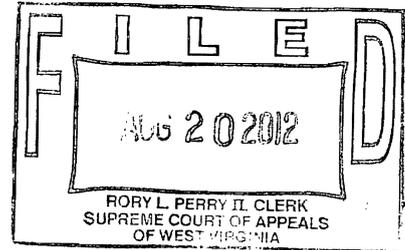


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0254



STATE OF WEST VIRGINIA,  
PLAINTIFF BELOW, RESPONDENT,

VS.

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

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

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Petitioner's Reply Brief

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## **STATEMENT OF THE CASE**

Between Petitioner's initial Statement of the Case and that of the State, Petitioner believes that a full presentation of this case has been provided to this Honorable Court. Consequently, only a few comments will be offered with respect to the State's assertions in her Statement thereof.

As to "some rescheduling" by the circuit court with regard to Petitioner's Transfer Hearing, the record clearly reflects that such "rescheduling" covers the period from February 28, 2011, when it was initially scheduled by an Agreed Order Rescheduling Hearing (Appendix Record, hereinafter "AR", 22/23), until April 6, 2011, when such hearing was actually held. (AR, 61/62/63; AR, 117).

It is also clear that at the time of the alleged commission of the underlying charges Petitioner had no record of criminal activity as a juvenile, having only been assigned to involvement with the Juvenile System as a "status offender" upon the Petition of his grandmother/adoptive mother. Petitioner's escape from the Vicki Douglas Juvenile Detention Center, for which he accepted responsibility and served his prescribed sentence at the West Virginia Industrial Home for Youth, occurred after the underlying charges.

Finally, the reports from his participation in the aforesaid program clearly show very positive efforts in the educational aspects of the program provided there and Petitioner asserts that his later "diminished performance/failures" came about due to him being denied traditional educational and necessary rehabilitative services to address the issues of juvenile delinquency after the assault referred to in the State's Brief, causing him to be placed on security status, which, in essence can be described as relative isolation, which began on January 30, 2012, a little more than one month after he was sentenced to 40 years in the penitentiary, and lasted until he

was transferred to the Eastern Regional Jail upon reaching his 18<sup>th</sup> birthday on August 1, 2012.

It is reported that he had no write ups during this time.

## **ARGUMENT**

### **1. ALLEGED PROCEDURAL AND DUE PROCESS ERRORS COMMITTED BY THE BERKELEY COUNTY CIRCUIT COURT SITTING AS A JUVENILE COURT.**

#### **1.a. Presence of the Petitioner at all Critical Proceedings**

While acknowledging the right of the Petitioner to be present at all critical stages of the proceedings against him, and the heavy burden required of the State to overcome the presumptive prejudice from such absences, the State attempts to rely upon assertions of “material factual misrepresentations” by Petitioner in his Brief and allegations that “any number of people who were present in the courtroom” can purportedly assert that he was present at all such times.

Petitioner’s Appellate Counsel is at the same “disadvantage” as is this Honorable Court, in that he was not involved with this case at the times in question and must rely upon the record of such proceedings. Consequently, Appellate Counsel, and this Honorable Court, can only base their analysis of the facts upon the record and the well-established principle (considered to not even require citation) that a “court of record speaks through its orders,” which are expected to accurately reflect the transcript of its proceedings. It is also well-recognized that the preponderance of orders in criminal cases are, in fact, drafted by the State and, therefore, are presumably protective of the State’s position. Interestingly, it is noted that all of the Orders of the Berkeley County Magistrate Court related to its proceedings involving your Petitioner clearly document the presence of the Juvenile “in person and with Counsel...”

Consequently, despite the representations by the State in her Brief, neither the transcript of the February 7, 2011, Hearing AR 112, 3, L.1-2), referred to by the court as a “status or agreed adjudication today...” (*Id*, p.3, L. 14-15), nor the lower court’s Order Rescheduling

Hearing, of such date, indicate or refer to the presence of the Petitioner and only refer to the appearance of “the Juvenile’s counsel and the State of West Virginia....” Additionally, Appellate Counsel cannot know the meaning behind the words of the State in advising the court that “I would note that Mr. Whetzel’s in detention.” (*Id*, p.4, L.3-4) Moreover, with regard to the State’s denial of having offered a plea to Petitioner (which would seem to not be an illogical action in anticipation of an “agreed adjudication hearing”) and assertion that the indicated comments (*Id*, p. 5-6) are reflective of another defendant and case, Appellate Counsel can only note that no reference to any other defendant nor case is included in such transcript.

Similarly, the lower court’s Agreed Order Rescheduling Hearing, dated February 11, 2011, (believed to have occurred after his recapture, as indicated on Page 6 of the State’s Brief, and placement at a “hardware secured facility,” namely, the Chick Buckbee Juvenile Detention Center) only refers to the Juvenile’s presence as being “by counsel John H. Lehman.” Despite the apparent absence of your Petitioner (considering the Chick Buckbee Center is not located near Berkeley County and no prior Order had provided for his transportation to and from the court), Petitioner’s Trial Counsel not only concurred in the cancellation of the previously scheduled February 14, 2011 Hearing, but waived the aforesaid statutory timeframe for holding the Transfer Hearing. Moreover, despite the critical nature of such statutory requirement for the timing of a Transfer Hearing following the filing of a Motion for Transfer, the said Order is also silent as to any effort by the court to assure the understanding and acquiescence of the Juvenile Defendant, or his parent, as would be anticipated if he/they had been present. (AR 22/23)

Again, the Order Rescheduling Hearing, of February 28, 2011, which had clearly been scheduled as for a Transfer Hearing (*Id*, p.1), only references the appearance of “John H. Lehman, Esq., the Juvenile’s counsel and the State of West Virginia by...” and misidentifies the

designated purpose of such hearing as having been for a “status hearing.” (AR 25/26) Of course, the lower court’s *sua sponte* Order Rescheduling Hearing of March 16, 2011 (AR 50/51), does not reflect the appearance of any party, despite the fact that it further delayed the required Transfer Hearing and continued the Juvenile’s pre-adjudication incarceration. (It should be noted that the Petitioner was not sentenced in conjunction with his escape from the Vicki Douglas Juvenile Detention Center until April 6, 2011.)

On the other hand, when there is no question as to the Petitioner’s presence, the lower court’s Order of Transfer to Adult Criminal Jurisdiction, dated April 6, 2011, clearly stated such fact “upon the appearance of the Juvenile, in person and by counsel, John H. Lehman, Esq....”

Consequently, despite the State’s representations and effort to deflect the significance of the legal requirement for the Petitioner to have been present at all critical stages of his proceedings, your Petitioner asserts that the State must be held to have failed in its obligation to prove the Petitioner was present (through its own orders), or if not, to have proven beyond a reasonable doubt that what transpired in his absence was harmless. State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977.) *See also* State v. D.M.M., 169 W.Va. 276, 286 S.E.2d 909 (1982).

As this Honorable Court made clear in the case of State ex rel Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975), Syl. Pts. 2, “correlative with the constitutional right of confrontation is the right of presence which requires that an accused charged with a felony shall be present in person at every critical stage of a criminal trial where *anything* may be done which affects the accused; the right of presence, originating in the common law, is secured to an accused by W.Va. Code 62-3-2.” (Emphasis added), *Id*, 158 W.Va. 647, 214 S.E.2d 331. Furthermore, this Honorable Court stated in Grob, in Syl. Pt. 3, “W.Va. Code 1931, 62-2-3, requires that one accused of a felony shall be present at every stage of the trial during which his interest may be

affected; and if *anything* is done at trial in the accused's absence which *may* have affected him by *possibly* prejudicing him, reversible error occurs." (Emphasis added), Grob, Id, 158 W.Va. 648, 214 S.E.2d 331. Finally, this Honorable Court indicated the magnitude of such right by stating, in Syl. Pt. 5, "failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *Id*, 158 W.Va. 648, 214 S.E.2d 330. When criminal proceedings which have been recognized by this Honorable Court as particularly critical, such as a Transfer Hearing, which results in the elimination of the special treatment afforded to juveniles in our justice system, are repeatedly rescheduled and a juvenile defendant's Counsel unilaterally waives statutorily mandated timeframes, Petitioner asserts that more *possible* prejudice has occurred.

**1.b. Issue of the Delay of Petitioner's Transfer Hearing**

The Petitioner will stand on his argument presented in his initial Brief with regard to this issue. An observation in the State's Response Brief, however, is considered to be reflective of the primary element of Petitioner's objection to the lower court's handling of the process of holding his Transfer Hearing. Despite the clear indication by the Legislature of the requirement of holding a *timely* hearing, within seven (7) days, for what this Honorable Court has identified as one of the most critical events in the prosecution of a Juvenile's case, namely, a determination as to whether to discard the special protections afforded a juvenile with regard to alleged criminal conduct and subject such a child to the harsh realities of adult criminal prosecution and, potentially, imprisonment with "hardened criminals," it is obvious that the State, at least in Berkeley County, and the lower court, completely discount the significance of a *timely held* Transfer Hearing. Hence, the State's justification for the lower court's *sua sponte* continuance of the scheduled February 28, 2011 Transfer Hearing was because "[a]fter scheduling the transfer

hearing for February 28, 2011, the court *had to* schedule additional matters on that same date and notified the parties by telephone that... (it now) would be a status hearing for further scheduling. The court then rescheduled the transfer hearing for March 22, 2011. After setting that date, the court again found that it *needed to* schedule other matters and chose to *sua sponte* continue the March 22, 2011, transfer hearing date, by order dated March 16, 2011, to April 16, 2011.” (State Brief, p.10) (Emphasis added).

Petitioner asserts that that the Berkeley County Circuit Court does not recognize the importance of a *timely* Transfer Hearing, despite the statutory requirement therefor, and operates from a perspective of “any excuse” as being sufficient to warrant repeated continuances. The record clearly is not supportive to the State’s assertion in her Brief that Petitioner, personally, acquiesced in his Counsel’s waiver of the statutory time-frame. Even if such assertion was supported by the record, the State’s suggestion that such action, even if justified, was an “open-ended approval” for repeated and limitless delays is considered legally weak and reflective of a disregard for the juvenile defendant’s right to constitutionally protected due process.

**1.c Insufficient Evidence to Support Transfer to Adult Criminal Jurisdiction**

The State seems to suggest that because the instant Transfer Hearing “lasted several hours” and that the State “called eight (8) witnesses,” and the Petitioner chose to not call any, that her burden to establish probable cause of the Petitioner’s involvement in the alleged offense(s) must necessarily have been met. If that was the criteria for prosecutorial effectiveness, the number of reversals of criminal convictions by this Honorable Court, the Courts of Appeal in the many States of our nation, and our Federal system would be greatly reduced. Despite the wish of the State, the correct criteria is whether the *quality* of the evidence

presented sufficiently rises above the level of mere suspicion to the requisite standard of “probable cause.”

In that regard, but for the hearsay testimony presented by Lt. Gary Harmison, no identification of the perpetrators of the instant crimes was offered beyond the observation that one was “tall and thin” and one was “short and stocky.” For the State to actually attempt to rely upon such “evidence” and to suggest the lower court had the opportunity to observe the stature of your Petitioner, in contrast to that of Ian Derr, is considered incredulous. It must also be noted that the other testifying police officer not only confirmed that the victims were unable to provide any identification of the individuals who were involved in the crime, there was no physical evidence whatsoever upon which any identification could be even attempted.

It must also be noted that Deborah Beckman, who clearly stated that she ran from the house at her initial confrontation by “the robbers” and locked herself in an outside building and, therefore, was unable to observe any of the actions which took place in the house, did not offer any thoughts as to who might have been involved when she initially spoke to the police. Only months later, when testifying *after* the purported identification of the “robbers” by the police and the initiation of criminal proceedings, did Mrs. Beckman offer such thoughts... which still cannot be construed as more than supporting “suspicion” of the Petitioner’s involvement.

The only witnesses who could directly connect the Petitioner to the instant offenses exercised their constitutional rights against self-incrimination and were declared “unavailable.”

Consequently, Lt. Harmison testified that he came to know your Petitioner in conjunction with his investigation of the underlying robbery following an anonymous telephone call stating that “Georgie W.” *may* have been involved in the robbery. At that time, Lt. Harmison and Deputy St. Clair proceeded to the home of “Georgie W.” and interviewed your Petitioner. Lt.

Harmison further testified that your Petitioner denied knowing anything about the underlying robbery. After tracking down Ian Derr, however, they obtained a confession to the robbery which implicated the Petitioner. (On cross-examination, Lt. Harmison indicated that he had no memory of how they identified and located Derr.)

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

Thereafter, Lt. Harmison singularly provided the substance of Ashley W. and Ian Derr's statements that connected the Petitioner to the instant offenses.

Since the State also relies heavily upon the "sketch" of the scene of the robbery provided to the police by Elizabeth McClain to support the court's finding of "probable cause," it must be noted that Lt. Harmison testified that Ashley W. admitted that it was she who drew it. The fact that it was found by Mrs. McClain in her residence, in which Ashley W. resided and in which

your Petitioner frequented, is less than a “smoking gun” as to the Petitioner’s participation in the instant offense. Even if one accepts Mrs. McClain’s testimony without hesitation (consideration of the clear perspective of her involvement with the police is considered to indicate that she was attempting to deflect any involvement of Ashley W. with such event from her first discussions with the police), it is incontrovertible that any occupant of such household could have been responsible for placing such sketch where Mrs. McClain claimed to have first seen it.

Furthermore, Lt. Harmison’s testimony regarding the Petitioner’s purported purchase of an automobile soon after the instant offenses, which Petitioner asserts was not even directly connected to him by any official documentation, does not support more than a sense of “suspicion” (especially since testimony presented by the State established that Petitioner had been legally employed prior to such purported purchase) and, therefore, is considered wholly inadequate of establishing “probable cause” of any criminal activity.

Similarly, the testimony of Elizabeth McClain with regard to seeing your Petitioner in possession of an undetermined amount of money and his reported representations of having bought certain items in December, 2010, after he had been legally employed cannot be construed as establishing “probable cause” of any criminal activity. Furthermore, with regard to Mrs. McClain’s suspicions regarding a necklace given to her by Petitioner for Christmas, 2010, it must be noted that there is no necklace included in the inventory of items contained in the “lockbox” stolen from the Beckman’s residence. Thus, such testimony must be considered to be suggestive of nothing relevant to this case.

In summary, but for the hearsay testimony of Lt. Harmison as to Ian Derr’s confession regarding your Petitioner and the alleged statements of Ashley W. regarding the underlying robbery, together with the hearsay statements of Ashley W. and your Petitioner to Elizabeth

McClain, the only “evidence” presented by the State in support of its Motion to Transfer Petitioner’s case to adult criminal jurisdiction are assertions that he spent some money on certain purchases in December, 2010. None of the victims could provide any identification of the robbers and the police investigation discovered no evidence indicating the identity of the robbers.

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

Although the State attempts to discount the authority offered by Petitioner by indicating that this Honorable Court has established greater latitude for the application of rules of evidence to a Transfer Hearing, since it does not determine the issues of culpability, and due to the judge’s presumed capacity to “weed out the extraneous from the relevant and because of his legal training will not (presumably) be influenced by otherwise inadmissible evidence...” obviously, the State’s representations are inconsistent, if not directly contrary, to the reality of numerous cases in which this Honorable Court has reversed and remanded convictions as a direct result of the lower court concluding that there was probable cause of the defendant’s involvement in criminal activity when, in truth, there was no valid basis supporting such conclusion, or it was supported only on the basis of inadmissible hearsay testimony.

The State’s reliance upon the case of K.M. Comer v. Ton A.M., 184 W.Va. 634, 403 S.E.2d 182 (1991), is consistent with a position of “grasping at straws” in order to support a

clearly weak position. While it is obvious that there was considerable hearsay testimony presented in such case, not only did the court have the testimony of the victim, which identified the defendant, it was supported by physical evidence noted upon her body when she was medically examined. Consequently, this Court's approval of the lower court's conclusions in such case is not contrary to its consistent theme that a juvenile cannot be transferred to the adult criminal jurisdiction of a circuit court based solely upon hearsay testimony.

The Petitioner recognizes the State's wish that this Court's holdings in State v. Largent, 172 W.Va. 281, 304 S.E.2d 868 (1983) and In the Matter of Stephfon W., 191 W.Va. 20, 442 S.E.2d 717 (1994) be considered wholly inapplicable to the analysis of this case because of the nature of the underlying charges, murder, and the limited nature of the State's presentation of evidence at the respective transfer hearings. However, not only does Petitioner believe that the analysis of this Honorable Court in such cases, and the guidance provided thereby, is not limited to only cases involving murder charges against a juvenile, but that the State's position is based upon the erroneous concept that it is the duration of time involved and the number of witnesses presented at a transfer hearing, rather than the nature and quality of the evidence presented that is relevant to an analysis of the propriety of a lower court's finding of probable cause.

The State also tries to justify the erroneous handling of the lower court's declaration of Ashley W.'s and Ian Derr's unavailability, essentially, by representing that under the circumstances it would have been a fruitless waste of time. Petitioner must respond to such assertion by noting that, although it is incontrovertible that a significant portion of our population, as well as a distinct percentage of the participants in our criminal justice system, may well share the same view with regard to many aspects of the procedural and evidentiary

restrictions imposed upon the criminal process, unfortunately, particularly for the State, our many Courts of Appeal do not disregard such factors merely because it may be inconvenient.

Moreover, with regard to the nature of the hearsay testimony regarding the “confessions” of Ian Derr and Ashley W., the State has no choice but to concede that the lower court did not apply the reliability analysis prescribed in In the Interest of Anthony Ray Mc., 200 W.Va. 312, 489 S.E.2d 289 (1997). The Transcript of the Transfer Hearing makes any such suggestion baseless. The State attempts to rely upon the case of K.M. Comer v. Tom A.M., *supra*, because this Honorable Court affirmed the finding of probable cause in that case despite the clear presentation of hearsay evidence therein. As previously addressed, however, the State’s attempted reliance upon such holding not only ignores the fact that the lower court in that case was also presented with the testimony of the victim, which was corroborated by actual physical evidence. Otherwise, there was no hearsay presentation of the alleged confessions of co-defendants (whether charged or uncharged) which were not subject to confrontation by the accused. Petitioner further asserts that he is unaware of any exception to the rules regarding hearsay, particularly with regard to that of alleged confessions by co-defendants, as the State would appear to offer by its comments regarding the testimony of Elizabeth McClain with regard to purported admissions by Ashley W. to her. Petitioner also asserts that contrary to the State’s representation that Deborah Beckman directly testified that the Petitioner knew the location of the stolen lockbox from his employment status, a fair reading of her testimony will only support that he *may or could have* been aware of such fact. Once again, while the actual testimony/evidence may well raise suspicion, it was inadequate to establish “probable cause,” but for the hearsay testimony.

The State also attempts to justify the lower court's failure to follow the step-by-step process established in Anthony Ray Mc., *supra*, by attempting to overcome such reality by "back-door" or "boot-strap" suggestions that because the Judge stated that he "appreciated" the argument of Petitioner's Trial Counsel, which noted that the sole basis of the State's case for transfer had come in the form of hearsay statements from Lt. Harmison, that the standards of Anthony Ray Mc were "informally" satisfied. If such indirect and unspecific comments can satisfy the prescribed procedure established by the Supreme Court of Appeals of West Virginia in Anthony Ray Mc., *supra*, your Petitioner can only conclude that this Honorable Court would not have bothered to expend its considerable analysis and effort in formulating such Opinion.

Furthermore, the State would seem to represent that just because the lower court "stated that there was 'clear cut' probative evidence that was not hearsay that established probable cause," without any identification or enumeration as to the nature of such "evidence," that the issue is resolved. Clearly, such a legal position is without legitimate foundation...

Finally, the State would hope that, upon a finding by this Honorable Court that the hearsay statements of Ashley W. and Ian Derr presented through the testimony of Lt. Harmison were, inadmissible and, therefore, clear error by the lower court, this Honorable Court will accept the State's representations that it was merely "harmless error" because there was so much other ample evidence to support probable cause. The State, again, is attempting to rely upon the amount of time and the number of witnesses presented and hopes that this Honorable Court overlooks the fact that, but for the hearsay testimony presented through Lt. Harmision, the State did not present any evidence identifying the robbers in this case nor any evidence that directly connected the Petitioner to any criminal activity, let alone "probable cause" that he participated in the robbery of the Beckman residence on December 10, 2010.

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

**2.a. The Berkeley County Circuit Court Abused Its Discretion by Failing to Make Findings as to the Possibility of the Rehabilitation of Petitioner or to Fully Consider Sentencing Petitioner Pursuant to W.Va. Code § 49-5-13.**

First, Counsel apologizes for misidentification of the case of State ex rel Hill v. Parsons, 194 W.Va. 688, 461 S.E.2d 194 (1995), as State ex rel Hill v. Zakaib. Nevertheless, Petitioner believes that the history of such case provides that the trial court has the discretion to sentence a juvenile, even for the most extreme case of murder, pursuant to juvenile standards, even if later regret is determined. Additionally, Petitioner asserts that in State v. Turly, 177 W.Va. 69, 350 S.E.2d 696 (1986), this Honorable Court, specifically, determined that a trial court is authorized to suspend the sentence of a juvenile convicted of aggravated robbery and assign him to a term in a center for youthful offenders. Finally, in State v. Ball, 175 W.Va. 652, 337 S.E.2d 310 (1985), this Honorable Court provided that a trial court is so authorized even in cases involving the most severe of crimes, multiple murders. It is clear, therefore, that there was no legal impediment to the instant trial court with regard to sentencing your Petitioner pursuant to W.Va. Code 49-5-13; order him to the Anthony Center; and, upon successful completion of such program, to place him on probation, just as is envisioned for his co-defendant.

Petitioner asserts that the State chooses to ignore the will of the Legislature in enactment of 49-5-13 and the clear view of this Honorable Court expressed in State v. Highland, 174 W.Va. 525, 327 S.E.2d 703 (1985), namely, that the entire tenor of such statute is motivated towards providing substantial flexibility in sentencing individuals who have committed criminal offenses while they were juveniles. Instead of considering sentencing avenues geared towards potential

rehabilitation of a juvenile first-time offender, the State, and the trial court, solely focused upon why and how severely your Petitioner must be punished.

Furthermore, while Petitioner does not assert that the trial court was mandated to sentence him pursuant to W.Va. 49-5-13, it is asserted that the court should be required to consider such factors on the record and address why they are inapplicable to a juvenile defendant's circumstances in a given case. In the absence of such analysis and related findings, it is, essentially, impossible for this Honorable Court to determine whether the trial court's conduct was an "exercise of sound discretion," simple oversight or a lack of awareness of the court's authority to so act. This would seem to be particularly true in the circumstance of a defendant's nightmare childhood and apparent significant psychological conditions (which had not been adequately addressed and treated by "the juvenile system.")

Instead, the State incorporated into the Petitioner's sentencing process her long history of prosecution of his parents, which, your Petitioner asserts, has no relevance to his case. The State cannot be permitted to justify the sentence of a child upon the sins of his father... and mother.

**2.b. The Berkeley County Circuit Court Committed Error of Constitutional Magnitude by Its Imposition of a Sentence on Petitioner That is Grossly Disproportionate to That Imposed by the Same Court and Same Judge Upon Petitioner's Adult Co-defendant Convicted of the Identical Offenses and Upon Identical Factual Circumstances.**

Both co-defendants, Petitioner and Ian Derr, entered into plea agreements with the State, the only distinction being that Derr entered a plea of guilty; while, due to his counsel's request, Petitioner entered a plea of *nolo contendere*. As the State is well aware, the legal effect of such pleas are identical and should not be viewed as a reflection of "less acceptance of responsibility," especially when Petitioner's Counsel stated on the record that such distinction was wholly the result of his choice.

Furthermore, despite the State's citations to this Honorable Court's decisions in State v. Layton, 189 W.Va. 470, 432 S.E.2d 740 (1993) and State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982), this Supreme Court of Appeals has found on numerous occasions that sentences imposed by trial courts, many for aggravated robbery, were subject to appellate review and reversal. In fact, with regard to State v. Buck, wherein the 23 year old defendant had robbed a store and injured the clerk by striking him in the head with a weapon, the sentencing imposed by the trial court was thrice considered and twice remanded for sentencing by this Honorable Court, namely: 170 W.Va. 478, 294 S.E.2d 281 (1982), 173 W.Va. 243, 314 S.E.2d 406 (1984); and 178 W.Va. 505, 361 S.E.2d 470 (1987). Thus, there should be no question that the sentence imposed upon your Petitioner is subject to review.

It would appear from the State's argument, and the indicated view of the Honorable Gina M. Groh (especially when justifying her sentencing of co-defendant Derr), that a Defendant's ability to eloquently, and facially, express "remorse" for the underlying crime is highly significant with regard to whether leniency is appropriated by the court. Thus, an individual such as your Petitioner, who suffers from psychological issues undoubtedly rooted in his nightmare of a childhood; who may be of lower intelligence levels; was younger and far less mature than Ian Derr; and who definitely is not an eloquent communicator; would appear unavoidably destined to serve longer sentences than those who are well-spoken. Moreover, there should be no question as to the reality that different Counsel allocate unequal periods of time and effort on such factors, in preparing their clients for court appearances and making statements in mitigation of their crime to the court. Consequently, application of the reasoning of the State and the indicated perception of the trial court may lead to unequal justice based upon the "luck of the draw" with regard to Counsel's respective degree of focus and effort towards preparing their

clients for their final plea to the Court, thinking that it could override the more relevant sentencing factors a court should consider.

So, in the case at Bar, despite their identical criminal conduct; the fact that Derr was an adult at the time while Petitioner was a 16 year old juvenile with no prior criminal record; and the fact that Petitioner not only had suffered an acutely abusive and damaging childhood but also was diagnosed with a psychological disorder and had a history of self-mutilation and multiple suicide attempts, Judge Groh determined to assign Ian Derr to a Center for Youthful Offenders, i.e., the Anthony Center; but refused to assign your Petitioner there or to treat him as a juvenile where he could have been appropriately treated until he reached the age of 21. While his, at least, equally culpable adult co-defendant will be eligible for probation upon successful completion of the program which could last not less than six (6) months nor more than two (2) years, your 17 year old Petitioner will have to *survive* ten years of incarceration with hardened, violent criminals, many of whom will be recidivists, before he will be eligible for parole and could conceivably serve twenty (20) years before discharging his sentence.

It's worth noting that the State suggests, on page 37 of its response Brief, that the Petitioner instilled the help and firearm of Mr. Derr to commit the robbery. The State cannot choose its own facts to bolster its position that the harsh treatment of the Petitioner was justified. There is no evidence, whatsoever, of who formed the plan and enlisted the other to commit the crime.

**2.c The Berkeley County Circuit Court Committed Constitutional Error by Imposing a Sentence so Excessive for the Circumstances of the Case as to Mandate Being Held to be "Cruel and Unusual."**

As Petitioner has acknowledged, many appeals of lengthy sentences have resulted in this Honorable Court holding that the appealed sentences were not sufficiently "disproportionate" to

the character and degree of the offense(s) as to amount to constitutionally prohibited “cruel and unusual” punishment. Recognizable common factors present in those cases, which are not consistent with the circumstances of his case, are perceived by Petitioner to have led to such decisions: (1) the defendants in such cases had an extensive criminal record and/or were already on parole for a felony conviction, and in the case of juveniles, usually involved prior offenses of a violent nature; (2) the aggravated robbery charges were in combination with other serious felony offenses, i.e., kidnapping, 1<sup>st</sup> degree sexual assault; or the defendants were deliberately preying on the elderly or helpless; or (3) the circumstances involved actual physical violence, often of a severe nature and with significant injury to victims and even death, or, a high potential risk of harm (actually discharged firearms, kidnapping, flight from police, dangerous driving, etc.)

Your Petitioner, however, at the time of the offense was only 16 years of age; had no prior criminal record whatsoever; and his only prior involvement with the juvenile system was as a “status offender” in conjunction with a petition initiated by his grandmother/adoptive mother as a means of trying to gain control of him, due to his failure to take his psychological medications and general “rule-breaking.” Furthermore, although Petitioner acknowledges that there is an inherently “violent nature” in the display of a firearm during the commission of a robbery, particularly in the victim’s home, it must be noted that there was no physical harm to any victim or even testimony of any physical touching of any victim; and absolutely no discharge of any weapon during the commission of the crime. The State would have this Honorable Court believe that this crime was planned around the tragic death of Mrs. Beckman’s husband. Again, the State cannot choose its facts. There is no evidence that the Petitioner knew of the death of Mr. Beckman.

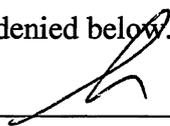
Finally, while we cannot fathom the devastatingly negative impact of the horrific experiences of his childhood on Petitioner, there is no denying that your Petitioner suffers from significant psychological disorders, including having been diagnosed with “bi-polar disorder,” subjecting himself to “self-imposed cutting,” and multiple attempts at suicide.

As this Court has noted, “From the earliest times infants were regarded as entitled to special protection for the State. “ State v. Arbaugh, 215 W.Va. 132, \_\_\_\_\_, 595 S.E.2d 289, 293-94 (2004), quoting State ex rel. Garden State Newspapers, Inc. v. Hoke, 205 W.Va. 611, 618, 520 S.E.2d 186, 193 (1999). This Court has recognized “[w]e have also articulated the duty we have as a Court to those society might choose to forget or ignore, ‘[p]risoners are no one’s constituents and wield little, if any, political clout. Consequently, society frequently forgets about, or even ignores these people, its unfortunate charges. It is therefore incumbent upon this Court ever to be vigilant in the protection of their legal rights.’” Arbaugh, supra, 215 W.Va. 132, \_\_\_, 595 S.E.2d 289, 294, quoting State ex rel. Riley v. Rudloff, 212 W.Va. 767, 779, 575 S.E.2d 377, 389 (2002).

Consequently, your Petitioner urges this Honorable Court to apply the same reasonable analysis to his case as was applied to the following cases wherein the this Honorable Court held that the sentences imposed were so excessive, under the circumstances of the case, as to be clearly disproportionate to the character and nature of the crime and, therefore, prohibited by the U.S. and West Virginia Constitutions’ as “cruel and unusual” punishment: State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983); State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984); 178 W.Va. 505, 361 S.E.2d 470 (1987); State v. Johnson, 213 W.Va. 612, 584 S.E.2d 468 (2003); and State ex rel. Ballard v. Painter, 213 W.Va. 290, 582 S.E.2d 737 (2003),

Finally, as this Court has noted, disparate sentences of co-defendants that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates our constitution. See State v. Buck, 173 W.Va. 428, 314 S.E.2d 406 (1982); 178 W.Va. 505, 361 S.E.2d 470 (1984); State ex rel Ballard v. Painter, 213 W.Va. 290, 582 S.E.2d 737 (2003); State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982); and Smoot v. McKenzie, 166 W.Va. 790, 277 S.E.2d 624 (1981). While Petitioner accepts that it is firmly established that disparate sentences between co-defendants are not *per se* unconstitutional, when justified by differing involvement in the underlying offense, differing prior records, lack of remorse, and potential for rehabilitation, he believes that even a cursory review of the sentencing circumstances of his case and that of his co-defendant, Ian Derr, will clearly demonstrate that it is a gross miscarriage of justice, rising to an unconstitutional abuse of discretion by the Berkeley County Circuit Court, to deny him the same *chance* at “saving his life” by taking advantage of the rehabilitative programs, including the opportunity for real treatment of his psychological disorder(s), offered by the Anthony Center for Youthful Offenders that is being provided to his adult co-defendant, who is not believed to have anywhere close to the mitigating life factors as are present in your Petitioner.

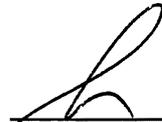
The State suggests that the lower court showed clemency in agreeing to run the Petitioner’s offenses concurrently. It should be noted that concurrency was a binding term of the agreement between the parties; it was not discretionary. The Petitioner did not receive clemency from the lower court, it was far from it. He asks that this Honorable Court provide the clemency and fair and appropriate treatment that he was denied below.

  
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Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of August, 2012, true and accurate copies of the foregoing Petitioner's Reply Brief were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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