or parole, other jurisdictions have widely varying statutes. For example, Oregon provides for post-prison supervision of offenders as determined by Or. Rev. Stat. Ann. § 144.102 (West 2005). Post-prison supervision for sexual offenders is described by that statute as a special condition, which may be requested by the prosecuting attorney, or by the victim at the sentencing hearing. The conditions of such supervision may include polygraph examinations, sexual offender treatment, no contact with minors, prohibitions from entering the county of residence of the victim, and not frequent places where minors congregate. Further restrictions upon liberty include curfews, not possessing sexually stimulating visual materials, maintenance of a driving log, not being permitted to drive alone, and not having a post office box. The State of Ohio classified its felonies, but does provide for supervised release of sexual offenses. Ohio Rev. Code Ann. § 2929.19 (West 2006) sets forth the requirements for felony sentencing including the provisions of supervised release. The State of Florida has in § 947.1405, Fla. Stat. Ann. (West 2010), enacted a conditional release program. Conditional release is a post-prison program under which a defendant who meets specified

criteria may be released from prison prior to the expiration of his sentence, and if the release is violated, the offender may be returned to prison for the balance of the original sentence. The State of New York, under N.Y. Penal Law § 70.45 (1998), provides for a period of post-release supervision for an individual convicted of a felony sexual offense. Violation of post-release supervision for a non-sexual offense subjects the offender to a term of incarceration for a further period of imprisonment up to the balance of the remaining period of supervision, not to exceed five years. However, for felony sex offenses, the period of post-release supervision falls within various ranges, including, in some instances up to 25 years. Therefore, a violation of post-release supervision may subject the offender to a lengthy term of incarceration. The statutory scheme in New York, for indeterminate sentences, does still include release on parole, supervised release and conditional release. The State of Louisiana in 2006 adopted provisions of the aforementioned Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. §§ 16901 *et seq.*) (2006), and its legislative findings and intent, as contained in La. Rev. Stat. Ann. § 15:561 (2006), is virtually identical to the West Virginia legislative intent. It notes that the potential high rate of recidivism dictates a policy to facilitate compliance with sexual offender registry provisions and notes that supervised release does not constitute probation and is therefore not subject to the five-year limitation on probationary terms. The Illinois supervised release statute has been amended repeatedly, most recently in 2007. Chapter 730, Ill. Comp. Stat. Ann. 5/3-3-7 (West 2007) delineates the conditions of parole or mandatory supervised release for the state of Illinois. Any individual who is convicted of a sex offense must complete sexual offender treatment and refrain from contacting via the Internet a child under the age of 18, refrain from the use of social networking sites and have other restrictions on his liberty. The State of Maine, Me.

Rev. Stat. Ann., tit. 17-A § 1231 (as amended in 2007) mandates supervised release for various periods of time depending upon whether the offender is a repeat offender and the crime committed. Violation of the supervised release can result in a sentence that equals all or part of the period of supervised release, without credit for time served on post-release supervision, and the remaining portion of the period of supervised release remains in effect to be served. The state of Nevada, as contained in Nev. Rev. Stat. Ann. § 176-0931 (West 1997) provides that if a defendant is convicted of a sexual offense, the court shall include, in addition to any other penalties a special sentence of lifetime supervision which commences after any period of probation or any term of imprisonment and any period of release on parole.

Therefore, a review of the sentencing provisions and post-release supervision provisions of the various states makes comparisons of sentencing between an individual convicted of sexual assault in the third degree in West Virginia and an individual convicted of a similar crime in another jurisdiction virtually meaningless. As noted by defense counsel, actual exposure to incarceration varies between some states having greater exposure, and some less. The above review of post-release supervision indicates that some states have lesser periods of supervision and some greater. However, it appears as if the national trend is toward having some degree of lengthy supervision of a defendant following his release from probation or incarceration, whether that be by extending the parole period, granting the inmate supervised or conditional release, or imposing supervised release after the other provisions of the sentence.

However, the statute in question in West Virginia, on its face, and in its application to the Appellant is neither cruel nor unusual punishment, does not shock the conscience of the court, and is not disproportionate to the offense. The Appellant received the benefit of a plea agreement, and

more than 45 pending felonies were disposed of in that plea, with the Appellant receiving a sentence to the Anthony Center, followed by probation for the two felonies to which he pled guilty, and the minimum time of supervised release for the sexual offense. He received consideration as a youthful offender and probation despite his failure to cooperate with the Probation Department, his repeated violations of home confinement, including repeated contact with the minor victim, and use of cocaine. The supervised release statute provides that the term of supervised release, although couched as a minimum term of ten years may in fact be terminated after only two years. It further provides that the supervised release period may be revoked only upon clear and convincing evidence of a violation of the terms and conditions of supervised release. Further, incarceration as a disposition for such violation of supervised release is not mandatory.

IV.

CONCLUSION

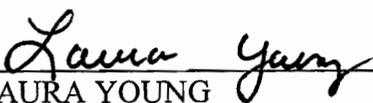
Therefore, the State respectfully requests that for the foregoing reasons, the Court find that the provisions of West Virginia Code § 62-12-26 are not unconstitutional either on their face or by application to this Appellant. The State further requests that the Court find that the sentence imposed does not shock the conscience of the court of society, is not cruel and unusual punishment, is not disproportionate to the offense, and that the Appellant's conviction be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Appellee's Brief upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 14th day of January, 2011, addressed as follows:

To: Dwayne J. Adkins
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LAURA YOUNG