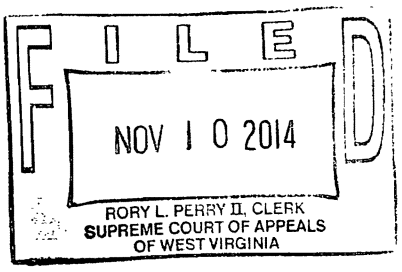

NO. 14-0484

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

v.

JERRY LEE HEDRICK
Defendant Below, Appellant

(Circuit Court of Mineral County)
(Case No. 09-F-58)

PETITIONER'S REPLY

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COMES NOW the Appellant, Jerry Lee Hedrick, by Counsel Nicholas T. James, pursuant to Rule 10(g) and accordingly replies to Respondent's Brief.

A.

The primary issue on appeal is whether the lower court abused its discretion by failing to strike two handwritten terms and conditions of extended supervised release established *sua sponte* by Petitioner's probation officers in January, 2014. The State's analysis is overly simplistic and primarily centered on two propositions in arriving at its final conclusion, *to-wit*; the underlying offense occurred on resort property[1] and the Petitioner has a history[2] of groping women. The State essentially argues that, given the above two propositions, the Petitioner will reoffend on resort property [or is at least high risk to reoffend on resort property] and therefore it is absolutely necessary to ban Petitioner from the resort in order to protect the public. The State's argument is not once a groper, always a groper. The Petitioner understands the State's argument to be once a groper <u>on resort property</u>, always a groper <u>on resort property</u>. Petitioner submits that the State's argument is an illogical syllogism.

Given the narrow focus of the State's argument, it appears that the State is satisfied that the public is adequately protected from the Petitioner outside the twenty-seven (27) acre property boundary of Smoke Hole Caverns. The State only argues that banning Petitioner from the resort protects the public. Is the State satisfied that once members of the public leave resort property that they are protected? It appears that the answer is yes. After all, visitors come and go all the

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[1] The Petitioner's underlying offense occurred at his marital residence, which is situated on resort property. [*See* Appendix, p. 22]

[2] Although the State and the lower court submit that the Petitioner has a history of groping women, the Petitioner has no other sex crime convictions other than his underlying conviction in the case *sub judice*. [*See* Appendix, p. 24-26]

time. Once a visitor leaves resort property does he or she leave a safe haven and then enter a danger zone? Of course not. If the Petitioner chose to reoffend, he certainly could do it anywhere. The Petitioner has not reoffended since he was released from prison approximately three years ago. There are certainly more members of the public at large outside the property lines of Smoke Hole Caverns than there are on resort property. It seems the focus of the lower court and the State is misplaced and should be more focused on the bigger picture. Would the State's position be the same if the Petitioner's underlying offense occurred off resort property?

Although the place of the crime is certainly a factor to consider by this Court in determining whether the employment and visitation ban are "reasonable" and serve a legitimate probationary goal, Petitioner submits that such factor alone is not dispositive. The analysis this Court must make is highly factual, multifaceted and involves balancing the "reasonableness" of the handwritten conditions pursuant to the precepts of *Louk*, determining whether the conditions have a nexus to a legitimate probationary goal and whether the conditions are exceedingly tenuous pursuant to *Leyva*.

The State cites two cases, *United States v. Wientraub* and *State v. Faraday*, for the position that modification of terms is appropriate to account for "new or unforeseen circumstances not contemplated at the initial imposition of supervised release." Resp's Br. p. 14 In the case *sub judice*, since the Petitioner was sentenced in 2009 there are no new or unforeseen circumstances that would warrant imposition of an employment or visitation ban at Smoke Hole Caverns now in 2014. As previously detailed, with the exception of two time periods while on parole, Petitioner was permitted on Smoke Hole Caverns property and had no issues. As further stated in Petitioner's brief, nothing new occurred from the time Petitioner was placed on parole sometime in 2011 until he went on extended supervised release in January, 2014 to justify an

employment and visitation ban. The State submits that something new did occur, *to-wit*; Petitioner's family and employees complained about Petitioner's presence. [March 11, 2014, Transcript, p. 11, paragraph 7] Specifically, the State argues "Petitioner's family members, as well as other employees of this property, brought it to the attention of Probation Officer Wade, who relayed the same to Probation Officer Smith, that Petitioner's presence on the property was still a problem." Resp's Br. p. 10.

With all due respect to Petitioner's family and employees, Petitioner submits that they have no standing in this criminal matter to usurp the power of two probation officers and the lower court to impose restrictions on Petitioner's supervised release to carry out their personal agenda of keeping the Petitioner off Smoke Hole Caverns property. Barring the Petitioner from his twenty-seven (27) acre resort property serves no legitimate probationary goal. Barring the Petitioner, however, does appease Petitioner's estranged wife and employees. Appeasing Petitioner's family and employees at the expense of placing a restriction on Petitioner's liberty whereby he may be incarcerated for twenty-five (25) years is not reasonable, not a legitimate probationary goal and exceedingly tenuous. It is readily apparent that the Petitioner's family and employees do not want Petitioner present on resort property due to his status as a registered sex offender. This fact played a part in the lower court's reasoning. More specifically, in denying Petitioner's motion to strike the lower court reasoned, "I think, it's very clear that his presence at that business would hurt that business." [March 12, 2014 Transcript, p. 12, paragraph 20] This Court must give substantial consideration to the fact that each term and condition constitutes a restriction on Petitioner's liberty as held in *Louk* and "any violation of any condition may result in imprisonment." *Louk* at 493 This is the exact reason why *Louk* requires that discretionary terms shall be "reasonable." Petitioner's family and current employees were not victims in the

underlying criminal case. The victim is no longer employed at the resort. Petitioner agrees that if the victim was still employed at the resort that an employment and restriction ban would be appropriate and serve a legitimate probationary goal. However, this is not the case. If the lower court believed an employment or visitation ban was necessary, it should have been addressed at the sentencing hearing in 2009, not in 2014. Nothing new or unforeseen has occurred to now justify imposition of an employment and visitation ban other than complaints by Petitioner's family and employees. As noted by the State, in Petitioner's first appeal in *State v. James*, "a forensic psychiatrist indicated that 'Mr. Hedrick was at least a moderate risk for recidivism and reoffending.'" *State v. James*, 227 W.Va. 407, 417 (2011) The lower court had this knowledge at sentencing in 2009. If the State or lower court was genuinely concerned that Petitioner was at risk of reoffending, an appropriate time to address an employment or visitation restriction would have been at sentencing, not five years after the fact at the insistence of Petitioner's family and employees for personal and business reasons. The State's reasoning that the ban is necessary to protect the public at the resort is simply a subterfuge to justify the ban and a way to appease Petitioner's family and employees.

Failing to strike the two handwritten terms and conditions added to Petitioner's extended supervised release *sua sponte* by Petitioner's probation officers at the insistence of Petitioner's family and employees barring employment or "visitation" at Petitioner's private business was an abuse of discretion by the lower court. The visitation and employment ban do not serve a legitimate probationary goal for the reasons previously raised in Petitioner's brief. Assuming *arguendo* that this Court finds there is a legitimate probationary goal, there are certainly less restrictive alternatives to protect any perceived threat by the Petitioner against the public at Smoke Hole Caverns other than a complete ban from the property. The Court could order a

variety of different alternatives, including that the Petitioner be supervised while on resort property, that his presence be limited to specific areas of the resort, or restrict the amount of time the Petitioner is present on the property. Pursuant to the current ban, the Petitioner cannot retrieve equipment and machinery from a maintenance building or even enter his marital residence.

The Petitioner has a great incentive to not reoffend, *to-wit*; twenty-five (25)[3] years of possible incarceration hanging over his head. If the Petitioner ever did reoffend he would not

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[3] The State argues that it is "a little disingenuous" for the Petitioner to argue that a violation of one of the handwritten conditions could result in incarceration for 25 years. However, in the next sentence the State cites W.Va. Code § 62-12-26 in a footnote and agrees that a violation of any condition of extended supervised release "can result in a defendant being incarcerated for the remainder of his period of supervised release, which in Petitioner's case is 25 years." *See* Resp's br. 21 Petitioner does not know how Respondent can in one sentence argue that Petitioner's position is "a little disingenuous," but in the next sentence agree that Petitioner's argument is certainly a possibility. Petitioner assumes the State meant to use a different descriptor other than "a little disingenuous."

Since the filing of the current appeal, the State has filed a Petition To Revoke Petitioner's Post Incarceration Supervision. According to the Petition To Revoke, the State has alleged that the Petitioner has committed several "technical violations," one of which is simply being present at the Smoke Hole Caverns promotional booth at the State Fair in August, 2014. For the benefit of Counsel for the State in this appeal and this Honorable Court, the State in its Petition To Revoke prayed that "the Court find the Defendant has violated the Terms and Conditions of his Probation and that said Probation be Revoked and that Defendant be committed to the Division of Corrections **to serve the remainder of his sentence**." The lower court took the matter under advisement. On October 29, 2014, the Court entered an Order finding one "technical violation" due to the fact that a third party had ammunition in an ATV on Petitioner's 500+ acre farm in neighboring Pendleton County. The lower court also found an actual violation as a result of Petitioner locking his gate to his farm, refusal to provide a key to the gate to his probation officer and by parking his truck behind his barn "in a way that it was concealed from view..." The Court did not incarcerate the Petitioner, but did order effective January 1, 2015, that Petitioner shall be prohibited from going to the 500+ acre farm in Pendleton County. The lower court did state in said Order in bold letters that "**any future violations will likely result in Mr. Hedrick's dying in prison**." Thus, the State's argument that "[i]t is difficult, if not impossible, to imagine the court sending Petitioner back to the penitentiary for 25 years simply because he stepped on SHC property" is without merit. The Petitioner now faces the reality of dying in prison by stepping foot on his 500+ acre Pendleton County farm.

Inter alia, the lower court directed the Clerk to send a copy of the Order to Janet Hedrick, Petitioner's estranged wife.

only face new criminal charges, but would also face the certainty of the Court imposing a "death sentence" given the Petitioner's age. The public is adequately protected from the Petitioner, whether he is at Smoke Hole Caverns or anywhere else. The Petitioner is under intensive supervised release and very closely monitored by multiple zealous sexual offender probation officers who take their job very seriously. The Petitioner must strictly abide by approximately ninety-five (95) terms and conditions. The public is further protected by the fact that the Petitioner is registered with the West Virginia State Police as a sexual offender. Pursuant to the legislative intent and findings found in the Sex Offender Registration Act codified in W.Va. Code § 15-12-1a, the purpose of requiring registration is to "...protect the public from sex offenders by requiring sex offenders to register with the state police detachment in the county where he or she shall reside and **by making certain information about sex offenders available to the public ...**" It should be up to the public to make an informed decision as to whether or not they want to patronize the Petitioner's private business as opposed to simply barring the Petitioner from the property. Whether or not Petitioner's business suffers as a result of Petitioner's presence on resort property is beyond the scope of concern of the lower court. By not allowing the Petitioner to maintain employment or to enter his property the lower court is actually doing a disservice to the public by perhaps maybe increasing the chances of the Petitioner reoffending.

B.

Petitioner submits he was denied procedural due process when the two handwritten terms of extended supervised release were established *sua sponte* by two probation officers while counsel was not present pursuant to *Louk*. In *Louk*, this Honorable Court clearly held that an "accused must be furnished with the assistance of counsel and counsel must be present when the

terms of probation are established or modified." *Louk* at 492. This Honorable Court reasoned that "because probation is directly related to a deferred or suspended sentence and the liberty of the accused is contingent upon his compliance with the conditions of his probation, due process ...mandate the presence of the accused when the terms of probation are established. *Id* at 493

The State fails to directly address the procedural due process violation and attempts to skirt around *Louk* by arguing that the holding is limited to probation, not extended supervised release. For the reasons previously addressed in Petitioner's brief, Petitioner submits the difference is not material. *See* Petr's Br. P. 7, 8 A violation of a term of probation or extended supervised release results in the same outcome. Both probation and extended supervised release are deferred or suspended sentences. The Petitioner's liberty is no less affected by a deferred sentence while on probation than it is to a deferred sentence on extended supervised release.

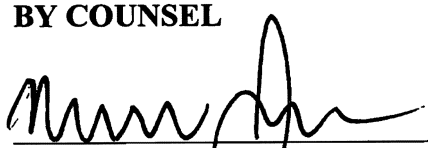
The State next attempts to justify the procedural due process violation by arguing that even if Petitioner were to violate one of the handwritten terms it is unlikely the lower court will send the Petitioner to prison for the full twenty-five (25) years. Petitioner submits the State's argument is completely irrelevant, non-responsive and is "grasping at straws." Regardless of whether the Court would send Petitioner to prison for less than the full twenty-five (25) years for violating a handwritten term is not a pass to violate the Petitioner's procedural due process.

The State finally submits that the violation of Petitioner's procedural due process is justified regardless of whether Petitioner had an attorney by sarcastically arguing that there was nothing for a lawyer to do other than to "hold his [Petitioner] hand" and that it would be a "headache" to provide the Petitioner an attorney just to modify his terms. Regardless of the State's opinion, it is not the law as set forth in *Louk*. Procedural due process requires that the Petitioner have counsel present before modifying terms. *See Louk* at 492-93 Petitioner submits

the State would not feel the same if the roles were reversed. Counsel is absolutely necessary to advocate and safeguard against the imposition of unreasonable terms for improper purposes that place Petitioner's liberty at risk. The case *sub judice* is the epitome of why counsel is necessary. After all, it only took a simple complaint from Petitioner's family and employees to a probation officer to impose the current handwritten employment and visitation ban. Procedural due process of providing counsel before establishing new terms or modifying old terms is necessary to protect an accused against such unfettered abuse.

WHEREFORE, for all the reasons set forth above and in the Petitioner's Brief, Petitioner Jerry Lee Hedrick respectfully moves this Honorable Court to grant all relief previously prayed for.

JERRY LEE HEDRICK
BY COUNSEL



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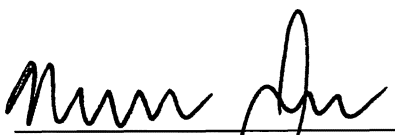
CERTIFICATE OF SERVICE

I, Nicholas T. James, Counsel for Jerry Lee Hedrick, do hereby certify that I have served a true copy of the **REPLY BRIEF** upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 7th day of November, 2014, addressed as follows:

Benjamin F. Yancey, III, Esquire
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

Rory L. Perry, II (Original and 10 copies)
Clerk of the Court
State Capitol Building, Room 317
Charleston, West Virginia 25305



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