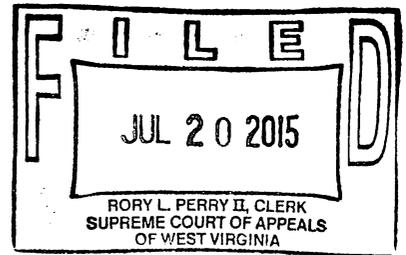


NO. 14-1198
IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

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

v.

JERRY LEE HEDRICK
Defendant Below, Appellant

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.

I.

The State argues that since the Petitioner was not incarcerated that it is irrelevant whether the lower Court erred in finding the Petitioner committed an "actual violation" of his supervised release by clear and convincing evidence as required by W.Va. Code § 62-12-26(g)(3).

Although the lower Court did not incarcerate the Petitioner after finding an actual violation was committed, the lower Court did use the finding as grounds to justify imposing four (4) additional restrictions of supervised release upon the Petitioner without further hearing, which was error.

As with any term or condition of supervision, this Honorable Court has stated that "[t]he liberty of the accused is no less 'affected' because probation is considered an act of grace." *Louk v. Haynes*, 159 W.Va. 482, 493, 223 S.E.2d 780 (1976) This Court further elaborated by stating that "[e]very condition of probation constitutes a restriction of liberty and violation of any condition may result in imprisonment." *Id.* Accordingly, the Petitioner disagrees with the State.

In the case *sub judice*, the State is now using the "actual violation" as found by the lower Court to insinuate to this Honorable Court that the Petitioner has been a "pain in the rear" and deserving of additional restrictions. *See* Respondent's brief, p. 17 The lower Court found the Petitioner committed an "actual violation" of his terms and conditions of supervised release by simply locking the gate to his farm and parking his truck behind his barn. On appeal, the State agrees with Petitioner that locking the farm gate does not appear in Petitioner's written terms and conditions. [Respondent's brief, p. 20] However, the State attempts to paint a picture of man who is attempting to evade supervision by locking his gate to justify the lower Court's action. In actuality, the Petitioner was simply attempting to prevent theft of his valuable tools and

equipment and to prevent his dogs from running out onto Rt. 55. It would be absolutely impossible for Petitioner to evade supervision as alleged by the State by locking the gate to his farm. Rural Pendleton County is not New York City with a population over eight million people! The Petitioner is a well-known figure in Grant and Pendleton Counties as a result of his long term ownership of the largest tourist attraction in the area, *to-wit*; Smoke Hole Caverns. Everyone in the area knows Jerry Hedrick. Petitioner's whereabouts are always known. If the Petitioner is not at his residence, he is at his farm with his cattle and dogs. If the Petitioner travels he has multiple restrictions he must comply with. Officer Smith routinely makes unannounced visits to Petitioner's residence and farm. Not only does the Petitioner have Officer Smith keeping close tabs on him, apparently the locals have no problem calling Officer Smith to report rumors they have heard about Petitioner. [Respondent's brief, p. 31]

II.

The State argues that it "is a little disingenuous" that the Petitioner asserts that he was denied due process as a result of the lower Court not holding a separate hearing before adding four (4) additional terms of supervised release. [Respondent's brief, p. 24] The State apparently has failed to review W.Va. Code § 62-12-26(g) and Rule 32.1(b) of the West Virginia Rules of Criminal Procedure. The September 22, 2014 hearing was only noticed on the State's Petition To Revoke. At the conclusion of the hearing Judge Jordan correctly stated that "I believe under the code I have to give, anybody changing the rules had to give notice of that hearing and some idea what those changes are going to be." [September 22, 2014 Hearing, transcript, p. 122, paragraph 19-23] However, Judge Jordan failed to follow through with his comment and simply issued an order that added four (4) new terms and conditions to Petitioner's supervised release without a hearing.

Currently, the Petitioner has approximately one hundred (100) written terms and conditions imposed upon him. There was no actual finding by the lower Court that the Petitioner violated any of these terms! The Petitioner should not have to guess what terms he must follow. This is the specific reason why W.Va. Code § 62-12-26(h) mandates that "...the probation officer provide the defendant with a written statement...that sets forth all the condition...that is sufficiently clear and specific..." This is also why a hearing is required before terms are modified or enlarged. How is the Petitioner to comply with terms that were not discussed or reduced to writing? Contrary to the State's position, the Petitioner is not trying to "push the envelope" as he clearly knows a violation will result in twenty-five (25) years of incarceration. In the October 29, 2014 Order Judge Jordan clearly states in **bold** letters that "any future violations will likely result in Mr. Hedrick's dying in prison." [JA, p. 90] It must be noted that the Petitioner did not have any issues while on parole and was discharged early based upon good behavior and no violations. [March 11, 2014 Transcript, p. 4, paragraph 12-23; JA, p. 54] The Petitioner's difficulties only arose after the Petitioner started supervised release under Judge Jordan and Probation Officer Daniel Smith. Furthermore, the issues only arise from unwritten terms or what the lower Court dubs *de minimis* "technical violations."

III.

As a result of the lower Court finding the Petitioner committing one (1) "actual violation"¹ the Court imposed four (4) additional restrictions upon the Petitioner, *to-wit*: banning the Petitioner from his 480 acre farm in Pendleton County, banning the Petitioner from Smoke

¹ As detailed in Petitioner's brief, the "actual violation" found by the lower Court involved the Petitioner locking the gate to his farm and occasionally parking his truck behind his barn. A cursory review of the Petitioner's approximately one hundred (100) written terms do not reveal a single restriction prohibiting Petitioner from locking his gate or parking his truck behind his barn. [JA, p.9, 25-39, 89-90]

Hole Caverns promotional booth, requiring Petitioner to obtain permission before traveling overnight in-state, and banning Petitioner from participating in all hunting activities. [JA, p. 89, 90]

The State argues that all four (4) terms are “reasonable” as required in *Louk v. Haynes*. The Petitioner agrees with the State as it relates to the condition that requires obtaining permission before traveling overnight in-state. However, the Petitioner respectfully disagrees that the remaining three (3) terms are reasonable for the reasons particularly set forth in Petitioner’s brief and the additional reasons herein.

The State argues that conditions of supervised release do not require a nexus to the underlying offense by citing *United States v. Worley*. In *Worley*, the defendant was convicted of federal methamphetamine drug charges in 2010. *Worley*, at 406 At sentencing the Court imposed a condition of supervised release prohibiting the defendant from “forming a romantic interest in or sexual relationship with a person who had physical custody of any child under the age of eighteen and from ...residing in or visiting any residence where minor children also reside without the approval of the probation officer.” *Id.* at 407 The *Worley* Court imposed said restriction, despite the fact that the defendant’s conviction was drug related, due to the fact that twelve (12) years prior he was convicted of a sex offense. *Id.* at 408 The defendant appealed. The Fourth Circuit held the district court erred by imposing said restriction. The *Worley* Court held that “conditions that interfere with a defendant’s constitutional liberties...must be adequately explained or else their imposition undermines the fairness and integrity of our judicial proceedings. *Id.* The *Worley* Court, citing a First Circuit opinion that originated out of Federal District Court in Puerto Rico, noted in *dicta* that a particular restriction does not necessarily require an “offense-specific nexus” if the sentencing court can adequately explain its decision

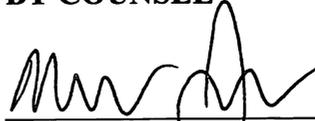
and its reasons for imposing it.” Id. at 407 The First Circuit opinion in *United States v. Perazza-Mercado* is certainly not “closer to home” than *State v. Leyva* out of the Supreme Court of Montana, which does require a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself. 365 Mont.204, 280 P.3d 252 (2012)

The legal standard in West Virginia is reasonableness, which begs the questions of how does a Court determine whether a restriction is reasonable? There are several factors, one of which is whether the restriction has a nexus to the Petitioner’s underlying offense. Petitioner submits the “nexus test” is just one factor, not a dispositive factor, a Court must at least take into consideration in determining whether a restriction is reasonable under *Louk*. In *Worley*, the defendant was not prohibited from seeing his young children while on state supervision for his sex-offense conviction, nor was he barred years later from living with his girlfriend and their toddler. Thus, the *Worley* Court did apply what appears to be a nexus test to the defendant’s underlying offense in finding error.

Similarly, when Petitioner was released on parole all the way up until he was placed on supervised release he was not prohibited by a term of release from going to his farm, not prohibited from going into the field and not prohibited from going to the Smoke Hole Caverns promotional booth at the State and local fair. In the case *sub judice*, there is nothing new now that would justify the lower Court’s decision. Locking a farm gate or occasionally parking behind the barn in the shade on a hot summer day or to unload feed cannot not be “adequately explained” has required in *Worley*. Simply stated, the terms undermine the fairness and integrity of our judicial system.

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**

A handwritten signature in black ink, appearing to read 'Nicholas T. James', written over a horizontal line.

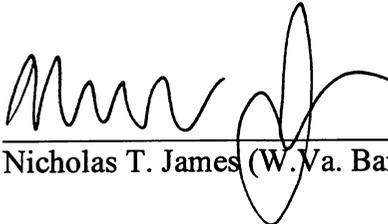
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CERTIFICATE OF SERVICE

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 17th day of July, 2015, 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



Nicholas T. James (W. Va. Bar # 10545)