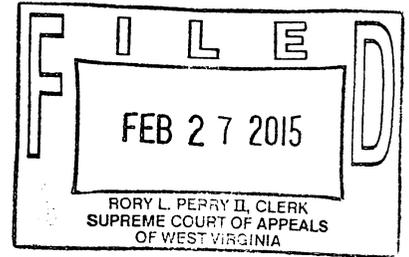


NO. 14-1198
IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

v.

(Circuit Court of Mineral County)
(Case No. 09-F-58)

JERRY LEE HEDRICK
Defendant Below, Appellant

PETITIONER'S BRIEF

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PETITION

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

I. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING CLEAR AND CONVINCING EVIDENCE, AS REQUIRED BY W.VA. CODE § 62-12-26(g)(3), THAT THE PETITIONER COMMITTED ONE “TECHNICAL” VIOLATION AND ONE ACTUAL VIOLATION OF HIS TERMS AND CONDITIONS OF EXTENDED SUPERVISED RELEASE

B. THE TRIAL COURT DENIED THE PETITIONER DUE PROCESS BY NOT COMPLYING WITH W.VA. CODE § 62-12-26 AND RULE 32.1 OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE BY ESTABLISHING ADDITIONAL TERMS AND CONDITIONS OF EXTENDED SUPERVISED SEXUAL OFFENDER RELEASE AS REFLECTED BY ORDER ENTERED ON OCTOBER 29, 2014 WITHOUT A PROPER HEARING AND NOT IN THE PRESENCE OF THE PETITIONER WITH THE ASSISTANCE OF COUNSEL

C. THE LOWER COURT ABUSED ITS DISCRETION BY ADDING ADDITIONAL TERMS AND CONDITIONS OF SUPERVISED RELEASE BY ORDER ENTERED ON THE 29th DAY OF OCTOBER, 2014, AS THREE OF THE FOUR NEW TERMS DO NOT SATISFY THE REASONABLENESS STANDARD AS HELD IN *LOUK V. HAYNES*

II. KIND OF PROCEEDING AND THE NATURE OF THE RULINGS IN THE LOWER TRIBUNAL

The Petitioner has another pending appeal before this Honorable Court in Case No. 14-0484, that raises similar issues as in the present appeal. Specifically, in Case No. 14-0484 Petitioner appealed a May 5, 2014 final order [JA, p.65] entered by the Honorable Phil Jordan barring the Petitioner from Smoke Hole Caverns Resort and prohibiting the Petitioner from maintaining employment at the resort. The matter presently before this Honorable Court in Case No. 14-0484 arises from an October 29, 2014 final order [JA, p.84] also entered by Judge Jordan that further bans the Petitioner was entering his 480 acre Pendleton County farm, bans the Petitioner from going to the Smoke Hole Caverns promotional booth at the State Fair in

Lewisburg, bans the Petitioner from participating in all hunting activities, *inter alia*. The Petitioner also appeals procedural issues that are more fully detailed herein. To fully consider the matter a brief recitation of the facts that resulted in Petitioner's underlying conviction and imposition of extended sexual offender release is necessary.

Mr. Hedrick is the majority owner of Smoke Hole Caverns Resort located in Grant County and has held this ownership position since 1977. [March 11, 2014 Transcript, p. 9, paragraph 14], [JA, p. 17, 18] Mr. Hedrick's now estranged wife is the minority owner. Smoke Hole Caverns is the largest tourist attraction in Grant County. Mr. Hedrick's primary residence is situated on the approximately twenty-seven (27) acre resort property, along with a large maintenance complex that houses Petitioner's farm equipment, tools, industrial equipment and trucks used at both his farm and Smoke Hole Caverns. [March 11, 2014 Transcript, p. 10, paragraph 8]

On the 8th day of July, 2008, a Grant County Grand Jury returned a true bill against the Petitioner charging him with two counts of First Degree Sexual Abuse in violation of W.Va. Code § 61-8B-7(a)(1) arising from a single incident that occurred sometime in June or July of 2007 at the Petitioner's residence / business. [JA, p. 5] Count one of the indictment specifically alleged that the Petitioner made sexual contact with the victim by touching her buttocks and count two specifically alleged that Petitioner made sexual contact with the victim by touching her breast. *Id.* According to the pre-sentence investigative report the victim in the matter was an adult twenty-five (25) year old female employee of the Petitioner. [JA, p. 12]

On May 27, 2009, after a change of venue, the matter proceeded to a jury trial in neighboring Mineral County and the following day the Petitioner was found guilty on both counts of the indictment. [JA, p. 6] At sentencing, Judge Jordan imposed the maximum fine of

\$20,000.00 and maximum prison sentence of two (2) consecutive indeterminate terms of not less than one (1) nor more than five (5) years in prison. In addition, the Court ordered the Petitioner to twenty-five (25) years of extended sexual offender supervised release pursuant to W.Va. Code § 62-12-26 to commence upon his release from parole. [JA, p. 22]

Mr. Hedrick served over two (2) years in prison without any disciplinary issues, was granted parole his first time eligible and discharged from parole early on January 14, 2014 based upon good behavior and no violations. [March 11, 2014 Transcript, p. 4, paragraphs 12-23]; [JA, p. 54]

On the 17th day of September, 2014, Grant County Prosecuting Attorney, Jeffrey Roth, filed “Petition To Revoke Post Incarceration Supervision.” [JA, p. 76] The State alleged in its Petition that the Petitioner committed several” technical” violations between February 12, 2014 and August 16, 2014. The matter came on for hearing before the Honorable Phil Jordan in the Circuit Court of Mineral County just five (5) days later on September 22, 2014. The State presented the testimony of Officer Daniel Smith, the Petitioner’s extended supervised release Probation Officer. The State did not call any other witnesses.

In addition to the Petitioner’s own testimony, the Petitioner called three witnesses to testify, *to-wit*; Josh Hedrick, Michelle Hedrick and Shaylan Miller. Josh Hedrick is the Petitioner’s son and Michelle Hedrick is the Petitioner’s daughter-in-law. Shaylan Miller is a neighboring landowner to the Petitioner’s 480 acre Pendleton County farm. After listening to approximately one (1) hour of testimony and arguments, Judge Jordan took the matter under advisement. Prior to concluding the hearing, Judge Jordan stated the following, *to-wit*;

... I don’t particularly want to have another hearing, I think, what I’m going to do is, do a new Court Order with various specific amended rules. That once I do that if they’re violated it’s going to be, I don’t care what the Family Court says or anybody else, it’s going to be unpleasant circumstances. And I

believe under the code I have to give, anybody changing the rules had to give notice of that hearing and some idea what those changes are going to be. So, what I'll do since particularly we're now almost an hour, all these folks are going to have to have Court during lunchtime here, I'll take this under advisement issue a ruling or issue it at the next hearing. Let's pick a time to come back for the changes that the Court is going to make and hopefully it will clarify. September 22, 2014 Hearing Transcript, p. 122, paragraph 14

After a very short discussion regarding rescheduling the matter, the court further stated, "[o]kay, whether than take time now, we'll figure out a time and I'll get with both counsel and have that and meanwhile I'll take this under advisement." September 22, 2014 Hearing Transcript, p. 123, paragraphs 10-13

Despite what Judge Jordan stated, he did not reschedule a hearing or give notice of any changes to the Petitioner's terms and conditions of sexual offender extended supervised release. A little over one (1) month later Judge Jordan simply issued an Order entered on October 29, 2014 with its ruling on the State's Petition To Revoke finding one (1) "technical" violation and one (1) actual violation. [JA, p. 84] Much to Petitioner's surprise, Judge Jordan in the same order also added four (4) new terms and conditions to Petitioner's extended supervised release. Judge Jordan did not impose incarceration as a sanction for the violation found. It is from the October 29, 2014 final Order that the Petitioner appeals. Petitioner now prays that this Honorable Court reverse the October 29, 2014 Order of the lower court and strike three (3) of the four (4) terms added by Judge Jordan.

On the 17th day of November, 2014, the Petitioner filed "Rule 28(a) Motion For Stay of October 29, 2014 Order / Rule 35 Motion For Reconsideration" and scheduled the matter for hearing on December 16, 2014. After the December 16, 2014 hearing, Judge Jordan partially granted the Petitioner's Motion For Stay by allowing the Petitioner to enter his 480 acre Pendleton County farm until the present appeal is decided. [JA, p. 100]

III. STATEMENT OF THE CASE

The State's Petition To Revoke Petitioner's Post Incarceration Supervision filed on September 17, 2014 alleged the Petitioner committed several "technical" violations over approximately a six (6) month period. [JA, p. 76] The State actually used the word "technical" in its Petition To Revoke. Despite alleging just "technical" violations, in the prayer for relief the State requested "that the Court find the Defendant has violated the Terms and Conditions of his Probation and that said Probation be Revoked and that Defendant be committed to the Division of Corrections to serve the remainder of his sentence." [JA, p. 79] The remainder of Petitioner's sentence is twenty-five (25) years¹ of incarceration.

After being released from parole early after approximately two (2) years without any violations, the Petitioner started on extended sexual offender supervised release in January, 2014, under the supervision of Officer Daniel Smith. The evidence presented at the September 22, 2014 hearing on the State's Petition To Revoke for each alleged "technical violation" and the lower court's findings as reflected in its October 29, 2014 order are detailed chronologically *in seriatim* below.

FEBRUARY 12, 2014 "TECHNICAL" VIOLATION

While checking up on the Petitioner at his 480 acre farm in Pendleton County² on

¹ Pursuant to the supervised release statute, the Petitioner may be sentenced to serve the term of his supervised release in prison for violating any terms and conditions of supervision. *See* W.Va. Code § 62-12-26

² The lower court incorrectly stated in its October 29, 2014 order that the Petitioner's farm is located in Grant County. For clarification purposes, the Petitioner's farm is located in Pendleton County. The incident that resulted in the Petitioner's underlying conviction occurred in Grant County at Smoke Hole Caverns Resort.

February 12, 2014, Officer Daniel Smith discovered nine (9) .22 long rifle ammunition and a few M80 fireworks/explosives in a cardboard box inside an old farmhouse³ built in 1902 that is unoccupied and used for storage. [JA, p. 91, 92] September 22, 2014 Hearing Transcript, p.20, paragraph 20; p. 84, paragraph 22. The Petitioner invited Officer Smith to look around inside the old farmhouse after Officer Smith inquired about the structure during the visit. September 22, 2014 Hearing Transcript, p. 85, paragraph 5; p. 26, paragraph 25; p. 27, paragraph 3 The Petitioner was asked the following questions about Officer Smith searching the farmhouse, *to-wit*;

Q: And you knowingly, intelligently invited ... Mr. Smith, to come in and look around?

A: Yes I have no reason not to let him look around make himself at home.

Q: Okay and if you knew something was in there you probably wouldn't let him go in would you?

A: Yes, I've been probably intelligent enough to take it out before he come, but I didn't know anything was in there.

Q: Okay. But you were polite with Mr. Smith, cooperative?

A: Yes of course I even took him upstairs and showed him around the house. September 22, 2014 Hearing Transcript, p. 85, paragraph 5-21

When questioned about the ammunition and M80's the Petitioner informed Officer Smith that "they were old and had been stored in the building for many years," which is consistent with the fact that the old farmhouse is in disrepair and unoccupied. September 22, 2014 Hearing Transcript, p. 7, paragraph 1; p. 85, paragraph 1; p. 24, paragraphs 5-15 On cross-examination Officer Smith even agreed that the items "appeared to be stored there for a while." September 22, 2014 Hearing Transcript, p. 25, paragraph 15

³ The Petitioner does not reside at his 480 acre farm. The Petitioner is residing in one of his rentals approximately seven (7) miles away near Seneca Rocks in Pendleton County. September 22, 2014 Hearing Transcript, p. 23, paragraph 17 The Petitioner's marital residence is located on Smoke Hole Caverns Resort Property, which the lower court has barred the Petitioner from entering.

Josh Hedrick, the Petitioner's son, testified that the .22 long rifle ammunition and M80's belonged to him. September 22, 2014 Hearing Transcript, p. 73, paragraph 17 The items had been in storage at the farmhouse for such a long time that Josh actually forgot that they were still there. Josh, who is thirty-five (35), estimated that the items had been in storage in the old farmhouse since he was in "Junior High." September 22, 2014 Hearing Transcript, p. 73, paragraph 23; p. 74, paragraph 7

Officer Smith failed to contact a single member of Petitioner's family on February 12, 2014 or anytime thereafter to inquire if the items belonged to them or to determine whether Petitioner had knowledge of the items. Nonetheless, Officer Smith alleged that the Petitioner violated his terms of supervised release by asserting the Petitioner was in "constructive possession" of the items located in the unoccupied farmhouse. September 22, 2014 Hearing Transcript, p. 29, paragraph 21; p. 28, paragraph 25; [JA, p. 91] Officer Smith confiscated the ammunition and M80's. September 22, 2014 Hearing Transcript, p. 6, paragraph 16 Ultimately, by Order entered on October 29, 2014, the lower court did "not find the presence of old ammunition and fireworks in the farm building to be a violation..." [JA, p.87]

JULY 23, 2014 "TECHNICAL" VIOLATION

On July 23, 2014, Officer Smith made another visit to the Petitioner's farm. However, this time the Petitioner was not present. The Petitioner was taking a break from working on the farm and was eating lunch at a local diner a few miles down the road. September 22, 2014 Hearing Transcript, p. 87; p. 7, paragraph 22 While on the farm, Officer Smith walked around and observed several old motor vehicles and ATVs locked to a tree in the far property corner approximately four hundred (400) yards away from the Petitioner's barn. September 22, 2014 Hearing Transcript, p. 8, paragraph 3; p. 33, paragraph 16; [JA, p. 93, 95] Officer Smith

observed in plain view through the window of one of the vehicles several boxes of ammunition. Officer Smith searched the ATVs and also found sixteen (16) rounds of .223 ammunition in a closed compartment. September 22, 2014 Hearing Transcript, p. 8, paragraph 11; p. 11, paragraph 13; p. 36, paragraph 23; [JA, p. 96]

None of the vehicles or ATVs belong to the Petitioner. Shaylan Miller, a neighboring landowner and owner of the ATV with ammunition searched by Officer Smith, testified that all the old vehicles and ATVs belong to either his family, a Nelson Family or a Twigg family that own adjacent land situated on the backside of Petitioner's farm. September 22, 2014 Hearing Transcript, p. 60, paragraphs 7-25 The neighboring landowners travel to and from their property with the vehicles and ATV's parked on the far property corner of Petitioner's farm via a right of way. September 22, 2014 Hearing Transcript, p. 34, paragraphs 4-20 The vehicles are parked on the far end of the Petitioner's farm because that is where a swinging bridge [JA, p. 94] is located that provides access to the farm and right of way over the North Fork of the South Branch of the Potomac River from Rt. 55. The Millers, Nelsons and Twiggs park their regular personal vehicles off Rt. 55, cross the swinging bridge and drive their ATV or vehicle situated on the other side of the river to their land adjacent to the backside of Petitioner's farm. September 22, 2014 Hearing Transcript, p. 61, paragraph 19-25; p. 62, paragraphs 1-8 Mr. Miller testified that his family and ancestors has been traveling to their property by crossing over the swinging bridge and Petitioner's farm since 1799. September 22, 2014 Hearing Transcript, p. 62, paragraph 14

Officer Smith learned through multiple sources other than the Petitioner about the neighboring landowners, their vehicles and right of way. Upset that his vehicle was searched and his ammunition taken, Mr. Miller called Officer Smith and explained to him that his family

has a right of way over the Petitioner's property. September 22, 2014 Hearing Transcript, p. 64, paragraphs 18-23. Officer Smith also learned of the right of way and the vehicles from a neighbor "who had kind of described the situation how they have the right of way and park their vehicles there." Mr. Miller informed Officer Smith that the .223 ammunition taken from the ATV was his, which Officer Smith eventually returned to him. September 22, 2014 Hearing Transcript, p. 34, paragraphs 17-21; p. 63, paragraph 21; p. 64, paragraph 13-18 Mr. Miller further testified that his ATVs and vehicles still remain locked to the same tree and that he is leaving them where they are so he can continue to access his farm. September 22, 2014 Hearing Transcript, p. 65, paragraphs 20-25

Nonetheless, Officer Smith still alleged that Petitioner violated the terms and conditions of his probation as a result of this incident. [JA, p. 73] Mr. Miller testified it was his honest belief that with all the vehicles and multiple people with a right of way that the Petitioner would not know which specific person owned a particular vehicle. September 22, 2014 Hearing Transcript, p. 70, paragraphs 19-25 Mr. Miller accesses his property every day to feed his animals and testified that he has never heard the Petitioner shooting a firearm or observed him in possession of a firearm. September 22, 2014 Hearing Transcript, p. 72, paragraphs 3-11 Mr. Miller testified that the Petitioner is at his farm everyday "building fence, feeding cattle and just everything a farmer should do." September 22, 2014 Hearing Transcript, p. 66, paragraph 18-25 The Petitioner does not enter his farm where the vehicles and ATVs are parked. As stated above, the vehicles and ATVs are directly across from a swinging bridge that spans from Rt. 55 across the North Fork of the South Branch of the Potomac River to the Petitioner's farm. September 22, 2014 Hearing Transcript, p. 87, paragraphs 8-17 The swinging bridge is used for foot travel onto the Petitioner's property and is a few hundred yards away from the actual bridge that

Petitioner drives his truck across to access his farm. September 22, 2014 Hearing Transcript, p. 31, paragraphs 21

After leaving the farm, Officer Smith drove to the diner where the Petitioner was eating his lunch and approached him in the parking lot as he was leaving the diner with a property receipt that listed the ammunition confiscated. Officer Smith demanded that the Petitioner sign the receipt. Petitioner was courteous, which Officer Smith acknowledged, but refused to sign the property receipt without having an opportunity to write on the receipt that the ammunition was not his. Petitioner stated that he did not feel in his “heart it was the right thing to do.”

September 22, 2014 Hearing Transcript, p. 87, paragraphs 20-25; p. 88, paragraphs 1-25; p. 42, paragraph 1 After considering all the evidence presented, the lower court still somehow found the “presence of old ammunition on the Miller’s ATV’s on the Hedrick farm is a technical violation.” [JA, p. 87]

AUGUST 7, 2014 “TECHNICAL” VIOLATION

On August 7, 2014, at 7:46 p.m. the Petitioner attempted to call Officer Smith on his cell phone to let him know he was going to the West Virginia State Fair in Lewisburg the next day. Officer Smith did not answer his phone so the Petitioner did what he could and left a voicemail informing Officer Smith that he would be leaving the following day. September 22, 2014 Hearing Transcript, p. 13, paragraphs 21-25 Officer Smith acknowledged receiving the voicemail and testified that the Petitioner stated he was going to the State Fair and would “be staying overnight but he was unsure how many nights he would be gone...” September 22, 2014 Hearing Transcript, p. 14, paragraphs 3 According to Officer Smith, on prior occasions the Petitioner would call him to notify him that he was going to travel to Virginia to get parts for his

tractor and on other occasions would call to notify Officer Smith that he was just going on a day trip. September 22, 2014 Hearing Transcript, p. 14, paragraphs 24; p. 15, paragraph 1

The following day after leaving the voicemail, Officer Smith testified that he tried calling the Petitioner to get more details. September 22, 2014 Hearing Transcript, p. 15, paragraph 13
Officer Smith testified that he was unable to contact the Petitioner by phone and **did not** leave a voicemail. September 22, 2014 Hearing Transcript, p. 16, paragraph 7 The Petitioner disputed that Officer Smith tried to call him back and produced his cell phone records that confirm same. September 22, 2014 Hearing Transcript, p. 97, paragraphs 8-20; [JA, p. 98, 99] The Petitioner testified that he called from his 703-8889 cell phone to Officer Smith's 703-9180 cell phone. September 22, 2014 Hearing Transcript, p. 96, paragraphs 7-8 The records do not show any incoming phone calls from 703-9180. [JA, p. 98, 99]

Once Petitioner got to the State Fair in Lewisburg he followed up with Officer Smith by calling him "a couple of different times..." September 22, 2014 Hearing Transcript, p. 95, paragraph 3 According to the Petitioner's cell phone records he tried calling Officer Smith on August 9, 2014, at 9:55 a.m. but he did not answer once again. [JA, p. 99] The Petitioner left another voicemail with Officer Smith and again did not receive a call back. September 22, 2014 Hearing Transcript, p. 97, paragraphs 4-15; [JA, p. 98, 99]

Officer Smith eventually received a complaint from the Petitioner's estranged wife that the Petitioner was present at the Smoke Hole Caverns promotional booth at the State Fair. September 22, 2014 Hearing Transcript, p. 16, paragraphs 16; p. 57, paragraph 25 The Petitioner's daughter-in-law, Michelle Hedrick, testified that she was present at the Smoke Hole Caverns booth and that although the Petitioner is "not her biggest fan," he did not cause any drama." September 22, 2014 Hearing Transcript, p. 76, paragraph 9; p. 77, paragraph 7

According to Michelle, the Petitioner was visiting with his daughter and his two month old grandchild. Michelle testified that it was only family at the booth, and **no employees** from the business. September 22, 2014 Hearing Transcript, p. 77, paragraphs 12-20 Officer Smith's concern for "the safety of the employees..." at the booth was not an issue as none was present. September 22, 2014 Hearing Transcript, p. 57, paragraphs 8-10 Michelle stated the Petitioner eventually moved on from the booth to watch his grandsons show cattle. September 22, 2014 Hearing Transcript, p. 77, paragraphs 21-24 When questioned by the Prosecuting Attorney on cross-examination as to how long the Petitioner was at the booth, Michelle stated that the Petitioner was not at the booth an extremely long time. Michelle stated that he came and went between shows with his grandsons and estimated over the course of four (4) days that the Petitioner was at the booth for a total of a "few hours at the most." September 22, 2014 Hearing Transcript, p. 81, paragraphs 12-15 The Petitioner testified that his primary reason for going to the fair was to watch his three grandsons show prime angus cattle. September 22, 2014 Hearing Transcript, p. 76, paragraphs 24-25; p. 77, paragraphs 1-5

Officer Smith alleged the Petitioner violated his extended supervised release by failing to keep him informed of his status at all times and also by visiting the Smoke Hole Caverns Resort promotional booth. September 22, 2014 Hearing Transcript, p. 43, paragraph 7; [JA, p. 73] After considering the evidence, the Court did not find the Petitioner violated the terms and conditions of his extended supervised release, but did state in its October 29, 2014 order that the Petitioner clearly violated "the spirt of supervisions rules..." [JA, p. 87]

AUGUST 16, 2014 "TECHNICAL" VIOLATION

Officer Smith made another visit to Petitioner's farm on August 16, 2014 and tried to access the property in his vehicle via the regular bridge, but the gate to the bridge was locked.

According to Officer Smith, Officer Larry Wade verbally instructed the Petitioner to leave the gate to the farm open when the Petitioner signed the terms of his supervised release in January, 2014. September 22, 2014 Hearing Transcript, p. 12, paragraph 4-23 Officer Wade's verbal instruction appears **nowhere** in Petitioner's written terms. September 22, 2014 Hearing Transcript, p. 50, paragraph 18; [JA, p. 25-39] The Petitioner testified that the gate was never discussed when he signed his terms and conditions. The Petitioner testified that Officer Wade was in and out of court the day he signed his terms and conditions of extended supervised release and that the only discussions were about Petitioner not going to Smoke Hole Caverns Resort, which was reduced to a handwritten term. September 22, 2014 Hearing Transcript, p. 91, paragraph 1-5

Officer Smith eventually accessed the Petitioner's farm by foot from the swinging bridge and walked to the barn where he observed the Petitioner's truck parked behind the barn. September 22, 2014 Hearing Transcript, p. 13, paragraph 2 Officer Smith verbally warned the Petitioner to leave the gate open on August 16, 2014.

As it relates to parking the truck behind the barn, the Petitioner testified that depending on the weather, he does sometimes park his truck behind the barn "if it's real hot." The Petitioner also pulls the truck around to the back of the barn to unload barrels of feed for his calves. September 22, 2014 Hearing Transcript, p. 93, paragraph 10-16 When the truck is parked behind the barn it is never completely hidden because Petitioner's barn is actually open on all four sides. September 22, 2014 Hearing Transcript, p. 52, paragraph 2 Officer Smith alleged the Petitioner violated his supervised release by locking the gate to his farm and by parking his truck behind the barn. Officer Smith agreed that the Petitioner's written terms and conditions do not prohibit him from parking his truck behind his barn. September 22, 2014

Hearing Transcript, p. 52, paragraph 24 By Order entered October 29, 2014, the lower court found the Petitioner in violation of his terms and conditions of supervised release by not providing a key to the gate to Officer Smith and by parking his truck behind the barn. [JA, p. 87]

IV. STANDARD OF REVIEW

In reviewing challenges to findings and rulings made by a lower court, a two pronged standard of review is applied. A lower court's findings of fact are reviewed under a clearly erroneous standard and questions of law are subject to *de novo* review. *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000) Ultimate disposition and final orders of a circuit court are reviewed under an abuse of discretion standard. *State v. Tanner*, 229 W.Va. 138, 727 S.E.2d 814 (2012)

Pursuant to W.Va. Code § 62-12-9, a trial judge may impose any condition of probation which he [or she] may deem advisable, but this discretionary authority must be exercised in a reasonable manner. *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976)

V. SUMMARY OF ARGUMENT

The evidence presented on the State's "Petition To Revoke Post Incarceration Supervision" failed to rise to the level of clear and convincing evidence that the Petitioner committed an actual violation of his written terms. The one (1) "technical" violation found by the lower court does not rise to the level of clear and convincing evidence. The one (1) actual violation Judge Jordan found the Petitioner committed, locking the gate to his farm and parking his truck behind his barn, is not contained in the Petitioner's written terms and conditions of extended supervised release. The Petitioner is facing twenty-five (25) years of incarceration for committing any violation and should not have to guess what terms and conditions he must follow that are not in writing. This is precisely why W.Va. Code § 62-12-26(h) specifically requires the

court to direct the probation officer to “provide the defendant with a **written** statement ...that sets forth all the conditions ...that is sufficiently **clear and specific...**” [Emphasis]

Judge Jordan failed to comply with W.Va. Code § 62-12-26 and Rule 32.1 of the West Virginia Rules of Criminal Procedure by adding four (4) new terms and conditions to Petitioner’s extended supervised release without giving the Petitioner a hearing with the assistance of counsel. The statute and rule specifically require the court to conduct a hearing in which the Petitioner is present and with the assistance of counsel prior to modifying or adding new terms. Judge Jordan did not hold a hearing specifically on modifying the Petitioner’s terms. The September 22, 2014 hearing that was held was only on the State’s Petition To Revoke. [JA, p. 80] The lower court erred by simply entering an order on the 29th day of October, 2014 imposing four (4) new terms to Petitioner’s extended supervised release without notice and an opportunity to be heard with the assistance of counsel.

Three (3) of the four (4) news terms and conditions imposed by the lower court are not reasonable, do not protect the victim or the public in general, do not serve a legitimate probationary goal, and have no nexus to the Petitioner’s underlying conviction to First Degree Sexual Abuse. The new terms are vindictive, arbitrary and capricious and do not pass the reasonableness standard as held in *Louk v. Haines*. 159 W.Va. 482, 223 S.E.2d 780 (1976)

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner states that the assignments of error raised in the Petition are proper for consideration by oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure.

VII. ARGUMENT

A. THE LOWER COURT ABUSED ITS DISCRETION BY FINDING CLEAR AND CONVINCING EVIDENCE, AS REQUIRED BY W.VA. CODE § 62-12-26(g)(3), THAT THE PETITIONER COMMITTED ONE “TECHNICAL” VIOLATION AND ONE ACTUAL VIOLATION OF HIS TERMS AND CONDITIONS OF EXTENDED SUPERVISED RELEASE

Judge Jordan found the Petitioner committed one (1) “technical” violation of his terms and conditions of extended supervised release as a result of Officer Smith discovering ammunition in a closed compartment in neighboring landowner Shaylan Miller’s ATV on July 23, 2014. [JA, p. 95, 96] The lower court found the Petitioner committed one (1) actual violation of his terms and conditions by not providing a key to the gate on his Pendleton County farm and by parking his truck behind his barn on August 16, 2014. [JA, p. 87]

In order for a court to find a defendant in violation of his or her terms and conditions of extended supervised release, the burden is on the State to prove clear and convincing evidence that a violation of a written term occurred. Specifically, W.Va. Code § 62-12-26(g)(3) states a court may

[r]evoke 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...

All terms imposed upon the defendant must be both in **writing** and **sufficiently clear and specific**. There are obvious reasons for requiring all terms to be in writing and clear and specific. W.Va. Code § 62-12-26(h) specifically states the following:

[t]he court shall direct that the probation officer provide the defendant with a **written statement** at the defendant’s sentencing hearing that sets forth **all** the conditions to which the term of supervised release is subject and that it is **sufficiently clear and specific** to serve as a guide for the defendant’s conduct and for such supervision as is required.

“TECHNICAL” VIOLATION

Finding the Petitioner committed a “technical” violation as a result of Officer Smith discovering ammunition in Mr. Miller’s ATV in a closed compartment four hundred (400) yards away from Petitioner’s barn was clearly erroneous. There is a reason Officer Smith, the State and now the lower court classify the discovery of ammunition in Mr. Miller’s ATV as a “technical” violation, as opposed to an “actual” violation. The reason is because the allegation is meritless. There is no middle ground. The Petitioner either violated an actual written term or he did not. Certainly, a finding of a “technical” violation by the lower court does not satisfy the high burden of clear and convincing evidence required by W.Va. Code § 62-12-26. This is especially true when a man faces twenty-five (25) years of possible incarceration for a violation. Judge Jordan will not hesitate to impose the full twenty-five (25) years, even for something as *de minimis* as stopping by the Smoke Hole Caverns promotional booth at the State Fair to visit with family. By order entered October 29, 2014, Judge Jordan clearly stated with strong language that “[a]ny future violations will likely result in Mr. Hedrick’s dying in prison.” [JA, p. 90]

The Petitioner is forbidden from possessing a firearm or ammunition as a result of his underlying felony conviction and pursuant to his terms of supervised release. Officer Smith alleged that the Petitioner was in “constructive possession” of the ammunition discovered in Mr. Miller’s ATV. Constructive possession requires Petitioner to have both knowledge that the ammunition was inside the closed compartment on Mr. Miller’s ATV and dominion and control over the ammunition. *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975) The Petitioner was not present at the farm when Officer Smith discovered the ammunition in the closed compartment on the ATV. The Petitioner was eating at a diner several miles down the road. September 22, 2014 Hearing Transcript, p. 87; p. 7, paragraph 22 Even if the Petitioner was at

his barn, Officer Smith testified the ATV and other vehicles were approximately four hundred (400) yards away [JA, p. 97] in the far property corner. September 22, 2014 Hearing Transcript, p. 8, paragraph 3; p. 33, paragraph 16 In drug possession cases, this Honorable Court has held “mere proximity to narcotic drugs is not sufficient to convict a defendant of possession.” *Id.* Mr. Miller testified that the Petitioner did not have knowledge that he had .223 ammunition inside his ATV. September 22, 2014 Hearing Transcript, p. 65, paragraph 6 The Petitioner testified that he did not have knowledge that there was ammunition in the vehicles or ATVs and that the owners of the vehicles have been “coming and going for years...” September 22, 2014 Hearing Transcript, p. 86, paragraph 24 Petitioner stated that they “aren’t my vehicles and I don’t go nosing around...” September 22, 2014 Hearing Transcript, p. 87, paragraph 1 Based upon the evidence presented, it is clear that the Petitioner did not have knowledge that the ammunition was in the closed compartment and certainly did not exercise dominion and control over the ammunition. According to Officer Smith’ logic, the Petitioner is in constructive possession of his service weapon every time he meets with the Petitioner or in constructive possession of a rifle when a hunter steps one foot over the property line onto Petitioner’s 480 acre farm during hunting season. This is not how the law of constructive possession is written or intended to be applied as absurd results would occur.

ACTUAL VIOLATION

It is not disputed that the Petitioner locked the gate to his farm and parked his truck behind his barn on August 16, 2014. Of the approximately one hundred (100) written terms [JA, p. 25-39] the Petitioner is required to follow, **nowhere** is it written that the Petitioner cannot lock his gate to his farm or park his truck behind his barn. To this very day, even after the inclusion of the four (4) new terms reflected in the October 29, 2014 order, the Petitioner’s written terms

still do not say he cannot lock⁴ his gate to his farm. The Petitioner would not risk twenty-five (25) years of incarceration for something so inconsequential. Officer Smith testified that **“[i]t actually isn’t in writing anywhere** it was just discussed with both myself and Officer Wade when he was doing his intake.” September 22, 2014 Hearing Transcript, p. 50, paragraph 18 The Petitioner adamantly denies that the gate issue was ever discussed. September 22, 2014 Hearing Transcript, p. 91, paragraph 1

The Petitioner has several legitimate reasons to keep the gate to his farm locked. On cross-examination Officer Smith admitted that the Petitioner has approximately fifteen (15) dogs on his farm and that one of the dogs ran out on to busy Rt. 55 and was hit by a car a few weeks after Petitioner was verbally instructed by Officer Smith to keep the gate open. September 22, 2014 Hearing Transcript, p. 48, paragraph 14 Fortunately, Reese, who just had puppies, was not killed. However, Reese had a severely broken leg and will never fully recover. September 22, 2014 Hearing Transcript, p. 92, paragraph 1 The Petitioner testified that he keeps the gate locked and shut at the farm for other reasons than to keep his dogs and cattle from going out onto Rt. 55. There had been some recent theft in the area and the Petitioner had concerns about the equipment, tools and machinery at his farm. September 22, 2014 Hearing Transcript, p. 92, paragraph 6-25 The gate is directly off Rt. 55 and could easily be accessed by an opportunistic thief. The Petitioner also likes to keep the gate shut and locked because he does not reside at the farm and when he is present does not spend all of his time at the barn. The Petitioner spends a lot of time away from the barn in the fields and woods “brush hogging and clearing the land off.”

⁴ After the December 16, 2014 hearing on Petitioner’s Motion For Stay, the Petitioner provided a key to the gate [JA, p. 100] to Officer Smith so he now has unlimited access to the farm by vehicle. Even without the key, Officer Smith always had access to the farm by foot via the swinging bridge.

September 22, 2014 Hearing Transcript, p. 93, paragraphs 3-9 Petitioner testified if the gate is ever locked, Officer Smith simply has to walk five (5) minutes to access his property by the swinging bridge. September 22, 2014 Hearing Transcript, p. 93, paragraph 24; [JA, p. 94]

The present issue in the case *sub judice* is exactly why W.Va. Code § 62-12-26(h) requires all terms to be sufficiently clear and specific and in writing. Given the fact that locking the farm gate and parking behind the barn was never reduced to writing, it was clearly erroneous to find the Petitioner committed an actual violation his terms of supervised release as a result of the incident on August 16, 2014.

B. THE TRIAL COURT DENIED THE PETITIONER DUE PROCESS BY NOT COMPLYING WITH W.VA. CODE § 62-12-26 AND RULE 32.1 OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE BY ESTABLISHING ADDITIONAL TERMS AND CONDITIONS OF EXTENDED SUPERVISED SEXUAL OFFENDER RELEASE AS REFLECTED BY ORDER ENTERED ON OCTOBER 29, 2014 WITHOUT A PROPER HEARING AND NOT IN THE PRESENCE OF THE PETITIONER WITH THE ASSISTANCE OF COUNSEL

Judge Jordan added four (4) new terms and conditions of extended supervised release to the Petitioner's already expansive list in violation of the West Virginia Code and West Virginia Rules of Criminal Procedure. The four (4) new terms prohibit Petitioner from entering his 480 acre Pendleton County farm, prohibit Petitioner from traveling in-state overnight without approval, prohibit Petitioner from visiting the Smoke Hole Caverns promotional booth at the State and local fair and prohibit the Petitioner from participating in all hunting activities. Appendix, [JA, p. 84]

W.Va. Code § 62-12-26(a) states a court, pursuant to the provisions of subsection (g) of this section, may modify any term of supervised release... W.Va. Code § 62-12-26(g) states a court may “modify, reduce or enlarge the conditions of supervised release ... consistent with the provisions of the West Virginia Rules of Criminal Procedure relating to modification of

probation ...” Rule 32.1(b) of the West Virginia Rules of Criminal Procedure is the specific Rule of Criminal Procedure that is applicable to modification of probation terms. Rule 32.1(b) mandates both a “hearing and assistance of counsel” before the “terms or conditions of probation can be modified.”

Judge Jordan recognized that there are specific rules regarding modification at the September 22, 2014 hearing by stating near the conclusion of the hearing the following, *to-wit*; “I believe under the code I have to give, anybody changing the rules had to give notice of that hearing and some idea what those changes are going to be.” September 22, 2014 Hearing Transcript, p. 122, paragraphs 19-23

Nonetheless, with knowledge of the applicable statute and rule of criminal procedure Judge Jordan failed to hold a hearing prior to adding the four (4) new terms to the Petitioner’s extended supervised release as reflected in the order entered on the 29th day of October, 2014. The hearing that occurred on September 22, 2014 was specifically on the State’s Petition To Revoke Post Incarceration Supervision. [JA, p. 80] As a result of the lower court failing to comply with the law, the Petitioner was denied procedural due process.

C. THE LOWER COURT ABUSED ITS DISCRETION BY ADDING ADDITIONAL TERMS AND CONDITIONS OF SUPERVISED RELEASE BY ORDER ENTERED ON THE 29th DAY OF OCTOBER, 2014, AS THREE OF THE FOUR NEW TERMS DO NOT SATISFY THE REASONABLENESS STANDARD AS HELD IN *LOUK V. HAYNES*

By order entered on the 29th day of October, 2014, the lower court added four (4) new terms to the Petitioner’s extended supervised release. In *Louk v. Haynes*, this Honorable Court held that any condition of probation which is imposed in the discretion of the trial court must be reasonable. 159 W.Va. 482, 223 S.E.2d 780 (1976) Petitioner is well aware of the fact that he does not enjoy “the absolute liberty to which every citizen is entitled” based upon his status as a

probationer on extended supervised release. *United States v. Knights*, 534 U.S. 112, 119 (2001)

Petitioner completed his period of parole early without any issues. [JA, p. 54] Extended supervised release is more akin to probation. This Court has held “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” *Id.* As such, terms governing probationers must be “reasonable.” *Id.* One obvious reason that any and all terms have to be reasonable is due to the fact one’s liberty is at stake and a violation may result in imprisonment. According to Judge Jordan, a violation in Petitioner’s case will result in a death sentence. [JA, p. 90]

The Supreme Court of Montana follows the same reasonableness standard as West Virginia and has recently helped clarify what is reasonable. In *State v. Leyva*, the Supreme Court of Montana held that a condition meets the standard requiring a restriction or condition to be reasonable if it is related to the objectives of rehabilitation or the protection of the victim and society 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. 365 Mont. 204, 280 P.3d 252 (2012) In addition, terms cannot be capricious or arbitrary. *State v. Tanner*, 229 W.Va. 138, 727 S.E.2d 814 (2012) The *Leyva* Court further held that reversal is necessary when the required nexus is “absent or exceedingly tenuous.” *Id.* Judge Jordan was well aware of the *Louk* case and reasonableness requirement prior to creating the new four (4) terms in its October 29, 2014 order. At the September 22, 2014 hearing, Judge Jordan stated, “...I note that you filed yet another appeal with the Supreme Court **making that same point**, I believe.” September 22, 2014 Hearing Transcript, p. 122, paragraph 3 Despite this fact, three of the four terms created by Judge Jordan are completely unreasonable as detailed below.

FARM

By order entered on the 5th day of May, 2014 [JA, p. 66], Judge Jordan previously ratified a handwritten term of Petitioner's supervised release that bans Petitioner from entering his Smoke Hole Caverns Resort property in Grant County and from maintaining employment at the resort. The Petitioner's marital residence is located on the resort, which has forced the Petitioner to reside in a rental he owns in Pendleton County. By ordered entered on the 29th day of October, 2014, the lower court has now expanded the ban by prohibiting Petitioner from going to his 480 acre farm in Pendleton County. [JA, p. 89]

The lower court has clearly exceeded its authority and abused its discretion. It should be obvious to this Honorable Court that the Petitioner is simply being punished. This is evidenced by the following language used by Judge Jordan in the October 29, 2014 order, *to-wit*;

[a]ll of the above restrictions will, no doubt, seem like a **harsh punishment** to Mr. Hedrick. But what the Court is trying to do is save him from himself. Serving 25 years in prison is hanging over his head. Any future violations will likely result in Mr. Hedrick's **dying in prison.**" Appendix, p. ____

Judge Jordan is not trying to save the Petitioner from himself. If such were true Judge Jordan would not impose arbitrary and capricious terms that have absolutely no nexus to the Petitioner's underlying offense or the victim. Petitioner submits that the terms created by Judge Jordan are actually setting him up for failure and an eventual death sentence.

Judge Jordan attempts to justify the farm ban by stating in the October 29, 2014 order that the farm has "been the source for three of the allegations in the Petition." [JA, p. 89] The key word used by the lower court is "allegation." As detailed above, the three "allegations" are meritless as there was either insufficient evidence presented to satisfy the burden of proof of clear and convincing evidence that a violation occurred or the "allegation" was not a written term of Petitioner's supervised release. Assignment of Error "A", *supra*, at 16 Petitioner submits the

“allegations” are nothing more than such and should have been given absolutely no weight in the lower court’s reasoning.

Judge Jordan further attempts to justify the farm ban by stating in its October 29, 2014 order that the Petitioner does not reside on the farm, does not receive significant income from the farm and it is a recreational farm. [JA, p. 89] What difference do these factors make? The factors have no nexus to the Petitioner’s underlying offense, no nexus to the victim and fail to serve a legitimate probationary goal. This Honorable Court must take into consideration the fact that the Petitioner is completely barred by Judge Jordan from entering or maintaining employment at Smoke Hole Caverns Resort. Although the farm is not a significant source of income, the Petitioner does supplement his social security by raising cattle at the farm.

When asked what reasonable probationary goal is achieved by keeping the gate open at the farm Officer Smith testified that “[i]t just gets officers easier access to the property and keeps us from having to walk across the old swinging bridge and clear across the farm to find Mr. Hedrick.” September 22, 2014 Hearing Transcript, p. 52, paragraphs 6-9

Petitioner submits that there is no logical nexus or legitimate probationary goal served by banning the Petitioner from his 480 acre Pendleton County farm. The Petitioner is already limited in what he can do given the fact that Judge Jordan banned him from his resort, his marital residence and from maintaining employment at the resort. [JA, p. 65] The only liberty and enjoyment the Petitioner has in his life right now are his children, grandchildren, farm and dogs. The Petitioner’s interaction with his children and grandchildren is limited due to the fact that he is barred from going to his marital residence, Smoke Hole Caverns and any promotional booth at the State and local fair. Consequently, the Petitioner spends the majority of his time on the farm and with his dogs.

SMOKE HOLE CAVERNS PROMOTIONAL BOOTH

As with locking the gate and parking behind the barn, there is no written term of Petitioner's extended supervised release prior to October 29, 2014 that prohibits Petitioner from visiting the Smoke Hole Caverns promotional booth at the State Fair in Lewisburg. [JA, p. 25-39] The Petitioner's written terms only ban him from going to Smoke Hole Caverns Resort in Grant County. [JA, p. 39]

By order entered on October 29, 2014, the Judge Jordan expanded the Smoke Hole Caverns Resort ban, which is the subject of the Petitioner's pending appeal in Case No. 14-0484, to include the promotional booth at the State Fair, local fairs and festivals. [JA, p. 84] No legitimate probationary goal is served by banning the Petitioner from the Smoke Hole Caverns promotional booth. Officer Smith testified at the September 22, 2014 hearing as follows, *to-wit*;

I'm not particularly concerned about the business, I'm concerned about the safety of the employees and I feel that they should be able to have a work environment where they're not in fear of similar crimes occurring.
September 22, 2014 Hearing Transcript, p. 57, paragraphs 8-10

Officer's Smith's concerns for employees is not an issue. Michelle Hedrick testified that it was only family at the booth, and **no employees** from the business. September 22, 2014 Hearing Transcript, p. 77, paragraphs 12-20 As such, there is no legitimate probationary goal served by banning the Petitioner from the Smoke Hole Caverns promotional booth.

IN-STATE TRAVEL

By order entered October 29, 2014, Judge Jordan added a new term and condition that requires Petitioner to obtain permission from Officer Smith if he will be traveling overnight in-state. The Petitioner already contacts Officer Smith when he is traveling. Said term is reasonable and the Petitioner has no objection to the inclusion of this term.

HUNTING ACTIVITIES

At the September 22, 2014 hearing the Petitioner was asked how many bear dogs he owns when discussing the farm. In response, the Petitioner stated the following, “I don’t know I have, some are puppies, I just bear hunt for the recreation of it I haven’t shot a gun in ages, I wouldn’t carry one if you give it to me.” September 22, 2014 Hearing Transcript, p. 91, paragraphs 10 Unfortunately, Judge Jordan misconstrued the Petitioner’s testimony as if he was actually going into the woods and shooting bear with a rifle. As a result, Judge Jordan included a new term and condition of supervised release that prohibits Petitioner from “participating in **all** hunting activities” and prohibits the Petitioner accompanying “other hunters into the woods or fields.” [JA, p. 89, 90]

For the reasons discussed above, the Petitioner was not put on notice that hunting was an issue as it was not raised in the State’s Petition. Assignment of Error “B”, *supra*, at 20; [JA, p. 76] Had the Petitioner been put on notice that this was an issue or had the lower court asked a follow up question regarding the issue or held a separate hearing on the issue testimony would have been presented and actual pictures produced of what the Petitioner was describing when he said he just hunts bear “for the recreation of it.” To clarify the matter, the Petitioner does not hunt bear as one may traditionally construe. The Petitioner cannot hunt with a rifle because he is prohibited from possessing a firearm. As a hobby, as a means to release stress in his life and to get exercise, the Petitioner is a true houndsmen and actively breeds, raises, and trains his dogs to pursue several different species of wildlife on his 480 acre Pendleton County farm. Given the fact that the Petitioner is limited in what he can do since Judge Jordan has banned him from Smoke Hole Caverns, the Petitioner enjoys going out into the field and photographing wildlife. As it relates to bear, the Petitioner is permitted by law to train his dogs on bear at any time

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pursuant to W.Va. Code § 20-2-5, except between May 1 and August 15. Pursuant to W.Va. Code § 20-2-5, a person training his or her dogs is prohibited from having a firearm during the closed season.

Petitioner submits Judge Jordan abused his discretion by taking an isolated statement made by the Petitioner without asking a follow up question to clarify or conducting an actual hearing on the matter, construing it in manner that is not accurate and then creating a very broad term that prohibits the Petitioner from participating in all hunting activities. Said term serves absolutely no legitimate probationary goal and is simply not reasonable. The lower court clearly has overstepped its discretion. As with the other terms added by Judge Jordan, prohibiting the Petitioner from raising and training his dogs to pursue wildlife and from going into the field to photograph wildlife has no relation to the nature of Petitioner's underlying conviction, does not protect the victim and does not protect the public at large. Simply stated, the term is vindictive and arbitrary.

VIII. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons set forth above, the Petitioner prays for the following relief from this Honorable Court:

- a) A hearing;
- b) That the Court reverse the October 29, 2014 Order of the lower court and remand the matter for entry of a proper Order;
- c) That the Court grant any further relief that it deems necessary.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of February, 2015, I served a copy of the foregoing Petitioner's Brief and Appendix on the following by U.S. Mail, postage prepaid:

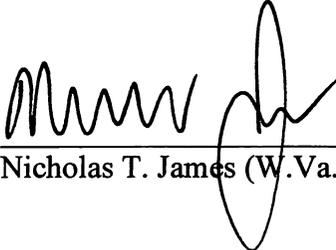
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