IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Docket No. 22-0197

STATE OF WEST VIRGINIA,
Plaintiff, Below, Respondent

Vs.) **18-F-31**
(Jefferson County)

RUSTY ALLEN WHITE
Defendant, Below, Petitioner.

PETITIONER'S BRIEF

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

IV. STATEMENT OF THE CASE

On or about October 1, 2018, Petitioner pled No Contest to the felony offense of Sexual Assault in the Third Degree, occurring on June 29, 2018. *See Amended Petition for Revocation of Supervised Release* (Appendix Record ("Appendix Record pg. 46). As a result of said plea, Petitioner was sentenced to the statutorily required indeterminate sentence of no less than one nor more than five years in the penitentiary. *Ibid.* It was further ordered that Defendant would be sentenced to ten years supervised release upon his release.

On January 14, 2021, having completed the maximum sentence of incarceration of five years (1.5 year in actual time served plus day-for-day credit for good conduct per W.Va. Code § 15A-4-17 et seq. plus an additional 1 year of parole), Petitioner was released from incarceration and began his 10 year sentence of Supervised Release under the supervision of the Jefferson County Probation Department. *Ibid.* While on supervised release, Defendant was subject to the following terms of Supervised Release, among others:

1. *The probationer shall not violate any law of this state, any other state, any municipality or of the United States.*

14. The Probationer shall not use, consume, purchase, possess or distribute any narcotics, marijuana, or other controlled substance, unless prescribed to him or her by a Physician.

Id. at p. 2 (AR pg. 24).

Thereafter, on January 5, 2022, Probation Officer Morgan McDonald filed an Amended Petition for Revocation of Supervised Release, alleging violations of the terms of supervised release described above. Specifically, PO McDonald alleged that he had failed a urinalysis by testing positive for cocaine and had further been charged with Conspiracy to Distribute Crack Cocaine on November 9, 2021 and had further been charged with Obtaining Money by False pretenses on December 9, 2021. *Ibid.*

In response, Petitioner filed a Motion to Dismiss Petition for Revocation on the basis that, because the Defendant had already killed his maximum sentence, and pursuant to *Apprendi* line of cases, the Court could not sentence him to an additional term of incarceration without a jury trial. *See Defendant's Motion to Dismiss Petition for Revocation of Supervised Release* (AR pg. 52). The State filed a Response in Opposition on February 8, 2022, and the Jefferson County Circuit Court denied Petitioner's Motion to Dismiss at the outset of Petitioner's revocation hearing. *See Transcript of Proceedings of February 16, 2022* ("AR pg. 71"), ll. 3:6-12; 5:20-24. Thereafter, the State proceeded with its evidence. Ultimately, the Defendant admitted to using crack cocaine (Id. at 87:1-4), and Court found Petitioner not guilty by clear and convincing evidence of Obtaining Money by False Pretences (Id. at 91:20-22),[1] but guilty of Conspiracy to Distribute Crack Cocaine. *Id.* at 90:20 – 91:19. As a result, the Court imposed upon Petitioner an additional two years of incarceration. *Id.* at 99:6-7.

[1] The basis for these charges had been that Petitioner, a contractor, had taken money from prospective clients to complete construction jobs and then did not return. However, testimony revealed that he did not complete the work or return the money because he had been arrested on the crack-cocaine distribution charges days after contracting to do the work. *See Id.* at 7:1-43:14

V. SUMMARY OF ARGUMENT

The Circuit Court committed reversible error when it denied Petitioner's Motion to Dismiss Petition for Revocation of Supervised Release because the revocation called for incarceration for an amount of time beyond the statutory maximum for the crime he had been convicted of, and therefore required separate findings of fact by a jury and beyond a reasonable doubt for further incarceration.

Moreover, even if the Circuit Court had been permitted to make findings of fact towards an additional term of incarceration, the Circuit Court further erred by finding that the State had met its burden of proving by clear and convincing evidence that Petitioner was guilty of Conspiracy to Distribute CDS because the evidence shows only that Petitioner was using drugs and there was no evidence submitted which would demonstrate either an agreement to engage in drug distribution or an act in furtherance thereof.

VI. STATEMENT REGARDING ORAL ARGUMENT

Petitioner asserts that Oral Argument in this matter is not necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

VII. ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT IT COULD IMPOSE A SENTENCE BEYOND THE STATUTORY MAXIMUM ON THE BASIS OF JUDGE-FOUND FACTS AND WITHOUT A JURY.

This assignment of error concerns a question of law. Questions of law are reviewed de novo. Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

The case at bar, to wit, a revocation of supervised release wherein the Court is being asked to impose a sentence of incarceration beyond the maximum contemplated by the statutory penalty for the charge of which Defendant was convicted, is dispositively controlled by a line of U.S. Supreme Court precedent which establishes that any criminal penalty or sentencing enhancement which escalates a punishment beyond that allowed for by the underlying criminal statute requires proof beyond a reasonable doubt before a jury or else violates the Constitution's Fifth and Sixth Amendments.

The seminal case on this point is *Apprendi v. New Jersey*, 530 U.S. 466 (2000), wherein the U.S. Supreme Court held unconstitutional a sentencing scheme that allowed a judge to increase a defendant's sentence beyond the statutory maximum based on the judge's finding of new facts by a preponderance of the evidence. There, the Defendant was indicted on a 23-count indictment and entered into a plea agreement to two counts - Second Degree Possession of a Firearm for Unlawful Purpose and Third-Degree Unlawful Possession of an Antipersonnel Bomb - which carried penalty ranges of 5-10 years and 3-5 years, respectively. *Id.* at 469-70. The plea agreement permitted the State to request the Court to impose a higher "enhanced" sentence on the ground that the offense was committed with a biased purpose (i.e. a hate crime). *Ibid.* Thereafter, upon the State's filing for enhancement, the Court found that the evidence supported a finding "that the crime was motivated by racial bias." *Id.* at 471. As a result, *Apprendi* was sentenced to incarceration in excess of the legally permissible limit for the relevant charge absent the sentencing enhancement. *Id.* at 470-471. The Supreme Court found this to be unconstitutional, holding:

> *Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction)*

> *that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243, n. 6. The Fourteenth Amendment commands the same answer in this case involving a state.*

Id. at 476.

The Court elaborated further, again relying on Jones for holding that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 480 (quoting Jones, 526 U.S. at 252-53).

Thereafter, in *Alleyne v. United States*, 570 U.S. 99 (2013), the U.S. Supreme Court, overruling its prior decision in *Harris v. U.S.,* 526 U.S. 545 (2002), held that the *Apprendi* principle applies when a judge finds additional facts to increase the mandatory minimum as well. Wrote the Court:

> Harris drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and with the original meaning of the Sixth Amendment. ***Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.***

Id. at 103 (emphasis added).

Most recently, in *United States v. Haymond*, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019), the Court applied this principal further to supervised release, and, in so doing, provided an excellent synopsis of the precedential reasoning in the *Apprendi* line of cases which demonstrates conclusively that a defendant cannot be sentenced in excess of the statutory maximum based on facts for which he is not entitled to a jury. Defendant will now endeavor to elucidate this line of cases through the Supreme Court's language in *Haymond*.

The *Haymond* Court began its legal analysis by noting the longstanding principals behind the 5th and Sixth Amendment as follows:

> *Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution § 1779, pp. 540–541 (4th ed. 1873).Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries." Apprendi v. New Jersey , 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).*

Id. at 2375-76.

"But" asked the court, posing the key question at issue in the instant case, "when does a 'criminal prosecution' arise implicating the right to trial by jury beyond a reasonable doubt?" *Id.* at 2376. In answer, the Court expressly linked it to punishment, saying:

> *At the founding, a "prosecution" of an individual simply referred to "the manner of [his]formal accusation... And the concept of "crime" was a broad one linked to punishment, amounting to those 'acts to which the law affixes... punishment,' or, stated differently, those 'element[s] in the wrong upon which the punishment is based.'... Consistent with these understandings, juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct."*

Ibid.

The Court then discussed the *Apprendi* case, noting the dispositive nature of that matter on Haymond's appeal.

> *A jury convicted the defendant of a gun crime that carried a maximum prison sentence of 10 years. But then a judge sought to impose a longer sentence pursuant to a statute that authorized him to do so if he found, by a preponderance of the evidence, that the defendant had committed the crime with racial bias. Apprendi held this scheme*

> *unconstitutional. "Any fact that increases the penalty for a crime beyond the prescribed statutory maximum," this Court explained, "must be submitted to a jury, and proved beyond a reasonable doubt," or admitted by the Defendant. 530 U.S. at 490, 120 S.Ct. 2348. Nor may a State evade this traditional restraint on the judicial power by simply calling the process of finding new facts and imposing a new punishment a judicial "sentencing enhancement."... "**The relevant inquiry is one not of form, but of effect – does the required judicial finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict.** Id., at 494, 120 S.Ct. 2348.*

Id. at 2377. (emphasis added).

The *Haymond* Court then noted that this same precedent applied not only to statutory maximums, but minimums as well. Said the Court

> *Before Apprendi , however, this Court had held that facts elevating the minimum punishment need not be proven to a jury beyond a reasonable doubt. McMillan v. Pennsylvania , 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) ; see also Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (adhering to McMillan). Eventually, the Court confronted this anomaly in Alleyne . There, a jury convicted the defendant of a crime that ordinarily carried a sentence of five years to life in prison. But a separate statutory "sentencing enhancement" increased the mandatory minimum to seven years if the defendant "brandished" the gun. At sentencing, a judge found by a preponderance of the evidence that the defendant had indeed brandished a gun and imposed the mandatory minimum 7-year prison term. This Court reversed. Finding no basis in the original understanding of the Fifth and Sixth Amendments for McMillan and Harris , the Court expressly overruled those decisions and held that "the principle applied in Apprendi applies with equal force to facts increasing the mandatory minimum" as it does to facts increasing the statutory maximum penalty. Alleyne , 570 U.S. at 112, 133 S.Ct. 2151. Nor did it matter to Alleyne 's analysis that, even without the mandatory minimum, the trial judge would have been free to impose a 7-year sentence because it fell within the statutory sentencing range authorized by the jury's findings. Both the "floor" and "ceiling" of a sentencing range "define the legally prescribed penalty." Ibid. And under our Constitution, when "**a finding of fact alters the legally prescribed punishment so as to aggravate it" that finding must be made by a jury of the defendant's peers beyond a reasonable doubt**. Id. , at 114, 133 S.Ct. 2151.*

Id. at 2378 (quoting *Alleyne*, supra, 570 U.S.at 114).

The *Haymond* Court then synthesized these precedents into a unified theory, and applied it to the federal Supervised Release statute, writing:

> *By now, the lesson for our case is clear. Based on the facts reflected in the jury's verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years under § 2252(b)(2). But then a judge—acting without a jury and based only on a preponderance of the evidence—found that Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release. Under § 3583(k), that judicial factfinding triggered a new punishment in the form of a prison term of at least five years and up to life. So just like the facts the judge found at the defendant's sentencing hearing in Alleyne , the facts the judge found here increased "the legally prescribed range of allowable sentences" in violation of the Fifth and Sixth Amendments. Id. , at 115, 133 S.Ct. 2151. In this case, that meant Mr. Haymond faced a minimum of five years in prison instead of as little as none. Nor did the absence of a jury's finding beyond a reasonable doubt only infringe the rights of the accused; it also divested the " 'people at large' "—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments.*

Id. at 2378-79.

In the instant case, Defendant White pled no contest to Third Degree Sexual Assault on June 29, 2018, and was sentenced to the statutorily required sentence of not less than one and no more than five years incarceration. *See Petition for Revocation*, (AR pg. 40) ¶¶ 2, 3. Defendant served the entirety of that sentence, and killed it in its entirety upon his release, at which time he became statutorily subject to 10 years of Supervised Release per W.Va. Code § 62-12-26. Thereafter the asked the Court to revoke that supervised release, and sentence Petitioner to an additional term of incarceration which, per the language of § 62-12-26(h)(3) would empower this Court 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…"

However, because Petitioner has already served the maximum sentence which could have been applied per his prior sexual assault conviction, he cannot be sentenced to any further

incarceration based on any factual finding made without the aid of a jury trial and the full panoply of due process rights afforded to criminally charged Defendants without running afoul of his 5th and 7th Amendment rights.

The State, in response to Petitioner's arguments in the Circuit Court, suggested that The West Virginia Supreme Court has distinguished the federal supervised released statute discussed in *Haymond* from the state statute via its ruling in *State v. Raymond B*, wherein the Court found that the *Haymond* decision did not act to thwart the revocation of the Defendant's term of probation. There, the Court did attempt to distinguish the federal supervised release statute from West Virginia's, and, in doing so, cited to a prior decision, State v. Edward B., No. 19-1026, 2020 WL 7231608, at *4 (W. Va. Dec. 7, 2020), wherein the Court noted that:

> *The Haymond plurality "emphasized" that its decision did not address all supervised release proceedings but, rather, was "limited to § 3583(k)—an unusual provision enacted little more than a decade ago—and the Alleyne [v. United States, 570 U.S. 99 (2013)] problem raised by its 5-year mandatory minimum term of imprisonment." Haymond, 139 S. Ct. at 2383. West Virginia Code § 62-12-26, the supervised release statute under which petitioner's supervised release was revoked, was not addressed in Haymond nor is it similar to § 3583(k). Most notably, West Virginia Code § 62-12-26 does not require imposition of a minimum term of incarceration "triggered by judge-found facts," which the Haymond plurality found problematic. 139 S. Ct. at 2383-84. Thus, petitioner has failed to demonstrate any error under Haymond, let alone one that is clear or obvious.*

While it is, of course, true that the relevant West Virginia statute does not escalate the minimum term of imprisonment like its federal counterpart, it nevertheless does allow for the escalation of a term of imprisonment beyond the statutorily required parameters for the relevant conviction based on judicially determined facts and at a lower burden of proof than due process requires for criminal convictions – exactly the type of behavior that was prohibited by the *Apprendi* decision ("'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, *any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a*

jury, and proven beyond a reasonable doubt.'" *Apprendi*, *supra*, 530 U.S. at 476 (quoting *Jones*, *supra*, 526 U.S. 227) (emphasis added)). It further provides for additional penalties that are not authorized under W.Va. Code § 61-8B-5 (sexual assault third degree), which allows only for imprisonment for 1-5 years and a fine of up to $10,000.[2] As such, for the purposes of the 5th and 7th Amendment analysis set forth in *Apprendi*, *Alleyne*, and *Haymond*, the West Virginia Supreme Court's decision in Raymond B amounts to a distinction without a material difference for the purposes of the issue currently before the Court.

Moreover, Raymond B. *is* materially distinguishable from the *Apprendi/Haymond* line of cases such that it cannot be relied upon as controlling or even persuasive authority on the instant issue. In *Raymond B.*, the Petitioner raised three assignments of error: (1) that the state was required to provide him a jury trial on his probation revocation per *Haymond*; (2) that his sentence violates the 8th amendment's proportionality principal; and (3) that the trial court erroneously admitted evidence of a failed polygraph. *Id.* at 2-4. As such, the *Raymond B.* Court's holding would not be inapposite to *Apprendi-Haymond* because it relates to a revocation of *probation,* not of supervised release, which is different from supervised release because probation, like parole, amounts to a suspension of all or part of the statutorily permissible sentence of incarceration in favor of an alternate and lesser sentence which can thereafter be revoked by judge-found facts and *for which the maximum sentence is only that which is already provided for by the underlying charge.* As such, none of the *Raymond B.* assignments of error required the Court to make a ruling on whether it was legally permissible for a judge to make

[2] It appears from the language of § 61-8B-5 that the Court could have, theoretically, escalated the sentence by imposing a fine of up to $10,000 because a fine is permitted under the statute, but the Supervised Release statute does not allow for a fine to be levied upon a revocation of supervised release.

findings of fact necessary to escalate a sentence of incarceration beyond that statutorily permitted for the conviction obtained.

II. IT WAS REVERSIBLE ERROR FOR THE COURT TO FIND BY CLEAR AND CONVINCING EVIDENCE THAT PETITIONER ENGAGED IN CONSPIRACY TO DISTRIBUTE CDS

Findings of fact by a Circuit Court are reviewed under a clearly erroneous standard. *State v. Hedrick*, 236 W.Va. 217, 778 S.E.2d 666, 672 (W. Va. 2015).

Here, the Circuit court's findings of fact that the state had established by clear and convincing evidence that Petitioner was engaged in a conspiracy to distribute crack-cocaine is clearly erroneous based on the testimony provided in support of the same.

The only evidence produced by the state in support of its allegations regarding conspiracy to distribute was the testimony of the arresting officer, Sgt. Justin Harper. Sgt. Harper testified that he encountered Petitioner when he conducted a traffic stop of a vehicle driven by Petitioner. *Revocation Transcript* (AR pg. 71), ll. 48:1-6. With Petitioner was one Joseph Garner. *Id.* at 48:12. Sgt. Harper testified that, upon asking Petitioner to step out of the vehicle, he witnesses signs of crack use around his seat, to wit, small pieces of copper scrub pad, push rods, and "corner bags" which would have previously held crack. *Id.* at 48:19-22; 51:7-10. He further testified that he searched Petitioner's person, and found no drugs on him, but did find a bag of crack-cocaine on Mr. Garner weighing 16 grams. *Id.* at 49:18-50:11. He further testified that when he asked Petitioner where they were headed, Petitioner advised that he was dropping Mr. Garner off at his home around the corner. *Id.* at 52:12-13. Harper further testified that officers then went to Mr. Garner's home, where they Mr. Garner's wife, Cynthia Allen, as well as Petitioner's wife, Heather White. *Id.* at 53:1-2. A subsequent warrant-based search of the home revealed $2700 in U.S. currency, 13.6 grams of powdered cocaine, 90 grams of marijuana, 6.7

grams of crack cocaine, some of which was actively being cooked at the time of search, 1.4 grams of suspected heroin, five suboxone strips, eight oxycodone pills, two pistols, and two digital scales. *Id.* at 54:1-9. Thereafter, all four individuals were arrested for felony drug conspiracy. *Id.* at 56:3. Officers at the scene did not obtain any statements from either female suspect regarding the alleged conspiracy. *Id.* at 56:10. Harper further testified that he was unable to attribute any of the cash found at the residence and the traffic stop as belonging to Petitioner, saying instead it belonged either to Mr. Garner or Ms. Allen. *Id.* at 56:17-23.

At no point did Officer Harper testify that he had obtained evidence that Petitioner and Mr. Garner had engage in a drug transaction at the 7-11 with a third party, or that they intended to do, nor did the state otherwise offer any evidence of the same.

On cross examination, Officer Harper admitted that there were a variety of legitimate and legal uses for copper scrub materials found in the vehicle. *Id.* at 59:15. He further admitted that, upon speaking to Petitioner outside of the vehicle, Petitioner did not provide any further information that suggested illegal activity. *Id.* at 60:3. He further stated that Mr. Garner claimed possession of the drugs found on his person. *Id.* at 61:9-13. He further stated that there was no other drugs found in the vehicle other than that found on Mr. Garner's person. *Id.* at 61:15-17. Regarding the evidence of drug packaging, Officer Harper elaborated that it was a single sandwich bag with a corner removed, and then another "empty bag or two that looked like it was a corner bags from a sandwich bag that drug had been in." *Id.* at 62:2-5. Officer Harper further admitted that it was possible that the corner bags founds in Petitioner's car could have simply been bags filled with drugs which had been given to Petitioner by Mr. Garner. *Id.* at 64:11. When asked if there was any other evidence proving Petitioner had engaged in a conspiracy to distribute drugs, Officer Harper noted only the presence of Petitioner's wife at Mr. Garner's

home with drugs in plain view. *Id.* at 65:5-6. However, contradicting himself, Officer Harper later admitted that he had charged Petitioner with conspiracy before going to Mr. Garner's home, indicating that nothing found therein would have factored into his belief that Petitioner was engaged in a conspiracy. *Id.* at 68:23-69:2.

When asked what evidence he had of an agreement necessary to charge Petitioner for conspiracy, Officer Harper reiterated the evidence he had already discussed, noting that "one subject has all the money [and] crack. The other subject has the car with signs of drug use and packaging material," and he further indicated that Ms. White being at Mr. Garner's home was proof of a conspiracy because "If he was buying crack from Mr. Garner inside the vehicle, there was a whole lot of crack already packaged at Mr. Garner's house so why would he need to drive anywhere to do a deal when his wife is sitting in plain view of a bunch of crack?" *Id.* at 67:1-7. In response, counsel for the Petitioner asked "Why does it have to be a deal? Maybe Mr. White and his wife who were in the throes of addiction showed up at their drug dealer's house and the drug dealer asked him to give him a ride to 7-eleven to purchase a Twinkie or a HoHo or a hot dog?" to which Officer Harper responded "I didn't see any signs of that but sure." *Id.* at 67:9-13. Counsel again queried "maybe they went to get a pack of cigarettes. Did you find any cigarettes on anybody?" to which Harper replied "I can't say whether I did or not. I very well may have but I can't say." *Id.* at 67:16-19. Officer Harper then admitted that there are "a million perfectly lawful and legitimate reasons that Mr. White might have been giving Mr. Garner a ride to and from 7-Eleven." *Id.* at 67:20-23. He further stated that he had no other evidence of agreement. Id. at 69:10. He further noted that no one in the house or anywhere else had provided any statement or other information that Petitioner was jointly engaged with Mr. Garner in the distribution of narcotics. *Id.* at 69:14-15. Officer Harper further agreed that mere presence at the scene of a

crime or observing the commission of a crime does not make one a participant. 71:19-22. Nevertheless, Harper insisted on reiterating "but when you factor in the fact that there's packaging materials in the car, signs of use in the car, I think all of those things go together to state that he entered into a conspiracy with him. If he knows that there's crack, if he sees him put it in his pants, if he sees and knows that there's packaging material in the car and signs of drug use in the car, I believe that is a conspiracy." 71:22-72:5.

Sadly, Officer Harper is entirely wrong, as a matter of law, in this belief. Being a witness to another individual who is possessing CDS, even with the intent to distribute, does not make one a co-conspirator.

Instead, the only crime for which any real evidence was produced was evidence that Petitioner had used crack-cocaine – a charge he readily admitted at his revocation hearing. Wv. Code § 62-12-26(h)(3) provides that a Defendant may be revoked on supervised release under the same rules and conditions as those for revocation of probation. Under those rules, specifically W.Va. Code § 62-12-10(2), simple possession of a controlled substance is punishable only by graduated sanctions, the first of which is a sixty day sanction. At the time of Petitioner's revocation hearing, he had already served 90 days. *See Revocation Transcript* (AR pg. 71) ll. 96:15.

As such, even if the Circuit Court was within its Constitutional authority to sentence Petitioner to an additional term of incarceration beyond the statutory maximum for Third Degree Sexual Assault, the Court further erred by sentencing him to 2 years incarceration upon an erroneous finding of Conspiracy to distribute and without any real evidence in support of the same.

VIII. CONCLUSION

For all the reasons asserted above, Petitioner requests that this Honorable Court reverse the decisions of the Circuit Court and remand the matter for further proceedings consistent with this opinion.

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RUSTY ALLEN WHITE
Defendant, Below, Petitioner.

CERTIFICATE OF SERVICE

I, Christian J. Riddell, Esq., attorney for the Petitioner, Rusty Allen White, do swear that a copy of the foregoing Brief for Appeal in this matter was served upon counsel, William E. Longwell, Assistant Attorney General, Office of the Attorney General – Appellate division, 1900 Kanawha Blvd., East, State Capitol Bldg. 6, Suite 406, Charleston, WV 25305 by USPS this 16th day of June, 2022.

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