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

REPLY BRIEF

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ASSIGNMENTS OF ERROR

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 REGARDING ORAL ARGUMENT AND DECISION

After review of the State's Response, the Petitioner continues to believe that argument under Rule 20 is appropriate as this case involves an important question of constitutional law as the lower court 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

The upshot of the State's position is that this Court should overrule: *Wanstreet v. Bordenkircher*, Syl. Pt. 4, 276 S.E.2d 205 (W.Va. 1981), *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980), *Smoot v. McKenzie*, 277 S.E.2d 624 (W.Va. 1981), *State v. Winston*, 295 S.E.2d 46 (W.Va. 1982), *State v. Cooper*, 304 S.E.2d 851 (W.Va. 1983), *State v. Buck*, 314 S.E.2d 406 (W.Va. 1984), *State ex rel Harless v. Bordenkircher*, 315 S.E.2d 643 (W.Va. 1984), the dozens of other cases where this Court has conducted proportionality review for first degree robbery sentences, and further should judicially repeal the proportionality clause of the West Virginia Constitution, or at least have this Court leave it without effect. W.Va. CONST. Art. III §5. Response Brief at 6.

The Court should reject the State's invitation.

I. *The State argues the incorrect standard for analyzing first degree robbery sentences.*

The Response cites the familiar point of law which causes defense appellate counsel heartache: "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." *State v. Hays*, Syl. Pt. 9, 408 S.E.2d 614 (W.Va. 1991); Response Brief at 6. *Hays* cited Syllabus Point 4 of *State v. Goodnight*, 287 S.E.2d 504 (W.Va. 1982) for this proposition.

Tracing the rule of law further back, *Goodnight* cites *State v. Rogers*, 280 S.E.2d 82 (W.Va. 1981) for this same rule, and *Rogers* gives the full, real rule that this Court uses:

> These claims [disproportionate sentencing] are generally limited to sentences which have no maximum limit provided by statute, **e.g. armed robbery** or life recidivist sentences. Wanstreet v. Bordenkircher, W.Va. 276 S.E.2d 205 (1981). **Outside these areas**, however, the rule is that sentences imposed by the trial court, if within statutory limits, and if not based on some impermissible factor are not subject to appellate review.

Id. at 84 (emphasis added). Thus, the State has cited the rule that is applicable to fixed term sentencing *only* and not the first-degree robbery sentence at issue. For example, if a statute calls for a five to thirty year determinate term, this Court will not hear an argument on appeal that thirty or twenty-five or twenty years is too long of a sentence.[1] However, it will clearly analyze an armed robbery sentence for proportionality as it contains "no maximum limit." *Id.*

The State's argument further makes no linguistic sense as there is no "limit" to be "within" regarding a first-degree robbery sentence unless the remainder of eternity is construed to be a temporal limit. A hundred trillion-year sentence would be just fine under the State's argument.

The State's argument is entirely without merit as it has applied the incorrect rule.

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[1] Although admittedly, all defense appellate counsel including current counsel, are frequently tempted to try to use the words "generally" or "impermissible factor" to fit any case at hand.

II. *The State argues with nobody when it alleges that armed robbery is bad.*

As predicted, the State devotes much emotion and ink into convincing this Court that armed robbery is a very serious crime. Response Brief at 9-13. Despite the Petitioner admitting as much in his brief, Pet'rs Brief at 10, he feels as if he must state it again: armed robbery is an extremely serious crime and there is no excuse for the Petitioner's conduct in this case. The cashier at Subway on that night should not have been placed in fear of harm, and the Petitioner was most terribly wrong. Armed robbery should be punished with a serious, yet proportionate prison sentence.

The State's assertion that the "Petitioner puts great stock into the fact that he did not shoot the cashier, as thought that makes his crime less offensive," Response Brief at 9, is a complete non-sequitur. The only time the Petitioner mentioned this was simply to point out that he could have gotten a lesser sentence for murder than for robbery. Pet'rs Brief at 15. Not once has he attempted to pat himself on the back for not committing murder; he simply points out the obvious fact that the State will not even concede: murder is worse than robbery.

Despite the State's rhetoric about the undisputed seriousness of the crime of armed robbery, the proportionality test is an attempt to determine where between ten years and infinity years the Petitioner's sentence should lie. The State never seriously engages in this exercise, and when it feigns to attempt to do so, it is wrong.

III. *The comparisons made by the State are inapt as its argument consists of case cites which are factually and legally dissimilar from the Petitioner's crime and finding and comparing the most severe historical sentences in contemporary United States history is not the proper proportionality test.*

The State continuously cites cases both in this State and in other states with enormous armed robbery penalties without stating the facts underlying those sentences.

A. Robberies in this State are not all equal

The State makes much of the fact that severe armed robbery sentences have been upheld by this Court, however it fails to discuss the underlying horrific facts of those cases. Response Brief at 10; 12; 15. It cites:

1) *Crawford v. Ballard*, No. 11-0783 (W.Va. Sup. Ct., November 28, 2011) (memorandum decision)—consecutive twenty-eight year sentences for two robberies where the defendant "fired a shot 'between mine and a fellow employees [sic] head . . . he told us to give him the money and lie on the floor . . . [a]s I was lying on the floor I was wondering if he was going to shoot me since he had already fired a shot for no apparent reason.'" *Id.* at *4. This is a lesser cumulative sentence for two robberies where a shot was fired in one than the Petitioner received in this case for a single robbery.

2) *State v. Phillips*, 485 S.E.2d 676 (W.Va. 1997)—consecutive seventy-year sentences for two robberies where the defendant:

> instructed all of the employees, except for the manager, to enter the cooler. He threatened to kill the manager if they attempted to leave. Phillips, weapon in hand, then escorted the manager to different points in the restaurant and collected money from the safe and a cash register. Finally, he took the manager to join the other employees in the cooler, threatened to kill anyone who did not remain in the cooler for an additional ten minutes, and left the premises. His hurried departure was observed by a drive-through customer who reported the incident to police.

Id. at 678. Next, the defendant, a couple of hours later:

> entered a Rax Restaurant at approximately 9:45 p.m. There were four employees working that evening. Phillips displayed his gun and gathered the four employees together behind the counter. He then ordered them into the office where he instructed them to turn around and face the wall. Phillips ordered the manager to assist him in collecting money from the office, the safe and various cash registers in the restaurant. Prior to departing, Phillips ordered all of the employees to get into the walk-in cooler, where he told them to stay for ten minutes. He promptly returned to ask about the alarm system. Before leaving a second time, he grabbed an eighteen-year-old female employee and told the other employees that he would kill her if they came out of the cooler. He then stated that he would release her in

> five minutes. Phillips put the girl in his car and instructed her to give him directions to the nearest interstate. She directed him to Interstate 77.
>
> Phillips entered I-77 traveling north. Sometime thereafter, Phillips was observed by an officer of the West Virginia State Police. The officer followed Phillips. After observing that he was being followed, Phillips instructed the girl to get down on the floorboard of the vehicle, a small car. He then began to accelerate, and a high-speed chase involving several police units followed. It was dark, and one police officer testified that there was a heavy fog over the road. At times during the chase, Phillips drove at speeds up to 125 miles per hour. He crossed the median approximately three times and once traveled north in the southbound lane for an unknown distance. Officers ultimately formed a traveling road block. After Phillips struck the cruisers surrounding him with his vehicle, he stopped. The chase lasted approximately twenty-five minutes and covered a thirty-five mile stretch of I-77. The girl was retrieved from the car, and Phillips was taken into custody. Phillips had detained the girl against her will for approximately one-and-one-half hours.

Id. at 679. Each of these horrific robberies carried a lesser sentence than the Petitioner received in this case.

3) *State v. Tyler*, 565 S.E.2d 368 (W.Va. 2002)—a mere **thirty-year** sentence where the defendant and an accomplice forced two seventeen year old girls to the ground on their hands and knees in the Town Center Mall parking garage at gunpoint and stole their car keys. This was deemed to be punishable by a full fifty years fewer than the Petitioner's sentence.

4) *State v. England*, 376 S.E.2d (W.Va. 1988)—life with parole eligibility after ten years when the defendant shot three times at a cashier and had a prior felony conviction. Mr. England would see the parole board in half or less than half of the time than the Petitioner will see the parole board if his sentence is upheld.

5) *State v. Ross*, 402 S.E.2d 248 (W.Va. 1990)—one hundred year sentence when the defendant "violently seized the victim, threatened her with a knife, and violently forced her to engage in sexual activity against her will." *Id.* at 251. Further, the defendant "had been arrested on a number of occasions for relatively violent and antisocial behavior. That record

indicated that he has been arrested for abduction, assault, battery, destruction of property, shoplifting, passing worthless checks, and trespassing." *Id.*

6) *State v. King*, 518 S.E.2d 663 (W.Va. 1999)—eighty four year sentence after the defendant broke into an 82 year old's home with a knife, took her gun, and forced her to call her daughter and son in law to come over and drive him from Charleston to Clarksburg at gunpoint. This monstrous activity was punishable by only four more years than the Petitioner's sentence.

7) *State v. Brown*, 355 S.E.2d 614 (W.Va. 1987)—sixty year sentence after robbing a restaurant owner at knifepoint and then sexually assaulting her. This is twenty years fewer than the Petitioner's sentence.

At page 15, the Response cites:

1) *State v. Adams*, 565 S.E.2d 353 (W.Va. 2003)—ninety-year sentence for an armed robber who also physically assaulted a store clerk, had five prior felony convictions, and a thirty year long criminal history, and agreed to the State recommending ninety years as a part of a plea agreement wherein the State dismissed another robbery charge and agreed not to pursue a life recidivist enhancement.

2) *State v. Booth*, 685 S.E.2d 701 (W.Va. 2009)—eighty-year sentence for a robber who was actively preying on elderly people, shoved the 82-year-old victim to the ground, the victim was seriously injured, was the primary caregiver for an infirm husband, could no longer walk without the aid of a walker due to the robbery, and was still not home from rehab at the time of trial. This was the identical sentence received by the Petitioner who did not physically harm anyone.

3) *State v. Chester*, No. 18-0140 (W.Va. Sup. Ct., March 15, 2019) (memorandum decision)—ninety-year sentence in a violent home invasion where two occupants of the home

were tied up with zip ties with guns pointed at their head. One victim was dropped on the floor and broke her leg in three places. A gun was placed in her mouth, and she was ordered to open the home safe.

4) *State v. Dent*, No. 18-0971 (W.Va. Sup. Ct., October 11, 2019) (memorandum decision)—ninety-year sentence for carjacking a 72-year-old lady, pulling her from the car throwing her to the ground and bone fragments from a right orbital fracture lodged in her right sinus cavity.

These cases cited by the State contain facts that are deserving of these harsh sentences imposed and upheld. Response Brief at 10; 12; 15. The State never explains how the Petitioner's conduct is remotely close to any of the conduct contained in these cases as it is simply unable to do so. Not all robberies are equal and deserving of lifelong punishments, which is exactly the reason this Court conducts proportionality review.

B. <u>Robberies in other states are not all equal</u>

Despite the Petitioner's Brief pointing out the factual differences in the out of state comparator cases, and specifically disparaging *Boag*, the State still clings to the *Boag* case.[2] *Id.* at 15; Pet'rs Brief at 14. (Mr. Boag gouged out the eye of a man while his wife was tied to a bed and forced to watch). It has added an additional case to its repertoire to support a ninety-nine (99) year sentence for armed robbery. Response Brief at 15; *Garrett v. State*, 486 S.W.2d 272 (Mo. 1972).

The State fails to mention that in this fifty-year-old case, Mr. Garrett:

> and a boy named 'Kenny' entered the 'Jam Inn' restaurant and 3.2 beer place on Highway 66 in St. Louis County. Defendant ordered and drank a beer; the only waitress on duty, Evelyn Jean Brown, had seen him in the place previously, but

[2] *State v. Boag*, 453 P.2d 508 (Ariz. 1969). Noting that this case does not stand for any grand principle of law, as the only courts that have relied on this case in the last fifty (50) years are Arizona courts and this Court. Pet'rs Brief at 14.

> did not actually know him. A little later he came back alone and parked in front of the place; he ordered and drank another beer and waited until the other one or two customers had gone. As the waitress was washing dishes, he approached her from the rear with an open pocketknife in his hand, grabbed her around the neck with one arm, cut her on the right side of the face and on the throat and, after she fell to the floor, stabbed her in the back at least seven times. When the knife was found later the blade which had been used was bent. In defendant's written and oral confessions, admitted without objection, he stated that he told the girl he wanted the money and not to scream, that she started to kick and scream, and that he got excited and "started striking her." In any event, he then dragged her to the rear of the place, took the paper money from the cash register, tore the telephone receiver from the instrument and laid it on the bar. He then moved the girl, threatening to kill her, into the men's room, where he choked her until she blacked out. Thereupon, he left and drove away. The girl regained consciousness, got up and ran to a motel apartment next door where she lives with her parents. She was bleeding profusely; the police came and she described her assailant before being taken to a hospital. Fifty-one stitches were required to close the cuts in her face and neck, and she remained in the hospital for eight days, during which time a lung collapsed.

State v. Garrett, 391 S.W.2d 235 (Mo. 1965). Mr. Garrett was also recidivized for a prior felony conviction. *Garrett*, 486 S.W.2d at 272.

As noted in the Petitioner's Brief, this becomes somewhat of a game of whack-a-mole. Pet'rs Brief at 13-15. The State will cite a case where there is a large robbery sentence, and then the Petitioner points out how much more heinous the facts are in that case from the instant case and how the defendant in that case deserved the long sentence. *Id.* The State then finds another case with more heinous facts and attempts to use that case as justification for the Petitioner's sentence. Response Brief at 10; 12; 15.

The overarching problem with the State's argument is that it fails to seriously engage in analyzing the Petitioner's actual conduct and realize the relative mildness[3] of it when comparing it with the cases it cites. If it did so, it would become clear that he has not engaged in anything

[3] Again, to avoid confusion, the Petitioner is not saying that any armed robbery is "mild" in the absolute sense. However, the baseline test of mildness or severity relevant to this case is where his conduct falls on the scale of ten years to infinity years.

close to the extreme examples in its cases, and if allowed to stand the Petitioner's sentence would be the harshest imposed in this country in the last fifty years based on his conduct. Such a sentence simply cannot be consistent with the idea of proportionality in sentencing.

More importantly, the Petitioner has been duped into playing into this game with the assumption of an incorrect legal standard. Perhaps Petitioner's counsel has missed a case or two across the country. However, the appropriate test has never been whether the State or anyone can scour Westlaw, Google Scholar, or LexisNexis to find cases published in the last fifty to sixty years where a few individuals got a terribly harsh and possibly unjustified but legal armed robbery sentence.

The proper test as stated by this Court is "what **would** be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *Cooper*, 304 S.E.2d at 857 (emphasis added). The Petitioner believes that he has amply shown that it is unlikely in the extreme that he would face this type of penalty in nearly any circumstance, and that it would be *impossible* under any circumstances to get anywhere close to such a sentence in any of our neighboring states. Pet'rs Brief at 12.

When this test is applied, the disproportionality of his sentence becomes apparent, even if a stray case has missed his review.

IV. The State's comparisons with punishments contained in other West Virginia statutes illustrate the disproportionate punishment the Petitioner received.

The State cites three crimes that it contends carry "much harsher penalties than the sentence Petitioner received." Response Brief at 16. All three assertions are incorrect. First, it cites kidnapping, yet a defendant who kidnaps a person released unharmed (as the cashier was unharmed in this case) can be imprisoned for twenty (20) to fifty (50) years. W.Va. Code §62-2-

14A (b) (3). Even in the worst case of kidnapping the defendant may ask the jury to grant him mercy after ten (10) years. *Id.* at (b) (1).

The State also mentions first degree sexual assault, in which if a defendant employs a deadly weapon or inflicts serious bodily injury on a child under the age of twelve while raping that child, he may see the parole board after twenty-five (25) years, one and one-third years *fewer* than the Petitioner will see the parole board in this case depending on this Court's construction of the firearm enhancement provision of the parole statute. Respondent's Brief at 16; W.Va. Code §61-8B-3(c); W.Va. Code §62-12-13 (b) (1) (c) (no parole until serving 1/3 of a determinate sentence, or 26 1/3 years in Petitioner's case).

Finally, illustrating the absurdity of the State's position, it cites treason as a crime that carries a harsher penalty than what the Petitioner is serving. Respondent's Brief at 16. Although Counsel does not imagine that Justices of this Court are routinely up late at nights pouring over briefs written in treason cases, if they were, they would see that a person who pleads guilty to treason may ask the jury for a penalty of three (3) to ten (10) years. W.Va. Code §61-1-1. If his plea was unsuccessful, the treasonous defendant would see the parole board in ten (10) years, one and one-half times less than the Petitioner in this case, with a firearms enhancement. *Id.* at §62-12-13 (c).

That is so shocking that it bears repeating: treason against the State of West Virginia is punishable by a penalty of less than half of what the Petitioner faces in this case. Despite its attempt to diminish the disproportionality of the Petitioner's sentence, the State has highlighted it.

V. The State's "toy gun" citation is out of date

Not to belabor the point about the toy gun as the Petitioner waived any defense he may have had against the charge by pleading guilty,[4] but the State is factually wrong about this Court's holding regarding armed robbery and a toy gun. This Court did hold that *under the statute in effect in 1987* a threat with a toy gun qualified as first-degree robbery. *State v. Massey*, 359 S.E.2d 865 (W.Va. 1987); Response Brief at 11. At that time, the statute:

> define[d] "aggravated robbery" as "commit[ting], or attempt[ing] to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality."

Id. at 869. The holding in *Massey* is textually unassailable. A person who presents a toy gun is indisputably robbing someone with the "threat...of firearms." *Id.* at 870. However, statutes change and in the year 2000 the robbery statute was amended to its current form and now reads:

> Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force **by the presenting of a firearm** or other deadly weapon, is guilty of robbery in the first degree.

W.Va. Code §61-2-12 (2000) (emphasis added). Textually, the statute now requires a presentment of an actual firearm to come within the ambit of the prohibition. The *Massey* decision in 1987 does not speak to the construction of a statute passed in 2000 and in effect today.

The Petitioner only mentions this to counter the State and lower court's argument that whether the gun was a toy was irrelevant as it pertains to sentencing. It is relevant as to whether

[4] Although he may have an excellent ineffective assistance of counsel claim in a post-conviction habeas corpus posture.

it was first degree robbery *at all* and should therefore have certainly been a factor in sentencing as much of the hysteria in the State's Response is blunted. *See, e.g.,* Response Brief at 13 ("There was a high potential that Ms. McGlothlin could have been gravely injured that night.") A toy gun, by its nature of being a toy, injects comparatively far less violence into a robbery situation than an actual gun and the fact should be considered in a proportionality analysis.

VI. *The Petitioner is not challenging the Rule 35 (b) ruling.*

The State persuasively argues that this Court has held that "Rule 35 (b) is not a mechanism by which defendants may challenge their convictions and/or the validity of their sentencing." *State v. Marcum*, Syl. Pt. 2, 792 S.E. 2d. 37 (W.Va. 2016). However, as pointed out in the Petitioner's Brief, *Houston* instructs defendants to bring proportionality challenges to first degree robbery sentences in exactly that fashion. Pet'rs Brief at 17-8; *State v. Houston*, 273 S.E.2d 375, 379 (W.Va. 1980).

A search of case law does not reveal if *Houston* has been partially overruled *sub silentio* or if the procedure in *Houston* is still good law in the first-degree robbery context. Nonetheless, the Petitioner is not challenging the Rule 35 (b) ruling *as a Rule 35 (b) ruling*. He is challenging the proportionality of his sentence as noted in the original Petitioner's Brief. If counsel below followed a now incorrect procedure, the Petitioner would ask that this Court hold it to be harmless until a new procedure is clarified.

In any event, through whatever sentencing procedure, the lower court failed to conduct the proper analysis of aggravating and mitigating factors which *Houston* deemed necessary for proper proportionality review on appeal. As noted in the Petitioner's Brief, none of the lower court's statements, nor the hyperbole in the Response, illustrate anything other than the factually least culpable type of armed robbery imaginable, if it was indeed armed robbery at all.

The State uses the one sentence statement in the purported PSI to boldly claim that "[Petitioner] perpetrated the same offense just the day before in Pennsylvania." Response at 12. There is no evidence in the record to suggest when, where, what evidence, or anything at all to assist the lower court in determining whether and to what extent this should be a sentencing factor or if it even happened at all. For all that is contained in the record, it may be mistaken assertion. Further, the lower court never mentioned it.

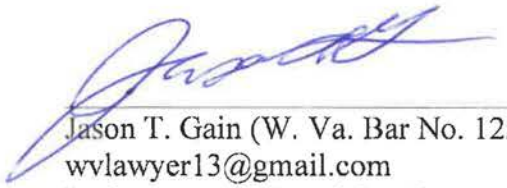
Despite the lower court's "findings" and the State's argument, the Petitioner displayed within his beltline what was arguably a toy gun and walked out of a Subway with less than two hundred dollars ($200). There was no physical violence, yelling, threats to kill, kidnappings, or sexual assaults. The Petitioner was and is an unfortunate young man who found himself in the all too familiar position of being addicted to drugs and made a poor choice, one that thankfully had no long-term effects on anyone, except himself. He should not suffer the better part of his life in prison due to this disproportionate sentence.

The Petitioner should, consistent with the proportionality principle, be given the lowest statutory sentence for that crime, or alternatively the lower court should develop further facts to justify such a sentence.

CONCLUSION

For the foregoing reasons and those contained in the Petitioner's Brief, 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,



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CERTIFICATE OF SERVICE

I certify that I have caused a copy of this "Reply 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 March 2022.

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