



**In the Supreme Court of Appeals  
of  
West Virginia**

Docket No. 12-0833

**STATE OF WEST VIRGINIA**, Plaintiff Below,  
Respondent,

v.

Appeal from a final order in  
Case No. 07-F-76  
Preston County Circuit Court

**ROBERT LEE LESTER**, Defendant Below,  
Petitioner.

**Respondent's Brief**

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## **STATEMENT OF THE CASE**

Upon information and belief, the following chronology is not disputed.

On October 23, 2007, a Preston County grand jury indicted Robert Lee Lester on two counts of Third Degree Sexual Assault. Following a trial on April 8 and 9, 2008, the petit jury found Mr. Lester guilty of the felony offense of Third Degree Sexual Assault as charged in Count One of the Indictment and also found him guilty of the misdemeanor offense of Third Degree Sexual Abuse, a lesser included offense within the charge set forth in Count Two of the Indictment.

A diagnostic evaluation and classification was conducted in aid of sentencing and a sentencing hearing was held on May 22, 2009. The Court sentenced the Defendant to one to five years in the state penitentiary pursuant to W. Va. Code §61-8B-5(b), followed by ninety days in jail pursuant to W. Va. Code §61-8B-9(c), followed in turn by ten years of supervised release pursuant to W. Va. Code §62-12-26(a). The imposition of this sentence was suspended, however, and the Court committed the Defendant to the Anthony Correctional Center. On August 10, 2010, the Defendant was returned as unfit for the Anthony Center program. Thereupon, the Court reaffirmed the previously imposed sentence and committed the Defendant to the custody of the Division of Corrections. Prior to February 9, 2012, the Defendant completed the portions of his sentence imposed pursuant to W. Va. Code §§61-8B-5(b) and 61-8B-9(c), and commenced the portion of his sentence imposed pursuant to W. Va. Code §62-12-26(a).

On March 15, 2012, the Defendant admitted to his Sex Offender Intensive Supervision Officer that he had had contact with the victim in his underlying case, whereupon he was taken into custody.

On March 23, 2012, the State filed a petition pursuant to W. Va. Code §62-12-26(g) to revoke or modify the Defendant's supervised release, alleging *inter alia* that the Defendant had had contact with the victim in the underlying case in violation of Sex Offender Supervised Release Condition No. 20. By Order entered the same date, the Court informed the Defendant of his right to counsel and appointed Randy R. Goodrich of Public Defenders Corporation to represent him. Thereupon, evidence against the Defendant was disclosed to the Defendant's counsel.

A preliminary hearing was held on April 19, 2012. The Defendant appeared for this hearing and was given an opportunity to present evidence on his own behalf. Thereupon, the Court determined that there was probable cause to hold the Defendant pending a final hearing.

On May 23, 2012, the Court held a final hearing of the State's petition and conducted the same in all regards consistent with Rule 32.1 of the West Virginia Rules of Criminal Procedure. Thereupon, the Defendant admitted on the record that he had had contact with the victim in the underlying case in knowing violation of the aforementioned Condition No. 20. Thereupon, pursuant to W. Va. Code §62-12-26(g)(3), the Court found by clear and convincing evidence that the Defendant had substantially violated a condition of supervised release, and committed him to the custody of the Division of Corrections for a period of two years.

## STANDARD OF REVIEW

Where the constitutionality of a statute is a question of law, the standard of review is *de novo*. Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008). However, every reasonable construction of the statute must be resorted to by the court in order to sustain constitutionality. Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). Where the issue on an appeal involves the interpretation of a statute, the standard of review is *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). To the extent that a question of law arises from the interpretation of a criminal procedure rule, this Court has applied the same standard – *see, e.g., State v. Bruffey*, 207 W. Va. 267, 531 S.E.2d 332 (2000).

A judicially imposed sentence that falls within the statutory limits established by the legislature is not generally subject to review, provided, however, that this Court may review issues of proportionality under an abuse of discretion standard. *See, e.g., State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983).

## SUMMARY OF ARGUMENT

The West Virginia legislature acted within the scope of its authority to create a sentencing structure for the felony offense of third degree sexual assault. The sentence is a one to five year indeterminate period of incarceration following by an up to fifty year determinate period of revocable supervised release. The ten year period of revocable supervised release ordered in the present case is within those statutory limits, and is proportioned to the character and degree of the offense.

West Virginia Code §62-12-26, establishing the latter part of this sentence, clearly and unambiguously defines when the supervision period begins, the terms and conditions that a court may impose, the consequences of a violation, and procedures for adjudicating an alleged violation. These procedures include notice to the Defendant of the alleged violation and the evidence in support thereof, the right to be represented by counsel, and the opportunity to be heard.

Because the legislature has established the provisions of West Virginia Code §62-12-26 as a part of the sentencing structure for certain offenses, the hearing of an alleged violation is equivalent to the hearing of an alleged probation violation. In other words, the process is distinct from the adjudication of a new criminal charge and no new jeopardy attaches.

**A. IT IS NOT CRUEL AND UNUSUAL PUNISHMENT TO RE-IMPRISON THE PETITIONER FOR TWO YEARS FOLLOWING HIS ADMISSION TO VIOLATING A CONDITION OF SUPERVISED RELEASE.**

In the omnibus opinion in *State v. James*, *State v. Hedrick*, and *State v. Daniels*, 227 W. Va. 407, 710 S.E.2d 98 (2011), this Court previously held that W. Va. Code §62-12-26 is not facially unconstitutional on the grounds of cruel and unusual punishment, vagueness, due process, or double jeopardy. Since that opinion was issued, the statute has not changed, nor have the reasons for finding that the statute, on its face, passes constitutional muster. The difference in the present case is that the Petitioner has now been incarcerated for violating a term of his supervised release.

Although this Court has not previously addressed the revocation of supervised release under §62-12-26, revocable supervised release has been a long-standing part of

the sentencing structure for certain federal offenses. Moreover, West Virginia Code §62-12-26 is so similar to Title 18 Section 3583 of the United States Code that the latter appears to have served as a model for our state legislature. Please consider and compare the following language pertinent here.

W. Va. Code §62-12-26(g):

Modification of conditions or revocation -- The court may:

- (1) Terminate a term of supervised release and discharge the defendant released at any time after the expiration of two years of supervised release, pursuant to the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice;
- (2) Extend a period of supervised release if less than the maximum authorized period was previously imposed or modify, reduce or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, consistent with the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;
- (3) Revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release;
- (4) Order the defendant to remain at his or her place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

18 U.S.C. §3583(e):

Modification of Conditions or Revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) Terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) Extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) Revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) Order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

The largely parallel language suggests that federal case law may be useful to this Court in analyzing the present case.

With a string of cases cited in *United States v. Purvis*, 940 F.2d 1276, 1278 (9<sup>th</sup> Cir. 1991), the Court noted that it had previously approved of the imposition of supervised release as part of a sentencing structure. In *Purvis*, as in the present case, the Court was asked to go to the next step and determine whether the revocation, as opposed

to the imposition, of supervised release was permissible. The *Purvis* Court stated that, “When we expressly approved of the imposition of supervised release, we implicitly approved of its revocation as well...Today we make our prior dicta the law.” *Id.* at 1279. The court went on to note that the federal law “authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his substantive offense, will exceed the maximum incarceration permissible under the substantive statute.” *Id.*

The logic employed in *Purvis* is difficult to refute. Presumably, more serious offenders are more likely to serve a greater portion, if not all, of that sentencing component imposed by the substantive criminal statute. For those defendants, no violation of supervised release, however egregious, would result in any real consequences.

If this Court accepts this proposition, the next consideration though is: can a sentencing court, upon revocation of supervised release, go too far? In other words, is there a point at which a period of imprisonment upon revocation of supervised release is so disproportionate as to shock the conscience and offend fundamental notions of human dignity, *i.e.*, the test acknowledged in *James/Hedrick/Daniels, supra*. 227 W. Va. at 416?

The State maintains that, even if there is such a threshold, it is clearly not reached in the present case. Based upon the Petitioner’s admitted violation of supervised release, the Circuit Court of Preston County only imposed a period of two years of re-imprisonment, which was expressly proportioned to the substantive criminal statutes under which the Petitioner was convicted. Accordingly, the period of re-imprisonment is not cruel or unusual.

**B. THE PETITIONER'S DUE PROCESS RIGHTS WERE FULLY HONORED AND NO NEW JEOPARDY ATTACHED.**

The Petitioner further complains that his state and federal due process rights and protections against double jeopardy were violated when he was re-imprisoned without jury involvement. This argument also lacks merit.

As previously noted, W. Va. Code §62-12-26 is remarkably similar to 18 U.S.C. §3583. In *U.S. v. Soto-Olivas*, 44 F.3d 788 (9<sup>th</sup> Cir. 1995), the court considered a double jeopardy challenge to a revocation of supervised release, and did so by reference to applicable due process rights. Citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) among other cases, that court concluded that proceedings to revoke supervised release – like the proceedings to revoke probation or parole – refer back to the original offense. Accordingly, re-imprisonment upon revocation of supervised release is punishment for the original crime, not double jeopardy. Therefore, courts need not comply with the protections constitutionally guaranteed for criminal prosecutions, and the allegations need not be proved beyond reasonable doubt. *Id.* at 791-792.

In *U.S. v. Wyatt*, 102 F.3d 241 (7<sup>th</sup> Cir. 1996), the court reached the same conclusion, nor are these courts unique in their application of 18 U.S.C. §3583. Examining §3583 for a different purpose, the court in *Johnson v. United States*, 529 U.S. 694, 146 L.Ed.2d 727 (2000), approved the practice of “most courts” which treat post-revocation sanctions as part of the penalty for the initial offense, thus avoiding issues of double jeopardy. *Id.* at 700. In reaching this conclusion, the *Johnson* court further noted without pause that violations of supervised release “need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond reasonable doubt.” *Id.*

Because there is no logical reason to treat a revocation of supervised release different from a revocation of probation, the Petitioner's due process rights in this matter are those rights which are related in Rule 32.1 of the West Virginia Rules of Criminal Procedure, all of which were fully honored.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Because a significant portion of this case involves an issue of first impression under West Virginia law, it may be appropriate for consideration by oral argument under Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure.

#### **CONCLUSION**

For the foregoing reasons, the Respondent requests that the instant appeal be denied.

Respectfully submitted,

State of West Virginia,  
By Counsel.



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