IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0197

STATE OF WEST VIRGINIA,

Respondent,

v.

RUSTY ALLEN WHITE,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the February 16, 2022, Order
Circuit Court of Jefferson County
Case No. 18-F-31

PATRICK MORRISEY
ATTORNEY GENERAL

WILLIAM E. LONGWELL
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 12290
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: William.E.Longwell@wvago.gov

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I. INTRODUCTION

Respondent, State of West Virginia, by and through its counsel, William E. Longwell, Assistant Attorney General, respectfully responds to the appellate brief filed by Rusty Allen White ("Petitioner") challenging the Jefferson County Circuit Court's judgment in Criminal Action Number 18-F-31 denying Petitioner's motion to dismiss the State's petition to revoke his period of supervised release, and imposing a sanction of two years imprisonment for his violations. Petitioner's argument with respect to the imposition of his two year period of incarceration rests upon misplaced and incorrect interpretations of the controlling legal authorities. Petitioner's second assignment of error only challenges the sufficiency of the evidence with respect to one of the two violations he was found to have committed. As a result, regardless of whether the Court agrees with his argument in this respect, which Respondent expressly asserts that it should not, he has failed to even allege error with respect to the second violation. Thus, Petitioner cannot demonstrate that he is entitled to relief, and this Court should affirm.

II. ASSIGNMENTS OF ERROR

Petitioner raises two assignments of error in his appellate brief:

1. The Circuit Court erred by denying Petitioner's motion to dismiss and finding that it could impose an additional sentence of incarceration on Petitioner beyond the statutory maximum without a jury.

2. The Circuit Court erred by finding that the State had met it [sic] burden of proving by clear and convincing evidence that Petitioner was guilty of conspiracy to distribute CDS.

Pet'r's Br. at 1.

III. STATEMENT OF THE CASE

A. Procedural History

Petitioner was indicted on January 17, 2018 by the Jefferson County Grand Jury for one felony count of Sexual Assault in the First Degree (Count One), and one count of Sexual Abuse by a Parent, Guardian, Custodian, or Person in Position of Trust (Count Two), as contained in Jefferson County Criminal Action Number 18-F-31. A.R. 17-18.

On May 15, 2018, the State presented Petitioner with a plea offer wherein the State would agree to dismiss Count Two of the indictment in exchange for Petitioner's no-contest plea to one count of Sexual Abuse in the Third Degree, a lesser included offense to that contained in Count One of the indictment. A.R. 20. The plea agreement also provided that, while the Petitioner would be free to argue at sentencing, the State would make no recommendation and that sentencing would be left to the sole discretion of the court. A.R. 20. The plea agreement also explicitly advised Petitioner that "a term of Supervised Release, W. Va. Code § 62-12-26, is mandatory for this conviction." A.R. 20.

Petitioner formally accepted and executed the plea offer on June 29, 2018. A.R. 21-22. Petitioner entered his plea of guilty pursuant to the plea agreement on the same date. A.R. 35. After the court accepted Petitioner's plea, Petitioner executed the "Notification of Sex Offender Responsibility" form. A.R. 23.

At his October 1, 2018 sentencing hearing, the circuit court sentenced petitioner to the statutorily prescribed indeterminate sentence of not less than one, nor more than five years imprisonment for his conviction of Sexual Abuse in the Third Degree. A.R. 35. The court also imposed the mandatory period of supervised release in accordance with West Virginia Code § 62-12-26(a), and set the term for a period of ten years. A.R. 35-36.

Also on October 1, 2018, Petitioner executed the "Terms and Conditions of Supervised Release," A.R. 24-29; "Sex Offender Conditions," A.R. 30-32; and "Computer Use Conditions," A.R. 33-34. In his "Terms and Conditions of Supervised Release," Petitioner assented to various terms, including, *inter alia*, that he would refrain from having direct or indirect contact with any "person engaged in criminal activity," and, further, that he would not "use, consume, purchase, or distribute any narcotics, marijuana, or other controlled substance" for which he did not possess a valid prescription. A.R. 25. Petitioner's terms also provided that he shall not "use, purchase, or possess any drug paraphernalia." A.R. 25.

Petitioner discharged the portion of his sentence providing for his one to five year period of incarceration after he served approximately fifteen months in prison, followed by one year on parole. A.R. 150. Petitioner's period of supervised release began, in accordance with West Virginia Code § 62-12-26, on January 14, 2021. A.R. 15.

B. Petitioner's Violations of Supervised Release Conditions

On October 15, 2021, Petitioner reported to Morgan McDonald, Jefferson County Intensive Supervising Officer, to provide a urinalysis test as part of his supervision. A.R. 143. The test administered on this date yielded a presumptively positive result indicating that Petitioner had consumed controlled substances in violation of the terms and conditions of his supervised release. A.R. 144-45. Officer McDonald sent the results for further testing, which confirmed the presence of cocaine metabolite. A.R. 146.

On November 9, 2021, Petitioner was arrested and charged with Conspiracy to Distribute Crack Cocaine, as charged in Berkeley County Magistrate Court Case Number 21-M02F-00905. A.R. 41. Shortly thereafter, the State filed a petition to revoke Petitioner's supervised release on November 19, 2021, alleging that Petitioner had used controlled substances without a valid

prescription, and that he had been charged with an additional felony, in violation of the conditions of his supervised release. A.R. 40-43.

On December 9, 2021, Petitioner allegedly committed a third violation when he was charged with the felony offense of Obtaining Money by False Pretenses, as charged in Berkeley County Magistrate Court Case Number 21-M02F-00966. A.R. 47-48. The State filed an amended Petition on January 5, 2022 to include the new charges as the basis for its petition to revoke. A.R. 46-49.

The parties appeared before the circuit court for a preliminary hearing upon the State's petition to revoke Petitioner's period of supervised release. A.R. 50-51. Although Petitioner waived his right to a contested preliminary hearing, he did orally move the court to dismiss the petition pursuant to the United States Supreme Court's decision in *United States v. Haymond*, 139 S.Ct. 2369 (2019). A.R. 50. The circuit court directed Petitioner to prepare a written motion, and scheduled an evidentiary hearing upon the State's petition on February 16, 2022. A.R. 50.

Petitioner filed his written motion to dismiss on January 11, 2022.[1]

C. Evidentiary Hearing and Imposition of Two Year Period of Incarceration[2]

Prior to the taking of evidence at the February 16, 2022 hearing, the circuit court allowed Petitioner to argue his previously filed motion to dismiss. A.R. 73-76. The court found that Petitioner's argument lacked legal authority, and, thus, denied his motion. A.R. 75-76.

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[1] Petitioner's allegations raised in his January 11, 2022 motion are substantially the same as those raised in his appellate brief presently before this Court. As such, Respondent will address all of Petitioner's claims in Section VI, below.

[2] Respondent will not address issues related to Petitioner's claims that he committed the offense of "Obtaining Money by False Pretenses." The circuit court found that the State did not meet its burden of proof with respect to that alleged violation, and is not relevant to any claim presently before this Court. *See* A.R.

The proceeding moved to the presentation of evidence, at which time the State called Sgt. J.L. Harper of the Martinsburg Police Department to testify. A.R. 117. Sgt. Harper testified that he made contact with Petitioner on November 9, 2021 after he conducted a traffic stop of the Ford F-150 pickup truck Petitioner was driving. A.R. 117-18. Sgt. Harper observed that Petitioner was driving the vehicle, while another male, later identified as Joseph Garner, was seated in the passenger seat. A.R. 118. Petitioner was asked to exit the vehicle and walk to the back of the truck to speak with Sgt. Harper. A.R. 118. As Petitioner exited the vehicle, Sgt. Harper observed what he described as "signs of crack use around his seat." A.R. 118. Sgt. Harper further explained that he saw pieces of copper scrub pads, which are commonly used by those who smoke crack cocaine as a type of filter to keep the substance from falling down the smoking device into the user's mouth. A.R. 118-19.

While Sgt. Harper was speaking with Petitioner, another officer arrived to assist. A.R. 119-120. This officer began speaking with the passenger, Mr. Garner, and soon advised Sgt. Harper that he had located a "hard object" in Mr. Garner's pants. AR. 120. Officers found two bags of crack cocaine on Mr. Garner's person, which had a total combined weight of 16.4 grams. A.R. 120. According to Sgt. Harper, the amount of crack seized was consistent with distribution and more than what one would possess if the substance was for personal use. A.R. 121.

In addition to the evidence already identified, Sgt. Harper testified that he also located "push rods" and "corner bags" inside Petitioner's truck. A.R. 121. Sgt. Harper explained that a "corner bag" is typical the corner of a sandwich bag that is used to package controlled substances for distribution. A.R. 121. He further testified that dealers will typically place whatever amount of controlled substance is being purchased in the corner of the sandwich bag, tie the corner off,

and remove the corner containing the substance from the bag before providing the "corner" of the bag to the purchaser. A.R. at 121.

After locating the various items consistent with drug use and distribution in Petitioner's vehicle, Sgt. Harper asked Petitioner where he had been and where he was going. A.R. at 122. Petitioner advised that he and Mr. Garner had just been at the local Seven Eleven gas station and were on their way back to Mr. Garner's residence around the corner. A.R. at 122. When asked what the address of Mr. Garner's residence was, neither Petitioner nor Mr. Garner were willing to provide that information. A.R. at 123.

Despite the unwillingness of Mr. Garner and Petitioner to disclose the location of the residence, Sgt. Harper was able to ascertain its whereabouts and travelled to the location. A.R. at 122-23. Sgt. Harper conducted a "knock and talk" at the residence, where he encountered Mr. Garner's girlfriend, Cynthia Allen, as well as Petitioner's wife, Heather White. A.R. 123. Ms. Allen admitted during her conversation with Sgt. Harper that he had smoked marijuana inside the residence, followed by her admission that she "smokes crack" and that there may be "some more stuff inside." A.R. 123.

A search of Mr. Garner's residence as conducted. A.R. 124. Inside, officers located a substantial amount of evidence indicating the residence was used for drug manufacturing and distribution purposes. A.R. at 124. Among the items located within the residence were: $2,700.00 in cash; 13.6 grams of powdered cocaine; 90 grams of marijuana; 6.7 grams of crack cocaine; crack cocaine actively cooking on the stove; 1.4 grams of heroin; five Suboxone strips; eight oxycodone pills; two pistols; and two digital scales. A.R. 124. Sgt. Harper recalled that "a large amount of this was in plain view. You couldn't step inside without seeing it. It was everywhere."

A.R. 124. Sgt. Harper testified that the amount of each substance located within the home was a "dealer amount." A.R. 124.

Following Sgt. Harper's testimony, the State called Petitioner's Intensive Supervision Officer, Officer McDonald, to testify. A.R. 143. Officer McDonald testified that Petitioner met with him on October 15, 2021 as part of his supervision of Petitioner while on supervised release. A.R. 145-46. During this meeting, Petitioner provided a urinalysis screen that was presumptively positive. A.R. 145-46. Once learning of the positive result, Officer McDonald inquired of Petitioner as to whether he had consumed a substance that would have caused the positive result. A.R. at 145-46. Petitioner denied consuming any substances, and Officer McDonald sent the results for further testing. A.R. 146-47. On October 26, 2021, Officer McDonald received the results which confirmed that Petitioner's urinalysis screen was positive for cocaine metabolites. A.R. 47, 146-47.

At the close of evidence, the court found by clear and convincing evidence that Petitioner had violated the terms of his supervised release. A.R. 160-61. In particular, the court found that the evidence stablished by clear and convincing evidence that Petitioner had committed the offense of Conspiracy to Distribute a Controlled Substance, and, further, that Petitioner had used and/or possessed a controlled substance, both constituting violations of the conditions of his supervised release. A.R. 160-61. The court then ordered Petitioner's supervised release be revoked, and imposed a two-year period of imprisonment. A.R. 167. The court provided its written order explaining its decision on February 16, 2022. A.R. 68-70

It is from this February 16, 2022 order that Petitioner now appeals.

IV. SUMMARY OF THE ARGUMENT

Petitioner's reliance on the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is entirely misplaced and provides no basis for this Court to grant him the relief he seeks. The Supreme Court's holding in *Apprendi* and its progeny have no application to the facts involved in the present proceedings. The holding in *Apprendi* stands for the notion that a defendant cannot be sentenced to a term that exceeds the statutory maximum when the imposition of that sentence relies on a factual finding that was not part of the jury's verdict, or the defendant's admission. The present case involves a statutory scheme that imposes an additional sentence of supervised release, based solely upon the conviction, and involves no independent factual finding before it may be properly imposed. Thus, Petitioner's first assignment of error is without legal merit, and should be disregarded.

Petitioner's second assignment of error is equally meritless. While the record reveals that the State presented more than sufficient evidence to prove Petitioner committed the offense of Conspiracy to Distribute a Controlled Substance, even if Petitioner's argument is believed, he cannot be entitled to relief as he was also found to have violated the terms of his release upon his use and/or possession of a controlled substance. Additionally, Petitioner's attempt to reclassify a supervised release revocation proceeding as subject to the "graduated sanctions" provisions of the West Virginia Code pertaining to probation revocation proceedings is without any legal support. Accordingly, Petitioner has failed to demonstrate he is entitled to relief, and, thus, this Court should affirm the judgment of the Jefferson County Circuit Court.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and

in the record, and the decisional process would not be significantly aided by oral argument. This case is suitable for resolution by memorandum decision.

VI. ARGUMENT

A. Standard of Review

"When reviewing findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." Syl. Pt. 1, *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738 (1997). Also, "[t]he Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997); *see also State v. Raymond B.*, No. 20-0605, 2021 WL 2580715, at *2 (W. Va. Supreme Court, June 23, 2021) (memorandum decision) (applying the above standards to determination as to lower court's order revoking supervised release and imposing a fifteen year prison term).

B. Petitioner's claims in his first assignment of error rests on an erroneous interpretation and application of the United States Supreme Court's holdings in *Apprendi* and its progeny, and, therefore, provide no legal basis for this Court to grant him the relief he seeks.

Petitioner's first assignment of error relies on an erroneous interpretation of the legal precedent announced by the United States Supreme Court in *Apprendi*, and its progeny. In support of his first assignment of error, Petitioner incorrectly relies, not only on *Apprendi*, but also on *Alleyne v. United States*, 570 U.S. 99 (2013); *Harris v. United States*, 526 U.S. 545 (2002); and *United States v. Haymond*, 139 S.Ct. 2369 (2019). Pet'r's Br. at 4-10. None of these cases, however, are applicable to the present proceedings.

1. *Apprendi* and its progeny do not apply

In order to fully respond to Petitioner's assertions, it is necessary to identify the holdings contained in the *Apprendi* line of cases and the facts upon which they are based. Indeed, Petitioner asserts that this case is

> dispositively controlled by a line of U.S. Supreme Court precedent which establishes that any criminal penalty or sentencing enhancement which escalates the punishment beyond that allowed for by the underlying criminal statute requires proof beyond a reasonable doubt before a jury or else [it] violates the Constitution's Fifth and Sixth Amendment.

Pet'r's Br. at 4. While this is an accurate recitation of the precedent established from the *Apprendi* line of cases, Petitioner's interpretation and application of it to the facts involved in the instant proceeding is wholly misguided and erroneous.

The facts at issue in *Apprendi* are not analogous to those involved in the instant proceedings. *Apprendi* involved a defendant who had been convicted of various offenses related to his firing of multiple rounds from a .22 caliber handgun into the residence of an African American family. *Apprendi*, 530 U.S. at 470. The defendant expressly stated shortly after being arrested that his reason for firing the rounds was due to the fact that the family was African American, and that he did not want them in the previously all-white neighborhood to which they had just moved. *Id.* Despite this, the State did not allege in the indictment that the crime was motivated by any sort of racial animus or bias. *Id.* Notwithstanding, after Petitioner entered a plea agreement, the State filed a motion seeking to enhance the statutory sentence due to the Petitioner's "biased purpose" for committing the offense. *Id.* at 470-71. A hearing was held and the defendant contested the imposition of the enhanced sentence. *Id.* The lower court found by clear and convincing evidence that the defendant acted with the relevant racial bias to trigger the

enhancement, and imposed an enhancement that increased the maximum aggregate sentence from twenty years to a term of thirty years. *Id.*

The Supreme Court reversed, and in so doing, expressly disavowed any "legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83. Thus, the inherent issue here is whether a particular fact has an impact on the sentence necessarily hinges on whether it is properly construed as an "element" of the offense, or a "sentencing factor;" the former needing to be proven by a jury, while the latter may be properly considered by the court. The Court phrased the particular inquiry as "not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"

In *Alleyne*, the Supreme Court reversed the lower court's imposition of an enhanced sentence based upon its finding, after the defendant had been convicted, that one of his crimes was committed while brandishing a weapon. *Alleyne*, 570 U.S. 103-04. The Court agreed with the defendant's argument that the enhancement of his sentence based upon the judicial factual determination that he had "brandished" a firearm, when the jury was never tasked with making such factual determination. *Id.* at 104, 107. As a result, the Petitioner received a mandatory minimum sentence of seven years based upon the additional factual finding, when the sentence for the offense without the enhancement only provided for a minimum five year term. *Id.* at 104.

Finally, in *Haymond*, the defendant was convicted and sentenced to a term of imprisonment followed by a term of supervised release. *Haymond*, 139, S.Ct. at 2374. After the defendant discharged his sentence, and while serving his period of supervised release, he was arrested and charged for additional criminal offenses. *Id.* Pursuant to the statutes involved in Petitioner's initial

conviction and sentence, he was subject to a maximum two-year period of incarceration for any violation of his supervised release. *Id.* However, a separate statute provided that, when a violation occurs that involves certain factual considerations, the court is obligated to impose a mandatory five year to life sentence. *Id.* The Court reversed the sentence, noting that the minimum period of incarceration greatly exceeded the statutorily prescribed sentence, and the enhancement rested upon the finding of additional facts that were never part of the elemental considerations attendant to the initial conviction. *Id.*

The facts presented to this Court do not involve those sentencing considerations the United States Supreme Court disavowed in *Apprendi* and its progeny. As the Supreme Court noted in *Apprendi*, the relevant question is whether there is a factual determination that was not part of the jury verdict or a fact contemplated in the defendant's plea that increased the maximum sentence beyond that which the statute contemplates. The instant case involves no factual finding that triggers the imposition of the period of extended supervised release. Indeed, the mere conviction, standing alone, requires the court to impose a period of supervised release for a period of up to fifty years. W. Va. Code § 62-12-26(a). For reasons discussed in more detail below, Petitioner conflates the element of an offense with a sentencing factor. The factual determinations made by the circuit court in support of its decision to revoke Petitioner's period of supervised release and impose a two-year period of incarceration were clearly "sentencing factors," and, thus, not subject to scrutiny under *Apprendi.*

2. Petitioner's "maximum sentence" was not increased beyond the statutory range, as a period of supervised release of up to fifty years is construed as "part of the original sentence" pursuant to West Virginia Code § 62-12-26.

Petitioner does not dispute that he was properly convicted of the felony offense of Sexual Assault in the Third Degree. West Virginia Code § 61-8B-5(b) provides that any person convicted

of such offense is subject to an indeterminate period of incarceration of not less than one, nor more than five years. In addition, however, West Virginia Code § 62-12-26(a) specifically provides that any person convicted of an offense contained in West Virginia Code § 61-8B-1, *et seq.*, "shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to 50 years . . .." For *Apprendi* purposes, the maximum sentence for Sexual Assault in the Third Degree is a period of incarceration of not less than one, nor more than five years, followed by a period of supervised release of up to fifty years. The period of extended supervised release is mandated upon the conviction of one of the enumerated statutory offenses, and involves no additional factual finding other than proof of each element necessary to sustain the conviction. By pleading guilty to the offense, Petitioner admitted to each of these elemental facts.

Petitioner does not appear to contest the initial imposition of his ten year period of supervised release. In fact, Petitioner explicitly acknowledged the mandatory imposition of such period in his plea agreement. A.R. 20-21. Instead, Petitioner focuses on the factual findings made at the revocation hearing. Pet'r's Br. at 3-10. But as made clear in *Apprendi* and its progeny, whether Petitioner violated a condition of his period of supervised release is a sentencing factor, and is in no way related to the imposition of his initial sentence. The distinction between the instant case and *Apprendi* that Petitioner fails to make is the difference between an elemental factor to the offense, which dictates what sentence applies, with a sentencing factor, which a court may properly consider in tailoring a particular sentence based upon the information before it. As this Court noted in Syllabus Point 11, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011), "supervised release [is] an inherent part of the sentencing scheme for certain offenses enumerated in West Virginia Code § 62-12-26 (2009)." Thus, any contention made by Petitioner that his

supervised release "increases" the maximum penalty for which he is exposed based upon his conviction is wholly incorrect.

3. Proceedings to revoke a period of supervised release are considered part of the initial prosecution and are tasked with determining whether a violation of the sentence imposed has occurred, and, if so, what sanction is appropriate

Proceedings to revoke one's period of supervised release are construed as a "continuation of the prosecution of the original offense, and not a new prosecution of additional offenses." *State v. Hargus*, 232 W. VA. 735, 742, 753 S.E.2d 893, 700 (2013). Factual determinations made in pursuit of these revocations hearings "do[ ] not require a finding of guilt by a jury beyond a reasonable doubt." *Id.* A court's decision to revoke one's supervised release and to impose a period of incarcerations "does not violate due process principles," so long as the revocation is based upon the court's finding by clear and convincing evidence that a violation occurred. *Id.*

"Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent upon the observance of special parole restrictions." *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972). *See also Dobbs v. Wallace*, 157 W. Va. 405, 411, 201 S.E.2d 914, 917 (1974) ("The parolee's liberty may be limited. He may be enjoined by past transgressions from the pleasures of the full freedoms enjoyed by the unconvicted and he may not be permitted to engage in some of his former activities."). As Justice Breyer noted in his concurrence in *Haymond*, proceedings instituted upon violations of the conditions of a period of supervised release are "first and foremost considered sanctions for the defendant's 'breach of trust'—his 'failure to follow the court-imposed conditions' that followed his initial conviction—not 'for the particular conduct triggering the revocation as if that conduct were being sentenced as a new . . . criminal conduct.'" *Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring) (quoting *Johnson v. United States*, 529 U.S. 694, 700 (2000)). Thus, these proceedings

"arise from and are 'treat[ed] . . . as part of the penalty for the initial offense,'" thus, because "[t]he defendant receives a term of supervised release thanks to his initial offense, . . . whether that release is later revoked or sustained [ ] constitutes part of the final sentence for his [underlying] crime." *Id.* at 2379-80. (citations omitted). This Court has adopted this interpretation, and has recognized:

> Although such violations [of supervised release] often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. . . . Where the acts of violation are criminal in their own right, they may be the basis for a separate prosecution.

Hargus, 232 W.Va. at 741, 752 S.E.2d at 899 (quoting *Johnson*, 529 U.S. at 700). Accordingly, revocation proceedings require the court to only make a "factual determination that an offense has been committed which imparts the conclusion that the rehabilitative and other purposes behind probation have failed." *State v. Ketchum*, 169 W. Va. 9, 12, 289 S.E.2d 657, 659 (1981).

While the controlling legal authorities directly refute Petitioner's argument that he was entitled to a jury for purposes of determining whether he violated the terms of his supervised release, it is important to note the implicit argument therein that such proceedings should be construed as determining "punishment." If Petitioner was correct, it "would raise a double jeopardy issue if the revocation of supervised release were also punishment for the same offense." *Hargus*, 232 W.Va. at 741, 753 S.E.2d at 899 (citing *Johnson*, 529 U.S. at 700 (citations omitted)). Treating any sanctions imposed as "part of the penalty for the initial offense, however, (as most courts have done), avoids these difficulties." *Id.*

Petitioner's assertion that he was entitled to a jury before the revocation of his supervised release is wholly unsupported and is an erroneous interpretation and application of law. Petitioner claims that, at the time he began his period of supervised release, he had already served the maximum sentence for his conviction under West Virginia Code § 61-8B-5. While it is true that

he had served his initial period of incarceration, it is of little relevance to his claim. His maximum sentence, by statute, and based solely upon the facts necessary to prove the offense for which he was convicted, *includes* the period of supervised release. Petitioner had not discharged his sentence tied to his conviction, nor has he discharged his sentence to this day. Petitioner's argument is simply one of convenience, and is completely detached from the controlling legal authorities.

4. Petitioner's original sentence and subsequent revocation were well within the sentencing range prescribed by statute

Finally, Petitioner's argument seeks to reclassify a revocation proceeding into one that is tantamount to a jury trial. Not only does this contention lack any legal support, but the controlling legal authorities directly refute this fantastical procedural claim. This Court has explicitly recognized that the holding in *Apprendi* does nothing to "suggest that it is impermissible for judges to exercise discretion . . . in imposing judgment *within the range* prescribed by statute." *James*, 227 W. Va. at 418, 710 S.E.2d at 109 (citing *Apprendi*, 530 U.S. at 481) (emphasis in original). Factual determinations made in furtherance of a sentencing court's discretion to tailor a particular sentence to meet the needs in a particular case are not bound by the precedent announced in *Apprendi*. *Id.* (citing *United States v. White*, 240 F.3d 127, 136 (2nd Cir. 2001)).

The entirety of Petitioner's sentence, including both his initial period of incarceration and the period of supervised release, were clearly within the statutory sentencing range for his conviction of Sexual Assault in the Third Degree. It makes no difference how a particular person commits the offense of Sexual Assault in the Third Degree; their conviction of such offense automatically requires the imposition of a period of supervised release. There can be no reasonable argument that the imposition of his sentence was predicated upon a fact that Petitioner did not expressly admit to by virtue of his plea agreement. While his conduct that resulted in his

revocation was necessary to determine whether his period of supervised release should be revoked, it had absolutely nothing to do with the legality of the initial sentence wherein he was ordered to serve a ten year period of supervised release. As a result, Petitioner's revocation was not to determine his guilt or innocence with respect to the violative conduct. Because Petitioner's liberty interests were limited by virtue of the fact that he was, at the time he engaged in the conduct resulting in his revocation, serving his statutorily prescribed sentence, he cannot assert the "full panoply of due process rights," Pet'r's Br. at 9, because he had no right to them. The due process rights he was entitled to were provided to him through his revocation hearing and the State proving his violations by clear and convincing evidence.

Thus, Petitioner's first assignment of error is entirely without merit. The instant proceedings in no way involve any issue in which *Apprendi* and its progeny would apply. Thus, this Court should disregard Petitioner's first assignment of error entirely, and affirm the judgment of the Jefferson County Circuit Court.

C. The circuit court correctly found that Petitioner had violated the conditions of his supervised release by clear and convincing evidence necessary to support its decision to revoke Petitioner's period of supervised release and impose a two-year period of incarceration.

1. The State presented sufficient evidence to prove by clear and convincing evidence that Petitioner committed the offense of Conspiracy to Distribute a Controlled Substance

Petitioner has failed to demonstrate that there was insufficient evidence to support the court's finding that Petitioner committed the offense of Conspiracy to Distribute a Controlled Substance by clear and convincing evidence. The state presented ample evidence which, when viewed pursuant to the clear and convincing evidence standard applicable to revocation hearings, was more than sufficient to meet its burden of proof.

The burden of proof in revocation proceedings is subject to the clear and convincing evidence standard. W. Va. Code § 62-12-26(h)(3). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019). To succeed, Petitioner must establish that the circuit court's factual findings were "clearly erroneous." Syl. Pt. 1, *Duke*, 200 W. Va. 356, 489 S.E.2d 738.

To prove conspiracy, the State must show that "the defendant agreed with others" to commit the offense in question, and that "some overt act was taken by a member of the conspiracy to effect the object of the conspiracy." Syl. Pt. 4, in part, *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981). The "agreement" necessary to prove that a conspiracy occurred "may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the state is not required to show the formalities of an agreement." *Id.* 170 W. Va. at 265, 294 S.E.2d at 67. The "overt act" requirement concerns evidence to show "that the conspiracy is at work." *Id.* But this overt act need not be committed by each co-conspirator; the overt act of any one of the co-conspirators in furtherance of the conspiracy is attributable to all involved. *Id.*

Petitioner places significant emphasis on his contention that the State offered no direct evidence that an agreement had been made between Petitioner and any of the alleged co-conspirators. Pet'r's Br. at 12-13. The State, however, is not required to produce such evidence, and may properly prove that an agreement was made based upon circumstantial evidence, or by inferences gleaned from the "words and actions of the conspirators." *Less*, 170 W. Va. at 265, 294 S.E.2d at 67.

At Petitioner's revocation hearing, the State offered evidence that the passenger in Petitioner's vehicle had 16.4 grams of crack cocaine on his person. A.R. 120. In addition, "corner bags," which are commonly used to package and distribute controlled substances, were found in

Petitioner's vehicle. A.R. 121. The investigating officer testified that, not only did he find the "corner" portion of the bags within Petitioner's vehicle, but he also found a sandwich bag inside the vehicle that had the corners ripped off, indicating that controlled substances had been packaged and sold or distributed from inside the vehicle. A.R. 132.

Moreover, the officer testified that Petitioner had advised that he and Mr. Garner had recently left the nearby Seven Eleven convenience store and were heading back to drop Mr. Garner off at his residence. A.R. 122-23. When the officer arrived at Mr. Garner's residence, not only did he find the Mr. Garner's girlfriend, but also Petitioner's wife inside the home. A.R. 123. Inside the home, the officer observed what was clearly an ongoing drug manufacturing and distribution enterprise. A.R. 124. The officer located large quantities of powdered cocaine, crack cocaine, marijuana, pills, and cash, along with pistols and digital scales. A.R. 124. The officer also testified that the amount of each substance was consistent with "dealer amounts." A.R. 124.

Petitioner argues that this information is insufficient to establish Petitioner's involvement in a conspiracy to distribute controlled substances by clear and convincing evidence. Pet'r's Br. at 11-14. Petitioner points to the lack of direct evidence pointing to Petitioner's agreement, or an overt act in furtherance of such an agreement as proof of the insufficiency. Pet'r's. Br. at 11-12. Petitioner also pointed out that some of the items considered to be evidence of drug use or drug manufacturing had a legitimate, legal purpose outside of whatever utility they possessed in the context of illicit drug use or sales. Pet'r's Br. at 11-13.

The circuit court properly found by clear and convincing evidence that Petitioner committed the offense of Conspiracy to Distribute a Controlled Substance. As noted above, no direct evidence of an agreement is necessary in order to prove a conspiracy. Rather, an agreement may be "inferred from the words or actions of the conspirators, or other circumstantial evidence."

Less, 170 W. Va. at 265, 294 S.E.2d at 67. Similarly, Petitioner's assertion that there was no evidence that demonstrated Petitioner or Mr. Garner engaged in a drug transaction at the Seven Eleven is unnecessary, as evidence that any one of the conspirators engaging in an overt act in furtherance of the conspiracy is sufficient and will be attributed to the other conspirators. *Id.* Moreover, Petitioner's argument that some of the items seized had legitimate uses outside of drug use and distribution is a gross generalization. Such argument requires one to view the items in a vacuum, and completely separate and apart from the substantial evidence that there was ongoing drug distribution taking place at the residence to which both Petitioner and Mr. Garner were returning.

The totality of the evidence demonstrated that Petitioner was in a vehicle with someone who was clearly dealing and manufacturing controlled substances. Any opportunity Petitioner had to indicate that he was simply going to "drop off" Mr. Garner at his residence is refuted by the fact that Petitioner's wife was inside where drugs were visibly strewn about the residence, and where controlled substances were being actively manufactured. A.R. 120-24. The evidence presented clearly leads to an inference, based upon the packaging materials found inside Petitioner's vehicle, along with the evidence obtained during the subsequent search of Mr. Garner's residence, that Petitioner and Mr. Garner did, in fact, travel to the Seven Eleven to conduct a drug transaction.

It is also important to note that the State's burden of proof in this respect is not proof beyond a reasonable doubt; it is proof by clear and convincing evidence. Whether the State is able to account for any given possibility that may exist outside of the Petitioner's involvement in the conspiracy is lessened based upon the lower burden of proof involved in revocation proceedings. The revocation proceeding was not to determine whether Petitioner was guilty of the offense of

conspiracy, but, rather, it was to determine whether there was clear and convincing evidence that Petitioner violated the terms of his supervised release by engaging in a conspiracy.

Petitioner has not demonstrated that the circuit court's judgment with respect to whether Petitioner participated in a conspiracy was clearly erroneous, and the circuit court's judgment should be affirmed. However, regardless of what this Court determines with respect to this specific issue, it is immaterial as Petitioner admitted, both during the revocation proceeding, A.R. 160, as well as in his appellate brief, to violating the terms of his supervised release, Pet'r's Br. at 14. Petitioner's argument that there was insufficient evidence to support the court's finding with respect to the alleged conspiracy completely discounts the fact that his revocation was based upon more than one violation. Indeed, Petitioner admitted to, and the court found, that he had violated the terms of his supervised release by using or possessing a controlled substance.

2. Petitioner admits to violating the conditions of his period of supervised release.

Petitioner's assertion in his second assignment of error is belied by the record. Regardless of whether the court properly found that there was clear and convincing evidence that he committed a conspiracy in violation of the terms of his supervised release, he acknowledged in his brief that he "readily admitted" that he "used crack-cocaine" in violation of those same conditions. Pet'r's Br. at 11. This admission, alone, is fatal to Petitioner's claims advanced in his second assignment of error.

Petitioner affirmatively acknowledged that he "shall not use, consume, purchase, possess, or distribute any narcotic, marijuana, or other controlled substance unless prescribed for him or her by a physician," as part of the conditions of his supervised release. A.R. 25. Petitioner admitted to "drug possession and use" during his revocation hearing. A.R. 160, Pet'r's Br. at 11. Following this admission, and at the conclusion of the presentation of evidence at his revocation

hearing, the court found "by clear and convincing evidence," that "Petitioner possessed, and/or consumed cocaine back in October [and] that he has violated that term of his supervision." A.R. 160. Petitioner offers no dispute as to these facts.

Pursuant to West Virginia Code § 62-12-26(h)(3), a circuit court, when tasked with deciding whether a defendant's supervised release should be revoked, is authorized to

> Revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release.

Petitioner's argument with respect to this issue, like his others, misses the mark. Petitioner appears to argue that the provision contained in West Virginia Code § 62-12-26 (h)(3) imposes the same guidelines for revocation proceedings based on "technical violations" (conduct that, by itself, may not be criminal but violate an express condition of one's release), with a "material violation" (conduct that amounts to a separate criminal offense). Pet'r's Br. at 14. Petitioner provides no support for his argument that West Virginia Code § 62-12-26(h)(3) imposes the same obligations upon a circuit court when determining whether to revoke one's supervised release pursuant to a technical violation as with proceedings to revoke one's probation.

Petitioner's argument, most notably, fails to take into account that a term of "probation" is not classified in the same manner as a period of supervised release. For example, "'[p]robation is a matter of grace and not a matter of right.' Syllabus Point 1, *State v. Rose*, 156 W. Va. 342, 192 S.E.2d 884 (1972)." Syl. Pt. 1, *State v. Hosby*, 220 W. Va. 560, 648 S.E.2d 66 (2007). "[A] defendant convicted of a crime has no absolute right to probation," *State v. Loy*, 146 W. Va. 308, 318, 119 S.E.2d 826, 832 (1961), because "probation is not a sentence for a crime . . .."

Christopher H. v. Martin, 241 W. Va. 706, 710, 828 S.E.2d 94, 98 (2019). As a result, "the decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court's discretion." *Duke*, 200 W. Va. at 364, 489 S.E.2d at 746.

Although a circuit court's decision to grant a defendant a period of probation in lieu of incarceration is one left to its sole discretion, the same cannot be said about the court's discretion to impose a period of extended supervised release. Under West Virginia Code § 62-12-26, the circuit court has *no discretion* with respect to the imposition of a period of supervised release after a defendant has been convicted of certain specified offenses. Subsection (a) clearly and unambiguously states that the defendant, after being convicted of an enumerated felony, "shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to 50 years." W. Va. Code § 62-12-26(a).

Moreover, while a defendant being placed on probation is considered an "act of grace," one receiving a period of supervised release pursuant to West Virginia Code § 62-12-26 as part of his or her sentence "reflects the legislative intent to impose a new and additional penalty to the sentence of a person convicted of certain enumerated offenses." *James*, 227 W. Va. at 418, 710 S.E.2d at 109.

Probation necessarily carries with it the certain expectation that the probationary period has some sort of "rehabilitative purpose." *See State v. White*, 181 W. Va. 455, 460, 383 S.E.2d 87, 92 (1989) (upholding court's decision to deny defendant a period of probation when it concluded that defendant "had problems requiring treatment and that there was only a moderate likelihood that there would be no future involvement with the criminal justice system"). The inverse to this, however, is that when a court finds that one is an appropriate candidate for

probation, it serves as an acknowledgment by the court that the individual is likely to refrain from future criminal conduct, or is willing to address those concerns which resulted in the conviction. The limitation of what a court may do in response to technical violations of probation, while not crimes in their own respect, is a reflection of the continued "grace" that a court must show for one who may fall short of meeting the rehabilitative purpose behind the probationary period. Indeed, there are legitimate policy justifications for such limitations.

For example, if one is convicted and placed on probation for a drug offense, it is reasonable that the terms of probation will include a prohibition of further drug use, as well as outpatient drug rehabilitation or some other rehabilitative component. But if that person provides one positive drug screen, or happens to miss a drug rehabilitation appointment, there is a legitimate policy consideration in limiting a court's ability to simply revoke that person's probationary period and require that person to serve the remainder of his or her sentence.

These same considerations, however, do not apply to one convicted of a certain sex offense mandating a period of supervised release. There is no rehabilitative purpose behind it; it is predicated upon the intention of imposing an "additional penalty" upon an individual convicted of certain offenses.

Petitioner's argument also misconstrues the concept of "punishment." As noted above, a period of probation is not "punishment." The granting of a period of probation is predicated upon the sentencing court's belief that the individual "is not likely again to commit crime and that the public good does not require that he be fined or imprisoned." W. Va. Code § 62-12-3. In other words, probationary periods reflect the "suspension" of the punishment for whatever offense was involved based upon the sentencing court's belief that the individual will not reoffend or that punishing the individual at that time would serve the "public good."

A period of supervised release, however, is considered part of the Petitioner's punishment; it is not an act of grace, nor an indication that the public good does not require said punishment. Thus, the overall considerations attendant to a probation revocation are different than those involved with proceedings to revoke a period of supervised release.

Moreover, Petitioner's argument fails to acknowledge that, like the "graduated sanctions" provisions contained in the probation statue, the imposition of a two-year period of incarceration as a result of his supervised release violation is also construed as a "sanction." *See Johnson*, 529 U.S. at 700 (Defining prison terms imposed as a result of supervised release as "sanctions" tied to the penalty for the initial offense); *See also Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring) ("The consequences that flow from violation of the conditions of supervised release are first and foremost considered sanctions for the defendant's "breach of trust").

Petitioner's two year prison term as a result of his revocation serves the same purpose as the "sixty day sanction" as provided in West Virginia Code § 62-12-10(2). The graduated sanctions contemplated in West Virginia Code § 62-12-10(2) effectively serve to limit the circumstances in which the sentence court may formally execute the "punishment" for the crimes the probationer was convicted. One who is serving a period of supervised release is actively serving his "punishment." He is not serving an alternative sentence to one of incarceration, nor is on his period of supervised release because the court believed that he was unlikely to reoffend or that his continued incarceration was unnecessary. To the contrary; Petitioner was serving a period of supervised release because the Legislature concluded that those convicted of certain sexual offenses should be subject to an additional penalty due to the egregiousness of their actions, and, therefore, enacted a statute that places a mandatory period of up to 50 years of supervised release for certain sexual offenses. Petitioner was not on probation because he was convicted of marijuana

possession; he was serving a period of supervised release, as part of his statutory sentence, related to his conviction tied to his sexual assault of a twelve-year-old child. A.R. at 17-18.

The plain language of West Virginia Code § 62-12-26(h)(3) does not indicate the Legislature intended for there to be any distinction between what would traditionally be considered a "technical violation" and a "material violation" of one's period of supervised release. Given the inherent differences between the purposes behind a period of probation and a period of supervised release, there is simply no basis in law to support this contention. The analysis simply reverts back to the general considerations classifying probationary periods as "acts of grace," and periods of supervised release as an "additional punishment" for certain offenses our legislature has determined warrants such. Petitioner's claim should, accordingly, be rejected, and the judgment of the circuit court should be affirmed.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment of the Jefferson County Circuit Court in Criminal Action Number 18-F-31.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

WILLIAM E. LONGWELL
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar No.: 12290
State Capitol Complex
1900 Kanawha Blvd. E.
Bldg. 6, Ste. 406
Charleston, WV 25305
Telephone: (304) 558-5830
Email: William.E.Longwell@wvago.gov
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0197

STATE OF WEST VIRGINIA,

Respondent,

v.

RUSTY ALLEN WHITE,

Petitioner.

CERTIFICATE OF SERVICE

I, William E. Longwell, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, August 1, 2022, and addressed as follows:

Christian Riddell, Esq.
The Riddell Law Group
329 South Queen Street
Martinsburg, WV 25401

William E. Longwell (State Bar No. 12290)
Assistant Attorney General