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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. _____

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below-Respondent,

Vs.

APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF CLAY COUNTY CASE NO. 09-F 4 & 09-F-13

KAREN TANNER,
Defendant Below-Petitioner.

PETITIONER'S BRIEF

JUSTICES:
CHIEF JUSTICE, THE HON. MARGARET WORKMAN
JUSTICE, THE HON. ROBIN JEAN DAVIS
JUSTICE, THE HON. BRENT D. BENJAMIN
JUSTICE, THE HON. MENIS KETCHUM, II
JUSTICE, THE HON. THOMAS E. McHUGH
AND
THE HON. RORY L. PERRY, II, CLERK

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PETITION FOR APPEAL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

COMES NOW the Appellant, Karen Tanner, (hereinafter "Ms. Tanner" "Karen Tanner" or "Petitioner") by and through her counsel, Barbara Harmon-Schamberger, with her petition for appeal to this Honorable Court related to that portion of her Court Supervised Parole that prohibits her from having contact with her husband, Michael Tanner. Your Petitioner avers that the Order of the trial court fails both to contain findings of fact sufficient to justify the separation of Ms. Tanner from her husband as well as fails to narrowly tailor narrowly the prohibition to rationally relate to the specific circumstances of the case at bar, said prohibition implicates Your Petitioner's basic fundamental right of marriage. If the Court were to **GRANT** petitioner's appeal, it would a case of first impression in West Virginia.

I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW:

This Petition arises before this Honorable Court as a result of the imposition of a modified criminal sentence pursuant to Petitioner's West Virginia Rules of Criminal Procedure, Rule 35 Motion seeking alternative sentencing to her incarceration upon sentencing under a plea agreement. After spending six months in the Central Regional Jail, Petitioner's motion for alternative sentencing was heard. The trial court at said hearing modified its sentencing order to permit Petitioner to be released from jail on home confinement under the terms of Court Supervised Parole. The order granting Petitioner Court Supervised Parole was entered the 7th day of December 2010. Appendix Page 1. Petitioner appeals one particular condition under which said parole is to be served: the court ordered separation from her husband.

II. STATEMENT OF FACTS.

On or about the 9th day of June, 2009, the Appellant, Karen Tanner, (hereinafter the "Appellant" or "Ms. Tanner") pled guilty to one offense in Clay County Case No.s 09-F-04 and 09-F-13, to the offense of Manufacturing a Controlled Substance in violation of W.Va. Code

§60A-4-401 as charged in an information. Appendix Page 11. In Clay County Case No. 09-F-05, her co-defendant, her husband, Michael Tanner also pled guilty to Manufacturing a Controlled Substance in violation of W .Va. Code §60A-4-401 and Conspiracy in violation of W.Va. Code §61-10-31. While Mr. Tanner's criminal record was more fulsome, this was Ms. Tanner's first offense.

Ms. Tanner had been was on bond from the 19th day of January 2007 through the 10th day of July 2009. In the last month of Ms. Tanner's prior to sentencing, Ms. Tanner failed a drug screen and was immediately incarcerated in the Central Regional Jail. The Circuit Court, based upon Ms. Tanner's failure to comply with the terms and conditions of her bond, denied Ms. Tanner probation or home confinement. The Circuit Court then ordered Ms. Tanner confined in the Central Regional Jail pending such transfer and classification as the West Virginia Department of Corrections would choose to impose.

For six months, Ms. Tanner remained in the West Virginia Central Regional Jail without incident or complaint. The separation from her husband and co-defendant was exceedingly hard on both spouses. The two had been married for ten years. Mike has raised Karen's youngest son, Harry, as his own. The two caught glimpses of each other while in jail. It was the only contact they had.

Then, Ms. Tanner learned that her father, Harry Dobbins, Jr. was gravely and terminally ill with cancer. Based upon the fact that this conviction was her first conviction of any kind, and based upon the hardship on her family posed by her father's illness, upon motion of the defendant, the Court granted unto Ms. Tanner home confinement at the home of her father for a term of six months. At the end of six months, Ms. Tanner moved the Court to be released from home confinement. Despite a mix up in proper calculation of time served (in Ms. Tanner's favor), by order entered the 23rd day of August 2010 (hereinafter the "Order") the Court eventually placed Ms. Tanner on Court Supervised Parole (hereinafter the "Parole"). Appendix Page 59

Generally, the terms contained in the Order are those typically associated with probation. An exception to the general terms of probation was the term and condition contained in paragraph 20, which read: "The defendant shall not be in the presence or accompaniment of anyone convicted of a felony [,] including her husband." Appendix Page 61

Ms. Tanner timely objected to said term and condition. The Court was un-persuaded by any argument. The objectionable condition of the Parole remained. The Court gave no explanation for its ruling and made no findings of fact. Additionally, a term was omitted that should have been included pursuant to the requirements of Chapter 62, Article 12 Section 18: the length of the period of the Parole,(which statutorily would be the maximum of Karen's sentence, less deductions for good conduct and work as provided by law. §62-12-18). The Order was subsequently amended and it is from that Order that Ms. Tanner petitions this Court for appeal.

III. ASSIGNMENTS OF ERROR:

1. The trial court erred in prohibiting association between spouses without stating upon the record its specific reasons for so doing and how said prohibition would assist in the rehabilitation of the parolee.
2. The trial court erred in ordering a blanket ban prohibiting association between the spouses and co-defendants, where it failed to narrowly tailor its prohibition to a rationally related purpose.

IV. QUESTIONS PRESENTED:

May a trial court, without making specific findings of fact to support its decision, prohibit spouses, who were also co-defendants, from associating with each other as a condition of court supervised parole?

May a trial court prohibit association between co-defendant spouses where the decision creates a blanket ban on the association of long married defendants and where such ban is not narrowly tailored to rationally meet the specific circumstances of the case before the court?

V. BRIEF ANSWERS:

No. A trial court may not prohibit association between co-defendant spouses without expounding upon the record its reasons for so doing and making specific findings of fact in support of its decision.

No. A trial court may not prohibit association between co-defendant spouses where the decision creates a blanket ban on the association of long married defendants and where such ban is not narrowly tailored to rationally meet the specific circumstances before the court.

"Marriage is a matter of more worth
Than to be dealt in by attorneyship"
***Henry VI, Part 1**, Act 5, Scene 5 Lines 50-1,*
William Shakespeare

VI. ARGUMENT AND DISCUSSION OF LAW:

A. Standard of Review:

These issues present mixed questions of law and fact as well as constitutional issues. The ultimate disposition is subject to an abuse of discretion standard, the factual findings are subject to a clearly erroneous standard, and questions of law are reviewed *de novo*. *See* Syl. Pt. 2, Walker v. West Virginia Ethics Comm., 201 W .Va. 108, 492 S.E.2d 167 (W.Va. 1997). Petitioner's right to preserve her marriage falls within the ambit of the fundamental right of marriage. *See* In Re: Kilpatrick, 375 S.E.2d 794, __W.Va. ___ (W.Va. 1988) (*citing:* in foot note 5 that U.S. Supreme Court's holding that marriage is a fundamental right). Burdens upon fundamental rights are reviewed with strict scrutiny. Skinner v. Oklahoma, 316 U.S. 535 at 540, 62 S.Ct. 1110 (1942); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 17, 93 S.CT. 1278 at ___ (1973). Terms and conditions of probation, being part of sentencing orders of trial courts are reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." State v. Jones, 610 S.E.2d 1, 216 W.Va. 666 (W.Va. 2004) *citing* Syl. Pt. 1 State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (W.Va. 1997). In the instant case, because the trial court imposed court supervised parole with a prohibition on the Petitioner and her husband having any contact, without explaining the reasons therefore or narrowly tailoring the prohibition to fit the facts of the case, the trial court's decision, as

discussed *infra,* violates both statutory and constitutional commands. It follows therefore, that the trial court's decision is not entitled to a deferential abuse of discretion standard.

B. West Virginia's Public Policy Position on Marriage.

Our Court has held,

> "[m]arriage is a relation in which the public is deeply interested and is subject to proper regulation and control by the state or sovereignty in which it is assumed or exists. The public policy relating to marriage *is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation.* This policy finds expression in probably every state in this country in legislative enactments designed to prevent sundering of the marriage ties for slight or trivial causes, or by the agreement of the husband and wife, or in any case except on full and satisfactory proof of such facts as the legislature has declared to be a cause for divorce." Persinger v. Persinger, __W.Va. ___ at ___, 56 S.E.2d 110 at 112 (W.Va. 1949). Emphasis added.

A marital relationship may be legally terminated in one of only three ways: annulment, divorce or death. *See* Persinger v. Persinger, __W.Va. ___ at ___, 56 S.E.2d 110 at 112 (W.Va. 1949) (*finding:* marital relationship, as a matter of law, may be terminated only one of two ways: annulment or divorce). The benefits and expectations of marriage, such as the rule that a child born of a marriage is presumptively legitimate, are "'founded in decency, morality and policy,' and [they] should be cast aside for most weighty reasons and on grounds of sound public policy." Ohlinger v. Roush, 193 S.E. 328 at 330, ___W.Va. ___ at ___ (W.Va. 1937). (*quoting:* Lord Mansfield). *See also* Bell v. Bell, 8 S.E.2d 183 at 184, __W.Va. __ at __ (W.Va. 1940) (*discussing:* public policies affecting marriage).

The power of marriage in our society is exceptional. Marriage may revoke a Last Will and Testament, unless said will provides for such contingency. Syl. Pt. 2 Foy v. County Com'n of Berkeley County, 191 W.Va. 29, 442 S.E.2d 726 (W.Va. 1994). Evolving public policy on marriage obliterated a long standing practice of common law marriage. In Fout v. Hanlin the Court quoted the forceful discussion of the Supreme Court of Oregon, finding that,

> "[t]he trend of modern authorities is against the recognition of common-law marriages. . . In our opinion the doctrine of common-law marriages is contrary to public policy and public morals[. . . .] Good government demands that our laws be obeyed in the solemnization of marriages as in all things else. An adherence to the law in this regard will tend to cause the parties to look with respect and reverence upon a contract which is the most sacred known to man,

and which ought not be lightly cast aside." Fout v. Hanlin, 169 S.E. 743 at 745, __W.Va. __ at __ (W.Va. 1933) *quoting* Huard v. McTeigh, 113 Or. 279, 232 P. 658, 663, 39 A.L.R. 528 (Or. 1933).

In the instant case, the trial court showed little consideration for the public policy in support of marriage. The trial court expressed its order in one numerical line, without explanation or discussion of facts and circumstances which would justify the de facto divorce of the defendant, Petitioner herein. Rationally, if de facto marriage (common law) marriage is not legal, a de facto divorce is not either. The equities in this matter are on the side of the Petitioner. Petitioner and her husband did not engage in domestic violence, adultery or other valid reasons to abandon a marriage. They broke the law, but not a law relating to the preservation of their marriage. Therefore, in this matter, the Court should either strike provision number 20 from the Order granting Petitioner Court Supervised Parole or remand the matter back to the trial court for a hearing as to why the Petitioner and her husband should not be permitted the contact normally afforded married persons when one is incarcerated and the other granted parole.

C. Conditions of Probation as Analogous to Conditions of Parole.

For purposes of the case at bar, because the court has imposed court supervised parole on the Petitioner (in contravention of both case law and statutes alike that make parole an executive function) and because the courts may impose probation as a proper exercise of judicial function, Petitioner avers that the most applicable case law is that which discusses terms and conditions of probation rather than parole. It therefore follows, as with many special conditions of probation, a condition which forbids association with a particular person prohibits conduct with is non criminal.[1] The question then is whether and to what extent such conditions must be justified as conducive to the rehabilitation of the probationer or required to protect society against a repetition of the crime. However, both by statute and design, trial courts have been granted broad discretion to impose conditions as deemed appropriate, although within jurisdictions certain conditions tend to become standardized. In the instant case, the Trial Court deviated substantially

[1] Most of this argument is taken directly from American Law Reports ALR3d, 99 A.L.R.3d. 967 (1980). By such acknowledgement, where quotation marks may unintentionally be lacking, counsel desires to avoid any allegation of plagiarism.

from generally accepted norms of terms of both parole[2] and probation in prohibiting Your Petitioner from associating with her husband, Mike Tanner.

D. Prohibition an Undue Burden upon Petitioner's Liberty Interest in her Marriage

In the instant case, by the terms of the court supervised parole, Petitioner may not associate with her husband which is an undue burden upon Petitioner's liberty interest in her marriage. Marriage is a basic civil right entitled to constitutional protection. Loving v. Commonwealth, 388 U.S. 1, at 12, 87 S.Ct. 1817 at ___ (1967); Skinner v. State of Oklahoma, 316 U.S. 535, at 541, 62 S.Ct. 1110, at 1113 (1942). Accordingly, courts have refused to impose a condition of probation which might prohibit a probationer from associating with his or her spouse. *See e.g.* Bunn v. State, 144 Ga. App. 879, 243 S.E.2d 105 (Ga. App. 1978) (*expressing:* doubt that a condition of probation would be proper if it prohibited a husband and wife from associating.). Thus, under statutes and constitutional requirements that punishments be proportionate to the offense and that one convicted of a felony retains the right to enter into marriage contracts except as otherwise provided by law, a court record consisting of a colloquy between the trial court and defense counsel to the effect that the defendant's husband had been largely to blame for the defendant's crimes of forgery, was found insufficient to justify imposing the condition that the defendant not associate with her husband. State v. Martin, 282 Or. 583, 580 P.2d 536 (Or. 1978). *See also* Dawson v. State, 894 P.2d 672 (Alaska App. 1995) (*finding:* trial court erred in declaring special rule of probation that defendant was not allowed contact with wife without first obtaining probation officer's approval since condition implicated liberty interest and was not narrowly tailored to defendant's circumstances.). A restriction will not be upheld where such prohibition was unrelated to the crime for which the probationer was convicted and was not reasonably related to prevent future criminal conduct. Hamburg v. State, 820 P.2d 523 (Wyo. 1991); State v. Allen, 12 Or. App. 455, 506 P.2d 528 (Or. 1973) (*prohibiting* marriage between probationer and a habitual criminal, without prior consent of the court and *providing* that the court has wide latitude in fashioning a probationary sentence).

[2] Parole is a purely executive branch function as discussed

In State v. Saxon, 131 Or. App. 662, 886 P.2d 505 (Or. App. 1994), the Oregon Supreme Court found that the special condition imposed on defendant that she not associate with husband for five years was improper, despite the fact that the trial determined that association between the spouses posed a threat to the defendant's rehabilitation. The reviewing court drew this conclusion because the trial court did not ascertain whether there existed a less restrictive manner of achieving the objective of preventing the husband's bad influence from harming the defendant. *Accord* State v. Nickerson, 791 P.2d 647, 164 Ariz. 121 (Az. 1990) (*finding* record amply supported trial court's apparent conclusion that separating husband and wife for a period of time, limiting contact to counseling sessions, telephone contact and visits within the discretion of probation officer served rehabilitative purpose). In general, "[i]n West Virginia, as in other states, probation differs from parole in that the judge is authorized to tailor the probation conditions to meet the particular needs of the individual case, while parole conditions are generally uniformly set by the parole board for all parolees." Jett v. Leverette, ___W.Va. ___, at __, 247 S.E.2d 469 at 471 (W.Va. 1978).

E. Prohibition on Marital Association Warranted and Upheld

Prohibitions upon a probationer's contact with his or her spouse appear to be based upon both a definitive rehabilitative purpose with a specific reason for the ban being placed in effect, particularly where the spouse may have a criminal history or considerable criminal influence and such prohibition being narrowly tailored to meet the facts of the case. A ban on association with a spouse was upheld under unusual circumstances, in Re: Peeler, 266 Cal. App. 2d 483, 72 Cal. Rptr. 254 (1968 3rd Dist. Cal.) wherein the defendant, indicted for selling marijuana, pleaded guilty to the lesser offense of possession thereof, and was placed on probation on the condition, inter alia, that she live with her parents and not associate with any known or reputed user or possessor of marijuana or other dangerous drugs or narcotics. The day before defendant's sentencing, the defendant married a young man and, she claimed, learned only after the marriage ceremony that charges were pending against him for possession and sale of marijuana. The defendant then failed to bring this change of circumstance to the attention of the court or her attorney out of fear that she would jeopardize her chance of probation. Defendant then promptly sought a modification of the terms of her probation to enable her to cohabit with her husband.

The court was not impressed and declined to so modify her probation. After a successful habeas petition, the Court's order was modified to reflect that the Defendant could not cohabit with her husband until her husband's name was cleared. Thus the term and condition of probation was not a blanket endorsement by the court of the separation of husbands and wives as a condition of probation under all circumstances. In Re: Peeler, 266 Cal. App. 2d 483, at ____, 72 Cal. Rptr. 254 at 260 (1968 3rd Dist. Cal.); *See also* U.S. v. Rodriguez, 178 Fed. Appx. 152 (3rd Cir. 2006) (*holding* limitation on defendant's contact with husband was directly related to salutary purpose of reducing husband's ability to induce wife to commit crimes and protecting the public from further offenses); Mitchell v. State, 516 So.2d 1120 (Fla. Dist. Ct. App. 1st Dist. 1987) (*holding:* two year prohibition on association with husband proper and bore reasonable relationship to goal of rehabilitation in that wife had been arrested and charged with aiding husband's escape from jail while he was incarcerated).

The Court has also upheld a prohibition on association between spouses where the prohibition was to protect a battered spouse from further harm. Moody v. State, 250 Ga. App. 380, 551 S.E.2d 772 (Ga. App. 2001) (*holding:* prohibition on defendant of having contact with wife upheld where defendant was convicted of three counts of battery, the victim of all three offenses being his wife, because condition rationally related to preventing further batteries on wife); People v. Jungers, 127 Cal. App. 4th 698, 25 Cal. Rptr. 3d 873 (Cal. App. 2005) (*holding*: probation condition was reasonable and constitutionally valid where state had an interest in addressing domestic violence and the order was narrowly drawn).

Based upon a reading of the case law in this narrow field, it would appear that the rule is a two part test:

> **First**, the court must make an inquiry into the specific circumstances of the case to determine if a prohibition on spousal contact is necessary to rehabilitate the probationer or effectuate a public policy, for example, but not limited to, the prevention of domestic violence or child abuse or further criminal acts; and
>
> **Second**, the court must narrowly tailor the prohibition to rationally relate to the specific circumstances of the case at bar.

It would also appear from the jurisprudence, that an outright ban on spousal contact requires something more than a probationer and spouse being merely co-defendants. Instead

prohibited contact demands something more, such as the spouse is a battered spouse, the probationer deceitful, the spouse be under criminal charges or indictment, the probationer has committed a crime in furtherance of aiding a criminal spouse, or where the spouses are simply a bad influence on each other.[3]

In the instant case, Karen and Michael Tanner have been married for thirteen years. Michael Tanner's criminal history, bluntly put, is extensive. From 1986 to 1998 Michael Tanner was charged with fourteen (14) crimes and convicted of half as many[4]. Then from 1998 through to 2007 there was a lull in any criminal activity. For nearly ten years, it would appear that Michael Tanner behaved. This period of time coincides with his marriage to Karen Tanner, a mother of six.

In January of 2007 Mr. Tanner fell off the wagon so to speak. He became involved with the manufacture and use of methamphetamine. At the same time, Karen Tanner became involved with the manufacture and use of methamphetamine. For nearly a decade, Karen Tanner kept her husband from returning to his old habits. Karen was clearly a good influence on her husband. Her yielding to the corruption around her reflected not so much Michael's bad influence as the insidious effects of methamphetamine in and of itself. Michael is younger than the Petitioner. Having born six children, Ms. Tanner was prone to weight gain. Karen's emotional insecurities about her weight and age compared to Michael, who, even without the use of methamphetamine, tends to be of a trim build, made the use of methamphetamine more attractive.

The Court, in determining that Karen and Michael Tanner should have no contact, failed to take into account the specific nature of Karen and Michael's marriage. The Court failed to take any evidence or hear from family untainted by the drug trade and use, as to why Karen and Michael had both a good relationship and a good marriage. The Court refused to consider that Michael and Karen would be supportive of each other's rehabilitation and thus should not be prohibited from seeing each other. The Court simply noted Karen Tanner's objections to the imposition of this term and condition and proceeded with imposing the rest of the terms of Karen Tanner's court supervised parole.

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[3] In State v. Nickerson the record "reveal[ed] that appellant and his wife were a bad influence on one another." 164 Ariz. 121 at ___, 791 P.2d 647 at 648 (Ariz. App. 1990).

[4] This number is based upon the disclosures made by the Clay County Probation Officer in her presentence report on Michael Tanner. Counsel does not have an NCIC with which to compare this conclusion but has no reason to believe that the probation officer's report is inaccurate.

Thus, because the trial court failed to make an inquiry into the specific circumstances of the case to determine if a prohibition on spousal contact was necessary to rehabilitate the parolee and because the trial court failed to narrowly tailor the prohibition to rationally relate to the specific circumstances of the case at bar the term and condition of Karen Tanner's Court Supervised Parole that she be prohibited from all contact with her husband should be reversed by the Court.

F. Prohibition on Court Ordered Parole/ Parole conditions not as amenable to specification as probation.

Petitioner raises the trial court's order of two years of court supervised parole solely for the purpose of distinguishing the lack of malleability between terms of parole and terms of probation. Parole is exclusively an executive branch function. Rowe v. W.Va. Dept. of Corrections, 292 S.E.2d 650, at 653, 170 W.Va. 230, at ___, (W.Va. 1982); Jett v. Leverette, ___W.Va. ___, 247 S.E.2d 469 (1978); Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113 (1943); Code of West Virginia §62-12-12 [1931, as amended]. Although well intentioned, because parole is exclusively a function of the executive branch, the trial court had no authority to place Karen Tanner on court supervised parole. The trial court, however, had absolute authority to grant or deny probation to Karen Tanner. Code of West Virginia, §62-12-1 [1931, as amended]. Probation is a judicial act subject to judicial review. Jett v. Leverette, ___W.Va. ___, at ___, 247 S.E.2d 469, at 471 (W.Va. 1978); Code of West Virginia §62-12-1 [1931, as amended].

In the instant case, the trial court placed the defendant on court supervised parole for two years. The basic distinction between "parole and probation . . . is that the term of probation 'has no correlation to the underlying criminal sentence, while parole is directly tied to it. In effect, there is a probation sentence which operates independently of the criminal sentence.'" State v. Cooper, 167 W.Va. 322 at __-__, 280 S.E.2d 95 at 100-101 (W.Va. 1981) *quoting* Jett v. Leverette, ___W.Va. ___, 247 S.E.2d 469 (1978). Petitioner would note that if this Court finds it necessary to remand the matter back to the trial court related not only to the terms contained in the trial court's order but also for modification of the trial court's order from court supervised parole to court supervised probation, Petitioner believes it would be double jeopardy for the trial court to increase Ms. Tanner's probation beyond the time frame set by the terms of the court

supervised parole. Sellers v. Broadwater, 176 W.Va. 232, 342 S.E.2d 198 (W.Va. 1986) (*holding:* any attempt to increase a sentence after a valid sentence has been served is a violation of the double jeopardy clause)[5]; Connor v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (W.Va. 1977). To reiterate, the Petitioner only discusses the aspect of the Court's Order dealing with parole to note that West Virginia has held that "[t]he opportunity for *less restrictive conditions* is therefore more available in probation than parole." Jett v. Leverette, ___W.Va. ___, at ___, 247 S.E.2d 469 at 471 (1978). Emphasis added. The Commissioner of Corrections may proscribe a parolee's right to marry, but not invalidate a parolee's marriage without due process of law. *See* Connor v. Griffith, 160 W.Va. 680, at ___, 238 S.E.2d 529, at 531 (W.Va. 1977) (*citing:* in footnote 12 list of limitations imposed upon parolee by Commissioner of Corrections in addition to terms and conditions of parole contained in statute). Thus one could infer that the conditions of probation, while narrowly tailored to meet the needs of the specific case at bar, are not meant to be either onerous or oppressive.

In short, had Petitioner not been married at the time of her conviction, by the terms and conditions of both statute and rules promulgated by the Commissioner of Corrections, Petitioner could not marry her co-defendant without the permission of her parole officer. Petitioner, however, was married prior to conviction. Petitioner had no previous criminal record. Petitioner was not a domestic violence victim of her husband and, given the ten years in which Mr. Tanner behaved himself, it is reasonable to assume that Your Petitioner is a person of good influence upon her husband. Moreover, Your Petitioner has learned a harsh lesson from engaging in conduct even remotely like her husbands. Thus, Your Petitioner was previously a good influence upon her husband and, presumably, is capable of being so again. Ms. Tanner ought to at least have the opportunity to present evidence to the trial court as to why the parties reunification would be in both their interests and what other services, acts or omissions would enable them both to comply with any terms and conditions of probation for Ms. Tanner and parole for Mr. Tanner (if he was granted parole). Ms. Tanner is likely to prevail upon her application to the Court for a modification of terms if this Court determines that it must remand the matter for further consideration by the trial court. Your Petitioner has had no parole violations to date. Your

[5] Parole, unlike probation, carries with it a term of incarceration during which the defendant must demonstrate through his or her good conduct in order to be released. Jett v. Leverette, 247 S.E.2d 469 at 470, 162 W.Va. 140 at ___ (W.Va. 1978). In the instant case, Petitioner spent a period of incarceration without incident prior to her release.

Petitioner successfully completed a period of home confinement. Your Petitioner resides in the marital home and said home is expected to be the place of residence for Mr. Tanner upon his release from prison. Petitioner and her husband have neither domestic violence protective orders against each other nor have they been charged with domestic battery upon one or the other. Despite this failure to conform their conduct to the requirements of society, Michael and Karen Tanner are capable of supporting each other in any period of rehabilitation and should be able to communicate with each other during Michael's further period of incarceration.

VII. CONCLUSION:

Petitioner and her husband were stupid. Their actions constituted criminal conduct for which they both took responsibility and pled guilty. Without making light of Ms. Tanner's charges, the Petitioner was not a hardened criminal and remained immune to her husband's history of criminal activities until, like Persephone, she tasted four seeds of a pomegranate and was condemned to spend half her life in her husband Hades' underworld. In Karen Tanner's case, she was condemned to life as a felon. Yet Petitioner and her husband, for their crimes, are not Bonnie and Clyde, Julius and Ethel Rosenberg, Myra Hindley and Ian Brady[6] or California teenager Jaycee Dugard's kidnappers Phillip and Nancy Garrido. They have no long criminal history, nor history of domestic violence. Separating this couple after ten years of marriage and segregation as a result of their incarceration furthers neither the goal of rehabilitation of either party nor does it preserve the fundamental right of Mr. and Mrs. Tanner to remain married.

VIII. PRAYER FOR RELIEF:

WHEREFORE YOUR PETITIONER PRAYS AS FOLLOWS:

1. That her Petition be **GRANTED.**
2. That her Petition be **HEARD.**
3. That this Honorable Court will strike the term and condition of Ms. Tanner's Court Supervised Parole that prohibits her from associating with her spouse of thirteen years.

[6] England's Moors Murderers

4. That this Honorable Court will establish a rule for the evaluation of the appropriateness of the separation of spouses in probationary that will accord with both constitutional and statutory demands.
5. That this Court will **GRANT** such further and other relief as justice may require.

RESPECTFULLY SUBMITTED,

KAREN TANNER, PETITIONER
BY HER COUNSEL,

BARBARA HARMON-SCHAMBERGER, WVSBN 7296