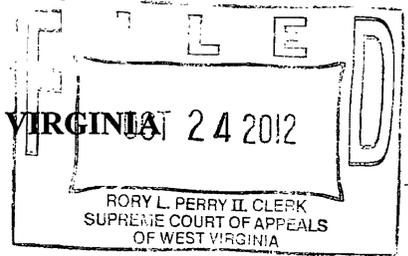


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

12-0513



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

GABRIEL HARGUS,

Defendant Below, Petitioner.

SUMMARY RESPONSE

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SUMMARY RESPONSE

Comes now the Respondent, by counsel, Laura Young, Assistant Attorney General, and pursuant to Rule 10 (e) of the Revised Rules of Appellate Procedure and a Scheduling Order from this Honorable Court, files the within summary response.

I.

STATEMENT OF THE CASE

The petitioner was charged, by warrant, with four felony offenses of failing to register or failing to provide accurate information for separate items of information required for the state police sexual offender registry. According to the complaint, the underlying sexual offense was possession of material depicting a minor in sexually explicit conduct. When completing his initial registration, he provided false information as to his date of birth, an habitually used alias, Internet accounts, and vehicle he could use. (App. at 5.) The sexual offender registration statute contained in W. Va. Code Chapter 15, Article 12, Section 8 requires a registrant to provide the following material: the full name, including any aliases, nicknames or other names; the address(es) where he resides or regularly

visits; his employer, and potential future employers; school or future schools; social security number, photograph, description of the crime, fingerprints and palm prints, information related to any motor vehicle owned or regularly operated by the registrant; information relating to any Internet account the registrant has, and phone information. Further, state police registry requirements include the accurate registration of a birth date. (App. at 25.) The preliminary hearing transcript reveals that when arrested the petitioner gave his name as “Ethan Stone” and a birth date of May 16, 1987 (App. at 26) when he was actually born in 1977. (*Id.* at 24.) The petitioner denied any Internet access at his residence, when in fact there was such access, albeit apparently in another person’s name. (*Id.* at 27-28.) Further, the underlying criminal offense regarding possession of child pornography involved the use of the Internet. (*Id.* at 28.)

A notice and motion to revoke the petitioner’s supervised release, dated February 27, 2012, informed the petitioner that it was alleged he violated the supervised release by the above cited sexual offender registration violations. The petitioner was notified that he was entitled to counsel, and that if the violation of any of the conditions of supervised release was proven, the court could revoke the release and order the petitioner to serve all or part of the term of supervised release in prison, without credit for time previously served on supervised release. (*Id.* at 7-8.)

The circuit court determined that despite each separate violation being designed to reflect one of the warrants in magistrate court, that the petitioner was not informed with any particularity what the deficiency was, and determined that in circuit court, the failures of registration constituted only one violation of supervised release. (*Id.* at 47.) Trooper Divita testified at the violation hearing that as to the underlying offense, she investigated a complaint regarding improper behavior by an “Ethan Stone” and that investigation revealed that Ethan Stone was actually the petitioner, Gabriel Hargus.

(*Id.* at 50.) Hargus pled guilty to a felony charge involving child pornography and was sentenced to prison, and then placed on 30 years supervised release. (*Id.* at 51.) The underlying offense involved child pornography, with the petitioner taking his computer, finding free Wi-Fi and downloading child pornography. (*Id.* at 52.) Trooper Divita requested the petitioner's file after he was released from prison and registered as a sex offender. She immediately noted that the date of birth was incorrect. The date provided to the registry was a birth date in 1987; Hargus was born in 1977. Of note, the incorrect birth date was material because in the previous child pornography case, Hargus pretended to be a decade younger than he was while surfing Facebook. (*Id.* at 54.) Further, Trooper Divita noted he had not disclosed the alias "Ethan Stone" which was actually the name the petitioner was using when initially arrested. The petitioner did not register his girlfriend's vehicle, and the trooper knew the petitioner had regular access to that vehicle because he was driving it when she initially arrested him. Further, the trooper was informed by the vehicle's owner that the petitioner had access to and was driving that vehicle at night. Additionally, the petitioner did not register his Internet access. (*Id.* at 55.) The Internet access was of particular concern because in the underlying felony, the 32 year old petitioner had used the Internet to "pick up" a 14 year old girl. The judge noted that it was a special condition of his supervised release that he not have access to the Internet. (*Id.* at 55-56.)

Trooper Hatten was the officer who actually registered the petitioner. The only source of information for the registry is the actual offender. Hargus told the trooper that his date of birth was in 1987. (*Id.* at 65.) The petitioner's actual date of birth was in 1977. (*Id.* at 67.) The petitioner professed not to know his social security number when asked for it for registration purposes. When asked whether he had an alias, the trooper actually explained to the petitioner that alias included

whether he had ever gone by any other names or been arrested by any other names. The petitioner denied any alias. (*Id.* at 68-69.) In fact, the petitioner had actually used the name “Ethan Stone” in previous court proceedings. (*Id.* at 69.) The petitioner denied having any access to the Internet or access to a vehicle. (*Id.*) On cross examination, the trooper clarified as to vehicles, the petitioner was asked not only about a vehicle he may have owned, but also about vehicles regularly operated. (*Id.* at 75.) Further, although the petitioner professed not to know his social security number for registration purposes, Trooper Divita, when she arrested the petitioner on the failure to register charge took the petitioner to the jail and he recited his social security number to the booking office. (*Id.* at 84.)

The petitioner’s girlfriend acknowledged that although her Internet access was password protected, the petitioner was home alone all day with his own computer, and that she would not know if he could get past the password. (*Id.* at 93.)

The petitioner denied telling the registration officer his date of birth and blamed the mix up on the jail. (*Id.* at 98.)

The Circuit Court determined that there was insufficient evidence of Internet access. (*Id.* at 110.) However, the court also determined that the petitioner provided a false date of birth and failed to provide an alias when requested to do so, and that thereby he had violated the terms of his supervised release. (*Id.* at 110-11.) The court revoked the supervised release, sentenced the petitioner to five years incarceration, to be followed by the rest of the supervised release term. (*Id.* at 118.)

The felony warrants for failure to register were dismissed following the revocation of supervised release. (*Id.* at 9.)

Following the revocation and imposition of sentence, a notice of appeal, scheduling order, petitioner's brief and this summary response ensued.

II.

ARGUMENT

Despite this Court having determined that the statute dealing with extended supervision of sexual offenders, the petitioner alleges that the act is unconstitutional. Clearly, there has been no change in legislative intent or the law since 2011, and the invitation to revisit the constitutionality of the supervised release statute should be emphatically declined.

The petitioner contends that the court has not ruled regarding the constitutionality of a violation of extended supervision. However, in *State v. Payne*, (Memorandum Decision, February 13, 2012, No. 11-0825), this Honorable Court dealt with precisely the same arguments proffered by this petitioner. The petitioner pled guilty to third degree sexual assault, and was sentenced to a term of incarceration followed by thirty years supervised release. The State filed a petition to revoke the supervised release upon several violations. Upon the revocation the State requested a two year incarceration, to be followed by the remainder of supervised release. However, the court sentenced the petitioner to five years incarceration to be followed by the remainder of the term of supervised release. (Of note, that is exactly the same sentence imposed upon the instant petitioner.)

The petitioner in *Payne* argued that his violations were not egregious, not unlike the argument proffered in the instant case that his violation of supervised release was "technical." However, the circuit court found that the instant petitioner violated the terms of his supervised release—and the violations occurred on the day he was released from prison—by deliberately failing to inform the state police of his alias, deliberately concealing his correct date of birth, and

deliberately concealing his social security number. This particular petitioner's underlying offense was possession of material showing minors engaged in sexually explicit conduct and sexual abuse of a fourteen year old girl. His modus operandi for those offenses was to disguise his age and surf the Internet. Significantly, disguising his name, age, and social security number to the state police would render him anonymity as regards public access to the sexual offender registry, as the public can access that registry by name. Although the petitioner did give his birth name to the registry official, he deliberately concealed the alias "Ethan Stone" which is a name that he apparently used in perpetrating the underlying felony offense as he actually was arraigned in magistrate court under that name. Therefore, concealing the alias "Ethan Stone" meant that, if he so chose, the petitioner could revive that alias in an attempt to victimize more children, and that any observant parent would not find "Ethan Stone" as an alias for the convicted sex offender, Gabriel Hargus. Further, such blatant disregard for the simplest of registry information can only lead to the conclusion that this petitioner was unwilling and unable to conform his behavior to the least of the registry requirements, and would therefore be unwilling and unable to conform his behavior to the requirements of law in all aspects. Again, it cannot be overemphasized that the petitioner was released from jail on December 23, went to register on December 23, and *immediately* attempted to conceal his alter ego and correct age from the state police.

The five year sentence upon the term of violation of supervised release is not reviewable as it was within the statutory limit, not based on any impermissible factor and does not violate any proportionality principles. The circuit court found that the only credible evidence was that the petitioner had violated his supervised release by certain particulars. The petitioner clearly violated the terms of his supervised release. This Court has held that sentences imposed, if with statutory

limits, and not based on any impermissible factor are not subject to appellate review. Syl. Pt.4, *State v. Goodnight*, 169 W. Va 366, 287 S.E.504 (1982.) The petitioner does not assert that the court based its sentence on any impermissible factor. The sentence is within statutory limits.

As to the argument that the provisions of the West Virginia and Federal Constitutions are violated because the petitioner does not receive the full panoply of rights attendant upon a jury trial, the United States Supreme Court in *Johnson v. United States*, 529 U.S. 694 (2000) determined that sanctions imposed upon revocation of supervised release are part of the penalty for the initial offense. Further, violations of supervised release, although they may lead to incarceration, need not be criminal and need only be found by a judge, not by a jury beyond a reasonable doubt. Additionally, where the acts of violation are criminal, they may be the basis for separate criminal prosecutions. As post revocation sanctions are part of the penalty for the initial offense, an individual may face revocation of supervised release and separate criminal prosecutions, without violating principles of double jeopardy. *Johnson*, at 700. In short, Mr. Hargus should not look a gift horse in the mouth. He could have his supervised release revoked, and be sentenced to a term of incarceration. Additionally, he could have been prosecuted for each of the four felony offenses of failure to register and faced additional terms of incarceration. The prosecuting attorney's office exercised its discretion and declined additional prosecution for the separate offenses.

Further, as noted in the memorandum decision in *Payne, supra*, the statute and the validity of the revocation of supervised release, are not unconstitutional. The decision in *State v. James*, 227 W. Va. 47, 710 S.E. 2d 98 (2011) explicitly found that the statute did not violate due process, double jeopardy, and the prohibition against cruel and unusual punishment. This Honorable Court has specifically found that the extended supervised release statute does not violate due process. The

terms of the statute did not infringe upon the right to a jury determination of relevant facts, and does not violate double jeopardy or cruel and unusual punishment. Syl. Pts. 9, 11, and 6, *James, supra*.

An individual who violates the terms and conditions of his supervised release is not being punished twice, as asserted in the petitioner's brief. The term of supervised release is part of the sentence imposed at disposition. The petitioner next argues that the statute is unconstitutional because the involuntary application of post-release supervision and the revocation thereof is cruel and unusual punishment and disproportionate to the offense. In *James*, this Court stated that in determining whether a given sentence violates proportionality, courts look to the nature of the offense, the legislative purpose, and a comparison of the sentence with other jurisdictions and with other offenses. Syl. Pt. 5, *James, supra*. Upon such review, the *James* Court determined that the post-release supervision statute is not facially unconstitutional on cruel and unusual punishment grounds.

The petitioners in *James* expressed concern that an individual who is convicted of a sex offense faces incarceration, sexual offender registration, followed by supervised release with the possibility of further incarceration if the provisions of supervised release are violated. The Court in *James* applied the subjective and objective tests enunciated in *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983) and *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). *James*, 227 W. Va. at 415-17, 710 S.E.2d at 106-108. The court determined that post-release supervision was not so disproportionate to the offense that it shocked the conscience of the court and offended society (the subjective test). The court noted that supervision is less restrictive on liberty than incarceration and that the period of supervision is contingent upon the facts and circumstances of each case. The Legislature determined that supervision was necessary to protect society over and

above incarceration. The appropriate period of supervised release is left to the determination and sound discretion of the sentencing court. (*Id.* at 418, 710 S.E.2d at 109.) Hence, the court found that the statute was not facially unconstitutional on cruel and unusual punishment grounds.

Nevertheless, in the instant appeal, the petitioner argues that the act is a form of cruel and unusual punishment, and that in light of the petitioner's lack of criminal history the punishment shocks the conscience of the court.

The petitioner's analogy ignores the important societal goals involved with supervised release. The Legislative purpose of W. Va. Code § 62-12-26 is not strictly retributory in nature. This Court has stated, "[s]upervised release is a method selected by the Legislature to address the seriousness of these crimes to the public welfare and to provide treatment during the transition of offenders back into society with the apparent goal of modifying the offending behavior." *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011). W. Va. Code § 62-12-26 has been determined to be a constitutional exercise of the Legislature's prerogative in determining what steps are necessary to protect the public. Supervised release is imperative to altering the behavior of these deviant individuals. Further, as noted above, the incarceration imposed upon the petitioner for his violation is well within statutory limits and not, therefore, subject to appellate review. Even, however, if examined by this Court, it is apparent that the petitioner's term of incarceration for possession of child pornography and sexual abuse was not a deterrent to future dishonest, even criminal conduct, because the petitioner immediately—the day of release—deliberately concealed his alias, birth date and social security number from the police. Clearly, and simply put, Mr. Hargus does not believe the rules apply to him, both in terms of registration and possession of material showing 8 year old children engaged in sexual activity.

Upon revocation of supervised release, W. Va. Code § 62-12-26 (g) and (I) unambiguously give the court the discretion to impose a term of incarceration. According to the plain language of the statute, the court's discretion in imposing this term of incarceration is limited only by the applicable term of supervised release. "Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

As explained earlier, the Legislature selected supervised release as the method to safely transition offenders of serious sex crimes back into society. To ensure that this measure adequately achieved its essential purpose, the legislature sought to create an incentive for defendants to refrain from violating their supervised release, by giving the court the discretion to impose a significant term of incarceration upon revocation. The clear and unambiguous language of the statute does not limit incarceration any particular length of time, save that it cannot exceed the term of supervised release itself.

The notice of violation was not fatally defective. It incorporated, by reference, the four specific failure to register violations for which warrants had been obtained in magistrate court and upon which a preliminary hearing had been held, in which petitioner's trial counsel and the petitioner participated. The circuit court found that the mere incorporation was not specific enough notice and that the petitioner could be found guilty of only one violation. The circuit court determined that the petitioner had violated by providing a false date of birth and failed to provide an alias when requested and required to do so. The petitioner complains that he was not prepared to defend against the social security number violation. However, as the petitioner was found guilty of violating his supervised release by the failure to provide a correct birth date and failure to provide the alias, and

as petitioner's trial counsel did not object to the provision regarding the social security number, that error, if error at all, was waived.

The petitioner asserts that the revocation and length of his sentence was based upon clerical errors and miscommunication. The violation and sentence was based upon the petitioner's lying to the state police and violating the registry provision. As to the ban from the Internet, your respondent merely replies that the petitioner, a 32 year old man, was charged in 2011 with multiple offenses involving soliciting a minor and possession of child pornography. He gave a false name and date of birth when arrested. (App. at 35.) He pled guilty to possession of child pornography and third degree sexual abuse. (*Id.* at 37.) Clearly, the petitioner is exactly the sort of individual who should be on supervised release, as he shows an alarming proclivity for sexual activity involving children. Equally alarming is his attempt to evade the registration requirements by failing to provide the state police with an alias which he used so often that he actually answered to it in magistrate court and lying about his age. Perhaps this term of incarceration can persuade Gabriel Hargus, also known to his victim as Ethan Stone, that he must conform his behavior to the rules of law.

III.

CONCLUSION

For the reasons herein stated, the State respectfully requests that the Court affirm the judgment of the Circuit Court of Kanawha County, revoking the Petitioner's supervised release.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



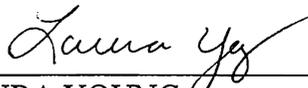
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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 24th day of October, 2012, addressed as follows:

To: Lori M. Peters, Esq.
Assistant Public Defender
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, WV 25330



LAURA YOUNG