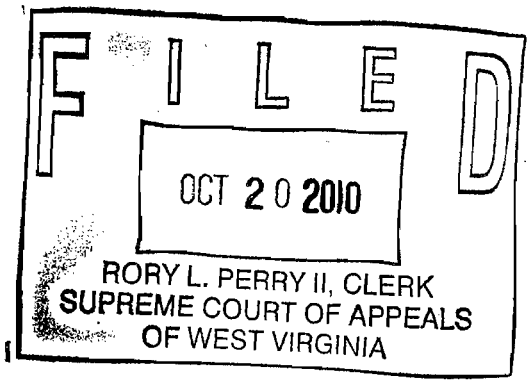
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



SUPREME COURT CASE NO.

35656

STATE OF WEST VIRGINIA,
Plaintiff below/Appellee

vs.

ROY "IKE" CUNNINGHAM,
Defendant below/Appellant

BRIEF OF THE APPELLANT

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ASSIGNMENTS OF ERROR

(a) The Court violated Appellant's constitutional rights as secured by Article III, §§5, 10 of the Constitution of West Virginia and the United States Constitution, Amendments 5, 8 and 14, when Circuit Court failed to impose definite sentences upon the Appellant when he was re-sentenced in February 1997 for convictions for Arson in the First Degree and Arsons in the Second Degree as required by West Virginia Code §61-3-1 (1997) and West Virginia Code §61-3-2 (1997) or in the alternative

(b) The Court erred in not re-sentencing the Appellant to definite terms as required by West Virginia Code §61-3-2 (1997), which became the applicable law after the Appellant was indicted, tried and convicted but prior to the Appellant's sentencing on February 27, 1997; the submission of the Petition for Appeal to the Supreme Court of Appeals on August 25, 1997; the denial of the Petition for Appeal on December 3, 1997; and the expiration of the ninety (90) day period for filing a Petition to certiorari with the United States Supreme Court. [See also *SER Miller v. Bordenkircher*, 166 W. Va. 169 (1980) (The rule is that the sentence pronounced becomes final at the end of the term at which it is declared.)].

SPECIFIC REFERENCE TO EACH PAGE OF THE TRANSCRIPT RECORD WHERE ISSUE RAISED, OBJECTION MADE, OR THE DOCUMENT IN THE RECORD ON APPEAL, WHICH RAISED THE ISSUE, ALONG WITH REFERENCE TO THE ORDER DECIDING ISSUE

The Motion for Correction of Sentence raising the issue is found at page 58 of Volume III of the transcript for Appeal.

The "Resentencing Order" (a copy of which is attached hereto) was not found in the transcript for Appeal.

COPY

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs. // CASE NO. 95-F-10

ROY "IKE" CUNNINGHAM,

Defendant.

RESENTENCING ORDER

On this 23rd day of November, 2009, came the State of West Virginia by Sean D. Francisco, Assistant Prosecuting Attorney in and for Wood County, West Virginia, and the Defendant, in custody, and accompanied by his attorney, Ernest M. Douglass, pursuant to the Defendant's Motion for Re-Sentencing.

Whereupon, the State objected to said motion, grounds assigned. Upon consideration of such motion, it is accordingly **ORDERED** that the sentencing Order dated August 30, 1996, be amended as follows:

Pursuant to Count Seven, *First Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than two (2) nor more than twenty (20) years.

Pursuant to Count Eleven, *First Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than two (2) nor more than twenty (20) years.

Pursuant to Count Thirteen, *First Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than two (2) nor more than

twenty (20) years.

Pursuant to Count Fourteen, *First Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than two (2) nor more than twenty (20) years.

Pursuant to Count Three, *Second Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than one (1) nor more than ten (10) years.

Pursuant to Count Five, *Second Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than one (1) nor more than ten (10) years.

Pursuant to Count Sixteen, *Second Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than one (1) nor more than ten (10) years.

Pursuant to Count Eighteen, *Second Degree Arson*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than one (1) nor more than ten (10) years.

Pursuant to Count Twenty-Three, *Conspiracy*, the Defendant shall be committed to the custody of the Commissioner of the West Virginia Division of Corrections for confinement in the penitentiary for a term and period of not less than one (1) nor more than five (5) years.

Pursuant to Count One, *First Degree Arson*, as enhanced by his conviction by his own admission of being the same person twice before convicted of felonies as hereinabove recited, the Defendant shall be committed to the custody of the Commissioner of the West

Virginia Division of Corrections for confinement in the penitentiary for life, pursuant to the provisions of W.Va. Code §61-11-18 (Michie Cum.Supp.1995).

It is further **ORDERED** that the sentences imposed in Counts Seven, Eleven, Thirteen, Fourteen, Three, Five, Sixteen, Eighteen and Twenty-Three all run **consecutive to each other** and **concurrent to the life sentence** for Count One.

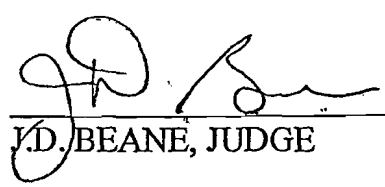
It is further **ORDERED** that the Defendant receive credit for 5,640 days previously served.

Whereupon, the Court advised and informed the defendant of his right to appeal this case to the West Virginia Supreme Court of Appeals and the right to employ an attorney to represent him for legal assistance in making such appeal, and that if the defendant did not have available finances and means to employ such an attorney, an attorney would be appointed by the Court to represent the defendant in making such appeal, and a transcript of the proceedings will be provided to the defendant without charge if he is unable to afford the cost of such transcript.

Whereupon, counsel for the defendant moved for an appeal bond in the amount of $20,000.00, which motion the Court DENIES.

Whereupon, the defendant is remanded to the custody of the West Virginia Division of Corrections for execution of sentence.

ENTER: 12-11-09



J.D. BEANE, JUDGE

WAIVER OF ORAL ARGUMENT

The Defendant waives oral argument.

CONCISE STATEMENT OF PROCEDURAL HISTORY

In 1996 the Circuit Court of Wood County, West Virginia, The Honorable George Hill presiding, imposed consecutive indeterminate sentences upon the Appellant for the following arsons:

Count One	First Degree Arson	567-1/2 Sixth Street
Count Seven	First Degree Arson	576 Sixth Street
Count Eleven	First Degree Arson	521 Gale Avenue
Count Thirteen	First Degree Arson	629 Leafy Glen Court
Count Fourteen	First Degree Arson	629 Leafy Glen Court
Count Three	Second Degree Arson	604 Market Street
Count Five	Second Degree Arson	801 Seventh Street
Count Sixteen	Second Degree Arson	579 Sixth Street
Count Eighteen	Second Degree Arson	579 Sixth Street

A Habitual Offender life sentence was also imposed upon the Appellant on the basis that he had been convicted of robbery when he was nineteen (19) and in 1984 was convicted under the Federal Dyer Act for interstate transportation of stolen vehicles. The third "triggering felony was Count One First Degree Arson" such that if the State failed to meet its constitutional burden of proof that the burned structure was a dwelling, the life sentence must be set aside.

Trial Counsel failed to raise the issue of the life sentence on appeal, which issue has now been raised in an omnibus Habeas Corpus proceeding along with trial counsel's ineffective assistance for failing to raise the issue on appeal. The Habeas Corpus proceeding has been pending a decision by the Circuit Court for several months probably owing to the numerous substantive issues raised including but not limited to:

(1) The fact that the Appellant did not receive a fair trial because Judge Hill, the trial judge, made faces during the testimony of witnesses, indicating to the jurors his pleasure or displeasure with the witnesses's testimony, supported by the testimony of Keith White, his trial counsel, and not refuted, in the Habeas Corpus proceedings (07-P-58).

(2) The failure of the State at trial to prove beyond a reasonable doubt that the burned structures were "dwellings", and

(3) The disparity of sentences of the co-defendants, some who actually admit setting the fires.

All these matters were in the mind of the Court resentencing the Appellant because Judge Beane is now presiding over the Habeas Corpus, No. 07-P-58, wherein has been entered the report of John Ellem as Appellant's expert witness in the Habeas. A copy of said report is attached hereto and included in this Petition by reference as "Exhibit A".

Also, a matter before the Circuit Judge in the Habeas Corpus proceeding is the poor health of the Appellant, who has had multiple surgeries to remove tumors.

In 2008, during the pendency of the Habeas Corpus, No. 07-P-58, the Appellant

filed a Motion seeking to be sentenced under the new penalties enacted by statute requiring a definite sentence. The Habeas Corpus proceeding is still pending a decision. However, on December 11, 2009, in response to the Motion, the Appellant was sentenced to the same indefinite sentences imposed by Judge George W. Hill, the trial judge. The only difference in the resentencing was that Judge Hill had run all sentences consecutively including the Habitual Criminal Life sentence while Judge Beane in resentencing the Appellant ran Counts Three, Five, Seven, Eleven, Thirteen, Fourteen, Sixteen and Eighteen consecutive to each other but concurrently with the Habitual Criminal Life sentence.

The primary thrust of the Appellant's motion was based on his right to be sentenced under the new penalties of definite sentences rather than indefinite sentences in effect when he was tried in 1996.

Following this Court's acceptance for appeal of the single ground, while ruling the other grounds as premature, the Appellant filed an original Mandamus proceeding in this Court seeking to compel a decision from Judge Beane in his Habeas Corpus, which is pending action by this Court.

BRIEF SUMMARY OF ARGUMENT

The Appellant is entitled to an election of being sentenced under the new definite sentence arson statutes rather than the older indefinite sentences. In resentencing the Appellant, the Circuit Court should be directed to consider whether the sentence is proportional to the character and severity of the arsons, the disproportionality of sentences meted out to co-defendants (who were the actual fire starters and principals in the first degree), the fact that no persons were harmed, and the value of the property lost.

THE STANDARD OF REVIEW

This is purely a legal conclusion to which a "de novo" standard of review is applied. *State v. Stuart*, 192 W. Va. 428, 452 S.E. 2nd 886 (1994).

BRIEF OF THE APPELLANT

I. WHY IS THE APPELLANT ENTITLED TO BE SENTENCED TO DEFINITE TERMS UNDER THE NEW ARSON STATUTE?

In West Virginia, the rule as articulated by the State Court of last resort is that the sentence pronounced becomes final at the end of term at which it is declared. *SER Dye v. Bordenkircher*, 168 W. Va. 374, 284 S.E. 2d 863, 865 (1981) citing *State ex. rel. Miller v. Bordenkircher*, 166 W. Va. 169; 272 S.E. 2d 676 (1980). Petitioner asks this Court to take judicial notice of the fact that the Circuit Court of Wood County has three (3) terms of Court annually. The January 1997 term commenced on Monday, January 13, 1997. Petitioner was sentenced on Thursday, February 27, 1997. Pursuant to *SER Dye v. Bordenkircher*, Petitioner's conviction became final no sooner than May 11, 1997. (The May term of the Circuit Court of Wood County, West Virginia, commenced on Monday, May 12, 1997.) "Under the prior decisions of the U.S. Supreme Court, the construction of a statute by its highest court, i.e., the Supreme Court of Appeals of West Virginia ... must be accepted as conclusive." *Louiseville, New Orleans and Texas Ry. Co. v. Mississippi*, 133 U.S. 587, 591, 10 S.Ct. 348, 349, 33 L. Ed. 784, 785 (1890).

Appellant contends that in "criminal cases, there is no final judgment without a conviction and sentence." See, B. § 200, "Final Judgments", American Jurisprudence, Vol. 46, 2nd Series, p. 517. Under West Virginia law, a judgment is not regarded as final until the expiration of the period during which the judgment remains within the inherent power

of the Circuit Court to modify or vacate. See, West Virginia Rules of Criminal Procedure, Rule 35(b), (120 days), Rules of Appellate Procedures, Rule 37(b) (4 - 6 months); SER Dye v. Bordenkircher, *supra*; State ex. rel. Miller v. Bordenkircher, *supra*. The law mandating definite terms of imprisonment upon conviction for arson became effective during the period when the Circuit Court of Wood County, West Virginia, had the powers to modify or vacate the indeterminate sentences imposed on Appellant.

"[A] final judgment...is one which disposes of the whole subject,... provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of judgment..." Vol. 11A Michie's Jurisprudence, "Judgments and Degrees", §7, at 64-65. "All judgments become final at the expiration of the term in which they are entered." Pyles v. Coiner, 152 W. Va. 473, 164 S.E. 2d 435 (1968); State v. Ludwig, 102 W. Va. 363, 365, 135 S.E. 277, 278 (1926). "The sentence [pronounced] becomes final at the end of the term at which it is declared."

The first session of the Seventy-Third Session of the West Virginia Legislature commenced on January 8, 1997, and concluded on April 20, 1997. This is the Legislature that determined that determinate sentences are more proportionate to the character and degree of the offense for arson offenses than indeterminate sentences. The West Virginia Legislature enacted West Virginia Code §61-3-1 (1997, c. 73) and West Virginia Code §61-3-2 (1997, c. 73) on April 12, 1997. Subsequently, Governor Underwood approved

and signed the bill on May 1, 1997, and it became the law of the land. West Virginia Constitution, Article VII, §14. "When the Governor approves and signs a bill presented to him after its passage it becomes law; and no additional requirement to make such law effective is expressly specified or imposed by" the State Constitution. *State v. Heston*, 137 W. Va. 375, 71 S.E. 2d 482, 492 (1952). Appellant's judgment was not final when the legislature mandated definite terms of imprisonment for arson.

II. HOW SENTENCING UNDER THE NEW ARSON LAW TO A DEFINITE TERM WILL PERMIT THE APPELLANT HIS CONSTITUTIONAL RIGHT TO RECEIVE A SENTENCE IN PROPORTION TO THE SEVERITY OF HIS SENTENCE.

When the Honorable J.D. Beane sentenced Appellant on November 22, 2009, the relevant statutory provisions required imposition of a "definite ter of imprisonment" for anyone convicted of arson in the first degree, West Virginia Code §61-3-1 (1997, c. 73), or anyone convicted of arson in the second degree, West Virginia Code §61-3-2 (1997, c. 73). Appellant has served sixteen (16) years and none of his co-defendants (the principals in the first degree) were required to serve more than twenty-seven (27) months.

Given the minimum sentences imposed on Walter Dale McFee, Charles Fought (misdemeanors), and Michael Schneider, Appellant's co-defendants, the dilapidated condition of the abandoned buildings, and disparity in the age of the Appellant and the age of his co-defendants, no definite term of imprisonment greater than two (2) years, the statutory minimum upon conviction of arson in the first degree, is "proportionate to character and degree of the offense" for the five (5) convictions for arson in the first degree, i.e., Count 1 (657-1/2 Sixth Street), Count 7 (576 Sixth Street), Count 11 (521 Gale Avenue), Counts 13 and 14 (629 Leafy Glen Court). Counts 13 and 14 are predicated on two (2) fires at 629 Leafy Glen Court less than thirty (30) days apart. The fires were ignited by Charles S. Fought, who was allowed to plead guilty to two (2) misdemeanors.

Given the minimum sentences imposed on Jerry L. Cheeseman (probation), Walter McFee, Charles S. Fought (misdemeanors), and Michael Schneider, the Appellant's co-

defendants, the dilapidated condition of the building at 579 Sixth Street, the nominal damage caused by the fires, and the disparity in the age of the Appellant and the age of his co-defendants, no definite term of imprisonment greater than one year (1) year, the statutory minimum upon conviction of arson in the second degree, is "proportionate to character and degree of the offense" for the four (4) convictions for arson in the second degree, i.e., Count 3 (604 Market Street, a commercial building), Count 5 (701 Seventh Street, a commercial building), and Counts 16 and 18 (579 Sixth Street). Counts 16 and 18 are predicated on fires at the same building less than thirty (30) days apart and the testimony of Jerry L. Cheeseman, who received probation.

No co-defendant was required to serve more than twenty-seven (27) months in prison. Michael Schneider was sentenced on August 16, 1996. He was granted parole on October 27, 1998, and discharged from custody on January 26, 2000. Walter Dale McFee was sentenced on May 5, 1995. He was granted parole on January 23, 1997, and discharged from custody on August 12, 1998. Charles S. Fought pled guilty to two (2) misdemeanors and Jerry L. Cheeseman received five (5) years probation.

The indeterminate sentences the Circuit Court of Wood County, West Virginia imposed upon the Appellant in November, 2009, are void because the sentences do not strictly conform to West Virginia Code §61-3-1 (1997, c. 73) and West Virginia Code §61-3-2 (1997, c 73); *SER Truslow v. Boles*, 148 W. Va. 707; 137 S.E. 2d 235 (1964).

The general rule is that a judgment rendered by a Circuit Court must conform strictly

to the statute which prescribes the punishment to be imposed and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void. State v. Cottrill, 204 W. Va. 77, 511 S.E. 2d 488 (1998). In November 2009, West Virginia Code §61-3-1 (1997, c. 73) prescribed a "definite term of imprisonment" for anyone convicted of arson in the first degree. West Virginia Code §61-3-2 (1997, c 73). The sentences imposed by the Circuit Court of Wood County in the case do not strictly conform to the relevant statutes. State v. Cunningham, Circuit Court of Wood County, 95-F-10, "Sentencing Order", December 11, 2009.

Appellant contends the sentence for arson in the first degree must be for a definite term of imprisonment between two (2) years and twenty (20) years and the imposition of an indeterminate sentence of two (2) to twenty (20) years for this crime constitutes error. See, State v. Lawson, 165 W. Va. 119; 267 S.E. 2d 438 (1980); Syl. Pt. 5, State v. Chafin, 156 W. Va. 264, 192 S. E. 2d 728 (1972). When the Court imposed an indeterminate sentence, the Court, in effect, imposed the maximum sentence for every conviction for arson in the first degree and the maximum sentence for every conviction for arson in the second degree.

Black's Law Dictionary defines an "indeterminate sentence" as "a maximum prison term that the parole board can reduce, through statutory authorization, after the inmate has served the minimum time required by law." St. Paul. MN: Thomas Reuters, Ninth Edition, p. 1485. A definite term mandated by state law allows each sentence to be proportionate

to the character and degree of the offense as required by Article III, § 5 of the Constitution of West Virginia.

There are four (4) factors, which the sentencing authority should consider when imposing a definite sentence. Robinson, Paul H., Cahill, Michael T. And Mohammad, Usam "The Five Worst (and Five Best) American Criminal Codes", Northwestern University Law Review, Fall, 2000. One, did the arsonist jeopardize anyone's safety in addition to damaging property? No individual's safety was jeopardized in any of the nine (9) fires ignited by Appellant's co-defendants. Two, what type of property was damaged? At trial the Prosecutor described the buildings as vacant and abandoned. Three, what was the value of the property before the fire? Four, how extensive was the damage to the property?

The West Virginia Legislature recently added the last three factors to the State Code when the lawmakers created a felonious destruction of property, West Virginia Code §61-3-30(b), and misdemeanor destruction of property, West Virginia Code §61-3-30(a).

> Any person who unlawfully, willfully and intentionally destroys, injures or defaces the real...property of one or more other persons or entities during the same act, series of acts or course of conduct causing a loss of value of the property in an amount of two thousand five hundred dollars or more, is guilty of the felony offense of destruction of property and, upon conviction thereof shall be fined not more than two thousand five hundred dollars or imprisonment in the state correctional facility for not less than one year nor more than ten years, or in the discretion of the court, confined in the...regional jail not more than one year, or both fined and imprisoned. West Virginia Code §61-3-30(b) (2004, c.78).

The distinction between felonious destruction of property and the misdemeanor is

whether the damages inflicted produced a loss in the value of property over $2,500.00. Therefore, state law has created a hierarchy of punishment when real property is damaged, defaced, injured or set on fire:

1) 1st Degree Arson (1997) - Definite term between 2 and 20 years.

2) 2nd Degree Arson (1997) - Definite term between 1 and 10 years.

3) 3rd Degree Arson (1997) - Definite term between 1 and 3 years.

4) Destruction of Property (2004) - Indeterminate term (1 - 10 years)

5) Destruction of Property - Misdemeanor

Nearly all of the Appellant's convictions rest upon incidents where the damage inflicted produced a loss in value under $2,500.00. The incidents are, under the current law regarding destruction of personal property, misdemeanors. It is virtually impossible to maintain the fiction that Appellant should be subject to the maximum penalty for each and every arson conviction.

Given the evidence presented to the jury, the Court's knowledge of the sentences imposed on Appellant's co-defendants and the evidence produced and presented to the State Habeas Court, the maximum penalty is not proportionate to the character and degree of the offense. Appellant requests this Court to vacate the convictions and sentences for arson and remand this case to the Circuit Court of Wood County, West Virginia, for sentencing.

The Circuit Court sentenced Appellant to the maximum penalty upon his conviction

for arson in the fist degree for a fire at 521 Gale Avenue, Parkersburg, West Virginia, in 1996, 1997, and 2009. The evidence presented to the jury and the evidence presented to the State Habeas Court do not support the imposition of the maximum sentence.

As to Count 11 (521 Gale Avenue, Parkersburg, West Virginia, July 1992), the Circuit Court recognized John Ellem, Esquire, of Parkersburg, West Virginia, as an expert witness in the currently pending Habeas Corpus. In his report, Mr. Ellem opined the second fire at 521 Gale Avenue on July 11, 1992, "should have amounted to only a charge of destruction of property". *Cunningham v. Painter*, Circuit Court of Wood County, West Virginia, Case No. 07-P-58(B), Report of the Expert Witness, June 11, 2008, p. 17. The trial jury acquitted Appellant of the first fire at 521 Gale Avenue on May 29, 1992. In his analysis of the evidence presented to jury, Mr. Ellem wrote:

> Affidavit #1 provides information on 521 Gale Avenue and notes that the property was identified as vacant, had a homestead exemption in 1991 but not in 1992, was assessed a fire fee for a structure 458 square feet, did not have homeowners insurance, had no operational smoke detectors, and water service had been disconnected in 1992.
>
> (C)o-conspirator, Jerry Cheeseman, testified that the house had one time been occupied by a Goldie Gregg, but she was now in a nursing home (Trial Transcript, p. 541). Similarly,...Charles Fought testified that the house on "Gale Ave." was an empty house (Trial Transcript, p. 703). In fact, Fought testified that he set the second fire at 521 Gale Avenue but did not think it would burn because it had already been caught on fire (Trial Transcript, p. 709). For his efforts in setting the fire on Gale Avenue. Mr. Fought received a plea to misdemeanor destruction of property (Trial transcript, p. 724). Finally, and of particular importance is the testimony of John Sandy that the first fire (May 29, 1992) at 521 Gale Avenue involved not only a vacant house, but caused a great deal of damage including significant char at floor level. Mr. Sandy noted that the fire spread rapidly due to a lot of debris, the debris being clothing, furniture that had been smashed or in disrepair - the fire load was the clothing and trash that was scattered throughout the structure." (Trial Transcript, p. 819)

> The house located at 521 Gale Avenue involved two separate arsons...Given the testimony of the witnesses it is arguable that 521 Gale Avenue was not intended for habitation prior the first fire as its last occupant was in a nursing home and the house apparently was in very poor condition and without utility service. However, in my opinion, 521 Gale Avenue was no longer a dwelling house nor could it have even been remotely intended for habitation after the first fire and before the second one in July of 1992. Such a conclusion is amply supported by the testimony of John Sandy...In fact, I did not note any evidence of an owner or anyone else or that matter attempting to make repairs to the property after the first fire.

Cunningham v. Painter, Circuit Court of Wood County, West Virginia, Case No. 07-P-58(B), Report of the Expert Witness, June 11, 2008, pp. 17, 16, 18.

In this case, the State could not establish the intention of the Goldie E. Gregg, the owner of 521 Gale Avenue in 1992, to use the building as a dwelling. Mrs. Greg died on June 10, 1994. The jury was not instructed that in order to convict an individual of common law arson that the owner's intent to use the structures as a dwelling is a critical element of the offense of arson in the first degree. The objective facts do not support imposition of the maximum sentence. One, no individual's safety was jeopardized by the July fire at 521 Gale Avenue. Two, the property damaged was an abandoned building not a dwelling. Three, the assessed value of the property was $1,370.00 in 1991 and $1, 617.00 in 1992.

As to 629 Leafy Glen Court, Count 13 (May, 1992), Count 14 (June, 1992), the Circuit Court sentenced Appellant to the maximum penalty of four (4) to forty (40) years upon his convictions for first degree arson for fires at 629 Leafy Glen Court, Parkersburg, West Virginia, in 1996, 1997, and 2009. The evidence presented to the jury and the evidence presented to the State Habeas Court do not support the imposition of the

maximum sentence.

The Circuit Court recognized John Ellem, Esquire, of Parkersburg, West Virginia, as an expert witness. In his report, Mr. Ellem opined the fires at 629 Leafy Glen Court "was at most second degree arson." In his analysis, Mr. Ellem wrote:

> Affidavit #4 provides information on 629 Leafy Glen Court, and notes that it was sold to the State for non-payment of 1987 real estate taxes with Issac Martin the most recent owner...This property would appear to still be owned by the State to present day. Captain Don Hamric of the Parkersburg Fire Department testified this location was a vacant building and that the utilities were turned off.
>
> The house at 629 Leafy Glen had been forfeited to the State of West Virginia before the arson and resulting jury verdict and in fact, still appears to be owned by the State. Thus, Mr. Cunningham was convicted of first degree arson on an unoccupied property that was forfeited to, and owned by the State of West Virginia. In reviewing my notes from the lengthy trial transcript, I do not see where this fact was brought out into evidence by defense counsel. The fact that neither the owner (nor any heirs) redeemed the property, nor was there any purchaser of the tax ticket, coupled with the building being vacant or abandoned should all have been presented to a jury as it would have cast tremendous reasonable doubt as to whether the property was still intended for habitation. In fact, given the State's ownership of the property how can anyone say what it was intended for at the time of (the) offense? The arson at this location was at most second degree arson.

Cunningham v. Painter, Circuit Court of Wood County, West Virginia, Case No. 07-P-58(B), Report of the Expert Witness, June 11, 2008, pp. 16, 14.

In this instance, the State did not identify the owner of 629 Leafy Glen Court or establish the intention of the owner in 1992 to use the building as a dwelling. The jury was not instructed that in order to convict an individual of common law arson that the owner's intent to use the structure as a dwelling is a critical element of the offense of arson in the first degree. The objective facts do not support imposition of the maximum sentence.

One, no individual's safety was jeopardized by the two fires at 629 Leafy Glen Court. Two, the property damaged was an abandoned building not a dwelling. In response to a Freedom of Information Request, Lydia E. White told Appellant's investigator "that 629 Leafy Glen Court is located in a M-1 Zone." (L. E. White, Assistant Zoning Administrator, to D. Dye, Investigator, Tri-S Investigations, June 27, 2008.) The Parkersburg Planning and Zoning Regulations stated "in the interest of general health and welfare, residential...uses are not permitted." (City of Parkersburg, Zoning Ordinance, No. 1351.02, M-1 Light Manufacturing District Use Regulations.) Buildings in the M-1 Light Manufacturing D Zone are non-residential. Three, the assessed value of the property was $2,142.00 in 1991 and $2,528.00 in 1992. On July 8, 2008, Dominique Dye of Tri-S Investigations, Inc., confirmed that the records in the Sheriff's Tax Office show that this property was actually given to the State in October 17, 1988. State v. Scarberry, 187 W. Va. 251, 418 S.E. 2d 361, 364 (1992). (Because owners of the mobile home abandoned it and had no intention of returning, Appellant did not break into a dwelling.) Therefore, the damage inflicted produced a loss in the value of property under $2,500.00 and under the current destruction of property law would constitute a misdemeanor.

As to Count 1 (567-1/2 Sixth Street, Parkersburg, West Virginia), the owner was identified as Mary K. Lobbins. Mrs. Lobbins did not testify. It is unknown if she intended to use the building as a dwelling in 1991. The jury was not instructed that in order to convict an individual of common law arson that the owner's intent to use the structure as a dwelling is a critical element of the offense of arson in the first degree.

The objective facts do not support imposition of the maximum sentence. One, no individual's safety was jeopardized by the fire at 567-1/2 Sixth Street. Two, the property damaged was an abandoned building not a dwelling. In response to a Freedom of Information Request, Lydia E. White told Appellant's investigator "that 567-1/2 Sixth Street is located in the M-1 Zone." (L. E. White, Assistant Zoning Administrator, to D. Dye, Investigator, Tri-S Investigations, June 27, 2008.) The Parkersburg Planning and Zoning Regulations stated "in the interest of general health and welfare, residential...uses are not permitted." (City of Parkersburg, Zoning Ordinance, No. 1351.02, M-1 Light Manufacturing District Use Regulations.) Buildings in the M-1 Light Manufacturing D Zone are non-residential. Three, in tax year 1991 the assessed valuation of 567-1/2 Sixth Street was $1,602.00 and after the fire in tax year 1992 the assessed valuation of 567-1/2 Sixth Street was $1,890.00. Therefore, the damages inflicted produced a loss in the value of property under $2,500.00 and under the current destruction of property law would constitute a misdemeanor.

As to Count 7 (576 Sixth Street, Parkersburg, West Virginia), after Appellant's trial, the Wood County Assessor identified the owner of 576 Sixth Street as Clyde Lipscomb, whose legal residence was 912 - 23rd Street, Vienna, West Virginia. Mr. Lipscomb did not testify at the Appellant's trial. The State did not establish the intention of Mr. Lipscomb to use the building as a dwelling. The jury was not instructed that in order to convict an individual of common law arson that the owner's intent to use the structure as a dwelling is a critical element of the offense of arson in the first degree.

The objective facts do not support imposition of the maximum sentence. One, no individual's safety was jeopardized by the fire at the 576 Sixth Street. Two, the County Assessor classified this property as Class IV: Non-residential. In response to a Freedom of Information Request, Lydia E. White told Appellant's investigator "that 576 Sixth Street is located in the B-2 Zone." (L. E. White, Assistant Zoning Administrator, to D. Dye, Investigator, Tri-S Investigations, June 27, 2008.) Three, in the tax year 1991 the assessed valuation for 576 Sixth Street was $3,932.00 and after the fire in the tax year 1992 the assessed valuation of 576 Sixth Street was $3,578.00. The fire produced a loss in the value of property of $354.00 and under the current destruction of personal property law would constitute a misdemeanor.

Clarence Cox, Manager of the Parkersburg Utility Board, indicated that water to 576 Sixth Street was inactive (disconnected). On May 16, 2008, Eric Bennett, Manager of the Parkersburg Utility Board, reiterated that the "structure located at 576 6th Street had an active account from July 1981 through October 1986. The structure was demolished in 1993." The electrical was disconnected. (Fire Investigation Report, Parkersburg Fire Dept., Jan. 4, 1992. Field Report - Parkersburg Fire Department - December 31, 1991. Captain Hupp identified 576 Sixth Street as "vacant property."

Mr. Lipscomb did not claim a homestead exemption for 576 Sixth Street. Mr. Lipscomb did not pay the annual fire protection fee after he acquired the property.

As to Count 3 (604 Market Street, Parkersburg, West Virginia, December 18, 1991), the Circuit Court sentenced Appellant to the maximum penalty of one (1) to ten (10) years upon his conviction of arson in the second degree for a fire at 604 Market Street in 1996. Despite the revision to the law, the same sentence was imposed in 1997 and 2009. The evidence presented to the jury and the evidence presented to the State Habeas Court do not support the imposition of the maximum sentence.

The loss of the value of the property is non-existent. On July 1, 1991 the assessed value of the building at 604 Market Street was $7,710.00 and on July 1, 1992, the assessed value of the building at 604 Market Street was $10,278.00.

As to Count 5 (801 Seventh Street, Parkersburg, West Virginia, December 18, 1991), the Circuit Court sentenced Appellant to the maximum penalty of one (1) to ten (10) years upon his conviction of arson in the second degree for a fire at 801 Seventh Street in 1996, 1997 and 2009. The evidence presented to the jury and the evidence presented to the State Habeas Court do not support the imposition of the maximum sentence.

The Field Report completed by A. Modesitt on December 18, 1991, identified the owner of the building at 810 Seventh Street, Parkersburg, West Virginia, as Sharon Cunningham. The estimated total loss (contents and structure) was $200.00. The fire was contained to the exterior roof of the building. (*State v. Cunningham*, Trial Record, Exhibit 57.)

As to 579 Sixth Street, Parkersburg, West Virginia, (Count 16 - May 31, 1992 and Count 18 - July 8, 1992), the Circuit Court sentenced Appellant to the maximum penalty of two (2) to twenty (20) years upon his conviction of arson in the second degree for two (2) fires at 579 Sixth Street in 1996. After the law was revised, the same sentence was imposed in 1997 and 2009. The evidence presented to the jury and the evidence presented to the State Habeas Court do not support the imposition of the maximum sentence.

The Wood County Grand Jury indicted Appellant for two (2) fires at 579 Sixth Street (Counts 16 and 18). The Prosecutor requested and the trial judge granted a substantial Amendment to the indictment to specify the location as "at or near" 579 Sixth Street. (Defense counsel failed to object at the pretrial hearing to the State's Amendment of Counts 12 through 16 so as to pertain to a certain structure located at 577 Sixth Street instead of 576 Sixth Street. *State v. Cunningham*, Circuit Court of Wood County, Trial Transcript, p. 214.) During the jury voir dire, the location was referred to as 577-1/2 Sixth Street. (*State v. Cunningham*, Circuit Court of Wood County, Trial Transcript, p. 214.)

In 1992, 579 Sixth Street (85-114) was a vacant lot. There are four (4) lots at or near 579 Sixth Street. When the State constructively amended the indictment returned by the Grand Jury, it could have easily provided defense counsel, the Court and jury with the specific address or lot designation for the building that was "at or near" 579 Sixth Street, i.e. Block 85, Lot 115; Block 85, Lot 133; or Block 85, Lot 132.

The 579 Sixth Street address was a vacant lot. As such the pretrial defense to this charge was that there was no second degree arson because there was not building. The jury would have had three (3) choices:

1) Acquit the Appellant of 2nd Degree Arson

2) Convict the Appellant of 3rd Degree Arson - West Virginia Code §61-3-6 (1935) Willfully, unlawfully and maliciously setting fire on lands. The penalty is one to five years

3) Convict the defendant of Destruction of Property - West Virginia Code §61-3-30 (1975) - Misdemeanor - Fine less than $500; one year in jail

In 2008, the Court vacated a sentence for nighttime burglary, because it was inconsistent with the indictment returned by the Grand Jury. State v. Noll, 672 S.E. 2d 142, 148 (2008). In reaching this conclusion, the Court revisited State v. Adams, 193 W. Va. 277 (1995), the seminal case addressing amendments to indictments. The Noll Court held:

> The effect of the evidence and subsequent instruction was, in essence, to indirectly or constructively amend the indictment to the elevated offense of daytime burglary under W. Va. Code §61-3-11(a), which calls for a greater sentence than W. Va. Code §61-3-11(b). By subjecting the appellant to a sentence greater than that which would be permitted under the *language* in the indictment, the action of the circuit court prejudiced the appellant in the sentencing phase of this trial.

Therefore, allowing the prosecution to change the address in the indictment, it was a substantial amendment that under the Adams case must be resubmitted to the Grand Jury. State v. Adams, *supra*. Defense counsel had conducted no pretrial research on the building at 577-1/2 Street, and Appellant was subjected to a greater sentence than permitted under the precise terms of Indictment 95-F-10.

On May 25, 1994, Jerry Cheeseman was allowed to plead guilty to Conspiracy to Commit Second Degree Arson as charged in Count Two of his indictment. State v. Cheeseman, Circuit Court of Wood County, WV, #94-F-1. The Honorable Robert A. Waters accepted his plea, suspended his indeterminate sentence of one (1) to five (5) years, and placed Mr. Cheeseman on probation for five (5) years. Based on Mr. Cheeseman's trial testimony, the jury found Appellant guilty of Counts 16 and 18, which resulted in the Circuit Court imposing a sentence of two (2) to twenty (20) years.

The trial court judge failed to fulfill his oath of office when he failed to sentence Appellant to definite terms of imprisonment as required by West Virginia Code §61-3-1 *et. seq.* (1997, c. 73).

The Constitution of West Virginia contains a strict proportionality clause. Article III, Section 5, requires all sentences to be proportionate to the character and degree of the offense. West Virginia Code, §61-3-1 *et. seq.* (1997, c. 73) mandates a "determinate term of imprisonment" be imposed upon an individual convicted of arson. Every judge must take an oath or affirmation to support the Constitution of West Virginia, Article IV, Section 5, "before proceeding to exercise the authority or discharge the duties thereof." See also West Virginia Code §6-1-7 (Code 1923, c. 9, § 4), West Virginia Code §30-2-3 (Code 1923, c. 19).

The Honorable George Hill, Jr., served as a trial judge at Appellant's criminal trial.

Judge Hill was cognizant of the minimal damage caused by the fires the Appellant's co-defendants ignited and the minimal punishment imposed on Appellant's co-defendants. In February, 1997, he sentenced Appellant to the maximum sentence for each conviction for violating West Virginia Code §61-3-1 (1935, c. 105), and he sentenced Appellant to the maximum sentence for each conviction for violating West Virginia Code §61-3-2 (1935, c. 105). He did not mitigate this punishment by ordering any of the nine sentences to run concurrently with the first term of imprisonment imposed. West Virginia Code, §61-11-23.

Judge Beane did allow some sentences to run concurrently when he failed to sentence the Appellant to a definite term for arson as sought in the Motion resulting in the re-sentencing from which he appealed.

In 1997, the initial term of the Circuit Court of Wood County, West Virginia, ran from January 1997 to May 1997. In April 1997, the West Virginia Legislature enacted a bill mandating definite sentences for all degrees of arson. The Honorable Cecil Underwood approved and signed this bill on May 7, 1997, prior to end of the January term of the Circuit Court of Wood County. Judge Hill did not recall and re-sentenced Appellant to proportionate sentences for each conviction for violating West Virginia Code §61-3-1 (1997, c. 73) and West Virginia Code §61-3-2 (1997, c. 73) as fidelity to the Constitution of West Virginia would require.

The Constitution of West Virginia contains a strict proportionality clause. Article III, Section 5, requires all sentences to be proportionate to the character and degree of the

offense. West Virginia Code §61-3-1 *et. seq.* (1997, c. 73) mandates a "determinate term of imprisonment" be imposed upon an individual convicted of arson."

Dudley Keith White and Carl Paul Bryant served as Appellant's trial counsel. Mr. White and Mr. Bryant were cognizant of the minimal damage caused by the fires Appellant's co-defendants ignited and the minimal punishment imposed on Appellant's co-defendants. On February 27, 1997, Appellant was sentenced to two (2) to twenty (20) years on each count of first degree arson. Appellant was sentenced to one (1) to ten (10) years on each count of second degree arson. The initial conviction for arson in the first degree was enhanced to a life sentence, and all sentences initially were consecutive.

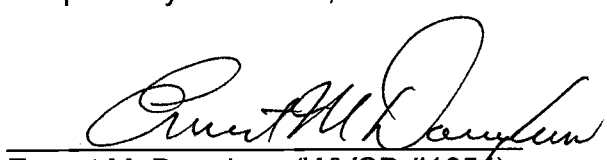
A judgment that imposes an indeterminate sentence when the applicable law prescribes a "definite term of imprisonment" is void. SER *Truslow v Boles*, 148 W. Va. 707; 137 S.E. 2d 235 (1964). A void judgment is an illegal sentence. Rule 35(a) allows an attorney to request the court to correct an illegal sentence at anytime. Black's Law Dictionary defines a "void judgement" as "a judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally." St. Paul MN: Thomas Reuters, Ninth Edition, p. 921.

Mr. White also prepared Appellant's direct Appeal to this Honorable Court. Mr. White did not include Court's failure to impose definite terms of imprisonment as required

by West Virginia Code, §61-3-1 *et. seq.* (1997, c. 73) as a viable claim for relief. Mr. White identified eleven (11) errors but he did not challenge the imposition of the habitual life sentence or the imposition of indeterminate sentences when definite sentences were required.

In the original Petition for Appeal, which was refused, there is no reference to Syllabus point 3, *SER Nicholson v. Boles*, 148 W. Va. 229; 134 S.E. 2d 576, 581 (1964), which would appear to support our contention that the State law mandated definite sentences when the Appellant was re-sentenced under West Virginia Code §61-3-1 and 61-3-2 (1997, c. 73).

Respectfully submitted,



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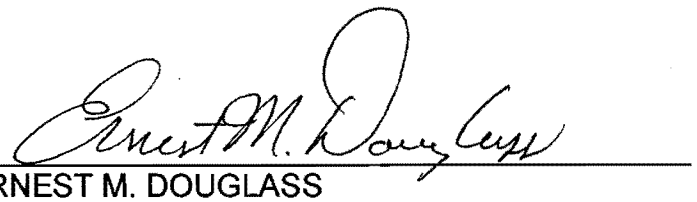
CERTIFICATE OF SERVICE

ERNEST M. DOUGLASS, Counsel for the Appellant, does hereby certify that on the 19th day of October, 2010, he served the foregoing BRIEF OF THE APPELLANT upon the following persons by depositing a true and exact copy thereof in the United States Mail,

postage prepaid, addressed as follows:

Jason Wharton
Wood County Prosecuting Attorney
317 Market Street
Parkersburg, WV 26101



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