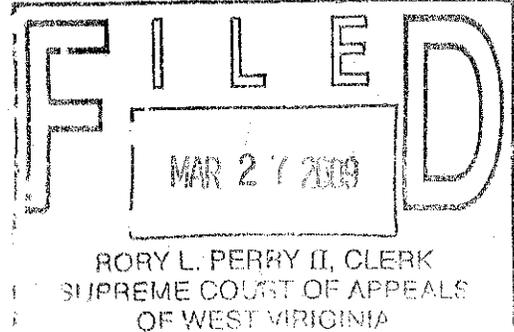


No. 34711

IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Plaintiff Below, Appellee,

v.

RICHARD BOOTH

Defendant Below, Appellant.

Underlying Proceeding  
No. 07-F-51  
Ohio County Circuit Court

BRIEF OF APPELLANT

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF  
APPEALS OF WEST VIRGINIA:

HON. BRENT D. BENJAMIN, CHIEF JUSTICE  
HON. ROBIN JEAN DAVIS, JUSTICE  
HON. THOMAS E. MCHUGH, SENIOR STATUS JUSTICE (SITTING BY  
TEMPORARY ASSIGNMENT.)  
HON., MARGARET L. WORKMAN JUSTICE  
HON. MENIS E. KETCHUM, III, JUSTICE

HON. RORY L. PERRY, II, CLERK

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**The Circuit Court of Ohio County abused its discretion and violated state and federal constitutional law in sentencing the Defendant to a term of incarceration of eighty (80) years in the West Virginia State Penitentiary because the sentence pronounced after accepting a negotiated guilty plea to an attempted purse-snatching is impermissibly harsh and disproportionate to the underlying facts of the case.**

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

**RICHARD BOOTH,**

**Petitioner,**

**v.**

**CASE NO.: 34711**

**STATE OF WEST VIRGINIA,**

**Respondent.**

**PETITION FOR APPEAL FROM THE SENTENCING ORDER OF THE CIRCUIT  
COURT OF OHIO COUNTY, CASE NUMBER 07-F-51 AND DATED MAY 23, 2008**

**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

This is a petition for appeal of the sentencing taken from the Circuit Court of Ohio County following a plea of guilty to the criminal offense of Robbery in the First Degree whereby the petitioner was sentenced to serve not less than eighty (80) years in the West Virginia State Penitentiary.

**STATEMENT OF JURISDICTION**

The West Virginia Supreme Court of Appeals has jurisdiction over this action pursuant to W. Va. Code §58-5-1(j) which allows a criminal defendant to file a petition for appeal to the West Virginia Supreme Court of Appeals from "a final judgment of any criminal case where there has been a conviction in a circuit court . . ." The Defendant was convicted following his June 8, 2007

post-indictment plea of guilty to one count of Robbery in the First Degree. On August 2, 2007, the Defendant was sentenced to serve eighty years in the West Virginia Penitentiary. The Defendant filed his timely notice of intent to appeal on August 4, 2007. The Sentencing Order was entered on May 23, 2008. Therefore, the petitioner is entitled to petition the West Virginia Supreme Court of Appeals for an appeal.

### **STATEMENT OF THE CASE**

On March 21, 2007 Richard Booth along with his co-defendants, Jessica Wood, Jennifer Jordan, and a male 17 year old juvenile J.H. drove from Moundsville, West Virginia to Wheeling , West Virginia so Mr. Booth could apply for employment. Trial Court Record at p.141 (TR-141). Mr. Booth was going to apply for a job at a telemarketing firm where his friend, Ms. Wood, was already employed. Mr. Booth was 20 years old, Ms. Wood was 24, and Ms. Jordan was 25. (TR-21; 35). Jessica Wood was driving her vehicle and at the time all four of the young people were high on prescription Xanax and Marijuana. Mr. Booth stated that he had ingested approximately 25 Xanax pills that morning. (TR-141).

While on their way to Wheeling the four co-defendants needed money to purchase more drugs and it was decided that they would try to steal it. Ms. Wood spotted an elderly lady walking down the street holding her purse and told Mr. Booth and J. H. to go and get her purse. (TR-141). J.H. and Richard Booth exited the car and followed the elderly lady down the street. Mr. Booth ran up behind her and grabbed her purse and attempted to pull it off of her

shoulder. The elderly lady, Mrs. Doris Schafer, was 82 years old at the time of the attempted purse snatching. When Mr. Booth pulled on her purse Mrs. Schaffer fell to the ground screaming as she clutched her purse. Mr. Booth let go of the purse and ran back to the car along with J.H. (TR-222).

Mr. Booth did not have a weapon of any kind, nor did his accomplice, J.H., and neither Mr. Booth nor J.H. ever struck, punched, kicked, or pushed Mrs. Schafer in any way. (TR-242). When Mrs. Schafer held onto the purse and fell to the ground, Mr. Booth let go of the purse and ran back into the waiting car. Ms. Wood then drove away. As she was driving away, a witness wrote down her license plate number and provided it to law enforcement when they responded to the scene. (TR-222).

Ms. Wood continued driving to St. Clairsville, Ohio, where later that evening they learned that law enforcement in West Virginia wanted them for questioning. Mr. Booth and the others all turned themselves in to police that same evening. Mr. Booth called the West Virginia State Police from a phone at 511 Western Ave. Moundsville, WV where the police responded and placed all four individuals in custody. (TR-29). The three co-defendants were questioned at the state police headquarters in Moundsville, West Virginia. Mr. Booth was not questioned based on his request for appointed counsel. (TR-30).

The juvenile male, J. H., gave a detailed statement implicating Ms. Wood, Ms. Jordan, and Mr. Booth after police informed J.H. that he would be

transferred to adult status and could receive a possible 90-year prison sentence.<sup>1</sup> (TR-224).

Richard Booth has been incarcerated continuously since that night due to his extraordinarily high bond of \$200,000, which was subsequently raised to \$500,000 when defense counsel moved for a bond reduction at the preliminary hearing.

Mr. Booth was indicted on two counts of attempted first degree robbery, assault in the commission of a felony and conspiracy to commit robbery. J. H. agreed to cooperate and was allowed to plead guilty as a juvenile offender to one count of first degree robbery. (TR-1). Ms. Jennifer Jordan was permitted to plead to one count of conspiracy to commit robbery by information and was sentenced to 1 to 5 years in the penitentiary.

Mr. Booth entered into an agreement to plead to one count of first degree robbery and the State agreed to dismiss the remaining counts. The prosecutor agreed that he would not recommend a sentence that was higher than the adult probation officer recommended. (TR-129).

The victim in the case, Mrs. Doris Schafer, came to the initial preliminary hearing in Ohio County Magistrate Court, held within approximately ten days of the incident, and did not appear to be injured by the fall she suffered as a result of the attempted purse-snatching. The initial x-rays taken the night of the incident at the Ohio Valley Medical Center Emergency Room were negative. (TR-62). The diagnosis by Dr. John D. Freed, M.D. on the night of the incident

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<sup>1</sup> J.H. later testified against Mr. Booth at his preliminary hearing. The tape of the preliminary hearing was not transcribed (TR-224).

was "contusion left shoulder and left hip." (TR-64). Subsequently, she underwent an MRI which indicated a hairline hip fracture. This resulted in hip surgery that was not successful and required a second surgery. (TR-249, 250). In a typed unsigned statement, included in the pre-sentence report, she stated how this injury impacted her and adversely affected her life. Mrs. Schafer did not make any recommendation or request for any prison sentence in her statement. (TR-175, 176).

Prior to the sentencing hearing, Mr. Booth voluntarily presented to his legal counsel a personal letter soberly expressing his heartfelt remorse and concerns for the elderly victim, which was delivered by Mr. Booth's counsel in open court to the prosecutor at the sentencing hearing for delivery to the victim according to regular protocol. (TR-232, 233). A copy of Mr. Booth's letter is attached hereto and incorporated herein by this reference.

The adult probation officer in his pre-sentence report recommended an 80 year sentence. The prosecutor agreed and requested that the court impose an 80 year sentence on Mr. Booth. The officer and the prosecutor had cited the nature of the offense as violent, with the life altering effect it had on Mrs. Schafer, and also that Mr. Booth had two previous, though actually *nonviolent*, felonies.<sup>2</sup> The Court then directly proceeded to sentence Mr. Booth to 80 years in the penitentiary

It is critical to note at this point that while not expressly assigned as error in this appeal, because it is subsumed in the appeal by the sentencing

---

<sup>2</sup> Two counts of second offense petit larceny that were the result of taking compact discs and items from parked cars.

judge's error in reliance on the pre-sentencing report and findings in support of the disproportionate length of sentence, and where both the probation officer and the Court erroneously mischaracterized Mr. Booth as "a repeat violent offender."

Counsel for Mr. Booth expressly objected to that erroneous pre-sentence report finding of "repeat violent offender," which was acknowledged as a proper correction from Mr. Booth's counsel by the sentencing judge at the sentencing hearing. (TR-240).

To understand the foundations of that predicate error by the sentencing court, a brief review of the following facts is essential: Mr. Booth's previous felony convictions were from the same case - in other words, *not "repeat offenses"* - and they were both statutorily enhanced second offense petit larcenies and involved no acts of violence. Mr. Booth pled to both of these charges in the same plea and the one year sentences for those second offense petit larcenies were ordered to run concurrently. (TR-142).

These previous felonies were pled to by Mr. Booth by agreement with the State because by operation of the "good time" rules of the West Virginia Department of Corrections he would do less actual incarceration time on them as felonies within the WVDOC than as misdemeanors within the Regional Jail Authority. In addition, as a Department of Corrections inmate the State of West Virginia rather than Marshall County was responsible for the cost of his incarceration. (TR-242).

Ms. Jessica Wood, represented by other counsel, pled guilty to first degree robbery largely in part due to the clear implications of Mr. Booth's plea and his statement made to the adult probation officer in his pre-sentence report. Mr. Booth also agreed in his plea agreement to testify truthfully if called to testify against Ms. Wood. Ms. Wood had also just been convicted of several unrelated felonies at trial in Ohio County prior to her plea on this robbery charge. (TR-141). The pre-sentence report of Ms. Wood recommended a 60-year sentence and the Judge deviated downward from that recommendation sentencing Ms. Wood to 50 years in the penitentiary. [TR-1 Case no. 07-F-52]. Mr. Booth and Ms. Wood both had the same judge at their separate sentencing hearings.

### **ASSIGNMENT OF ERROR**

**The Circuit Court of Ohio County abused its discretion and violated state and federal constitutional law in sentencing the Defendant-Petitioner to a term of incarceration of eighty (80) years in the West Virginia State Penitentiary.**

### **STATEMENT OF THE STANDARD OF REVIEW**

Inasmuch as the issue raised on appeal deals solely with the sentencing, "the Supreme Court of Appeals reviews sentencing orders...under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. pt. 1, in part, State v. Lucus, 201 W.Va. 271,

496 S.E.2d 221 (1997) *cited in* State v. Middleton, --W.Va.--, --S.E.2d--, 2006 WL 3455001 (2006).

### ARGUMENT

**The Circuit Court of Ohio County abused its discretion and violated constitutional law in sentencing the Defendant to a term of incarceration of eighty (80) years in the West Virginia State Penitentiary. The sentence pronounced for the negotiated guilty plea to an attempted purse-snatching is impermissibly and shockingly harsh, unjustified, and disproportionate to the underlying facts of the case.**

The issue for consideration is whether The Circuit Court of Ohio County abused its discretion and violated West Virginia law and the protections of the constitutions of West Virginia and/or the United States of America in sentencing the Defendant to term of incarceration of eighty (80) years in the West Virginia State Penitentiary whereby the sentence is unconscionably disproportionate to the underlying facts.

Article III Section 5 of the West Virginia Constitution provides that “...Penalties shall be proportioned to the character and degree of the offence.”

Additionally, this Court has previously determined that penalties should be proportionate when viewed in light of sentences imposed on co-defendants.

*See generally*, Smoot v. McKenzie, 166 W.Va. 790, 277 S.E.2d 624 (1981) and

State v. Buck, 170 W.Va. 428, 294 S.E.2d 624 (1982). Moreover, this Court

has previously held that “[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.” Syl. Pt. 4, Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981). Finally, “sentences imposed under statutes providing no upper limits may be contested based upon allegations of violation of the proportionality principles contained in Article III, Section 5 of the West Virginia Constitution.” State v. Tyler, 211 W.Va. at 250, 565 S.E.2d at 372, (2002).

The present action involves an 80-year penitentiary sentence imposed on the Petitioner subsequent to a plea of guilty to the offense of first degree robbery — an offense which carries no maximum penalty set by statute. The statute and sentencing discretion thereunder, is familiar to this Court. See, e.g., State v. Houston, 166 W.Va. 202, 204-205, 273 S.E.2d 375, 376 (1980). In the case *sub judice*, the acts of Mr. Booth do not rise to a level justifying what is, in effect, a life sentence. The sentence imposed by the Circuit Court is disproportionate to the underlying facts, shocks the conscience and offends fundamental notions of human dignity.

As this Court has previously declared:

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

Syl. Pt. 5 State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851(1983).

The Petitioner argues that the current sentence, while facially permissible under the open-ended statute, should be declared constitutionally

impermissible as applied to Mr. Booth. The Court's sentence is unduly harsh under the circumstances and facts of this case,

In Cooper, *supra*, this Court held that a determination of whether a sentence is constitutionally disproportionate may be subjective or objective. The subjective test inquires into whether the sentence for the particular crime shocks the conscience of the court and society such that it is so offensive that it cannot pass a societal and judicial sense of justice. See State v. Cooper, 172 W.Va. at 272 (1983). If the sentence in fact shocks the consciences of the court, then the inquiry ends. If the sentence does not shock the conscience, then the Court must proceed to examine the objective test.

To that end, Petitioner reminds the Court:

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. 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.

State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857(1983).

In the first instance, Petitioner's sentence of eighty years shocks the conscience of society and it cannot pass a societal and judicial sense of justice. The Petitioner agreed to testify in the prosecution of Ms. Wood who was tried and convicted of a number of unrelated felony offenses that did not involve the Petitioner. The State Assistant Prosecutor stated that Ms. Wood was the most culpable based on her age, previous record and involvement in the crime. Ms.

Wood provided the transportation and selected the victim and encouraged the juvenile male and younger Mr. Booth to get out of the vehicle and take her purse.

Mr. Booth has had a significant drug addiction since the age of 13 when he first began abusing prescription medication and other illegal drugs. Mr. Booth became a parent while he was still a teenager and was forced to drop out of school in the tenth grade due to his family and economic situation. (TR-141). Unfortunately, Mr. Booth was never offered any type of alternative sentences in his prior incidents in court when it was clear that legal problems were a direct consequence of his drug addiction. Prior to the current offense, Mr. Booth's criminal background contained only two enhanced felony offenses of Petit Larceny and two misdemeanor offenses consisting of a petit larceny (the predicate offense for the two felony charges) and a theft charge. (TR-142).

In addition to the facts and circumstances presented above, it is also unconscionable that Mr. Booth's sentence was so much greater than the sentences imposed on all three of his co-defendants in the case – combined.

And, of the two main defendants, the younger Mr. Booth received a sentence nearly double that of the extremely harsh sentence of 50 years that the 24-year old Ms. Wood received. The bottom line is the 20-year old Mr. Booth received the harshest sentence of all four of the defendants: 80 years in the state penitentiary.

Finally, and significantly to the interests of justice and its administration in West Virginia, the sentence pronounced in Mr. Booth's case will have a chilling effect on the use of plea agreements for felonies, especially those with no maximum statutory limit or reliable rational guidelines on sentencing. When a court sentences people such as Mr. Booth to what is, in effect, a life sentence while people convicted of more serious crimes such as malicious wounding and murder are actually given less time than a purse snatcher, it makes negotiating a plea for a robbery in the first degree either impossible or unadvisably imprudent, regardless of any other charges that might be offered to be dismissed by the prosecutor. This direct and wide-spreading negative social consequence of the disproportionate sentence imposed on Mr. Booth also detrimentally compromises the ability to resolve other similar criminal charges and criminal trial court matters in West Virginia, if not just Ohio County, by way of plea agreement<sup>3</sup>.

If, however, the Court is reluctant to find the Petitioner's 80-year sentence for purse-snatching so offensive that it cannot pass a societal and judicial sense of justice as set forth in Cooper, then the Petitioner urges the Court to find so, accordingly, under the objective test set forth in Wanstreet, *supra*, in remanding the case for re-sentencing:

[I]n 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

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<sup>3</sup> The petitioner notes that in his particular case, the sentencing was left in the sole discretion of the Court. To that end, this was not a plea agreement made pursuant to Rule 11(e)(1)(C) of the W.Va.R.Crim.P. However, it is standard practice in Ohio County that the Circuit Courts do not accept "binding pleas."

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.”

Syl. pt. 5, Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Your Petitioner readily acknowledges that the West Virginia Legislature has “impliedly authorized life imprisonment as the maximum penalty for aggravated robbery.” *See generally, State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696 (1986). In that regard, the Petitioner recognizes the wide range provided to the Circuit Court in imposing a sentence. Petitioner further recognizes that this Court has had the occasion to survey similar offenses and their corresponding sentences imposed by other jurisdictions. To that end, the West Virginia Supreme Court has recognized that other jurisdictions “condone severe penalties for the crime of aggravated robbery.” *See generally, State v. Tyler*, 211 W.Va. at 252, 565 S.E.2d at 374, (2002); State v. Glover, 177 W.Va. 650, 355 S.E.2d 631 (1987).

Notwithstanding the above, the Petitioner maintains that of his co-defendants he was punished much more severely. Petitioner did not possess any weapon and no weapon was used in the offense, the Petitioner did not strike or hit the victim in any way, and the Petitioner did not make any threats. Petitioner actually abandoned the crime in progress when the victim offered the least amount of resistance. The Petitioner thereby asserts that a review of West Virginia precedent regarding robbery sentences, shows that this jurisdiction has “recurrently evaluated proportionality challenges to sentences arising from

robbery convictions where a weapon was used during the commission of the offense.” State v. Tyler, 211 W.Va. at 252, 565 S.E.2d at 374, (2002) (upholding a thirty-year sentence for first degree robbery involving the use of firearm).<sup>4</sup>

Mr. Booth’s case facts and circumstances are similar to those reviewed previously on two occasions by this Court in State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984), and this Court’s ultimate opinion and decision in the Buck case provides a good guide for application in the case of Mr. Booth. In Buck, the Court noted his young age, twenty three, and his lack of any previous crimes of violence, and the leniency of the trial court on Mr. Buck’s co-defendant. The co-defendant in that case pled guilty to the felony offense of grand larceny and was sentenced to one year in the county (regional) jail under the misdemeanor alternative sentence provided for within that statute. Mr. Buck was sentenced to seventy five (75) years for aggravated robbery (the robbery statute was later amended to read first degree and second degree instead of aggravated and non-aggravated robbery).

Mr. Booth like Mr. Buck was young, twenty years old, and had not been convicted of any previous violent crimes. Also, like Mr. Buck his juvenile co-defendant was allowed to plead guilty to robbery as a juvenile offender and did

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<sup>4</sup> See also, State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)(84-year sentence for aggravated robbery involving the firing of a gun and use of a knife); State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)(30-year sentence involving the use of a gun); State v. Spence, 182 W.Va. 472, 388 S.E.2d 498 (1989)(60-year sentence for robbery involving a knife); State v. Woods, 194 W.Va. 250, 460 S.E.2d 65 (1995)(36-year sentence for robbery involving use of a gun); State v. Brown, 177 W.Va. 633, 355 S.E.2d 614 (1987)(60-year sentence for robbery involving a knife); State v. England, 180 W.Va. 342, 376 S.E. 2d 548 (1988)(Life sentence for robbery involving gun that was discharged on three occasions during the crime).

not serve any time in jail or prison. This Court in the Buck case found the disparate sentences alone violated the proportionality clause of the West Virginia Constitution and ordered that the case be remanded for re-sentencing.

The West Virginia precedents cited *supra*, make it clear that the common nexus between the diverse cases is the use of a weapon during the commission of the offense. To illustrate further, in Cooper, this Court ordered re-sentencing on remand for a 45-year sentence imposed after a first degree robbery conviction, stating "it would seem that a ten year sentence would be appropriate." In reversing the 45-year sentence on the proportionality grounds, the Court noted, *inter alia*, that no weapon was involved and that the appropriate sentence appeared to be the statutory minimum of 10 years. Cooper at 274.

This Court must acknowledge that Mr. Booth had no weapon nor did any of his co-defendants carry any weapons. And similar to Cooper, Petitioner Booth was never even accused of using a weapon nor was Mr. Booth accused of making any threats in the course of his actions. Mr. Booth attempted what is commonly known as a "purse snatching" by running up behind the victim and trying to snatch her purse away. Ultimately, the sentencing court did not determine and pronounce a sentence that was consistent with the facts and circumstances and proportionate to the character and degree of the offense committed by this soberly remorseful young man.

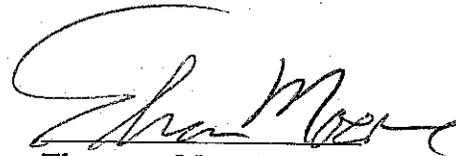
Petitioner hereby respectfully urges this Honorable Court to order that his sentence be vacated and that the matter be remanded to the Circuit Court of Ohio County for re-sentencing consistent with the facts and circumstances of the case, and the law governing proportionate, just, and fair sentencing.

**RELIEF**

WHEREFORE, for the forgoing reasons, the Court is asked to reverse the sentencing decision of the Circuit Court of Ohio County and remand the case for proportionate re-sentencing consistent with law, and to provide such other relief that this Honorable Court finds just and necessary

RICHARD BOOTH  
Respectfully submitted,

By:

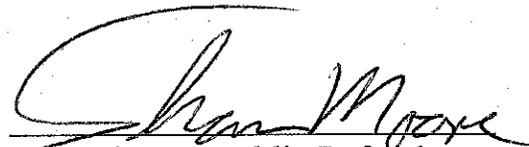


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27<sup>th</sup> day of March 2009 that service of the foregoing petition for appeal was made upon the Respondent, the State of West Virginia, by hand delivering a true copy to Scott R. Smith, Prosecuting Attorney for Ohio County at his office 1500 Chapline Street, Wheeling, WV 26003 and by mailing a true copy thereof by United States mail, postage prepaid, to its counsel, Darrell V. McGraw, Attorney General of West Virginia, at Building 1, Room E 26, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305-0220, his last-known address.

  
Assistant Public Defender