IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

NO. 21-0796

STATE OF WEST VIRGINIA

Plaintiff Below, Respondent

v.

Appeal from a final order
of the Circuit Court of
Nicholas County (20-F-56)

CHRISTOPHER MCDONALD

Defendant Below, Petitioner

PETITIONER'S BRIEF

Counsel For Petitioner:

Jason T. Gain (WV Bar #12353)
Losh Mountain Legal Services
P.O. Box 578
Anmoore, WV 26323
Phone: (304) 918-9369
Fax: (304) 715-3605
wvlawyer13@gmail.com

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1) The circuit court erred by sentencing the Petitioner to a disproportionate term of eighty (80) years imprisonment for his crime of robbery in the first degree when he merely displayed what was arguably a toy gun and caused no physical injury.

2) The circuit court erred by failing to make particularized findings to justify the excessive sentence it imposed upon the Petitioner.

STATEMENT OF THE CASE

On February 4, 2020, Derrick Pease, Elizabeth Carrighan, and the Petitioner, Christopher McDonald arrived in Birch River, Nicholas County, West Virginia with the intent to rob a Subway fast food store. Appendix Record ("A.R.") at 38. The Petitioner entered the Subway and told the cashier to give him the money out of the register. *Id.* The cashier asked, "Really, dude?" and the Petitioner replied "Really." *Id.*

Upon doing so, the Petitioner "pulled a gun up to show [the cashier] out of his pants." *Id.* at 47. The cashier then gave the Petitioner one hundred eighty-three dollars ($183), and he left the store. *Id.* at 38. The three individuals drove away and were pulled over shortly thereafter by the Braxton County Sheriff's Department. *Id.* The three were calm, cooperative, showed identification, and convinced the deputy that they were not the individuals that robbed the Subway and were allowed to proceed on their way. *Id.* at 38-9.

After further investigation, the three individuals were identified as the three who committed the robbery, were arrested in Arkansas, and were returned to West Virginia. *Id.* at 40.

The three were indicted by the Grand Jury of Nicholas County on June 16, 2020, on identical charges: 1) Conspiracy to Commit Robbery, and 2) Robbery in the First Degree. *Id.* at 5. Defendants Pease and Carrighan each entered into a plea agreement with the State in which they tendered guilty pleas to the conspiracy charge and they each received one-to-five-year sentences. *Id.* at 58; 82. The Petitioner did not receive such a generous offer.

The Petitioner pled guilty to Robbery in the First Degree in exchange for the dismissal of the conspiracy with no recommendation, binding or non-binding, to the lower court regarding his sentence. *Id.* at 60; 70.

At the plea hearing held on August 31, 2020, the Petitioner waived a presentence investigation ("PSI"), however the court ordered that one be prepared. *Id.* at 133;73. The Nicholas County Probation Department prepared a one-half (1/2) page document which alleged that the Petitioner was wanted in New York, that the same three individuals had robbed "a place" in Pennsylvania the night before, and that the Petitioner had previously been extradited from Florida to New York. *Id.* at 69. It concluded by stating that after speaking with a State Police Officer "we believe a fair sentence would be 80 years in the DOC...." *Id.* This is the entirety of the purported PSI.

The Petitioner objected to the contents of the PSI and the matter proceeded to sentencing on December 7, 2020. *Id.* at 74. The lower court offered to delay the sentencing hearing to conduct a PSI. *Id.* at 145. The Petitioner, against the advice of counsel, asked to proceed to sentencing that day. *Id.*

In sentencing the Petitioner to an eighty (80) year term of imprisonment, the only justification offered by the circuit court was that the Petitioner was a drug user, did not care if the gun was a toy or not, that the cashier was "scared for her life or his life," that the crime is very serious, and that when it occurs in Nicholas County it deserves a "stiff sentence." *Id.* at 147. The court, after objection, noted that it did not take the cashier's fright into consideration of its sentence. *Id.* at 148.

The court's written order simply noted that probation, which no party asked for, was not appropriate for the crime. *Id.* at 79.

The Petitioner was appointed new counsel who filed a Rule 35 (b) Motion to Reduce this sentence on March 26, 2021. *Id.* at 81. The motion noted, *inter alia*, the excessiveness of the sentence when compared with other crimes in West Virginia. *Id.* at 84.

The very next day, on March 27, 2021, the court denied the Rule 35 (b) motion in a one sentence order. *Id.* at 86.

After a bit of confusion, the Petitioner was appointed new counsel who is current counsel on appeal. On September 24, 2021, the Petitioner was resentenced for purposes of appeal. *Id.* at 87. He now comes to this Court seeking relief against the excessive and disproportionate sentence that he received.

SUMMARY OF ARGUMENT

The Petitioner concedes that Robbery in the First Degree is a very serious crime and does not attempt to understate the gravity of it. However, our Legislature has provided the possibility of a ten-year penalty for the crime, and one could hardly sit in a law school classroom and come up with a more non-violent and non-harmful way of committing it. The Petitioner's confederates, who were only slightly less culpable that he, have both nearly discharged their sentences while the Petitioner has the next seventy-eight (78) years to serve for his crime.

The imposition of such a lengthy term of incarceration when compared with the Petitioner's actual conduct is a violation of the proportionality clause of the West Virginia Constitution.

In addition, the lower court denied the Petitioner his right to due process and meaningful appellate review by not following the procedures contained in controlling case law and making the necessary findings to justify its excessive sentence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that argument under Rule 20 is appropriate as this case involves an important question of constitutional law as the lower court has misapplied the proportionality clause of our State Constitution.

Alternatively, a memorandum decision reversing the sentencing order to develop the record would also be appropriate.

ARGUMENT

I. Standard of Review

This Court reviews questions of law under a *de novo* standard. *See, e.g., State v. Lilly*, 461 S.E.2d 101 (W.Va. 1995). This Court "reviews sentencing orders ... under a deferential abuse of discretion standard, *unless the order violates statutory or constitutional commands.*" *State v. Lucas*, Syl. Pt. 1, in part, 496 S.E.2d 221 (W.Va. 1997) (emphasis added).

As such, whether this sentence violates the constitutional proportionality principle is a question of law that the Court reviews *de novo*.

II. The circuit court erred by sentencing the Petitioner to a disproportionate term of eighty (80) years imprisonment for his crime of robbery in the first degree when he merely displayed what was arguably a toy gun and caused no physical injury.

"Penalties shall be proportioned to the character and degree of the offence." W.Va. CONST. Art. III §5. This provision guarantees the people of West Virginia, and our guests while traveling through, a greater protection from excessive punishments than the corresponding Eighth Amendment to the United States Constitution which contains no explicit proportionality guarantee. *Harmelin v. Michigan*, 501 U.S. 957 (1991); *see also* Richard S. Frase, Limiting Excessive Prison Sentences Under Federal and State Constitutions, 11 U. PA. J. CONST. L. 39,

64 (2008) (noting that only eight states, including West Virginia, have proportionality principles in their state constitutions).

Nonetheless, this Court has been rather stingy in enforcing this guarantee against the Legislature and lower court sentencing judges as it typically will only review a criminal sentence in limited circumstances. *Wanstreet v. Bordenkircher*, Syl. Pt. 4, 276 S.E.2d 205 (W.Va. 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.").

When it will review a sentence under those limited conditions, the Court has laid out the applicable test:

> The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981):
>
> In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.
>
> *State v. Cooper*, 304 S.E.2d 851, 857 (W.Va. 1983).

As an initial matter, the test does not define whether the terms "particular crime" or "offense" refers to the elemental statute that was violated or the particular conduct of a defendant in a specific case.

This Court's cases almost universally analyze the facts of the underlying crime for proportionality purposes,[1] however some recent memorandum opinions find the objective test satisfied because of the nature of the elemental crime itself. *See, e.g.*, *State v. Griffin*, No. 16-0594 (W.Va. Sup. Ct., June 9, 2017) (memorandum decision) (robbery in the first degree is very dangerous and justifies a harsh sentence)[2]. For reasons more fully discussed below, the analysis of the actual conduct of a defendant is the more appropriate test.

Turning to the facts of this case, the Petitioner qualifies for a review of his sentence because it is robbery in the first degree which contains "no fixed maximum set by statute." *Wanstreet* at Syl. Pt. 4; W.Va. Code §61-2-12 (punishable by "not less than ten years"). As noted above, the Court should conduct a *de novo* sentencing review because it involves a question of law as to whether the sentence the Petitioner received for his conduct violates the West Virginia Constitution. *State v. Lilly*, 461 S.E.2d 101 (W.Va. 1995)

A) Subjective Test

Applying the above law, the Court first determines if "the sentence for the particular crime shocks the conscience of the court and society." *Cooper*, 304 S.E.2d at 857. In applying this test, the Court typically recites the facts of the case and then declares that the sentence is shocking, *id.*, or is not shocking. *See, e.g., State v. Booth*, 685 S.E.2d 701 (W.Va. 2009).

As the test is inherently subjective and stated to be so, it is difficult to make a legal argument regarding whether this sentence is subjectively shocking. Counsel would state that an eighty (80) year sentence for displaying what the Petitioner alleges is a toy gun[3], with no

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[1] *See, e.g.*, *State v. Buck*, 314 S.E.2d 406 (W.Va. 1984); *State v. Williams*, 519 S.E.2d 835 (W.Va. 1999); *State v. Tyler*, 565 S.E.2d 368 (W.Va. 2002); *State v. Gibbs*, 797 S.E.2d 623 (W.Va. 2017)

[2] *See also State v. Glover*, 355 S.E.2d 631, 640 (W.Va. 1987) ("[Armed] [r]obbery has always been regarded as a crime of the gravest character.")

[3] A.R. at 81.

screams, threats, force, or other actions, shocks his conscience. He further proffers that it shocks the conscience of several lay people in the community he has asked, especially given the sentences the Petitioner's co-defendants received. Counsel and these lay people would still be shocked at such a drastic eighty (80) year sentence if the pistol that the Petitioner did not waive or even remove from his waistband[4] turned out to be a real gun.

However, it is likely that when the State responds we will find that it has a much more fortified conscience that is not capable of being shocked as easily as that of Petitioner's counsel or the others with which he has spoken. Further, after extensive research, it seems that *Cooper* is the only case where this Court found its collective conscience to be shocked upon a review of a first-degree robbery sentence. *Cooper*, 304 S.E.2d at 857.

Although the Court has not reviewed every sentence in the state, this paucity of relief on the subjective ground leaves the Petitioner fearful that he may not be successful by relying on that prong. For this reason, the Petitioner argues that this sentence shocks the conscience, but will not rest his hopes on that alone.

B) Objective Test

As noted above, the Court would next look at "nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *Id.* Further, although "[d]isparate sentences for co-defendants are not *per se* unconstitutional," the Court nonetheless considers it as a factor. *Id.* at 856; *Smoot v. McKenzie*, 277 S.E.2d 624 (W.Va. 1981).

[4] A.R. at 38.

i) **Nature of the Offense**

The Petitioner unequivocally states that what he did was not only wrong, but terribly wrong. Nobody working at Subway or anywhere else should be threatened with a firearm, real or not. The Petitioner concedes that he is guilty of robbery in the first degree in violation of W.Va. Code §61-2-12 and should be punished accordingly. He agrees that he owes not only the victims of his crime, but the State of West Virginia the prescribed punishments for his offense.

For his crime, the Legislature has determined that he serve a minimum of ten years in prison with no maximum set by statute, thereby permitting up to an effective life without mercy sentence. *Id.*

As noted above, however, the "nature of the offense" must look at the actual conduct involved instead of the name of the crime as it would make little sense to conduct proportionality review at all if the Court would hold that any enormous robbery sentence is always proportional because it is robbery.

Applying the facts of this case, one could scarcely find a hypothetical situation in a law school classroom setting, or elsewhere, which would meet the definition of first-degree robbery with any less culpable conduct. The Petitioner allegedly carried a toy gun[5], merely displayed it to the cashier, got the money and left. A.R. at 38; 81. There is nothing in the record to indicate that she experienced any fear above and beyond what would normally be felt when such a crime is perpetrated.

As such, this factor weighs heavily in the Petitioner's favor.

[5] As the Petitioner notes, even if it were a real gun, the conduct was still the most mild first degree robbery imaginable.

ii) Legislative Purpose

This Court has previously stated that there are two legislative purposes behind the penalties prescribed in the first-degree robbery statute: "First, it gives recognition to the seriousness of the offense by imposing a minimum sentence below which a trial court may not go. Second, the open-ended maximum sentencing discretion allows trial courts to consider the weight of aggravating and mitigating factors in each particular case." *State v. Adams*, 565 S.E.2d 353, 356-7.

In this matter, the first legislative purpose is clearly satisfied as the lower court did not usurp the Legislature's authority by slapping the Petitioner on the wrist with a less than ten-year sentence. However, the lower court did not fulfill the legislative purpose in its assessment of where to set the Petitioner's sentence in the infinite upper range. It made no findings regarding "aggravating and mitigating factors." *Id.*; *See also* Section III, *infra*. The entirety of the lower court's analysis of the sentence it imposed was as follows:

> And it's a first degree robbery. We go from meth- -- methamphetamine, heroin, first degree robbery with the use and presentment of a firearm – Whether that was a BB gun or not, doesn't matter to me, and it certainly didn't matter to that store clerk who was standing there scared for her life or his life. It's a very serious charge, and this kind of violent threatening crime that takes place in Nicholas County deserves a stiff sentence, and that's what's going to happen.

A.R. at 147. After defense counsel objected to the finding of fear by the store clerk, the lower court then found that "I did not decide any portion of the sentence based on that factor." *Id.* at 148. The written sentencing order also did not address any reasons for such a harsh sentence other than to note that probation, a sentence not argued for by the Petitioner, would not be appropriate. *Id.* at 79.

Taking all of this together, the lower court thwarted the second portion of the legislative purpose behind the punishment by failing to consider the aggravating and mitigating factors

involved. The court's reasons were: 1) It is a first degree robbery (which is conceded and accounted for in the statute), 2) the Petitioner previously used "methamphetamine and heroin," 3) it is a very serious charge (which is conceded and accounted for in the statute), 4) it involved the use of a firearm (which is conceded[6] and accounted for in the statute),and 5) it occurred in Nicholas County (which is wholly irrelevant because all fifty-four (54) other counties could enhance their penalties for the same "get tough" reason and proportionality review would be meaningless).

The only factor used by the lower court with any relevance was the observation, only known because it was stated by the Petitioner seconds prior, that he had began using illegal drugs after his mother passed away. *Id.* at 145. Such a finding is arguably mitigating and could in no way support the excessive eighty (80) year sentenced imposed.

The lower court did not fulfill the legislative purpose behind an extreme punishment and therefore this factor weighs heavily in the Petitioner's favor.

iii) <u>Comparison of Punishments in Other Jurisdictions</u>

In all five neighboring states, the Petitioner could not have received more than one-fourth (1/4) of the sentence he received in this case for the most heinous armed robbery imaginable. MD Code, Criminal Law, §3-402 (not more than fifteen (15) years); Kentucky Revised Statutes §§515.020; §§532.060 (2) (b) (ten (10) to twenty (20) years); Ohio Revised Code §§2911.01; §§2929.14 (three (3) to eleven (11) years); 18 Pa. CS §§3701 (a) (1); §1103 (not more than twenty (20) years); Va. Code Ann. §18.2-58; §18-2-10 (not less than five (5) nor more than

[6] Although this Court has never decided the issue, the Petitioner assumes, *arguendo*, that the presentment of a toy gun qualifies as the use of a "firearm" sufficient for a conviction under the first-degree robbery statute without conceding such argument for other purposes.

twenty (20) years). Our state stands alone in this area with its exorbitant punishment like one the Petitioner received.

Although this Court previously cited some of these statutes in *Cooper* as comparators, the Court has tended in later cases to rely on the following:

> In comparing the length of petitioner's sentence with what is imposed in other jurisdictions, this Court has previously recognized that other jurisdictions also permit long prison sentences for first-degree robbery. See Id. at 235, 565 S.E.2d at 357 (citing State v. Boag, 453 P.2d 508 (Ariz. 1969) (imposing seventy-five to ninety-nine-year sentence); State v. Victorian, 332 So.2d 220 (La. 1976) (imposing forty-five-year sentence); State v. Hoskins, 522 So.2d 1235 (La. Ct. App. 1988) (imposing ninety-nine-year sentence); People v. Murph, 463 N.W.2d 156 (Mich. Ct. App. 1990) (imposing two forty-six-year sentences); State v. Morris, 661 S.W.2d 84 (Mo. Ct. App. 1983) (imposing life sentence); Robinson v. State, 743 P.2d 1088 (Okla. Crim. App. 1987) (imposing 100 year sentence)).

State v. Griffin, No. 16-0594 (W.Va. Sup. Ct., June 9, 2017) (memorandum decision); *State v. Gibbs*, 797 S.E.2d 623, 637 (W.Va. 2017) (substituting "what would be inflicted" for "what is imposed"); *State v. Pruitt*, 17-0802 (W.Va. Sup. Ct., October 12, 2018); *State v. Murphy*, No. 16-0362 (W.Va. Sup. Ct., May 22, 2017) (substituting "what would be inflicted" for "what is imposed").

The Court should reject this latter line of cases because they do not comport with the well-reasoned earlier lines of cases[7] which give our proportionality guarantee substance. The first flaw in the commonly used string cite is that the applicable test is not what punishment another jurisdiction would "permit," *id.*, but what "would be inflicted." *Cooper*, 304 S.E.2d at 857. Further, none of these states have a constitution which contains a proportionality clause. Finally, these cases further do not analyze the underlying facts of the cases that it cites.

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[7] *State v. Buck*, 314 S.E.2d 406 (W.Va. 1984); *State v. Cooper*, 304 S.E.2d 851 (W.Va. 1983); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205 (W.Va. 1981)

For example, in *Boag*, during the robbery, the defendant gouged out the eye of a man while his wife was tied to a bed and watching. *Boag*, 453 S.E.2d at 508. In *Hoskins*, the defendant cut the throats of four people with a knife and broken bottles. *Hoskins*, 522 So.2d at 1235. *Murph* involved a concurrent kidnapping, car theft, and there were two victims. *Murph*, 463 N.W.2d at 156. In *Morris*, an elderly man was pushed to the ground by two men, a gun stuck in his side, and a wallet taken while he was in a supermarket parking lot. *Morris*, 661 S.W.2d at 84. In *Robinson*, two men carjacked a man, held a knife to his throat, and Mr. Robinson had four prior felony convictions. *Robinson*, 743 P.2d at 1088.

The *Victorian* case from Louisiana from 1976 did uphold a forty-five (45) year sentence without any statement of the underlying facts. *Victorian*, 332 So.2d at 220. However, Louisiana law holds that the presence of a toy gun is a relevant fact in determining whether an armed robbery occurred *at all*. *State v. Gould*, 395 So.2d 647 (La. 1980).

Further, the cases cited are not of any sort of national import, nor do they stand for any grand propositions. The *Murph* case out of Michigan is a relatively minor case cited only eighteen (18) times on Google Scholar in the last thirty-one (31) years, six (6) times by Michigan courts, and twelve (12) times by this Court.[8] Likewise, the *Boag* case from Arizona has only been cited by Arizona and West Virginia courts in the last fifty (50) years.[9]

These cases are seemingly plucked from the stream of cases around the country to lend support to the non-controversial idea that in some states, without constitutional proportionality principles, and under some circumstances far more egregious than the Petitioner's conduct, armed robbery sentences can be very harsh. They shed no light on the how the Petitioner *would*

[8] http://scholar.google.com. Accessed on January 3, 2022.
[9] In 1970, an Oregon Appeals Court cited *Boag*, the only other state or federal court to do so. *Id.*

be sentenced in other jurisdictions for his particular conduct and contradict the experience of our neighbor states and the well-reasoned cases like *Buck* and *Cooper*, *supra*.

As such, this factor leans heavily towards the Petitioner.

iv) Comparison with this Jurisdiction

As the Petitioner noted before the lower court, the eighty (80) year determinate sentence for his actions is entirely disproportionate with other, far more serious actions in this State. A.R. at 84. He could have committed first degree sexual assault and have been sentenced to a maximum of thirty-five (35) years. W.Va. Code §61-8B-3, or second-degree murder and sentenced to a forty (40) year maximum term. *Id.* at §61-2-3.

Incredibly, had the Petitioner shot and killed the cashier during the robbery, he would have had an opportunity to ask a jury to have mercy on him and see the parole board in fifteen (15) years. *Id.* at §62-12-13 (c). Under his current sentence, he must wait twenty (20), *id.* at (b) (1) (A), or possibly twenty-six and two-thirds (26 2/3) years depending on the Court's construction of the firearm enhancement provisions of the parole code. *Id.* at (b) (1) (C).

These disparate penalties are simply facially disproportionate to any lay person with a common understanding of a system of punishment.

This Court sometimes justifies harsh robbery sentences by pointing to *other* robbery sentences it has previously upheld. *See, e.g., State v. Gibbs*, 797 S.E.2d 623, 637-8 (W.Va. 2017) (string citing cases). The Court upheld a ninety (90) year sentence for first degree robbery when the perpetrator had five prior felony convictions and physically assaulted a store clerk. *Adams*, 565 S.E.2d at 353. Justice Starcher noted in his concurrence that Mr. Adams had a thirty (30) year criminal history. *Id.* at 358. *Adams* also cited substantially the same string of cases noted above. *Id.* at 357.

The Court also upheld a mammoth two hundred twelve (212) year sentence for first degree robbery against a defendant for beating a pizza delivery person with a club. *State ex rel Hatcher v. McBride*, 656 S.E.2d 789 (W.Va. 2007). In *Hatcher*, the Court approved the lower court's consideration that Mr. Hatcher had been subsequently convicted of first-degree murder and sentenced to life without mercy. *Id.* at 792.

The rationale underlying these cases does not apply here. Although the Petitioner has a modest to mild criminal history[10] there is nothing to suggest that he presents anything remotely close to the extreme danger to society as Messrs. Adams and Hatcher. No case from this Court supports such a harsh sentence based on the Petitioner's conduct and criminal history.

As such, this factor is in the Petitioner's favor.

v) Co-Defendant Sentencing

Disparate sentences between co-defendants may be considered in a proportionality analysis. *Smoot v. McKenzie*, 277 S.E.2d 624 (W.Va. 1981). However, as this Court has long held, they:

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

Cooper, 304 S.E.2d at 856. (internal citations omitted). In this matter, the sentence received by the Petitioner is unconstitutionally disparate from that of his co-defendants. On the night in question, all three individuals had the requisite intent to make them guilty of first-degree robbery. Defendant Pease was the driver and car owner, and the Petitioner was seated in the back. A.R. at 38.

[10] At least as far as can be inferred from the truncated and purported PSI prepared below. A.R. at 69.

Concededly, the Petitioner was the "prime mover" as he was the one that entered the store and committed the robbery. *Cooper*, 304 S.E.2d at 856. However, that fact was neatly considered by the prosecutor in the differing plea deals offered to the other two individuals. A.R. at 58; 82.

There is nothing in the record that rationally justifies why the Petitioner was sentenced to between twenty (20)[11] and eighty (80) times greater than his co-defendants who all committed the same legally repugnant conduct.

For all the foregoing reasons, the Petitioner respectfully requests that the Court reverse the sentencing order of the Circuit Court of Nicholas County and remand this matter with instructions to sentence the Petitioner to ten (10) years in prison.

III. The circuit court erred by failing to make particularized findings to justify the excessive sentence it imposed upon the Petitioner.

This Court has for over forty years prescribed a procedure for challenging a robbery sentencing for proportionality in the lower courts which the court in this case failed to follow. *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980). *Houston* mandates:

> From a procedural standpoint, where the defendant desires to challenge the length of his sentence for robbery by violence, he is entitled to do so by a timely motion to the trial court made within the time period provided by W.Va.Code, 62-12-3, for suspending a sentence, and an appropriate record shall be made to provide the factual basis for the sentence. The sentencing record should include the presentence report and any other diagnostic reports used as an aid in imposing the sentence. The court shall also permit statements relevant to the sentence to be made on the record by the defendant, his attorney, and the prosecuting attorney, if the statements have not already been recorded at or prior to the time sentence was initially imposed. Where sentence is pronounced on a guilty plea, the transcript of the guilty plea shall also be included. Finally, the sentencing judge shall state on the record his reasons for selecting the particular sentence, except in those instances where the sentencing judge considers it in the interest of the defendant not to fully state the reasons in the presence of the defendant. In those instances,

[11] Or 26 2/3 greater depending on the construction of the parole statute.

> he should subsequently file such reasons in writing, which shall be made a part of the record.

Id. at 379. (internal citations omitted). Houston was decided prior to West Virginia having specific rules of criminal procedure and noted that W.Va. Code §62-12-3 was the state analog to Federal Rule 35. *Id.* at n. 8.

The procedural error in this case is plain from the record. The Petitioner desired to challenge the length of his sentence and filed a timely motion under Rule 35 (b). A.R. at 81. However, the lower court did not then: 1) make a record to provide a "factual basis" for the excessive sentence, 2) did not order a PSI or other diagnostic reports, 3) did not state its reasons, or alternatively include them in the record in written form, for selecting the "particular" sentence of eighty (80) years. *Houston*, 273 S.E.2d 375 at 379. The court simply denied the challenge in a one sentence order. A.R. at 86.

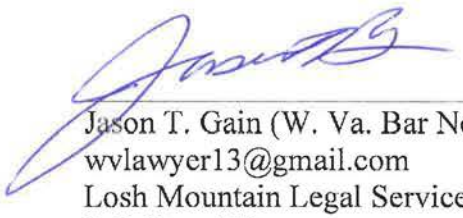
The State would likely respond that this language does not require the preparation of a PSI or diagnostic reports and would point out that the Petitioner waived any right to the preparation of a PSI. *Id.* at 145. Nonetheless, the crux of the procedural protection in *Houston* was to allow this Court to meaningfully review the sentence imposed. If the lower court had needed a PSI, then it could have ordered one despite the Petitioner's waiver. If it felt that it could properly sentence the Petitioner without a PSI, which it apparently did, then it utterly failed to provide factual support for the draconian sentence imposed and violated the Petitioner's procedural due process rights.

For this reason, the Petitioner respectfully requests reversal of the sentence.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the sentencing order of the Circuit Court of Nicholas County and remand the matter to that court with directions to resentence the Petitioner to a term of ten (10) years or alternatively make additional findings for more meaningful appellate review.

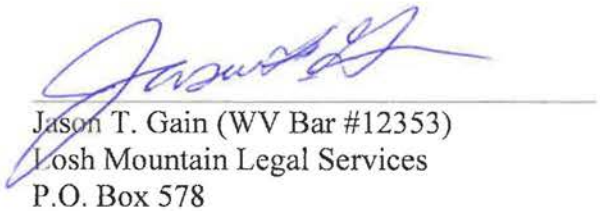
Respectfully submitted,



Jason T. Gain (W. Va. Bar No. 12353)
wvlawyer13@gmail.com
Losh Mountain Legal Services
P.O. Box 578
Anmoore, WV 26323
Telephone: (304) 918-9369
Facsimile: (304) 715-3605
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I have caused a copy of this "Petitioner's Brief" to be placed in the United States mail, first-class, postage prepaid to the Assistant Attorney General, Appellate Division, 1900 Kanawha Blvd E., State Capitol, Blg. 6, Ste. 406, Charleston, WV 25305 on this 5th day of January 2022.



Jason T. Gain (WV Bar #12353)
Losh Mountain Legal Services
P.O. Box 578
Anmoore, WV 26323
Phone: (304) 918-9369
Fax: (304) 715-3605
wvlawyer13@gmail.com
Counsel for Petitioner