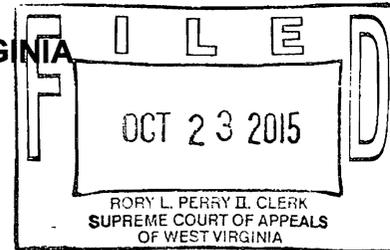


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CASE NO. 15-0714**

State of West Virginia v. Gerald Doom

Appeal from a final order of the  
Circuit Court of Braxton County, West Virginia  
Case No.: 15-F-5



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**PETITIONER'S APPELLATE BRIEF**

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### **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT ALTERNATIVE SENTENCING.

### **KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE CIRCUIT COURT**

This is a direct appeal from a final order entered by the Circuit Court of Jackson County, West Virginia granting the State's Motion for Summary Judgment in regards to the Petitioner's Petition for a Writ of Habeas Corpus. The Petitioner's third habeas petition was denied without an evidentiary hearing.

### **STATEMENT OF THE CASE**

#### **FACTUAL BACKGROUND**

On June 18, 2014, a Criminal Complaint was filed in the Magistrate Court of Braxton County alleging that the Petitioner, Gerald Doom, on or about the 14<sup>th</sup> day of June, 2014, committed the act of Shoplifting—Third Offense. The Complaint alleged that the Defendant took \$9.91 of merchandise from Fisher's Auto including a flashlight and three air fresheners. The Complaint further alleged that the Petitioner was caught in the act of shoplifting when a store employee noticed the flashlight shining in the Petitioner's pants pocket. (A.R. at 3).

Following the completion of an indigent waiver, the Petitioner was appointed counsel, Kevin Hughart, Hughart Law Office to represent his legal interests. (A.R. at 1). On June 30, 2014, the Petitioner appeared in Magistrate Court for a preliminary hearing and the timeframe for said hearing was waived upon written motion of Counsel. (A.R. at ). Thereafter, on December 17, 2014, the Defendant waived his right to a preliminary hearing in Magistrate Court and the matter was bound over to the Circuit Court. (A.R. at

On February 3, 2015, the Petitioner, Gerald Doom was indicted on one count of the felony of Shoplifting-Third Offense. On February 9, 2015, an arraignment was held and the Petitioner entered a plea of "not guilty." (A.R. at 18). Thereafter, following deliberation between Petitioner's Counsel, Kevin Hughart and the Braxton County Prosecuting Attorney's Office, a plea agreement was reached and the matter was set for a plea hearing. On April 27, 2015, a Plea Hearing was held and the Petitioner's written plea agreement was entered, along with the Petitioner's "Rights Waived by Guilty Plea," "Defendant's Statement in Support of Guilty Plea" and "Attorney's Statement in Support of Guilty Plea." (A.R. at 23-28).

Thereafter, on June 22, 2015, a Sentencing Hearing was held in the Circuit Court of Braxton County. (A.R. at 29). At the hearing, Circuit Court Judge Richard Facemire inquired as to whether Petitioner's Counsel had reviewed the pre-sentence investigation report with the Petitioner, to which Petitioner's Counsel replied in the affirmative. The Circuit Court further inquired as to whether Petitioner, or Petitioner's Counsel had any objections to the factual allegations contained in the pre-sentence investigation report and Petitioner's Counsel advised the court that neither had objections to the information contained in the report.

The Circuit Court then proceeded to the sentencing of the Petitioner. At that time, Petitioner's Counsel asked the Circuit Court to allow the Petitioner to be granted alternative sentencing, or in the alternative, to run the Petitioner's Braxton County sentence concurrently with the sentence the Petitioner was currently serving from Monongalia County, West Virginia. (A.R. at 29-34). The State of West Virginia also recommended that the Petitioner's sentence run concurrently with any time that the Petitioner was presently serving on prior charges from other counties. The Petitioner's motion for alternative sentencing was promptly denied by Sentencing Judge, Richard Facemire, who found that based on the Petitioner's Pre-Sentence Investigation, the Petitioner was a poor candidate for alternative sentencing and if granted probation or home confinement, he was likely to re-offend.

Thereafter, the Petitioner was sentenced to not less than (1) one year nor more than (10) ten years incarceration in the state penitentiary, said sentence to run *consecutively* to the sentence the Petitioner received in Monongalia County, West Virginia. No fine was imposed on the Petitioner, but the Petitioner was ordered to pay \$50 in restitution to Fisher's Auto, as well as the costs of prosecuting the action. The Petitioner was given (2) two days credit for time served while awaiting sentencing the matter. At the conclusion of the hearing, the Petitioner was ordered into the custody of the Commissioner of Corrections to be transferred to the Regional Jail Authority where he was ordered to remain pending transfer to the state penitentiary. At that time, Petitioner's Counsel was also appointed to represent him in the present appeal of the Circuit Court's decision. The Petitioner was further directed to file a motion for

reconsideration within one hundred twenty (120) days of the sentence if he so desired.<sup>1</sup>(A.R. at 25-28).

It is from the Order that the Petitioner appeals.

### **SUMMARY OF ARGUMENT**

The Circuit Court abused its discretion in failing to grant the Petitioner's motion for alternative sentencing. The sentence of not less than one (1) to not less than ten (10

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Because the principle issue in this case has not been authoritatively decided in the Court's jurisprudence, oral argument under the Revised Rules of Appellate Procedure Rule 19 may be necessary unless the Court determines the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

### **ARGUMENT**

#### **STANDARD OF REVIEW**

In Syllabus Point 1 of *State v. Lucas*, this Honorable Court held that:

The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.

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<sup>1</sup> Counsel for the Petitioner filed said Motion on October 12, 2015 and it is currently pending before the Circuit Court of Braxton County. Because this Appellate action addresses only sentencing, should the Petitioner's Motion be granted, this Appellate action would likely become moot. (A.R. at 35).

**ERROR**

1. **THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE PETITIONER'S MOTION FOR ALTERNATIVE SENTENCING BECAUSE THE PETITIONER'S SENTENCE UNDER W.Va. Code §61-3A-3(c) IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND IT VIOLATES THE PROPORTIONALITY PRINCIPLES OF ARTICLE III, SECTION 5 OF THE WEST VIRGINIA CONSTITUTION.**

The Petitioner does not contest the validity of his underlying offense. The Petitioner understood, in entering a guilty plea to the offense of Shoplifting-Third Offense, that the only his sentence could be addressed on appeal. However, the Petitioner argues that the Circuit Court abused its discretion in failing to grant the Petitioner's Motion for Alternative Sentencing, after receiving a sentence of not less than (1) one year nor more than (10) ten years incarceration in the state penitentiary, which was to run *consecutively* to the sentence the Petitioner received in Monongalia County, West Virginia. Further, the Petitioner argues that the Circuit Court abused its discretion because the sentence received was cruel and unusual punishment in that the punishment received was disproportionate to the crime committed, which consisted of the Petitioner removing three air fresheners and a small flashlight from an auto part store.

Historically, this Court has held that sentences imposed by the trial court, if they are within the limits prescribed by statute, are not subject to review by this Honorable Court. Specifically, in Syllabus Point 4 of *State v. Goodnight*, this Court stated:

Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible(sic.) factor, are not subject to appellate review.

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

West Virginia Code § 61-3A-3(c), the third offense shoplifting statute, provides:

*Third offense conviction*---Upon a third or subsequent shoplifting conviction, regardless of the value of the merchandise, the person is guilty of a felony and shall be fined not less than five hundred dollars nor more than five thousand dollars, and shall be imprisoned in the penitentiary for not less than one year nor more than ten years. At least one year shall actually be spent in confinement and not subject to probation: Provided, That an order for home detention by the court pursuant to the provisions of article eleven-b [§ 62-11B-1 et seq.], chapter sixty-two of this code may be used as an alternative sentence to the incarceration required by this subsection.

*W.Va. Code § 61-3A-3(c)* (1994).

However, the prohibition on appellate review of sentences imposed by the trial court is not absolute, particularly when there are constitutional issues involved. The Eighth Amendment of the United States Constitution addresses cruel and unusual punishment. The Eighth Amendment provides that “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 addresses the same and provides that “Penalties shall be proportioned to the character and degree of the offence.” In Syllabus Point 8 of *State v. Vance*, this Court held that Article III, Section 5 is the West Virginia Constitutional counterpart to the Eighth Amendment of the United States Constitution:

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of

the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'

*State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

This Honorable Court has held that although constitutional proportionality arguments are typically framed around a sentence that has no fixed maximum or where there is a life recidivist statute, the principals may undoubtedly be applied to any disproportionate Sentence. This Court stated, specifically, in Syllabus Point 4 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981):

While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

The Fourth Circuit Court of Appeals has provided guidance in determining whether a sentence is constitutionally disproportionate to the offense. In *Hart v. Coiner*, the Fourth Circuit held that:

Although the standard applicable under the eighth amendment is one "not susceptible to precise definition," there are several objective factors which are useful in determining whether the sentence in this case is constitutionally disproportionate. The test to be used is a cumulative one focusing on an analysis of the combined factors.

*Hart v. Coiner*, 483 F.2d 136, 27 A.L.R. Fed. 93 (4<sup>th</sup> Cir. 1973) discussing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

*Hart* provided further guidance regarding analysis utilizing the nature of the offense. *Hart* found that, "In assessing the nature and gravity of an offense, courts have repeatedly emphasized the element of violence and danger to the person." *Id.* at 140-141. (Emphasis added). *Hart* further reasoned that another factor in the analysis was the "legislative purpose behind the punishment." *Id.* at 141.

Factually speaking, the Petitioner's crime was minor and the nature of the offense was non-violent. The criminal complaint, which was filed in the Magistrate Court of Braxton County, stated that the Petitioner shoplifted three air fresheners and a single flashlight from Fisher's Auto in Sutton, WV. All told, the items shoplifted by the Petitioner carried a retail value of only \$9.91. All goods were recovered by the victim before the Petitioner left the place of business. There was absolutely no violence committed and at no time was there danger to any person.

The legislative intent in regards to third offense shoplifting is clear. By increasing the severity of a crime that is a misdemeanor offense as a first offense to a felony offense as a third offense, the legislature was attempting to deter repeat shoplifters from offending again. In *Alexander v. U.S.*, the United States Supreme Court held that:

Great deference is given to the legislature's determination of what is necessary to achieve both the punitive and remedial goals served by criminal penalties. However, the legislature's powers are limited by the Eighth Amendment to the United States Constitution, which is applicable to the states through the due process clause of the Fourteenth Amendment. The Eighth Amendment prohibits cruel and unusual punishment and the levying of excessive fines.

*Alexander v. U.S.*, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d, 509 U.S. 544, 113 S.Ct. 2766.

Further, in *Furman*, United States Supreme Court Justice Brennan observed that, "If there is a significantly less severe punishment to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." *Furman* at 279, 92 S.Ct. at 2747. Here, the Petitioner was denied alternative sentencing and will spend up to ten (10) years in prison, on the instant offense alone, over stolen goods amounting to approximately \$9.91. It seems blaringly obvious that the intent of the legislature could be carried out with a far less severe

sentence. Particularly, considering that numerous violent offenses in West Virginia carry a less-severe sentence than third offense shoplifting.

For example, an assault under W.Va. Code § 61-2-9(b) would carry a prison sentence of not more than six (6) months. A battery under W.Va. Code § 61-2-9(c) would carry a prison sentence of not more than twelve (12) months. Even an unlawful assault under W.Va. Code § 61-2-9(a), without malicious intent, carries a potential prison sentence of not less than one (1) nor more than five (5) years.

The only violent offense under § 61-2-9(a) that carries a similar penalty to the present offense, with a potential prison sentence of not less than two (2) nor more than ten (10) years is malicious assault. The elements of malicious assault stipulate that if any person “maliciously shoot[s], stab, cut or wound any person, or by any means cause him or her bodily injury with intent to maim, disfigure or kill...”

In the present case, the Prosecuting Attorney would have the discretion to charge the Petitioner with petit larceny in lieu of charging the Petitioner under the shoplifting statute. Petit larceny, which involves the taking of goods valued at less than \$1000.00, is a misdemeanor crime under West Virginia Code § 61-3-13(b), states that:

(b) If a person commits simple larceny of goods or chattels of the value of less than one thousand dollars, such person is guilty of a misdemeanor, designated petit larceny, and, upon conviction thereof, *shall be confined in jail for a term not to exceed one year* or fined not to exceed two thousand five hundred dollars, or both, in the discretion of the court.

*Id.* (emphasis supplied).

In comparison, the felony charge of grand larceny, involves the taking of goods valued at more than \$1000.00 and typically carries a sentence of imprisonment in the penitentiary *not less than one nor more than ten years*, which is the same period of

incarceration imposed under third offense shoplifting. However, in the discretion of the court, under the grand larceny statute, the Petitioner could *be confined in jail not more than one year and fined not more than two thousand five hundred dollars*. W.Va. Code § 61-3-13(a).

The petit larceny statute, which the Petitioner likely could have been charged and sentenced under, would have imposed a jail sentence of not less than one year for the Petitioner taking air fresheners and a miniature flashlight with a value of only \$9.91. Even if the Petitioner had taken goods worth more than \$1000.00, under the grand larceny statute, with the court's discretion, the Petitioner could have been incarcerated for under a year and fined less than \$2500. This realization is constitutionally problematic. This realization is particularly constitutionally problematic in the Petitioner's case, when the value of the goods taken was less than \$10.

Again, clearly, the intent of the legislature to deter future crimes could be carried out with a far less severe sentence. Sentencing the Petitioner for up to ten (10) years for a non-violent offense, for a crime that is in itself a misdemeanor, or would be a misdemeanor larceny, where the value of the goods taken was less than \$10, clearly violates the constitutional protections of the Eighth Amendment of the United States Constitution.

In Syllabus Point 5 of *State v. Cooper*, this Court held:

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

*State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983)

A sentence of up to ten years in the state penitentiary, served consecutively to any other sentences the Petitioner may have for a crime of stealing three air fresheners and a mini-flashlight is undoubtedly so disproportionate that it “shocks the conscience” when a similar sentence would be served for maliciously stabbing another person with the intent to kill and a markedly less-severe sentence would be served for the most similar crime under another statute.

The Petitioner’s sentence of not less than one (1) nor more than ten (10) years clearly violates the cruel and unusual punishment protections of the Eighth Amendment of the United States Constitution because using the *Hart* analysis the nature of the offense was non-violent, the legislative purpose could be accomplished with a less severe sentence and violent crimes under the West Virginia Code are punished far less severely. Further, the punishment is not proportioned to the character and degree of the offence under Article III, Section Five of the West Virginia Constitution because it shocks the conscience that the Petitioner would receive a sentence of up to ten (10) years for shoplifting only \$9.91 of goods. Because the Petitioner’s sentence violates the cruel and unusual punishment protections of the Eighth Amendment and is disproportionate to the nature of the Petitioner’s minor, non-violent offense, the Circuit Court undoubtedly abused its discretion in refusing to grant the Petitioner’s motion for alternative sentencing, specifically home incarceration, which was the only less-severe sentence available to the Circuit Court.

**CONCLUSION**

For the reasons more fully addressed above, the Circuit Court abused its discretion in refusing to grant the Petitioner's motion for alternative sentencing and sentencing him to not less than one (1) and no more than ten (10) years in the state penitentiary.

WHEREFORE, the Petitioner prays that this Honorable Court will vacate the sentencing order of the Circuit Court; cause the Circuit Court to grant the Petitioner's motion for alternative sentencing; and grant unto the Petitioner such other, further and general relief as may seem proper to this Honorable Court.

Respectfully Submitted,  
**GERALD DOOM**  
Petitioner,  
By counsel.



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PETITIONER'S APPELLATE BRIEF

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I, Christen M. Justice, Counsel for the Petitioner, hereby certify that true and accurate copies of the foregoing "**Petitioner's Brief**" were deposited in the U.S. Mail, contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Zachary Viglianco, Esq.  
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on this 23rd day of October, 2015.



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