DO NOT REMOVE
FROM FILE

FILED
FEB 10 2022
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 21-0904

THE STATE OF WEST VIRGINIA

FILE COPY

V.

DAVID EUGENE HALL

Appeal from a Final Order
of the Circuit Court of Mercer County
(20-F-157-WS)

Counsel *for*
David Hall's
Petition

Counsel for David Hall.

Bobby J. Erickson, Esq.
Hager and Lawson, PLLC
1460 East Main Street
Princeton, WV 24740
Phone (304) 431-3492
WV State Bar #: 13882

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

STATUTORY AUTHORITY

CONSTITUTIONAL

CASELAW

ASSIGNMENT OF ERROR ALLEGED BY PETITIONER

I. **The Lower Court failed to consider all mandatory factors when sentencing Petitioner as required by West Virginia Code §61-11-23.**

II. **The Lower Court erred by imposing a disproportionate sentence to the offense committed due to Petitioner's diminished mental capacity and age.**

1. STATEMENT OF THE CASE

On November 28, 2019, Petitioner and his family were in the Princeton, West Virginia area for Thanksgiving. During their stay at a local hotel B. D., Petitioner's half-sister, claims that he

> entered her room and grabbed the strings of her bathing suit, removing it. At that time, the victim stated that Hall threw her on the bed, took his shorts off and laid on top of her. The victim stated that Hall grabbed her wrist and proceeded to insert his penis into her vagina...

(App. at 179). Petitioner's mother, A.B., because of this incident decided that Petitioner was "grounded for 'at least three months.'" (Id.). On January 22, 2020, the victim, B.D., was taken to the hospital for "nausea, vomiting and a reduction in her appetite." (App. at 181). During this hospital visit, B.D. changed her statement regarding the sequence of events claiming that Petitioner solicited intercourse from her for the cost of a phone card. (Id.). B.D. was subsequently given a pregnancy test, and the results showed that Petitioner was pregnant. (Id.).

Petitioner was charged and arrested on February 3, 2020, for the offense of "Sexual Assault-1st Degree." Petitioner's case was transferred from the juvenile jurisdiction of the Lower Court to the Adult Criminal Jurisdiction of the Lower Court on July 2, 2020. This was done according to West Virginia Code §49-4-710. (W.Va. Code §49-4-710). Petitioner then waived indictment and pled by information to the offense of "Sexual Assault-2nd Degree" on August 19, 2020. (App. at 47-86). At that August 19,

2020, hearing, the Lower Court ordered that Petitioner complete a sexual offender evaluation and be sent to Sam Purdue Juvenile center to complete a juvenile sex offender program. (App. at 81, Line 19-23). The Lower Court then deferred actual adjudication until after completion of the Sam Purdue juvenile sex offender program. Upon completion of this program the Lower Court planned to "bring him back for further [sic] sentencing then and put him on probation." (Id.). On October 25, 2021, Petitioner was returned to the Lower Court from Sam Perdue for being "non-compliant." (App. at 229-230).

The Lower Court, on March 1, 2021, adjudged Petitioner guilty of "Sexual Assault-Second Degree." The Lower Court sentenced Petitioner to "not less than ten (10) nor more than twenty-five (25) years," for the single offense of "Sexual Assault-Second Degree." (App. 115-116). The Lower Court then suspend the sentence to allow Petitioner to complete the "Young Adult Offender Program" at the Anthony Correctional Center. (App. 115-116). Petitioner had issues at the Anthony Center and was returned as unfit to the Lower Court on July 12, 2021. (App. at 233-234). At the next hearing on July 21, 2021, the Lower Court, after having removed Petitioner from the Anthony Center, imposed the underlying sentence of "not less than ten (10) nor more than twenty-five (25) years," and Petitioner was subsequently incarcerated. (App. at P236).

2. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner's case is ripe for decision by Memorandum Opinion as the law contemplated within Petitioner's Assignments of Error is well-settled. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

3. ARGUMENT

I. The Lower Court failed to consider all mandatory factors when sentencing Petitioner as required by West Virginia Code §61-11-23.

According to West Virginia Code §61-11-23(c), there are fifteen (15) factors that the Court "Shall Consider" when sentencing a juvenile whose case has been transferred from the Juvenile Jurisdiction to the Adult Criminal Jurisdiction of the Lower Court. (West Virginia Code §61-11-23(c)). West Virginia Code §61-11-23(c) states,

> (c) In addition to other factors required by law to be considered prior to the imposition of a sentence, in determining the appropriate sentence to be imposed on a person who has been transferred to the criminal jurisdiction of the court pursuant to §49-4-710 of this code and who has been subsequently tried and convicted of a felony offense as an adult, the court shall consider the following mitigating circumstances:
> (1) Age at the time of the offense;
> (2) Impetuosity;
> (3) Family and community environment;
> (4) Ability to appreciate the risks and consequences of the conduct;
> (5) Intellectual capacity;
> (6) The outcomes of a comprehensive mental health evaluation conducted by a mental health professional licensed to treat adolescents in the State of West Virginia: Provided, That no provision of this section may be construed to require that a comprehensive mental health evaluation be conducted;
> (7) Peer or familial pressure;
> (8) Level of participation in the offense;
> (9) Ability to participate meaningfully in his or her defense;
> (10) Capacity for rehabilitation;
> (11) School records and special education evaluations;
> (12) Trauma history;
> (13) Faith and community involvement;
> (14) Involvement in the child welfare system; and
> (15) Any other mitigating factor or circumstances.

(West Virginia Code §61-11-23(c)). These factors must be considered any time "a person [who] has been transferred to the criminal jurisdiction of the court pursuant to §49-4-710

of this code and who has been subsequently tried and convicted of a felony offense as an adult." (West Virginia Code 61-11-23(c).)

In the case at bar, the State filed a "Motion to Transfer to Criminal Jurisdiction" on August 19, 2020, according to West Virginia Code §49-4-710. Petitioner pled to and was convicted of the offense "Sexual Assault-Second Degree." (App. at 47-86). A Dispositional Hearing was held on October 26, 2020, where the Lower Court ordered Petitioner "to complete the sex offender program at Sam Purdue Juvenile Center" with the criminal disposition deferred until completion of the program. (App. at 87-95; at 229-230; at 115-116, and;. at 233-234). The Lower Court then imposed Petitioner's underlying sentence on July 21, 2021. (An indeterminate period of not less than ten (10) nor more than twenty-five (25) years) (App. at 151-168).

The issue here is that the Lower Court considered only the traditional grounds regarding for Petitioner's sentencing; particularly why Petitioner was not a candidate for alternative sentencing

> for the following reasons: (1) there is a substantial risk that the defendant will commit another crime during any period of alternative sentencing; (2) alternative sentencing would unduly depreciate the seriousness of the Defendant's crime; (3) the public good would not be served by the Court granting the Defendant an alternative sentence and (4) the public good would be served by the Court imposing a sentence of actual incarceration.

(App. 151-168).

As stated above, the issue here is that the Court considered only traditional grounds for why Petitioner was not a candidate for alternative sentencing. The only reasons provided by the Lower Court were,

> there is a substantial risk that the defendant will commit another crime during any period of alternative sentencing; (2) alternative sentencing would unduly depreciate the seriousness of the Defendant's crime; (3) the public good would not be served by the Court granting the Defendant an alternative sentence and (4)

> the public good would be served by the Court imposing a sentence of actual incarceration

(*Id.*). These considerations fall well short of the significant considerations required by West Virginia Code §61-11-23(c), which states that a Court sentencing a Defendant whose case has been transferred pursuant to West Virginia Code §49-4-710 from the Juvenile to Adult Criminal Jurisdiction of the Lower Court "shall consider" the above-mentioned fifteen (15) factors. As discussed below, the Lower Courts' consideration of all factors was deficient.

A. Age at the time of the offense

An offender's age should significantly affect the sentence imposed upon an offender. The United States Supreme Court and the West Virginia Supreme Court have both found as such. This Court, while considering an issue involving juvenile sentencing in *Christopher J. v. Ames* quoted the United States Supreme Court when it stated,

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367; see also *Eddings*, *supra*, at 115–116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra*.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, *supra*, at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and

> to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. (Roper v. Simmons)

Christopher J. v. Ames, 214 W.Va. 822 (2019) quoting *Roper v. Simmons*, 543 U.S. 551 (2005).

> The Lower Court did state,
>
> I think everybody in the Courtroom, from the defense counsel to even the State to a certain extent, recognized the fact that Mr. Hall was --, you know, as a juvenile when this was – was committed and for that reason, gave him every chance in the world not to have to go to the penitentiary. That's just the simplest way I could put it.

(App. at 151-168). Petitioner, however, argues that adequate consideration is not paid to the fact that he was a minor at the time the offense was committed and at sentencing. The United States Supreme Court made this point abundantly clear in their opinion regarding *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). (*Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In *Miller,* the United States Supreme Court stated, "Children are constitutionally different from adults, and

criminal sentences must take their status as children, and the accompanying emotional, psychological, and developmental differences into account." (*Miller*, 567 U.S. at 460.)

B. Impetuosity

The Court is directed to consider Defendant's "Impetuosity." Impetuosity is defined as "the quality or state of being impetuous." (Impetuosity, 2022).[1] Impetuous is defined as being "likely to do something suddenly without considering the results of your actions." (impetuous, 2022)[2]. In *Roper,* the Supreme Court stated,

> [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367; see also *Eddings*, *supra*, at 115–116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra.*

Miller, 567 U.S. at 470-471. At no time during the July 21, 2021, Dispositional hearing did the lower Court consider impetuosity in sentencing Petitioner in this matter. Additionally, neither the Psychological Evaluations nor the Pre-Sentence Investigation reports mention impetuosity as a factor for consideration. (App. at 169-199) and (App. at 200-218).

C. Family and community environment, including family and peer pressure.

---

[1] Merriam Webster Dictionary. 2022. *impetuosity*. [online] Available at: <https://www.merriam-webster.com/dictionary/impetuosity#:~:text=Definition%20of%20impetuosity,an%20impetuous%20action%20or%20impulse> [Accessed 8 February 2022].

[2] Dictionary.cambridge.org. 2022. *impetuous*. [online] Available at: <https://dictionary.cambridge.org/us/dictionary/english/impetuous> [Accessed 8 February 2022].

Considering family and environmental factors is a necessary procedure when sentencing a juvenile who is in the Adult Criminal Jurisdiction of a court. A juvenile has little control but is forced to internalize their surroundings. Once again, the United States Supreme Court and this Court have provided reasoning for this. In *Christopher J.* this Court cited *Miller* when it stated that juveniles have, "limited control over their own environment and lack the ability to extricate themselves from horrific crime producing settings." (*Miller,* 567 U.S. at 470-471).

In the case at bar, there were multiple issues regarding Petitioner's family life and his mothers' involvement in the matters before the Lower Court. These issues regarding Petitioner's family and home life are addressed in court documents as far back as the Criminal Complaint. In the Criminal Complaint Victim claims that her and Petitioner's mother had only taken very limited disciplinary actions toward Petitioner, such as grounding and taking Petitioner's phone as if he had committed some infraction of house rules. (App. at 175-182). This issue with the mother's interaction with and influence over Petitioner even cause issues at the psychological evaluation. The family dynamic was of such concern to the evaluator that he recommends that Petitioner and his mother's contact be limited. The evaluator in their report stated, "I am particularly concerned about the role that Ms. Banes plays in the life of Mr. Hall daily." (App. at 182-199). However, the Lower Court failed to consider this or give it any weight at sentencing.

The second issue at bar here is how juveniles like Petitioner are susceptible to peer and familial pressure. The United States Supreme Court found in *Miller* that children "are more vulnerable or susceptible to negative influences and outside pressures, including from their family and peers." (*Miller,* 567 U.S. at 570). Once again, these issues came up

as far back as the criminal complaint where Petitioner's mother is dismissive of Petitioner's conduct. (App. at 175-182).

During the September 3rd psychological evaluation, Petitioner's mother, A.B., made so many comments attacking the baseline validity of the factual evidence presented against Petitioner that the evaluator stated, "such a position has consistently resulted in Mr. Hall's position being reinforced. He has readily heard his mother make the statements, including during the clinical interview. There is no doubt that this has been counterproductive." (App. at 269). Once again, there is no record to show that the Lower Court considered these factors.

D. Intellectual capacity

The intellectual capacity of a juvenile is reduced compared to that of an adult. This means that, to some degree, culpability is reduced as well. The issue worsens when a juvenile has limited mental capacity, as Petitioner does. Petitioner has an I.Q. ranging from 65 to 70, and all evaluations for general skills and tests ran through the three evals show that Petitioner has had these limitations since childhood. (App. at 183-199), (App. at 200-218), and (App. at 219-223). Nowhere else is this made more apparent than when the evaluator in the September 3, 2020 psychological evaluation stated, "even if he is admitting what happened, I am confident that he has no real appreciation for what the resulting consequences are, to include specifically for the victim." (App. at 183-199).

The Lower Court failed to consider any of this in making its decision.

The factors considered by the Lower Court were extremely limited. The factors mentioned in the order were limited to the form factors the Lower Courts of Mercer County tend to use as form language, which included

> for the following reasons: (1) there is a substantial risk that the defendant will commit another crime during any period of alternative sentencing; (2) alternative sentencing would unduly depreciate the seriousness of the Defendant's crime; (3) the public good would not be served by the Court granting the Defendant an alternative sentence and (4) the public good would be served by the Court imposing a sentence of actual incarceration.

(App. at 233-238). Of the remaining nine (9) factors, which included,

> (6) The outcomes of a comprehensive mental health evaluation conducted by a mental health professional licensed to treat adolescents in the State of West Virginia: Provided, That no provision of this section may be construed to require that a comprehensive mental health evaluation be conducted; ... (8) Level of participation in the offense; (9) Ability to participate meaningfully in his or her defense; (10) Capacity for rehabilitation;
> (11) School records and special education evaluations; (12) Trauma history;
> (13) Faith and community involvement; (14) Involvement in the child welfare system; and (15) Any other mitigating factor or circumstances.

(W.Va. Code § 61-11-23(c).) The only one of these nine (9) factors that the Lower Court considered was his capacity for rehabilitation which the Lower Court attempted to address by listing off the programs Petitioner was sent to. Even then, however there was no actual consideration made for the mitigating factors. (App. at 151-168).

The Lower Court's failure to consider all necessary factors means that the sentence imposed is improper. The legislature intended for the Lower Court to consider all of the specifically enumerated factors and all additional mitigating factors when a minor is being sentenced in a matter transferred to the criminal docket of that court pursuant to West Virginia Code §49-4-710. W.Va. §61-11-23(c), and W. Va. Code §49-4-710. Failure to rectify this failure would set a dangerous precedent for how not only minors could be sentenced in contravention of the Code but also how a potentially less culpable person can be sentenced harshly or unfairly.

II. The lower court erred by imposing a disproportionate sentence to the offense committed due to Petitioner's diminished mental capacity and age.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense. No person shall be transported out of, or forced to leave the state for any offense committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offense.

(West Virginia Constitution Article Three Section Five.) This portion of the West Virginia Constitution is made in the image of the Eight (8th) Amendment to the United States Constitution. This text states that "[p]enalties shall be proportioned to the character and degree of the offense."

The appropriate standard for review in this matter is to review "sentencing orders under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands." (Syl. pt.1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)). If the case is deemed to be subject to review, this Court has explained the appropriate analysis stating,

> 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.

(Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)).

However, when there is a "statutory or constitutional comman[d]" which has not been followed, there is an issue. Petitioner concedes that this Court has held "[w]hile 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." (In syllabus point 4 of Wanstreet v. Bordenkircher, 166

W.Va. 523, 276 S.E.2d 205 (1981)). This Court has, however, also held that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factors, are not subject to appellate review." (Syl. pt. 4, West Virginia v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982)).

Petitioner contends that this issue is ripe for review as the Lower Court considered impermissible or improper factors. The Court did consider the four (4) general factors, which included:

> (1) there is a substantial risk that the defendant will commit another crime during any period of alternative sentencing; (2) alternative sentencing would unduly depreciate the seriousness of the Defendant's crime; (3) the public good would not be served by the Court granting the Defendant an alternative sentence and (4) the public good would be served by the Court imposing a sentence of actual incarceration.

(App. at 235-238). These four (4) factors on their own are generally permissible when applied to an adult offender, but they do not satisfy the "statutory or constitutional commands" made by West Virginia Code §61-11-23(c). (W.Va. Code §61-11-23(c)). When sentencing a juvenile whose case has been transferred to the Adult Criminal Jurisdiction of the Lower Court, all fifteen (15) enumerated factors found in West Virginia Code § 61-11-23(c) must be considered. (W.Va. Code §61-11-23(c)). Petitioner contends that the Lower Court only considered one permissible factor, which was the potential to re-offend which goes toward Petitioner's capacity for rehabilitation. This factor, on its own, fails to meet the requirement to considering the other fourteen (14) factors.

By failing to consider all necessary factors, the Lower Court has failed its "statutory command" by not considering all fifteen (15) as required by code when

sentencing a juvenile whose case has been transferred to the court's Adult Criminal Jurisdiction. (W.Va. Code §61-11-23(c)). While those four factors are not impermissible on their own, the failure to apply all fifteen (15) factors is a critical flaw. Petitioner contends that failing to apply all fifteen (15) factors makes all other factors or sentencing in general impermissible. Petitioner additionally contends that, devoid of the application of any of these factors, the sentence imposed was disproportionate and that the disproportionality standard applied in West Virginia should be modified or reviewed to make accommodations for those who have reduced mental functioning by virtue of age or intellectual disability.

It has long been accepted that juveniles have a diminished understanding and control over their actions and reason. This Court has acknowledged the acceptance of this understanding by quoting the United States Supreme Court;

> First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367; see also *Eddings*, *supra*, at 115–116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra*.

(*Christopher J. V. Ames*, 214 W.Va. 822 (2019) quoting *Roper v. Simmons*, 543 U.S. 551 (2005)). This diminished lack of maturity and recklessness reduces the intentional nature of the crime. Once again, to the Lower Courts credit, they acknowledged Petitioner's age at the time of sentencing, but the Lower Court chose to proceed with a sentence that well

exceeded Petitioner's actual criminal culpability in the offenses and tends to undermine a legitimate reason for the punishment. (App. at 151-168, Page 164, Line 12).

The next issue is that the law assumes that extreme punishment of the mentally disabled or impaired is disproportionate and cruel. When discussing Article Three (3) Section five (5) of the West Virginia Constitution, it is necessary to look at its foundation, and it is based on the Eighth (8th) Amendment to the United States Constitution. When interpreting the Eighth (8th) Amendment, the United States Supreme Court has held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." (*Trop v. Dulles*, 356 U. S. 86, 100 (1958)).

When reviewing the application of severe sentences to the intellectually disabled, the United States Supreme Court has clarified the issue for us by showing that

> [n]o legitimate penological purpose is served by executing a person with intellectual disability. Id., at 317, 320. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 554 U. S. 407, 420 (2008).

(Hall v. Florida, 134 S. Ct. at 1992-93). While the State of West Virginia has chosen to remain on the right side of the consensus regarding the death penalty, this argument is no less relevant to the case at bar where a lengthy sentence has been imposed upon Petitioner who was seventeen (17) at the time of the offense. Regarding mental functioning Petitioner had an I.Q. ranging between 65 and 70 while scoring low in nearly all functioning tests in evaluations. The consideration for the "three principal rationales of *Kennedy* become relevant. ("rehabilitation, deterrence, and retribution"; *Kennedy*, 554 U. S. at 420 (2008); App. at 175-199, and at 200-218).

The diminished capacity of Petitioner already removes him from "deserving of the most severe sentences." The three factors mentioned above can show a further reason why this sentencing is disproportionate and cruel. (*Miller*, 567 U.S. at 470-471). Rehabilitation being the first rationale under *Kennedy*, would make the sentence imposed by the lower court irrational. Even the doctor who conducted the final eval said Petitioner might be "treatment-resistant" and that "his intellectual limitations may make him even more resistant to change". (App. at 196)." Rehabilitation being made difficult in a treatment centered facility by Petitioners intellectual limitations and age would make rehabilitation in a penal setting like a regional jail or state prison virtually impossible.

The second factor of *Kennedy,* deterrence is also not advanced by this sentence. When considering sentencing, "those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale." (*Hall*, 134 S. Ct. at 1992-93). The issue here arises from an intellectually impaired person suffering a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses." (Atkins v. Virginia, 536 U. S., at 320). Petitioner in this case was limited by his intellectual limitations, once again as the evaluator explained in the psychological evaluation stated, "even if he is admitting what happened, I am confident that he has no real appreciation for what the resulting consequences are, to include specifically for the victim." (App. 183-199). A person in Petitioner's shoes would not have been able to process and understand the wrongfulness of their actions and the possible outcomes or ramifications of their actions.

The third and final factor is retribution. Petitioner, having diminished capacity due to his age and mental limitations, has diminished moral culpability as well. This principle is made clear by the United States Supreme Court, which held that "[t]he diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment." (Atkins, 536 U. S., at 319). Having diminished capacity by virtue of being intellectually disabled or by being a minor leads to lessened moral culpability. This makes these offenders undeserving of such severe sentencing. In all, Petitioner has fallen into both categories; his capacity and, by extension, his culpability are diminished, making the sentence imposed Disproportionate.

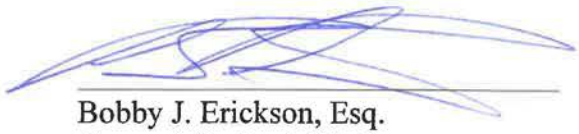
There is a standard test that should be applied is found in Syllabus Point 5 of *Wanstreet.*

> 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.

(Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)). Petitioner contends that while this is the applicable test and standard to be applied in disproportionate sentencing review, it is flawed. This set of factors affords no consideration for limited mental functioning due to disability or youth. With those additional factors, Petitioner contends that his sentence is disproportionate.

4. CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner, by Counsel, respectfully prays that this Honorable Court grant Petitioner's appeal and reverse and remand the order sentencing Petitioner to be sentenced in line with West Virginia Code §61-11-23(c).



Bobby J. Erickson, Esq.
Counsel for David Hall
1460 East Main Street
Princeton, WV 24740
(304) 431-3492
WV State Bar #: 13882

CERTIFICATE OF SERVICE

I, Bobby J. Erickson, Counsel for Petitioner David Hall, hereby certify that on this 9 day of February, 2022, a true and accurate copy of the foregoing **Counsel for David Hall's Petition** was deposited to the following parties, either in the U.S. Mail contained in postage-paid envelope addressed to counsel for the State and other parties, or by hand in this appeal as follows:

Attorney General's Office C/O William E. Longwell.
Assistant Attorney General
1900 Kanawha Blvd. East
State Capitol, Bld. 6, Ste. 406
Charleston, WV 25305

Edythe Nash Gaiser, Clerk of Court
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

And hand delivered to the following:

Lauren Lynch
Assistant Prosecuting Attorney
120 Scott Street
Princeton, WV 24740

Hon. William Sadler
Circuit Court Judge
1501 West Main Street
Princeton, WV 24740

Julie Ball
Circuit Clerk
1501 West Main Street
Princeton, WV 24740

Bobby J. Erickson, Esq.
State Bar No.: 13882