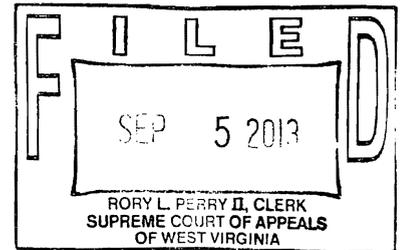


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. _____



IN RE: J.S., a Juvenile.

Appeal from the Circuit Court of Barbour County, West Virginia
The Honorable Alan D. Moats
(Circuit Court Case Numbers 13-JD-01, 13-JD-11)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court ERRED by not immediately conducting a detention hearing in Barbour County case number 13-JD-1, and a preliminary hearing in case number 13-JD-11, after the court Ordered the Juvenile to be picked-up and committed to a secure detention facility for a 45-day Diagnostic Evaluation. The pick-up Order was based solely on the allegation in Juvenile Petition 13-JD-11, which was filed during the time that the Juvenile was released to his parents on home confinement pending disposition of Juvenile Petition 13-JD-1.

2. The Circuit Court ERRED by not entering an Order after the Adjudication Hearing in case number 13-JD-01 within seven (7) days, pursuant to Rule 33 of the West Virginia Rules of Juvenile Procedure. The Juvenile and his parents were not afforded proper Notice of the terms and conditions of the court's "zero tolerance" release home after the Juvenile stipulated to adjudication as a delinquent in case number 13-JD-1. The Order was entered sixteen (16) days after the Adjudicatory hearing, and was entered on the same date that the Juvenile was picked-up by law enforcement and placed in a secure detention facility upon an *ex parte* Order.

3. The Circuit Court ERRED by considering hearsay and other negative information about the Juvenile that was not properly presented to the court as evidence, and the court improperly considered this information at disposition to commit the Juvenile to a secure detention facility when less restrictive placement alternatives had not been first tried and failed.

4. The Circuit Court ERRED by not following relevant West Virginia Code, the Rules of Juvenile Procedure, and relevant case law, and by not considering this Juvenile Petitioner's specific circumstances and history of no prior out-of-home placements for disposition. The court did not commit the Juvenile to the least restrictive placement that could have best met the Juvenile's treatment needs (the Elkins Mountain School) before committing him to the custody of the Division of Juvenile Services until he is 21 years of age.

5. The Circuit Court committed several other due process and procedural errors throughout the Juvenile Petitioner's cases, including but not limited to, violating the directives of West Virginia Code § 49-5-13(e) by not advising the Juvenile of his appellate rights at the conclusion of the disposition hearing after the court Ordered the Juvenile to continue in secure detention until the age of twenty-one (21).

6. The Circuit Court ERRED by not scheduling a Review Hearing in the Juvenile Petitioner's cases, pursuant to Rule 43 of the West Virginia Rules of Juvenile Procedure.

STATEMENT OF THE CASE

1. The Petitioner, J.S., is a seventeen (17) year old Juvenile born on _____, to
parents _____ and _____ who are still married and reside in Barbour County, West
Virginia (A.R. 27). _____ is the second-generation owner of a small-business in
Buckhannon, and _____ is a retired nurse who previously worked at the Emergency
Department of Davis Memorial Hospital in Elkins. J.S. has one older sister, with whom he
shares a close emotional bond. (A.R. 60-61)
2. J.S. is currently at the Rubenstein Center, having been recently transferred from the Donald R.
Kuhn Juvenile Detention facility by an Order entered sometime after August 19, 2013, to
which Counsel for J.S. had not agreed nor even seen a draft of the Order. (A.R. 130-140)
Counsel for J.S. avers that he was not contacted by the State nor the lower court prior to
August 19, 2013 regarding J.S. being transferred to the Rubenstein Center, and that the
undersigned did not consent to any "Agreed Order" for transfer of J.S.
3. The Donald R. Kuhn Juvenile Detention facility is located in Julian, West Virginia, a three (3)
hour drive from J.S.'s family. J.S. was held at the Kuhn Center for approximately six (6)
months prior to his recent transfer to the Rubenstein Center. The undersigned avers (and
facility records would support) that the parents visited him at the Kuhn Center regularly, but
for the first several months of his detention, the Probation Officer would not authorize any
other family members to visit J.S. The family requested numerous times that J.S. be permitted
to see his grandparents, with whom he is very close, but the Probation Officer had control of
who could visit J.S. in detention. The Kuhn Center finally granted the family's requests.

4. J.S. was charged in Juvenile Petition 13-JD-1 with the felony offense of Burglary, in violation of West Virginia Code 61-3-11(a), filed in the Circuit Court of Barbour County on January 23, 2013. (A.R. 3-5) The offense occurred on December 14, 2012 at the home of a neighbor, and J.S. maintains that he did not believe the owners were at home. J.S. did gain entry into the garage but could not gain entry into the home. He did not take anything but admitted that he would have taken beer if he found any in the garage or the home. (A.R. 27; 31-38)
5. A Preliminary Hearing was scheduled in case number 13-JD-1 for February 11, 2013, and Counsel Karen Hill Johnson was appointed to represent J.S., by an Order entered on January 18, 2013 (prior to the filing of the Juvenile Petition). (A.R. 1-2)
6. J.S. and his family aver that law enforcement, the court, the DHHR and the Probation Office did not make contact with J.S. or his family to offer rehabilitative services between the date of the Burglary (December 14, 2012) and the Preliminary Hearing (February 11, 2013), other than service of the Petition. J.S. resided at home with his parents during all relevant times.
7. On February 11, 2013, J.S. went before the Honorable Alan D. Moats in the Circuit Court of Barbour County for the purpose of a Preliminary Hearing, represented by his appointed Counsel. (A.R. 27-28) J.S. stipulated to adjudication for the offense of Burglary, gave a factual basis for his admissions, and was questioned extensively by the court. (A.R. 28-75)
8. The lower court adjudicated J.S. as a juvenile delinquent, but first improperly questioned J.S.'s veracity and motives for going to the neighbor's house. His previous Counsel did not object. (A.R. 31-53) After adjudication, the court heard improper hearsay statements and speculations from law enforcement and school officials about alleged other bad acts of J.S., and the court further questioned J.S. and his parents regarding his release home pending disposition. (A.R.

55-73) The court imposed home confinement (without electronic monitoring) and set forth strict conditions of J.S.'s release home with his parents, without Ordering any supportive services to be provided to J.S. by the Probation Officer or the DHHR for the issues and concerns that the court discussed (only an evaluation was ordered). (A.R. 68-70)

9. The court did not pronounce any statements, findings nor Orders on the record during the hearing on February 11, 2013 to place J.S. in the legal custody of the West Virginia Department of Health and Human Resources (DHHR). J.S. was released to the custody of his parents pending disposition, with non-electronic home confinement and supervision by the Probation Department. (A.R. 68-70) However, the Order entered from that hearing has findings and rulings that the court did not make on the record. (A.R. 6-14)

10. During the hearing on February 11, 2013, the Prosecutor made improper statements to the court regarding the risk J.S. poses to the public, despite the over month-long delay between his crime and any action by the State. (A.R. 54-55) Throughout the hearing, the court permitted hearsay statements about J.S.'s past alleged behavior and improperly questioned J.S. without asking him if he first wanted to talk to his Counsel.¹ J.S. was understandably intimidated and stressed by the court's statements and questions. The court improperly threatened J.S. with immediate detention for a wide range of perceived problems and deficiencies with his custodial circumstances and his statements to the court (A.R. 41-51; 53-59; 68-70; 72-76) During the entire hearing, J.S.'s previous Counsel did not object, she did not offer any rebuttal information on behalf of J.S., nor did she offer any argument to the court regarding the best interest of J.S. Counsel did not question how the "zero tolerance policy" would be enforced.

¹ The court had even asked J.S. if he intended to commit sexual assault during the Burglary of his neighbor's house, with no evidence to support such a negative and biased inference. (A.R. 41)

11. The *Preliminary/Adjudicatory Hearing Order* from the hearing on February 11, 2013 was not entered until February 27, 2013, and the Order contained findings and Orders of the lower court regarding reasonable efforts to prevent out-of-home placement and that J.S.'s legal custody was Ordered with the DHHR, which findings and Orders were not set forth on the record during the hearing on February 11, 2013. (A.R. 6-14)
12. Also entered on February 27, 2013 regarding J.S. are a Juvenile Petition for Battery, Barbour County case number 13-JD-11, and an Order in that matter setting a preliminary hearing for March 22, 2013 and appointing Counsel Karen Hill Johnson. (A.R. 17-23) Also entered on February 27, 2013 was an *Order of Removal*, case number 13-JD-1, which caused J.S. to be picked-up from school that same day and publicly escorted in handcuffs by the Sheriff's deputy and taken to a Division of Juvenile Services detention facility. (A.R. 15-16)
13. The allegations of Battery arise from an incident at Philip Barbour High School on February 21, 2013 between J.S. and another student. (A.R. 19-23) J.S. contests the allegations in the Petition and as testified to at the adjudicatory hearing in case number 13-JD-11. (A.R. 83-112)
14. The *Order of Removal* entered on February 27, 2013 placed J.S. at the Donald R. Kuhn Diagnostic and Detention Center for a 45-day Diagnostic Evaluation without the court first conducting a hearing. (A.R. 15-16) The Order cites the court's "zero tolerance policy" regarding J.S.'s release to his parents on February 11, 2013, yet the family and J.S. had not received a copy of the Order from that hearing with terms of J.S.'s release because it had not been entered until the same day that J.S. was picked-up by law enforcement and placed in detention (almost one week after the alleged Battery). J.S. could not have fully understood, just from being told by the court in a highly stressful hearing, the terms of his release home.

15. The undersigned Counsel avers that J.S. and his family were not contacted by the school, the charging Officer, nor the Probation Officer between the date that the alleged Battery occurred at school and the date that J.S. was picked-up by the Sheriff's Deputy at school, almost one week. J.S.'s family was not notified of the pick-up Order, although it was not an emergency situation since almost a week had passed. Previous appointed Counsel for J.S. did not file any motions nor raise these issues or objections on behalf of J.S.
16. A Detention Hearing was never held in case number 13-JD-1. A Preliminary hearing was not held on March 22, 2013 in case number 13-JD-11, and it is unclear from the record how that hearing was cancelled (it was scheduled by an Order entered on February 27, 2013, A.R. 17-18). No Order to continue the hearing on March 22, 2013 is entered in the records. At that time, J.S. was represented by appointed Counsel Karen Hill Johnson. The undersigned Counsel avers that J.S. and his family have advised that he did not consent to any waiver of his right to a detention or preliminary hearing, and his previous Counsel did not return phone calls from J.S. when he went to detention (prompting his family to retain the undersigned Counsel).
17. Beginning on March 6, 2013, J.S. was subjected to a 45-day Diagnostic Evaluation at the Donald R. Kuhn Detention Center without the benefit of a hearing and without having talked to his prior appointed Counsel. The undersigned Counsel has elected not to include the evaluation with the Appendix Record, as most information is sensitive, and now irrelevant, and J.S. was not afforded his right to a hearing prior to the evaluation. The court had previously Ordered an evaluation at the hearing on February 11, 2013, but that Order was not for an evaluation to take place in a secure detention facility. (A.R. 68) Also, it is unclear how much the lower court considered the evaluation at disposition on June 7, 2013.

18. J.S.'s prior placement, the Kuhn Center, is the same facility that conducted the evaluation and has the benefit of its contents. Although, J.S. asserts that some of the information contained in the diagnostic evaluation is unreliable, clearly subjective and produces an improper bias against him (which was voiced during MDT meetings, but not on the record before the court), the Kuhn Center has issued a positive behavior report for J.S. based on how he has recently performed in placement. (A.R. 141) The diagnostic evaluation is not relevant for this appeal because J.S. has been doing well in placement, and those reports should have greater weight to support J.S. immediately returning home on probation. Also, since placement in a DHHR residential facility is no longer an option for J.S., the evaluation is irrelevant for this appeal and for consideration of less restrictive placement. The only placement available for J.S. at this time, due to his age, is in a secure detention facility.

19. On May 1, 2013, the diagnostic evaluation was completed and the parties informally went before the lower court (by that time, the undersigned Counsel had been retained to represent J.S.). (A.R. 24-25) The undersigned moved the court to return J.S. home to his parents pending disposition, based on a positive preliminary report from the Kuhn Center evaluation (which was not filed until May 10, 2013). The court denied the request because "The Juvenile continues to exhibit behaviors that violate the Court's prior Order," although J.S. had been in detention the entire time. (A.R. 24-25) The undersigned avers that J.S. was reported to be generally compliant in detention during the evaluation, and while being held prior to the next hearing on June 7, 2013. The *Order Continuing Juvenile In DJS Custody* in case number 13-JD-1 was entered on May 3, 2013, and contains improper findings and Orders over the objection of Counsel. (A.R. 24-25)

20. On June 7, 2013, J.S. was brought before the court for disposition in case number 13-JD-1, and adjudication in case number 13-JD-11. (A.R. 80-81) J.S. contested the allegations of Battery, and although Counsel for J.S. first moved for a continuance, the court wanted to proceed because the State had the alleged victim present to testify. (A.R. 81-82)
21. J.S.'s previous Counsel did not request a Jury Trial in case number 13-JD-11 within the 20-day time frame after she was appointed to represent J.S. in that matter on February 27, 2013. (A.R. 17-18) The undersigned Counsel was not retained until mid-April, 2013, after the time-frame for requesting a Jury Trial had lapsed. At the time of the hearing on June 7, 2013, the undersigned Counsel was not aware of the lower court's biased and improper statements regarding J.S. and his veracity during the February 11, 2013 hearing, so the need for an impartial Jury Trial in case number 13-JD-11 was not abundantly clear.
22. The lower court conducted the Bench Trial and adjudicated J.S. for Battery, despite a lack of proper and sufficient evidence to overcome the State's burden of 'proof beyond a reasonable doubt.' (A.R. 83-115)
23. The record is replete with statements by the court which show a bias against J.S. The court had previously questioned J.S.'s truthfulness when he admitted to Burglary, and made several statements during the hearing on June 7, 2013 which demonstrate that the court had information and allegations about J.S. that were either hearsay or *ex parte* communications, and which information and allegations were not presented on the record through credible testimony for J.S. and his family to refute. (A.R. 35-39; 41-43; 54-58; 109-111; 115-120)
24. J.S. had never failed a court-Ordered drug screen, and his parents were regularly drug-testing him at home prior to his first appearance in court on February 11, 2013. (A.R. 59-61)

25. Counsel objected to the disputed information and accusations of prior bad acts about J.S., and requested residential treatment at the Elkins Mountain School. (A.R. 113-115; 117-120)²
26. The lower court proceeded directly to Disposition in both matters on June 7, 2013, and Ordered J.S. to the custody of the Division of Juvenile Services until the age of twenty-one (21) years old. (A.R. 127-128; 130-138) The court made unclear statements about whether J.S. could be released prior to his 21st birthday if he completes a program. (A.R. 127-128)
27. At the time of disposition, J.S. had been “rejected” by the Rubenstein Center for inclusion into that program because of a history of “bullying,” yet some of the information provided to the Rubenstein Center about J.S. is disputed by J.S. and his family, and is in-part based on second-hand reports not directly investigated for accuracy or relevance. (A.R. 116-120)
28. The lower court made improper statements about possibly considering that J.S. could go to another less-restrictive placement before he turns 21, although rehabilitation of J.S. had never been tried. (A.R. 127) The undersigned avers that because of his age now, J.S. would not be accepted into any level three residential treatment placement through the DHHR, but J.S. does not need additional out-of-home treatment to be successful at home and in the community.
29. The undersigned Counsel did not receive a proposed draft Order from the adjudication and disposition hearings held on June 7, 2013 until late July, 2013. The undersigned had repeatedly contacted the Prosecutor’s Office and the office of the lower court to inquire about when an Order would be submitted, and was preparing a *Petition for Writ of Mandamus* to file against the lower court for Ordering an improper disposition, failure to enter an Order and failure to schedule a review hearing. The Prosecutor’s Office drafted the proposed Order and

² The undersigned avers that the Elkins Mountain School will not accept J.S. at this time because he is too close to turning 18 and cannot stay in the program past his 18th birthday. He would have been accepted in June, 2013.

submitted it to the undersigned Counsel at the end of July, 2013. The undersigned promptly contacted the Prosecutor's Office to advise of several typographical errors within the Order, and the Prosecutor's Office agreed to correct the same. The undersigned Counsel did not receive another revised proposed Order, but would have filed written substantive objections to the proposed Findings and Orders if a draft had been submitted.

30. On August 22, 2013, the undersigned received in the mail a signed copy of the Order from the hearing on June 7, 2013, which was entered on August 8, 2013. (A.R. 130-138)
31. On August 26, 2013, the undersigned received by facsimile a signed and entered copy of the "Agreed Transfer of Placement Order" from a conference with the court that allegedly took place on August 19, 2013. (A.R. 139-140)³
32. Although he was re-evaluated and accepted into the Rubenstein Center as of August 14, 2013, J.S. objects to now being sent to the Rubenstein Center as a "step-down" placement to start over in a new program.⁴ (A.R. 142; A.R. 139-140) The Rubenstein Center is a secure detention facility, not residential treatment. J.S. has the support of his family and his own goals of going to the military and college, and continued placement and the program at the Rubenstein Center will not significantly help J.S. and is not in his overall best interest.
33. The service providers and treatment team at the Kuhn Center, who have been working with J.S. since March 6, 2013, provided a recent positive behavior report. (A.R. 141)
34. As of the filing of this Petition, the lower court has not scheduled a Review Hearing for J.S. pursuant to Rule 43 of the West Virginia Rules of Juvenile Procedure.

³ As previously stated, the undersigned avers that he was not part of any conference with the lower court on August 19, 2013, and did not agree to any Order for J.S. to be transferred to the Rubenstein Center.

⁴ The undersigned has been advised by staff at the Rubenstein Center that J.S. will start over in the program unless a court Order grants him "credit" from his time and participation at the Kuhn Center.

SUMMARY OF ARGUMENT

J.S. was entitled to a detention hearing in case number 13-JD-1, and a preliminary hearing in case number 13-JD-11, before being subjected to further holding in a secure detention facility and a 45-day Diagnostic Evaluation in secure detention based on allegations of Battery, which the court deemed as a violation of its Order to release J.S. home to his parents.

The court and the treatment team should not have considered inadmissible hearsay and disputed reports of J.S.'s behavior and alleged "history of bullying" when deciding on an out-of-home placement. The court did not consider J.S.'s therapeutic needs based on his history. J.S. was entitled to the least restrictive out-of-home placement that could best meet his needs for rehabilitative purposes, before the court imposed the most restrictive disposition of detention until the age of 21, as J.S. had never been placed at a less-restrictive residential treatment facility.

The court's disposition, as pronounced at the end of the hearing on June 7, 2013, is improper and unenforceable. A Juvenile adjudicated for daytime Burglary without property loss, personal injury, or damages, and a Battery that occurred at school with no injuries, should not be automatically held in secure detention until the age of 21. In this case, the lower court did not consider the mitigating facts and circumstances of J.S.'s crimes, his lack of a prior out-of-home placement and rehabilitation efforts, and his family support. A Juvenile with no prior placement history should have the benefit of being released home after the successful completion of a program, but the lower court did not Order such a disposition in this case. The Kuhn Center had not received a Disposition Order for J.S. while he was being held there, and the family and the undersigned Counsel had received conflicting reports as to whether J.S. was working through a "program" during his time there. J.S. has been improperly held in secure detention for six (6)

months without the benefits and incentives of a rehabilitative treatment program for him to work towards being released home, yet he has a very positive report from the Kuhn Center and had achieved the highest behavior level for the past two (2) months before being moved to the Rubenstein Center on or about August 27, 2013.

This Court should mandate the lower court to immediately release J.S. home on Probation. In the alternative, this Court should mandate that the lower court issue a proper and enforceable Disposition Order for J.S. to be released home without the supervision of probation when the Rubenstein Center recommends that he return home for successfully completing the program. However, it is imperative that J.S. receive credit for his time and progress in the ‘program’ at the Kuhn Center and that this time and progress be applied towards his completion of the program at the Rubenstein Center. At a minimum, the lower court should be Ordered to immediately schedule a Review Hearing in J.S.’s cases pursuant to Rule 43 of the West Virginia Rules of Juvenile Procedure, with direction from this Court as to J.S.’s Disposition, and that the State be responsible for issuing subpoenas to the Kuhn Center and Rubenstein Center treatment teams to testify on behalf of J.S. regarding his suitability to go home on probation instead of starting over in the Rubenstein Center program. J.S. asserts that expedited relief on appeal from this Court is necessary before going before the lower court for a Review Hearing, because the lower court’s Disposition is improper and J.S. will not benefit from such a hearing without first being granted appellate relief by this Court.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may be unnecessary because the facts and legal arguments are adequately presented in the brief and record on appeal; this Court's legal precedent, the Rules of procedure and West Virginia Code are clear regarding the Petitioner's issues presented herein; and the decisional process would not be significantly aided by oral argument. Oral argument would delay this Court's decision, and the time frame for granting relief is narrow because it is not in the best interest of the Juvenile to continue in a secure detention facility.

If the Court deems oral argument necessary on the legal issues presented on appeal, J.S. moves this Court to grant him expedited relief to be returned home on probation pending the final outcome of this appeal. In the alternative, if oral argument is scheduled, J.S. moves this Court to grant expedited relief and Order the lower court to conduct a 90-day Review Hearing, with clear direction from this Court as to whether J.S. should be released from the Rubenstein Center upon successful completion of the program, and whether J.S. should receive credit from his participation in the "program" during the past six (6) months at the Kuhn Center.

ARGUMENT

This case should be considered and ultimately ruled upon based on what is in the overall best interest of J.S. The appellate standards of review in this matter are as follows:

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an 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, 459 S.E.2d 415 (1995).

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 2, *Nutter v. Nutter*, 218 W.Va. 699, 629 S.E.2d 758 (2006).

The standard of review for a circuit court's sentencing order or juvenile delinquent disposition is whether the circuit court's ruling constitutes an abuse of discretion. *State v. Kirk N.*, 214 W.Va. 730, 741, 591 S.E.2d 288, 299 (2003), quoting *State ex rel. D.D.H. v. Dostert*, 165 W.Va. 448, 471, 269 S.E.2d 401, 416 (1980), ("discretionary" rulings of circuit courts at the dispositional stage in juvenile cases "should only be reversed where they are not supported by the evidence or are wrong as a matter of law"); *In the Interest of Thomas L.*, 204 W.Va. 501, 504, 513 S.E.2d 908, 911 (1998), (disposition in juvenile case held to be within the circuit court's "sound discretion"); *State ex rel. Department of Health and Human Resources v. Frazier*, 198 W.Va. 678, 683, 482 S.E.2d 663, 668 (1996), (circuit courts are "vested with discretion to select the appropriate disposition for a particular juvenile").

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977). "When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action." Syl. Pt. 2, *Bone v. W. Va. Dep't of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979).

ASSIGNMENTS OF ERROR 1 AND 2:

The lower court Ordered J.S. to be committed to a secure detention facility without a hearing, almost one week after the alleged incident which prompted the lower court to remove J.S. from his home. (A.R. 15-16) It is unclear, and absent from the record, whether the Probation Officer or the State requested that J.S. be removed from his home. The State did not file a new Petition against J.S. until February 27, 2013, yet the Barbour County Sheriff's Department request for a Juvenile Petition documents that it was sent to the Prosecutor on the date of the incident, February 21, 2013. (A.R. 22-23) The Probation Officer and the State did not file any report that J.S. violated the terms of his release on bond, and no one alleged that J.S. violated any of the court's Orders that were stated on the record during the February 11, 2013 hearing. (A.R. 68-75) J.S. and his family advised the undersigned that they were not contacted about the alleged Battery prior to J.S. being picked-up at school by law enforcement, and that no one received a copy of the Orders entered on February 27, 2013, nor the Petition in 13-JD-11, until

one week after J.S. was placed in detention. Prior Counsel did nothing in response on behalf of J.S. J.S.'s family retained the undersigned Counsel in April, 2013 after the Preliminary Hearing scheduled for March 22, 2013 in case number 13-JD-11 was "cancelled" without notice to anyone (the family had shown up at the courthouse for the hearing), and prior appointed Counsel was not returning phone calls to J.S. or his family. J.S. and his family did not have sufficient Notice of the lower court's "zero-tolerance" conditions of J.S.'s release home, and they did not have proper and sufficient Notice that he could be picked-up and placed in secure detention without a hearing, because the Order was not entered until the same date J.S. was picked-up at school by a Sheriff's Deputy. The family advised the undersigned Counsel that the Sheriff's Office, the Probation Office, and the Prosecutor's Office did not contact J.S.'s family before or after he was picked-up at school and taken to detention. J.S. had been complying with the court's conditions that were announced during the hearing on February 11, 2013. J.S. would not have understood that a dispute at school would have caused him to be placed in detention on a mere allegation prior to being adjudicated for a crime, especially since he was complying with home confinement and not using drugs or drinking. J.S. has been in secure detention since February 27, 2013, and he was moved to the Donald R. Kuhn Diagnostic and Detention Center on or about March 6, 2013, where he was subjected to an intrusive Diagnostic Evaluation without the opportunity to first consult with his appointed Counsel. J.S. was not afforded his right to any type of hearing until June 7, 2013. J.S. was moved from the Diagnostic Unit of the Donald R. Kuhn Center to the regular population on or about May 1, 2013, and he remained at that facility until he was recently moved to the Rubenstein Center.⁵ J.S. should not have to start

⁵ It is unclear whether J.S. was actually participating in a "program" at the Kuhn Center, but the Kuhn Center staff have reported that J.S. achieved and maintained the highest behavior level, he was participating in all treatment groups and therapy, and did weekly community service. (A.R. 141)

over at the Rubenstein Center's program, but the lower court has already Ordered J.S. to be placed there without any notice or agreement from the undersigned Counsel. (A.R. 139-140) J.S. would not benefit from the Rubenstein Center now, as he has already been in a secure detention facility and received services there for six (6) months. Considering his overall progress and participation in the Kuhn Center program, J.S. may have had to serve less time at the Kuhn Center to complete the program there than if he has to start over at the Rubenstein Center.

ASSIGNMENTS OF ERROR 3 AND 4:

J.S. would have been better served by being returned home on probation with therapeutic in-home services through the DHHR, or by placement in a less-restrictive residential treatment program, but the only placement available now for J.S. is a secure detention facility. J.S. never tested positive for any controlled or illicit substances while under the jurisdiction of the Circuit Court, but readily admitted to his past drug and alcohol use and asked the lower court for residential treatment and help. (A.R. 121) J.S. was adjudicated for Battery, yet throughout the hearing on June 7, 2013, the court made statements about J.S. being a chronic bully and considered evidence not properly presented on the record about other alleged behaviors and "prior bad acts" attributed to J.S. (A.R. 115-128) J.S. was being adjudicated for Battery, not chronic bullying, but the court clearly had information about J.S. that was not presented on the record by proper evidence, and considered hearsay statements about J.S. that influenced the court's decisions and placement of J.S. The lower court's concerns over second-hand and unreliable reports that J.S. allegedly bullied other kids to a chronic level were inflated and improperly considered for disposition. The court seemed to only considered the negative and

disputed contents of the Diagnostic Evaluation (most of which was not presented or discussed on the record). If this Court solely considers the evidence that was properly presented on the record regarding J.S., and what disposition or placement is in his overall best interest, secure detention until the age of twenty-one (21) years old is improper and overly-punitive. J.S. asserts that his Diagnostic Evaluation is inadmissible for the purpose of this appeal because he did not have effective assistance of Counsel during the time that he was improperly detained without a hearing and subjected to the intrusive evaluation. J.S. did not have a choice but to participate in the evaluation, he was in secure detention without the assistance of Counsel, but it appears that the court did not consider the recommendation of the evaluation for a level three placement. The Rubenstein Center improperly rejected J.S. because of biased, unreliable and second-hand reports of J.S.'s past behavior for which he was never adjudicated, but the more-therapeutic and less-restrictive Elkins Mountain School had accepted J.S. and a bed was available June 14, 2013. (A.R. 120-121; 124-125) Now, it is too late for less-restrictive placement through the DHHR because J.S. will turn 18 in early November, 2013. However, after six (6) months at the Kuhn Center, J.S. will not benefit any further from the only less-restrictive placement available to him (another secure detention facility). It is overly-punitive for J.S. to start over in another program at the Rubenstein Center. Further placement is not required for J.S. at this time because he has benefitted from the program at the Donald R. Kuhn Center, he has successfully complied overall with the "ad hoc" program of that facility, and requiring J.S. to complete the program at the Rubenstein Center is overly punitive.⁶

⁶ The Donald R. Kuhn Center is in the process of implementing a "program" for its adjudicated residents, as the Industrial Home for Youth has been closed and the Division of Juvenile Services is restructuring its facilities. J.S. should not be punished by having served "dead time" at the Kuhn Center because he happened to be placed there during this transition in DJS. J.S. received services in his former placement and he should be granted credit towards completing a program for all of his time in secure detention.

ASSIGNMENT OF ERROR 5:

The findings and conclusions of the lower court as stated in the “Order Following Adjudicatory/Disposition Hearing,” from the June 7, 2013 hearing, are not supported by sufficient and reliable evidence. For example, on page 4 of the Order, paragraph number 28, the court finds “[t]hat after the Court let the Juvenile... go home in Case Number 13-JD-1 it was Ordered for the Juvenile to stay home and he failed to comply with the Court’s Order.” (A.R. 133) There is absolutely no evidence that J.S. failed to comply with the court’s Order that J.S. be only with his parents or at school between the first hearing on February 11, 2013 and when J.S. was placed in detention on February 27, 2013. The court was mistaken on that point. (A.R. 122)

Page 4 of the final Order contains another erroneous finding regarding the actions of J.S., paragraph 26 states “[t]hat the Juvenile... received a formal complaint against him for bullying at the Donald R. Kuhn Juvenile Diagnostic and Detention Center.” (A.R. 133) The only evidence of this “formal complaint” that exists on the record is double hearsay (an email from the Kuhn Center case manager to the Probation Officer being read on the record by the court), and the undersigned Counsel was not aware of the “formal complaint” that the court referred to during the hearing. (A.R. 123-124)⁷ J.S. directly testified under oath to what happened during the incident, but the court still considered improper hearsay of a “formal complaint” to find that J.S. is a “bully” and a threat to other residents in placement. (A.R. 124-128) If the court is going to consider other bad acts of a Juvenile for placement, other than behaviors for which a Juvenile is already adjudicated as delinquent, then direct evidence should be properly presented with an adequate opportunity for Counsel to cross-examine witnesses and provide rebuttal evidence.

⁷ The undersigned Counsel was actually told at the MDT meeting prior to the hearing that J.S. had NOT received any “formal complaints” or “write-ups,” and argued the same at disposition. (A.R. 118-120)

Several of the court's findings regarding why a level-three placement is not appropriate for J.S. because he poses a risk to other juveniles in placement are based on speculations and opinions of the court, and are not supported by the evidence presented on the record. (A.R. 130-138)

West Virginia Code § 49-5-13(b) (and by similar language, Rule 39(c) of the West Virginia Rules of Juvenile Procedure) govern courts placing a Juvenile in the custody of the Division of Juvenile Services only after consideration of other alternatives:

(b) Following the adjudication, the court shall conduct the dispositional proceeding, giving all parties an opportunity to be heard. In disposition the court shall not be limited to the relief sought in the petition and shall, in electing from the following alternatives, consider the best interests of the juvenile and the welfare of the public: (5) Upon a finding that the best interests of the juvenile or the welfare of the public require it, and upon an adjudication of delinquency pursuant to subdivision (1), section four, article one of this chapter, the court may commit the juvenile to the custody of the Director of the Division of Juvenile Services for placement in a juvenile services facility for the treatment, instruction and rehabilitation of juveniles: *Provided*, That the court maintains discretion to consider alternative sentencing arrangements... Commitments shall not exceed the maximum term for which an adult could have been sentenced for the same offense and any such maximum allowable sentence to be served in a juvenile correctional facility may take into account any time served by the juvenile in a detention center pending adjudication, disposition or transfer.

In this case, placement in a secure detention facility until the age of twenty-one (21) is not a reasonable Disposition and J.S. should get credit for all of his time in detention since February 27, 2013. J.S. would assert that he is being improperly held in a secure detention facility when he was not given an adequate and meaningful chance at home on probation, J.S. and his family were never offered any in-home services, and a less-restrictive placement for J.S. was not adequately considered. J.S. has no adequate remedy other than this Court granting expedited relief on appeal, because the lower court's ruling on June 7, 2013 is improper and should be

overturned. If this Court grants expedited relief on appeal, the parents will institute appropriate and adequate safeguards for J.S. and the community upon his return home. J.S. has served enough time in detention to appreciate the seriousness of his delinquency and not pose a risk to society. J.S. has a clear legal right to now have a proper Disposition imposed for his adjudications of Burglary and Battery.

The lower court did not state anything during the disposition portion of the hearing on June 7, 2013 about the appellate rights of J.S., pursuant to West Virginia Code § 49-5-13(e),

Disposition of juvenile delinquents:

(e) Following disposition, the court shall inquire whether the juvenile wishes to appeal and the response shall be transcribed; a negative response shall not be construed as a waiver. The evidence shall be transcribed as soon as practicable and made available to the juvenile or his or her counsel, if the same is requested for purposes of further proceedings. A judge may grant a stay of execution pending further proceedings.

The transcript from the hearing on June 7, 2013 is clear that the lower court did not follow the directive set forth within the above-cited Code section. The lower court made no mention of J.S.'s appeal rights and imposed an unreasonable and arguably illegal disposition of placement in secure detention until the age of twenty-one (21). (A.R. 125-128)

ERROR BASED ON VIOLATIONS OF THE CODE, RULES AND CASE LAW:

The court ignored or violated the West Virginia Rules of Juvenile Procedure and relevant West Virginia Code and case law early and throughout the proceedings against J.S. Now, the only adequate remedy is this Court to grant expedited relief on appeal and Order that J.S. immediately return home. J.S.'s conduct and overall progress at his prior placement also

warrants an Order that he return home, despite the lower court's pronouncements about J.S.'s past behaviors and sense of entitlement at the disposition hearing. (A.R. 125) J.S. should not have to now complete a "step-down" program in another secure detention facility, not only because there would be no further rehabilitative benefit to continued placement, but also because the lower court violated his due process rights and West Virginia law by placing him in detention on February 27, 2013 and later imposing an improper and unreasonable disposition.

Regarding J.S. being taken into custody and placed in secure detention without a hearing, the lower court violated Rule 6 of the West Virginia Rules of Juvenile Procedure, "Taking a Juvenile Into Custody." Rule 6(a)(2) *Orders for Immediate Custody, Immediate Custody Order for Delinquency Offenses* governs when a juvenile can be taken into custody, but does not specify between placement in a secure detention facility or a DHHR "residential" less-restrictive placement. Except in extreme cases, the law in this State is clear that when out-of-home placement of a Juvenile is considered by a Circuit Court, less-restrictive placements should be first meaningfully considered, tried and have failed before prolonged placement in a secure detention facility is warranted. The court also directly violated Rule 6(a)(5) *Orders for Immediate Custody, Contents of Order for Immediate Custody*: "An order for immediate custody shall be signed by a circuit judge or magistrate, and shall: (A) order the juvenile to be brought immediately before the circuit or magistrate court for a detention hearing." The court also violated Rule 6(a)(11) *Orders for Immediate Custody, Notice*: "When an order for immediate custody is executed, the juvenile's parents or legal guardians shall immediately be informed of the custody and the reasons why the juvenile is being taken into custody as stated in the order. If a parent or guardian cannot be located, a close relative shall be informed of the custody and

order.” And Rule 6(c) *Prompt Presentment Upon Custody*. “Upon taking a juvenile into custody with or without a court order under one of the circumstances specified in this rule, the law-enforcement officer shall immediately bring the juvenile before the circuit or magistrate court for a detention or placement hearing.” J.S. was not brought before the lower court until June 7, 2013 after being placed in secure detention on February 27, 2013.

The lower court violated Rule 12 of the West Virginia Rules of Juvenile Procedure, “Detention and Alternative Placement in Delinquency Cases.” Rule 12(a) *Scope* “governs all physical liberty restrictions placed upon a juvenile in delinquency cases before and after adjudication, upon disposition, or pending a probation violation hearing. For purposes of this rule, the first day of any confinement from which the designated period of time begins to run shall be included.” Rule 12(b)(1) *Types of Detention or Placement, Secure Detention Facility*: “A secure detention facility means any public or private residential facility which includes construction fixtures designed to physically restrict the movements and activities of detainees held in lawful custody in such facility. A secure detention facility is designed to restrict a juvenile's liberty and substantially affect physical freedom or living arrangements.” J.S. contends that the lower court did not properly follow Rule 12(c)(1) *Presumption for Unconditional Release*: “The juvenile shall be released, with or without conditions, unless the court determines there is substantial likelihood that: (A) the juvenile's health or welfare would be immediately endangered; (B) the juvenile would endanger others; (C) the juvenile would not appear for a court hearing; or (D) the juvenile would not remain in the care or control of the person into whose lawful custody the juvenile is released.” The lower court did not have sufficient evidence against J.S. to determine that he qualified for immediate out-of-home

placement after an allegation of Battery that occurred at school (without injury) on February 21, 2013, when the Petition for Battery was not filed until February 27, 2013. (A.R. 15-23)

Accordingly, Rule 13 of the West Virginia Rules of Juvenile Procedure, “Pre-Adjudicatory Detention Factors For Delinquency Offenses” offered protections for J.S. which the lower court ignored. Rule 13(c) *No Mandatory Detention*:

A juvenile who is excluded from mandatory release under subparagraph (a) is not to be automatically detained. No category of alleged conduct in and of itself may justify a failure to exercise discretion to release upon consideration of the needs of the juvenile and the community. (1) *Discretionary Release*. In every situation in which the detention of an arrested juvenile is permissible, the court shall first consider and determine whether the juvenile qualifies for an available diversion program or release under bond conditions, or whether any other form of control short of detention is available to reasonably reduce the risk of flight or misconduct. The court should explicitly state in writing the reasons for rejecting each of these forms of release. (2) *Secure vs. Other Detention*. When appropriate, the court shall consider staff-secure detention alternatives prior to committing a juvenile to a secure detention facility.

Rule 13(f) *Discretion to Release Even if One or More Factors are Met*: “Even if a juvenile meets one or more of the detention factors above, the court has broad discretion to release that juvenile following the detention hearing if other less restrictive measures would be adequate under the specific circumstances as determined by the court.” The record is clear that the lower court did not conduct any such analysis because there was not a detention hearing for J.S., and the *ex parte Order of Removal* is insufficient on its face. (A.R. 15-16)

In case number 13-JD-11, the lower court clearly violated Rule 18 of the West Virginia Rules of Juvenile Procedure, “Preliminary Hearings.” Rule 18(a) *Timeliness and Purpose*: “A preliminary hearing shall be held within 20 days after the juvenile is served with the petition, or within 10 days if the juvenile is detained, unless a preliminary hearing was conducted in

conjunction with a detention hearing, or waived by the juvenile after being advised by counsel.”

The record is clear that a preliminary hearing was not held in case number 13-JD-11.

J.S. further alleges that Rule 32 of the West Virginia Rules of Juvenile Procedure, “Standard of Proof” was not followed during his adjudication for Battery in case number 13-JD-11. Rule 32(a) *Delinquent Offense*: “The burden is on the State to prove the allegations in the petition beyond a reasonable doubt before an adjudication can be made that a juvenile committed a delinquent offense.” J.S. contends that the evidence to support a Battery conviction was not sufficient because only the uncorroborated testimony of the alleged victim was presented by the State. (A.R. 83-116) The lower court was not a proper or objective trier-of-fact in case number 13-JD-11 because the court had previously stated on the record that J.S. was untruthful. (A.R. 40-44) The lower court was clearly biased against J.S., but J.S. was denied his right to a Jury Trial because his previous Court-appointed Counsel had not requested a Jury Trial within the proper time-frame. The undersigned Counsel did not have the benefit of hearing the lower court’s statements of bias against the Juvenile during the hearing on February 11, 2013.

Rule 33 of the West Virginia Rules of Juvenile Procedure, “Adjudication Findings” has been ignored by the lower court in case number 13-JD-11. Rule 33 states:

Within seven days of the conclusion of the adjudication hearing, the court shall issue an order stating its findings that the allegations in the petition have or have not been proven. Findings may be made on the record at the conclusion of the adjudicatory hearing, but must be followed up in writing within the seven days. For good cause, the court may extend the time for filing written findings for an additional seven days. If one or more offenses have been proven at the adjudication hearing, the court shall schedule a dispositional hearing. The court shall dismiss the petition if the allegations have not been proven.

The Order for Adjudication (and Disposition) of case number 13-JD-11, from the hearing held on June 7, 2013, was entered on August 8, 2013, but was not received by the undersigned Counsel until August 22, 2013. (A.R. 130-138)

Rule 34 of the West Virginia Rules of Juvenile Procedure, "Disposition Hearing" was also clearly violated by the lower court in both of J.S.'s cases. Rule 34(a) *Generally*:

Juveniles adjudicated as delinquent or status offenders are entitled to be sentenced in the least restrictive manner possible that will meet their needs and protect the welfare of the public. The goal in disposition should be the rehabilitation of the juvenile to enable and promote becoming a productive member of society. In disposition, the court has discretion when determining terms and conditions, and is not limited to the relief sought in the petition. The court shall consider the best interests of the juvenile and the welfare of the public when rendering its decision.

The record is devoid of any efforts by the lower court to properly consider a less-restrictive placement for J.S. because the court was basing its determination for placement on J.S. being a "bully." J.S. contends that he should not have been immediately removed from his home in the first place and placed in secure detention for an allegation of Battery at school.

Rule 39 of the West Virginia Rules of Juvenile Procedure, "Delinquency Disposition," was not followed by the lower court because sufficient evidence was not presented at the hearing on June 7, 2013 to support the findings and Orders set forth in the final Order entered on August 8, 2013. (A.R. 130-139) The statements of the lower court during J.S.'s Disposition Hearing were improper and not based on sufficient or reliable direct evidence. Rule 39(a)(1) *Findings*:

The dispositional order by the court shall contain written findings of fact to support the disposition and shall contain the following information: (A) why public safety and the best interest of the juvenile are served by the disposition ordered; (B) what alternative dispositions, if any, were recommended to the court and why such recommendations were not ordered; and (C) if the disposition

changes the custody or placement of the juvenile: (i) the reasons why public safety and the best interest of the juvenile are not served by preserving the juvenile's present custody; and (ii) suitability of the placement, taking into account the program of the placement facility and assessment of the juvenile's actual needs.

The lower court entered a Disposition Order for cases 13-JD-1 and 13-JD-11 almost two months after the hearing. The disposition as pronounced by the court during the hearing on June 7, 2013 is improper and unenforceable because J.S. should not have to go to a level three "step-down" detention placement after being held at the Kuhn Center for six (6) months, or linger in detention until twenty-one (21) years of age. The lower court's analysis of why a level three residential placement (the Elkins Mountain School) was not suitable for J.S. was not based on sufficient or reliable evidence. The lower court considered hearsay and second-hand reports regarding J.S. during the hearing on February 11, 2013 and during the hearing on June 7, 2013.

The lower court also failed to recognize several sections of the West Virginia Code that govern juvenile proceedings for his detention, and adjudication and disposition of J.S.'s cases.

§ 49-5-2. Juvenile jurisdiction of circuit courts, magistrate courts and municipal courts; constitutional guarantees; hearings; evidence and transcripts.

(g) A juvenile is entitled to be admitted to bail or recognizance in the same manner as an adult and shall be afforded the protection guaranteed by Article III of the West Virginia Constitution.

(j) At all adjudicatory hearings held under this article, all procedural rights afforded to adults in criminal proceedings shall be afforded the juvenile unless specifically provided otherwise in this chapter.

(k) At all adjudicatory hearings held under this article, the rules of evidence applicable in criminal cases apply, including the rule against written reports based upon hearsay.

(m) A transcript or recording shall be made of all transfer, adjudicatory and dispositional hearings held in circuit court. At the conclusion of each of these hearings, the circuit court shall make findings of fact and conclusions of law, both of which shall appear on the record.

§ 49-5-7. Institution of proceedings by petition; notice to juvenile and parents.

(a)(2) Upon the filing of the petition, the court shall set a time and place for a preliminary hearing as provided in section nine of this article and may appoint counsel. A copy of the petition and summons may be served upon the respondent juvenile by first class mail or personal service of process.

(b) The parents, guardians or custodians shall be named in the petition as respondents and shall be served with notice of the proceedings in the same manner as provided in subsection (a) of this section for service upon the juvenile and required to appear with the juvenile at the time and place set for the proceedings unless such respondent cannot be found after diligent search.

J.S. and his parents were not provided with a copy of the Petition and Order in case number 13-JD-11 until one week after J.S. was placed in detention. His prior Counsel did not object, did not raise any of these issues, and did not demand a detention/preliminary hearing, so release on bail was never considered. Although it is too late for an adequate remedy to now be granted, this Court should recognize the overall lack of compliance with West Virginia Code.

§ 49-5-8 Taking a juvenile into custody.

(a) In proceedings formally instituted by the filing of a juvenile petition, the circuit court, a juvenile referee or a magistrate may issue an order directing that a juvenile be taken into custody before adjudication only upon a showing of probable cause to believe that one of the following conditions exists: (1) The petition shows that grounds exist for the arrest of an adult in identical circumstances; (2) the health, safety and welfare of the juvenile demand such custody; (3) the juvenile is a fugitive from a lawful custody or commitment order of a juvenile court; or (4) the juvenile is alleged to be a juvenile delinquent with a record of willful failure to appear at juvenile proceedings and custody is necessary to assure his or her presence before the court. A detention hearing pursuant to section eight-a of this article shall be held by the judge, juvenile referee or

magistrate authorized to conduct such hearings without unnecessary delay and *in no event may any delay exceed the next day.* (Emphasis added)

(c) Upon taking a juvenile into custody, with or without a court order, the official shall: (1) Immediately notify the juvenile's parent, guardian, custodian or, if the parent, guardian or custodian cannot be located, a close relative; (2) Release the juvenile into the custody of his or her parent, guardian or custodian unless: (A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released; (B) No responsible adult can be found into whose custody the juvenile can be delivered: *Provided*, That each day the juvenile is detained, a written record must be made of all attempts to locate such a responsible adult; or (C) The juvenile has been taken into custody for an alleged act of delinquency for which secure detention is permissible. (4) Take the juvenile without unnecessary delay before a juvenile referee or judge of the circuit court for a detention hearing pursuant to section eight-a of this article: *Provided*. That if no judge or juvenile referee is then available in the county, the official shall take the juvenile without unnecessary delay before any magistrate then available in the county for the sole purpose of conducting such a detention hearing. *In no event may any delay in presenting the juvenile for a detention hearing exceed the next day after he or she is taken into custody.* (Emphasis added)

(d) In the event that a juvenile is delivered into the custody of a sheriff or director of a detention facility, the sheriff or director shall immediately notify the court or juvenile referee. The sheriff or director shall immediately provide to every juvenile who is delivered into his or her custody a written statement explaining the juvenile's right to a prompt detention hearing, his or her right to counsel, including appointed counsel if he or she cannot afford counsel, and his or her privilege against self-incrimination. *In all cases when a juvenile is delivered into a sheriff's or detention center director's custody, that official shall release the juvenile to his or her parent, guardian or custodian by the end of the next day unless the juvenile has been placed in detention after a hearing conducted pursuant to section eight-a of this article.* (Emphasis added)

J.S. and his parents received nothing from the Sheriff's Department or the deputy who picked-up J.S. at school and took him to detention. J.S. was entitled to an immediate detention hearing when he was picked-up by law enforcement at school, which did not occur until almost one week after the alleged Battery that prompted the lower court to issue the *Order of Removal* on February 27, 2013. No hearing was conducted pursuant to the above-cited Code section.

§ 49-5-8a Detention hearing.

(a) The judge, juvenile referee or magistrate shall inform the juvenile of his or her right to remain silent, that any statement may be used against him or her and of his or her right to counsel, and no interrogation may be made without the presence of a parent or counsel. If the juvenile or his or her parent, guardian or custodian has not retained counsel, counsel shall be appointed as soon as practicable. The referee, judge or magistrate shall hear testimony concerning the circumstances for taking the juvenile into custody and the possible need for detention in accordance with section two, article five-a of this chapter. The sole mandatory issue at the detention hearing is whether the juvenile should be detained pending further court proceedings. The court shall, if the health, safety and welfare of the juvenile will not be endangered thereby, release the juvenile on recognizance to his or her parents, custodians or an appropriate agency; however, if warranted, the court may require bail, except that bail may be denied in any case where bail could be denied if the accused were an adult. The court shall: (1) Immediately notify the juvenile's parent, guardian or custodian or, if the parent, guardian or custodian cannot be located, a close relative; (2) Release the juvenile into the custody of his or her parent, guardian or custodian unless: (A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released; (B) No responsible adult can be found into whose custody the juvenile can be delivered: *Provided*, That each day the juvenile is detained, a written record must be made of all attempts to locate such a responsible adult; or (C) The juvenile is charged with an act of delinquency for which secure detention is permissible; and (b) The judge of the circuit court or the juvenile referee may, in conjunction with the detention hearing, conduct a preliminary hearing pursuant to section nine of this article: *Provided*, That all parties are prepared to proceed and the juvenile has counsel during such hearing.

The record is clear that the lower court does not recognize this section of the Code and that J.S.'s rights were violated. Not only were his rights violated by the court, but he was not afforded effective assistance of Counsel because his prior Counsel did nothing to object or demand a hearing. It is arguable that even if a hearing had been immediately conducted, the State could not have established by proper evidence the factors to support pre-adjudication placement in detention for J.S. The lower court's prior stated "zero-tolerance policy" of releasing J.S. to his parents in case number 13-JD-1 was improper, violated J.S.'s right to sufficient Notice and due process. Ordering a "zero-tolerance policy" on the record without providing clear, written terms

does not provide justification for the court to violate the relevant Code sections when J.S. was ultimately placed in detention then subjected to an intrusive Diagnostic Evaluation. (A.R. 68-77)

It is unclear from the record how or why the Preliminary Hearing scheduled in case number 13-JD-11 for March 22, 2013 was cancelled, but J.S. has advised the undersigned that he and his family did not consent to the hearing being cancelled and that they were not even notified that the hearing was cancelled. (A.R. 17-18)

§ 49-5-9(a) Preliminary hearing.

Following the filing of a juvenile petition, unless a preliminary hearing has previously been held in conjunction with a detention hearing with respect to the same charge contained in the petition, the circuit court or referee shall hold a preliminary hearing. In the event that the juvenile is being detained, the hearing shall be held within ten days of the time the juvenile is placed in detention unless good cause is shown for a continuance. If no preliminary hearing is held within ten days of the time the juvenile is placed in detention, the juvenile shall be released on recognizance unless the hearing has been continued for good cause. If the judge is in another county in the circuit, the hearing may be conducted in that other county. The preliminary hearing may be waived by the juvenile, upon advice of counsel.

A hearing was not held within ten (10) days in case number 13-JD-11. J.S. contends that he did not waive his right to a detention hearing in case number 13-JD-01, and did not waive his right to a preliminary hearing in case number 13-JD-11. If his prior Counsel agreed to the same, it is not in the record and J.S. did not consent to the waiver. Forcing J.S. to undergo an intrusive 45-day Diagnostic Evaluation in a secure detention facility without first appearing before the court and consulting with Counsel is a violation of his rights to due process and the assistance of Counsel.

Considering the lower court's numerous violations of relevant West Virginia Rules of Juvenile Procedure and West Virginia Code, J.S. should be immediately released home to his

parents and placed on probation as his disposition for case numbers 13-JD-1 and 13-JD-11. He has served six (6) months in a secure detention facility for his adjudications of daytime Burglary and Battery. The facts and circumstances of those two crimes are not sufficient to warrant that J.S. remain in secure detention until the age of twenty-one (21) years old when no less restrictive placements were first tried but failed, as mandated by West Virginia law.

Finally, J.S. maintains that relevant West Virginia juvenile case law and precedent support the relief he is requesting in this Petition and demonstrate that the lower court abused its discretion and committed clear error in J.S.'s cases below.

“W.Va.Code § 49-5-13(b) (1980 Replacement Vol.) requires the juvenile court at the dispositional stage of delinquency proceedings to "give precedence to the least restrictive" of the enumerated dispositional alternatives "consistent with the best interests and welfare of the public and the child." Syl. Pt. 1, *State ex rel. R.S. v. Trent*, 289 S.E.2d 166, 169 W.Va. 493 (1982).

“Before ordering the incarceration of a child adjudged delinquent, the juvenile court is required to set forth upon the record the facts which lead to the conclusion that no less restrictive alternative is appropriate. The record must affirmatively show that the child's behavioral problem is not the result of social conditions beyond the child's control, but rather of an intentional failure on the part of the child to conform his actions to the law, or that the child will be dangerous if any other disposition is used, or that the child will not cooperate with any rehabilitative program absent physical restraint.” Syl. Pt. 2, *State ex rel. R.S. v. Trent*, 289 S.E.2d 166, 169 W.Va. 493 (1982). “A child adjudged delinquent and committed to the custody of the State has both a constitutional and a statutory right to treatment.” Syl. Pt. 6, *State ex rel. R.S. v. Trent*, 289 S.E.2d 166, 169 W.Va. 493 (1982).

J.S. also moves this Court to apply the following holdings of *State ex rel. D.D.H. v. Dostert* in considering the requests for relief herein, and in directing the lower court to Order a proper disposition for J.S.'s adjudications for Burglary and Battery.

4. In a juvenile proceeding it is the obligation of a trial court to make a record at the dispositional stage when commitment to an industrial school is contemplated under W.Va. Code, 49-5-13(b)(5) (1978) and where incarceration is selected as the disposition, the trial court must set forth his reasons for that conclusion. In this regard the court should specifically address the following: (1) the danger which the child poses to society; (2) all other less restrictive alternatives which have been tried either by the court or by other agencies to whom the child was previously directed to avoid formal juvenile proceedings; (3) the child's background with particular regard to whether there are pre-determining factors such as acute poverty, parental abuse, learning disabilities, physical impairments, or any other discrete, causative factors which can be corrected by the State or other social service agencies in an environment less restrictive than an industrial school; (4) whether the child is amenable to rehabilitation outside an industrial school, and if not, why not; (5) whether the dual goals of deterrence and juvenile responsibility can be achieved in some setting less restrictive than an industrial school and if not, why not; (6) whether the child is suffering from no recognizable, treatable determining force and therefore is entitled to punishment; (7) whether the child appears willing to cooperate with the suggested program of rehabilitation; and, (8) whether the child is so uncooperative or so ungovernable that no program of rehabilitation will be successful without the coercion inherent in a secure facility.

5. Since the treatment available in our juvenile justice system is often disguised punishment, particularly as the severity of the commitment increases, the court cannot justify incarceration in a secure, prison-like facility on the grounds of rehabilitation alone; notwithstanding improvements in the educational and counseling facilities of our industrial schools, secure, prison-like facilities are still dangerous and coercive and the selection of an industrial school as the appropriate disposition must be grounded on the factors set forth in syllabus point 4 of this case, and not on the fact that treatment can be afforded more cheaply or conveniently in a secure facility.

6. "In considering the least restrictive dispositional alternative for sentencing a juvenile, a juvenile court must consider the reasonable prospects for rehabilitation of the child as they appear at the time of the dispositional hearing, with due weight given to any improvement in the child's behavior between the time the

offense was committed and the time sentence is passed." Syl. Pt. 3, *State ex rel. S. J. C. v. Fox*, 268 S.E.2d 56, 165 W.Va. 314 (1980).

Syl. Pts. 4, 5 and 6, *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401, 165 W.Va. 448 (1980).

Finally, this Court has held that "[t]he State's interest in taking custody of delinquents is rehabilitation. Due process therefore requires that the nature of the custody bear a relation to that rehabilitative purpose." Syl. Pt. 2, *State ex rel. M.L.N. v. Greiner*, 360 S.E.2d 554, 178 W.Va. 479 (1987). J.S.'s continued custody in secure detention until he turns 21 years old does not have a rehabilitative purpose and should not be upheld by this Court. The case law in West Virginia is clear that the detention of Juveniles should be rehabilitative unless the Juvenile demonstrates that he is not amenable to rehabilitation or services after all reasonable attempts have been made to achieve rehabilitation.⁸ J.S. is in detention because the lower court labeled him a "bully" and opined that J.S. has a sense of entitlement. Written reports containing hearsay and vague statements by school officials and the DHHR worker about alleged prior bad acts and reputation of J.S. is not proper evidence for disposition of a juvenile adjudged to be delinquent. Even if J.S. having a history of being a "bully" had been established by proper evidence, should the court have considered the same when J.S. was not adjudicated for those prior bad acts? Is being a "bully" sufficient cause for the disposition imposed against J.S. without rehabilitation having first been tried? The lower court has a clear legal duty to have followed the cited Rules of Juvenile Procedure, West Virginia Code and relevant case law in J.S.'s cases. The record is clear that the lower court abused its discretion and issued findings about J.S. that are not supported by proper evidence, and that the disposition as Ordered is improper and unreasonable.

⁸ See also "All officers and employees of the State charged with implementing the provisions of the juvenile law are required to act in the best interests of the child and the public in establishing an individualized program of treatment for each child adjudged delinquent." Syl. Pt. 7, *State ex rel. R.S. v. Trent*, 289 S.E.2d 166, 169 W.Va. 493 (1982).

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ASSIGNMENT OF ERROR 6:

Rule 43 of the West Virginia Rules of Juvenile Procedure has not been followed by the lower court, *Judicial Review, Applicable Cases:*

Following adjudication, in every status offense case and in every juvenile delinquency case in which a multidisciplinary treatment team has convened, the court shall conduct regular judicial review of the case with the multidisciplinary treatment team. These judicial review hearings may be conducted as often as considered necessary by the court. Provided, if the juvenile is in an out-of-home placement, the judicial reviews shall occur at least once every three months.

A Review Hearing and MDT meeting have not been scheduled for J.S. in case numbers 13-JD-1 and 13-JD-11, but J.S. should not go before the lower court until this Court grants expedited relief on his behalf, as set forth herein. Based on the lower court's improper ruling as stated at on June 7, 2013, J.S. should go before the court for a Review Hearing only after relief is granted on appeal and clear direction comes from this Court. It appears that even if the treatment team members from the Kuhn Center and the Rubenstein Center were to recommend that J.S. be returned home on probation, the lower court's ruling on the record during Disposition on June 7, 2013 indicates that the court would only "consider" releasing J.S. home after he completes the program at a level three placement. (A.R. 125-129; 137) The Kuhn Center did provide group counseling and treatment to J.S., he performed community service, and he attained the highest behavior level, but he may not have been formally in a "program." (A.R. 141) Absent an Order from this Court, J.S. will have to start over again in the program at the Rubenstein Center. Expedited relief on appeal and clear directives to the lower court are required before J.S. can have a meaningful Review Hearing, but J.S. asserts that sufficient grounds exist for this Court to Order that he immediately return home on probation.

CONCLUSION AND PRAYER FOR EXPEDITED RELIEF

The Circuit Court is mandated by relevant West Virginia case law, the West Virginia Code and the Rules of Juvenile Procedure to afford J.S. certain protections; due process rights, and rehabilitative treatment services. J.S. was never given the chance in a less restrictive out-of-home placement and the lower court's reasons are not adequate nor supported by proper evidence. What is an adequate remedy for a Juvenile who's due process rights were violated and who has been improperly held for a long period of time in a secure detention facility, when less restrictive alternatives and rehabilitative services were not first tried, and those options are no longer available to the Juvenile?

J.S. had never been in any type of out-of-home placement prior to his detention on February 27, 2013, he has benefitted from placement at the Kuhn Center, and the lower court should be directed on appeal to immediately Order J.S. released home to his parents on probation. It is in the best interest of J.S. to immediately return home after a long period of being held in secure detention, and that he be given a fair chance at home on probation for his adjudications of Burglary and Battery. Oral argument is not necessary for this Court to find that J.S. was denied a meaningful chance at home with services prior to his detention, and that it is in the overall best interest of J.S. and the community for J.S. to be home with his family and supervised under the terms and conditions of probation.

If this Court does not find sufficient cause to issue an expedited Order for J.S. to immediately return home on probation, the lower court should at least be directed to release J.S. from the Rubenstein Center upon his successful completion of the program, with credit for the past six (6) months at the Kuhn Center. At a minimum, J.S. moves this Honorable Court to grant

expedited relief on appeal and direct the lower court to forthwith enter a proper Order with appropriate and objective findings and conclusions from the hearing on June 7, 2013, and to immediately conduct a Review Hearing pursuant Rule 43, *Judicial Review*, West Virginia Rules of Juvenile Procedure. J.S. would further move this Court to grant expedited relief Ordering that the lower court shall impose a proper and reasonable Disposition in J.S.'s cases 13-JD-1 and 13-JD-11, whereupon J.S. would be granted credit towards the completion of the program at the Rubenstein Center for his almost six (6) months of time in secure detention at the Kuhn Center (where he has received positive behavior and community service reports). The lower court should follow the Division of Juvenile Services' recommendations for when J.S. should be released home, it should not be discretionary for the court to hold J.S. in detention until he attains twenty-one (21) years of age.

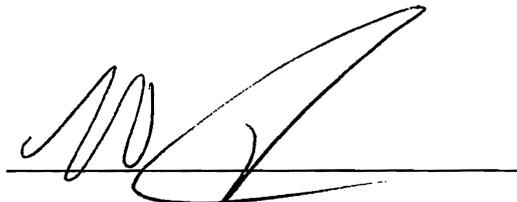
Because of J.S.'s age, there are no longer any available DHHR residential treatment placements for him, but he is not in need of further treatment. If the lower court's disposition is allowed to stand, the only placement available for J.S. at this time, due to his age, is in a secure detention facility. Considering the totality of J.S.'s circumstances and his family support, continued placement in a secure detention facility (even the Rubenstein Center) is not in the best interest of J.S. or society. He has been drug-free since the day he committed the Burglary, his parents were drug-testing him at home prior to his first appearance before the lower court, and there is nothing in the record to show that J.S. ever failed a drug screen by the Probation Department. It is clear that J.S. does not need out-of-home treatment for substance abuse, and the lower court's concern about "bullying" is not a reasonable basis for locking-up J.S. until he attains the age of twenty-one (21). Most recently, J.S. should not have been placed at the

Rubenstein Center to start over in a program as a “step-down” placement because the Rubenstein Center is still a secure detention facility and J.S. will not benefit from another program. J.S.’s continued placement in detention is overly-punitive and would serve no rehabilitative purpose.

The imposition of secure detention until the age of twenty-one (21) years old for daytime Burglary and a separate incident of Battery at school when less-restrictive placement was never first tried and failed, and when the Juvenile could successfully complete a treatment program in detention, is an illegal Disposition in this case. J.S. asserts that sufficient cause has been presented herein for this Court to grant expedited relief on appeal and Order that J.S. be immediately returned to the legal and physical custody of his parents. The undersigned Counsel avers that J.S.’s parents understand the seriousness of their son’s behaviors before he was placed in detention, and they are committed to closely monitoring J.S. at home and to participate in any services recommended by the DHHR and/or the Probation Office. J.S. has only six (6) credits to receive a high school diploma and his mother can provide home-schooling (as she already provides certified home-schooling to his sister), so he can complete the high school credits he needs without returning to public school, to avoid any concerns of the lower court that J.S. will “bully” other kids. No credible evidence exists to support the finding that J.S. continues to pose a risk to the community, and his approximately six (6) month incarceration has had an overall positive effect to deter him from further acts of delinquency. J.S. has the goal of going to college, and continued out-of home placement in secure detention is not in his best interest. J.S.’s family is supportive and committed to helping him transition into supporting himself as an adult, and he has benefitted overall from placement at the Kuhn Center.

WHEREFORE, J.S. respectfully prays for this Court to grant expedited relief on appeal so that he can be home with his family by his birthday and before the holidays, and to otherwise review and rule upon the the lower court's many due process and procedural violations in J.S.'s cases.

Respectfully submitted,
PETITIONER,
J.S., A JUVENILE,
BY COUNSEL:

A handwritten signature in black ink, appearing to read 'P. Isner', is written over a horizontal line.

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VERIFICATION

The undersigned Counsel hereby declares under penalty of perjury that the statements contained within the foregoing *Petitioner's Brief* are true and correct, and that the undersigned Counsel has a good faith basis for the filing of such Petition and the relief requested under the laws of the State of West Virginia.



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CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that on the 4th day of September, 2013, a true copy of the *Notice of Appeal, Petitioner's Brief, Appendix Record to Petitioner's Brief, and Motion for Expedited Relief* was sent to the State of West Virginia, through its Counsel Leckta Poling, Barbour County Prosecuting Attorney, PO Box 38, Philippi, WV, 26416; and that a true copy of the *Notice of Appeal* was sent to the Barbour County Circuit Clerk, 8 North Main Street, Philippi, 26416, via postage pre-paid USPS mail.



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