

Supreme Court No. 34744

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

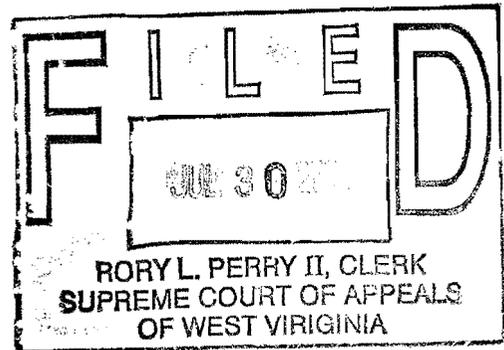
STATE OF WEST VIRGINIA,

*Appellee,*

v.

LARRY T.,

*Appellant.*



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APPELLANT'S REPLY BRIEF

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## DISCUSSION OF LAW – ARGUMENT

### I. THE CIRCUIT COURT OF KANAWHA COUNTY ERRED IN ALLOWING THE STATE TO PROCEED ON A TRANSFER MOTION FILED AFTER THE ARRAIGNMENT WAS HELD IN VIOLATION OF W.VA. CODE § 49-5-10(B) (2001).

W.Va. Code § 49-5-10(b) (2001) (2004 Repl. Vol) defines the procedures for a juvenile transfer. Specifically, W. Va. Code § 49-5-10(b) states:

(b) No inquiry relative to the admission or denial of the allegation of the charge or the demand for a jury trial may be made by or before the court until the court has determined whether the proceeding is to be transferred to criminal jurisdiction.

This section of the statute is procedural in nature with numerous implications on a juvenile's constitutional rights. The Appellee contends W.Va. Code §49-5-10(b), does not apply when an arraignment hearing takes place prior to the filing of a transfer motion. (Appellee's Brief at 9). The Appellee cites two cases to support its contention that subsection (b) presupposes the State has already filed a motion to transfer, Arbogast v. R.B.C., 171 W.Va. 737, 741, 301 S.E. 2d 827, 831 (1983) (*per curiam*), *rev'd in part on other ground*, E.B. Jr. v. Canterbury, 183 W.Va. 197, 201, 394 S.E.2d 892, 896 (1990) and Comer v. Tom A.M., 184 W.Va. 634, 403 S.E. 2d 182 (1991) (*per curiam*). While this may be true, the procedural problem in this case is that the State failed to timely file the motion to transfer prior to the arraignment at which the defendant entered his plea of not guilty. Furthermore, the cited cases do not support the State's position.

The Court in Arbogast v. R.B.C. stated W.Va. Code §49-5-10(b) "merely stays further proceedings, such as an arraignment, until the court has made its decision whether to transfer the child to adult jurisdiction." 171 W.Va. at 741, 301 S.E. 2d at 831. The

Appellee argues this language supports the circuit court's conclusions because it is impossible to stay a proceeding that has not yet begun. (Appellee's Brief at 11).

Arbogast, however, is not relevant to the case at hand because the arraignment in Larry T.'s case had already happened. In Kanawha County, it is common practice for an arraignment to be stayed after a transfer motion has been filed. Typically, the State files a motion to transfer a case and then moves to continue the arraignment to ensure the transfer motion was timely filed. The filing of the transfer motion stays the arraignment until the transfer issue is resolved, which is clearly what the Court was commenting on in Arbogast. The Appellee's reliance on Arbogast is misplaced in this case because the arraignment had already happened. (Appellee's Brief at 11).

Further, the Appellee cites Comer v. Tom A.M., 184 W.Va. 634, 403 S.E. 2d 182 (1991) (*per curiam*). In Comer, the juvenile was "arraigned" before the magistrate the same evening he was charged. The Appellee argues that in the Comer case the procedure of arraigning a juvenile prior to the transfer decision was not even questioned. See Id. at 636, 403 S.E. 2d at 184 (Appellee Brief at 11).

Appellee, however, is confusing an initial arraignment after arrest with the formal arraignment at which the juvenile enters a plea. In Comer the juvenile was "arraigned" before a magistrate at approximately 11:00 p.m. following an interview of the juvenile by the state police. This "arraignment" however, was actually an initial appearance or a detention hearing before the magistrate.

W.Va. Code § 49-5-8(c)(4) (2005) (2004 Repl. Vol) requires a juvenile be taken to a juvenile referee or circuit court judge for a detention hearing and if no judge or juvenile referee is available, the juvenile shall be brought before any magistrate for the

sole purpose of conducting a detention hearing. In Comer, because it was 11:00 pm, there were no circuit court judges or juvenile referees available; therefore, the juvenile was taken to a magistrate for a detention hearing.

Furthermore, magistrate court does not have jurisdiction over juvenile matters. W.Va. Code § 49-5-2(a) (2007) (2004 Repl. Vol) states the circuit court has original jurisdiction over juvenile proceedings. Only the circuit court can arraign a juvenile, and accept a plea and a request for a jury trial in a juvenile delinquency matter. In Comer, the juvenile was “arraigned” before the magistrate but that hearing did not involve entering a plea or a request for a jury trial because the magistrate would not have jurisdiction to accept such pleas or request.

The West Virginia code is clear and unambiguous and protects juveniles in transfer proceedings. W.Va. Code § 49-5-10(b) states the transfer motion and decision must be made before the juvenile is subjected to the choice of whether to plead guilty or not guilty. The procedural problem in this case is that the State failed to timely file the transfer motion prior to the arraignment. Instead the State waited until after the juvenile entered his plea of not guilty and then filed the transfer motion. As a result, the State failed to comply with the statutory provisions of W.Va. Code § 49-5-10(b) that require a motion to transfer proceed a plea at the arraignment.

The Appellee also asserts Larry T. was not prejudiced by the State’s actions in this case. (Appellee Brief at 11-13). It is clear from the record, however, Larry T. was prejudiced by the State’s exploitation of the transfer provision as a tactical device. Larry T. was further prejudiced because he was punished for exercising his right to a jury trial.

In Larry T.'s case, the State manipulated the transfer process to get another bite at the apple. Initially the State filed a juvenile petition charging Larry T. with first degree sexual abuse. The preliminary hearing was held on the matter and probable cause was found. The arraignment was set for September 26, 2009. Prior to the arraignment, however, the State filed another juvenile petition charging Larry T. with first degree sexual assault.

After reviewing the transfer provisions, W.Va. Code § 49-5-10, and the record from the arraignment before the trial judge, it is clear why the State wanted to proceed with a transfer motion on the second petition, the first degree sexual assault charge. The assault charge carries both a longer jail sentence and falls under the mandatory transfer provision of the W.Va. Code § 49-5-10(d).

A transfer on the original charge, first degree sexual abuse would be much more difficult for the state to prove because it falls under W.Va. Code § 49-5-10(g) the discretionary transfer provision. In order to transfer the abuse case the State would have to put on evidence of the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience, and similar personal facts. Further, the trial court would have to make a careful and detailed analysis into these factors before the case could be transferred. Syl. Pt.2, State v. Sonja B., 183 W.Va. 380, 395 S.E. 2d 803 (1990).

The first degree sexual assault, however, falls within the mandatory transfer provision of the W.Va. Code. With mandatory transfers the State is only required to demonstrate there was probable cause a crime was committed.

At the arraignment hearing, the Court inquired as to whether the State was going to transfer the first degree sexual abuse case to adult status. The State said “there is a first degree sexual assault set for Monday...and we are going to transfer that. A first degree sexual abuse, we cannot transfer with his history.” (9/26/2006 Tr. Page 5). It is clear from the State’s response to the trial judge’s questions that was their intent was to proceed on the more serious offense and the case that would be easier to transfer. The prosecutor admitted that they could not transfer Larry T. with his history if the case was set for a discretionary transfer. However, with a first degree sexual assault they would not have to put on any such evidence, it would be a mandatory transfer.

When the first degree sexual assault case was dismissed at the preliminary hearing, the State elected to file a transfer motion on the original charge, the first degree sexual abuse. The State came back and filed a transfer motion even though two weeks before they claimed they would not and could not file. This was a tactical maneuver to get at least one of the charges transferred after they were unsuccessful in proving probable cause on the easier transfer case, the first degree sexual assault. The problem is that this tactical maneuver was not timely and clearly violated W.Va. Code §49-5-10(b) which implicitly requires a transfer motion to be made prior to the juvenile arraignment.

The State further used the transfer process to retaliate against Larry T. once the first degree sexual assault, the easier case to transfer, was dismissed at the preliminary hearing. The juvenile denied the allegation of first degree sexual abuse and demanded a jury trial because he thought the trial would be a juvenile trial; that he would be faced with a juvenile disposition; that he would be adjudicated as a juvenile. When Larry T. entered his not guilty plea he had no reason to believe that he would not remain in the

juvenile jurisdiction on the first degree sexual abuse case. Had the juvenile been aware the State would attempt to transfer the first degree sexual abuse, he could have pled guilty on September 26<sup>th</sup>, 2008, and would have remained in the juvenile jurisdiction and have been sentenced in the juvenile jurisdiction. To file a transfer motion after such an inquiry or in response to a not guilty plea is punishing the juvenile for pleading not guilty and exercising his right to a jury trial. A trial court may not punish a defendant for exercising his constitutional right to a jury trial. United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485 (1982). “To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’” Goodwin, 457 U.S. at 372 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663 (1978)).

This Court has also addressed the issue of punishing a defendant for exercising his constitutional right to a jury trial. In Scott v. McGhee, 174 W.Va. 296, 324 S.E.2d 710 (1984) the defendant was charged in municipal court and requested a jury trial. After the defendant requested a jury trial, the municipal court judge dismissed the municipal court charges so the defendant could be charged with the comparable misdemeanor charges carrying longer jail sentences. Id. at 298, 324 S.E.2d at 712. This Court held the due process clause prohibits a municipal court judge from dismissing municipal charges solely because the accused has exercised his constitutional right to a jury trial, when the penalty under state law for the same offense carries a heavier jail sentence than provided for by municipal ordinance. Id. at 298, 324 S.E.2d at 712.

Similarly, in this case the juvenile was punished when he exercised his right to a jury trial and as a result was exposed to a heavier jail sentence than provided in the juvenile system. For the State to file a transfer motion after the juvenile entered a not

guilty plea and requested a jury trial punishes the juvenile for exercising his right to a jury trial and exposed him to a heavier jail sentence in the adult jurisdiction.

**II. THE CIRCUIT COURT OF KANAWHA COUNTY ABUSED ITS DISCRETION BY FAILING TO CONSIDER ALL OF THE STATUTORILY REQUIRED FACTORS AND TRANSFERRING THE JUVENILE CASE TO ADULT STATUS.**

**a. The State Failed to Address All of the Factors the Circuit Court is Required to Consider at a Transfer Hearing, Pursuant to W.Va. Code § 49-5-10(g) (2001), the Discretionary Transfer Provision.**

The State's motion to transfer was based upon the statutory provision W. Va. Code § 49-5-10(g) (2001) (2004 Repl. Vol). This provision does not require transfer, but instead leaves the decision to transfer within the discretion of the Court. However, "before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors." Syl. Pt.2, State v. Sonja B., 183 W.Va. 380, 395 S.E. 2d 803 (1990).

The Appellee concedes the evidence submitted at the transfer hearing was "admittedly not comprehensive." (Appellee Brief at 16). "Not comprehensive," however, is a poor characterization of the lack of evidence offered by the State and the lack of a careful and detailed analysis by the trial court. The State presented only two witnesses to support their motion to transfer – Ricky Smoot, Kanawha County Juvenile Probation Officer who only met with Larry T. four times, and Larry T.'s mother, Patsy T. Further, no psychological evaluation, no substance abuse evaluation, no sexual offender evaluation, no probation report, no pre-disposition report, no social summaries, no home

visits, no family interview, no school records, and no school testing was submitted into evidence. No expert witnesses testified such as a physician or psychologist and no teachers or counselors were called to testify.

**a. The State failed to present evidence of the juvenile's mental and physical condition.**

A long and consistent line of cases from this Court establishes the importance of psychological or psychiatric evidence in juvenile transfer cases. The Appellee argues that none of the cases regarding transfer hearings require that psychological or psychiatric evidence is absolutely required before a transfer motion may be granted. (Appellee's Brief at 17-18). However, this argument is inconsistent with this Court's rulings. This Court has consistently upheld transfer motions where there is psychological or psychiatric evidence and has consistently remanded transfer appeals when there has not been sufficient psychological or psychiatric evidence.

For example, in State v. Michael S., 188 W.Va. 229, 231, 423 S.E. 2d 632, 634 (1992), the evidence at the transfer hearing included a psychological report from a school psychologist, but this Court did not find that was enough evidence to support a transfer to adult jurisdiction. Whereas in In the Matter of Joseph M., 193 W.Va. 443, 457 S.E. 2d 120 (1995) the Court found sufficient evidence to transfer where the State presented the expert testimony of a child psychiatrist who had examined the juvenile and provided testimony regarding his potential for rehabilitation. Similarly, in State v. Gary F., 189 W.Va. 523, 532, 432 S.E. 2d 793, 801 (1993), it was found that the circuit court had

considered sufficient and appropriate evidence regarding the statutory factors where the State presented testimony by a psychiatrist.

The West Virginia Supreme Court has also addressed the consideration of age in regards to a transfer from the juvenile jurisdiction. Age of the juvenile is of some significance as it bears upon the opportunity of the Court to exercise its jurisdiction and to select appropriate procedures for rehabilitation; “however age alone should never be the determinative factor.” State v. Scott, 160 W.Va. 730, 734, 238 S.E. 2d 223, 226 (1977). Yet the trial court specifically stated, “considering the juvenile respondent’s age, the Court finds that his mental and physical condition was that of an adult.” (Supreme Court Record at 90).

**b. The State failed to present evidence of the juvenile’s home or family environment.**

Another factor the trial court is statutorily required to consider in a transfer hearing pursuant to W.Va. Code § 49-5-10(g) is the juvenile’s “home or family environment.” The Appellee asserts that the circuit court did consider testimony regarding the Larry T.’s home or family environment. The Appellee notes Larry T.’s mother testified and although presented in the “probable cause” portion of the transfer hearing, Larry’s sister-in-law, step-niece, and brother indicated that Larry had an unstable home environment. (Appellee’s Brief at 18-19).

This sparse evidence submitted, however, does not provide a detailed analysis of the juvenile’s home or family environment as required by this Court. Syl. Pt.2, State v. Sonja B., 183 W.Va. 380, 395 S.E. 2d 803 (1990). This Court held in State v. Michael

S., 188 W.Va. 229, 423 S.E.2d 632 (1992), that the juvenile’s probation officer’s investigation and report were insufficient because the probation officer, in her investigations, had only interviewed the juvenile respondent for forty-five minutes, and had never spoken to any of the juvenile respondent’s relatives, other than the juvenile respondent’s mother. Id. at 231, 423 S.E.2d at 634.

In this case, the Court did not even have as much information as was found inadequate in Michael S. In the present matter, the State called Ricky Smoot, Larry T.’s supervising probation officer who testified he conducted no home visits while supervising Larry T. (10/7/2008, Tr. 59), and only met with him for four office meetings (10/7/2008, Tr. 50). Further, no probation report was ever ordered nor an investigation conducted.

The paltry evidence the trial court received regarding Larry T.’s home or family environment should mitigate against his transfer. Larry’s mother testified he cooperated while on probation, maintaining employment and working towards his GED at Garnet Career Center (10/7/2008, Tr. 63-64). Further, the testimony from the “probable cause” portion of the transfer hearing the Appellee cites (Appellee’s Brief at 18-19) to would also mitigate against transfer in that the juvenile had an unstable home environment. (10/7/2008, Tr. 12). Larry’s mother testified he had been on probation since June 2008, and had followed all of the rules of probation. (10/7/2008, Tr. 68).

The Appellee also asserts the trial court is not required to “mention in detail the testimony of each witness who offered pertinent social testimony” in its findings, State v. Gary F., 189 W.Va. 523, 532, 432 S.E.2d 793, 802 (1993). (See Appellee’s Brief at 18). In this case, however, the issue is not whether the trial court provided details from the

witness testimony in its order, but that the trial court did not even mention at all the juvenile's home or family environment in the transfer order.

**c. The State failed to present evidence of the juvenile's maturity and emotional attitude.**

Regarding Larry T.'s emotional attitude and maturity, the Court's order states, "the fact that the juvenile was working while also furthering his education shows that his maturity was that of an adult when the offense allegedly occurred." (Supreme Court Record at 90). Further, since Larry T. baby-sat for the victim, the juvenile was "mature enough to know that he was in a position of responsibility to care for Jessica [C]." (Supreme Court Record at 90).

The trial court's ruling is far removed from a detailed analysis into the juvenile's maturity and emotional attitude. Again this is another factor where psychological and psychiatric evidence is indispensable. Without a careful and detailed analysis of psychological or psychiatric evidence, it would be impossible to know the juvenile's maturity and emotional attitude.

The Appellee argues that the trial court considered testimony of Appellant's sister in law and brother regarding Larry T.'s babysitting and the fact that he cried when confronted with the accusation against him. (Appellee's Brief at 19). The Appellee argues "this showing of remorse gave the court an indication of Appellant's emotional attitude." (Appellee's Brief at 19). If anything, however, the evidence presented through this testimony demonstrates Larry possesses the remorse, maturity, and emotional attitude to benefit from the dispositional options available in the juvenile system.

**d. The State failed to present evidence of the juvenile's school experience.**

Although required by statute, the trial court did not even address past school experience in the transfer order. This Court in State v. Michael S., 188 W.Va. 229, 423 S.E. 2d 632 (1992) offered guidance as to what would be appropriate consideration of a juvenile's school experience. In Michael S. the state offered a psychological report by a school psychologist that the juvenile was in special education classes for the learning disabled and was cited for discipline problems in school. Id. at 231, 423 S.E. 2d at 634. The juvenile's probation officer offered a social history information report that included the juvenile's mother had been notified approximately three times regarding the juvenile's misbehavior at school. Id.

The Court held, however, that the trial court gave insufficient consideration to the factors set "forth by statute which must be considered upon a motion to transfer." State v. Michael S., 188 W.Va. at 232, 423 S.E. 2d at 635. In the present case, there was even less evidence submitted. The Appellee argues "Mr. Smoot and Ms. T. also testified regarding appellant's school experience." (Appellee's Brief at 20). In fact, this was the only evidence submitted. Mr. Smoot testified that Larry was attending Garnet at the time of the allegation. (10/7/2008, Tr. 59). Mr. Smoot, however, had no knowledge of how Larry T. was doing in school prior to attending Garnet GED. (10/7/2008, Tr. Page 60). Larry's mother also testified, but she could not even remember when he had dropped out of school. (10/7/2008, Tr. 63).

Further, neither teachers nor counselors were called as witnesses and no school records or standardized test scores were submitted into evidence. Larry T.'s overall school record with Kanawha County Schools, which would have been easily accessible by the juvenile probation department, was not placed into evidence. Mr. Smoot did not gather Larry T.'s Kanawha County school records while supervising him or for the purposes of the transfer hearing. (10/7/2008, Tr. 59).

**e. The State failed to present evidence of the juvenile's reasonable prospects for rehabilitation and similar personal factors.**

Further, in considering whether to transfer a juvenile to criminal jurisdiction, an evaluation of the prospects for rehabilitation must be undertaken. In the Matter of Joseph M., 193 W.Va. 443, 457 S.E. 2d 120 (1995). Moreover, the Appellee is correct in arguing the juvenile must show that he has rehabilitation potential and options within the juvenile justice system. Michael S., 188 W.Va. at 232, 432 S.E. 2d at 636, and (Appellee Brief at 21).

This Court has once again offered guidance as to what grounds should be considered in determining a juvenile's potential for rehabilitation. In In the Interest of H.J.C., 180 W.Va. 105, 107, 375 S.E. 2d 576, 578 (1988) this Court upheld a transfer where the State offered evidence of the juvenile's lack of potential for rehabilitation. The State called the chief probation officer and the probation officer who directly supervised the juvenile. These witnesses testified the juvenile repeatedly refused to cooperate and had run the gamut of the juvenile justice system. The juvenile over the past ten years was placed in foster, group, detention and correctional settings and ran away from most of

those. Based upon the testimony from the probation department, the trial court found there were no reasonable prospects for rehabilitation left within the juvenile justice system. . Id. at 107-108, 375 S.E. 2d at 578-579 (1988).

The Appellee, however, argues Larry T.'s counsel introduced no evidence that the Appellant had significant rehabilitation potential. "In fact, no witnesses were called by the defense regarding any of Appellant's personal factors, including his potential for rehabilitation." (Appellee Brief at 21). This argument, however, is inaccurate. Defense counsel questioned Larry T.'s supervising probation officer extensively about the juvenile's placement history and possible placements. Mr. Smoot testified Larry T. has not undergone any treatment through the juvenile justice system. He has never been placed in a group home or other residential treatment facility for therapy and treatment while in the juvenile justice system. He has never undergone therapy, either outpatient or inpatient for depression or substance abuse in the juvenile justice system. (10/7/2008, Tr. 56-58). Ms. T. also confirmed Larry T. has had no treatment through the juvenile system, no therapy either inpatient or outpatient, and no substance abuse counseling. (10/7/2008, Tr. 68). Larry's history is in sharp contrast to the numerous placements the probation department tried in H.J.C's case.

Further, Larry T. still has rehabilitative options in the juvenile jurisdiction. If adjudicated a delinquent child, Larry T. could be sentenced to the West Virginia Industrial Home for the Youth until age twenty-one (21). The West Virginia Industrial Home for the Youth is a secure detention facility with an on-grounds school, individual and group therapy, and vocational training. While serving a sentence at the West

Virginia Industrial Home for the Youth, Larry T. could be placed in the sexual offender unit which offers individual therapy for juvenile sexual offenders.

The Court below stated, “finally with regard to rehabilitation, the Court concludes that the juvenile respondent does not have significant rehabilitative potential as he was already on probation when he committed the alleged sexual abuse.” (Supreme Court Record at 91).

While it is true Larry T. was on probation, he had only been on probation since June 2008 and had responded remarkably well to the structure. He was abstaining from drug and alcohol use, complying with the rules of probation, maintaining employment and working towards his GED.

**f. West Virginia Code §49-5-13 applies to disposition of juvenile delinquents, not transfer procedures.**

The Appellee further asserts that as a result of Larry T.’s refusal to waive the W.Va. Code § 49-5-13(a) (2005) (2004 Repl. Vol), the circuit court would have been prohibited from considering the psychological evaluation and sexual offender assessment that were previously ordered. The Appellee cites to W.Va. Code § 49-5-13(a) only in part. (Appellee’s Brief at 22). The entire W.Va. Code § 49-5-13 reads:

“Disposition of juvenile delinquents; appeal.”

- (a) In **aid of disposition** of juvenile delinquents, the juvenile probation officer assigned to the court shall, upon request of the court, make an investigation of the environment of the juvenile and the alternative dispositions possible. The court, upon its own motion, or upon request of counsel, may order a psychological examination of the juvenile. The report of such examination and other investigative and social reports shall not be made available to the court until after the adjudicatory hearing.

When this statute is reviewed in its entirety, rather than the single part the Appellee cites, it is easy to ascertain the code section applies to juvenile dispositions. When construed in context, it is clear W.Va. Code § 49-5-13(a) applies to the use of such reports to aid the court in the appropriate disposition of juvenile delinquent, not as factors to consider in transfer purposes.

The transfer provision of the West Virginia Code is separate and distinct. W.Va. Code § 49-5-10, along with this Court's case law, governs the practice and procedures regarding transfers. Other code sections, such as the disposition sections are not applicable.

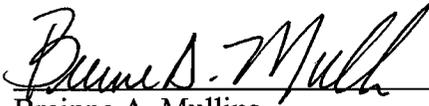
A long and consistent line of cases from this Court establishes the importance of psychological or psychiatric evidence in juvenile transfer cases. These cases range from indicating what evidence should be considered, such as expert testimony of a child psychiatrist, when evaluating a juvenile's mental and physical conditions. In the Matter of Joseph M., 193 W.Va. 443, 457 S.E. 2d 120 (1995) and State v. Gary F., 189 W.Va. 523, 532, 432 S.E. 2d 793, 801 (1993), and to what evidence is not sufficient, such as a report from a school psychologist. State v. Michael S., 188 W.Va. 229, 231, 429 S.E. 2d 632, 634 (1992). This Court has provided a great deal of guidance as to what evidence needs to be considered and how it is to be considered, yet none of the cases discussing psychological and psychiatric evidence even mention W.Va. Code § 49-5-13(a).

**REQUEST FOR RELIEF**

Wherefore, the Appellant, Larry T. respectfully requests that this Honorable Court reverse his transfer to the criminal jurisdiction of the Kanawha County Circuit Court and remand this case to the juvenile court.

Respectfully submitted,

LARRY T.  
By Counsel



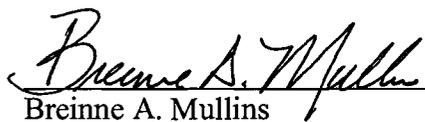
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## CERTIFICATE OF SERVICE

I, Breinne Mullins, hereby certify on the 30<sup>th</sup> day of July, 2009, I mailed a copy of the foregoing Appellant's Reply Brief to counsel for the Appellee, Dawn E. Warfield, Deputy Attorney General, 1900 Kanawha Boulevard East, Room E-26, Charleston, West Virginia 25305.

  
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