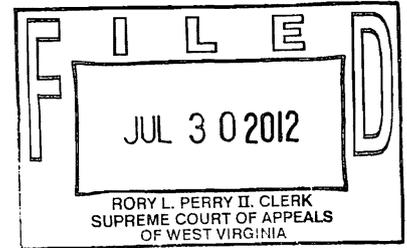


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

RONALD D. WHETZEL, JR.,
Defendant Below, Petitioner.

DOCKET NO.: 12-0254
(Berkeley County Case No.: 11-F-96)

RESPONDENT STATE OF WEST VIRGINIA'S BRIEF

Cheryl K. Saville
Assistant Prosecuting Attorney
State Bar No. 9362
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
csaville@berkeleycountycomm.org

TABLE OF CONTENTS

	Page
Petitioner’s Assignment of Error.....	1
Statement of the Case.....	1
Summary of Argument.....	2
Statement Regarding Oral Argument and Decision.....	3
Argument, Assignment I.....	3
Argument, Assignment II.....	22
Conclusion.....	39
Certificate of Service.....	40

TABLE OF AUTHORITIES

Page

Constitutions

Article III, Section 5 of the West Virginia Constitution.....29

Statutes

W.Va. Code §25-4-6.....37

W.Va. Code §49-5-10.....6, 9, 12, 14

W.Va. Code §49-5-13.....22, 23, 24, 25

W.Va. Code §49-5-16.....23

W.Va. Code §49-5-20.....24

W.Va. Code §61-2-12.....30

W.Va. Code §61-3-11.....30

W.Va. Code §61-11-21.....39

Rules

West Virginia Rules of Evidence

Rule 804.....16, 17, 18

West Virginia Rules of Juvenile Procedure

Rule 20.....6, 9

Cases

In re E.H., 166 W.Va. 615, 276 S.E.2d 557 (1981).....12, 13, 20

In the Interest of Anthony Ray Mc., 200 W.Va. 312, 489 S.E.2d 289 (1997).....17, 18, 20, 21

In the Interest of Moss, 170 W.Va. 543, 295 S.E.2d 33 (1982).....12, 21

In the Matter of Stephfon W., 191 W.Va. 20, 442 S.E.2d 717 (1994).....14, 15

Jenkins v. State, 384 So.2d 1135 (Ala.Crim.App. 1979).....36

K.M. Comer v. Tom A.M., 184 W.Va. 634, 403 S.E.2d 182 (1991).....13, 18, 20

State v. Ball, 175 W.Va. 652, 337 S.E.2d 310 (1985).....22

State v. Bannister, 162 W.Va. 447, 250 S.E.2d 53 (1978).....11, 22

State v. Barrill, 196 W.Va. 578, 474 S.E.2d 508 (1996).....11, 21

State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).....3

State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984).....25, 28, 38

State v. Buck, 178 W.Va. 505, 361 S.E.2d 470 (1987).....38, 39

State v. Bush, 163 W.Va. 168, 255 S.E.2d 539 (1979).....7

State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983).....29, 30, 35, 39

State v. D.M.M., 169 W.Va. 276, 286 S.E.2d 909 (1982).....3,4

State v. Dozier, 553 So.2d 931 (La.App. 4 Cir 1989), *writ denied* 558 So.2d 567 (La. 1990)....36

State v. Gary F., 189 W.Va. 523, 432 S.E.2d 793 (1993).....8, 10, 16

State v. Glover, 177 W.Va. 650, 355 S.E.2d 631 (1987).....29, 30, 35, 36, 39

State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).....22, 25, 29

State v. Haskins, 522 So.2d 1235 (La.App. 4 Cir. 1988).....36

State v. James, 710 S.E.2d 98 (2011).....30

State v. Jason H., 215 W.Va. 439, 599 S.E.2d 862 (2004).....7, 8, 10

<u>State v. Largent</u> , 172 W.Va. 281, 304 S.E.2d 868 (1983).....	14
<u>State v. Layton</u> , 189 W.Va. 470, S.E.2d 740 (1993).....	22, 25, 29
<u>State v. Lucas</u> , 201 W.Va. 271, 496 S.E.2d 221 (1997).....	22, 25, 29
<u>State v. Mechling</u> , 219 W.Va. 366, 633 S.E.2d 311 (2006).....	20
<u>State v. Morris</u> , 661 S.W.2d 84 (Mo.App.1983).....	36
<u>State v. Phillips</u> , 199 W.Va. 507, 485 S.E.2d 676 (1997).....	38
<u>State v. Robert McL.</u> , 201 W.Va. 317, 496 S.E.2d 887 (1997).....	22
<u>State v. Ross</u> , 184 W.Va. 579, 402 S.E.2d 248 (1990).....	35
<u>State v. Simpson</u> , 200 Neb. 823, 265 N.W.2d 681 (Neb. 1978).....	36
<u>State v. Tiller</u> , 168 W.Va. 522, 285 S.E.2d 371 (1981).....	3
<u>State v. Turley</u> , 177 W.Va. 69, 350 S.E.2d 696 (1986).....	22
<u>State v. Williams</u> , 205 W.Va. 552, 519 S.E.2d 835.....	35, 36, 37, 38
<u>State v. Woods</u> , 194 W.Va. 250, 460 S.E.2d 65 (1995).....	35, 38
<u>State ex rel. Cobbs v. Boles</u> , 149 W.Va. 365, 368, 141 S.E.2d 59, 61 (1965).....	39
<u>State ex rel. Cook v. Helms</u> , 170 W.Va. 200, 292 S.E.2d 610 (1981).....	8, 10
<u>State ex rel. Faircloth v. Catlett</u> , 165 W.Va. 179, 267 S.E.2d 736 (1980).....	35
<u>State ex rel. Grob v. Blair</u> , 158 W.Va. 647, 214 S.E.2d 330 (1975).....	3
<u>State ex rel. Hill v. Zakaib</u> , 194 W.Va. 688, 461 S.E.2d 194 (1995).....	22
<u>State ex rel. Redman v. Hedrick</u> , 185 W.Va. 709, 408 S.E.2d 659 (1991).....	3, 7
<u>Wanstreet v. Bordernkicher</u> , 166 W.Va. 523, 276 S.E.2d 205 (1981).....	29, 30

PETITIONER'S ASSIGNMENTS OF ERROR

- I. WHETHER THE CIRCUIT COURT PREJUDICED THE PETITIONER'S CASE BY VIOLATING HIS PROCEDURAL, CONSTITUTIONAL DUE PROCESS RIGHTS BY:
 - a. HOLDING CRITICAL PROCEEDINGS OUTSIDE THE PETITIONER'S PRESENCE;
 - b. FINDING GOOD CAUSE FOR BEING OUTSIDE OF TIME STANDARDS FOR JUVENILE CASES; AND
 - c. TRANSFERRING THE PETITIONER TO THE ADULT CRIMINAL JURISDICTION OF THE COURT?

- II. WHETHER THE CIRCUIT COURT IMPROPERLY SENTENCED THE PETITIONER BY:
 - a. NOT FULLY CONSIDERING SENTENCING PURSUANT TO W.Va. CODE §49-5-13(e);
 - b. SENTENCING THE PETITIONER DISPROPORTIONATELY TO HIS ADULT CO-DEFENDANT; AND
 - c. IMPOSING AN EXCESSIVE SENTENCE?

STATEMENT OF THE CASE

The Petitioner was charged by juvenile petition with the offenses of first-degree (aggravated) robbery, burglary, and conspiracy to commit robbery, all of which would be felonies if he was an adult, on or about January 17, 2011, in case number 11-JD-3. [Appendix Record (hereinafter referred to as AR), 1-6.] The charges stem from a home invasion that had occurred on or about December 9, 2010, involving two armed white males. The State filed a motion to transfer the case to the adult criminal jurisdiction of the court on or about February 11, 2011, pursuant to W.Va. Code §49-5-10(d)(1), alleging that the Petitioner was over the age of fourteen (14) and had committed the offense of first degree robbery involving the use or presentation of a firearm. [AR, 77-80.] After some rescheduling by the circuit court, a transfer hearing was held on April 6, 2011, at which time the court found probable cause to transfer the Petitioner. [AR, 88-95, Transcript of Hearing Held on April 6, 2011, pg. 1-106.]

Thereafter, the Petitioner was indicted by a Berkeley County Grand Jury in May of 2011 in case 11-F-96 for one (1) felony count of first-degree (aggravated) robbery, one (1) felony count of conspiracy to commit robbery, and one (1) felony count of burglary. [AR, 96-97.]

On or about November 17, 2011, the Petitioner entered knowing, voluntary, and counseled

pleas of no contest to count one of the indictment charging first-degree (aggravated) robbery and to count three of the indictment charging burglary pursuant to a plea agreement with the State. [AR, 104-105, 120, 121-123, 137-139, Transcript of Proceedings Held on November 17, 2011, pg. 1-52.] As part of that plea agreement, the State dismissed the remaining count of the indictment and, while sentencing would be argued by the parties, bound to a recommendation for concurrent sentencing. [Id.] Based upon his pleas, the Court adjudged the Petitioner guilty of one (1) felony count of first-degree (aggravated) robbery and one (1) felony count of burglary. [Id.]

On or about December 15, 2011, in consideration of the completed presentence investigation report including the Petitioner's statement, the victim impact statements made, presentation of evidence by the Petitioner, and the arguments of counsel, the court sentenced the Petitioner to a determinate term of forty (40) years of incarceration for the offense of first-degree (aggravated) robbery and to the statutory term of not less than one (1) nor more than fifteen (15) years of incarceration for the burglary charge. [AR, 107-117, 140-142, Transcript of Proceedings Held on December 15, 2011.] The court ordered the sentences to run concurrently. [Id.] The court further ordered the Petitioner to pay restitution (joint and several with his co-defendant) in the amount of \$8,000. [Id.]

SUMMARY OF ARGUMENT

The circuit court's handling of the matter as a juvenile proceeding was appropriate, within the bounds of law and procedure, and not violative of the Petitioner's rights. The circuit court never heard the matter without the presence of the Petitioner, the circuit court did not abuse its discretion in scheduling the Petitioner's transfer hearing, and the circuit court had sufficient evidence to transfer the Petitioner to the adult criminal jurisdiction of the court. Furthermore, the trial court properly sentenced the Petitioner pursuant to the statutory guidelines for the offenses of conviction, did not consider any impermissible factors in so sentencing the Petitioner, and sentenced the Petitioner in proportion with the seriousness of his offense as well as with his co-defendant's sentence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State avers that none of the issues presented are of first impression to the Court, there existing decided authority as precedent to the dispositive issues; that the facts and legal arguments are adequately presented in the briefs and record on appeal; and that the decisional process would not be significantly aided by oral argument.. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN ITS HANDLING OF THE MATTER IN ITS INCEPTION AS A JUVENILE CASE.

A. THE PETITIONER WAS PRESENT FOR ALL CRITICAL PROCEEDINGS.

i. Standard of Review

It is well established that a defendant has the right to be present at all critical stages of a criminal proceeding.

“1. ‘The defendant has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless.’ Syl. Pt. 6, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).

2. ‘If an accused demonstrates that his right to confront his accusers was abridged by the State or that he was absent during a critical stage of the trial proceeding, his conviction of a felony will be reversed where the possibility of prejudice appears from the abrogation of the constitutional or statutory right.’ Syl. Pt. 8, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

3. In a criminal proceeding, the defendant’s absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs.”

Syl. Pts. 1-3, State ex rel. Redman v. Hedrick, 185 W.Va. 709, 408 S.E.2d 659 (1991).

“A critical stage of a criminal proceeding is where the defendant’s right to a fair trial will be affected.” Syl. Pt. 2, State v. Tiller, 168 W.Va. 522, 285 S.E.2d 371 (1981), State v. D.M.M., 169

W.Va. 276, 279, 286 S.E.2d 909, 910 (1982).

ii. Discussion

Petitioner's counsel makes several material factual misrepresentations in this portion of his appellate brief. The Petitioner was detained on January 17, 2011, on charges of aggravated robbery, burglary, and conspiracy stemming from a home invasion that took place on or about December 9, 2010. [AR, 7-12.] On January 18, 2011, the Petitioner appeared in the custody of the Division of Juvenile Services accompanied by correctional officers from Vicki Douglas Juvenile Center and waived his preliminary and detention hearings. [AR, 7-18.] The presiding magistrate set a bond in the amount of \$250,000 cash or surety. [AR, 11, 15.] The Division of Juvenile Services was further ordered to provide or arrange transportation so that the Juvenile was present for the next hearings upon receiving notification of such dates. [AR, 12.]

The circuit court then scheduled a status hearing on February 7, 2011. [AR, 65.] At that hearing, the Juvenile was again transported in the custody of the Division of Juvenile Services and was present in the courtroom accompanied by correctional officers from Vicki Douglas Juvenile Detention Center. At that time, the State had not yet made a final decision on whether to transfer the Petitioner to the adult criminal jurisdiction of the court or to proceed in the court's juvenile jurisdiction. [AR, Copy of Transcript of Status Hearing, pg. 3-4.] Considering the Petitioner's continued detention, the parties asked for a date sooner than the court's next scheduled open motion day and were told a brief status hearing could be held on February 14, 2011, in order to ascertain if an adjudicatory hearing or a transfer hearing should be scheduled. [AR, Copy of Transcript of Status Hearing, pg. 3-7.]

Petitioner's counsel indicates that at one point the State represents that the Petitioner was absent from proceedings. That is untrue. The record shows that the State asks the court, since the Petitioner is "in detention" (meaning since he is continuing in the custody of the Division of Juvenile Services and has not yet posted bond) that the next hearing be scheduled in an expedited fashion.

[AR, Copy of Transcript of Status Hearing, pg. 4.] The State did not indicate that the Petitioner was absent nor literally sitting at the detention center during the hearing because the Petitioner was clearly sitting at counsel table with his attorney at the time. Although the court did not specifically note the Petitioner's personal appearance at the outset of the hearing, Petitioner's counsel used the term "we" (indicating he and his client) during his entire presentation to the court, and stated that "Mr. Whetzel is ok with this." [See AR, Copy of Transcript of Status Hearing, pg. 4.] Additionally, the Division of Juvenile Services had been previously ordered to transport the Petitioner to all proceedings and had it failed to do so, the court, the State, or Petitioner's counsel would have called the Vicki Douglas Detention Center to have the Petitioner transported since the detention center is located less than one mile from the judicial center. [AR, 12.] Any number of people who were present in the courtroom, including the undersigned Respondent's counsel, can attest to this Court that the Petitioner was present.

The State would also note that it did not make a plea offer to the Petitioner prior to his transfer as Petitioner's counsel states in his brief. Petitioner's counsel indicates that Mr. Lehman states on the record during the February 7, 2011, status hearing that that Mr. Lehman had not had an opportunity to talk to "him" (which Petitioner's counsel says refers to the Petitioner) about a plea offer the State had made that morning. A full reading of the transcript clearly indicates that "him" was not referencing the Petitioner at all but another client of Mr. Lehman. That statement was made during a conversation on the record with regard to another case that was scheduled for a trial the next week and was only discussed for the court's scheduling purposes. [See AR, Copy of Transcript of Status Hearing, pg. 5-6.]

On February 9, 2011, only two (2) days after the circuit court's first status hearing wherein the Petitioner, through counsel, put forth on the record his hope that his case may proceed in the court's juvenile jurisdiction, the Petitioner escaped from the Vicki Douglas Juvenile Detention Center, injuring a correctional officer in the process. [AR, 68, 112.] Upon the Petitioner's capture

on February 11, 2011, the State filed a juvenile petition charging the Petitioner with escape from DJS custody, conspiracy, and assault on a correctional officer, as well as the motion to transfer the Petitioner's home invasion case to the court's adult criminal jurisdiction. [AR, 77-79.] As of the filing of the transfer motion on February 11, 2011, a trial/adjudicatory hearing date was not yet set by the court. **W.Va. Code §49-5-10(a)** as well as Rule 20 of the **West Virginia Rules of Juvenile Procedure** provide that "any transfer motion made by the prosecuting attorney shall be filed and served at least eight (8) days prior to the adjudicatory hearing." As such, the State was within statutory guidelines for filing the transfer motion.

Following the State's filing of the motion for transfer, counsel for the State and the Petitioner knew that enough time for a transfer hearing would need to be scheduled by the circuit court since the court indicated that the February 14, 2011, hearing would only be a very brief status hearing set at the same time as a number of other hearings before the court. [See AR, Copy of Transcript from Status Hearing, pg. 5-7.] Considering Petitioner's counsel had also since experienced a scheduling conflict for 9:00am on February 14th, the parties submitted an agreed order indicating that a transfer hearing would be necessary and asking the court to schedule that proceeding. [AR, 75-76.] Petitioner's counsel represented affirmatively in the order that the Petitioner wished to waive the seven (7) day timeframe for the scheduling of the transfer hearing in order to be able to adequately prepare. [Id.] No hearing was held on February 14, 2011, in the Petitioner's case.

The court scheduled the transfer hearing for February 28, 2011. [Id.] After 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 the February 28, 2011 date would be a status hearing for further scheduling. At the hearing on February 28, 2011, the Juvenile once again appeared in the custody of the Division of Juvenile Services and was accompanied by correctional officers from

Chick Buckbee Juvenile Detention Center.¹ The Court had ordered the Division of Juvenile Services to transport the Juvenile both specifically for the February 28, 2011 hearing as well as “all future hearings, as needed.” [AR, 75-76.] And, again, a myriad of people who were present in the courtroom, including undersigned Respondent’s counsel, can attest to this Court that the Petitioner was present for that hearing.

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 6, 2011. [AR, 87.] No hearing was held in the Petitioner’s case on March 22, 2011.

The Juvenile’s transfer hearing was held on April 6, 2011. The Juvenile was present once again in the custody of the Division of Juvenile Services accompanied by correctional officers from Chick Buckbee Juvenile Detention Center. [See AR, Transcript of Hearing Held on April 6, 2011.]

There was never a hearing conducted in the Petitioner’s matter outside of the Petitioner’s presence. As such, the Petitioner’s rights were not violated and there was no prejudice to the Petitioner in this regard. State ex rel. Redman v. Hedrick, *supra*.

B. THE CIRCUIT COURT PROPERLY PROCEEDED ON THE STATE’S MOTION FOR TRANSFER.

i. Standard of Review

“A motion for continuance is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion. Syl.Pt. 2, State v. Bush, 163 W.Va. 168, 255 S.E.2d 539 (1979).”

Syl. Pt. 2, State v. Jason H., 215 W.Va. 439, 599 S.E.2d 862 (2004).

Furthermore, this Court has held that a trial court may sua sponte order a continuance by scheduling a matter outside of time standards because of the court’s busy docket regardless of the

¹ After the Petitioner’s escape from the staff secured Vicki Douglas Juvenile Center, the Petitioner was housed at the hardware secured Chick Buckbee Juvenile Center.

fact that neither party requested a continuance. State v. Gary F., 189 W.Va. 523, 531, 432 S.E.2d 793, 801 (1993). *See also* State ex rel. Cook v. Helms, 170 W.Va. 200, 201, 292 S.E.2d 610, 611 n. 1 (1981).

ii. Discussion

The Petitioner was detained on January 17, 2011, on charges of aggravated robbery, burglary, and conspiracy stemming from an armed home invasion that took place on or about December 9, 2010. [AR, 7-12.] On January 18, 2011, the Petitioner waived his preliminary and detention hearings. [AR, 7-18.] The presiding magistrate set a bond in the amount of \$250,000 cash or surety. [AR, 11, 15.]

The circuit court then scheduled a status hearing on February 7, 2011. [AR, 65.] At that time, the State had not yet made a final decision on whether or transfer the Petitioner to the adult criminal jurisdiction of the court or to proceed in the court's juvenile jurisdiction. [AR, Copy of Transcript of Status Hearing, pg. 3-4.] The record shows that the State wanted to gather information concerning the Petitioner's crime and background before filing the motion to transfer considering his offense would involve a mandatory transfer upon a showing of probable cause. [Id.] The Petitioner did not object to the continuance under the circumstances. [Id., pg. 4-5.] Considering the Petitioner's continued detention, the parties asked for a date sooner than the court's next scheduled open motion day. [Id., pg. 3-7.] The court, upon good cause shown and the agreement of the parties, continued the matter for what the court described would be a brief status hearing on February 14, 2011, in order to ascertain if an adjudicatory hearing or a transfer hearing should be scheduled. [Id.] There was no abuse of discretion in the court's granting of the State's motion to continue. State v. Jason H., *supra*.

On February 9, 2011, only two (2) days after the circuit court's first status hearing wherein the Petitioner, through counsel, put forth on the record his hope that his case may proceed in the court's juvenile jurisdiction, the Petitioner escaped from the Vicki Douglas Juvenile Detention

Center, injuring a correctional officer in the process. [AR, 68, 112.] Upon the Petitioner's capture on February 11, 2011, the State filed a juvenile petition charging the Petitioner with escape from DJS custody, conspiracy, and assault on a correctional officer, as well as the motion to transfer the Petitioner's home invasion case to the court's adult criminal jurisdiction. [AR, 77-79.] As of the filing of the transfer motion on February 11, 2011, a trial/adjudicatory hearing date was not yet set by the court. **W.Va. Code §49-5-10(a)** as well as Rule 20(b) of the **West Virginia Rules of Juvenile Procedure** provide that "any transfer motion made by the prosecuting attorney shall be filed and served at least eight (8) days prior to the adjudicatory hearing." As such, the State was within statutory guidelines for filing the transfer motion.

Additionally, the Petitioner points out that Mr. Lehman had already filed the Petitioner's demand for jury trial and motions for discovery prior to the February 7, 2011, status hearing. The State would note that the clear language of Rule 20(c) of the **West Virginia Rules of Juvenile Procedure** states only that "no *inquiries* relative to admission or denial of the allegations contained in the petition or the demand for jury trial *may be made of the juvenile* until the court has determined whether the proceedings will be transferred to criminal jurisdiction." (Emphasis added.) *See also* **W.Va. Code §49-5-10(b)**. Although Petitioner's counsel filed a boilerplate document demanding a trial by jury and moving for discovery upon receiving the juvenile petition, a clear reading of the transcript of the February 7, 2011, status hearing shows that no such inquiries were made of the Petitioner by the court prior to the State's filing of the motion to transfer on February 11, 2011. [AR, Copy of Transcript of Status Hearing, pg. 1-8.] As such, this procedural formality was also observed by the court.

Following the State's filing of the motion for transfer, counsel for the State and the Petitioner knew that enough time for a transfer hearing would need to be scheduled by the circuit court since the court indicated that the February 14, 2011, hearing would only be a very brief status hearing set at the same time as a number of other hearings before the court. [See AR, Copy of Transcript from

Status Hearing, pg. 5-7.] Considering Petitioner's counsel had also since experienced a scheduling conflict for 9:00am on February 14th, the parties submitted an agreed order indicating that a transfer hearing would be necessary and asking the court to schedule that proceeding. [AR, 75-76.]

Petitioner's counsel represented affirmatively in the order that the Petitioner wished to waive the seven (7) day timeframe for the scheduling of the transfer hearing in order to be able to adequately prepare. [Id.] Not only was the Petitioner within his rights to waive this time frame, this Court has expressly found that it is good cause to continue a transfer hearing beyond the seven-day limit prescribed by statute to give all parties concerned adequate opportunity to prepare for the hearing. Syl. Pt. 1, State ex rel. Cook v. Helms, *supra*.

The court scheduled the transfer hearing for February 28, 2011. [AR, 75-76.] After 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 the February 28, 2011 date would be a status hearing for further scheduling. The court then rescheduled the transfer hearing for March 22, 2011. [AR, 81.] 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 6, 2011. [AR, 87.] Both at the February 28, 2011, hearing and in its March 16, 2011, order, the court stated that its sua sponte continuances of the transfer hearing were because of scheduling conflicts with the court's busy docket, which included juvenile abuse and neglect proceedings which take judicial precedence over other matters. [AR, 81, 87.] This Court in State v. Gary F., *supra*, found no reversible error in the court's consideration of its busy docket in scheduling matters outside of time frames. Additionally, the Petitioner had already waived the time frame, as discussed above, and the Petitioner did not object to the court's rescheduling of transfer hearing dates. Again, there was no abuse of discretion on behalf of the court. State v. Jason H., *supra*.

In addition to good cause existing and being found by the court in scheduling matters, there was no prejudice to the Petitioner caused by the delay in the transfer hearing. In addition to

the felony charges for which the Petitioner was awaiting transfer, the Petitioner was also charged with escape, conspiracy, and battery on a correctional officer in a separate ongoing proceeding that could not be transferred. Even if the transfer hearing had been held on February 28th or March 22nd, the Petitioner would have still been detained on those charges.²

C. THE CIRCUIT COURT HAD SUFFICIENT EVIDENCE TO TRANSFER THE PETITIONER TO THE ADULT CRIMINAL JURISDICTION OF THE COURT.

i. Standard of Review

“Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed.”

Syl. Pt. 1, State v. Bannister, 162 W.Va. 447, 250 S.E.2d 53 (1978).

“While findings of fact are subject to a clearly wrong standard, ‘[w]here the issue on appeal from the circuit court is clearly a question of law or involving interpretation of a statute, we apply a de novo standard of review.’ Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 449 S.E.2d 415 (1995).”

Syl. Pt. 1, State v. Barrill, 196 W.Va. 578, 474 S.E.2d 508 (1996).

ii. Discussion

The transfer hearing conducted by the court in this matter lasted several hours. The State called eight (8) witnesses to the stand, and the Petitioner chose not to call any witnesses. The State also introduced two exhibits during the course of the hearing. Two of the witnesses called by the State during the transfer hearing asserted their own constitutional rights not to testify and/or otherwise refused to answer questions. These witnesses were found to be unavailable by the court. The State introduced statements made by these two witnesses through the investigating officer under the statement against interest exception to the hearsay rules. At the close of the

² The Petitioner entered a knowing, voluntary, and counseled admission to paragraph five (5) of the juvenile petition in case 11-JD-22, charging escape from the custody of the Division of Juvenile Services. The State agreed to drop the remaining paragraphs, and the court, by agreement of the parties, committed the Petitioner to the custody of the Commissioner of the Division of Juvenile Services for completion of the program at the West Virginia Industrial Home for Youth for a period not to exceed one (1) year.

hearing, the court noted the issues with considering the hearsay statements of these witnesses and found that even without the hearsay statements, the State clearly established probable cause for the transfer.

Statute provides in relevant part:

“The court shall transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that: (1) the juvenile is at least fourteen years of age and has committed...the crime of robbery involving the use or presenting of firearms or other deadly weapons under section twelve [§61-2-12] of said article...”

W.Va. Code §49-5-10(d)(1). To that end, the court is required to conduct a hearing in order to make an independent determination of whether there is probable cause to believe that a juvenile has committed one of the offenses enumerated in **W.Va. Code §49-5-10(d)(1)**. See In re E.H., 166 W.Va. 615, 276 S.E.2d 557 (1981); see also In the Interest of Moss, 170 W.Va. 543, 295 S.E.2d 33 (1982).

“Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it.”

Syl. Pt. 1, In the Interest of Moss, *supra*.

The Petitioner alleges that there was insufficient evidence introduced by the State at the transfer hearing to support the court’s finding of probable cause for the transfer. As a part of this argument, the Petitioner alleges that the introduction of hearsay evidence in the course of the testimony of Lt. Harmison violated both the West Virginia Rules of Evidence and the Petitioner’s rights under the Confrontation Clause.

It is well established that “the probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence.” Syl. Pt. 3, In the Interest of Moss, *supra*. However, it is also well established that “the failure to give strict adherence to the rules of evidence or to the scope

of cross-examination as required in a criminal trial will not be grounds for reversible error at a transfer hearing.” Syl. Pt. 4, In re E.H., *supra*.

Through the years, the Court has considered the waiver of juvenile jurisdiction a critical stage in proceedings, which demands a substantial level of constitutional due process considerations. The Court has also kept in mind, however, that a transfer hearing does not determine the issue of culpability. For that reason,

“there is a broader latitude on evidentiary matters, since it is assumed that a judge can weed out the extraneous from the relevant and because of his legal training will not be influenced by otherwise inadmissible evidence.”

In re E.H., 166 W.Va. at 627, 276 S.E.2d at 565. In fact, the case law on juvenile transfer hearings is replete with distinctions made between both the rights that are implicated by a transfer hearing as opposed to a juvenile adjudication or adult criminal trial and also evidence that is admissible at a transfer hearing which may be left to a different level of scrutiny before a judge would allow its admission at a juvenile adjudication or adult criminal trial. Specifically, this Court has found that there is no right to a jury at a transfer hearing. In re E.H., *supra*. Further, this Court has held that while the court is required to make a cursory determination on the voluntariness and admissibility of a statement for use at a transfer hearing, it is not the same scrutiny and procedure used for admissibility in a criminal trial. K.M. Comer v. Tom A.M., 184 W.Va. 634, n. 8, 403 S.E.2d 182, n. 8 (1991). This Court has further ruled that the issue of prompt presentment is not a relevant consideration for the court at a transfer hearing since the issue is one of probable cause and not culpability. Id. at n. 9.

In the case of K.M. Comer v. Tom A.M., *supra.*, this Court upheld a court’s finding of probable cause while conceding that a “substantial portion of the testimony” introduced at the transfer hearing was hearsay. Id. at 184 W.Va. at 640, 403 S.E.2d at 188. Fifteen (15) year old Tom A.M. was charged with the first-degree sexual assault of his nine (9) year old sister, and the State

filed a motion to transfer him to the adult criminal jurisdiction of the court. At the transfer hearing, the State called the mother, Tom A.M.'s probation officer, a child protective service worker, and the investigating State Trooper. The court allowed the use of a psychological report and statements from both Tom A.M. and the victim. This Court ruled that the lower court was aware of the problems of the hearsay testimony based upon the record and that there was other non-hearsay evidence presented by the State which the court also relied upon in making its probable cause determination. Id. Noting that broader latitude on evidentiary matters should be given in transfer hearings and finding that the record did not consist entirely of hearsay testimony, this Court found no error in the circuit court's finding of probable cause. Id.

The Petitioner relies on the cases of 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) in support of his argument that the Court erred in finding probable cause in the case herein. These two cases are clearly distinguishable from the matter at hand. In Largent, the defendant was charged through juvenile petition with first-degree arson, among other offenses, and the State moved for transfer. The State presented the homeowner at the transfer hearing to testify about the fact that the fire had occurred. The State further presented to the court the indictment showing that the defendant was charged with first-degree arson, which was a transferable offense under W.Va. Code §49-5-10(d)(1). There was no testimony establishing a link between the arson and the defendant. In Stephfon W., the defendant was charged with first-degree murder by juvenile petition, and the State moved to transfer. At that transfer hearing, the State merely presented the court with the findings of fact and conclusions of law made by the juvenile referee at the previously held preliminary hearing, and the circuit court accepted those findings and conclusions as its own for the purpose of transfer. The defendant was also precluded from introducing any evidence at the hearing. In both cases above, this Court found that there was no meaningful independent transfer hearing upon which the lower courts could have made a finding of probable cause: in Largent, because an indictment on its face is not presumed or

conclusive evidence of the commission of an offense by the person charged and in Stephfon W. because the court failed to undertake its own evidentiary hearing on the issue of probable cause and merely adopted the findings of the juvenile referee.

In the case at hand, the circuit court held a full transfer hearing, including the testimony of several witnesses and the introduction of exhibits. Lt. Harmison testified that the Sheriff's Department had received an anonymous tip that the Petitioner and Ian Derr were involved in the home invasion at the Beckman residence. [AR, 26.] This information led to several revelations in the case. First, it was soon discovered that the Petitioner had worked for Deborah Beckman and her late husband at the kennel they ran adjacent to their home. All three eye witnesses to the robbery (Deborah Beckman, Wendy Beckman, and Amy Edwards) testified that the two armed, masked men came into residence and the "short stocky" one went immediately back the hallway and retrieved the portable safe from the master bedroom. [AR, Transcript of Hearing Held April 6, 2011, pg. 18-50.] All three testified that this was the only item that they observed or believed the men to take. Deborah Beckman further testified that there were computers and other valuable items visible in the house at the time of the robbery. [Id., pg. 23.] This led Ms. Beckman to believe that, as she testified, whoever the robbers were, they were familiar with her home and the location of the lockbox such that it had to be someone who had worked for the kennel or an emergency responder who had been inside the home and bedroom the previous week when her husband had passed away. [Id.] Ms. Beckman further testified that as a former employee, the Petitioner would have known the whereabouts of this safe and that there was cash kept inside it. [Id., pg. 24-25.] Second, officers obtained from Elizabeth McClain, the Petitioner's grandmother, a sketch that she testified she had found in one of the Petitioner's school books. [Id., pg. 88-89.] This sketch was clearly a drawing of the layout of the Beckman residence (and showed the attached kennel labeled as "kennel") with the word "TARGET" written in capital letters in the corner of the master bedroom where the portable safe was kept. This sketch was introduced as evidence. Additionally, the court heard generalized

descriptions of the intruders as one being “short and stocky” and one being “tall and skinny.” The court had the opportunity to view both the Petitioner and his co-defendant Ian Derr. Further, officers were able to interview Ian Derr and Ashley W. in the course of their investigation.

The Petitioner takes issue with the introduction of hearsay statements made by both Ashley W. and Ian Derr in the testimony of Lt. Harmison. As discussed above, the court is given broad discretion in evidentiary matters in hearing cases for transfer, especially in the area of hearsay. It is also established that Confrontation Clause issues can also be implicated in the introduction of hearsay at a transfer hearing.

The evolution of the Confrontation Clause is traceable through not only through adult criminal cases but also in the case of juvenile transfer hearings. It was ruled by this Court in State v. Gary F., 189 W.Va. 523, 432 S.E.2d 793 (1993), that

“a juvenile is denied his constitutional right to confront his accusers when a critical witness, who has not been demonstrated as unavailable pursuant to the rules of evidence, is permitted to testify by telephone during a transfer hearing.”

Id., Syl. Pt. 3. This established that a showing under the rules of evidence was needed in order to provide an accused with the necessary due process at a transfer hearing.

Under Rule 804 of the **West Virginia Rules of Evidence**, a witness is “unavailable” when that witness

- (1) “is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; or
- (2) persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of his or her statement; or
- (4) is unable to be present or to testify at the hearing because of the death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under

subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means."

W.V.R.E. 804 (a)(1)-(5). Furthermore,

"A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true"

is not excluded by the hearsay rule if the declarant is unavailable as a witness. W.V.R.E. 804(b)(3).

That rule also provides that "a statement tending to expose the declarant to criminal liability offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Id.

This Court did adopt the procedure for establishing a witnesses' unavailability pursuant to the penal interest exception of Rule 804(b)(3) that it requires for adult criminal trials in juvenile transfer proceedings in the case of In the Interest of Anthony Ray Mc., 200 W.Va. 312, 489 S.E.2d 289 (1997). In the case at hand, Ashley W. was called to the stand, unrepresented by counsel but accompanied by her father. Because Ashley W., a juvenile, had not been charged and had not been granted immunity for her testimony, the State requested that she be Mirandized prior to offering testimony. Ashley W. and her father promptly requested counsel before answering any questions. As such, the parties agreed and the court found that Ashley W. was unavailable as a witness under Rule 804. [AR, Transcript of Hearing Held April 6, 2011, pg. 52-57.] Next, Ian Derr was called to the stand. He was accompanied by his attorney, Nicholas F. Colvin, Esq. Mr. Derr had already been indicted on charges of aggravated robbery, burglary and conspiracy related to his involvement in this crime. Mr. Derr answered preliminary questions as to his name, that he had been indicted on these crimes, and that he was represented by counsel who was present. The State asked Mr. Derr if he knew the Petitioner. At that point, Mr. Colvin began to instruct his client not to answer any further questions. There was an exchange on the record concerning Mr. Derr's refusal to answer a question

even as simple as if he knew the Petitioner at which time the parties agreed and the court ordered that Mr. Derr was unavailable as a witness. [Id., pg. 58-62.] Admittedly, the court did not move forward with the testimony and find whether the answer to each of the State's questions would or would not be facially incriminating, but it was clear at that point that Mr. Derr, upon advice of his counsel, was refusing to answer any further questions. This refusal, as did Ashley W.'s before him, rendered him unavailable under Rule 804.

According to the outlined procedure in the Anthony Ray Mc. case, the court should then undertake a reliability analysis in satisfaction of the Confrontation Clause. The State concedes that the court did not expressly do this on the record. However, the State would argue that, analogous to the court in the case of K.M. Comer v. Tom A.M., *supra*, the court was aware of the issues presented by the testimony of Ian Derr and Ashley W., listened to the testimony of Lt. Harmison, and gave the testimony the weight the court believed it deserved. The statement of Ashley W. introduced by Lt. Harmison was that Ashley waited in the car while the Petitioner and Mr. Derr committed the robbery. The statement of Mr. Derr introduced through Lt. Harmison was that he and the Petitioner committed the robbery at the Petitioner's suggestion, that the Petitioner had a BB gun or pellet gun and that Mr. Derr had a 40-caliber pistol, that they dumped the lockbox and worthless contents at a specific location, and that they all received a share of the money.

According to Anthony Ray Mc., *supra.*,

“The burden is squarely on the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.”

Id., Syl. Pt. 13.

Looking at the other evidence introduced by the State, the prosecution provided the court with ample evidence to rebut the presumption that the hearsay statements of Ashley W. and Ian Derr

were unreliable and established that said statements were trustworthy such that adversarial testing would have added little to their reliability. Elizabeth McClain, the Petitioner's grandmother who is also the grandmother of witness Ashley W., also testified that Ashley W. told her that Ashley had waited in the car while the Petitioner and Ian Derr committed the robbery. [AR, Transcript of Hearing Held April 6, 2011, pg. 93.] In regard to the statements of Ian Derr, there is no evidence that Ian Derr was in any way familiar with the Beckmans or Beck's Kennel, but there was testimony from Deborah Beckman herself that indicated that the Petitioner had worked for the Beckmans and knew where the lockbox was located in the residence. This lends support to Derr's statement that the robbery was the Petitioner's idea. Additionally, the fact that Mr. Derr admitted that he had been in possession of the real handgun while the Petitioner had been in possession of a modified BB gun or pellet gun is inherently reliable since it places the genuine pistol in Mr. Derr's hands. Mr. Derr also gave officers the gun he used in the robbery. Lt. Harmison and Deputy St. Clair were also able to recover an envelope from Beck's Kennel along the riverbank where Ian Derr had told them they dumped the unwanted contents of the lockbox. [Id., pg. 68.] Especially considering the distance of this location from the Beckman residence, this confirmed Mr. Derr's account of the disposal site. Furthermore, Mr. Derr told the officers that he had used his share of the money to pay rent, buy a car stereo and purchase marijuana. Mr. Derr only implicated himself in further criminal activity by giving that statement to the officers. As a further indicia of reliability, the court also heard that even as of the date of the transfer hearing, Mr. Derr had not been offered any type of a plea agreement by the State. [Id., pg. 59.]

During argument following the taking of testimony at the transfer hearing, Petitioner's counsel argued that the State's case had been entirely based on the hearsay statements introduced through Lt. Harmison and argued against the transfer. [Id., pg. 103-104.] The court, in making its finding of probable cause for the transfer, informed the parties that the court appreciated the argument of the Petitioner's counsel in light of the evidence that the court had heard, but further

stated that there was “clear cut” probative evidence that was not hearsay that established probable cause. [Id. pg. 104.]

Just as this Court allowed latitude in the lower court’s hearing of and on-record analysis regarding hearsay evidence in K.M. Comer v. Tom A.M., *supra.*, noting that the issue is one of probable cause at a transfer hearing and not one of culpability as it would be in an adjudication or at trial, this Court should allow latitude to the court herein recognizing the court’s ability to “weed out the extraneous from the relevant and because of his legal training...not be influenced by otherwise inadmissible evidence.” In re E.H., *supra.* As discussed, the court properly declared the witnesses unavailable under Rule 804 pursuant to In the Interest of Anthony Ray Mc., *supra.*, upon their refusal to answer further questions, and the State provided affirmative reasons throughout the course of the hearing that the court could have used to rely on the statements of the unavailable witnesses. In making his verbal ruling on the transfer, the court recognized the issues surrounding the hearsay testimony by acknowledging his appreciation of the arguments of Petitioner’s counsel, which demonstrated that the court, whether it had gone through the analysis on the record or not, had certainly considered the reliability of that testimony appropriately.

The Petitioner also notes the case of State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006), as further support that the hearsay evidence be excluded; although, the Petitioner concedes that Mechling applies specifically to a defendant’s Sixth Amendment right to confront his accusers in the context of a criminal trial. As already discussed above, it is the State’s position that the due process rights of the juvenile for the purposes of the transfer hearing, which are distinguishable from the due process considerations for a criminal trial according to the body of this Court’s case law, are satisfied considering the testimony was otherwise admissible under both the rules of evidence and precedent for juvenile transfer hearings, and the Petitioner had an opportunity to cross-examine the proponents of those statements. In re E.H., *supra.*, K.M. Comer v. Tom A.M., *supra.*, In the Interest of Anthony Ray Mc., *supra.*

Furthermore, even if this Court finds that the introduction of hearsay statements made by Ian Derr and Ashley.W. through Lt. Harmison was error, such error should be found to be harmless under the circumstances of this case. As the State outlined above, there was ample other evidence to establish probable cause that the Petitioner committed these crimes for the purposes of the transfer hearing. The Sheriff's Department received an anonymous tip that the Petitioner and Ian Derr were involved in the home invasion at the Beckman residence. Deborah Beckman, Wendy Beckman, and Amy Edwards testified that the "short and stocky" of the two armed men went immediately back the hallway and soon came back with only the portable safe despite the existence of other valuables in and around the house. Deborah Beckman testified that the Petitioner used to work for the Beckmans and, as a former employee, the Petitioner would have known about the portable safe, where it was kept, and that it contained cash. Additionally, Elizabeth McClain testified that she discovered a sketch in one of the Petitioner's schoolbooks of the Beckman Kennel with the word "TARGET" written in all capital letters in the back corner of the home where the lockbox was kept in the master bedroom. Ms. McClain also testified that at around the time of the robbery, the Petitioner showed her a roll of money and gave her several different explanations for where he obtained it. Finally, the court had the opportunity to view both of the accused robbers after having heard the descriptions of their body types from the eye witnesses. This evidence alone, regardless of the statements of Ian Derr and Ashley W., is wholly sufficient to warrant a prudent person in the belief that an offense had been committed and that the accused committed it. In the Interest of Moss, *supra*. The lower court expressly made this finding on the record. [AR, Transcript of Hearing Held on April 6, 2011, pg. 104.]

The court, therefore, had sufficient admissible evidence to support a finding of probable cause for the juvenile's transfer and did not commit reversible error in its consideration of evidence. State v. Barrill, *supra*. Upon a review of the evidence presented, the court's finding of probable cause for the transfer was not clearly wrong. State v. Bannister, *supra*. As such, this Honorable

Court should affirm the transfer of the Petitioner to the adult criminal jurisdiction of the court.

II. THE CIRCUIT COURT PROPERLY SENTENCED THE PETITIONER.

A. IT WAS WITHIN THE CIRCUIT COURT'S DISCRETION NOT TO REMAND THE PETITIONER FOR JUVENILE DISPOSITION PURSUANT TO W.Va. CODE §49-5-13(e).

i. Standard of Review

“The Supreme Court of Appeals reviews sentencing orders...under an abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

ii. Discussion

W.Va. Code §49-5-13(e) states as follows:

“Notwithstanding any other provision of this code to the contrary, if a juvenile charged with delinquency under this chapter is transferred to adult jurisdiction and there tried and convicted, the court *may* make its disposition in accordance with this section in lieu of sentencing such person as an adult.”

(Emphasis added.) This statute makes a court's sentencing decision under this provision completely discretionary. See State v. Robert McL., 201 W.Va. 317, 496 S.E.2d 887 (1997).

The State would first note that the Petitioner cites the cases of State ex rel. Hill v. Zakaib, 194 W.Va. 688, 461 S.E.2d 194 (1995), State v. Turley, 177 W.Va. 69, 350 S.E.2d 696 (1986), and State v. Ball, 175 W.Va. 652, 337 S.E.2d 310 (1985) in support of the court's consideration of placement pursuant to W.Va. Code §49-5-13(e), but none of those cases involved a court sentencing a defendant pursuant to that code section. In all of those cases, the court sentenced the defendants as adults but remanded them to the custody of the Division of Juvenile Services pursuant to the mandates of W.Va. Code §49-5-16 until such time as they attained the age of eighteen (18) years.

As such, the cases relied upon by the Petitioner are not authority for sentencing under **W.Va. Code §49-5-13(e)**.

Additionally, the Petitioner does not state how further placement at a juvenile facility would have been practical for the court to order or how it would have been of further benefit to the Petitioner. The sentencing court was aware, and the record clearly reflects, that on April 6, 2011, the Petitioner was committed to the custody of the Division of Juvenile Services (with credit for time served) for completion of the program at the West Virginia Industrial Home for Youth. [AR, 112, 118-119, Transcript of Hearing Held on April 6, 2011, pg. 5-9.] Since his term of commitment could not exceed the maximum amount of time for which an adult could be incarcerated, his commitment was ordered not to exceed one (1) year. [Id.] This commitment was ordered as a result of an escape charge incurred by the Petitioner while in detention pending the matters currently before this Court. [Id.] Although this commitment was ordered in a separate and confidential juvenile proceeding (Berkeley County Circuit Court case 11-JD-22), by administrative error, some of the Petitioner's progress reports as well as his prepared discharge summary for the escape charge appear in the record for the current case.³

Part of the reason that the Petitioner's disposition on the escape charge was commitment to the Industrial Home was the issue of security. The Petitioner escaped from a staff secure Division of Juvenile Services placement and had to be moved to a hardware secured facility. Aside from the Industrial Home (or a commitment to Barboursville pursuant to a mental hygiene action which is not appropriate in the Petitioner's case), the only true hardware secure treatment facility in the State of West Virginia is the Industrial Home.

In examining the Petitioner's progress while in juvenile placement at the West Virginia

³ Counsel for this response has already conferred with Petitioner's appellate counsel about getting those misfiled documents sealed to protect the Petitioner's confidentiality rights under W.Va. Code §49-5-17. Since Petitioner's counsel wished to rely on those reports for the purpose of this appeal (and since the sentencing court properly considered his juvenile history as well), the parties have kept them a part of the record of this appeal.

Industrial Home for Youth, it appears that although the Petitioner (like all youths committed to that facility) entered into the program on Phase II, he was still at Phase II as of the date of his discharge summary on November 2, 2011. [AR, 118.] It was emphasized by the treatment team in the summary that the Petitioner had “never made Phase IV or Phase V.” [Id.] The summary also emphasized that various hearing officers had imposed a number of sanctions against the Petitioner for a multitude of behavioral violations, including two (2) separate assaults. [Id.] Educationally, the Petitioner was only maintaining a grade point average of 1.75, and was then serving in-school suspension for an assault against another resident at school. [AR, 18-19.]

The discharge summary in case 11-JD-22 was prepared by the facility pursuant to **W.Va. Code §49-5-20** in consideration of the Petitioner maxing out his one (1) year sentence on the escape charge as of January 17, 2012.⁴ [AR, 119.] It was specifically noted by the treatment team in preparation of the discharge plan that the Petitioner had never obtained Phase IV or V of the program. The program requires at least a Phase IV maintained appropriately for a period of time as to show consistency as a part of their criteria for successful completion. Because of the Petitioner’s frequent behavior problems, including an assault which caused him to be on security status at the facility and in in-school suspension even as of the date of the plea-taking in the instant matter on November 17, 2011, the Petitioner was not being recommended for discharge for successfully completing the program at the West Virginia Industrial Home for Youth.

Petitioner’s counsel at the sentencing hearing urged the court to consider sentencing pursuant to **W.Va. Code §49-5-13(e)**, and the court even inquired of the parties what progress the Petitioner had made at the Industrial Home. [AR, 9.] However, the Petitioner advances no argument as to why it would have been appropriate for the court to re-commit him to the custody of the Director of the Division of Juvenile Services when the Petitioner had already been so committed with minimal

⁴ The discharge summary, plan, and recommendation is required to be distributed to multidisciplinary team members well in advance of the resident’s actual discharge in order to allow for objections or modifications of the plan and further hearing by the court. **W.Va. Code §49-5-20.**

behavioral progress for nearly one (1) year.

It is clear from the court's questioning of counsel during the course of the sentencing hearing as well as from the court's reasoning in pronouncing sentence that the court did consider the option of juvenile disposition under **W.Va. Code §49-5-13(e)** but ultimately found that option inappropriate for the Petitioner. In so doing, the court did not consider any impermissible factors and did not abuse its discretion. State v. Goodnight, *supra*.

B. THE PETITIONER WAS PROPERLY FOUND BY THE COURT NOT TO BE SIMILARLY SITUATED TO HIS CO-DEFENDANT AFTER CONSIDERATION OF MITIGATING AND AGGRAVATING FACTORS FOR SENTENCING.

i. Standard of Review

“The Supreme Court of Appeals reviews sentencing orders...under an abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

In State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984), this Court held:

“Disparate sentences between codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age, and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.”

Id., Syl. Pt. 2.

ii. Discussion

Both the Petitioner and his co-defendant, Ian Derr, were offered identical plea agreements by the State except that the Petitioner wished to plead no contest and Mr. Derr was willing to plead guilty. [AR, 104, 137-138, 146-147.] Additionally, the State recommended a determinate sentence

of forty (40) years of incarceration for the offense of first-degree (aggravated) robbery for both the Petitioner and his co-defendant. [AR, Transcript of Proceedings Held on December 15, 2011, pg. 26, Transcript of Excerpt from Proceedings Held on February 9, 2012, pg. 22-23.] In fact, at the sentencing hearing for Mr. Derr, which took place after the Petitioner was sentenced by the court, the prosecutor even made the statement, “if his co-defendant got 40, he should get 40.” [AR, Transcript of Excerpt from Proceedings Held on February 9, 2012, pg. 22, line 19.]

The court, however, in sentencing the co-defendant, Mr. Derr, made a full record on the issues of how her consideration of the Petitioner’s sentencing differed from that of Mr. Derr. The court recognized that “Mr. Derr’s actions in committing this crime of violence were no different than the actions of his co-defendant, Mr. Whetzel...and Mr. Derr’s actions are as culpable as Mr. Whetzel’s actions...” [AR, Id. at pg. 24.] The court went on to say, however, that “there is a marked difference between Mr. Derr and Mr. Whetzel.” [Id.] The court further stated:

“The court saw Mr. Derr’s demeanor at the time that the victim spoke. And from my perception, reading his face and his reaction to the victim, he was remorseful. Genuinely remorseful as he explained to the Court in the PSI and basically as best he could here in court that he was. I also saw his reaction when his mother spoke on his behalf. And yet again he was very tearful at that point and remorseful and ashamed. And we often don’t have defendants in these cases when their—many times when parents speak on behalf of the defendant, they’re totally unfazed.

Speaking of marked difference between Mr. Derr and Mr. Whetzel, Mr. Whetzel, to my surprise, was totally nonreactive during the whole course of our plea taking up through sentencing. And that just is not the case with Mr. Derr. And Mr. Derr, in both appearance and in his words, was genuinely remorseful as his statement in the PSI would leave the court to believe...

He took responsibility for his actions today. He took responsibility for his actions when he spoke to the probation officer. And, in fact, he gave a full confession at the very beginning to the police which, again, puts some more contrast between himself and his co-defendant. In fact he even helped the police try to recover some of the property in this case and assisted them as best he could.

All of those things are in Mr. Derr’s favor with regard to a referral to Anthony as well as the fact that in my estimation, I believe that Mr. Derr is one of those occasional individuals, young defendants who come before this court, that is going to be able to turn this

around...”

[Id., 24-26.]

The court, however, also went on to inform Mr. Derr that upon his return from the Anthony Center, whether it be because of a successful completion of the program or because of not completing the program, the court would sentence him to a minimum of 40 years on the first-degree robbery charge both because said sentence is justifiable considering the serious circumstances surrounding the crime and the effect the crime has had on the victims and “because that is what Mr. Whetzel received.” [AR, pg. 26.] The court further stated that it may be a longer sentence if Mr. Derr should be unsuccessful at the Anthony Center. [Id.]

Additionally, the court considered a number of significant factors in sentencing the Petitioner, which were not factors in the consideration of the sentencing of Mr. Derr. Namely, that the Petitioner personally knew the victims and made the choice to rob them. [AR, Transcript of Proceedings Held on December 15, 2011, pg. 27.] Mr. Derr did not know the victims. The court went on to state:

“The court’s primary concern in this case is not Mr. Whetzel’s family’s track record, but the offense that he committed, the circumstances surround the offense, the fact that he was already in the system and had been in the system at a time that he committed the offense, the severity of the offense, the impact on the victim, and the court’s concern with protecting the safety of this community. And I don’t see if he is sent to the Anthony Center and comes out six months to two years how he’ll be able to reverse that trend and will jeopardize the safety of this community and these victims. And the court finds that any benefit he can receive at the Anthony Center after he would leave Salem [West Virginia Industrial Home for Youth] can also best be accommodated from the penitentiary system.”

[Id., pg. 28.]

Furthermore, although it is not as clear from the court’s holdings in the Petitioner’s sentencing hearing as it is abundantly clear from the court’s discussion of Mr. Whetzel’s demeanor at the sentencing of Mr. Derr, that the court also considered the apparent lack of remorse on the part of

the Petitioner. This is supported in the Petitioner's PSI report wherein his statement to the court reads "I will take the plea and let the court decide (sic) what they are going to do with me to decide (sic) my sentence." [AR, 112.] It is clear from Mr. Derr's hearing that he wrote a significant statement to the court that details his remorse for his wrongdoing and his apologies to the victims for the trauma that his actions inflicted. [AR, Transcript of Excerpt from Proceedings Held on February 9, 2012, pg. 24-26.] Furthermore, when the Petitioner was given the chance to address the court at his sentencing hearing, he minimized his delinquency history despite the fact that he was serving a commitment for an escape charge at the time of his sentencing, by saying that he has never been in trouble "beside the time." [AR, Transcript of Proceedings Held on December 15, 2011, pg. 22.] The Petitioner also distances himself from the victims despite the fact that he knew them and worked for them and also demonstrates an inability to take responsibility for his crime by stating "I just want to say sorry to the people that this happened to..." [Id.] The Petitioner doesn't say the people *I* hurt or the people *I* robbed. His statement is indicative of a lack of ownership of his actions as well as another sign of lack of genuine remorse. Lastly, the Petitioner entered a plea of no contest while Mr. Derr entered a plea of guilty.

Because the court found that the Petitioner is not similarly situated to his co-defendant based on the court's consideration of the mitigating and aggravating factors present for each perpetrator, the Petitioner's argument that his sentence is unconstitutionally disproportionate based on the disparity of the sentence of his co-defendant holds no weight. State v. Buck, *supra*. Furthermore, because the court did not consider any impermissible factors in the course of that analysis, the court did not abuse its discretion. State v. Goodnight, *supra*.

C. THE PETITIONER'S SENTENCE WAS NOT EXCESSIVE AND WAS PROPORTIONATE TO THE CRIMES OF CONVICTION.

i. Standard of Review

"The Supreme Court of Appeals reviews sentencing orders...under an abuse of discretion

standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Court stated in Syllabus

Point 5:

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

Furthermore, this Court sets forth in State v. Glover, 177 W.Va. 650, 658, 355 S.E.2d 631, 639 (1987) the applicable tests for disproportionate sentence consideration:

“In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), we set forth two tests to determine whether a sentence is disproportionate to the crime that it violates W.Va. Const. art. III §5. 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.’ 172 W.Va. at 272, 304 S.E.2d at 857. Cooper then states the second test: If it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test spelled out in syllabus point 5 of Wanstreet v. Bordenkicher, 166 W.Va. 523, 276 S.E.2d 205 (1981):

‘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 of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.’”

This Court recently noted its reluctance to apply the proportionality principle inherent in the

cruel and unusual punishment clause as an expression of due respect for and in substantial deference to legislative authority in determining the types and limits of punishments for crimes. State v. James, 227 W.Va. 407, 710 S.E.2d 98, 106 (2011).

ii. Discussion

The Petitioner was sentenced to a determinate term of forty (40) years of confinement on the charge of first-degree (aggravated) robbery pursuant to **W.Va. Code §61-2-12**. [AR, 107-117, 140-142, Transcript of Proceedings Held on December 15, 2011.] The Petitioner was also sentenced to the statutory term of not less than one (1) nor more than fifteen (15) years of confinement on the charge of burglary. **W.Va. Code §61-3-11**. [Id.] These sentences were ordered to be served concurrently. [Id.] The Petitioner was also ordered to pay restitution (joint and several with his co-defendant) in the amount of \$8,000. [Id.]

First, the Petitioner seems to concede that his statutory sentence of not less than one (1) nor more than fifteen (15) years of confinement for the burglary conviction is within statutory limits. The Petitioner instead devotes his brief to arguing that the imposition of a forty (40) year sentence for armed robbery is disproportionate. The State will, as such, also concentrate on this aspect of the court's sentence.

W.Va. Code §61-2-12(a) states as follows:

“Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.”

Id. The facts under which the petitioner was charged with this crime support facts leading to his conviction under subsection (2) involving threat of deadly force by the presentation of a firearm or other deadly weapon.

The record is full of references of the terrible childhood of the Petitioner. The State concedes

that Petitioner's parents have been in and out of prison for the majority of his life such that custody of the Petitioner was awarded to his grandmother, Carolyn Barrett. Ms. Barrett has done her best to raise the Petitioner and his siblings. Ms. Barrett even went as far as filing an incorrigibility questionnaire with the 23rd Judicial Circuit Probation Office in order to obtain help for the Petitioner when his behavior steadily deteriorated and he became unmanageable for her at home.

Despite his difficult upbringing and other issues, the Petitioner became acquainted with the Beckmans who agreed to give the Petitioner employment at their kennel. Deborah Beckman indicated that the Petitioner only worked for them for a few months, but during that time, she also indicated that the Beckmans treated him "like family," providing him with transportation, food, and an opportunity to earn a living even though they knew he "had problems." [AR, Transcript of Proceedings Held on December 15, 2011, pg. 23.] Ultimately, the Petitioner walked off the job. [AR, 115.]

The Petitioner had not been complying with the diversion program. Probation Officer Futrell stated at the Petitioner's sentencing hearing that the Petitioner had been having curfew violations, using drugs, and being defiant with his grandmother. [AR, Transcript of Proceedings Held on December 15, 2011, pg. 15.] Officer Futrell noted that there were at least two occasions on which the Petitioner tested positive for illegal drugs while in the diversion program. [Id., pg.18.] Officer Futrell also described the Petitioner actively seeking out and purposefully associating with adult criminals. [Id., pg. 19-20.] Officer Futrell speculated that the Petitioner behaved this way partially because of the "culture" he came out of where it's commonplace to be proud of and brag about your criminal lifestyle. [Id.]

The record shows that while on continuing supervision of the Diversion Program through which both his grandmother and Probation Officer Futrell had been trying to help the Petitioner and affect a change in himself through the offering of support and outpatient counseling services, the Petitioner began to plan a robbery of the Beckman residence. Mr. Beckman, the husband of Deborah

Beckman and part owner of Beck's Kennel, passed away a few days before the robbery. [Id., pg. 23, AR 115.] The Petitioner seized this opportunity to rob a grieving widow of the contents of her portable safe, which, as Ms. Beckman testified, the Petitioner knew contained a fairly substantial amount of cash. [AR, Transcript of Hearing Held on April 6, 2011, pg. 23-25.] The Petitioner enlisted the help and firearm of Ian Derr for the commission of the robbery in exchange for giving Mr. Derr a cut of the money the Petitioner knew from his employment with the Beckmans would be contained in the lockbox. [AR, 27.] Late on the evening of December 9, 2010, the Petitioner and Ian Derr, dressed entirely in black wearing gloves and ski masks, forced Amy Edwards into the Beckman residence at gunpoint. [AR, Transcript of Hearing Held on April 6, 2011, pg. 45-47.] Once inside, the two men began yelling at Amy Edwards and Wendy Beckman to give them money. [Id.] Ian Derr kept Amy Edwards and Wendy Beckman in the office of the home at gunpoint while the Petitioner brandished his weapon at Deborah Beckman, who was vacuuming the hallway of her home, causing her to flee her residence and hide terrified in an outbuilding of the property. [Id., at pg. 18-44.] The Petitioner went directly back the hall to the master bedroom and retrieved the portable safe. [Id.] The Petitioner then returned to the office, and the Petitioner and Mr. Derr exited the property. [Id.]

Ms. Beckman testified that, because the armed intruders only took the safe when there were other valuables in the house and because the intruders apparently knew the exact location of that safe, she believed the perpetrators to be someone familiar with her home, such as an employee or a responder who would have been in her home at the time of her husband's death just days earlier. [Id., pg. 23-24.] It is clear from the record that upon finding out that the Petitioner committed this offense against them that it profoundly affected the Beckmans.

Ms. Beckman gave statements regarding the impact that this crime had on her and her family, both emotionally and financially. [AR, 115, Transcript of Proceedings Held December 15, 2011, pg. 23-24, Transcript of Excerpt of Proceedings Held on February 9, 2012, pg. 18-19.] She stated that

she believed she would be forever impacted by the Petitioner's crime. [Id.] She described not being able to be alone and asking others to move in with her to provide an added sense of security. [Id.] She also said she'd lost a significant amount of weight and experiences trouble sleeping. [Id.] She further reported that she, her daughter, and her stepdaughter were left all terrified of guns. Ms. Beckman also stated that because of her relationship with the Petitioner prior to his commission of this crime against her, she does not know if she will ever be able to fully trust anyone again like she once did. [Id.] To further complicate matters for Ms. Beckman, the Petitioner stole her late husband's will when he took the portable safe from the home. This caused Ms. Beckman significant hardship in settling her husband's estate, especially as it related to their small business. [Id.] Ms. Beckman also told the court about the increased need for Wendy Beckman to attend counseling and receive medication for her now exacerbated mental health issues. She further reported that Wendy was now also afraid to be alone and keeps a dog with her at all times. [Id.] Ms. Beckman also reported to the court that Amy Edwards had lost her husband, who had been battling cancer throughout the early stages of the proceedings, and she had installed a complete security system in her home due to her fear of re-victimization. [Id.] Ms. Beckman was overcome with how "cold and calculated" the Petitioner's crime was. [AR, 115.]

Following this terrible crime they committed which impacted the victims in these horrible ways, the Petitioner split the money from the safe between himself and Ian Derr. The Petitioner flashed around a wad of cash to his family members who began to question where the money had come from since the Petitioner was unemployed at the time. [AR, Transcript of Hearing Held on April 6, 2011, pg. 86-87.] The Petitioner's grandmother also described a number of purchases the Petitioner had made immediately following the time of the robbery, including a car and new tires and stereo system for the car. [Id., pg. 90-91.] The Petitioner and his co-defendant dumped the items that were worthless to them, including Mr. Beckman's will which was crucial to the Beckman family at the time, into a river. [AR, 27.]

In the course of the investigation, officers received an anonymous tip stating that the Petitioner and Ian Derr were involved in the robbery at the Beckman residence. The Petitioner denied all involvement to the officers. [AR, 26, Transcript of Proceedings Held on April 6, 2011, pg. 63.] When officers spoke with Ian Derr, they received full cooperation and a complete confession implicating the Petitioner. [Id., AR 26-27.] Even after officers recovered a drawing that the Petitioner's grandmother had found in the Petitioner's schoolbook showing the layout of the Beckman residence with the word "TARGET" written in capital letters in the corner of the master bedroom where the portable safe was kept, the Petitioner continued to deny responsibility for the crime.

Once the officers detained the Petitioner, the Petitioner waived his preliminary and detention hearings, and a bond was set for the Petitioner in the amount of \$250,000 cash or surety. The State was aware of the Petitioner's involvement in the Diversion Program as well as factors concerning the Petitioner's background. As such, the State began gathering information on the Petitioner in order to make a determination as to whether a motion to transfer the Petitioner to the adult criminal jurisdiction of the court would be filed or whether the matter should be allowed to proceed under the court's juvenile jurisdiction. [AR, Transcript of Proceedings Held on February 7, 2011, pg. 3-4.] Just two days after the court's initial status hearing in the Petitioner's case where he put forth his hopes that his case would be left in the court's juvenile jurisdiction, the Petitioner escaped from the Vicki Douglas Juvenile Detention Center, injuring a correctional officer in the process. [AR, 68, 112.] Following this incident, the State believed that the Petitioner would not be amenable to cooperating with further treatment services and filed the motion for transfer.

Throughout his placement at the West Virginia Industrial Home for Youth pursuant to the escape charges, the Petitioner continued to act out behaviorally, in some instances violently assaulting other residents. [AR, 118-119.] This was despite his consistent participation in counseling services offered to the Petitioner at the facility, and despite the highly structured nature of

the program at the Industrial Home. [Id.]

In consideration of the particularly egregious circumstances surrounding the Petitioner's preying on the Beckman family, who had so graciously offered him employment and taken him under their wing as an employee, doing so at a time when the women in the family were completely vulnerable and grieving following the death of the family patriarch, and doing so by forcibly entering their home with guns pointed in their faces, yelling at them to give up their money, and in further consideration of the fact that the Petitioner continued to make criminal choices in the face of individuals who were either actively helping him, had tried to help him or were willing to help him, a sentence of forty (40) years does not "shock the conscience." State v. Cooper, *supra.*, State v. Glover, *supra.*

Furthermore, the Petitioner's sentence is not disproportionate under the objective test in Glover, *supra.* The offenses herein are serious felony offenses involving armed, violent intrusion into the victims' home. This Court has previously observed that "aggravated robbery in West Virginia has been recognized as a crime that involves a high potentiality for violence and injury to the victim involved." State v. Ross, 184 W.Va. 579, 582, 402 S.E.2d 248, 251 (1990).

"As a result, the Legislature has provided circuit courts with broad discretion in sentencing individuals convicted of aggravated robbery or attempted aggravated robbery. In fact, '[t]he Legislature chose not to deprive trial courts of discretion to determine the appropriate specific number of years of punishment for armed robbery, beyond ten.' State v. Woods, 194 W.Va. 250, 254, 460 S.E.2d 65, 69 (1995), *quoting State ex rel. Fiarcloth v. Catlett*, 165 W.Va. 179, 181, 267 S.E.2d 736, 737 (1980).'

State v. Williams, 205 W.Va. 552, 555, 519 S.E.2d 835, 838 (1999). In West Virginia, "robbery has always been regarded as a crime of the gravest nature." State v. Glover, 177 W.Va. at 659, 355 S.E.2d at 640. West Virginia is not alone in this.

Jurisdictions are fairly uniform in their regarding of aggravated or armed robbery, seeing it as one of the most serious crimes of violence that one can commit against another person. Case law is

uniformly replete with its regard to armed robbery being a “vicious crime.” See State v. Morris, 661 S.W.2d 84 (Mo.App.1983), *quoted with approval by* State v. Williams, 205 W.Va. at 556-557, 519 S.E.2d at 839-840. In State v. Morris, *supra.*, the Missouri Court of Appeals upheld a life sentence for robbery in the first degree after Morris and an accomplice shoved the victim to the ground in a supermarket parking lot, held a gun to his side, and took his billfold. This Court used that holding by the Missouri Court of Appeals as well as comparable cases from Alabama (*see*, Jenkins v. State, 384 So.2d 1135 (Ala.Crim.App.1979)), Louisiana (*see* State v. Haskins, 522 So.2d 1235 (La.App. 4 Cir. 1988) and State v. Dozier, 553 So.2d 931 (La.App. 4 Cir. 1989), *writ denied*, 558 So.2d 567 (La.1990)), and Nebraska (*see* State v. Simpson, 200Neb. 823, 265 N.W.2d 681 (Neb.1978)), in upholding the fifty (50) year sentence in the case of State v. Williams, *supra.*

In the case of State v. Williams, this Court upheld a fifty (50) year determinate sentence for Williams’ conviction of attempted aggravated robbery. At the time of the robbery, Tonya Williams was eighteen (18) years old and had no prior juvenile or adult record whatsoever. Ms. Williams and her friend had devised a plan to trick the victim out of his money by offering to give him a private dance in his home, allowing him to get intoxicated, and then stealing his money without providing any service. Prior to going to the victim’s home, Ms. Williams and her friend encountered two male friends with whom they shared their plan to rob the victim. The male friends asked to come along, stating that if Ms. Williams and her friend were unable to steal the money through their trickery, they would take the money by force. Ms. Williams stated that she heard the two men mention the taking of a gun and told them not to bring the firearm as it would not be necessary. During the course of the evening, Ms. Williams went outside the victim’s residence and was followed back in by the two male friends who brandished a firearm at the victim. A struggle ensued over the gun, and Ms. Williams ran out of the house and sped off in a vehicle after hearing the gun go off and seeing the victim laying in the front yard. Ms. Williams cooperated with police in the course of their investigation. It was also clear from the record that Ms. Williams was not in possession of the gun at any point nor

was there evidence that disputed Ms. Williams' statement that she told her co-defendants not to bring the weapon.

In sentencing Ms. Williams to fifty (50) years for an attempted aggravated robbery, the lower court found that the crime was a crime "of a violent nature. It was of dangerous proportions. It was clearly deliberate." *Id.* at 555, 838. In support of its sentencing decision, the court also cited the fact that Ms. Williams knowingly associated with known felons and hardened criminals and concluded from her failure to fully accept responsibility for her conduct and lack of remorse that she was in need of a "structured correctional environment" to provide the services she required. *Id.* at 558-559, 841-842. Ms. Williams, like the Petitioner herein, also alleged that the trial court erred by not applying the Youthful Offender Statute, **W.Va. Code §25-4-6**. This Court found specifically that "the application of this statute is discretionary." *Id.* at 559, 842. This Court went on to say that, while the court had undoubtedly been aware of the facts that Ms. Williams was only 18 years old, had no juvenile or criminal history, and did not actually possess or necessarily know about the presence of the firearm, there were sufficient aggravating factors to justify the imposition of a determinate fifty (50) year sentence. *Id.*

While the State concedes the victim in the Williams case was shot in a scuffle for the firearm and ultimately died as a result of his injuries, the case has significant applicability to the facts at hand. Here, the Petitioner and his co-defendant, like the Ms. Williams' co-defendants, entered the home of the victim presenting firearms. It should again be noted that Ms. Williams never possessed a weapon nor did she even necessarily know a weapon would be used, but she received a sentence of fifty (50) years. As discussed above, the presentation of firearms in the commission of a crime is gravely serious and has the potential for tragedy should a victim try to flee or unarm a criminal or should the criminal get anxious and decide to utilize his weapon. That seriousness is only magnified by the forcible entry into the sanctity of the home of the victim. The Petitioner did have a weapon and did instill the help and firearm of Mr. Derr to commit this robbery. Further, while the Petitioner

and Ms. Williams were both teenagers at the time of their crimes, Ms. Williams, who received a fifty (50) year sentence, had no juvenile or adult criminal history at all. The Petitioner, who received a forty (40) year sentence, was under the supervision of a probation officer when he committed this offense, and the Petitioner further committed the crime of escape while in custody for these offenses for which he spent a year in the custody of the Division of Juvenile Services. There was also evidence, as there was in the Williams case, that the Petitioner knowingly associated with felons and hardened criminals. Furthermore, the court had ample evidence, even more than in the Williams case, to find a lack of remorse by the Petitioner and a failure of the Petitioner to fully take responsibility for his actions. The court did this through observing the Petitioner as he sat through his hearings, by considering his statements and his demeanor, by acknowledging his escape from custody following his arrest, and by his plea of no contest. The court also had ample evidence, again even more than the court did in the Williams case, to find that the Petitioner could best be provided services in a structured correctional institutional setting given his continued aggressive behavior during his commitment to the West Virginia Industrial Home for Youth.

Furthermore, in the case of State v. Phillips, 199 W.Va. 507, 485 S.E.2d 676 (1997), the defendant received a 45-year sentence on one conviction for aggravated robbery after he threatened employees at a fast food restaurant with an air pistol resembling a real gun, which was upheld by this Court.⁵ In State v. Woods, 194 W.Va. 250, 460 S.E.2d 65 (1995), this Court upheld a 36-year sentence for the robbery of a Go-Mart at gunpoint. In appeal of the resentencing of State v. Buck, *supra.*, this Court upheld a 30-year sentence for a 23-year-old defendant for striking a store proprietor from behind and robbing him of \$1,200. State v. Buck, 178 W.Va. 505, 361 S.E.2d 470 (1987).

Additionally, it should be noted by the Court that the Petitioner was convicted of both first-

⁵ The defendant's aggregate sentence in State v. Phillips, *supra.*, was 140 years. The defendant also, that same night, robbed another restaurant with the air pistol and took one employee hostage to give him directions to the interstate. He was sentenced to 45 years of incarceration for each robbery and 50 years for the kidnapping charge.

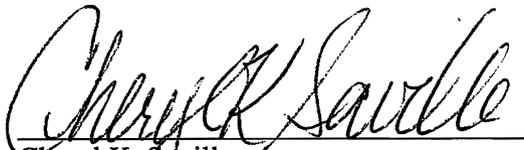
degree (aggravated) robbery and burglary, and the lower court showed clemency in agreeing to run the Petitioner's offenses concurrently.⁶

Based upon the record of the case and applicable law, the Petitioner's sentence is not disproportionate to the crimes of conviction, and the State asks this Court to find that there was no abuse of discretion. State v. Cooper, supra., State v. Glover, supra.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to refuse the Petition for Appeal.

Respectfully submitted,
State of West Virginia,



Cheryl K. Saville
Assistant Prosecuting Attorney
State Bar No.: 9362
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
csaville@berkeleycountycomm.org

⁶ **W.Va. Code** §61-11-21 provides by default that sentences for separate crimes run consecutively unless the trial court chooses in its discretion to mandate otherwise, such that where an order makes no provision that two sentences shall run concurrently, under the provisions of **W.Va. Code** §61-11-21, they must run consecutively. *See State ex rel. Cobbs v. Boles*, 149 W.Va. 365, 368, 141 S.E.2d 59, 61 (1965).

CERTIFICATE OF SERVICE

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 27th day of July, 2012:

Steven A. Greenbaum, Esq.
Steven A. Greenbaum, Esq., Attorney at Law, PLLC
Counsel of Record for the Petitioner
131 North Queen Street
Martinsburg, West Virginia 25401


Cheryl K. Saville
Assistant Prosecuting Attorney
State Bar No.: 9362
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
csaville@berkeleycountycomm.org