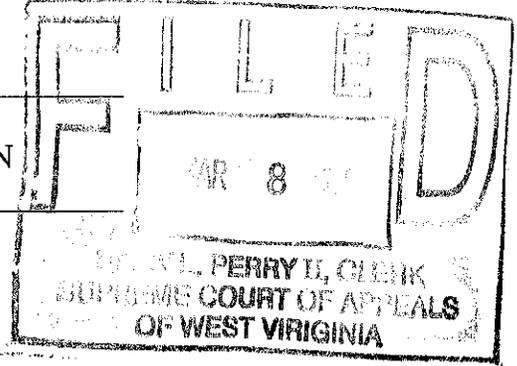


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

vs.

Appeal No. 33299

DANIEL B. BINGMAN,

Defendant below, Petitioner

APPELLANT'S BRIEF

FROM THE CIRCUIT COURT OF GILMER COUNTY, WEST VIRGINIA
ORDER OF 10 MARCH 2006

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Defendant below, Petitioner

APPELLANT'S BRIEF

Now comes Daniel B. Bingman and represents that he is aggrieved by the Order of the Circuit Court of Gilmer County entered March 10, 2006.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a criminal case in which the Petitioner was charged with (Count 1) grand larceny, (Count 2) transferring and receiving the same property, (Count 3) larceny of standing timber. The event subject of Count 1 and Count 2 occurred on January 31, 2002. The Defendant was initially indicted on March 4, 2003. That indictment was dismissed on October 25, 2004. Appellant was then again indicted for the same offenses on March 9, 2005. The Defendant went to trial on December 13 and 14, 2005 and was found guilty of a lesser included offense to Count 1, petit larceny, a misdemeanor. Count 3 was dismissed for lack of evidence at trial. The jury order was entered December 22, 2005. The Defendant made motions for a judgment not withstanding the verdict and for a new trial, and the Court denied those motions

and sentenced the Petitioner to one year in jail. The order denying new trial and sentencing Defendant was entered on March 10, 2006. An order extending the time to appeal by an additional 60 days was entered on June 22, 2006.

STATEMENT OF FACTS:

Essentially, this was a criminal prosecution which was really a civil case gone awry.

Your Petitioner, Daniel B. Bingman, is a 53 year old man who lives in Cuyahoga Falls, Ohio. All of his adult life, he has been in the entertainment business, mostly working as a on-air radio personality/DJ. This work history led to one strained rendition of facts in the record, that the Petitioner uses a “fake name” (Sentencing transcript, page 23). In fact, because “Bingman” is somewhat difficult to pronounce clearly, the Defendant has always used the name “Jim West” on his radio shows, which is a very standard practice in the radio industry.

Virginia Rafferty, Mr. Bingman’s grandmother, died leaving four children. One of these children was Ramona Bingman, the Petitioner’s mother. The siblings got along very poorly after their mother’s death and, indeed, engaged in litigation over her will. It is clear in the record that the hard feelings created by heirship issues tinged this criminal prosecution. For example, the court’s probation officer noted without attribution that “it has been reported” that Defendant had fathered two children out of wedlock, which neither appears in the record nor is true. This is simply an example of the rumor and innuendo which brought Appellant to this point.

Appellant was indicted on March 4, 2003, for grand larceny of certain farm equipment¹ valued collectively at \$1,100, transferring and receiving the same farm equipment, and grand larceny of standing timber. The incident in the first two counts involving the farm equipment occurred on January 31, 2002 (T.172), more than one year before the indictment was brought. That indictment languished for more than a year and a half and was finally dismissed on October 25, 2004. Mr. Bingman was again indicted four and a half months later for the same grand larceny of the same farm equipment, transferring and receiving the same farm equipment, and grand larceny of standing timber. Mr. Bingman's case was tried to a jury before Honorable Richard Facemire, Judge, in Gilmer County on December 13 and December 14, 2005. Count 3 of the indictment, the grand larceny of the standing timber, was dismissed by the Court after the presentation of all evidence. The jury returned a verdict of guilty of the lesser included offense of petit larceny under Count 1. The Petitioner appeared for sentencing on February 27, 2006, and was sentenced to one year in jail. The trial order was entered on December 22, 2005. The order denying new trial and sentencing Mr. Bingman was entered on March 10, 2006. An order extending the time to appeal by an additional 60 days was entered on June 22, 2006.

There was confusion at trial about the ownership of all the property by subject of the indictment. The timber, for example, stood on property owned by the heirs of Virginia Rafferty, including Mr. Bingman's mother, Ramona Bingman. Mr. Bingman's mother testified that she gave Mr. Bingman the authority to sell the timber on the property. That testimony led the Court to dismiss the timber-related Count of the indictment. Mr. Bingman asserts that the

¹ This equipment included a rototiller, boom pole, four-row cultivator, brush hog, and potato plow.

same mixed-ownership exists regarding the farm equipment subject of the Count under which Mr. Bingman was convicted, that is, that his mother had an interest in that, too.

At trial, the victim of the grand larceny of the equipment was identified as Roger Rafferty, one of the children of Virginia Rafferty, and Appellant's uncle. He testified essentially that the five items of farm equipment were his property. *He did not testify about any value of that property.* The wife of the individual to whom the property was supposedly sold, Shirley Ball, testified that the Petitioner sold these five items of farm equipment to her late husband on January 31, 2002, for \$500. (T.172) Mr. Gerald Rafferty, her husband, died before the trial.

The State introduced the testimony of an expert in valuing farm equipment, Marilyn Matheny, who is a principal in a farm equipment business. She estimated that the rototiller was worth \$700.00 to \$800.00, the boom pole worth \$40.00 to \$60.00, the four-row cultivator worth \$100.00, the brush hog worth \$200.00, and the potato plow worth \$100.00. She estimated that this property was worth \$1100.00 to \$1200.00, and indeed the indictment states values of these five items totaling \$1100.00. Ms. Matheny testified that there was some leeway in an exact valuation:

OSHOWAY: OK. And, so, if there's a 10% lee way and this equipment is worth \$1100.00.

MATHENY: Uh, huh.

OSHOWAY: Give or take.

MATHENY: Uh, huh.

OSHOWAY: 10% Then that 10% difference of \$100.00 would put the value below a \$1,000.00?

MATHENY: You mean on used?

OSHOWAY: Exactly.

MATHENY: Well, I haven't seen any that's not worth that. But it's possible. I'm not gonna say it's not possible." (T.132-133)

Thus, the State's only independent witness about the value of the real estate testified that the equipment could have been worth less than the \$1000.00 borderline between grand larceny and petty larceny. *West Virginia Code*, §61-3-13(a). That witness did not comment on the fact that in an apparent arm's-length transaction, the same equipment sold for \$500.00 under the evidence offered by the State.²

The State's investigating officer, Sergeant Larry Gerwig, did not testify about valuation until he was questioned by the Court at the end of his testimony. (T.112-114). Sergeant Gerwig did note that the equipment was out in a field covered by tarps (T.106-107).

The Defendant offered one witness, Ramona Bingman, one of the children of Virginia Rafferty and the Petitioner's mother. She testified about the various family relationships and testified that she had authorized the Petitioner to sell the timber. She also testified that the various items of farm equipment "just belonged to the farm, and was there for farm use." (T.205). Even though her brother, Roger Rafferty, had testified that the equipment was his, Ms. Bingman stated that their mother had paid for it:

HOUGH: I see. So you saw your mother buy those pieces of equipment?

R. BINGMAN: I didn't see her buy it, I'm sure she paid for it. Because, she paid for everything. And, in that period of time when that was purchased, I don't think Roger had that kind of money. Because, he hadn't,

²Nor was she asked by trial counsel.

hadn't
living on the farm,
time." (T.219).

been working that much in those days. And, he was
and not working. You know, part of that

During the deliberations, the jury sent back a question directly related to the value of the equipment: "Should we consider a 10% above or below for the cost of the equipment?" (T.285). Obviously, the value of the equipment was a critical fact.

The jury was instructed on the lesser included offense of petit larceny. This was first mentioned by the trial judge:

. . . I believe that again, that's an issue before the jury as to whether they believe the equipment was valued at above \$1,000 or whether it was valued at less than a \$1,000. (T.230) [This was in the context of rulings on the motion for a directed verdict.]

The Court modified State's instruction Number 1. The Court modified it to give it the definition of petit larceny . . . And, put the elements of petit larceny in. (T.236)

The Appellant cannot, however, claim that his counsel didn't go along with that plan of instruction:

I think that we . . . somewhere need to, uh, make uh, allowance uh, either as part of Instruction Number 1, or Instruction Number 2 for the uh, for the lesser included offense. * * * I think we want them to have the option of, of finding uh, of making a finding of guilty of transferring property, valued less than a \$1,000. (T.236 - 237)

One juror, Ms. Peggy Moore, testified in voir dire that she had a son who works at the Regional Jail. (T.8). However, Ms. Moore was not dismissed for cause (The Defendant did not move that she should be dismissed for cause, nor use a preemptory strike on her).

The Defendant was sentenced on February 27, 2006. The sentencing went very poorly for the Defendant. For the first time (see *infra*) the Defendant gave his account of the offense.

That account was that he considered the farm equipment part of the farm in which his mother had an interest, he took some equipment to Mr. Ball's farm to be put in working order, and that the \$500 payment wasn't for the equipment, but rather was a loan. That account may not have been too little, but it was too late. Among other things, the fact that Mr. Bingman did not express remorse (for something he adamantly denied doing), the Court sentenced Mr. Bingman to a maximum sentence of one year:

It is easy to look in hindsight, but some decisions made by trial counsel are peculiar. One of these was the decision that the Defendant not testify. The Court properly instructed the Defendant of his right to either refrain from testifying or testifying in his own behalf. (T.191-193). At his sentencing, the Defendant testified that the \$500.00 payment from Mr. and Mrs. Ball was a loan, and the deal regarding the farm equipment was that Mr. Ball would get the farm equipment working so that both he and the Petitioner could use it (Sentencing transcript pages 19, 21). The Petitioner also testified at sentencing that he was not present when the equipment was picked up for Mr. Ball. Here we have a man who for all his adult life has been a professional communicator. We have perhaps the most important event of his adult life where he should have taken the opportunity to present his side of the story to a jury so that he had a chance to be believed. It does not appear in the record what thought went into the decision that Mr. Bingman not testify.

ASSIGNMENTS OF ERROR:

I. THE DEFENDANT WAS INDICTED FOR A FELONY MORE THAN ONE YEAR AFTER THE ALLEGED DATE IT WAS COMMITTED, AND THE DEFENDANT WAS CONVICTED OF A LESSER INCLUDED MISDEMEANOR OFFENSE, WHICH IS THEREFORE BARRED BY THE STATUTE OF LIMITATIONS; AND THE DEFENDANT HAVING REQUESTED A MISDEMEANOR INSTRUCTION DOES NOT WAIVE THIS ERROR.

II. THE STATE DID NOT MAKE A PRIMA FACIE CASE, AND THE VERDICT IS THEREFORE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

III. A JUROR WAS SEATED WHO HAD A SON EMPLOYED IN LAW ENFORCEMENT, AT A REGIONAL JAIL.

IV. THE SENTENCE IS DISPROPORTIONATE TO THE OFFENSE.

ARGUMENT:

I. STATUTE OF LIMITATIONS ON THE MISDEMEANOR AND POSSIBLE WAIVER

This case exactly fits the rule found in *State v. Leonard*, 209 W.Va. 98, 543 S.E.2d 655 (2000), to the effect that one cannot be convicted of a lesser included misdemeanor in a felony prosecution where the indictment came only more than one year after the offense. Counsel is acutely aware that misplaced self-confidence is a grievous error for a lawyer to make, but the Appellant still says that this case fits *State v. Leonard* exactly. The true issue, in Appellant's opinion, is whether the provisions of *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000),

regarding waiver of the statute of limitations by having the jury instructed on the misdemeanor apply.

Looking at the evidence most favorable to the State, the sale of the supposedly stolen farm equipment occurred on January 31, 2002. (T.172) There is a one year statute of limitations on prosecution of a misdemeanor:

A prosecution for a misdemeanor shall be commenced within one year after the offense was committed[.] West Virginia Code §61-11-9

Mr. Bingman was not indicted until March 4, 2003, more than one year after the offense. (Indeed, that indictment languished for nineteen months until it was dismissed on October 25, 2004.) More than four months later, Mr. Bingman was again indicted, this time more than three years after the offense was supposedly committed.

Statutes of limitation serve to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time, they minimize the danger of official punishment because of acts in the far-distant past, and they encourage law enforcement officials promptly to investigate suspected criminal activity. See Cleckley, *Handbook on West Virginia Criminal Procedure*, §§ II-144 - 148. Statutes of limitations balance the government's interest in prosecution with the need to protect those who lose their means of defense. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

This Court has specifically addressed the situation we find in the instant case. In *State v. Leonard*, 209 W.Va. 98, 543 S.E.2d 655 (2000), the Court's syllabus point provided:

““The provision of Code, 61-11-9, which provides that “A prosecution for a misdemeanor shall be commenced within one year after the offense was committed,* * *”, read in *pari materia* with Code, 62-2-1, which provides that “Prosecutions for offenses against the State, unless otherwise provided, shall be by presentment or indictment” serves to bar a conviction of a misdemeanor had under an indictment for a felony, which embraces the misdemeanor, where the indictment was not returned within one year after the offense charged therein was committed.”” Syllabus Point 5, *State v. King*, 140 W.Va. 362, 84 S.E.2d 313 (1954).

The Court added:

Our decision in *King* joined an overwhelming majority of courts that hold a defendant cannot be convicted of a lesser offense upon a prosecution for a greater crime commenced after the statute has run on the lesser offense. See ““*Conviction of A Lesser Offense, Against Which Statute of Limitations Has Run, Where Statute Has Not Run Against Offense With Which Defendant is Charged,*”” 47 A.L.R.2d 887. . . . The following courts have held that a defendant cannot be convicted of a lesser offense upon prosecution for the greater crime which includes the lesser offense when the prosecution is commenced after the statute of limitations has run on the lesser offense: *State v. N.S.*, 98 Wash.App. 910, 991 P.2d 133 (2000); *Cane v. State*, 560 A.2d 1063 (Del.1989); *State v. Stillwell*, 418 A.2d 267, 175 N.J.Super. 244 (1980); *Holloway v. State*, 362 So.2d 333 (Fla.Ct.App.1978); *Padie v. State*, 557 P.2d 1138 (Alaska 1976); *Waters v. United States*, 328 F.2d 739 (10th Cir.1964); *Chaietz v. United States*, 288 F.2d 133 (D.C.Cir.1960), *rev'd* on other grounds, 366 U.S. 209, 81 S.Ct. 1051, 6 L.Ed.2d 233 (1961); *Benes v. United States*, 276 F.2d 99 (6th Cir.1960); *Drott v. People*, 71 Colo. 383, 206 P. 797 (1922); *People v. Burt*, 51 Mich. 199, 16 N.W. 378 (1883).

Moreover, at all times, the State had the ability to process two pieces of evidence which later came in at the trial. One was that their own expert (and it was not established when that expert was retained) said that the farm equipment as a whole could be worth less than a \$1000.00. Second, there was a sale of that same equipment as charged in the indictment for

\$500.00. This case was the outgrowth of a petty family dispute unfortunately familiar to the courts in this state. It is understandable that emotions within a family can run high. But the fact that we have an energetic “victim” should not lead us to ignore the statute of limitations. Essentially, the Prosecuting Attorney should not be able to resurrect a misdemeanor by overcharging an individual with an felony. If we did not trust juries, we could say that the situation here placed Appellant in the position of selecting either the possibility that a jury would improperly convict him of a felony in the absence of a misdemeanor instruction, or that the jury would convict him after the statute of limitations had long since passed of a misdemeanor. We must, however, trust our juries.

Appellant is certainly mindful of Justice Maynard’s dissent in *State v. Leonard*, to the effect that that decision punishes the State for good faith efforts to bring a prosecution. Here, however, there was *no* effort to bring this prosecution within one year. Further, in *State v. Leonard*, that Defendant at least materially contributed to the delay by his motion to transfer the misdemeanor to Circuit Court. Here, there was no prosecution at all, so the Appellant cannot have contributed to this delay.

This prosecution should have been dead before it was ever brought. It was charged more than one year after the offense occurred. Evidence available to everyone at that time was that this farm equipment could be worth less than a \$1000.00. A civil statute of limitations might have not been violated. But the criminal statute of limitations certainly was. The statutes of limitations are designed to prevent *possible* prejudice, according to Justice Cleckley. See Cleckley, *Handbook on West Virginia Criminal Procedure*. It is not necessary that the Petitioner actual show prejudice, but in this case he can do so anyway – the person to whom he

allegedly sold the “stolen” farm equipment died before your Petitioner’s case came to trial nearly four years after the fact.

A key issue is whether the provisions of *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000) render the *State v. Leonard* argument ineffective. The Court’s third syllabus point in *State v. Boyd* states:

When a defendant is not indicted within one year of the date on which an offense is committed but requests the Circuit Court to instruct the jury on a time-barred lesser included offense, the defendant by that act waives the statute of limitations.

There are four reasons that this provision of *State v. Boyd* should not apply in this case. First, *State v. Boyd* specifically anticipated the possibility that a case with the facts of the instant case would arise, and stated that the result might be different. Second, like the leading case on the fundamental issue of conviction of a misdemeanor *State v. King*, 140 W.Va. 362, 84 S.E.2d 313 (1954) and unlike *State v. Boyd*, your Appellant’s prosecution was commenced by a bare indictment and was never subject of earlier proceeding through a complaint and warrant. Third, there should be a policy that where the facts are clear, a Prosecuting Attorney should not be permitted to “rescue” a misdemeanor by over-charging a felony. Finally, where it is clear that the value of the “stolen” property is less than \$1,000, asking for a misdemeanor instruction reveals a mistrust of juries that is itself against public policy.

a. State v. Boyd anticipated this case:

State v. Boyd specifically anticipated the instant case. In footnote 2, this Court states:

We do not have a situation here where the State obtained an indictment and subsequently entered a nolle prosequi so that a

new indictment could be obtained on the same offense which did not violate the statute of limitations. If that were the case, the result might be different.

Here, we have exactly that situation. The first indictment was the first criminal proceeding for these offenses, and it was returned fourteen months after the alleged conduct. A year and a half later, that indictment was nolle'd and another four months passed before Appellant was again indicted for the same thing. Had Appellant been tried on *that* indictment, *State v. Boyd* would apply to this appeal. He was not, however.

b. There was no proceeding of any sort before the indictment of Appellant:

State v. King, 140 W.Va. 362, 84 S.E.2d 313 (1954) is the leading case for the proposition that one cannot be convicted of a lesser-included misdemeanor in a prosecution commenced more than one year after the fact. In *State v. Boyd*, the State depended heavily on the fact that the situation in *Boyd*, a prosecution by warrant complicated by a *Defendant's* motion to transfer, was different from *King*, a bare indictment.

The State argues persuasively that the circuit court did not err because *King* is distinguishable from the case at bar in that *King* commenced with an indictment while this case began with a criminal complaint. 543 S.E.2d at 649.

This Court relied heavily on this distinction:

This activity seems to stand in stark contrast to the activity contained in the facts of the *King* case. The activity in *King* consisted of the return of an indictment nearly two years after the date the offense was committed. In fact, the first statement in the opinion reads, ““In this criminal prosecution of State of West Virginia against Lewis M. King, the defendant was indicted by a grand jury convened at the October term, 1953, of the Circuit Court of Monongalia County, for the commission of a felonious assault.”” *King*, 140 W.Va. at 364, 84 S.E.2d at 314. If earlier activity had occurred in the case, surely the facts would state as much. 543 S.E.2d at 650.

That distinction is still important, and should bar Appellant's conviction.

c. There should be a policy against over-charging:

It was clear from the outset that this was at most a misdemeanor. It is true that the State found an expert who placed the valuation either right above or right below the \$1,000 threshold, but the very facts alleged by the victim's surviving widow belie that figure. She testified that this property was sold to her late husband for \$500. This was old, used farm equipment. She and her husband operated a farm. In apparently what she said was an arm's-length transaction, the equipment was sold for \$500. An appraisal is an estimate of the fair market value of an asset. The fair market value, however, is the price that the asset brings in an arm's-length transaction. The State knew that this equipment sold for \$500. For reasons unknown to Appellant and not of record, the State did not begin any prosecution for more than one year. Charging a felony under these facts was clearly improper.

d. There should be a policy that we trust juries to follow the Court's instructions.

If we are saying that Mr. Bingman's jury must be instructed on a misdemeanor to prevent his unjust conviction of a felony, we are saying that we don't trust a jury to follow instructions. Indeed, perhaps that is what was on trial counsel's mind when he either agreed to or asked for a misdemeanor instruction. In many of the cases where a conviction is reversed by this Court, the error is a faulty instruction. In those cases, the Court believes that a faulty instruction is so serious that it alone justifies reversing an otherwise proper and just conviction. We should not apply a lesser standard here. Juries should be instructed properly. We now provide jurors with copies of the charge, the better to remind them of the exact instructions of

the Court. We *must* trust our juries, and a case based upon a mistaken fundamental *distrust* should not stand.

II. VERDICT AGAINST THE WEIGHT OF THE EVIDENCE

The appellate role in reviewing the sufficiency of the evidence is a narrow one, that is, to determine whether a reasonable person could have concluded guilt beyond a reasonable doubt. The verdict must be sustained if there is substantial evidence to support the finding of guilt. *United States v. Russell*, 971 F.2d 1098, 1109 (4th Cir. 1992). See also *United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996), and *State v. Ross*, 184 W.Va. 579, 402 S.E.2d 248 (1990).

[I]n the context of a criminal action, substantial evidence is evidence that a reasonable finder of fact would accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt. *Burgos*, 94 F.3d at 862.

There is simply insufficient evidence to support a conviction of Mr. Bingman. Mr. Roger Rafferty made the bare assertion that the farm equipment was his. It was established, however, through Ramona Bingman's testimony that this farm equipment was purchased with Virginia Rafferty's money, and that Roger Rafferty would not have had the money to originally purchase that equipment. Thus, the Defendant was absolutely entitled to treat this equipment as heirship equipment and have it repaired and use it as he testified in sentencing that he did.

III. JUROR CONNECTED TO LAW ENFORCEMENT

Jurors who are related to or have close friends who are in law enforcement may be disqualified. *State v. Beckett*, 310 S.E.2d 883 (W.Va., 1983). The relationship which justifies disqualification need only be tenuous. *State v. Pratt*, 244 S.E.2d 227 (W.Va., 1978). Some

Courts disqualify those persons without a motion to strike for cause.³ Clearly, a juror with a family member connected to law enforcement isn't an ideal juror from the standpoint of the defendant. The juror here, Ms. Moore, had a son working at a regional jail. Candidly, trial counsel made no motion to strike for cause, and didn't use a preemptory strike to remove this juror. The right of a Defendant to have an impartial jury is so basic that this juror should have been dismissed by the Court without motion.

IV. SENTENCE DISPROPORTIONATE TO THE OFFENSE.⁴

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offence." Syllabus Point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980); See also *State v. Cooper*, 172 W.Va. 266, 304 S.E. 851. There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. *Accord, Stockton v. Leeke*, 269 S.C. 459, 237 S.E.2d 896, 897 (1977). The first 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

³ That does not appear of record, rather is an observation by appellate counsel at trials.

⁴ The sentencing order sentences Appellant to one year in jail. In a subsequent order modifying the conditions of Appellant's bond on appeal, the Circuit Court recited that Appellant had been sentenced to probation.

conscience, a disproportionality challenge is guided by the objective test which the Court 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.

The ground of disproportionate sentence is a hard sell in any forum. We have a trial court that heard all of the evidence, and which carefully reviewed the presentence report and its attachments. In this case, we also have a sentence within the statutory maximum, albeit right at the maximum.

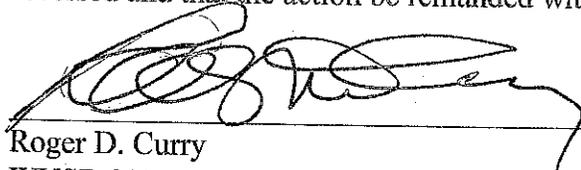
The primary object of punishment is retributory justice, and unless such justice be shown in the sentence of the court it is not likely to deter others from committing crime nor to reform the person sentenced. An excessive punishment, instead of being a deterrent, often results in the generation of an angry public contempt of justice because of its severity, and does not reform the criminal who perceives injustice towards himself. The best course for the courts is to adapt the duration of the punishment to the prisoner's guilt, keeping in view his character and susceptibility to reformation as an ingredient. 1 Kerr's Whart. Crim.Laws, §§§§ 12, 22. Quoted in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851

Mr. Bingman's character and history *strongly* argues for a sentence less than the maximum. It is difficult to recall another petit larceny case where a Defendant has actually been given a full year in jail. Among other things, sentences should be consistent one with another. That promotes the respect of the public for the judicial system and for the uniform application of the law. Here, a Defendant only stated his version of the offense at sentencing. Because that differed with the State's evidence and because the Defendant did not express

remorse (because he had nothing to be remorseful for), the trial court sentenced him to the maximum possible sentence. Clearly, that is disproportionate.

CONCLUSION:

Accordingly, the Claimant prays that the order of the Circuit Court of Gilmer County be reversed and that the action be remanded with instructions to dismiss the indictment.



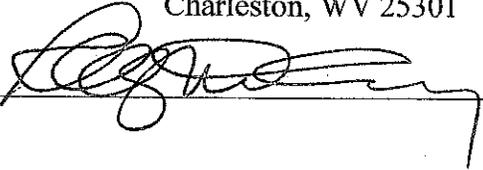
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CERTIFICATE OF SERVICE

I certify that on March 23, 2007, I served the foregoing by United States Mail, First Class, Postage prepaid, upon:

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Glennville, WV 26351

Dawn E. Warfield, Esq.
Deputy Attorney General
State Capitol
Charleston, WV 25301



A handwritten signature in black ink, appearing to read "Dawn E. Warfield", is written over a horizontal line.