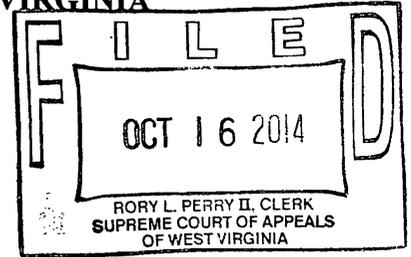


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0484



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

JERRY LEE HEDRICK,

*Defendant Below, Petitioner.*

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BRIEF OF RESPONDENT  
STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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*Defendant Below, Petitioner.*

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

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

On July 8, 2008, the Grant County Grand Jury indicted Petitioner on two counts of first

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<sup>1</sup> Please note that the appendix for the current appeal does not contain a transcript of Petitioner’s trial, which trial took place on May 27 and 28, 2009. As such, these facts were drawn primarily from this Court’s statements in Petitioner’s first appeal following his conviction and sentence. *See State v. James*, 227 W. Va. 407, 412, 710 S.E.2d 98, 103 (2011). *See also generally* App. vol. 1, at 6-11. The *James* case involved Petitioner’s, along with two other defendants’ (in separate cases), appeal to this Court challenging the constitutionality of the extended sexual offender supervised release statute, W. Va. Code § 62-12-26. In *James*, the Court consolidated these appeals and ultimately upheld the constitutionality of this statute, as well as affirming Petitioner’s sentence, which sentence included placing Petitioner on extended sexual offender supervised release for 25 years. *See generally James*, 227 W. Va. at 411-21, 710 S.E.2d at 102-12.

degree sexual abuse. App. 1.

Petitioner's trial took place on May 27 and 28, 2009, and ended with the jury convicting him of two counts of first degree sexual abuse.<sup>2</sup> App. 12, 15, 16.

On October 21, 2009, a sentencing hearing was held in this case, during which the circuit court ("court") sentenced Petitioner to two consecutive terms of 1 to 5 years in the penitentiary for his convictions of two counts of first degree sexual abuse. App. 19. The court further ordered that, upon his completion of parole, Petitioner be placed on extended sexual offender supervised release for 25 years. App. 20. During this same hearing, having been convicted of a sex crime, Petitioner signed off on a *Sex Offender Conditions* form, which form listed numerous conditions that Petitioner was subject to upon being released from prison on parole.<sup>3</sup> *See generally* App. 34-36. The form also had an additional condition, which was left blank, which read, "[o]thers as appropriate to the case." App. 36. Thereafter, Petitioner began serving his sentence, eventually made parole, and was released from prison.

On January 14, 2014, Petitioner was discharged from parole. App. 63. Thereafter, on January 21, 2014, Petitioner signed off on a *Rules and Regulations Governing Probationers* form, which form enumerated numerous typewritten conditions that Petitioner was subject to during the time he was on supervised release.<sup>4</sup> *See generally* App. 37-38. In addition to these typewritten conditions, the form included a handwritten condition providing that Petitioner was "not to be

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<sup>2</sup> Although indicted in Grant County, Petitioner, upon his request for a change of venue, was actually tried in Mineral County. App. 12, 15, 18; App. vol. 1, at 3.

<sup>3</sup> At the time of his signing of this form, Petitioner's trial counsel, Stephen G. Jory, was present and also signed off on this form. App. 36.

<sup>4</sup> No counsel was present with Petitioner at his signing of this form. App. 38.

employed at Smoke Hole Resort in any capacity.”<sup>5</sup> App. 38.

Two days later, on January 23, 2014, Petitioner signed off on a *Terms and Conditions of Supervised Release* form, which form also listed numerous typewritten conditions that Petitioner was subject to during the time that he was on supervised release.<sup>6</sup> *See generally* App. 39-48. On top of these typewritten conditions, the form included a handwritten condition providing that Petitioner could have “[n]o employment or visitation at Smoke Hole Caverns<sup>[7]</sup> or gift shop property as defined in the general terms.”<sup>8</sup> App. 47.

On or about February 12, 2014, Petitioner filed a Motion to Strike the two handwritten conditions noted above. *See generally* App. 5, 49, 51-53. On March 11, 2014, a hearing was held on Petitioner’s Motion to Strike these conditions, which Motion the court denied.<sup>9</sup> *See generally* App. vol. 1, at 3, 7-13. Thereafter, Petitioner brought the current appeal.

## II.

### SUMMARY OF ARGUMENT

The two handwritten conditions of extended sexual offender supervised release prohibiting

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<sup>5</sup> This handwritten condition was added by Probation Officer Lawrence Wade. App. 38, 78.

<sup>6</sup> Again, no counsel was present with Petitioner at his signing of this form. App. 48.

<sup>7</sup> Smoke Hole Caverns is a tourist/resort area in Grant County. Petitioner is the majority owner of this property, which property he purchased in 1977. App. 78. Petitioner also has a maintenance complex on the property, which complex houses his equipment, machinery and tools. App. 78.

<sup>8</sup> This handwritten condition was added by Probation Officer David Smith. App. 48.

<sup>9</sup> Following this hearing, on May 5, 2014, the court entered an Order again denying Petitioner’s Motion to Strike these conditions. *See generally* App. 74, 75, 76. By Corrected Order, entered on August 18, 2014, the court once again denied Petitioner’s Motion to Strike these conditions. *See generally* App. 77, 79-80, 81.

Petitioner from Smoke Hole Caverns (“SHC”) are reasonable. The sexual abuse committed by Petitioner in this case occurred at SHC, this sexual abuse involved an employee of this tourist/resort area, there had been at least one other similar incident involving a guest at this area, and there was cause for concern for other female employees and guests at this area. Thus, the two handwritten conditions go “hand-in-hand” with what is of paramount importance in this case—protecting the public, namely women (employees and guests alike) at SHC, from Petitioner’s unwanted and uninvited sexual advances, which advances Petitioner has a proclivity towards. Therefore, contrary to his contention, the trial court did not abuse its discretion by denying Petitioner’s Motion to Strike the two handwritten conditions at issue in this case.

At the time that the two handwritten conditions of extended sexual offender supervised release were put in place, Petitioner was not on probation; rather, he was on supervised release. Therefore, contrary to his contention, Petitioner was not denied procedural due process when these conditions were established, although he did not have counsel present at the time.

### III.

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

The State does not believe that oral argument is necessary in this case, as the “facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.” Rev. R.A.P. 18(a)(4). However, it appearing that Petitioner has requested oral argument, *see* Pet’r’s Br. 7, and if so ordered by the Court, the State will be there to respond. The State, of course, defers to the discretion and wisdom of the Court on this point, as well as the Court’s election to issue a memorandum decision or opinion in this case.

#### IV.

#### ARGUMENT

**A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONER'S MOTION TO STRIKE THE TWO HANDWRITTEN CONDITIONS OF EXTENDED SEXUAL OFFENDER SUPERVISED RELEASE CREATED BY TWO PROBATION OFFICERS, AS THESE CONDITIONS ARE REASONABLE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.**

Under West Virginia's extended sexual offender supervised release statute, "[t]he court may . . . modify, reduce or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release[.]" W. Va. Code § 62-12-26(g)(2). *See also* W. Va. Code § 62-12-26(a) ("[P]ursuant to the provisions of subsection (g) of this section, a court may modify, terminate or revoke any term of supervised release imposed[.]").<sup>10</sup>

With this "backdrop" in place, Petitioner, on appeal, takes issue with the two handwritten conditions of extended sexual offender supervised release imposed upon him after he was released from parole. Taken together, these conditions, in effect, bar Petitioner from his property, SHC, whether it be for purposes of employment or visitation. From a number of different "angles," Petitioner essentially asserts that these conditions are not reasonable. In making this assertion, Petitioner argues that the conditions do not have a nexus to a legitimate probationary goal and are exceedingly tenuous. Thus, as further argued by himself, the court abused its discretion in denying

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<sup>10</sup> Notably, West Virginia's probation release statute also permits a trial court to modify, at any time, the conditions of a probationer's probation. *See* W. Va. Code § 62-12-9(b) ("[T]he court may impose, subject to modification at any time, any other conditions [of probation] which it may determine advisable[.]"). The same can be said of corrections officials' modification, at any time, of the conditions of a parolee's parole in West Virginia. *See* W. Va. Code § 62-12-17(d) ("[T]he Division of Corrections may impose, subject to modification at any time, any other conditions [of parole] which the division considers advisable.").

Petitioner's Motion to Strike these conditions. *See generally* Pet'r's Br. 7-13. The State disagrees.

For legal support, Petitioner relies primarily on two cases—*Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976) and *State v. Leyva*, 280 P.3d 252 (Mont. 2012). *See* Pet'r's Br. 7. At syllabus point 6 of *Louk*, this Court held that “W. Va. Code, 62-12-9, [a]s amended, permits a trial judge to impose any conditions of probation which he may deem advisable, but this discretionary authority must be exercised in a reasonable manner.”<sup>11</sup> In *Leyva*, the Supreme Court of Montana held that

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

*Leyva*, 280 P.3d at 258 (citations omitted).<sup>12</sup>

To conclude that the two handwritten conditions at issue in this case meet the standards set forth in *Louk* and *Leyva*, one need only look at the court's findings during the March 11, 2014 hearing on Petitioner's Motion to Strike these conditions. In their entirety, these findings are as follows:

THE COURT: Okay. Of course the Court had the advantage of presiding over the trial and these proceedings and this is the scene of the crime. This was an employee

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<sup>11</sup> *See also Louk*, 159 W. Va. at 495, 223 S.E.2d at 788 (“The statute [W. Va. Code § 62-12-9] imposes certain mandatory conditions of probation and permits the trial judge in his discretion to impose additional conditions which may include but are not limited by those conditions designated in the statute as discretionary. Any condition of probation, however, which is imposed in the discretion of the trial court must be reasonable.”).

<sup>12</sup> It is important to note that one of the handwritten conditions that Petitioner complains about here prohibits him from engaging in any type of employment at SHC, with the other condition prohibiting him from any visitation at this property. In *Leyva*, the Court approved an employment restriction of supervised release, which restriction provided that “[t]he Defendant shall be subject to reasonable employment or occupational prohibitions and restrictions designed to protect the class or classes of persons containing the likely victims of further offenses.” *Leyva*, 280 P.3d at 256.

of the motel that was the victim here and in the course of the presentence report it was revealed that there were other situations similar that were never prosecuted. At least one situation with a guest at the motel, a female guest, and it was sort of common knowledge in the county that Mr. Hedrick was a concern for the young girls that worked there as well as the other women. His attorney Steve Jory made the very unusual motion when he made the motion for change of venue instead of saying because of adverse publicity, because there really surprisingly had not been much publicity, he said and I'll quote:

“His client was the most hated man in Grant County”.

And he predicted we would not be able to get a jury and I didn't take that, frankly, very seriously; but, we tried to get a jury and we went several hours and found out that he was telling the truth that everybody had something against Mr. Hedrick, and we actually granted the change of venue because so many people hated him. And in the course of hearing some of those jurors, you know, they had heard some of these same things and some other violations and, I think, it's very clear that his presence at that business would hurt that business. Women don't want to go there and it would hurt getting employees so, even though he's got an interest in the property, I think, his interest in the property is going to be enhanced by his absence. So, I[']m going to find under these very unusual circumstances, particularly since this was the scene of the crime, that it is a reasonable regulation to keep him off those premises.

App. vol.1, at 11-13.

Again, as the court's findings plainly illustrate, the two handwritten conditions prohibiting, for purposes of employment or visitation, Petitioner from SHC satisfy the standards of *Louk* and *Leyva*. Specifically, as correctly found by the court, the sexual abuse committed by Petitioner in this case occurred at SHC, this sexual abuse involved an employee of this tourist/resort area, there had been at least one other similar incident involving a guest at this area, and there was cause for concern for other female employees and guests at this area. Thus, the two handwritten conditions go “hand-in-hand” with what is of paramount importance in this case—protecting the public, namely women (employees and guests alike) at SHC, from Petitioner's unwanted and uninvited sexual groping, which groping Petitioner obviously has a proclivity towards. This is buttressed by this Court's

findings during Petitioner's first appeal:

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

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

Furthermore, not only do the handwritten conditions at issue in this case satisfy the standards of *Louk* and *Leyva*, these conditions also satisfy the standards of West Virginia's federal circuit court. That is, given the nature and circumstances of the crimes for which Petitioner has been convicted (i.e., two counts of the first degree sexual abuse of an employee of SHC), as well as the history and characteristics of Petitioner himself (i.e., at least one other similar incident involving a guest at SHC, a cause for concern for other female employees and guests at this area, as well as this Court's recognition that Petitioner is at a moderate risk for recidivism and reoffending), these two handwritten conditions help to deter Petitioner from reoffending at SHC. In so deterring Petitioner, these conditions help to protect the public, whether it be an employee or visitor to this property, from the same thing happening all over again. See *United States v. Worley*, 685 F.3d 404, 407 (4th Cir. 2012) (citations and internal quotation marks omitted) ("A sentencing court may impose any condition that is reasonably related to the relevant statutory sentencing factors, which include considering the nature and circumstances of the offense and the history and characteristics of the

defendant; providing adequate deterrence; protect[ing] the public from further crimes; and providing the defendant with training, medical care, or treatment. The condition must also be consistent with the Sentencing Commission policy statements. A particular restriction does not require an offense-specific nexus, but the sentencing court must adequately explain its decision and its reasons for imposing it.”); *United States v. Henson*, 22 Fed. Appx. 107, 112 (4th Cir. 2001) (citations and internal quotation marks omitted) (“A special condition of supervised release may restrict fundamental rights when the special condition is narrowly tailored and is directly related to deterring [the defendant] and protecting the public. Restrictions affecting constitutional rights are valid if directly related to advancing the individual’s rehabilitation and to protecting the public from recidivism.”).

Despite all of this, Petitioner maintains in this appeal that “the lower court clearly abused its discretion by failing to strike the two handwritten terms and that . . . [these] restrictions are not reasonable, have no nexus to a legitimate probationary goal and are exceedingly tenuous for several reasons.” Pet’r’s Br. 8. Needless to say, as discussed below, the State disagrees with these “reasons.”

First, Petitioner notes that, while he was on parole, there were two time periods when he was prohibited from SHC property. The first period restricting Petitioner from this property occurred when he was first released from prison and placed on parole. This restriction was eventually lifted by his parole officer after consulting with the parole legal department. The second period occurred when his estranged wife obtained a domestic violence protective order against him, which order prohibited him from coming within 500 feet of the property. Following the expiration of this order, on September 24, 2013, Petitioner’s estranged wife sought a second protective order against him,

which was denied by the Family Court. Thereafter, from September 24, 2013 until January 21, 2014 (when the first handwritten condition prohibiting Petitioner from working at SHC was put in place), Petitioner could freely enter this property. During this period, as further argued by himself, nothing new occurred, other than him being discharged from parole early for good behavior and being placed on extended supervised release, which would warrant the two handwritten conditions prohibiting him from SHC. *See generally* Pet'r's Br. 8-9.

“For starters,” lest anyone forget, when it comes to this property (SHC) and its female employees and visitors, Petitioner cannot “keep his hands to himself”—and the record in this case undeniably shows just that! To protect these women from Petitioner’s “roving” hands, Probation Officers Lawrence Wade and David Smith added the two handwritten conditions that Petitioner complains about in this appeal. Furthermore, contrary to his contention, something new did occur during the period between September 24, 2013 and January 21, 2014, which warranted the handwritten conditions prohibiting Petitioner from SHC. Specifically, it was during this period that Petitioner’s family members, as well as other employees of this property, brought it to the attention of Probation Officer Wade, who relayed the same to Probation Officer Smith, that Petitioner’s presence on the property was still a problem. All of this was fully explained by Probation Officer Smith during the March 11, 2014 hearing on Petitioner’s Motion to Strike the two handwritten conditions at issue in this case:

MR. SMITH: Yes, I just wanted to point out that the basis of this term, when I spoke with Mr. Wade, was it was my understanding and I haven’t personally spoken with any employees at the business at Smoke Hole or any family members; but, it was my understanding from Mr. Wade that it was the family members and the employees request that he not be allowed there based upon, I guess, maybe a harassing type demeanor, a feeling of intimidation working there, they didn’t, I guess, didn’t feel safe in that environment if Mr. Hedrick was around. So, that was our basis, solely,

for that term so I just wanted the Court keep that in mind.

App. vol. 1, at 11.

Next, Petitioner takes specific aim at the first handwritten condition's ban against him having any type of employment at SHC.<sup>13</sup> In doing so, Petitioner first notes that this employment ban is paradoxical to other provisions of the documents specifying the conditions of his supervised release.<sup>14</sup> Petitioner further notes that, since 1977, he has owned and maintained employment at SHC and that is all that he knows. Thus, as Petitioner further argues, the employment ban at this property created by the first handwritten condition is not reasonable, as he cannot be expected to find new employment at his age—65. *See generally* Pet'r's Br. 9-10.

First of all, Petitioner's arguments on this point “beg” the question—What is more important, the protection of the public—i.e., the women working and visiting SHC from Petitioner's sexual abuse—or Petitioner's desire to work at this property? In the State's view, the answer is simple—the protection of the public. Petitioner's arguments also give rise to another question—If Petitioner is now so worried about being able to work at SHC, then why did he sexually abuse the victim in this case (employee of SHC) on this property, which sexual abuse Petitioner also perpetrated on another woman (visitor to SHC) on the property? Again, in the State's view, the answer is simple—Petitioner's proclivity to fondle the private parts of women visiting and employed by SHC

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<sup>13</sup> The second handwritten condition likewise prohibits Petitioner from having any type of employment at this property.

<sup>14</sup> The January 21, 2014 *Rules and Regulations Governing Probationers* form provides, in pertinent part, as follows: “You shall use your best efforts to obtain suitable employment and to remain gainfully employed[.]” App. 37. The January 23, 2014 *Terms and Conditions of Supervised Release* form provides, in relevant part, the following: “The Probationer shall, at all times, be employed or actively seeking employment[.]” App. 43.

overpowers any desire he may have to work at this property.

Furthermore, as found by the court, through the help of his son, Petitioner has been able to access the equipment, machinery and tools that he keeps at SHC: “The Defendant testified that his son retrieves the equipment, machinery, and tools, and meets him to retrieve the same off of Smoke Hole Caverns property.” App. 79. Obviously, Petitioner is using this equipment, machinery and tools somewhere other than SHC or he would not be, for lack of a better phrase, “gathering them up to begin with.” Thus, Petitioner’s argument that the employment ban at this property created by the first handwritten condition is not reasonable, as he cannot be expected to find new employment at the age of 65, is simply not credible.<sup>15</sup>

Lastly, on this point, it appears that the employment ban created by the first handwritten condition has not caused Petitioner to suffer financially. In other words, as the majority owner of SHC, surely Petitioner is still receiving “a slice of the pie.” Furthermore, a presentence investigation was conducted in this case, which investigation reveals that Petitioner has substantial “holdings.” Specifically, the presentence investigation report, dated August 11, 2009, indicates that Petitioner, by his own admission, owns numerous properties in addition to SHC, including cattle farms in Pendleton County, Tucker County, and Grant County, West Virginia, as well as Bath County, Virginia. App. 28. This report also indicates that Petitioner, as of 2004, had assets totaling \$7,104,793; these assets are made up of cash (\$714,933), as well as motor vehicles, real estate and business holdings (\$6,389,850). *Id.* The report also indicates that Petitioner, as of 2004, had a

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<sup>15</sup> It should also be noted that Petitioner is an educated man, with Bachelor’s and Master’s degrees “under his belt.” App. 27.

monthly income of \$42,122.<sup>16</sup> *Id.*

Next, Petitioner takes specific aim at the second handwritten condition, which condition, in addition to prohibiting him from working at SHC, also prohibits him from having any visitation at this property. Petitioner argues that this second handwritten condition broadened the employment ban of the first handwritten condition. Petitioner further argues that this visitation ban is unduly restrictive of his liberties and autonomy, as well as being exceedingly tenuous and lacking the required nexus to a legitimate probationary goal as held in *Leyva*. In arguing such, Petitioner first points out he has a significant work history at SHC, stores a large amount of tools and equipment on this property, is the majority owner of the property, and maintains his marital residence on the property. Thus, as further argued by Petitioner, there is no logical probationary goal of preventing him from visiting SHC other than to appease his estranged wife. Petitioner further argues that his family and employees were the driving force behind the visitation, as well as the employment, ban. However, as further argued by himself, Petitioner's family and employees were not the victim in this case and, as such, they do not have any standing. In this same vein, Petitioner points out that the victim in this case, Rachel S. Evans, is no longer an employee of SHC. Lastly, Petitioner argues that there is no legitimate probationary goal by prohibiting him from visiting SHC, such as protecting the victim. Thus, Petitioner lastly argues, his liberties are greatly infringed by the visitation ban and the court abused its discretion in upholding such ban. *See generally* Pet'r's Br. 10-11.

To begin with, as with his arguments against the employment ban, Petitioner's arguments

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<sup>16</sup> It should be noted that, during the presentence interview, Petitioner reported that he did not have any idea what his assets and/or debts totaled. App. 28. However, in 2004, Petitioner reported that he did not have any debts, whether it be in the form of a mortgage or any other outstanding loans. *Id.*

against the visitation ban “beg” the question—What is more important, the protection of the public—i.e., the women working and visiting SHC from Petitioner’s sexual abuse—or Petitioner’s desire to visit this property? Again, in the State’s view, the answer is simple—the protection of the public.

Furthermore, the State admits, as Petitioner states, that the second handwritten condition expands the employment ban of the first handwritten condition to include a prohibition against Petitioner visiting SHC. However, the expansion of such conditions are not uncommon and are generally held to be acceptable should the need arise. Here, such a need is “ever present.” In other words, an employment ban alone in this case “just won’t do.” Petitioner could sexually abuse a female employee or visitor to SHC during a visit to this property just as easily as sexually abusing such female while working at the property. *See United States v. Weintraub*, 371 F. Supp.2d 164, 166 (D. Conn. 2005) (internal quotation marks omitted) (“[M]odification [of supervised release] is appropriate to account for new or unforeseen circumstances not contemplated at the initial imposition of supervised release.”). *See also State v. Faraday*, 842 A.2d 567, 574 (Conn. 2004) (internal quotation marks omitted) (“[M]odifications of probation routinely are left to the office of adult probation. When the court imposes probation, a defendant thereby accepts the possibility that the terms of probation may be modified or enlarged in the future[.]”); *Faraday*, 842 A.2d at 585 (citations omitted) (“[C]onditions of probation are necessarily flexible, and may be amended by the office of adult probation or the court to meet the current situation, as it presents itself. Thus, it stretches the ex post facto prohibition beyond its proper boundaries to suggest, as the defendant’s argument does, that only those conditions of probation specifically mentioned in the statutes at the time of the underlying conduct may ever be imposed.”). *See also State v. Crouch*, 939 A.2d 632, 636 (Conn. App. 2008) (“If he accepts the offer of probation, [the defendant] must accept all of the

conditions. . . . In accepting probation, the defendant accepted at the time of sentencing the possibility that the terms of his probation could be modified or enlarged in the future in accordance with the statutes governing probation.”).

As for Petitioner’s argument that the second handwritten condition prohibiting him from visiting SHC is exceedingly tenuous and lacks the required nexus of *Leyva*, such argument has been addressed above. As such, this point will not be “rehashed” here, other than to say that the requirements of *Leyva*, as well as *Louk*, are clearly met in this case insofar as the visitation ban of the second handwritten condition. As also argued above, the same is true of the employment ban contained in the first handwritten condition.

Additionally, the visitation ban, and the employment ban for that matter, are certainly restrictive of Petitioner’s liberty and autonomy, but not unduly so as Petitioner insists here. Bluntly stated, Petitioner’s interest in SHC, whether for purposes of visitation or employment, is subordinate to protecting the public, which is exactly what the visitation and employment bans serve to do. Thus, Petitioner’s argument that the visitation ban is unduly restrictive of his liberty and autonomy should not be countenanced by this Court. The same is true of Petitioner’s arguments that he has a significant work history at SHC, stores large amounts of tools and equipment on this property, is the majority owner of the property, and has his marital residence on the property. Again, as correctly found by the court, Petitioner, with the help of his son, has been able to access the equipment, machinery and tools that he keeps on this property. Because he has access to this equipment, machinery and tools, Petitioner has been able to use the same away from SHC. Otherwise, why would Petitioner have his son retrieve this equipment, machinery and tools from SHC, and then have his son meet him off this property where Petitioner could take possession of the same? The answer

to this question is obvious—Petitioner is using this equipment, machinery and tools elsewhere; presumably at his numerous other properties/cattle farms in West Virginia and Virginia.

As for Petitioner’s argument that there is no logical probationary goal of imposing a visitation ban at SHC other than to appease his estranged wife, please forgive the expression, but “it just ain’t so.” In support of this argument, Petitioner states that “Officer Daniel Smith testified at the March 14, 2014 hearing that after speaking with Officer Wade that it was his understanding . . . that it was the family members and the employees request that he [Petitioner] not be allowed there [Smoke Hole Caverns] . . . .” Pet’r’s Br. 11 (emphasis omitted). Obviously, Petitioner has cut off Probation Officer Smith’s sentence here—and with good reason. Specifically, Officer Smith, after stating that it was the family members and employees request that Petitioner not be allowed at SHC, went on to state that this request was “based upon, I guess, maybe a harassing type demeanor, a feeling of intimidation working there, they didn’t, I guess, didn’t feel safe in that environment if Mr. Hedrick was around.” App. vol. 1, at 11. Clearly, on this statement, there is more involved here in imposing the visitation ban than simply appeasing Petitioner’s estranged wife.

Petitioner also makes much of the fact that the victim, Rachel S. Evans, is no longer an employee at SHC and thus, as argued by himself, there is no legitimate probationary goal by prohibiting him from visiting this property, such as protecting the victim. It is true that Rachel no longer works at SHC, which is certainly understandable given Petitioner’s sexual abuse of Rachel, who wanted nothing more than a day off from work from her boss—Petitioner. As this Court has found, Rachel was “so shaken by the experience that she never returned to the workplace.” *James*, 227 W. Va. at 417, 710 S.E.2d at 108. Furthermore, as other courts have found, conditions of supervised release do not have to be absolutely connected to the underlying offense, such as to the

victim of the offense. *See United States v. Miller*, 514 Fed. Appx. 374 (4th Cir. 2013) (citations omitted) (“Although a particular condition of supervised release need not be connected to the underlying offense, the sentencing court must provide an explanation for the conditions it imposes.”); *Worley*, 685 F.3d at 407 (citations omitted) (“A particular restriction does not require an ‘offense-specific nexus,’ but the sentencing court must adequately explain its decision and its reasons for imposing it.”).

Additionally, Petitioner’s sexual abuse of women at SHC reaches beyond the victim in this case. As the court found at the March 11, 2014 hearing on Petitioner’s Motion to Strike the handwritten conditions at issue here, “there were other situations similar that were never prosecuted,” including “[a]t least one situation with a guest at the motel, a female guest, and it was sort of common knowledge in the county that Mr. Hedrick was a concern for the young girls that worked there as well as the other women.” App. vol. 1, at 11-12. On top of this, this Court, in Petitioner’s first appeal, noted that an evaluation of Petitioner by a forensic psychiatrist indicated that “Mr. Hedrick was at least at a moderate risk for recidivism and reoffending.” *James*, 227 W. Va. at 417, 710 S.E.2d at 108. Given these findings, and contrary to his contention, there is a legitimate probationary goal of prohibiting Petitioner from having any visitation at SHC, which, as stated many times above, is to protect the public, i.e., women working at and visiting this property.

Next, Petitioner takes aim at the court’s reasoning in denying his Motion to Strike the two handwritten conditions barring him from any employment or visitation at SHC. This reasoning, as Petitioner further argues, is not logically connected to a legitimate probationary goal. In arguing such, Petitioner points to some of the court’s statements during the March 11, 2014 hearing on his Motion to Strike the two handwritten conditions. Specifically, Petitioner points to the following

statement of the court: “I think, it’s very clear that his [Petitioner] presence at that business would hurt that business.” Pet’r’s Br. 11. Petitioner further states that the court drew this conclusion based on a quote from his trial counsel, in moving for a change of venue, that “his client was the most hated man in Grant County.” Pet’r’s Br. 12. Based on these statements, Petitioner now argues that the fact that he may or may not be liked is completely irrelevant and does not create a nexus to a legitimate probationary goal. As part of this argument, Petitioner also asserts that it is not within the purview or concern of the court to speculate whether his presence at SHC, a private business, would have a negative economic effect on this business. Lastly, on this point, Petitioner argues that the court, in affirming the employment and visitation restrictions in this case, “simply reasoned that the Petitioner is the most hated person in Grant County and his presence at the resort [Smoke Hole Caverns] would hurt the business.” Pet’r’s Br. 13.

Simply put, had the court stated nothing more than the language noted above by himself, Petitioner would be right, but such did not occur here. In fact, in denying Petitioner’s Motion to Strike the handwritten conditions at issue in this case, the court brought out some extremely important factors. Specifically, the court found that SHC was “the scene of the crime.” App. vol. 1, at 11. In further discussing the underlying crime in this case, the court also found that “[t]his was an employee of the motel [at SHC] that was the victim here.” *Id.* Based on the presentence investigation, the court also found “that there were other situations similar [to the underlying crime] that were never prosecuted,” including “[a]t least one situation with a guest at the motel, a female guest.” *Id.* The court also noted that it was “common knowledge in the county that Mr. Hedrick was a concern for the young girls that worked there as well as the other women.” App. vol. 1, 11-12. Given these findings, and contrary to his assertions, the court did not deny Petitioner’s Motion to

Strike the handwritten conditions involved in this case by simply reasoning that Petitioner was most hated man in Grant County and that his presence at SHC would hurt this business.

As a means of attempting to circumvent the court's findings, Petitioner notes that "[t]he lower court also took judicial notice without citing to specific incidents that 'it was sort of common knowledge in the county that Mr. Hedrick was a concern for the young girls that worked there as well as the other women.'" Pet'r's Br. 12. On the contrary, the court did make note of a specific instance involving "a guest at the motel, a female guest." App. vol. 1, at 11. Furthermore, any failure on the court's part to cite to specific instances, i.e., give the actual names of any victims, was to protect the identity of any other victims of Petitioner's sexual abuse. There is further support for this point, as it appears from the record in this case that some of the information that the court looked at was kept, at the court's own initiative, under seal during the litigation of the underlying crime. *See generally* App. 4.

Lastly, as a further means of getting around the court's findings, Petitioner also notes that "the victim is no longer employed at Petitioner's business." Pet'r's Br. 12. As this argument was fully covered above, the State will not belabor the point here, other than to stress that, although the victim (Rachel S. Evans) no longer works at SHC, Petitioner still poses a threat to the other women (employees and guests alike) at this property.

**B. ALTHOUGH HE DID NOT HAVE COUNSEL PRESENT AT THE TIME, PETITIONER WAS NOT DENIED PROCEDURAL DUE PROCESS WHEN THE TWO PROBATION OFFICERS ESTABLISHED THE TWO HANDWRITTEN CONDITIONS OF EXTENDED SEXUAL OFFENDER SUPERVISED RELEASE.**

On appeal, Petitioner asserts that he did not have any counsel present when he signed off on the forms (*Rules and Regulations Governing Probationers form and Terms and Conditions of*

*Supervised Release* form) that contained the handwritten conditions at issue in this appeal. Because of this, as further asserted by himself, the Probation Officers in this case (Probation Officers Lawrence Wade and David Smith) had free discretion to arbitrarily establish these handwritten conditions, which if violated could result in Petitioner being incarcerated for 25 years. Thus, again as asserted by himself, Petitioner's procedural due process rights have been violated. *See generally* Pet'r's Br. 14-15. The State disagrees.

For legal support, Petitioner again relies primarily on *Louk, supra*. At syllabus point 3 of *Louk*, this Court held that “[t]he suspension of a sentence coupled with probation is a critical stage of the trial proceedings and due process of law, therefore, requires that an accused be furnished the assistance of counsel and that counsel be present when the terms or conditions of probation are establish[ed] or modified.” Expanding on this, at syllabus point 5 of *Louk*, the Court further held that “[c]onditions of probation which are established or modified in the absence of either the accused or his counsel are void and unenforceable.”<sup>17</sup>

On their face, it is obvious that the *Louk* Court's holdings apply to the establishment or modification of a defendant's conditions of probation. Here, at the time that Probation Officers Wade and Smith added the handwritten conditions at stake in this case, Petitioner was not on probation, as correctly pointed out by the court during the March 11, 2014 hearing on Petitioner's

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<sup>17</sup> It should be noted the this Court, in adhering to these rules, seems to be in the minority, as compared with other courts, state and federal alike, across the country. *See, e.g., State v. Smith*, 769 A.2d 698, 704 (Conn. 2001) (“We previously have never considered whether due process requires that an individual on probation be afforded an opportunity to be heard with counsel before the office of adult probation may modify the defendant's conditions of probation. Although the right to counsel and a hearing has been expanded over the years, particularly with regard to parole and probation revocations, we agree with the numerous federal and state courts that have held that due process does not require a court hearing or counsel before the conditions of an individual's probation may be modified.”).

Motion to Strike these conditions. *See generally* App. vol. 1, at 5-6. In fact, Petitioner never has been on probation in this case, as he was sentenced to the penitentiary after being convicted of the underlying crime. Nor was Petitioner on parole at the time that the handwritten conditions were instituted, as he completed his parole on January 14, 2014, and Probation Officers Wade and Smith added the handwritten conditions respectfully on January 21 and 23, 2014. Rather, Petitioner was on nothing more than supervised release at the time of the addition of these handwritten conditions.

To overcome this, Petitioner argues that *Louk* is still applicable in this case, as a violation of the handwritten conditions could result in him being incarcerated for 25 years. The State believes this argument to be a little disingenuous. Yes—Petitioner has been placed on supervised release for 25 years. And yes—a violation of a condition of supervised release can result in a defendant being incarcerated for the remainder of his period of supervised release, which in Petitioner’s case is 25 years.<sup>18</sup> However, it is difficult, if not impossible, to imagine the court sending Petitioner back to the penitentiary for 25 years simply because he stepped on SHC property. It is equally difficult, if not impossible, to imagine this Court allowing such to occur. Instead, this Court would, in all likelihood, find that such sentence was disproportionate under the Court’s holdings in *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983), and/or *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).<sup>19</sup>

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<sup>18</sup> *See* W. Va. Code § 62-12-26(g)(3) (giving the trial court the authority to “[r]evoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release . . . if the court . . . finds by clear and convincing evidence that the defendant violated a condition of supervised release[.]”).

<sup>19</sup> As found by the Court in Petitioner’s first appeal, *James*, 227 W. Va. at 416, 710 S.E.2d at 107:

(continued...)

Notably, in Petitioner’s first appeal, this Court held that Petitioner’s sentence of being placed on supervised release for 25 years was not unconstitutionally disproportionate. *See James*, 227 W. Va. at 417, 710 S.E.2d at 108 (2011). However, it is a whole other matter whether the Court would find such if Petitioner would actually be sent back to the penitentiary for 25 years because he violated the handwritten conditions at issue in this case by simply stepping on SHC property. Again, the State believes that the Court would not allow such to occur.

Lastly, as an afterthought, from the record it does not appear that Petitioner even had a lawyer, whether retained or appointed, representing him in this matter at the time that the two handwritten conditions were put in place. Specifically, as noted above, Petitioner was represented at trial by Stephen G. Jory, which trial took place on May 27 and 28, 2009, and ended with the jury convicting him. Following this conviction, on October 21, 2009, the court sentenced Petitioner to the penitentiary and he began serving his sentence. While serving this sentence, Petitioner filed his first appeal with this Court, for which appeal Petitioner was again represented by Mr. Jory, along with Michael W. Parker. *See James*, 227 W. Va. at 411, 710 S.E.2d at 102. After serving 2+ years,

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<sup>19</sup>(...continued)

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

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

Petitioner made parole and was released from prison (exact date unknown). Thereafter, on January 14, 2014, Petitioner was discharged from parole and began his period of extended sexual offender supervised release. "A week or so" after Petitioner was placed on supervised release, on January 21 and 23, 2014 to be exact, the handwritten conditions at issue in this case were put in place.

Again, when these handwritten conditions were put in place, Petitioner did not have a lawyer. This is so for an obvious reason—there was no need for one by this time, as Petitioner had already been tried, convicted, sentenced, incarcerated, appealed his sentence, paroled out of prison, and discharged from parole. There was simply nothing left for a lawyer to do other than, as Petitioner would have it, to "hold his hand" during the time he was on supervised release. If this were required, as he contends, then arrangements would have to be made for Petitioner to have a lawyer "by his side" any and every time his conditions of supervised release may be modified for the next 25 years. What a "headache!"

V.

**CONCLUSION**

The circuit court's denial of Petitioner's Motion to Strike the two handwritten conditions of supervised release prohibiting Petitioner, for purposes of employment and/or visitation, from Smoke Hole Caverns should be affirmed.

**Respectfully submitted,**

**STATE OF WEST VIRGINIA,**

**Respondent,**

**By counsel**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0484

STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

JERRY LEE HEDRICK,

*Defendant Below, Petitioner.*

CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent State of West Virginia* upon Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 16th day of October, 2014, addressed as follows:

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BENJAMIN F. YANCEY, III