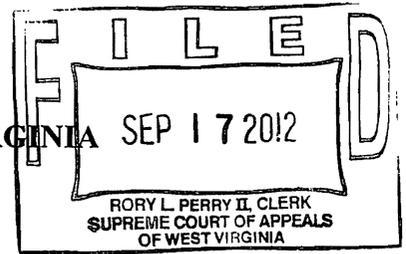


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

v.

Supreme Court No. 12-0513
Circuit Court No. 11-F-40
(Kanawha)

GABRIEL HARGUS,

Petitioner.

PETITIONER'S BRIEF

Lori M. Peters
W.Va. Bar No. 11303
Assistant Public Defender
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, WV 25330
304-348-2323

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ASSIGNMENTS OF ERROR..... 5

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 8

SUMMARY OF ARGUMENT..... 11

STATEMENT REGARDING ORAL ARGUMENT..... 12

ARGUMENT

 I. The West Virginia Extended Supervision of Sex Offenders Act, W.Va. Code §62-12-26 (2010), is unconstitutional under the West Virginia and United States Constitutions in that it violates the defendant’s rights of procedural due process, substantive due process, equal protection, prevention of double jeopardy, and right to proportionate sentencing..... 13

 II. The notice of violation of extended supervision was constitutionally defective in that the original criminal complaint giving rise to the violation allegation did not contain the charge of failing to provide a valid social security number and Petitioner was eventually found in violation of his term of extended supervision due in part to this specific allegation of failure to properly register as a sex offender. 25

 III. Petitioner’s term of extended supervision, including the length of the term and the conditions added by the trial court judge, is excessive..... 26

CONCLUSION..... 29

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348 (2000)	17,19
<i>Damron v. Haines</i> , 223 W.Va. 135, 672 S.E.2d 271 (2008)	17,21
<i>Iowa v. Sallis</i> , 786 N.W.2d 508 (Iowa App. 2009)	22
<i>Louk v. Haynes</i> , 159 W.Va. 482, 223 S.E.2d 780 (1976).....	25
<i>Ohio v. Johnson</i> , 467 U.S. 493, 104 S.Ct. 2536 (1984)	17,21
<i>Sigman v. Whyte</i> , 165 W.Va. 356, 268 S.E.2d 603 (1980).....	18
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S.Ct. 1140, (2003).....	15
<i>State ex rel. Jones v. Trent</i> , 490 S.E.2d 357, 200 W.Va. 538 (1997).....	19
<i>State v. Cooper</i> , 172 W.Va. 266, 304 S.E.2d 851 (1983).....	23
<i>State v. David D.W.</i> , 214 W.Va. 167, 588 S.E.2d 156 (2003).....	21,23,24
<i>State v. Fraley</i> , 163 W.Va. 542, 258 S.E.2d 129 (1979).....	26
<i>State v. Goodnight</i> , 169 W.Va. 366, 287 S.E.2d 504 (1982).....	26
<i>State v. James et al.</i> , 227 W.Va. 407, 710 S.E.2d 98 (2011).....	<i>passim</i>
<i>State v. Lucas</i> , 201 W.Va. 271, 496 S.E.2d 221 (1997)	26
<i>State v. Martin</i> , 196 W.Va. 376, 472 S.E.2d 822 (1996).....	19
<i>State v. Vance</i> , 164 W.Va. 216, 262 S.E.2d 423 (1980).....	23
<i>State v. Wright</i> , 200 W.Va. 549, 490 S.E.2d 636 (1997).....	17,21
<i>United States v. Burroughs</i> , 392 U.S.App.D.C. 68, 613 F.3d 233, (2010)	27
<i>United States v. Heckman</i> , 592 F.3d 400 (2010)	27

STATUTES

Iowa Code §903B.1 (2010).....22

Wis. Stat. §939.615 (2010).....22

W.Va. Code §62-12-10 (2011) 19,20

W.Va. Code §62-12-19.....20

W.Va. Code §62-12-26 (2010).....*passim*

CONSTITUTIONAL PROVISIONS

Article III, §5, W.Va. Constitution 15

Article III, §10, W.Va. Constitution 15

U.S. Constitution, Amend. V 15

U.S. Constitution Amend. VI 15

U.S. Constitution, Amend. VIII23

U.S. Constitution Amend. XIV 15

OTHER AUTHORITIES

Bauer, Jared C., The West Virginia Division of Corrections, *Recidivism: 2001-2003*22

Fortney, T., Levenson, J., Brannon, Y. & Baker, J.N., *Myths and Facts about Sexual Offenders: Implications for Treatment and Public Policy, Sexual Offender Treatment, Volume 2 (1) (2007)*, available at www.sexual-offender-treatment.org/55.0.html, last visited September 11, 201222

Senate Bill No. 654 (e)(3) (2003)..... 16

Twexsbury, Richard, Jennings, Wesley G., Zgoba, Kristen, (2012), *Sex Offenders Recidivism and Collateral Consequences*, NCJRS Document No. 23806022

ASSIGNMENTS OF ERROR

- I. The West Virginia Extended Supervision of Sex Offenders Act, W.Va. Code §62-12-26 (2010), is unconstitutional under the West Virginia and United States Constitutions in that it violates the defendant's rights of procedural due process, substantive due process, equal protection, prevention of double jeopardy, and right to proportionate sentencing.
- II. The notice of violation of extended supervision was constitutionally defective in that the original criminal complaint giving rise to the violation allegation did not contain the charge of failing to provide a valid social security number and Petitioner was eventually found in violation of his term of extended supervision due in part to this specific allegation of failure to properly register as a sex offender.
- III. Petitioner's term of extended supervision, including the length of the term and the conditions added by the trial court judge, is excessive.

STATEMENT OF THE CASE

On February 22, 2011, Gabriel Hargus plead guilty to one count of possession of materials of visually portraying a minor engaged in sexually explicit conduct. As a result, he was sentenced to two (2) years incarceration, a period of thirty (30) years extended supervision, and lifetime registration as a sex offender. After being released from incarceration, Mr. Hargus immediately reported to the State Police to complete his sex offender registration. He did so because he wanted to comply with his requirements. Due to misunderstandings and miscommunications during the interview, some of the information in his registration was incomplete or inaccurate. Mr. Hargus was not trying to deceive law enforcement; he simply misunderstood what the requirements were and what was being asked of him.

Gabriel Hargus was arrested on January 4, 2012, due to allegations of failure to register as a sex offender. Mr. Hargus was never tried on these charges. Instead, on February 27, 2012, the State notified Mr. Hargus that it was pursuing a violation of his term of extended supervision. On March 14, 2012, the lower court determined that Mr. Hargus had violated his term of extended supervision because he failed to properly register as a sex offender. As a result of this finding, the lower court sentenced Mr. Hargus to five (5) years incarceration and ordered him to complete the balance of his term of extended supervision (25 years) after release from incarceration. Of note, the hearing regarding Mr. Hargus's alleged violation of extended supervision was not a typical criminal trial as the statute regarding violations of extended supervision does not permit a regular criminal trial. Mr. Hargus was not allowed to impanel a jury to decide his guilt or innocence and the trial court used the standard of clear and convincing evidence rather than the standard of beyond a reasonable doubt.

Because of this lack of procedural protection and other constitutional violations, the finding

that Mr. Hargus violated his term of extended supervision is in error and must be overturned. This Court stated that it would not render an opinion about the constitutionality of punishment for violations of extended supervision until a person had actually been violated on extended supervision. *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Mr. Hargus was violated on extended supervision and therefore, this matter is ripe for review.

PROCEEDINGS AND RULINGS BELOW

On January 13, 2012, a preliminary hearing occurred on the four counts of failure to register as a sex offender. At issue were: (1) whether the petitioner provided an accurate birth date; (2) whether the petitioner provided accurate information regarding owning an automobile; (3) whether the petitioner provided accurate information regarding access to the internet; and (4) whether the petitioner failed to provide any aliases. At the conclusion of the hearing, the magistrate found probable cause as to each charge. These charges should have proceeded to trial, instead the State sought to violate Mr. Hargus's term of extended supervision.

The extended supervision violation was tried on March 14, 2012, before the Honorable Louis H. "Duke" Bloom, with sentencing immediately following this hearing. Judge Bloom determined that Mr. Hargus had violated the terms and conditions of his extended supervision by: (1) failing to provide his social security number as required; (2) failing to provide an accurate date of birth; and (3) failing to provide any aliases. Judge Bloom then sentenced Mr. Hargus to five (5) years in the penitentiary, adding that upon his release from the penitentiary, Mr. Hargus must finish his term of extended supervision with the additional conditions that Mr. Hargus may not reside in any residence that has a computer and that Mr. Hargus must provide information regarding any vehicles any person

in the household where he lives may have.

STATEMENT OF THE FACTS

Mr. Gabriel Hargus is an actor by trade. He had no desire or intent to mislead or deceive the State regarding his age or any other information. However, while incarcerated, he was listed as being younger than he was. This incorrect birth date was on all of his prison documents and identification. Mr. Hargus continued to use that incorrect birth date throughout his incarceration because it was already on all his prison documents. Upon release, Mr. Hargus reported to the State Police barracks to complete his sex offender registration. He was asked for his identification and provided the officer with his identification from the prison which contained the incorrect birth date. (A.R., pp. 99-100). The Officer interviewing him copied down his birth date from his prison identification. (A.R., p. 100). After he registered, Mr. Hargus obtained his birth certificate so that he could re-verify his birth date with the State Police as required. Mr. Hargus explained that “I got my birth certificate on December 27th from the Division of Vital Statistics, and I provided that birth certificate to the state trooper who came to my home during the sweep.” (A.R., p. 102).

During his interview for sex offender registration, Mr. Hargus was asked whether he had access to the internet. He explained that his live-in girlfriend has password protected internet access because she needs internet access for her job. (A.R., pp. 89-90, 104). He also explained that he did not know his girlfriend’s password and therefore, did not have access to the internet. (A.R., pp. 89-90, 104). The State viewed these statements as being misleading and as an attempt by Mr. Hargus to deceive the State. Ultimately, the lower court found there was insufficient evidence to support the State’s position.

Mr. Hargus also was asked about having a vehicle. Since he did not own a car, Mr. Hargus responded that he did not have a vehicle. (A.R., p. 104). The State posited that since Mr. Hargus's girlfriend had a car, he had access to a vehicle and therefore was trying to deceive the State regarding his access to a vehicle. As Mr. Hargus explained, his girlfriend did not allow him to use her car, although she had done so in the past. (A.R., pp. 88-89, 104).

As to the issue of an alias, Mr. Hargus testified that he does have a stage name of Ethan Stone. (A.R., p. 105). However, Mr. Hargus explained the officer asked him if he had ever been arrested under another name or had a nickname, neither of which had ever occurred, so he replied in the negative. (A.R., p. 105). Mr. Hargus was unaware that the officer was asking about any name that is not his birth name and wanted Mr. Hargus to report his stage name. (A.R., p. 105). At the preliminary hearing, Corporal Sally Hatton, the officer who had completed Mr. Hargus's sex offender registration, testified "[h]e was initially arrested under John Doe because he wouldn't tell us his name at all. He was put into the jail and then at the jail, he told them that his name was Ethan Stone. They video arraigned him here. He told the Court that his name was Ethan Stone and provided the date of birth that he provided us, 5/16 of '87." (A.R., p. 26). During the violation hearing, Mr. Hargus explained that he never provided the name Ethan Stone, but that "I had paperwork filled out for me that said I was Ethan Stone." (A.R., p. 107). He further explained that upon his initial arrest "I did not speak to investigators, I did not speak to the police. I invoked Miranda and remained silent." (A.R., p. 107).

At the close of the hearing, Mr. Hargus's counsel argued that the violation finding and associated punishment was unconstitutional because it was cruel and unusual punishment. (A.R., p. 111). The lower court responded "this would be the improper forum to raise that. That would be

upon appeal to the Supreme Court.” (A.R., p. 111).

SUMMARY OF ARGUMENT

Mr. Hargus's conviction and sentence must be overturned due to its unconstitutional nature, as it violates Mr. Hargus's rights to due process, equal protection, and prevention of double jeopardy. Specifically, Mr. Hargus is entitled all the same protections at a violation hearing as he is at a criminal trial because the violation hearing could result in additional punishment for a crime of which he was already convicted and punished. In this matter, Mr. Hargus did not receive the process that he was due and was subject to double jeopardy as he received an additional sentence for a crime for which he already had been punished. Additionally, Mr. Hargus is labeled as a sex offender subject to extended supervision; no other group of offenders is subject to such supervision and there is no rational basis for such supervision, therefore, this supervision scheme violates equal protection.

Mr. Hargus served his sentence for the charge of possessing material visually displaying a minor in sexually explicit conduct. He then was released and attempted to register as a sex offender as required by law. In doing so, miscommunications and misunderstandings lead to the belief that Mr. Hargus had failed to register as required by not providing certain pieces of accurate data. However, Mr. Hargus honestly tried to provide all the needed information and at no time intentionally deceived the State. As a result, the State charged Mr. Hargus with four counts of failure to register as a sex offender as required. Rather than proceeding to trial on these charges, the State took the much simpler route and sought to violate Mr. Hargus for non-compliance with his term of extended supervision. This finding of a violation of extended supervision infringes on Mr. Hargus's constitutional rights and therefore, this finding of a violation must be declared null and void for being unconstitutional.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

A Rule 20 oral argument is necessary in this case as it presents the following: (1) issues that have not yet been decided by this Court and (2) issues involving constitutional rights of a defendant and the protection of the defendant's liberty rights. In *State v. James et al.*, 227 W.Va. 407, 421, 710 S.E.2d 98, 112 (2011), this Court held that any alleged constitutional violations arising from being revoked and punished for a violation of extended supervision was speculative and that "there is no justiciable controversy before us." There is now a justiciable controversy. In addition, the decisional process would be significantly aided by oral argument.

This case is not appropriate for a memorandum decision as the complexity of the issues presented cannot be sufficiently discussed and resolved through a memorandum decision and should be discussed and resolved through a full opinion by this Court.

ARGUMENT

- I. **The West Virginia Extended Supervision of Sex Offenders Act, W.Va. Code §62-12-26 (2010), is unconstitutional under the West Virginia and United States Constitutions in that it violates the defendant's rights of procedural due process, substantive due process, equal protection, prevention of double jeopardy, and right to proportionate sentencing.**

This Court ruled that the West Virginia Extended Supervision of Sex Offenders Act (hereinafter Extended Supervision Act) is constitutional on its face, determining that imposing extended supervision is regulatory and akin to sex offender registration. *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011). However, this Court specifically delayed ruling regarding the constitutionality of a violation of extended supervision, stating that it would address that issue when a person was actually violated under the Act and facing punishment. *Id.* This case is such a case. Mr. Hargus currently is incarcerated as a result of a violation of his period of extended supervision. The trial court ruled that Mr. Hargus had failed to register as a sex offender as required, which violated the terms of his extended supervision. Mr. Hargus received a sentence of five (5) years of incarceration, a sentence two-and-a-half times greater than the sentence he received for his original criminal offense giving rise to his period of extended supervision and requirement to register as a sex offender. Further, Mr. Hargus received no time credit for the two (2) years he already served on this conviction.

The Extended Supervision Act is very broad, allowing judges great flexibility in whether to order supervision and in determining the length of time of that supervision. The Act is supposed to assist the public in protecting itself from sex offenders. However, what the Act actually does is spend a significant amount of resources on heavily monitoring released offenders regardless of their

individual risk of re-offense, thus creating the illusion of safety. The Act does not serve its legislative purpose and therefore, must be struck down.

The Extended Supervision Act Violates the United States and West Virginia Constitutions As Demonstrated Through the Act's Plain Language and Legislative History

West Virginia first enacted the statute providing for extended supervision for certain sex offenders in 2003. Extended supervision was designed to be “in addition to any other penalty or condition imposed by the court” and to not begin until *all* periods of incarceration, parole and probation have been completed by the offenders. Senate Bill No. 654 (2003). Although the Extended Supervision Act has been amended several times, extended supervision is still “*in addition* to any other penalty or condition imposed by the court” and still does not begin until *all* periods of incarceration, parole and probation have been completed by the offenders. W.Va. Code §62-12-26(a)&(c) (2010) (emphasis added). This Court noted the Extended Supervision Act is an “additional punishment” and is “an inherent part of the sentencing scheme for certain offenses” and therefore, “does not on its face violate the double jeopardy provisions contained in either the United States Constitution or the West Virginia Constitution.” Syl. Pt. 11, *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011).

In practice, a person sentenced to incarceration due to a violation of the Extended Supervision Act is being punished twice – once for the original offense and then a second time for a violation of the Extended Supervision Act. This Act only applies to sex offenders who, but for the conviction of the qualifying offense, would not be subject to this Act. Likewise, this Act is not applicable to any other group of offenders. Essentially, a person is being punished for his status as a sex offender, a status that has already been punished through the sentence for the qualifying offense.

Under the Extended Supervision Act, a sex offender, even after completing a full term of incarceration, parole and/or probation pursuant to the statutory rules, is forced to serve yet another term of supervised release during which his liberty is restricted and, in this matter, led to incarceration for a period of five (5) years. This additional punishment creates violations of the equal protection and double jeopardy clauses of the United States and West Virginia Constitutions, mandating that the law be overturned. *See* United States Constitution, Fifth, Sixth, and Fourteenth Amendments, West Virginia Constitution, Article III, §§ 5, 10.

No other group of offenders is subject to such punishment under the guise of regulation or management, meaning sex offenders do not receive equal protection. Moreover, any violation of the terms of the extended supervision can lead to re-incarceration and that period of re-incarceration can be greater than the statutory maximum for the original offense associated with the extended supervision.¹ The Extended Supervision Act, given its punitive nature, it being a second punishment, and the real potential for significant prison time, subjects the identified sex offenders to an affirmative disability and restraint. Offenders under extended supervision are not allowed to freely move where they wish, live where they wish, or work as other citizens. *See Smith v. Doe*, 538 U.S. 84, 101, 123 S.Ct. 1140, 1152 (2003) (“Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction.”). Instead, every such decision must be made in cooperation with a probation

¹ The Extended Supervision Act originally provided that incarceration for a violation cannot exceed the statutory maximum for the underlying offense. However, through the course of its amendment, the Extended Supervision Act now provides that incarceration for any violation can be up to the ordered period of extended supervision. W.Va. Code §62-12-26(g)(3). In this case, Mr. Hargus’s original sentence was a flat two (2) year period of incarceration; he is now incarcerated for a period of five (5) years, which is 2.5 times longer than his original sentence.

officer, with the probation officer's determination overruling the offender's wishes if the two are in conflict. This excessive restraint on freedom makes the extended supervision scheme much more punitive than regulatory.

When the Extended Supervision Act was first enacted in 2003, it provided that a term of extended supervision could be revoked and an offender be required to serve in prison "all or part of the term of supervised release *Provided*, That no person may serve a period of incarceration for a violation of supervised release **which exceeds the maximum statutory period of confinement for the offense of conviction underlying the period of supervised release.**" Senate Bill No. 654 (e)(3) (2003). The state legislature amended this act in 2006, allowing the period of incarceration for a violation of supervised release to be expanded so that "a defendant whose term is revoked under this subdivision may not be required to serve more [time incarcerated on a violation] than the period of supervised release." W.Va. Code §62-12-26(g)(3) (2006). This act continues to provide for a maximum period of incarceration for a violation of extended supervision as being no greater than the period of supervised release. W.Va. Code §62-12-26(g)(3) (2010). Additionally, an offender receives no time credit toward his incarceration for the period of time he maintained himself on extended supervision or for any period of time he was incarcerated for the underlying offense. An offender could serve a full term of incarceration for his underlying, qualifying offense, then violate his extended supervision and be re-incarcerated for a period of time much greater than his original sentence. Further, no other group of offenders is subject to such supervision. This result clearly violates the constitutional protections against double jeopardy, proportionate sentencing, equal protection, and due process.

The United States Supreme Court recognized that multiple punishments for a single offense violates a defendant's constitutional rights and therefore, is not permissible. *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536 (1984) (explaining that multiple punishments for a single offense are prohibited but that a state may still prosecute a defendant for multiple offenses in a single trial). Additionally, this Court recognized that a defendant may not receive multiple punishments for the same offense, explaining that to do so is a violation of the West Virginia Constitution's Double Jeopardy Clause. *State v. Wright*, 200 W.Va. 549, 490 S.E.2d 636 (1997). This Court also stressed that multiple punishments are only available where a conviction under each separate criminal statute requires proof of an additional fact that the other statutes do not require. *Damron v. Haines*, 223 W.Va. 135, 672 S.E.2d 271 (2008). *See also Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)(holding that other than verifying a prior conviction, any fact that increases penalty for crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt). In Mr. Hargus's case, he was violated for failing to register as a sex offender as required; his violations were technical and he may very well have been found not guilty by a jury of his peers using the beyond a reasonable doubt standard. However, in the instant matter, he was found guilty, by a judge, not a jury, of violating the statute. Also, in the instant matter, proof was by clear and convincing evidence, not evidence beyond a reasonable doubt. As a result of this violation hearing, Mr. Hargus is now subjected to five (5) years of incarceration.

Also of importance, a violation hearing is identical to a probation violation hearing, meaning that the standard is much lower and there is no jury—the procedural protections required by a criminal trial are not present. This Court recognized that a revocation of parole or probation is not part of a criminal prosecution and therefore, the rights attached to a criminal trial are not applicable

to a parole or probation revocation proceeding. *Sigman v. Whyte*, 165 W.Va. 356, 268 S.E.2d 603 (1980). However, unlike probation or parole, in contractual terms, the defendant subject to extended supervision is not receiving any benefit from the bargain. A defendant who is on probation or parole either avoids being incarcerated or is released from incarceration early, either of which is clearly a benefit to the defendant. With extended supervision, all the defendant receives is additional monitoring beginning when all other punishments (incarceration, probation, parole) are complete and the possibility of being re-incarcerated, clearly not a benefit to the defendant. This difference highlights that extended supervision, with the possibility of additional incarceration beyond the statutory maximum for the underlying offense, is punitive and not a matter of grace like probation or parole. This difference also makes the issue of a violation of extended supervision unique, as one could argue that no actual agreement was ever formed because one party, the defendant, did not receive the benefit of his bargain. As such, the contract should be void, meaning the defendant should return to a state of being free rather than being subject to monitoring. Moreover, given this difference, a defendant should be entitled to all the rights associated with a criminal trial for a violation of extended supervision because unlike probation or parole, which places a person in a position of conditional liberty, extended supervision is simply placed on a person in violation of his right to liberty.

Violations of parole and probation are not deemed additional punishments. However, this Court held that extended supervision itself is an additional punishment prescribed by the Legislature for certain offenders. Syl. Pt. 11, *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Again, this comparison shows that a violation of extended supervision is different and should be handled differently than a violation of probation or parole. One such difference should be that any

person accused of violating a term of extended supervision receives all the constitutional rights and protections that the person would receive if he were standing accused of a crime. The United States Supreme Court instructed that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and must be proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). While it is easy to place all violations of the various types of supervision in the same category, a careful review of the relevant statutes demonstrates that it is constitutionally necessary to treat violations of extended supervision, which is an additional punishment to the additional punishment of being placed on extended supervision, with greater constitutional protections than violations of parole and probation.

The process and procedure for conducting a violation hearing is unconstitutional. Essentially, a judge, by one decision, can massively increase (by anywhere from twice to tenfold or greater) the sum total sentence for certain crimes that by statute provides for a much lower maximum period of incarceration. Simply by being a sex offender under extended supervision, that person is subject to multiple rounds of punishment, including a maximum of serving fifty (50) additional years of incarceration simply by falling into the category of “certain sex offenders” and having a technical violation of the terms of supervision.

A violation of extended supervision must be shown by clear and convincing evidence. W.Va. Code §62-12-26(g)(3) (2010). However, a probation violation need only be shown by a clear preponderance of the evidence. W.Va. Code §62-12-10 (2011), *State ex rel. Jones v. Trent*, 490 S.E.2d 357, 200 W.Va. 538 (1997). Neither proof beyond a reasonable doubt nor proof by clear and convincing evidence is required for such a violation. *State v. Martin*, 196 W.Va. 376, 472 S.E.2d

822 (1996). A person accused of a probation violation or parole violation is only entitled to a prompt and summary hearing. W.Va. Code §§62-12-10, 62-12-19. The statute regarding a violation of extended supervision does not contain this language. Based on the differences in language between the probation and parole violation statutes and the extended supervision violation statute, it is clear that the Legislature recognized that extended supervision is distinctive and unique from probation and parole. Extended supervision, unlike probation and parole, is not a matter of grace. Therefore, any violation of extended supervision should be subject to a full criminal trial with all the associated rights. Thus, in this matter, the trial court's finding of a violation of petitioner's term of extended supervision should be ruled unconstitutional as he did not receive the full protection of his constitutional rights.

Also of note, if a person fails to register as required under the sex offender registration act, that person is subject to a criminal trial for failure to register. With extended supervision, which, like registration, only targets sex offenders and is identified as being regulatory in nature, a violation does not merit a full criminal trial. If both statutes are regulatory, both are supposed to provide community protection, and both target sex offenders, then why are the procedures for violations so significantly different? The legislature has erred by not providing full constitutional protections for those alleged to have violated their terms of extended supervision, even though this same group of offenders would receive a full criminal trial with all the constitutional protections if accused of failing to register as required. In this matter, petitioner was originally charged with four counts of failure to register, but rather than try him on those four counts, the State opted to pursue a violation of extended supervision instead. Doing so gave the State a unique advantage as the State had a lower burden of proof and fewer constitutional requirements to meet. Such an outcome is unfair and

unconstitutional.

The Extended Supervision Act does not provide guidelines on how long the period of incarceration should be given the type of violation, meaning a judge has discretion to impose any term of incarceration for any type of violation, technical or otherwise. Also, the United States Supreme Court recognized that multiple punishments for a single offense violates a defendant's constitutional protection against double jeopardy, and therefore, is not permissible. *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536 (1984) (explaining that multiple punishments for a single offense are prohibited but that a state may still prosecute a defendant for multiple offenses in a single trial). Additionally, this Court recognized that a defendant may not receive multiple punishments for the same offense, explaining that to do so is a violation of the West Virginia Constitution's Double Jeopardy Clause. *State v. Wright*, 200 W.Va. 549, 490 S.E.2d 636 (1997). This Court also stressed that multiple punishments are only available where a conviction under each separate criminal statute requires proof of an additional fact that the other statutes do not require. *Damron v. Haines*, 223 W.Va. 135, 672 S.E.2d 271 (2008). The punishment under the Extended Supervision Act clearly violates the constitutional protections against double jeopardy, proportionate sentencing, equal protection, and due process. No other group of offenders is subject to such a result. *See, e.g., State v. David D.W.*, 214 W.Va. 167, 588 S.E.2d 156 (2003). Other statutes give guidelines and parameters for sentences and violations of parole or probation. No such direction is available under the Extended Supervision Act.

Other states have reasonable caps on the periods of incarceration for violations of extended supervision. For example, in Iowa, a person can serve no more than two (2) years of incarceration upon his first violation and no more than five (5) years on any second or subsequent revocation.

Iowa Code § 903B.1 (2010); *see also Iowa v. Sallis*, 786 N.W.2d 508 (Iowa App. 2009). The State of Wisconsin permits lifetime supervision of sex offenders, however, the prosecutor must provide notice that the State is seeking lifetime supervision and there must be a judicial finding that lifetime supervision is appropriate. *See Wis. Stat. §939.615* (2010). No such procedural protections are available to those on extended supervision in West Virginia. Of the jurisdictions imposing lifetime supervision on sex offenders, West Virginia has one of the longest terms with the fewest procedural protections and the greatest penalties for violations.

The Extended Supervision Act Violates the United States and West Virginia Constitutions As It Is A Form of Cruel and Unusual Punishment

The idea of releasing sex offenders into the community may appear to be a scary proposition. However, the empirical research does not support the public's perception of the need to fear sex offenders more than other released offenders.² The public perceives that approximately 75% of all sex offenders will recidivate, whereas the empirical research concludes that the actual rate of recidivism for sex offenders is between 14% and 20%. Fortney, T., Levenson, J., Brannon, Y. & Baker, J.N., *Myths and Facts about Sexual Offenders: Implications for Treatment and Public Policy*,

² "Sex Offenders, commonly thought to have high recidivism rates, actually had the third lowest rate (9.5%) among all crime categories." Bauer, Jared C., The West Virginia Division of Corrections, *Recidivism: 2001-2003*, p.1. Of note, this recidivism rate was the rate *prior to* the enactment of extended supervision. Additionally, the rates of recidivism during this time period for those convicted of child abuse and sexual offenses were 18.8% and 9.5%, respectively, whereas the recidivism rates for those convicted of robbery, assault, and drug offenses were 29.8%, 15.8%, and 23.7%, respectively. *See id.* Clearly, those convicted of a sex crime had some of the lowest rates of recidivism in comparison to other offenders, contradicting the theory that sex offenders are among those most likely to recidivate. Additionally, "94.7% of the sex offenders are identified as low-risk compared to less than 75% of the non-sex offenders." Tewksbury, Richard, Jennings, Wesley G., & Zgoba, Kristen, (2012), *Sex Offenders: Recidivism and Collateral Consequences*, NCJRS Document No. 238060.

Sexual Offender Treatment, Volume 2 (1) (2007), available at www.sexual-offender-treatment.org/55.0.html, last visited September 11, 2012.

The Extended Supervision Act clearly violates constitutional rights and creates a false perception of safety by requiring significant, extensive monitoring of sex offenders, a type of monitoring to which no other group of offenders is subjected, and by repeatedly punishing certain sex offenders for violations of this supervision, punishment that no other group of offenders faces. Because the act does violate constitutional rights, punishment under it is cruel and unusual in violation of the United States and West Virginia Constitutions.

The Eighth Amendment to the United States Constitution proscribes “cruel and unusual punishments[.]” Article III, Section 5, of the West Virginia Constitution similarly proscribes the infliction of “cruel and unusual punishment[.]” Disproportionate sentences have been equated with “cruel and unusual” punishment. This Court has recognized that “[a] criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution” and this maxim is explicitly stated in this State’s parallel provision. Syl. pt. 10, *State v. David D.W.*, 214 W.Va. 167, 588 S.E.2d 156 (2003), Syl. pt. 7, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980). This result is so even if the sentence falls within statutory guidelines. *See, e.g., State v. David D.W.*, 214 W.Va. at 177, 588 S.E.2d at 166 (“[T]he sentences imposed by the trial court were within the statutory limits. Furthermore, the trial court’s decision to make the sentences consecutive as opposed to concurrent was authorized by statute Nonetheless, excessive penalties, even if authorized by statute, cannot transgress the proportionality principle”); *State v. Cooper*, 172 W.Va. 266, 271, 304 S.E.2d 851,

855 (1983) (“[W]hen our sensibilities are affronted and proportional principles ignored, there is an abuse of discretion that must be corrected”).

The West Virginia Supreme Court of Appeals has set forth two alternative tests to aid in determining whether a sentence violates the proportionality principle:

The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test

[Under the objective test,] consideration is given to the nature of the offense, the legislative purpose behind 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.

State v. David D.W., 214 W.Va. at 177, 588 S.E.2d at 166.

In light of Mr. Hargus’s lack of criminal history, his only conviction being to the offense that qualified him for a term of extended supervision, the punishment for violating his period of extended supervision shocks the conscience, satisfying the subjective test and requiring that the order of incarceration for this violation be vacated.

As noted above, *see supra* p. 21, other states take less drastic measures to manage sex offenders. The periods of supervision are shorter and the punishments for violations less severe. Therefore, even if the Court questions whether Mr. Hargus’s sentence meets the requirements of the subjective test, Mr. Hargus asserts that under the objective test his sentence is still constitutionally disproportionate in that this conviction is his second conviction, based solely on a technical violation for extended supervision, and the only other offense of which Mr. Hargus was convicted is child pornography (the qualifying offense), not an offense involving sexual contact. Additionally, this

Court must consider that this statute is only applicable to sex offenders, likewise making it constitutionally disproportionate as sex offenders are more severely punished than similarly-situated non-sex offenders without sufficient justification. The rational basis provided for extended supervision is that sex offenders recidivate at a much higher rate than other criminals, which, as shown above, is not true. Therefore, there is no rational basis for applying extended supervision to sex offenders, thus rendering that measure unconstitutional.

II. The notice of violation of extended supervision was constitutionally defective in that the original criminal complaint giving rise to the violation allegation did not contain the charge of failing to provide a valid social security number and Petitioner was eventually found in violation of his term of extended supervision due in part to this specific allegation of failure to properly register as a sex offender.

Constitutional due process requires that a defendant receive notice of the charges against him so that he may prepare a proper defense. *See generally*, Syl. Pt. 12, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976). Mr. Hargus received proper notice of his alleged failures to provide the following: an accurate birth date, an accurate accounting of his alias, accurate information regarding vehicles in his home, and accurate information regarding access to the internet in his house. However, nowhere in the Notice of Violation, or the original criminal complaint for Failure to Register, is there any language or any reference to allegations regarding providing an inaccurate social security number. Yet at the conclusion of the violation hearing, the trial judge found that Mr. Hargus had violated his term of extended supervision, in part, because he failed to provide an accurate social security number. (A.R., pp. 1-2). Since Mr. Hargus did not receive constitutionally adequate notice on this charge, the finding of a violation of extended supervision based on failing to

provide an accurate social security number must be reversed as being unconstitutional.

In probation revocation proceedings, reliance by the State on violations not included in the probation revocation petition is permissible where probationer's counsel had ample notice of intention to rely on such violations. *State v. Fraley*, 163 W.Va. 542, 258 S.E.2d 129 (1979). However, the issue of the alleged inaccurate social security number was not discussed at Mr. Hargus's preliminary hearing. Therefore, there is no possibility that Mr. Hargus or his counsel were on notice that the accuracy of his social security number was at issue, meaning the notice was insufficient and unconstitutional.

III. Petitioner's term of extended supervision, including the length of the term and the conditions added by the trial court judge, is excessive.

This Court reviews sentencing orders under a “deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). This Court also held that “[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). However, the Court has never specified what constitutes an impermissible factor.

Part of examining the fairness of sentencing in this case is interpreting the Extended Supervision Act. This Court held that extended supervision is an additional punishment prescribed by the Legislature for those convicted of certain enumerated sex offenses. *State v. James et al.*, 227 W.Va. 407, 710 S.E.2d 98 (2011). This Court did not address the constitutional issues regarding a violation of extended supervision, finding it too theoretical given the facts of the cases at hand. *Id.*

The Petitioner now is being punished for a violation of his term of extended supervision and the constitutionality and fairness of that sentence is ripe for review.

The trial court ordered that Petitioner be incarcerated for a period of five (5) years for his violation and that upon release, he return to his period of extended supervision. The trial court also ordered Petitioner “shall not reside in a residence with a computer, and must provide information to the West Virginia State Police about any vehicle of any person at a residence in which he resides.” (A.R., pp. 1-2). The length of Petitioner’s sentence is unconstitutional as it is excessive given that the basis of the violation was clerical errors and miscommunications. The new condition imposed by the trial court likewise is unconstitutional as it directly impinges on Petitioner’s First Amendment rights.

In modern times, the Internet is a primary method of communication and information gathering. To be completely cut off from the Internet greatly hampers a person’s ability to obtain a job, read a newspaper, or stay in contact with friends and family. The United States Third Circuit Court found that prohibiting a defendant from access to the Internet for life was too broad and declared it to be plain error. *United States v. Heckman*, 592 F.3d 400 (2010). *See also United States v. Burroughs*, 392 U.S.App.D.C. 68, 78, 613 F.3d 233, 243 (2010)(“That an offense is sometimes committed with the help of a computer does not mean that the district court can restrict the Internet access of anyone convicted of that offense.”). In doing so, the Third Circuit emphasized that in determining the validity of such a condition, the court must look at: “(1) the length and (2) coverage of the imposed ban; and, (3) the defendant’s underlying conduct.” 592 F.3d at 405. The Third Circuit also emphasized that any restriction must be narrowly tailored and directly related to protecting the public. *Id.* at 406.

In this matter, the trial court's restriction on Internet access is too broad. While there is reason to be concerned as Petitioner met his victim online, by making the ban so broad, not only is the trial court preventing him from meeting people online, but also is preventing him from submitting job applications and paying bills electronically. There are valid reasons for Petitioner to use the Internet, however, the trial court's ban eliminates both illegitimate and legitimate access without regard to its impact on Petitioner's substantial rights. Further, Petitioner is subject to this ban for twenty five (25) years. While that is less than a lifetime ban, twenty five years is a significant amount of time, especially in light of Petitioner's age, which places him in the actively working age range. Therefore, the addition of such condition is an abuse of discretion and must be overturned.

CONCLUSION

Mr. Hargus respectfully requests that this Honorable Court remand this case back to the Circuit Court of Kanawha County with directions to dismiss the finding that he violated his term of extended supervision, and with further directions to eliminate the new conditions regarding the ban from computers/Internet from his term of extended supervision.

Respectfully Submitted

GABRIEL HARGUS
By Counsel



Lori M Peters
W.Va. Bar No. 11303
Assistant Public Defender
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, WV 25330
Phone: 304-348-2323
Fax: 304-348-2324

CERTIFICATE OF SERVICE

I certify that I have served the attached Brief of the Appellant by delivering a true copy thereof to Laura Young, at the Attorney General's Office, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301; by hand delivery or by U.S. States Mail postage prepaid this the 17th day of September, 2012.



Lori M Peters
W.Va. Bar No. 11303
Assistant Public Defender
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, WV 25330
304-348-2323