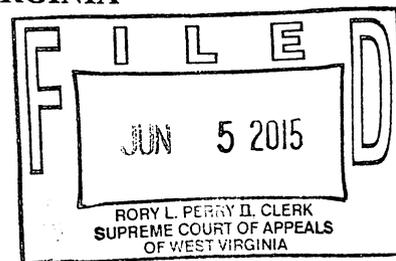


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1198



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

JERRY LEE HEDRICK,

*Defendant Below, Petitioner.*

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

On or about July 13, 2007, Jerry Lee Hedrick (“Petitioner”), who was 55 years old at the time, made uninvited and unwanted sexual advances to a 25-year-old employee, Rachel E., when she asked for a day off from work. Specifically, Petitioner subjected Rachel to sexual contact by touching her buttocks and her breast without her consent and by use of forcible compulsion.<sup>1</sup>

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<sup>1</sup> Please note that the appendix for the current appeal does not contain a transcript of Petitioner’s trial, which trial took place on May 27 and 28, 2009. As such, these facts were drawn primarily from this Court’s statements in Petitioner’s first appeal following his conviction and sentence. *See State v. James*, 227 W. Va. 407, 412, 710 S.E.2d 98, 103 (2011). The *James* case involved Petitioner’s, along with two other defendants’ (in separate cases), appeal to this Court challenging the constitutionality of the extended sexual offender supervised release statute, W. Va. Code § 62-12-26. In *James*, the Court consolidated these appeals and ultimately upheld the constitutionality of this statute, as well as affirming Petitioner’s sentence, which sentence included placing Petitioner on extended sexual offender supervised release for 25 years. *See generally James*, 227 W. Va. at 411-21, 710 S.E.2d at 102-12.

On July 8, 2008, the Grant County Grand Jury indicted Petitioner on two counts of first degree sexual abuse. App. 5.

Petitioner's trial took place on May 27 and 28, 2009, and ended with the jury convicting him of two counts of first-degree sexual abuse.<sup>2</sup> *See generally* App. 6-7.

On October 21, 2009, a sentencing hearing was held in this case, during which the circuit court ("court" or "lower court") sentenced Petitioner to two consecutive terms of 1 to 5 years in the penitentiary for his convictions of two counts of first-degree sexual abuse. App. 23. The court further ordered that, upon his completion of parole, Petitioner be placed on extended sexual offender supervised release for 25 years. App. 24. During this same hearing, having been convicted of a sex crime, Petitioner signed off on a *Sex Offender Conditions* form, which form listed numerous conditions that Petitioner was subject to upon being released from prison on parole. *See generally* App. 25-27. Among these numerous conditions was a condition, which was left blank, which read, "[o]thers as appropriate to the case." App. 27. Thereafter, Petitioner began serving his sentence, eventually made parole, and was released from prison.

On January 14, 2014, Petitioner was discharged from parole. App. 54. Thereafter, on January 21, 2014, Petitioner signed off on a *Rules and Regulations Governing Probationers* form, which form enumerated numerous typewritten conditions that Petitioner was subject to during the time he was on supervised release. *See generally* App. 38-39. Among these numerous typewritten conditions, were the following conditions:

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<sup>2</sup> Although indicted in Grant County, Petitioner, upon his request for a change of venue, was actually tried in Mineral County. *See generally* App.6, 22.

10. You shall not own, carry, possess any firearms or other lethal weapons of any kind (including, but not limited to, knives, arrows, mace/pepper spray and gunpowder).

App. 39.

14. That you shall report as directed to the Court or assigned Probation Officer and permit the officer to visit your home, place of employment, or school. You shall answer truthfully all reasonable inquiries made by the Probation Officer. You shall submit to any and all searches of your person, residence, property, or effects by the Probation Office at any time the Probation Officer deems it necessary based upon reasonable suspicion or safety concerns, and agrees to the seizure of any property found or discovered as a result of the search.

App. 39.

18. A curfew of 11:00 P.M. – 7:00 A.M Sundays through Saturdays.

App. 39.

In addition to these typewritten conditions, the form included a handwritten condition providing that Petitioner was “not to be employed at Smoke Hole Resort in any capacity.”<sup>3</sup> App. 39.

Two days later, on January 23, 2014, Petitioner signed off on a *Terms and Conditions of Supervised Release* form, which form also listed numerous typewritten conditions that Petitioner was subject to during the time that he was on supervised release. *See generally* App. 28-37. Among these numerous typewritten conditions, were the following conditions:

5. The Probationer shall keep the Probation Officer informed of his/her status at all times.

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<sup>3</sup> Smoke Hole Resort or “Smoke Hole Caverns”, as it is actually titled, is a tourist/resort area in Grant County. Petitioner and his wife, Janet Hedrick, are the owners of this property, with Petitioner being the majority owner, which property Petitioner purchased in 1977. App. 69; App. Vol. 2, at 56.

App. 29.

7. The Probationer shall comply with the terms and conditions of his/her probation as prescribed by the Court, and shall cooperate fully with the Probation Officer at all times.
8. The Probationer shall truthfully answer all inquiries of the Probation Officer or any law enforcement officer.

App. 29.

27. During the term of his/her probation, the Probationer shall not own, possess, carry, or use any firearm or lethal weapon, including but not limited to a knife, club, mace, pepper spray, taser, bow or black powder weapon.
28. Any Probationer convicted of a felony offense or a domestic battery offense shall read and sign the firearm prohibition form.<sup>[4]</sup>

App. 32.

35. The Probationer shall be inside his/her place of residence at such time as instructed by the probation officer.

App. 33.

42. The Probationer shall submit to random home and/or employment visits.
43. The Probationer shall agree and consent to the search upon reasonable cause of his home, person, outbuildings, property (including computers), or motor vehicles at any time and at any place by any Probation Officer, and shall agree and consent to the seizure of any property found or discovered during such searches which (a) is stolen, embezzled, or obtained by false pretenses, or (b) is or was designed or intended for use or which has been used as a means of committing a criminal offense or a violation of probation, and does waive all of his/her constitutional rights to be free from such searches and seizures without a valid search warrant, upon probable cause.

App. 34.

53. The Probationer shall form his/her conduct to such additional requirements

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<sup>4</sup> Petitioner signed the firearm prohibition form on January 23, 2014, which form prohibited him from possessing any firearms, ammunition or other explosive devices. App. Vol. 2, at 29.

as the Probation Officer may from time to time temporarily impose as circumstances warrant.

App. 36.

On top of these typewritten conditions, the form included a handwritten condition providing that Petitioner could have “[n]o employment or visitation at Smoke Hole Caverns or gift shop property as defined in the general terms.” App. 36.

On or about February 12, 2014, Petitioner filed a Motion to Strike the two handwritten conditions noted above, which conditions prohibit Petitioner from any employment at and/or any visitation to Smoke Hole Caverns. *See generally* App. 4, 40, 42-44. On March 11, 2014, a hearing was held on Petitioner’s Motion to Strike these conditions, which Motion the court denied.<sup>5</sup> *See generally* App. Vol. 1, at 3, 7-13. Thereafter, and previous to the current appeal, Petitioner (in case no. 14-0484) appealed this ruling to this Court, which prior appeal is still pending with the Court.

On February 12, 2014, Probation Officer Daniel Smith, along with Probation Officers Roberts and Brill (first names uncertain), made his first supervised visit to Petitioner at his farm in Pendleton County, West Virginia.<sup>6</sup> App. Vol. 2, at 5. This farm is made up of around 400 acres of land, upon which sits several outbuildings, a barn, as well as an old farmhouse; Petitioner uses the farmhouse as a storage area. App. Vol. 2, at 6, 23-24, 28, 30, 86. Upon entering the farmhouse, these Officers found a box containing some ammunition—i.e., nine .22 caliber rifle

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<sup>5</sup> Following this hearing, on May 5, 2014, the court entered an Order again denying Petitioner’s Motion to Strike these conditions. *See generally* App. 65, 66, 67. By Corrected Order, entered on August 18, 2014, the court once again denied Petitioner’s Motion to Strike these conditions. *See generally* App. 68, 70-71, 72.

<sup>6</sup> Petitioner does not actually live on this Pendleton County farm. Rather, Petitioner lives approximately 7 miles away in the Seneca Rocks, West Virginia, area, which is also in Pendleton County. App. 84; App. Vol. 2, at 23, 24, 34-35, 86.

cartridges. Also found in this box were some fireworks—i.e., 30 M60s, 15 pyro-pop devices, and 45 firecrackers.<sup>7</sup> App. Vol. 2, at 6, 24-25, 26. Thereafter, these items were confiscated, Petitioner signed and was given a property receipt for the same, and he was sternly told that he needed to comply with the terms and conditions of his supervised release. App. Vol. 2, at 7.

In early July 2014 (exact date uncertain), Probation Officer Smith, along with other Probation Officers (names uncertain), again went to Petitioner's Pendleton County farm to "pay" him a visit. App. Vol. 2, at 7, 31. During this visit, Officer Smith saw numerous vehicles and ATVs/four wheelers in the far corner of the field of the farm; these vehicles and ATVs were around 300 to 400 yards from the barn area.<sup>8</sup> App. Vol. 2, at 7-8, 31, 33, 87. Laying in plain view in one of these vehicles/pickup truck were numerous boxes of ammunition and loaded rifle magazines. App. Vol. 2, at 8, 31, 32, 32. When asked about this situation, Petitioner indicated that he was not sure to whom the pickup truck and ammunition belonged, that it was not his ammunition, and that he did not know the ammunition was there. At this point, Officer Smith instructed Petitioner to locate the

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<sup>7</sup> According to himself, Petitioner did not know these items were in the farmhouse, they were old, and had been stored in the house for many years. App. Vol. 2, at 6-7, 84, 85. According to Petitioner's son, Josh Hedrick, these items belonged to him and had been there for a long period of time—i.e., since he was in middle/junior high school—and Petitioner did not know they were there. App. Vol. 2, at 73-74.

<sup>8</sup> Notably, there are as many as nine vehicles, including six trucks and three ATVs/four wheelers, parked at this location. As it turns out, these trucks and ATVs actually belong to Shaylan Miller, other members of Mr. Miller's family, as well as other persons. From the record, it appears that all of these individuals, including Shaylan Miller, have farms adjacent to Petitioner's property. From the record, it also appears that there is a right-of-way over Petitioner's property that is used by all of these persons to access their land. *See generally* App. Vol. 2, at 34, 60-63, 70.

owner of the vehicles and ATVs and have the ammunition removed.<sup>9</sup> App. Vol. 2, at 8-9, 35, 38, 86, 87.

However, a week or two later, around mid-July 2014 (exact date uncertain), Officer Smith returned to Petitioner's farm and found the pickup truck was still there and still contained the ammunition. App. Vol. 2, at 9. Finding such, Officer Smith addressed this issue with Petitioner for the second time; by the time that Officer Smith made his next visit to Petitioner's farm, the ammunition had been removed from the pickup truck. App. Vol. 2, at 9.

Again, on July 23, 2014, Probation Officers Smith, Roberts and Brill conducted a supervised visit of Petitioner at his Pendleton County farm. App. Vol. 2, at 10. While there, Officer Smith observed a camper trailer, which trailer had not been there on previous visits, in the same corner area of the farm where the vehicles and ATVs/four wheelers were located. App. Vol. 2, at 10. Officers Smith, Roberts and Brill then walked over to this area, at which point Officer Brill found some ammunition in a box on/in one of the four wheelers. This ammunition consisted of 16 rounds of .223 rifle ammunition, which ammunition was confiscated. App. Vol. 2, at 10-11, 36, 63-65. When asked about this matter, Petitioner indicated that he did not have any idea who the ATVs and ammunition belonged to, that he did not know that there was any ammunition on/in/around the ATVs, and that he did not want to ask anyone any questions about the vehicles on his property. App.

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<sup>9</sup> The record also indicates that, after initially telling Officer Smith that he did not have any idea who the vehicle and ammunition belonged to, Petitioner eventually gave Officer Smith a name (the Miller family) of who he thought the owner of the same might be. App. Vol. 2, at 9, 89, 104, 105. Thereafter, Petitioner tried to contact this individual to no avail, and then told Officer Smith that he was going to have the vehicle towed, as he was unable to make contact with the vehicle's owner and did not want the ammunition on his property. App. Vol. 2, at 9.

Vol. 2, at 10-11, 21, 86, 87. Thereafter, as it was not his ammunition, Petitioner refused to sign the property receipt for the same.<sup>10</sup> App. Vol. 2, at 11, 21, 40-41, 88.

On August 7, 2014 (Thursday), at approximately 7:46 p.m., Petitioner called Probation Officer Smith's cell phone, who was off duty at the time, and left a message that he would be leaving the next day to go to the State Fair in Lewisburg, West Virginia. App. Vol. 2, at 13, 43-44, 45-46, 94, 95, 96, 111. Petitioner further advised that he would be staying overnight, that he was unsure how many nights he would be gone, or when he would be returning home. App. Vol. 2, at 13-14, 43-44, 47, 94, 95. Nor did Petitioner leave Officer Smith any contact information and/or an address of where he would be staying while at the Fair. App. Vol. 2, at 14, 43-44, 47.

The next day, August 8, 2014 (Friday), and without prior consent for doing so, Petitioner took off to the Fair. App. Vol. 2, at 20, 45. All of this was against protocol, which protocol is designed to keep the probation officer informed of the supervised person's status during the time that they are away from their residence. App. Vol. 2, at 14. Specifically, this protocol required that the supervised person ask and get permission to go in the first place, that he/she provide the probation officer with contact information so as to allow the officer to know where he/she will be staying and how he/she can be contacted. App. Vol. 2, at 14.

On August 8, 2014, after receiving his phone message, Probation Officer Smith attempted to call Petitioner in order to ascertain Petitioner's contact information and where he was staying

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<sup>10</sup> After being confiscated, this ammunition was eventually returned to its owner, Shaylan Miller. According to Mr. Miller, Petitioner was unaware of this ammunition being in the location at which it was found. App. Vol. 2, at 39, 63-65.

while at the Fair. However, Officer Smith was unable to get a hold of Petitioner.<sup>11</sup> App. Vol. 2, at 15, 44-45. Approximately three days later, on or about August 11, 2014, Officer Smith attempted a supervised visit to Petitioner's home. App. Vol. 2, at 15. However, Petitioner was not at home and it did not appear that he had been back from the Fair. App. Vol. 2, at 15.

Sometime during this same time frame, Probation Officer Smith received a call from Petitioner's wife, Janet Hedrick, concerning Petitioner's trip to the State Fair. App. Vol. 2, at 16, 56, 57. Specifically, Officer Smith was informed that Smoke Hole Caverns ("SHC") had a booth set up at the Fair, from which booth it was selling various business-related merchandise and items. App. Vol. 2, at 16. Running this booth were SHC's employees, as well as other members of Petitioner's family. App. Vol. 2, at 16. Officer Smith was also informed that Petitioner had visited this booth multiple times and for significant periods of time – i.e., several hours. App. Vol. 2, at 16, 17, 56. Lastly, Officer Smith was informed that Petitioner's presence at the booth created a negative impact on SHC's business.<sup>12</sup> App. Vol. 2, at 56-57.

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<sup>11</sup> It should be noted that Petitioner's phone rang multiple times until it finally switched over to an automated voicemail system; Officer Smith did not leave a message on this voicemail system. App. Vol. 2, at 15-16. According to himself, Petitioner never received any phone calls, whether to his cell phone or home phone, from Officer Smith during the time that he was at the Fair. Also, according to himself, at around 9:55 a.m. on August 9, 2014 (Saturday), Petitioner called Officer Smith from the Fair to confirm that he (Officer Smith) received his earlier message on August 7, 2014 (Thursday), that he was going to the Fair and also to confirm that he was at the Fair. *See generally* App. Vol. 2, at 96-97, 111.

<sup>12</sup> According to Petitioner's daughter-in-law, Michele Hedrick, only family members of Petitioner were working SHC's booth during the Fair. App. Vol. 2, at 77. Ms. Hedrick also reported that no "drama" occurred during Petitioner's visits to the booth. App. Vol. 2, at 77. However, Ms. Hedrick did indicate that Petitioner's presence at the booth did make her feel uncomfortable. App. Vol. 2, at 82. Ms. Hedrick further indicated that she, along with other members of the family, do not like Petitioner, have been hurt by him, do not want him around, and would prefer that he stay away. (continued...)

On August 16, 2014, Probation Officers Smith and Roberts again traveled to Petitioner's Pendleton County farm to conduct a supervised visit of Petitioner. App. Vol. 2, at 12. Upon their arrival, these Officers found the gate to the farm locked. App. Vol. 2, at 12. Petitioner's locking of this gate was in direct contravention to a prior instruction given to him by Officer Smith, as well as Probation Officer Lawrence Wade, at the time that he signed the form (in January 2014) specifying the terms and conditions of his supervised release.<sup>13</sup> App. Vol. 2, at 12-13, 48, 50-52. Because of his failure to follow this instruction, these Officers walked approximately a ¼ mile down the road (Route 55) adjacent to Petitioner's farm. From there, the Officers walked over an old swinging bridge (which crosses over the North Fork distributary of the Potomac River) onto Petitioner's farm in order to make contact with him.<sup>14</sup> App. Vol. 2, at 12, 48-49, 61-62. When they got to his barn, these Officers observed that Petitioner's truck was hidden from the road, as the truck was parked behind the barn underneath a roof. App. Vol. 2, at 12-13. Tellingly, prior to this visit, Officer Smith had received a phone call, during which the caller (name uncertain) informed that Petitioner stated to some people (names uncertain) that he was going to close the gate and park behind the barn in order to thwart any probation officers' knowing that he was at the farm.<sup>15</sup> App. Vol. 2, at 12.

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<sup>12</sup>(...continued)  
App. Vol. 2, at 76-77.

<sup>13</sup> Specifically, Officer Wade instructed Petitioner that the gate to the farm had to be left open while he was there so as to allow probation officers to enter the farm to make contact with him. App. Vol. 2, at 12-13. Notably, Petitioner denies that he was given any such instruction from Officers Wade and Smith. App. Vol. 2, at 90-91, 108.

<sup>14</sup> It should be noted that there is an area where a car can pull over off the road at this swinging bridge. App. Vol. 2, at 50.

<sup>15</sup> According to himself, Petitioner did not use to lock the gate, but began doing so to protect  
(continued...)

During this same August 16, 2014 visit, Probation Officer Smith spoke to Petitioner about his trip to the State Fair. App. Vol. 2, at 17. During this conversation, Petitioner admitted that he spent a good deal of time at SHC's booth, during which he visited with family members as well as other people connected to SHC. App. Vol. 2, at 17, 58. Petitioner further indicated to Officer Smith that it was permissible for him to make these visits, as the previous protective order prohibiting him from going around SHC property had been lifted by the Family Court in Hardy County. App. Vol. 2, at 18. This, of course, had nothing to do with the terms and conditions of his supervised release and the court's affirmance of the same, which terms and conditions essentially banned Petitioner from SHC property. App. Vol. 2, at 18.

During their conversation, Officer Smith stressed to Petitioner that he was not following the rules—i.e., that he was not allowed to just take off and stay overnight away from his residence without telling Officer Smith where he would be staying and how to get a hold of him. App. Vol. 2, at 18-19. In response, Petitioner acted as if it was okay or “[n]o big deal” that he had failed to take these measures. App. Vol. 2, at 19. Lastly, of the four nights that he was at the State Fair, Petitioner indicated to Officer Smith that he slept in his truck two of these nights and the other two nights in a motel. App. Vol. 2, at 18, 19, 98-100. This was of great concern to Officer Smith, as Petitioner was a convicted sex offender and should not be sleeping in his car with no one really knowing where he is at the time.<sup>16</sup> App. Vol. 2, at 19-20.

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<sup>15</sup>(...continued)

the equipment on his farm from being stolen, as he had heard of such thefts occurring on the other farms in the area. App. Vol. 2, at 92. Also, according to himself, Petitioner sometimes parks his vehicle behind the barn to unload heavy barrels of feed for his calves. App. Vol. 2, at 93.

<sup>16</sup> According to himself, Petitioner slept in his car for two nights because he could not find a room, as they were all “booked up.” App. Vol. 2, at 98-100, 111.

Based on these events, on September 17, 2014, the prosecution filed a Petition to revoke Petitioner's supervised release with the lower court. *See generally* App. 76-80. As part of this Petition, the prosecution requested that Petitioner be sent back to the penitentiary to serve the remainder of his term of supervised release of 25 years. App. 79.

On September 22, 2014, a hearing was held on the prosecution's Petition, during which hearing the parties presented their evidence and arguments.<sup>17</sup> *See generally* App. 82-83, App. Vol. 2, at 1-122. After hearing all of the parties' evidence and arguments,<sup>18</sup> the court indicated that it was not particularly in favor of having another hearing. App. Vol. 2, at 122. As such, the court ruled that it was going to take the matter under advisement and gave notice to the parties that it intended to resolve the matter in one of two ways: (1) issue a new order setting forth some additional, specific terms and conditions on Petitioner's supervised release, or (2) issue the new order setting forth the same, have a hearing on this order and, at the end of this hearing, give its ruling. *See generally* App. 83; App. Vol. 2, at 122-123.

On October 29, 2014, the court issued its *Order of Additional Terms of Supervision*. *See generally* App. 84-90. In this Order, based on his actions and its findings concerning the same, the court found that Petitioner committed "one [actual] violation and one technical violation" of the terms and conditions of his supervised release. App. 87-88. Specifically, the "technical" violation

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<sup>17</sup> As indicated by the court, in its Order deferring its ruling on the prosecution's Petition to revoke Petitioner's supervised release, this hearing was scheduled for 45 minutes, but lasted 1 ½ hours. *See* App. at 83, n. 1.

<sup>18</sup> The prosecution's evidence consisted of the testimony of Probation Officer Smith; Petitioner's evidence included the admission of numerous exhibits, as well as the testimony of himself, Shaylan Miller, Josh Hedrick (Petitioner's son), and Michele Hedrick (Josh Hedrick's wife and Petitioner's daughter-in-law). *See generally* App. 82; App. Vol. 2, at 4-114.

involved “the presence of the ammunition found on the Miller’s ATV’s[.]”<sup>19</sup> App. 87. The “actual” violation concerned Petitioner’s “locking the gate and his refusal to provide a key on his Grant County farm<sup>[20]</sup> and parking his truck in a way that it was concealed from view[.]” App. 87. On his continual refusal to provide his probation officers with a key to the gate to his farm, the court further found as follows:

The fact that, even at the hearing, Mr. Hedrick is still refusing to provide a key and believes the ISO officers should go a distance and cross a rickety swinging bridge to access the farm speaks volumes about Mr. Hedrick’s attitude. The Court finds that all of these actions are an effort to evade supervision.

App. 87.<sup>21</sup>

As for Petitioner’s trip to the State Fair and hanging around SHC’s booth at the Fair, the court did not find that such actions were an actual violation of the terms and conditions of his supervised release and/or the court’s earlier Order banning him from SHC’s property. However, the court did find that these actions violated the spirit of these terms and conditions and earlier Order.

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<sup>19</sup> Notably, the court found that the presence of the old ammunition and fireworks found in the old farmhouse on Petitioner’s farm not to be a violation of the terms and conditions of his supervised release. App. 87.

<sup>20</sup> Please note that here, and elsewhere in its Order, the court mistakenly refers to this particular farm as being located in Grant County; in actuality, the farm is located in Pendleton County. The court’s confusion on this point may be attributable to the fact that Grant County, and specifically at SHC, is where the underlying crimes (two counts of first-degree sexual abuse) occurred.

<sup>21</sup> Notably, at the September 22, 2014 revocation hearing, Petitioner maintained providing a key to the gate to his farm to his probation officers was not necessary, as these officers could easily access his property by crossing over the swinging bridge onto his farm. Petitioner further maintained that should he provide such key, and thereafter should the gate be left open by these officers, could result in one of his hunting dogs getting hit by a car, as has happened in the past. Petitioner additionally maintained that should the gate be left open by these officers, some of his equipment might be stolen. *See generally* App. Vol. 2, at 105-108.

On this point, the court found as follows:

The Court finds that Mr. Hedrick left a phone message that he was going to the State Fair in Lewisburg. He did not say where he would be staying or how long he would be there. The sex offender rules are not clear on in-state travel. Offenders are required to notify ISO of “their status”. While this is a clear violation of the spirit of supervision rules, the Court cannot find this is a violation as currently written. The Court finds that Mr. Hedrick hung around the Smoke Hole Caverns booth at the State Fair for several days. Mr. Hedrick was aware that the Court had previously prohibited him from Smoke Hole premises. This was not a violation of the language of that Order. It was, however, another huge breach of the spirit of that Court Order.

App. 87-88.

Finally, in its Order, the court found that Petitioner’s actions in this case, and its findings concerning the same, did not warrant the revocation of his supervised release and returning him to the penitentiary for 25 years. App. 88. In lieu of such sanctions, the court added certain restrictions to Petitioner’s terms and conditions of supervised release. These restrictions included: (1) a prohibition restricting Petitioner from going to his farm in Pendleton County;<sup>22</sup> (2) a ban on Petitioner going to any and all offsite locations that SHC may use to promote or conduct its business, including, but not limited to, SHC’s annual booth at the State Fair, as well as any booths of SHC at any other local fairs or festivals; (3) a prohibition restricting Petitioner from any overnight, in-state travel without the express permission from his probation officer, and that he must provide his probation officer with the details of his travel plans, including where he will be staying and any other information requested by his probation officer; and (4) a prohibition restricting Petitioner from participating in all hunting activities, including accompanying other hunters into the woods or

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<sup>22</sup> Please note that following its implementation of this particular restriction (on October 29, 2014), the court issued an Order (on December 16, 2014), wherein the court granted Petitioner a partial stay as it relates to this restriction; this partial stay was conditioned on Petitioner providing a key to the gate to his farm to his probation officer, Officer Smith. *See generally* App. 100-101.

fields.<sup>23</sup> App. 88-90.

Thereafter, Petitioner brought the current appeal.

## II.

### SUMMARY OF ARGUMENT

The court did not revoke petitioner's supervised release and/or recommit him to the penitentiary to serve all or any part of the remainder (25 years) of his term of supervised release. As such, "clear and convincing" evidence was not needed for the court to find that petitioner committed a "technical" violation of the terms and conditions of his supervised release, as this "technical" violation relates to the presence of the ammunition found on Shaylan's Miller's ATV. The same holds true the court's finding that petitioner committed an "actual" violation of the terms and convictions of his supervised release, as this "actual" violation relates to petitioner locking the gate to his Pendleton County farm and refusing to provide his probation officers with a key to the same, although the written terms of his supervised release do not contain any such conditions. Thus, contrary to Petitioner's assertions, the court did not commit error in making its "technical" and "actual" violations findings.

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<sup>23</sup> It should be noted that this last restriction—i.e., prohibition against Petitioner engaging in all hunting activities—arose out of Petitioner's testimony during his revocation hearing on September 22, 2014, which testimony raised concerns for the court. App. 89. In restricting him from all hunting activities, the court found that Petitioner "previously was convicted of a federal wild-life felony, in addition to the two felony counts of sexual abuse in the case at hand" and "is prohibited from possessing firearms, ammunition, and cross-bows." App. 89-90. *See also* App. 16. After recognizing Petitioner's statement that he had been hunting for recreational purposes, but did not take a gun, the court went on to find that "Mr. Hedrick is known as a big-time hunter, especially as a bear hunter", and that "[t]he Court is very concerned that Mr. Hedrick is putting himself in a position where he will be tempted to take just one shot or that one of his many enemies will claim that he did." App. 90.

The court did not conduct a separate hearing before adding four new restrictions to Petitioner's terms and conditions of supervised release. However, in not doing so, the court let Petitioner know well ahead of time that it might choose to handle this matter in this exact way. Furthermore, the revocation hearing that was actually held in this case served as the hearing on the validity of the court's implementation of these new restrictions. Thus, contrary to Petitioner's assertion, the court did not commit error by imposing these new restrictions without first having a separate hearing on the same.

The court's additional restriction against Petitioner going onto his Pendleton County farm serves a legitimate probationary goal, as this restriction prevents Petitioner from using this farm as a means of evading the supervision of his probation officers. The court's additional restriction prohibiting Petitioner from SHC's promotional booths at future fairs and festivals, including the State Fair, likewise serves a legitimate probationary goal, which is the protection of the public. This consists of protecting the women (employees and guests alike) who may, in the future, work at or visit SHC's promotional booths from Petitioner's unwanted and uninvited sexual advances, towards which Petitioner has a proclivity. Again, the court's additional restriction prohibiting Petitioner from all hunting activities, including accompanying other hunters into the woods or fields, serves a legitimate probationary goal. This legitimate probationary goal includes preventing Petitioner from violating any hunting laws, state and federal alike, as well as preventing him from violating the weapons and ammunition restriction of his terms and conditions of supervised release. This is so given the fact that petitioner has a previous federal wildlife felony conviction, is prohibited from possessing guns and ammunition, is known as a big-time hunter, and may be tempted to take just one

shot. Thus, contrary to petitioner's assertions, the court did not commit error in imposing all of the above noted restrictions.

### III.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary in this case, as the "facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." Rev. R.A.P. 18(a)(4). However, it appearing that Petitioner has requested oral argument, *see* Pet'r's Br. 15, and if so ordered by the Court, the State will be there to respond. The State, of course, defers to the discretion and wisdom of the Court on this point, as well as the Court's election to issue a memorandum decision or opinion in this case.

### IV.

#### ARGUMENT

- A. THE LOWER COURT DID NOT REVOKE PETITIONER'S EXTENDED SEXUAL OFFENDER SUPERVISED RELEASE. NOR DID THE LOWER COURT RECOMMIT PETITIONER TO THE PENITENTIARY TO SERVE ALL OR ANY PART OF THE REMAINDER (25 YEARS) OF HIS TERM OF SUPERVISED RELEASE. THUS, CONTRARY TO HIS ASSERTIONS, THE LOWER COURT DID NOT COMMIT ERROR IN FINDING THAT PETITIONER COMMITTED ONE "TECHNICAL" VIOLATION AND ONE "ACTUAL" VIOLATION OF THE TERMS AND CONDITIONS OF HIS SUPERVISED RELEASE.**

Bluntly stated, and begging opposing counsel's and the Court's pardon, Petitioner has been nothing more than a "pain in the rear" to everyone in this case, including the lower court, the prosecution and his probation officers. After finding that Petitioner committed one "technical" violation and one "actual" violation of the terms and conditions of his supervised release, the court, in its Order of October 29, 2014, summed this entire case up nicely as follows:

These findings result in one [actual] violation and one technical violation. These findings also paint a picture of a man who will not only “push the envelope”, but try to evade supervision.

One would think that facing 25 years in prison and having served in prison would make Mr. Hedrick abide by the rules. It hasn't. One would think that Mr. Hedrick would appreciate the fact that this Court has exempted him from taking polygraphs and lifted the prohibition on him being around children. He does not.

At this time, the Court does not believe that the above findings should result in a 25 year prison sentence.

App. 88.<sup>24</sup>

With this “backdrop” in place, in its Order of October 29, 2014, the lower court found that Petitioner committed one “technical” violation and one “actual” violation of the terms and conditions of his supervised release. The “technical” violation (occurring on July 23, 2014) involved the presence of the ammunition found on one of Shaylan Miller’s ATVs, which ATV was located on Petitioner’s Pendleton County farm. The “actual” violation (occurring on August 16, 2014) concerned Petitioner’s locking of the gate to his Pendleton County farm and parking his truck in such a way (behind the barn) that it was concealed from view, as well as his refusal to provide a key to this farm to his probation officers. On appeal, from a number of different “angles,” Petitioner asserts

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<sup>24</sup> Along the same lines as above findings of the court, Petitioner’s Probation Officer, Daniel Smith, gave the following testimony during the September 22, 2014, hearing on the revocation of Petitioner’s supervised release:

Q He [Petitioner] is just making your guy’s [probation officers] job just difficult to keep him supervised?

A That[’s] correct.

App. Vol. 2, at 21.

that the above findings of the court are erroneous. *See generally* Pet'r's Br. at 16- 20. For the reasons explained below, the State disagrees.

**1. "Technical" Violation.**

As it relates to the court's finding of a "technical" violation due to the presence of the ammunition found on Shaylan Miller's ATV, Petitioner essentially argues there is no "clear and convincing evidence" to support the court's finding. Petitioner further argues that this "clear and convincing evidence" must be present, as W. Va. Code §62-12-26 (g) (3) requires it. *See generally* Pet'r's Br. at 16, 17-18.

Simply put, Petitioner's reliance on this statute is misplaced. In pertinent part, W. Va. Code §62-12-26 (g) (3) provides as follows:

*The court may ... [r]evoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release ... if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release[.]*

(Emphasis added).

Certainly, this provision provides that a circuit court must have "clear and convincing evidence" in order to find that a defendant violated a condition of his supervised release. However, by the provision's own language, this "clear and convincing evidence" standard only applies when the circuit court revokes a defendant's supervised release and puts him in the penitentiary to serve all or a part of his term of supervised release. Here, the court did not revoke Petitioner's supervised release. Nor did the court send Petitioner back to the penitentiary to serve all, or any part, of the remainder (25 years) of his supervised release term. Instead, the court simply made its "technical"

violation finding and went on to implement some additional restrictions to Petitioner's terms and conditions of supervised release. Thus, contrary to Petitioner's contention, the court did not commit reversible error in finding that Petitioner committed a "technical" violation of the terms and conditions of his supervised release.

**2. "Actual" Violation.**

As for the court's finding of an "actual" violation due to Petitioner locking the gate to his farm, his refusal to provide a key to this farm to his probation officers, and parking his truck in such a way (behind the barn) that it was concealed from view, Petitioner essentially argues that these matters were never reduced to writing, in sufficiently clear and specific language, in his terms and conditions of supervised release. Petitioner further argues that the lack of any such sufficiently clear and specific writing violates W. Va. Code §62-12-26 (h), which provision requires the same. *See generally* Pet'r's Br. at 16, 18-20.

Again, in the State's view, Petitioner's reliance on this statute is misplaced. In its entirety, W. Va. Code §62-12-26 (h) provides the following:

The court shall direct that the probation officer provide the defendant with a written statement at the defendant's sentencing hearing that sets forth all the conditions to which the term of supervised release is subject and that it is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

Certainly, this provision provides that a defendant must be provided with a written statement setting forth the conditions of his supervised release, which written conditions must be sufficiently clear and specific. And certainly, the terms and conditions of his supervised release do not specifically, in writing, provide that Petitioner cannot lock the gate to his Pendleton County farm,

that he must provide a key to this gate to his probation officers, or that he cannot park his truck behind his barn.<sup>25</sup> Again, however, the court did not revoke Petitioner's supervised release. Nor did the court send Petitioner back to the penitentiary to serve all, or any part, of the remainder (25 years) of his supervised release term. Instead, the court simply made its "actual" violation finding and went on to impose some additional restrictions to Petitioner's terms and conditions of supervised release. Thus, contrary to Petitioner's contention, the court did not commit reversible error in finding that Petitioner committed an "actual" violation of the terms and conditions of his supervised release.

Lastly, on this issue, the statute that Petitioner relies on, W. Va. Code §62-12-26 (h), applies to the conditions imposed upon a defendant at the defendant's "sentencing hearing," which conditions are to serve as a "guide" for the defendant's conduct while on supervised release. Obviously, the policing of someone on supervised release can be a "fluid" situation. It is likewise obvious that the written terms and conditions of a defendant's supervised release cannot possibly account for every eventuality that may "crop up" during the term of a defendant's supervised release. Because of these factors, sometimes changes must be made "along the way" to effectuate the supervision of the person on supervised release. Such is the case here where, rather than revoking his supervised release and recommitting him to the penitentiary, the court imposed some additional

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<sup>25</sup> Notably, the written terms and conditions of Petitioner's supervised release do provide that he must fully cooperate with his probation officer at all times. These written terms and conditions also provide that Petitioner must submit to random visits to his home and/or place of employment. These written terms and conditions further provide that Petitioner must agree and consent to the search of his home, person, outbuildings, property and/or motor vehicles at any time and at any place by his probation officer. These written terms and conditions additionally provide that Petitioner must form his conduct to any additional requirements as his probation officer may, from time to time, temporarily impose as the circumstances may warrant.

restrictions to Petitioner's terms and conditions of supervised release. As discussed in greater detail below, given Petitioner's actions as well as other circumstances surrounding this case, the court's implementation of these additional restrictions are reasonable.

**B. THE LOWER COURT DID NOT COMMIT ERROR BY ESTABLISHING ADDITIONAL RESTRICTIONS TO PETITIONER'S TERMS AND CONDITIONS OF SUPERVISED RELEASE BY NOT FIRST HAVING A HEARING ON THE SAME.**

Before modifying the conditions of ... supervised release, the court must hold a hearing, at which the person has the right to counsel[.] W. Va. Rule Crim. Proc. 32.1.

With this Rule in place, Petitioner asserts on appeal that the lower court, in its Order of October 29, 2014, denied him due process by adding four new restrictions to his already existing terms and conditions of supervised release. In making this assertion, Petitioner argues that the court failed to have a separate hearing on these new restrictions, during which hearing, had it been held, Petitioner had the right to be present with the assistance of counsel. *See generally* Pet'r's Br. at 20-21. Again, for the reasons explained below, the State disagrees.

To begin with, and again begging opposing counsel's and the Court's pardon, "every time ya turn around" in this case another hearing has to be held. More specifically, within the first nine months (from January 2014 through September 2014) of Petitioner's 25 year term of supervised release, "we" have already had two hearings.<sup>26</sup> As correctly pointed out by the lower court, this is so because Petitioner "pushes the envelope" on what is allowed under the terms and conditions of his supervised release, and because he tries to evade supervision. Quite frankly, and understandably

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<sup>26</sup> These hearings occurred on March 11 and September 22, 2014.

so, the judge below is probably getting a little tired of interrupting his docket because of Petitioner's "shenanigans." This is further evidenced by the court's warning to Petitioner that "any future violations will likely result in [him] dying in prison." App. 90.

At any rate, and admittedly, the court did not conduct a separate hearing before adding the four new restrictions to Petitioner's already existing terms and conditions of supervised release. However, in not doing so, the court let Petitioner know well ahead of time that it might choose to handle the matter in this exact way. More specifically, near the end of the hearing (on September 22, 2014) on the revocation of Petitioner's supervised release, the court ruled that it was going to take the revocation matter under advisement and gave notice to the parties that it intended to resolve the matter in one of two ways: (1) issue a new order setting forth some additional, specific terms and conditions on Petitioner's supervised release, or (2) issue the new order setting forth the same, have a hearing on this order and, at the end of this hearing, give its ruling. Ultimately, the court chose option number one—i.e., the court issued a new order setting forth the four new restrictions that Petitioner complains about here without a hearing.

Furthermore, in a sense Petitioner did receive a hearing before the court added the four new restrictions to Petitioner's existing terms and conditions of supervised release. This hearing came in the form of a revocation hearing, which hearing was conducted on September 22, 2014. During this revocation hearing, Petitioner, who was certainly present and represented by counsel, was permitted to present evidence on his behalf. This evidence consisted of the admission of numerous exhibits, as well as the testimony of himself, Shaylan Miller, Josh Hedrick (Petitioner's son), and Michele Hedrick (Josh Hedrick's wife and Petitioner's daughter-in-law). During this same hearing,

Petitioner, through counsel, was also given the opportunity to cross-examine the prosecution's sole witness—Probation Officer Daniel Smith. Following the evidentiary phase of this hearing, Petitioner, through counsel, was able to argue at length against the prosecution's allegations that he had violated the terms and conditions of his supervised release. *See generally* App. Vol. 2, at 115-20.

Lastly, on this issue, had there been a separate hearing on the court's modifications (four new restrictions) of the terms and conditions of his supervised release, Petitioner presumably would have argued that such modifications are not reasonable, as they do not serve a legitimate probationary goal. In fact, Petitioner, through counsel, argued this same thing at the revocation hearing concerning his locking the gate to his Pendleton County farm and parking his truck behind the barn. *See* App. Vol. 2, at 118. Given all of this, in the State's view, Petitioner's assertion in this appeal that the court denied him due process, as the court failed to have a separate hearing before modifying the terms and conditions of his supervised release, is a little disingenuous.<sup>27</sup>

**C. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY ADDING ADDITIONAL RESTRICTIONS TO THE TERMS AND CONDITIONS OF PETITIONER'S SUPERVISED RELEASE, AS THESE ADDITIONAL RESTRICTIONS ARE REASONABLE UNDER THE FACTS AND**

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<sup>27</sup> Interestingly, from the record, it does not appear that Petitioner's counsel was necessarily in any "big hurry" to have another hearing on the modification of the terms and conditions of Petitioner's supervised release by the court. On this point, during the revocation hearing on September 22, 2014, Petitioner's counsel stated as follows:

It's unfortunate we're here today wasting the Court's time, but he'll [Petitioner] comply with the terms and conditions that have been imposed upon him. If there needs to be issues that need to be clarified, which I thought that's what we did at the last hearing, then we could maybe try to clarify those today so that we're not back here again.

App. Vol. 2, at 119.

## CIRCUMSTANCES OF THIS CASE.

Under West Virginia's extended sexual offender supervised release statute, "[t]he court may . . . modify, reduce or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release[.]" W. Va. Code § 62-12-26(g)(2). *See also* W. Va. Code § 62-12-26(a) ("[P]ursuant to the provisions of subsection (g) of this section, a court may modify, terminate or revoke any term of supervised release imposed[.]").<sup>28</sup>

With these provisions in place, in its Order of October 29, 2014, the court added four new restrictions to Petitioner's already existing terms and conditions of supervised release. These four new restrictions included: (1) a prohibition restricting Petitioner from going to his farm in Pendleton County; (2) a ban on Petitioner going to any and all offsite locations that SHC may use to promote or conduct its business, including, but not limited to, SHC's annual booth at the State Fair, as well as any booths of SHC at any other local fairs or festivals; (3) a prohibition restricting Petitioner from any overnight, in-state travel without the express permission from his probation officer, and that he must provide his probation officer with the details of his travel plans, including where he will be staying and any other information requested by his probation officer; and (4) a prohibition restricting Petitioner from participating in all hunting activities, including accompanying other hunters into the woods or fields.

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<sup>28</sup> Notably, West Virginia's probation release statute also permits a trial court to modify, at any time, the conditions of a probationer's probation. *See* W. Va. Code § 62-12-9(b) ("[T]he court may impose, subject to modification at any time, any other conditions [of probation] which it may determine advisable[.]"). The same can be said of corrections officials' modification, at any time, of the conditions of a parolee's parole in West Virginia. *See* W. Va. Code § 62-12-17(d) ("[T]he Division of Corrections may impose, subject to modification at any time, any other conditions [of parole] which the division considers advisable.").

On appeal, Petitioner takes issue with three of these four new restrictions, namely the first, second and fourth restrictions.<sup>29</sup> Regarding these three new restrictions, Petitioner essentially asserts that they are not reasonable. In making this assertion, Petitioner basically argues that these restrictions have no nexus to his underlying offenses (two counts of first-degree sexual abuse), no nexus to the victim of these offenses, and they fail to serve a legitimate probationary goal. *See generally* Pet'r's Br. at 21-27.

For legal support, Petitioner relies primarily on two cases—*Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976) and *State v. Leyva*, 280 P.3d 252 (Mont. 2012). *See generally* Pet'r's Br. at 21-22. At syllabus point 6 of *Louk*, this Court held that “W. Va. Code, 62-12-9, [a]s amended, permits a trial judge to impose any conditions of probation which he may deem advisable, but this discretionary authority must be exercised in a reasonable manner.”<sup>30</sup> In *Leyva*, the Supreme Court of Montana held that

a restriction or condition must be reasonably related to the objectives of rehabilitation or the protection of the victim and society. A condition meets this standard “so long as the condition has a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself.” . . . We will reverse a condition when the required nexus is “absent or exceedingly tenuous.”

*Leyva*, 280 P.3d at 258 (citations omitted).

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<sup>29</sup> Notably, in his brief, Petitioner acknowledges that the third restriction—i.e., prohibition against him taking any overnight, in-state trips without first getting permission from his probation officer—is reasonable and, further, that he does not have any objection to the court’s inclusion of this restriction in his overall terms and conditions of supervised release. *See* Pet'r's Br. at 25.

<sup>30</sup> *See also Louk*, 159 W. Va. at 495, 223 S.E.2d at 788 (“The statute [W. Va. Code § 62-12-9] imposes certain mandatory conditions of probation and permits the trial judge in his discretion to impose additional conditions which may include but are not limited by those conditions designated in the statute as discretionary. Any condition of probation, however, which is imposed in the discretion of the trial court must be reasonable.”).

As for Petitioner's use of *Leyva* and its requirement that the condition of supervised release must have a nexus to the underlying offense, other courts "closer to home," namely our own federal circuit court, do not require any such nexus.

A sentencing court may impose any condition that is reasonably related to the relevant statutory sentencing factors, which include considering the nature and circumstances of the offense and the history and characteristics of the defendant; providing adequate deterrence; protect[ing] the public from further crimes; and providing the defendant with training, medical care, or treatment. The condition must also be consistent with the Sentencing Commission policy statements. *A particular restriction does not require an offense-specific nexus*, but the sentencing court must adequately explain its decision and its reasons for imposing it.

*United States v. Worley*, 685 F.3d 404, 407 (4th Cir. 2012) (emphasis added) (citations and internal quotation marks omitted). *See also United States v. Miller*, 514 Fed. Appx. 374 (4th Cir. 2013) (emphasis added) (citations omitted) ("Although *a particular condition of supervised release need not be connected to the underlying offense*, the sentencing court must provide an explanation for the conditions it imposes.").

Here, in making in making his "unreasonable/no nexus/no legitimate probationary goal" arguments, Petitioner asserts that he is "simply being punished" by the court. *See Pet'r's Br.* at 23. In support of this so-called "being punished" assertion, Petitioner points to the following language of the court:

All of the above restrictions will, no doubt, seem like a harsh punishment to Mr. Hedrick. But what the Court is trying to do is to save him from himself. Serving 25 years in prison is hanging over his head. Any future violations will likely result in Mr. Hedrick's dying in prison.

App. 90. *See also Pet'r's Br.* at 23. After pointing to this language, Petitioner goes on to claim that

Judge Jordan is not trying to save the Petitioner from himself. If such were true Judge Jordan would not impose arbitrary and capricious terms that have absolutely no nexus to the Petitioner's underlying offense or the victim. Petitioner submits that

the terms created by Judge Jordan are actually setting him up for failure and an eventual death sentence.

Pet'r's Br. at 23.

Absolutely not! "For starters," if Judge Jordan was simply "out" to punish Petitioner, then he (Judge Jordan) would not have bothered imposing any new restrictions to Petitioner's terms and conditions of supervised release. Rather, Judge Jordan would have simply revoked Petitioner's supervised release and recommitted him to the penitentiary to serve the remainder of the term of his supervised release—25 years. Nor was Judge Jordan, by imposing the new restrictions at issue in this appeal, attempting to set Petitioner up for failure and, as characterized by Petitioner, an eventual "death sentence." If such were the case, Judge Jordan would not have warned Petitioner that any future violations on his part would likely result in him dying in prison. Furthermore, in the State's view, any such "death sentence", as characterized by Petitioner, would not "stand up." More specifically, this Court would, in all likelihood, find that such a sentence is disproportionate under the Court's holdings in *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983), and/or *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).<sup>31</sup>

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<sup>31</sup> As found by the Court in Petitioner's first appeal, *James*, 227 W. Va. at 416, 710 S.E.2d at 107:

Subjective and objective tests are considered in determining whether a sentence violates proportionality principles. The subjective test, set forth in syllabus point five of *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983), involves ascertaining whether the punishment is so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity." The objective test was stated in syllabus point five of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981), as follows:

In determining whether a given sentence violates the proportionality principle . . . , consideration is given to the nature of the offense, the legislative purpose behind

(continued...)

Rather than punishing him, as characterized by Petitioner, the court, in adding the new restrictions that Petitioner complains about here, was trying to “head off” any trouble “down the line.” As discussed below, given Petitioner’s actions and other circumstances surrounding this case, the court’s attempt to prevent any such trouble was certainly reasonable and served legitimate probationary goals. *See United States v. Weintraub*, 371 F. Supp.2d 164, 166 (D. Conn. 2005) (internal quotation marks omitted) (“[M]odification [of supervised release] is appropriate to account for new or unforeseen circumstances not contemplated at the initial imposition of supervised release.”). *See also State v. Faraday*, 842 A.2d 567, 574 (Conn. 2004) (internal quotation marks omitted) (“[M]odifications of probation routinely are left to the office of adult probation. When the court imposes probation, a defendant thereby accepts the possibility that the terms of probation may be modified or enlarged in the future[.]”); *Faraday*, 842 A.2d at 585 (citations omitted) (“[C]onditions of probation are necessarily flexible, and may be amended by the office of adult probation or the court to meet the current situation, as it presents itself. Thus, it stretches the ex post facto prohibition beyond its proper boundaries to suggest, as the defendant’s argument does, that only those conditions of probation specifically mentioned in the statutes at the time of the underlying conduct may ever be imposed.”). *See also State v. Crouch*, 939 A.2d 632, 636 (Conn. App. 2008) (“If he accepts the offer of probation, [the defendant] must accept all of the conditions. . . . In accepting probation, the defendant accepted at the time of sentencing the possibility that the terms of his probation could be modified or enlarged in the future in accordance with the statutes governing

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<sup>31</sup>(...continued)

the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

probation.”).

Furthermore, and importantly, “[j]ust as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.” *United States v. Knights*, 534 U.S. 112, 119 (2001). With the above “stage” set, the State will now specifically address Petitioner’s assertions against the court’s new restrictions to his terms and conditions of supervised release.

**1. Petitioner’s Farm.**

In its Order of October 29, 2014, the court added a new restriction to Petitioner’s terms and conditions of supervised release, which restriction prohibited Petitioner from going to his farm in Pendleton County. On appeal, Petitioner asserts that this restriction is unreasonable. In making this assertion, Petitioner essentially argues that this restriction does not have a nexus to his underlying offenses (two counts of first-degree sexual abuse) or to the victim of these offenses, and fails to serve a legitimate probationary goal. *See generally* Pet’r’s Br. at 23-24. The State disagrees.

Simply put, as noted above, the court’s farm restriction does not have to have a nexus to Petitioner’s underlying offenses, nor to the victim of these offenses. *See Worley*, 685 F.3d at 407 (“A particular restriction does not require an offense-specific nexus[.]”). *See also Miller*, 514 Fed. Appx. 374 (“[A] particular condition of supervised release need not be connected to the underlying offense[.]”).

Furthermore, contrary to Petitioner’s assertions, the court’s farm ban serves a very important, legitimate probationary goal. That is, this ban serves to prevent Petitioner from evading the supervision of his probation officers. On this point, at the September 22, 2014, revocation hearing, Probation Officer Daniel Smith testified as follows:

I received a phone call stating that, I guess Mr. Hedrick had stated to some people, he was going to close the gate and park around back so that the Probation Officers didn't know when he was at the farm.

App. Vol. 2, at 12.

“Sure enough,” when Officer Smith, along with Officer Roberts, attempted to visit Petitioner’s Pendleton County farm on August 16, 2014, these officers found the gate to the farm locked. This was in direct contravention to a prior verbal instruction given to him by Officer Smith, as well as Officer Lawrence Wade, at the time (in January 2014) that Petitioner signed off on the form specifying the terms and conditions of his supervised release. More specifically, Petitioner was instructed that the gate to the farm had to be left open while he was there so as to allow his probation officers to enter the farm to make contact with him. Because of his failure to follow this instruction, Officers Smith and Roberts (when they visited Petitioner’s farm on August 16, 2014) had to walk a ¼ mile down the road and then walk over an old swinging bridge onto Petitioner’s farm in order to make contact with him. Notably, traversing this bridge would have been “doubly hard,” if not impossible, for these Officers had it been wintertime, when the bridge could very well be “loaded up” with snow and ice; such would also pose a danger to these Officers. At any rate, after crossing the bridge, these Officers observed that Petitioner’s truck was hidden from the road, as the truck was parked behind Petitioner’s barn. On top of all of this, as of the time that the court issued its October 29, 2014 Order, Petitioner was still refusing to provide his probation officers with a key to the gate to his farm.

Based on these factors, the court, and correctly so, found that Petitioner was attempting to evade the supervision of his probation officers:

The Court finds that Mr. Hendrick's locking the gate and his refusal to provide a key to the gate on his Grant County [SIC] farm and parking his truck in a way that it was concealed from view are violations of the terms of supervised release. The fact that, even at the hearing, Mr. Hedrick is still refusing to provide a key and believes the ISO officers should go a distance and cross a rickety swinging bridge to access the farm speaks volumes about Mr. Hedrick's attitude. The Court finds that all these actions are an effort to eliminate supervision.

App. 87.

Again, the court's farm ban serves to prevent Petitioner from using this farm to evade the supervision of his probation officers. Surely, this Court would agree that such a ban serves a very important, legitimate probationary goal.

## **2. Smoke Hole Caverns' Promotional Booths.**

In its Order of October 29, 2014, the court added a new restriction to Petitioner's terms and conditions of supervised release, which restriction prohibited Petitioner from going to any booths set up by SHC at locations offsite to SHC's property, including the State Fair and any other local fairs or festivals. Petitioner asserts that this ban does not serve any legitimate probationary goal. Pet'r's Br. at 25. In asserting such, Petitioner first points to Probation Officer Smith's testimony at the September 22, 2014 revocation hearing, wherein Officer Smith stated, "I'm concerned about the safety of the employees [at SHC] and I feel that they should be able to have a work environment where they're not in fear of similar crimes [sexual abuse at the hands of Petitioner] occurring." App. Vol. 2, at 57. *See also* Pet'r's Br. at 25. On this testimony, Petitioner argues that Officer Smith's concerns for SHC's employees is not an issue, as Petitioner's daughter-in-law, Michele Hedrick, testified at the revocation hearing that only family members, and no employees of SHC, were at SHC's booth at the State Fair. Pet'r's Br. at 25.

Petitioner's arguments on this point beg the question—What about the next fair or festival and the ones after that? Certainly, female employees of SHC could be working at SHC's booth during these future fairs and festivals. And certainly, other females will visit SHC's booth during these future fairs and festivals. Furthermore, it is undeniable that, when it comes to SHC and its female employees and visitors, Petitioner cannot "keep his hands to himself." This is buttressed by the lower court's findings:

THE COURT: Okay. Of course the Court had the advantage of presiding over the trial and these proceedings and this is the scene of the crime. This was an employee of the motel that was the victim here and in the course of the presentence report it was revealed that there were other situations similar that were never prosecuted. At least one situation with a guest at the motel, a female guest, and it was sort of common knowledge in the county that Mr. Hedrick was a concern for the young girls that worked there as well as the other women.

App. Vol. 1, at 11-12.

The above findings of the lower court are "right in line" with this Court's findings during Petitioner's first appeal:

Although Mr. Hedrick's case did not involve a minor, crimes of violence against the person were nonetheless involved. The twenty-five-[year-]old victim of Mr. Hedrick's uninvited and unwelcome sexual advances was an employee – a subordinate requesting time off from her boss. Mr. Hedrick took advantage of this disparate relationship and attempted to intimidate the young woman (who was thirty years his junior) in order to obtain sexual favors. The victim was so shaken by the experience that she never returned to the workplace. The jury hearing this evidence returned a verdict of guilty on two counts of sexual abuse in the first degree. The judge imposed a supervised release sentence of twenty-five years based on evidence and information, including an evaluation by a forensic psychiatrist. We note from the record before us that among the things indicated in this evaluation was that Mr. Hedrick was at least at a moderate risk for recidivism and reoffending.

*James*, 227 W. Va. at 417, 710 S.E.2d at 108.

In short, the additional restriction imposed by the lower court prohibiting Petitioner from

SHC's promotional booths at the State Fair, as well as other local fairs and festivals, goes "hand-in-hand" with what is of paramount importance in this case—protecting the public. This protection of public, of course, consists of protecting the women (employees and guests alike) who may, in the future, work at or visit SHC's promotional booths from Petitioner's unwanted and uninvited sexual advances, which advances Petitioner obviously has a proclivity towards. Thus, contrary to Petitioner's contention in this appeal, this additional restriction does serve a legitimate probationary goal.

Furthermore, the court had the following to say about Petitioner's trip to the State Fair:

The Court finds that Mr. Hedrick left a phone message that he was going to the State Fair in Lewisburg. He did not say where he would be staying or how long he would be there. The sex offender rules are not clear on in-state travel. Offenders are required to notify ISO of "their status". While this is a clear violation of the spirit of supervision rules, the Court cannot find that this is a violation as currently written. The Court finds that Mr. Hedrick hung around the Smoke Hole Caverns booth at the State Fair for several days. Mr. Hedrick was aware that the Court had previously prohibited him from Smoke Hole premises. This was not a violation of the language of that Order. It was, however, another huge breach of the spirit of that Court Order.

App. 87-88. Again, these findings solidify what the court, and correctly so, thinks of Petitioner and his actions during the short time that he has been on supervised release—i.e., "a man who will not only 'push the envelope', but try to evade supervision."

Lastly, on this issue, Petitioner relies much on Michele Hedrick's testimony that only family members, and no employees, were at SHC's booth during the State Fair. However, Petitioner seems to "skip over" other very important testimony coming from Ms. Hedrick. This testimony consisted of Ms. Hedrick stating that, while no "drama" occurred during Petitioner's visits to the booth, Petitioner's presence at the booth made her feel uncomfortable. Ms. Hedrick further indicated that she, along with other members of the family, do not like Petitioner, have been hurt by him, do not

want him around, and would prefer that he stay away. On these factors, Petitioner's presence at SHC's booths at future fairs and festivals is nothing more than "trouble waiting to happen." Put differently, if Petitioner continues to show up at SHC's booths, sooner or later there is going to be a "run-in" between himself and one or more of his family members. Thus, the lower court's restriction prohibiting Petitioner from these booths serves to stave off any such "run-ins," which certainly is a legitimate probationary goal.

### **3. Hunting Activities of Petitioner.**

At his September 22, 2014, revocation hearing, in response to a question as to how many bear dogs he owned, Petitioner stated as follows: "I don't know I have, some are puppies. I just bear hunt for the recreation of it I haven't shot a gun in ages, I wouldn't carry one if you give it to me." App. Vol. 2, at 91.

On appeal, Petitioner asserts that the court misconstrued this testimony to mean that Petitioner was actually going into the woods and hunting bear with a rifle. As a result thereof, according to himself, the court (in its Order of October 29, 2014) imposed a new restriction on his terms and conditions of supervised release, whereby Petitioner was prohibited from participating in all hunting activities, as well as accompanying other hunters into the woods or fields. In arguing against this restriction, Petitioner asserts that the court failed to ask a follow-up question to clarify his testimony, as it related to his bear hunting activities. Petitioner further asserts that the court failed to conduct a separate hearing on this issue, at which hearing he could have presented testimony and pictures describing what he meant when he testified that "he just hunts bear 'for the recreation of it.'" Petitioner goes on to argue that he does not hunt bear in the traditional sense—i.e., with a gun or rifle. Rather, as he further argues, Petitioner (as a hobby, to relieve stress, and to get exercise)

breeds, raises and trains his dogs to pursue different types of wildlife on his Pendleton County farm, and that he enjoys going out into the woods or fields to photograph wildlife.<sup>32</sup> *See generally* Pet'r's Br. at 26.

Based on all of this, Petitioner asserts the court's additional restriction prohibiting him from engaging in all hunting activities, including accompanying other hunters into the woods or fields, is not reasonable and does not serve any legitimate probationary goal. In making this assertion, Petitioner argues that the court's hunting restriction has no relation to his underlying conviction, does not protect the victim and does not protect the public at large. Rather, as lastly argued by Petitioner, the court's restriction is "vindictive and arbitrary." *See generally* Pet'r's Br. at 27.

Not at all! To begin with, in making the above arguments, Petitioner fails to inform the Court of a crucial fact in this case. That is, as correctly pointed out by the lower court, Petitioner "previously was convicted of a federal wild-life felony, in addition to the two felony counts of sexual abuse in the case at hand." App. 89. This prior wildlife felony involved Petitioner knowingly purchasing and transporting, in interstate commerce, "two Mountain Lions," in violation of federal law. App. 16. These factors alone show that Petitioner is not to be trusted when it comes to hunting and/or any activities related thereto. This would include Petitioner training his dogs on any wildlife, including bear, as well as accompanying other hunters into the woods and fields. Surely, this Court would agree that taking measures prevent Petitioner from violating any hunting laws, state and

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<sup>32</sup> Notably, Petitioner also argues that he is permitted by statute, W. Va. Code §20-2-5, to train his dogs on bear during a certain period of the year. *See* Pet'r's Br. at 26-27. The actual provision that "speaks" to this issue is W. Va. Code §20-2-5 (23), which provision allows a person to train his dog(s) on wild animals, including bear, throughout the year except May 1 through August 15.

federal alike, serves a legitimate probationary goal. This is especially true here, where Petitioner has a history of violating such laws.

Nor did the court misconstrue, as he insists, Petitioner's testimony concerning his bear hunting with his dogs for recreational purposes. This is more than evident from the following finding of the court: "Mr. Hedrick exclaimed: 'I've been hunting for recreational purposes, *but I don't take a gun.*'" App. 90 (emphasis added). Obviously, and contrary to what he argues in this appeal, the court did not "take" this testimony to mean that Petitioner was actually going into the woods and hunting bear with a rifle. If such had been the case, then the court would not have pointed directly at Petitioner's statement that he did not take a gun with him when he hunted for recreational purposes.

Furthermore, as pointed out by the court:

Mr. Hedrick is known as a big-time hunter, especially as a bear hunter. The Court is very concerned that Mr. Hedrick is putting himself in a position where he will be tempted to take just one shot or that one of his many enemies will claim that he did.

App. 90. By these findings, it is again obvious that the court, in imposing a complete bar from Petitioner engaging in hunting activities, is trying to "head off" Petitioner from violating the terms and conditions of his supervised release. These terms and conditions, as pointed out by the court, prohibit Petitioner from "possessing firearms, ammunition, and cross-bows." App. 89-90. Again, surely this Court would agree that taking measures to prevent Petitioner from violating the weapons and ammunition restriction of his terms and conditions of supervised release serves a legitimate probationary goal.

Again, as for Petitioner's argument that the court's hunting restrictions have no nexus to his underlying conviction (two counts of first-degree sexual abuse), it does not have to. *See Worley*, 685

F.3d at 407 (“A particular restriction does not require an offense-specific nexus[.]”). *See also Miller*, 514 Fed. Appx. 374 (“[A] particular condition of supervised release need not be connected to the underlying offense[.]”). As for Petitioner’s argument that the court’s hunting restrictions do not protect the victim of the underlying offense and do not protect the public at large, the court never intended that it do so. Instead, the court was reacting to Petitioner’s testimony during the September 22, 2014, revocation hearing. During this hearing, the court learned, for the first time, that Petitioner was still engaging in hunting activities—i.e., bear hunting with his dogs without a gun. Upon learning this, and knowing that Petitioner had been previously convicted of a federal wildlife felony, the court imposed its hunting restrictions. In doing so, as noted above, the court was very concerned that Petitioner was putting himself in a position where he would be tempted to take just one shot. Given these factors, in imposing its hunting restrictions, the court was reacting to Petitioner’s history (federal wildlife felony), as well as its learning that Petitioner was still hunting, albeit without a gun. Simply put, such modifications and/or amendments are permissible. *See Weintraub*, 371 F. Supp.2d at 166 (“[M]odification [of supervised release] is appropriate to account for new or unforeseen circumstances not contemplated at the initial imposition of supervised release.”). *See also Faraday*, 842 A.2d at 585 (“[C]onditions of probation are necessarily flexible, and may be amended by the office of adult probation or the court to meet the current situation, as it presents itself.”).

Lastly, as for Petitioner’s assertion that the court’s hunting restrictions prevent him from going into the woods or fields to photograph wildlife, nothing could be further from the truth. In short, photographing wildlife is not a hunting activity, which is what the court’s restrictions speak to. Thus, contrary to his contention, the court’s hunting restrictions do not prevent Petitioner from going into the woods or fields to take wildlife photographs, although he cannot be in the company

of other hunters while doing so. Nowhere is this more evident than the court's Order of October 29, 2014, which Order is the subject of this appeal: "Jerry Hedrick is hereby prohibited from participating in all hunting activities. He cannot accompany other hunters into the woods or fields. This is effective immediately." App. 90.

V.

**CONCLUSION**

The lower court's Order of October 29, 2014, which Order imposed new restrictions to petitioner's terms and conditions of supervised release, should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent*

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**CERTIFICATE OF SERVICE**

I, BENJAMIN F. YANCEY, III, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *BRIEF OF RESPONDENT STATE OF WEST VIRGINIA* upon counsel for the Petitioner by depositing said copy in the United States mail, with first class postage prepaid on this 5<sup>th</sup> day of June, 2015, addressed as follows:

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Benjamin F. Yancey (by James Jr)  
BENJAMIN F. YANCEY, III