

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Respondent**

v.

**PATRICK SHAWN COLLINS,
Defendant Below, Petitioner**

**No. 15-0958
(Gilmer County, No. 12-F-5)**

SUPPLEMENTAL BRIEF OF PETITIONER

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
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v.

**No. 15-0958
(Gilmer County, No. 12-F-5)**

**PATRICK SHAWN COLLINS,
Defendant Below, Petitioner**

SUPPLEMENTAL BRIEF OF PETITIONER¹

ASSIGNMENTS OF ERROR

I. The Circuit Court abused its discretion in denying the Petitioner's Motion for a Reduction of Sentence because the Petitioner's sentence of 10 to 25 years for the minor regulatory violations of failing to report, in a timely manner, changes in sex offender registration information, is 40 to 100 times greater than the 90-day maximum penalty for the Petitioner's underlying offense.

II. The statute providing for a sentence of 10 to 25 years for subsequent violations of failing to report, in a timely manner, changes in sex offender registration, is unconstitutionally disproportionate as applied to the Petitioner, because the Petitioner's underlying charge is a misdemeanor, punishable by a maximum of only 90 days in jail.

¹This Supplemental Brief was authorized by the Order of this Court of June 27, 2016.

Consequently, the penalty for the victimless regulatory violations is 40 to 100 times greater than the underlying substantive offense and, as such, constitutes a violation of the Eight Amendment prohibition against cruel and unusual punishment and Article III, Section 5 of the West Virginia Constitution.

III. Although requirements of sex offender registration, in general, are regulatory in nature and not punitive, the requirement of sex offender registration, for life, for a misdemeanor offense punishable by a maximum of 90 days in jail (applied to a 20-year-old male with a life expectancy of approximately 57 more years), equals a period of registration that is over 200 times longer than the maximum sentence for the underlying offense, and rises to the level where the registration requirement is, in fact, punitive in nature.

As such, the requirement of lifetime registration is a violation of the Eighth Amendment prohibition of cruel and unusual punishment and Article III, Section 5, of the West Virginia Constitution.

STATEMENT OF THE CASE

This case involves the issues of whether the imposition of a sentence of 10 to 25 years for the regulatory violations of failing to report, in a timely manner, changes in sex offender registration, is (1) an abuse of discretion, or (2) a violation of the Cruel and Unusual Clause of the United States and West Virginia Constitutions when the sentence for the regulatory violations is 40 to 100 times longer than the maximum 90-day sentence for the underlying offense.

This case also involves the issue of whether sex offender registration, ordinarily considered to be regulatory in nature rather than punitive, rises to the level of punitive in nature and is disproportionate to the offense, when imposed upon a 20-year-old person for the remainder of his life, constituting an estimated period of time that is over 200 times longer than the maximum penalty of 90 days in jail for the Petitioner's underlying offense.

Underlying Proceedings in the Magistrate Court of Lewis County

On August 18, 2006, in the Magistrate Court of Lewis County, the Petitioner pled guilty to the misdemeanor offense of sexual abuse in the third degree, in violation of W.Va. Code § 61-8B-9. Guilty Plea, *State v. Patrick Shawn Collins*, No. 06-M-640, Magistrate Court of Lewis County, Aug. 18, 2006. Pet. Supp. App. at 3-4. Upon entry of his guilty plea, the Petitioner was sentenced to the maximum statutory term of 90 days, including credit for time served. Jail Commitment or Release Form, *State v. Patrick Shawn Collins*, No. 06-M-640, Magistrate Court of Lewis County, Aug. 18, 2006. Pet. *pro se* App., at 2.²

(The Magistrate Court forms give rise to some confusion in this case, because both the Guilty Plea form and the Jail Commitment form describe the offense to which the Petitioner pled guilty as "sexual *assault* 3rd degree," yet it is apparent from both the signed plea agreement and the penalty imposed that the Petitioner pled guilty not to sexual *assault* in the third degree (a

²Pursuant to Rule 7 of the Rules of Appellate Procedure, the Petitioner attached an Appendix to his *pro se* brief. Subsequently, the Respondent State of West Virginia filed a Supplemental Appendix. Finally, upon appointment of counsel for the Petitioner, it became apparent that additional documents were required in order to adequately represent the interests of the Petitioner. Consequently, concurrently with this Supplemental Brief the Petitioner filed a Motion for Leave to File a Supplemental Appendix. For purposes of this Supplemental Brief, references to the three Appendices are as follows: references to the Petitioner's *pro se* Appendix are designated as "Pet. *Pro Se* App."; references to the Respondent's Supplemental Appendix are designated as "Resp. Supp. App."; and references to the Petitioner's Supplemental Appendix are designated as "Pet. Supp. App."

felony involving penetration), but to sexual *abuse* in the third degree (a minor misdemeanor). Jail Commitment or Release Form, State v. *Patrick Shawn Collins*, No. 06-M-640, Magistrate Court of Lewis County, Aug. 18, 2006. Pet. *pro se* App., at 2; and Negotiated Plea Agreement, *Patrick Shawn Collins*, No. 05-F-67 and 06-M-640, Magistrate Court of Lewis County, July 2006. Pet. Supp. App., at 1-2)

Under W.Va. Code § 61-8B-9, the misdemeanor of sexual abuse in the third degree, to which the Petitioner pled guilty, consists of "sexual contact" without consent, when the lack of consent is due to the person being less than 16 years old. Sexual contact is defined in W.Va. Code § 61-8B-1(6) as "an intentional touching" (not involving penetration) "either directly or through clothing . . . where . . . the touching is done for the purpose of gratifying the sexual desire of either party."

The Petitioner has committed no other offenses, ever, other than failing to update sex offender registry information in a timely manner.

The Requirement of Sex Offender Registration

Despite the misdemeanor status of the offense, punishable by a maximum of 90 days in jail, because the victim was a minor, under W.Va. Code § 15-12-4(a)(2)(E) the Petitioner was required to register as a sex offender for the duration of his life. According to the sex offender registration form, the victim is listed as a 14-year-old female, with the relationship listed as "family friend." Patrick S. Collins, W.Va. State Police Criminal Information Bureau Registry, Jan. 18, 2012. Pet. Supp. App., at 21. The Petitioner's date of birth is listed on the Registration form as July 28, 1985. At the time of the offense, the Petitioner was 20 years old.

According to the Petitioner's initial sex offender registration form, with credit for time served, the Petitioner completed his 90-day sentence on Oct. 12, 2006. Patrick Shawn Collins, Sex Offender Registration and Verification, Oct. 12, 2006. Pet. Supp. App. at 6. Under W.Va. Code § 15-12-2(e)(1), the Petitioner was required to register as a sex offender "within three business days of release" from custody. Additionally, under W.Va. Code § 15-12-2(d), the registration is required to be performed "in person," at the West Virginia State Police detachment covering the person's county of residence.

The required information, as provided by the Petitioner, includes:

- name, aliases, nicknames
- the address where the registrant resides or intends to reside
- the address of any property owned or leased by the registrant that he regularly visits
- the name and address of the registrant's employer or place of occupation at the time of registration
- the names and addresses of any anticipated future employers or places of occupation
- the name and address of any school or training facility the registrant is attending
- the names and addresses of any schools or training facilities the registrant expects to attend
- the registrant's social security number
- a full-face photograph of the registrant at the time of registration
- a brief description of the crime or crimes for which the registrant was convicted
- fingerprints
- information relating to any motor vehicle, trailer or motor home owned or regularly operated by a registrant, including vehicle make, model, color, and licence plate number, including travel trailer, fold-down camping trailer and house trailer
- information relating to any internet accounts the registrant has and the screen names, user names or aliases the registrant uses on the internet
- information relating to any telephone or electronic paging device numbers that the registrant has or uses, including, but not limited to, residential, work and mobile telephone numbers

W.Va. Code § 15-12-2(d)(1) through (9).

Upon his release from jail on Oct. 12, 2006, the Petitioner complied with these registration requirements, registering with the State Police, in person, on the same day as his

release. Pet. Supp. App. at 6. (Unfortunately, the Sex Offender Registration form repeats the erroneous description of the Petitioner's conviction as the felony of third degree sexual *assault*, rather than the correct description of the misdemeanor of third degree sexual *abuse*. Pet. Supp. App., at 6.)

Changes in Sex Offender Registration Information

Upon registration, under W.Va. Code § 15-12-3, "When any person required to register . . . changes his or her residence, address, place of employment or occupation, motor vehicle, trailer or motor home information . . . or school or training facility which he or she is attending, or when any other information required by this article changes . . ." such person shall, "within ten business days," report the change to the West Virginia State Police.

The penalty for a person required to register for life who knowingly fails to provide a change in any required information is a felony sentence of an indefinite term of imprisonment of "not less than one year nor more than five years." For a second or subsequent violation by a person required to register for life, the penalty is imprisonment "not less than ten nor more than twenty-five years." W.Va. Code § 15-12-8(c).

According to the records maintained by the State Police Criminal Information Bureau Sex Offender Registry, upon registering with the State Police, as required, on Oct. 12, 2006, the Petitioner continued his compliance by reporting changes in his registration information on seven consecutive occasions:

1. Nov. 22, 2006: Reported change in employment and Internet information. Pet. Supp. App. at 7.

2. Nov. 30, 2006: Reported change in address and employment. Pet. Supp. App. at 8.
3. Jan. 3, 2007: Reported change in employment. Pet. Supp. App. at 9.
4. Feb. 13, 2007: Reported change in telephone number. Pet. Supp. App. at 10.
5. March 15, 2007: Reported change in employment. Pet. Supp. App. at 11.
6. June 6, 2007: Reported change in employment. Pet. Supp. App. at 12.
7. July 9, 2007: Reported change in employment. Pet. Supp. App. at 13.

Violations of Reporting Requirements in Lewis County

On Sept. 10, 2007, after properly updating the registration information on seven previous occasions, the Petitioner was charged with four counts of failing to update the registry in a timely manner, in violation of W.Va. Code § 15-12-8. The charges consisted of two changes in cell phone numbers, a change in address, and a change in motor vehicle information. Criminal Complaint, *State v. Patrick Shawn Collins*, No. 07-F-59-62, Magistrate Court of Lewis County, Sept. 10, 2007. Pet. Supp. App. 22-24. As the police narrative attached to the criminal complaints states, the Petitioner's failure to update the registry in a timely manner appeared to be based on a lack of transportation. The police narrative states, the Petitioner "stated that he did indeed fail to update his registry information [in a timely manner] and added that he called into the [State Police] office, but had no way of getting into the office." Pet. Supp. App. at 23.

On Feb. 8, 2007, the Petitioner pled guilty in the Circuit Court of Lewis County to the first count of a four-count indictment, based on the same charges. The court sentenced the Petitioner to an indeterminate term of one to five years, and then suspended the sentence and

placed the Petitioner on probation. Order, *State v. Patrick Shawn Collins*, No. 07-F-32, Circuit Court of Lewis County, Feb. 8, 2007. Pet. Supp. App. at 25-31.

On July 28, 2008, the Petitioner's probation was revoked, not because of any new offenses, but based solely on technical violations of the conditions of his probation. On the same date, July 28, 2008, the Petitioner also pled guilty in the Circuit Court of Lewis County to an information alleging that in January 2008, he failed to report the opening of a Yahoo Internet account. Information, *State v. Patrick Shawn Collins*, No. 08-F-18, Circuit Court of Lewis County, July 28, 2008. Pet. Supp. App. at 32, 37-41.

Upon revocation of his probation in Lewis County No. 07-F-32 and guilty plea to the information in Lewis County No. 08-F-18, the Petitioner was committed to the Division of Corrections for placement at the Anthony Center for youthful male offenders, pursuant to W.Va. Code § 25-4-6. Order, *State v. Patrick Shawn Collins*, No. 07-F-32, Circuit Court of Lewis County, July 28, 2008. Pet. Supp. App. at 33-36; Order, *State v. Patrick Shawn Collins*, No. 08-F-18, Circuit Court of Lewis County, July 28, 2008. Pet. Supp. App. at 37-41.

On August 27, 2009, upon his return from the Anthony Center, the Petitioner was returned to probation on both Lewis County No. 07-F-32 and Lewis County 08-F-18. Order, *State v. Patrick Shawn Collins*, Nos. 07-F-32 and 08-F-18, Circuit Court of Lewis County, Aug. 27, 2009. Resp. Supp. App. at 18-25.

Upon completion of his commitment to the Anthony Center, combined with his pretrial incarceration at the Central Regional Jail, the Petitioner had spent a total of 405 days in custody for the failure to update the registry in a timely manner. (See Commitment Form, *State v.*

Patrick Shawn Collins, No. 07-F-32, Circuit Court of Lewis County, Oct. 1, 2012. Pet. Supp. App. at 42.)

Upon his return from the Anthony Center, according to the records maintained by the State Police Criminal Information Bureau Sex Offender Registry, in addition to the seven proper reports of changes of information that the Petitioner completed prior to revocation of probation, upon his release, the Petitioner reported seven more changes, including:

8. Sept. 18, 2009: Reported change in residence upon enrollment in college. Pet. Supp. App. at 14.
9. May 27, 2010: Reported change in residence hall at college. Pet. Supp. App. at 15.
10. Aug. 26, 2010: Reported further change in residence hall at college. Pet. Supp. App. at 16.
11. May 16, 2011: Reported further change in residence hall at college. Pet. Supp. App. at 17.
12. Aug. 29, 2011: Reported further change in residence hall at college. Pet. Supp. App. at 18.
13. Sept. 12, 2011: Reported change in screen name of Facebook (from Patrick Shawn Collins to Shawn Collins). Pet. Supp. App. at 19.
14. Jan. 8, 2012: Reported change in residence hall at college. Pet. Supp. App. at 20.

Violations of Reporting Requirements in Gilmer County

On March 6, 2012, after reporting changes in registration on 14 occasions, once again the Petitioner was charged with failing to update the registry in a timely manner, this time in a three-count indictment in the Circuit Court of Gilmer County. Count One alleged the failure to report in a timely manner the creation of a Facebook account (in his own name of Patrick Shawn

Collins). Count Two also alleged the failure to report in a timely manner the creation of a Facebook account (again in his own name of Shawn Collins). Count Three alleged the failure to report a change of address in a timely manner (that is, within 10 days). Indictment, *State v. Patrick Shawn Collins*, No. 12-F-5, Circuit Court of Gilmer County, March 6, 2012. Resp. Supp. App. at 1-3.

On June 1, 2012, the Petitioner pled guilty to Count One of the Indictment. The remaining two counts were dismissed. Plea Order, *State v. Patrick Shawn Collins*, No. 12-F-5, Circuit Court of Gilmer County, June 1, 2012. Resp. Supp. App. at 13-17.

On August 12, 2012, based on his guilty plea, the Petitioner was sentenced to a term of 10 to 25 years in the penitentiary, with an effective sentence date (with credit for pretrial incarceration) of March 5, 2012. Sentencing Order, *State v. Patrick Shawn Collins*, No. 12-F-5, Circuit Court of Gilmer County, Aug. 14, 2012. Pet. *pro se* App. at 3-5.

One month later, on Sept. 13, 2012, based on the Gilmer County conviction and sentence of 10 to 25 years, the Circuit Court of Lewis County revoked the Petitioner's probation in Lewis County on both Lewis County No. 07-F-32 and 08-F-18. The Court imposed sentences on each conviction of one to five years, to be served consecutively with each other but concurrent with the 10 to 25 year sentence in Gilmer County, with credit for the 405 days previously served. Order, *State v. Patrick Shawn Collins*, Nos. 07-F-32 and 08-F-18, Circuit Court of Lewis County, Sept. 13, 2012. Pet. *pro se* App. at 6-12.

By Order of July 1, 2015, in response to a *pro se* Petition for Writ of Habeas Corpus, the Circuit Court of Gilmer County entered an Order granting the Petitioner leave to file a motion for reconsideration of sentence. Order Denying in Part and Granting in Part Petitioner's Post-

Conviction Habeas Corpus Petition, *Patrick Shawn Collins v. Marvin C. Plumley, Warden*, No 14-C-19, Circuit Court of Gilmer County, July 1, 2015. Pet. Supp. App. at 43-53.

On July 14, 2015, the Petitioner filed his *pro se* Motion for Reduction of Sentence. Motion for Reduction of Sentence Pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, *State v. Patrick Shawn Collins*, No. 12-F-5, Circuit Court of Gilmer County, July 14, 2015. Pet. *pro se* App. at 13-15. By Order of Sept. 9, 2015, the Circuit Court denied the motion. Order Denying Sentence Reconsideration, *State v. Patrick Shawn Collins*, No. 12-F-5, Circuit Court of Gilmer County, Sept. 9, 2015. Pet. *pro se* App. at 1.

Proceedings in the Supreme Court of Appeals

On October 1, 2015, acting *pro se*, the Petitioner filed his Notice of Appeal. On January 11, 2016, the Petitioner filed his Brief, requesting this Court to reverse the denial of his Rule 35 Motion for Reduction of Sentence. Petitioner's Brief, *State v. Patrick Shawn Collins*, No. 15-0958, Jan. 11, 2016. On Feb. 16, 2016, the State of West Virginia filed a Summary Response along with a Motion for Leave to Supplement the Appendix. On Feb. 29, 2016, the Petitioner, still acting *pro se*, filed his Reply Brief.

By Order of June 27, 2016, the Court scheduled this case for oral argument under Rule 19, on October 12, 2016. The Court further appointed present counsel for the Petitioner and directed the parties to file supplemental briefs in this matter, with the Petitioner's Supplemental Brief due on or before August 10, 2016. Order, *State v. Patrick Shawn Collins*, No. 15-0958, June 27, 2016.

SUMMARY OF ARGUMENT

In 2006, at age 20, the Petitioner pled guilty to the misdemeanor offense of sexual abuse in the third degree, in violation of W.Va. Code § 61-8B-9. The misdemeanor conviction involved a touching (but not penetration) that was non-consensual only because of the age of the female, age 14. The offense of sexual abuse in the third degree is punishable by a maximum of 90 days in jail and is the most minor of the sexual offenses contained in the West Virginia Code.

Despite the relatively minor nature of the offense, under W.Va. Code § 15-12-4(a)(2)(E), the Petitioner was required to register as a sex offender for the remainder of his life. The Petitioner registered, as required, and updated the registration, as required, on numerous occasions. Despite updating the registry on numerous occasions, through inadvertance, lack of transportation, misunderstanding or forgetfulness, on some occasions the Petitioner failed to update the registry in a timely manner.

Petitioner has committed no offenses other than the minor misdemeanor that placed him on the registry in the first place and the occasional failures to update the registry in a timely manner. The Peititioner made no efforts to hide or conceal his identity. Nevertheless, because of the technical, victimless failures to update the registry in a timely manner, under W.Va. Code § 15-12-8(c), the Petitioner was sentenced to a term of imprisonment of not less than 10 nor more than 25 years.

The Petitioner's sentence of 10 to 25 years for the regulatory violations of failing to report, in a timely manner, changes in sex offender registration information, is 40 to 100 times greater than the 90-day maximum penalty for the Petitioner's underlying offense. Consequently,

the Circuit Court abused its discretion in denying the Petitioner's Motion for Reduction of Sentence.

Additionally, the statute providing for a sentence of 10 to 25 years for the Petitioner's failures to report, in a timely manner, changes in sex offender registration, is unconstitutionally disproportionate as applied to the Petitioner, because the Petitioner's underlying charge is a misdemeanor, punishable by a maximum of only 90 days in jail. The penalty for the victimless regulatory violations, 40 to 100 times greater than the underlying substantive offense, constitutes a violation of the proportionality requirement of the Eight Amendment prohibition against cruel and unusual punishment and Article III, Section 5 of the West Virginia Constitution.

Finally, although requirements of sex offender registration, in general, are regulatory in nature and not punitive, because the Petitioner was 20 years old at the time, with a life expectancy of approximately 57 more years, the expected period of registration is over 200 times longer than the maximum sentence for the underlying offense. As such, the requirement of lifetime registration imposes a requirement that is, in effect, punitive, and grossly disproportionate to the underlying offense. Consequently, the requirement of lifetime registration, as applied to the Petitioner, constitutes a violation of the proportionality requirement of the Eighth Amendment prohibition of cruel and unusual punishment in the United States Constitution and Article III, Section 5, of the West Virginia Constitution.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court's Order of June 27, 2016, schedules this matter for oral argument under Rule 19 of the Rules of Appellate Procedure.

Oral argument under Rule 20, rather than Rule 19, would also be appropriate because the Petitioner raises constitutional questions regarding disproportionate sentencing in violation of Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution.

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING THE PETITIONER'S MOTION FOR REDUCTION OF SENTENCE BECAUSE THE PETITIONER'S SENTENCE OF 10 TO 25 YEARS FOR THE MINOR REGULATORY VIOLATIONS OF FAILING TO REPORT, IN A TIMELY MANNER, CHANGES IN SEX OFFENDER REGISTRATION INFORMATION, IS 40 TO 100 TIMES GREATER THAN THE 90-DAY MAXIMUM PENALTY FOR THE PETITIONER'S UNDERLYING OFFENSE.

A. Standard of Review.

For an appeal of a ruling on a motion for reduction of sentence under Rule 35 of the Rules of Criminal Procedure, this Court stated, "we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review. *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996); *State v. Georgius*, 225 W.Va. 716, 719, 696 S.E.2d 18, 21 (2010).

B. Under the Extreme Circumstances of This Case, It Was an Abuse of Discretion for the Circuit Court to Deny the Petitioner's Rule 35(b) Motion for Reduction of Sentence.

Ordinarily, when a sentence is within statutory limits and is not based on an impermissible or unconstitutional factor, this Court denies appeals of motions for reduction of sentences, often in unpublished memorandum decisions. A review of such decisions is significant, however, because the review reveals that the denials of relief either involve offenses that are far greater than those involved in the present case, or involve penalties that are far lighter.

Examples of offenses far greater than those in the present case include the recent case of *State v. Cirigliano*, No. 15-0798, 2016 WL 3463489 (W.Va. June 21, 2016) (mem. decision), where the petitioner pled guilty to two counts of first-degree robbery, offenses which the petitioner committed by breaking into the home of his elderly aunt and forcibly robbing his aunt and another elderly women by use of a butcher knife. Similarly, in the recent case of *State v. Rios*, No. 15-0347, 2016 WL 2969180 (W.Va. May 20, 2016) (mem. decision), the petitioner pled guilty to first-degree robbery, on offense in which the petitioner "discharged a firearm three times (once just inches from his victim's face)."

Other recent examples include *State v. Frank D.*, No. 15-0779, 2016 WL 1547234 (W.Va. April 15, 2016) (mem. decision), where the petitioner pled guilty to six felonies involving sex crimes committed against his own minor daughter. In *Rhodes v. Ballard*, No. 15-0430, 2016 WL 1550430 (W.Va. April 15, 2016) (mem. decision), the petitioner pled guilty to first degree murder involving dousing his girlfriend with an incendiary fluid and setting her ablaze, after which she lingered in the hospital for a month before dying from her injuries. Finally, in *State v. Nathan B.*, No. 15-0698, 2016 WL 1456057 (W.Va. April 12, 2016) (mem. decision), the petitioner pled guilty to five counts of first-degree sexual abuse based on forcing his 10-year-old daughter to perform oral sex on him.

Based on the severity of these offenses, in each of the above instances this Court held that it was not an abuse of discretion for the Circuit Court to deny the motion for reduction of sentence. (The sentences involved in these examples, respectively, are *Cirigliano*: a determinate sentence of 60 years (with parole eligibility after 15 years); *Rios*: a determinate sentence of 60

years; *Frank D.*: an indeterminate sentence of 15 to 50 years; *Rhodes*: life without parole; and *Nathan B.*: an indeterminate sentence of 25 to 125 years.)

Other recent examples of denials of motions for reconsideration involve less severe offenses but also involve penalties far lighter than in the present case. In *Riley v. Vest*, No. 15-0885, 2016 WL 1452112 (W.Va. April 22, 2016) (mem. decision), for example, for orchestrating a plan to smuggle marijuana into the Huttonsville Correctional Complex, the petitioner was convicted of three felonies (delivering a controlled substance to an inmate, conspiracy, and intent to deliver). The petitioner was sentenced to three terms of one to five years, to be served consecutively. Similarly, in *State v. Fugate*, No. 14-193, 2015 WL 3751803 (W.Va. June 15, 2015) (mem. decision), for two daytime burglaries, the petitioner was sentenced to two indeterminate terms of one to ten years, to be served consecutively. In each instance, this Court upheld the Circuit Court's denial of a motion for reconsideration of sentence.

Although the long list of recent decisions involving motions for reconsideration appear to be exclusively unpublished memorandum decisions, the opinions that have been published in previous years appear to be infrequent and sharply contested. The *per curiam* opinion of *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010), for example, which upheld the Circuit Court on a four-to-one vote, involved a denial of reconsideration where the offense was the repeated first degree sexual assault (repeated forcible penetration) of the petitioner's five-year-old niece. *State v. Arbaugh*, 215 W.Va. 132, 595 S.E.2d 289 (2004), which was reversed on a three-to-two vote, similarly involved repeated sexual assaults of minors ranging in age from four to thirteen.

By contrast to the many unpublished memorandum decisions, and by contrast to the published opinions in *Georgius* and *Arbaugh*, which involve some of the most severe crimes

contained in the West Virginia Code, the underlying conviction in the present case is third degree sexual abuse, a misdemeanor involving a maximum penalty of 90 days -- the least severe sexual offense under West Virginia law. And the offenses for which the Petitioner was sentenced to 10 to 25 years (failing to update sex offender registration in a timely manner) are technical regulatory offenses not involving a victim at all.

In *Georgius* and *Arbaugh*, and in all the recent memorandum decisions set forth above, where the prisoners appear to be serving sentences that are severe, the prisoners were also convicted of crimes that were severe. By contrast, in the present case the Petitioner is serving a sentence for regulatory violations that is 40 to 100 times greater than the maximum sentence for the underlying offense.

Consequently, this case is an extreme outlier under West Virginia law. Even though, ordinarily, this Court will uphold a denial of reconsideration when the sentence is within statutory limits, this case is not an ordinary case.

As apparent from the details set forth in the Statement of the Case, the regulatory violations in the present case appear to be the result of lack of transportation, misunderstanding, or forgetfulness. In none of the failures to update the registry in a timely manner does there appear to be an intent to hide, deceive, or commit new substantive offenses.

In the present case, the Circuit Court had numerous options instead of imposing the statutory sentence of 10 to 25 years. Such options include various periods of confinement ranging up to six months in jail. First, the Circuit Court could have acknowledged credit for time served (from March 5, 2012 to August 14, 2012, a period of over five months) and then re-instated probation. *State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783 (2002). Second, under

W.Va. Code § 62-12-3, the Circuit Court could have imposed the statutory sentence and then, anytime within 60 days of incarceration, suspended the remainder of the sentence and reinstated probation. Third, under Rule 35(b) of the Rules of Criminal Procedure, the Circuit Court could have imposed the statutory sentence but then, even without a motion by the Petitioner, reduced the sentence to a period of probation after the Petitioner had served up to 120 days of incarceration. Finally, under W.Va. Code § 62-12-9(b)(4), the Circuit Court could have imposed a sentence of up to six months, followed by a period of probation. *State v. McLain*, 211 W.Va. at 65, 561 S.E.2d at 787.

Because a sentence for regulatory violations that is 40 to 100 times longer than the underlying violation is excessive to the point of constituting cruel and unusual punishment (as set forth in the following section), and because the Circuit Court had numerous lesser options, as set forth above, in this extraordinary case it was an abuse of discretion for the Circuit Court to deny the Petitioner's Rule 35(b) Motion for Reconsideration of his sentence.

II. THE STATUTE PROVIDING FOR A SENTENCE OF 10 TO 25 YEARS FOR SUBSEQUENT VIOLATIONS OF FAILING TO REPORT, IN A TIMELY MANNER, CHANGES IN SEX OFFENDER REGISTRATION, IS UNCONSTITUTIONALLY DISPROPORTIONATE AS APPLIED TO THE PETITIONER, BECAUSE THE PETITIONER'S UNDERLYING CHARGE IS A MISDEMEANOR, PUNISHABLE BY A MAXIMUM OF ONLY 90 DAYS IN JAIL.

CONSEQUENTLY, THE PENALTY FOR THE VICTIMLESS REGULATORY VIOLATIONS IS 40 TO 100 TIMES GREATER THAN THE UNDERLYING SUBSTANTIVE OFFENSE AND, AS SUCH, CONSTITUTES A VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND ARTICLE III, SECTION 5 OF THE WEST VIRGINIA CONSTITUTION.

A. Standard of Review.

"The constitutionality of a statute is a question of law which this Court reviews de novo."

State v. Hargus, 232 W.Va. 735, 739, 753 S.E.2d 893, 897 (2013).

B. The Eighth Amendment of the United States Constitution and Article II, Section 5 of the West Virginia Constitution Prohibit Punishments That Are Disproportionate to the Character and Degree of the Offense.

The Eighth Amendment to the United States Constitution states, in its entirety, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article III, Section 5, of the West Virginia Constitution contains the identical language as the United States Constitution, but then includes an additional provision, which states, "Penalties shall be proportioned to the character and degree of the offence." It is this additional provision of the West Virginia Constitution, requiring proportionality, that is violated in the present case.

Additionally, although the Eighth Amendment of the U.S. Constitution does not contain the explicit language of proportionality that is contained in the W.Va. Constitution, the United States Supreme Court has recognized that proportionality is explicit in the prohibition of cruel and unusual punishment. *Rummel v. Estelle*, 445 U.S. 263 (1980).

1. Under the First, Subjective Test of Proportionality, the Sentence in the Present Case Shocks the Conscience and Offends Fundamental Notions of Human Dignity.

In discussing proportionality in sentencing, in *State v. Shafer*, No. 15-0115 (W.Va., June 3, 2016), this Court recently reaffirmed that the Court uses "two tests for determining whether a sentence violates the proportionality requirement" as set forth in the West Virginia Constitution. As the Court explains, "The first test is subjective and requires that the Court determine whether the sentence 'shocks the conscience and offends fundamental notions of human dignity.'" *State v. Shafer*, No. 15-0115 (W.Va., June 3, 2016), slip op. at 11.

In *Shafer*, the Court concluded that the sentence in question (life without parole) did not shock the conscience of the Court because, during the commission of an armed robbery of an elderly woman, the petitioner watched his codefendant stab the victim nineteen times until she died and then, showing "his utter disregard for the sanctity of life and his lack of remorse," *Shafer*, slip op. at 15, "returned to the victim's home -- which contained the victim's decomposing body -- multiple times to steal the victim's belongings." *Shafer*, slip op. at 12-13.

By contrast, the conviction in the present case is the misdemeanor of sexual abuse in the third degree, a touching not involving penetration and non-consensual only because of age -- the most insignificant sexual offense that exists under West Virginia law -- followed by victimless

regulatory violations of failure to update the resulting sex offender registration in a timely manner. Because the underlying offense is a misdemeanor punishable by a maximum of only 90 days in jail, and because the subsequent failures to update registration requirements in a timely manner are victimless offenses, the Petitioner's sentence of 10 to 25 years -- a sentence that is 40 to 100 times longer than the underlying offense -- is disproportional, in violation of the U.S. and West Virginia Constitutions, to the extent that it does, in fact, shock the conscience and offend fundamental notions of human dignity.

In *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), the Court reviewed a determinate 45-year sentence imposed on petitioner who beat a victim into unconsciousness and stole his wallet and credit cards. Because the appellant was only 19 years old and had no significant criminal record, the Court concluded that the sentence "shocks our sense of justice and is on its face grossly disproportionate to [the petitioner's] crime, age, and prior record." 172 W.Va. at 272, 304 S.E.2d at 857.

Cooper is similar to the present case in terms of the petitioner's age and prior record. The sentence found to be unconstitutional is also similar to the petitioner's in the present case in that, under W.Va. Code § 62-12-13(b)(1)(A) a person serving a determinate sentence of 45 years is eligible to apply for parole after serving one-fourth of the sentence -- that is, 11 years and three months -- compared to parole eligibility in the present case after 10 years. The significant difference in *Cooper* and the present case is in the severity of the offense. In *Cooper*, the offense was first degree robbery, robbery by violence involving beating the victim into unconsciousness. Despite the far greater seriousness of the offense, this Court found the penalty imposed in *Cooper* to shock the conscience and violate the proportionality clause. The magnitude of the

disproportionality in the present case is vastly greater than in *Cooper* and creates an even stronger case for relief.

Additionally, it is significant to note that the Appellant's 10 to 25 year sentence is not imposed because of the severity of the offense in itself (the relatively minor, victimless, failure to update a registry), but is imposed because of the repetition of the offense. In *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 526, 276 S.E.2d 205, 208 (1981), in reviewing proportionality in the context of the recidivist statute, this Court recognized the difference in culpability between offenses which are severe in themselves and offenses which carry heavier penalties only because of repetition.

Courts in other jurisdictions have recognized that penalties for failure to update sex offender registries in a timely manner can be so disproportionate that they violate the Eighth Amendment prohibition against cruel and unusual punishment. In *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (Ga. 2008), for example, the Supreme Court of Georgia held that a life sentence for a second violation of the registration law constituted cruel and unusual punishment.

The *Bradshaw* case is significant for two reasons. First, under Georgia law, a sentence of life imprisonment is, in some respects, actually shorter than the sentence imposed on the Petitioner in the present case. The "life" sentence in Georgia includes eligibility for parole after only seven years. 284 Ga. at 679-80, 671 S.E.2d at 490. By contrast, in the present case, under W.Va. Code § 62-12-13(b)(1)(A), with an indeterminate sentence of 10 to 25 years, the Appellant must serve the 10 year minimum before becoming eligible to apply for parole -- three years longer than parole eligibility under the sentence in Georgia, for a similar offense, that is held to be unconstitutional.

Second, in *Bradshaw*, in contrast to the present case, the appellant's underlying conviction was for the felony of statutory rape, a crime in Georgia punishable by five years in prison. Because the underlying offense in the present case is only a misdemeanor punishable by 90 days in jail, the petitioner in *Bradshaw* (1) was convicted of a significantly more serious underlying offense; (2) received a penalty for repeat failure to update the sex offender registry that was, in effect, shorter than the appellant in the present case, and yet (3) the Supreme Court of Georgia held that the penalty for failure to update the registry in a timely manner constituted cruel and unusual punishment.

In a case similar to *Bradshaw*, the California Court of Appeals in *People v. Carmony*, 127 Cal.App.4th 1066, 26 Cal.Rptr. 365 (Cal.App. 2005), held that the penalty for failing to update the sex offender registry was disproportionate when it resulted in a term of 25-years-to-life under that California "three strikes" law. In *Carmony*, the the appellant's underlying offenses were far more severe than the single misdemeanor in the present case. (In *Carmony*, the underlying offenses were "oral copulation by force or fear, with a minor under the age of 14," followed by two violent felony convictions involving assaults to girlfriends. 127 Cal.App. at 1073, 1080, 26 Cal.Rptr. 3d at 369, 375.)

Despite the severity of the underlying offenses in *Carmony* compared to the present case, the court held that "If the constitutional prohibition [on cruel and unusual punishment] is to have a meaningful application it must prohibit the imposition of a recidivist penalty based on an offense that is no more than a harmless technical violation of a regulatory law." 127 Cal.App. at 1072, 26 Cal.Rptr. 3d at 368.

In so holding, the court in *Carmony* acknowledged that "The willful failure to register [or update the registry] is a regulatory offense that may be committed merely by forgetting to register as required." 127 Cal.App. at 1078, 26 Cal.Rptr. 3d at 373. Because, as in the present case, the appellant had previously registered correctly and made no effort to evade law enforcement officers, the court explained that "the instant offense was a passive, nonviolent, regulatory offense that posed no direct or immediate danger to society." 127 Cal.App. at 1078, 26 Cal.Rptr. 3d at 373. As the court concluded, "his failure to register was completely harmless and no worse than a breach of an overtime parking ordinance." 127 Cal.App. at 1079, 26 Cal.Rptr. 3d at 374.

Consequently, the court found that the sentence of "25-years-to-life for the duplicate registration offense committed by the defendant shocks the conscience of this court. We therefore hold it to be cruel and unusual punishment . . ." 127 Cal.App. at 1089, 26 Cal.Rptr. 3d at 381.

Similarly, in *Gonzalez v. Duncan*, 551 F.3d 875, 889 (9th Cir. 2008), the Ninth Circuit Court of Appeals held that, despite the appellant's extensive criminal history (once again, in contrast to the present case), a penalty of 28 years to life imprisonment (with parole eligibility, under California law, after seven years), is "grossly disproportionate to the 'entirely passive, harmless, and technical violation of the [sex offender] registration law."

Because the present case involves an underlying offense of only a misdemeanor, and no ability to apply for parole -- let alone receive parole -- until the completion of a minimum of 10 years in prison, the 10 to 25 year sentence in the present case is even more disproportionate than those found to shock the conscience in *Bradshaw*, *Carmony*, and *Gonzalez*. Consequently, the

sentence in the present case violates the Eighth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution and should be set aside.

2. Under the Second, Objective Test of Proportionality, the Sentence in the Present Case, Weighed in Light of All Four Objective Criteria, is Unconstitutionally Disproportionate, in Violation of the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

As set forth in *State v. Shafer*, above, of the two tests for determining whether a sentence violates the proportionality requirement of the Constitution, if the first test (the subjective "shock the conscience" test) is met, then the sentence is unconstitutional and "the Court need not proceed to the second test." *Shafer*, slip op. at 11. Although, as set forth above, the subjective "shock the conscience" test is met in the present case, it is still helpful to consider the second objective test in understanding the context and the strength of the constitutional violation.

In *Shafer*, the Court sets forth the second, objective test as a consideration of "(1) 'the nature of the offense,' (2) the legislative purpose behind the punishment,' (3) how the punishment compares 'with what would be inflicted in other jurisdictions,' and (4) how the punishment compares to the punishments of 'other offenses within the same jurisdiction.'" *Shafer*, slip op. at 12.

In applying the first of the four parts of this objective test, "(1) the nature of the offense," as acknowledged by *Carmody* and *Bradshaw* the nature of the offense is indisputably a passive, nonviolent, victimless, regulatory offense. And in contrast to *Carmody* and *Bradshaw*, which both involved relatively serious underlying charges, the underlying charge in the present case is also relatively minor, a minor misdemeanor punishable by a maximum of only 90 days in jail.

The second part of the objective test: "(2) "the legislative purpose behind the punishment," is answered by W.Va. Code § 15-12-1a, which sets forth the legislative purpose "to assist law-enforcement agencies' efforts to protect the public from sex offenders by requiring sex offenders to register with the State Police detachment in the county where he or she shall reside"

From the time he was first required to register, the appellant committed no further offenses other than the failures to update the registry in a timely manner. The Petitioner made no attempt to flee and was easily located and apprehended by the police upon failing to update the registry in a timely manner.

The Petitioner was easily located and apprehended because he was arrested at his place of employment -- *a place of employment that he had properly and timely reported to the State Police Registry*. On July 9, 2007, the Petitioner properly reported his change of employment as the "Jane Lew Family Restaurant." Pet. Supp. App. at 13. As confirmed by the factual statement attached to the Criminal Complaint, on Sept. 6, 2007, the arresting officer "located the defendant at his current place of employment, the Jane Lew Restaurant." Factual Statement attached to Criminal Complaint, *State v. Patrick Shawn Collins*, No. 07-F-59, Magistrate Court of Lewis County, Sept. 10, 2007. Pet. Supp. App. at 23.

Consequently, although the technical legislative purpose was, in part, violated by the appellant, the legislative purpose was also achieved because, based on the Petitioner's proper previous reporting, the appellant was easily located, and his technical violation was minor in nature, with no victimization and no extensive expenditure of effort on the part of law enforcement.

The third part of the objective test is: "(3) how the punishment compares with what would be inflicted in other jurisdictions." The Georgia case of *State v. Bradshaw* is significant in this regard in that it contains an analysis of penalties imposed for second offense failure to register in other jurisdictions. The court found that "no state other than Georgia" imposes a penalty as harsh as Georgia for a second infraction (that is, life, with parole eligibility after seven years). 284 Ga. at 681, 671 S.E.2d at 491-92.

In asserting that no state other than Georgia imposes a penalty as harsh for a second infraction, the Georgia court is mistaken, because the Georgia analysis erroneously lists West Virginia's penalty for a second offense as one to five years, 284 Ga. at 681, 671 S.E.2d at 491-92. Instead, under W.Va. Code § 15-12-8(c), a second offense by a person required to register for life is punishable -- not by one to five years -- but by 10 to 25. As such, according to the analysis of the Supreme Court of Georgia as corrected, the state with the harshest penalty for subsequent failures to update the registry, at least in terms of parole eligibility, is not Georgia, but is West Virginia. Because the Georgia court found its penalty, with parole eligibility after seven years, to be unconstitutionally disproportionate, under the analysis of the Georgia court, the West Virginia penalty, with parole eligibility not beginning until after 10 years, is even more disproportionate.

The fourth part of the objective test is "(4) how the punishment compares to the punishments of 'other offenses within the same jurisdiction.'" In making this comparison, it is important to note that the petitioner's penalty of an indeterminate term of 10 to 25 years for failing to update the registry in a timely manner is greater -- in many instances far greater -- than the penalties for the following far more severe offenses:

Treason: "at the discretion of the jury . . . confinement in the penitentiary for not less than 3 nor more than 10 years." W.Va. Code § 61-1-2. (otherwise life)

Manslaughter: "a definite term of imprisonment of not less than 3 nor more than 10 years." W.Va. Code § 61-2-4.

Attempt to Kill by Poison: "not less than 3 nor more than 18 years." W.Va. Code § 61-2-7.

Malicious Wounding: "not less than 2 nor more than 10 years." W.Va. Code § 61-2-9.

Extortion: "not less than 1 nor more than 5 years." W.Va. Code § 61-2-13.

First Degree Arson (of a dwelling): "a definite term of imprisonment which is not less than 2 nor more than 20 years." W.Va. Code § 61-3-1.

Breaking and Entering (of a dwelling): "not less than 1 nor more than 15 years." W.Va. Code § 61-3-11.

Grand Larceny: "not less than 1 nor more than 10 years." W.Va. Code § 61-3-13.

Forgery: "not less than 1 nor more than 10 years." W.Va. Code § 61-4-5.

Bribery: "not less than 1 nor more than 10 years." W.Va. Code § 61-5-4.

Child Neglect Resulting in Death: "not less than 3 nor more than 15 years." W.Va. Code § 61-8D-4a.

Possession With Intent to Deliver Schedule I or II Narcotics: "not less than 1 nor more than 10 years." W.Va. Code § 60A-4-401.

Operating a Clandestine Meth Lab: "not less than 2 nor more than 10 years." W.Va. Code § 60A-4-411.

DUI Causing Death: "not less than 2 nor more than 10 years." W.Va. Code § 17C-5-2(a).

Consequently, under both the subjective "shock the conscience" and objective four-part test for proportionality, the sentence of 10 to 25 years for a subsequent violation of failing to report a change of sex offender registration, in a timely manner -- a sentence 40 to 100 times

longer than the 90 day sentence for the underlying offense -- is disproportionate to the offense and, as such, is a violation of both the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

III. ALTHOUGH REQUIREMENTS OF SEX OFFENDER REGISTRATION, IN GENERAL, ARE REGULATORY IN NATURE AND NOT PUNITIVE, THE REQUIREMENT OF SEX OFFENDER REGISTRATION, FOR LIFE, FOR A MISDEMEANOR OFFENSE PUNISHABLE BY A MAXIMUM OF 90 DAYS IN JAIL (APPLIED TO A 20-YEAR-OLD MALE WITH A LIFE EXPECTANCY OF APPROXIMATELY 57 MORE YEARS), EQUALS A PERIOD OF REGISTRATION THAT IS OVER 200 TIMES LONGER THAN THE MAXIMUM SENTENCE FOR THE UNDERLYING OFFENSE, AND RISES TO THE LEVEL WHERE THE REGISTRATION IS, IN FACT, PUNITIVE IN NATURE.

AS SUCH, THE REQUIREMENT OF LIFETIME REGISTRATION IS A VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT AND ARTICLE III, SECTION 10 OF THE WEST VIRGINIA CONSTITUTION.

A. Standard of Review.

"The constitutionality of a statute is a question of law which this Court reviews de novo."

State v. Hargus, 232 W.Va. 735, 739, 753 S.E.2d 893, 897 (2013).

B. The Requirement of Registration for Life, for a Person Whose Underlying Offense Is a Minor Misdemeanor Punishable by a Maximum of Only 90 Days in Jail, Is, in Fact, Punitive in Nature and Disproportionate to the Nature of the Offense.

Under W.Va. Code § 15-12-4(a)(2)(E), despite the misdemeanor status of the Petitioner's underlying offense, the Petitioner was required to register as a sex offender for the duration of his life. In the introductory section of the West Virginia Sex Offender Registration Act, W.Va. Code §15-12-1a, the Legislature states "It is not the intent of the Legislature that the [sex

offender registration] information be used to inflict . . . additional punishment . . . This article is intended to be regulatory in nature and not penal."

Despite the expressed intent of the Legislature, other jurisdictions have recognized that sex offender registration statutes, as applied in particular instances, can in fact be punitive and, as such, violative of the cruel and unusual clause of the Eighth Amendment of the U.S.

Constitution. In *People v. DiPiazza*, 286 Mich.App. 137, 139, 778 N.W.2d 264, 266 (2009), for example, the Michigan Court of Appeals considered a situation, similar in many respects to the present case, where the defendant was 18 years old and "had a consensual sexual relationship with [a female] who was nearly 15 years old." Under Michigan's Youthful Trainee Act, the defendant was sentenced to a period of probation, which he completed, resulting in the dismissal of the charges and no conviction on his record. Regardless, under Michigan law, the defendant was required to register as a sex offender -- not for life, as in the present case -- but for a period of 25 years, a term which was subsequently reduced to 10 years. 286 Mich.App. at 140, 778 N.W.2d at 266.

The Michigan court acknowledged that "two recent federal court decisions have held that the registration and notification requirements of Michigan's Sex Offenders Registration Act, as applied to adult defenders, do not impose 'punishment' under the Eighth Amendment of the United States Constitution." 286 Mich.App. at 144, 778 N.W.2d at 268, *citing Doe v. Kelley*, 961 F.Supp. 1105 (W.D.Mich. 1997); and *Lanni v. Engler*, 994 F.Supp. 849 (E.D.Mich. 1998).

The Michigan court then noted that, based on the defendant's sole, relatively minor underlying violation (much as in the present case), the defendant does not constitute a danger to the public. The court concluded that "by including defendant's name on the sex offender

registry, the government is effectively warning the public that defendant is dangerous, thus publicly labeling the defendant as dangerous. Such warning or 'branding' in the context of this case clearly constitutes punishment." 286 Mich.App. at 152, 778 N.W.2d at 272.

Upon concluding that the 10-year registration requirement, in the context of the case, does in fact constitute punishment, the Michigan court proceeded to determine if the punishment was disproportionate to the extent of violating the Eighth Amendment. As the court explained, "Here, the circumstances of the offense are not very grave. Defendant was 18 years old and in a consensual sexual relationship with another teen who was almost 15 years old." 286 Mich.App. at 154, 778 N.W.2d at 273. The court then added, "The penalty in this case, however, has been harsh. Defendant is being required to register as a sex offender for 10 years. He receives the social stigma of being labeled as a sex offender . . . As a result of registering as a sex offender, defendant has been unable to find employment and, in fact, lost two jobs after it was discovered that his name is on the sex offender registry . . . Given the circumstances of this case, the offense that defendant committed was not very grave, but the penalty has been very harsh." 286 Mich.App. at 154, 778 N.W.2d at 273.

Consequently, the court stated "we conclude that requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment." 286 Mich.App. at 156, 778 N.W.2d at 274.

Similarly, the Supreme Court of Indiana held that sex offender registration, as applied in particular instances, can in fact be punitive. In *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009), the Indiana court acknowledged that sex offender registration "imposes significant affirmative obligations and a severe stigma on every person to whom it applies." The court

explained that the registration act "exposes registrants to profound humiliation and community-wide ostracism." 905 N.E.2d at 380. Finally, the court pointed out that registration requirements apply "without regard to whether the individual poses any particular future risk," and that, much like the West Virginia statute, "Offenders cannot [petition to] shorten their registration or notification period, even on the clearest proof of rehabilitation." Consequently, for defendants in *ex post facto* circumstances, the Indiana court concluded that the registration act is, in fact, punitive. 905 NE.2d at 384.

Similarly, the Supreme Court of Ohio held that sex offender registration requirements, which have become increasingly harsh, have risen to the level of being punitive. As the court explained, "Sex offenders are no longer allowed to challenge their classifications as sex offenders because classification is automatic depending on the offense." *State v. Williams*, 129 Ohio St. 3d 344, 349, 952 N.E.2d 1108, 1113 (2011). The court added, "all the registration requirements apply without regard to the future dangerousness of the sex offender." 129 Ohio St. 3d at 349, 952 N.E.2d at 1113. Consequently, the court concluded, "all doubt has been removed: [the sex offender registration statute] is punitive." 129 Ohio St. 3d at 348, 952 N.E.2d at 1112.

Subsequent to its holding in *Williams* that sex offender registration is in fact punitive, in *In re C.P.*, 131 Ohio St. 3d 513 967 N.E.2d 729 (2012), the Supreme Court of Ohio considered whether the requirement of registration for life, applied to juveniles, constitutes cruel and unusual punishment. Although the appellant in the present case was an adult at the time, because he was eligible for "young adult offender" treatment under W.Va. Code § 25-4-6, many of the same points apply.

As the Ohio court stated, "For juveniles, the length of the punishment [of sex offender registration] is extraordinary . . . the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken . . . He will never have a chance to establish a good character in the community." 131 Ohio St. 3d at 525, 967 N.E.2d at 741. The court added, "He will be hampered in his education, in his relationships, and in his work life." 131 Ohio St. 3d at 525, 967 N.E.2d at 741.

The court concluded that the lifetime registration requirements for juveniles, even with reconsideration available after 25 years, "'shock the sense of justice of the community' and thus violate Ohio's prohibition against cruel and unusual punishment." 131 Ohio St. 3d at 531, 967 N.E.2d at 746.

Although the Ohio case of *In re C.P.* involves a juvenile, and the present case involves a young adult (although eligible at the time for young adult offender status), the present case is more harsh in its consequences in that the underlying offenses committed by *C.P.* in the Ohio case were far more serious (a long history of severe sexual offenses, including the rape and kidnapping of a six year old) and, unlike in the present case, in Ohio the lifetime registration requirement can be reconsidered after 25 years. 131 Ohio St. 3d at 524, 967 N.E.2d at 740-41.

In the present case, the Petitioner is not aware of a single state that imposes as harsh a penalty as that imposed on the Petitioner: a requirement of lifetime registration as a sex offender for an offense, committed under the status of a "young adult offender," that is a misdemeanor punishable by a maximum of only 90 days in jail.

According to the Actuarial Life Table maintained by the United States Social Security Administration, a 20 year old male has a life expectancy of approximately 57 more years.

<https://www.ssa.gov/oact/STAT/table4c6.html>. As a consequence, the lifetime registration requirement of W.Va. Code § 15-12-4(a)(2)(E), applied in the present case, equals an estimated period of registration that is over 200 times longer than the 90-day maximum sentence for the underlying offense. As such, the requirement is both punitive in nature and disproportionate to the point of constituting cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and Article III, Section 10, of the West Virginia Constitution.

CONCLUSION

For the above reasons, the Order of the Circuit Court of Gilmer County, denying the Petitioner's Motion for Reconsideration of Sentence, should be reversed. This case should be remanded to the Circuit Court of Gilmer County with instructions for the imposition of a sentence that is proportionate to the character and degree of the offense. Additionally, upon remand, the Circuit Court of Gilmer County should be instructed to reduce the period of registration to a length of time that is proportionate to both the degree of the offense and the risk and potential harm of re-offending.

Respectfully submitted,

PATRICK SHAWN COLLINS PAINTER,
By counsel



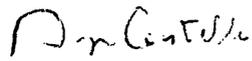
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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 8th day of August, 2016, I served, by U.S. Mail, a copy of the foregoing Supplemental Brief of Petitioner, upon:

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