IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-184



STATE OF WEST VIRGINIA
Respondent

v.

LAWRENCE DAVONN FOYE
Petitioner

# PETITIONER'S BRIEF

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## ASSIGNMENTS OF ERROR

1. The parole revocation order does not make a finding that the State met the burden of proof of a clear preponderance of the evidence, as required for a revocation of parole.

2. The Court did not apply the correct burden of proof of a clear preponderance of the evidence and the State's evidence did not meet this burden of proof.

3. The revocation of the petitioner's parole was based solely on hearsay evidence.

## STATEMENT OF CASE

The petitioner, Lawrence Foye, appeals from an Order revoking his home incarceration parole and sentencing him to prison for a term of one to five years. The revocation order does not state that the proper burden of proof of clear preponderance of the evidence was used in determining whether Mr. Foye violated his parole. The evidence at the parole hearing consisted solely of unreliable hearsay and the State did not meet its burden of proof.

**Procedural History**

The petitioner, Lawrence Foye, pleaded guilty to the offense of fleeing with reckless indifference, W.Va. Code § 61-5-17(f), on October 5, 2020. He was sentenced by the Circuit Court to home incarceration for a term of one to five years on December 8, 2021. (A.R. 8) Mr. Foye was paroled from this sentence on October 26, 2022. (A.R. 14) Pursuant to W.Va. Code § 62-11B-12, the Circuit Court has the authority of the parole board as to release on parole and revocation of parole in home incarceration cases.

Mr. Foye was arrested on January 27, 2023 on a Cabell County warrant charging him with first degree murder. The murder allegedly occurred on November 30, 2022. (A.R. 22) As of this writing, Mr. Foye has not been indicted in Cabell County.

On January 30, 2023 a petition for violation of parole was filed by the Kanawha County probation department. (A.R. 17) The petition alleged three violations: (1) Mr. Foye admitted to using marijuana on December 16, 2022; (2) Mr. Foye was charged with the offense of first degree murder occurring November 30, 2022; (3) Mr. Foye had contact with a disreputable person, Malik Hawk. Malik Hawk was also charged in the same Cabell County murder case. Mr. Foye was arrested with Malik Hawk on January 27, 2023.

**Revocation Hearing**

A parole revocation was held on February 24, 2023. Retired judge Dan O'Hanlon presided as a substitute for Judge Tabit. The hearing was conducted by video over Microsoft Teams. Two witnesses testified, Officer Brandon Adkins of the Huntington Police Department and probation officer Nona Black.

Officer Adkins was the investigating officer who charged Mr. Foye with murder in Cabell County. He was asked about a cooperating witness who provided details that led to identifying Lawrence Foye as a suspect. The petitioner made his first hearsay objection, which was denied. (A.R. 32)

Officer Adkins testified that a phone number associated with Mr. Foye was showing in Huntington at the time of the shooting according to cell tower data. He testified "We located a vehicle that was used during the incident, and at the time Mr. Foye was identified as the individual that was supposed to have that vehicle." A hearsay objection by the defendant was denied. (A.R. 33)

Officer Adkins identified Lawrence Foye as the person he charged with murder.

The petitioner moved for 26.2 statements before cross-examination. The motion was granted by the Court, but counsel was directed to proceed with cross-examination without receiving these statements. (A.R. 35-37)

Officer Adkins testified that Mr. Johnson was shot by an individual named Matthew Daughtery. He testified that Mr. Foye did not appear to be a possible shooter.

He was asked

> Q: And just to make sure I know what my question was, my question was he was not physically present at the shooting. We're in agreement with what my question was; right?
>
> A. Yeah. Standing – standing beside the person shooting, no. But as far as, like I said, maybe a half block away, yes.

Officer Adkins was further asked

> Q. So my question was, is he being charged as an aider and abettor?
>
> A. No. He's being charged with first degree murder
>
> Q. Okay, he didn't shoot the guy, right?

(A.R. 42-43) An objection by the State (asked and answered) was sustained by the Court.

The officer was asked "So there's no verbal or written communication from Mr. Foye indicating an intent to either rob or kill Mr. Johnson; is that correct?" He answered "As far as I know, correct." (A.R. 43) Mr. Foye did not make any incriminating statement at the time of his arrest. (A.R. 44)

The petitioner asked questions regarding the cooperating individual who identified Mr. Foye. The officer testified that the witness was at the scene of the crime. (A.R. 48) This person identified Mr. Foye through a photograph. (A.R. 49)

> Q. So is, like, the cooperating witness involved in all this?
>
> A. Yeah. I believe that – the individual is with him during the entire encounter, the entire event.

Q. Okay. So it's a fifth person?

A. Well that would be the cooperating witness.

Q. Yeah. Okay and that person is not charged?

A. This is still an ongoing investigation.

Q. Okay. Have they been given any promises as to being charged?

A. I'm not sure what the prosecution – I'm not sure. I don't know what the exact answer is to that.

(A.R. 49-50)

Probation Officer Nona Black testified regarding allegations 1 and 3 in the petition to violate probation, use of marijuana and contact with a disreputable person. The petitioner informed the Court that he was not contesting those violations. (A.R. 50)

Ms. Black testified that Mr. Foye admitted to her, on December 16, 2023, that he used marijuana. Her information about contact with the disreputable person came from the criminal complaint charging Mr. Foye with murder. (A.R. 53)

In argument regarding the evidence, the State asked the Court to "find reasonable cause to believe that the defendant had violated his parole." (A.R. 55)

Petitioner's counsel stated: "I didn't brush up on the standard for a parole revocation before I came in and – but I'm under the impression that it's not reasonable cause, that it's clear and convincing evidence, but I could be wrong on that. But probable cause – whatever reasonable cause means – because it's a very unusual burden of proof to hear – it means something more than probable case." (A.R. 56)

Discussing the unnamed cooperating individual, counsel stated:

Now, we don't have his name, but we've got him – I can't see the difference in what this person's involvement is supposed to be and what Lawrence Foye's involvement is

> supposed to be. If he's in the vehicle to travel to Huntington and that the possible shooter got in the car and continued in the vehicle, if this informant was there, he's just as implicated as anybody else, which goes to the credibility of whatever information we're supposed to have from him, which is very little anyway, but there's no reason to believe an unnamed person who could be just as implicated as Lawrence Foye. And there's no evidence outside of that. There's no independent evidence other than this unnamed person putting Lawrence Foye at the scene.

(A.R. 57)

Counsel stated "…that doesn't mean that this Court heard any evidence under any burden of proof to find that Mr. Foye committed a murder, is guilty as an aider and abettor to murder." (A.R. 58)

Counsel for the State cited and read W.Va. Code § 62-12-19(a)(1) stating the standard for a parole revocation hearing is "reasonable cause to believe that the defendant has violated parole." (A.R. 58)

The Court found that Mr. Foye had violated parole and sentenced him to one to five years in the penitentiary. The Order was entered on March 2, 2023.

## SUMMARY OF ARGUMENT

The burden of proof at a parole violation hearing is a clear preponderance of the evidence. In this case, the Court's order was based on a lesser burden of proof, reasonable cause, over the objection of the petitioner. The evidence at the hearing did not satisfy the correct burden of proof. The evidence at the violation hearing consisted solely of hearsay, denying the petitioner his right to confrontation and cross-examination of witnesses. Therefore, the order violating the petitioner's parole and sentencing him to the penitentiary should be reversed.

## STATEMENT REGARDING ORAL ARGUMENT

The Petitioner requests a Rule 20 oral argument in this case. The case involves a violation of the petitioner's due process rights and has resulted in his incarceration.

## ARGUMENT

This Court has established the constitutionally required burden of proof for a parole or probation violation. "Where a probation violation is contested, the State must establish the violation by a clear preponderance of the evidence." Syllabus Point 4, *Sigman v. Whyte,* 165 W. Va. 356, 356, 268 S.E.2d 603, 604 (1980). This burden of proof was not used at Mr. Foye's revocation hearing and was not met at the revocation hearing.

Mr. Foye was on parole from his home incarceration sentence. A person sentenced to home incarceration is placed on parole, not probation, because home incarceration is considered to be the equivalent of a prison sentence. The sentencing court may place the defendant on parole after they have served the minimum statutory sentence. W.Va. Code § 62-11B-12.

Parole from home incarceration is supervised by the probation office of the sentencing court. Parole violation proceedings are conducted under rules provided by the probation revocation statute, § 62-12-10.

The standard of appellate review for probation revocation has been established by this Court.

> When reviewing the 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).

Syllabus Point 1, *State v. Brown*, 215 W.Va. 664, 600 S.E.2d 561 (2004). In this case, issues involving the burden of proof are questions of law which are subject to *de novo* review. The issue of sufficiency of the evidence is reviewed under a clearly erroneous standard.

Probation revocation proceedings involve a person's liberty and must meet Constitutional standards.

> The final revocation proceeding required by the due process clause of the Fourteenth Amendment and necessitated by *W.Va.Code,* 62-12-10, *as amended,* must accord an accused with the following requisite minimal procedural protections: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing officer; [and] (6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation." Syl. pt. 12, *Louk v. Haynes,* 159 W.Va. 482, 223 S.E.2d 780 (1976).

Syllabus Point 2, *State v. Brown*, 215 W. Va. 664, 600 S.E.2d 561 (2004)

The burden of proof of clear preponderance of the evidence is also constitutionally required. This Court explained why this burden of proof was required:

> In order to allay fears that the revocation proceeding will be abused by the law enforcement authorities we require that the evidence against the probationer be proven by a clear preponderance of the evidence.
>
> In requiring that the evidence be proven by a clear preponderance we have exceeded the standard of a preponderance of evidence which has been recommended by the ABA Project on Standards for Criminal Justice, Standards Relating to Probation, s 5.4(a)(iii), at 65 (Approved Draft 1970).

*Sigman v. Whyte*, 165 W. Va. 356, 362, 268 S.E.2d 603, 607 (1980)

The Home Incarceration statute specifically provides that parole revocation proceedings are conducted under the procedures contained in the probation violation statute. But the burden of proof is the same, regardless of whether the defendant is on parole or on probation. "Parole and probation revocation proceedings are, of course, equivalent in terms of the requirements of due process." *Sigman v. Whyte*, 165 W. Va. 356, 359 n.4, 268 S.E.2d 603, 605 (1980)(citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3, 93 S.Ct. 1756, 1759 (1973)).

The Home Incarceration statute contains the phrase "reasonable cause to believe that the person paroled has violated . . ." W.Va. Code § 62-11B-12. "Reasonable cause." was cited by the prosecuting attorney in argument (A.R. 58) and is contained in the revocation order (A.R. 1) If reasonable cause was ever considered the burden of proof in a parole violation context, it has

long given way to the burden of proof required by this Court. The *Sigman* decision does not even mention the phrase "reasonable cause." In considering what due process required, "reasonable cause" could never be an adequate burden of proof.

The burden of proof in this parole hearing was not a matter of semantics. The hearing was practically devoid of any substantive evidence against Mr. Foye. Only through a misunderstanding and misstatement of the burden of proof could there be a finding of a parole violation on the record of this case.

The Home Incarceration statute provides for the revocation of parole in W.Va. Code § 62-11B-12.

> If at any time during the period of parole there is reasonable cause to believe that the person paroled has violated the terms and conditions of his or her parole, he or she shall be subject to the procedures and penalties set forth in [W.Va. Code § 62-12-10]. If at any time during the period of parole from home incarceration there is reasonable cause to believe that the person paroled has violated the terms and conditions of his or her parole and the home incarceration was imposed as an alternative sentence to another form of incarceration, he or she shall be subject to the same penalty or penalties as he or she could have received at the initial disposition hearing.

**The Evidence did not meet the Burden of Proof**

A preliminary question which must be considered prior to a determination of the adequacy of the evidence is the nature of the charge or allegation against Mr. Foye. Mr. Foye is not alleged to have shot Mr. Johnson. He is not alleged to have been present at the shooting. He was "fifteen seconds apart." (A.R. 41) He is alleged to have picked up the possible shooter in a vehicle that he was driving. He is not charged with being an accessory after the fact. He is not charged with conspiracy with other persons to commit the crime of murder.

West Virginia law provides for the prosecution of accessories.

> (a) In the case of every felony, every principal in the second degree and every accessory before the fact shall be punishable as if he or she were the principal in the first degree;

> and every accessory after the fact shall be confined in jail not more than one year and fined not exceeding $500.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, any person who knowingly harbors, conceals, maintains or assists the principal felon after the commission of the underlying offense violating the felony provisions of [§ 61-2-1, 4, and 9, murder] or gives such offender aid knowing that he or she has committed such felony, with the intent that the offender avoid or escape detention, arrest, trial or punishment, shall be considered an accessory after the fact and, upon conviction, be guilty of a felony

W. Va. Code § 61-11-6.

> The definition of these accessories has been clearly explained by this Court.
>
> A person who is the absolute perpetrator of a crime is a principal in the first degree, and a person who is present, aiding and abetting the fact to be done, is a principal in the second degree.
>
> An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact. Syllabus Point 2, *State ex rel. Brown v. Thompson,* 149 W.Va. 649, 142 S.E.2d 711, *cert. denied,* 382 U.S. 940, 15 L.Ed.2d 350, 86 S.Ct. 392 (1965).
>
> The chief difference between a principal in the second degree and an accessory before the fact is that the former is actually or constructively present at the time and place of the commission of the offense, while the latter is absent.

Syllabus Points 5, 6, 7, *State v. Fortner*, 182 W. Va. 345, 349, 387 S.E.2d 812, 816 (1989)

Mr. Foye cannot be charged as a principal in the second degree because he is not alleged to have been present at the time of the offense. He has not been charged as an accessory after the fact under W.Va. Code § 62-11-6(b). The only way to be charged as an accessory before the fact is if he aided and abetted the commission of the crime. "An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact." *State v. Fortner*, *Id.*

Officer Adkins was directly asked whether Mr. Foye was being charged as an aider and abettor. He clearly answered No. Without a proper theory of prosecution, the Court cannot make a finding that the parolee committed a crime.

If Mr. Foye was alleged to have aided and abetted the crime of murder, counsel would have asked specific questions regarding the elements discussed in the *Fortner* case. When the investigating officer testified that Foye was not being charged under this accessory theory, there was no reason to ask any questions along those lines.

**The Court's Order does not find that the State's Evidence met the required Burden of Proof**

The revocation order states "based on the evidence and testimony heard by the Court, the Court finds reasonable cause to believe the defendant-probationer violated his parole based on the allegations contained in paragraphs one, two, and three" of the revocation notice. (A.R. 1) Nowhere, does the Order state that the evidence met the proper burden of proof of clear preponderance of the evidence.

The record of the violation hearing makes clear that this was not a typographical error. The State provided an incorrect burden of proof at the violation hearing and prepared an order repeating the incorrect standard. This is not a case where the Court considered the evidence under the correct legal standard, but signed a document with an inadvertent error.

The petitioner objected to the "reasonable cause" standard provided by the prosecutor:

> I didn't brush up on the standard for a parole revocation before I came in and – but I'm under the impression that it's not reasonable cause, that it's clear and convincing evidence, but I could be wrong on that. But probable cause – whatever reasonable cause means – because it's a very unusual burden of proof to hear – it means something more than probable cause . . . but it's not a legal standard for revocation of probation.

(A.R. 56)

This off-the-cuff legal argument misstated the burden of proof. Counsel stated "clear and convincing evidence" rather than "clear preponderance." However the objection to reasonable cause was preserved and a standard of clear and convincing evidence would have been an adequate basis to find a parole revocation.

The prosecuting attorney cited the inapplicable reasonable cause language from West Virginia Code § 62-12-19. The Court stated "That is correct, and I will revoke the parole based on all three things." (A.R. 59)

The order prepared by the prosecuting attorney preserved the error. The Circuit Court has not made a finding that the State proved violations of parole by a clear preponderance of the evidence. For that reason, the Court's order must be reversed.

**Revocation was based solely on Hearsay Evidence**

"Although a revocation of probation may not be based on hearsay evidence alone, a revocation of probation will stand even though hearsay evidence was introduced at a hearing, provided there was additional competent evidence sufficient to support the revocation. *State v. Stuckey*, 174 W. Va. 236, 239, 324 S.E.2d 379, 381–82 (1984)(per curiam) (quoting 21 Am.Jur.2d *Criminal Law* § 579 (1981)).

The evidence connecting Mr. Foye to the shooting was hearsay evidence alone. The petitioner objected to this hearsay and the denial of confrontation and cross-examination of the unnamed informant.

There was some non-hearsay evidence at the hearing but it did not directly link Mr. Foye to a murder charge. The most direct independent evidence was the testimony that a cellphone number belonging to Mr. Foye was in Huntington around the time of the incident. (A.R. 33)

Officer Adkins did not testify to any details regarding the time and precise location of this cellphone information. No report was provided to the petitioner or placed in evidence.

Officer Adkins testified regarding surveillance video he observed. The video showed a white and black SUV. The suspect Matthew Daughtery arrived at the scene in the white SUV. He is seen running from the scene after the shooting and is apparently picked up and driven away by the black SUV.

All other substantive evidence was derived from the hearsay informant. The hearsay informant identified Mr. Foye from a photograph. The hearsay informant told the police that Mr. Foye was in the black SUV allegedly involved in picking up the shooter. The hearsay informant is the one who makes the claims regarding the travel of the two vehicles and the planning which took place between the four suspects. (A.R. 49)

On cross-examination it was revealed that the cooperating person had been in the vehicle allegedly driven by Mr. Foye. This person allegedly had just as much involvement as Mr. Foye. Officer Adkins testified that he did not know whether there had been a decision made to charge this person.

Not only was this information, hearsay, but it is a type of hearsay that has been regularly deemed unreliable. This Court has stated:

> A confession of an accomplice which inculpates the accused is presumptively unreliable. Where the accomplice is unavailable for cross-examination, the admission of the confession, absent sufficient independent "indicia of reliability" to rebut the presumption of unreliability, violates the Sixth Amendment right of confrontation. Syl. Pt. 2, *State v. Mullens,* 179 W.Va. 567, 371 S.E.2d 64 (1988); Syl. Pt. 1, *State v. Marcum,* 182 W.Va. 104, 386 S.E.2d 117 (1989); Syllabus Point 1,

Syllabus Point 1, *State ex rel. Jones v. Trent*, 200 W. Va. 538, 539, 490 S.E.2d 357, 358 (1997)(per curiam). *Jones v. Trent* was a probation violation case which is directly applicable to the Court's review.

The United States Supreme Court addressed the issue decisively in *Lilly v. Virginia*. "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." 527 U.S. 116, 134, 119 S. Ct. 1887, 1899 (1999). The *Crawford* opinion included an extensive discussion of *Lilly*. It made clear that statements by accomplices were "core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. 36, 63-64, 124 S.Ct. 1354, 1371 (2004).

The prosecutor in Mr. Foye's hearing responded to a hearsay objection with the statement: "This is a parole revocation hearing and the rules of evidence don't apply." This is the type of statement that inevitably is followed with improper, unreliable evidence and a denial of due process rights.

Rule 1101 of the West Virginia Rules of Evidence provides:

> (b) **Rules Inapplicable.** Unless otherwise provided by rules of the Supreme Court of Appeals, these rules other than those with respect to privileges do not apply in the following situations:
>
> . . .
>
> **(3) Miscellaneous Proceedings.** Sentencing; granting or revoking probation or supervised release; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.

One reading of Rule 1101 could be that when the West Virginia Rules of Evidence don't apply, then the Court should revert to the common law of evidence. Another reading would be that it places the Court on the tenuous ground of considering any evidence by some makeshift test of reliability without resort to established legal principles.

Regardless of whether the rules of evidence apply, there is a hearsay rule specifically applicable to revocation hearings. A defendant has "(4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing

confrontation)." Syllabus Point 2, *State v. Brown,* 215 W. Va. 664, 600 S.E.2d 561 (2004). Rule 32.1(D) of the West Virginia Rules of Criminal Procedure requires "The opportunity to question adverse witnesses"

The record does not reflect good cause for failure to present the hearsay informant. The Court did not find good cause. The nature of the hearsay informant and her basis of knowledge was not discussed at all at the time of the initial hearsay objection. Upon cross-examination the Court learned that the hearsay informant was a likely accomplice to the crime, rendering her information unreliable. In admitting the hearsay, the Court denied Mr. Foye the right to confront and cross-examine the only substantive witness.

The concept that "the rules of evidence don't apply" suggests a lawless proceeding, a mere formality inevitably resulting in the incarceration of a defendant. That is not the case.

> In the evidentiary context, the fact that the West Virginia Rules of Evidence do not apply to probation revocation proceedings is somewhat mitigated by the following observation set forth in *State v. Evans, supra:* "We observe that the inapplicability of the rules of evidence to probation revocation proceedings does not mean that there are no constitutional limitations that may apply to evidence used in such proceedings." 203 W.Va. at 448 n. 2, 508 S.E.2d at 608. In that regard, due process of law and the right of confrontation were among the authorities cited by this Court in *State v. Stuckey,* 174 W.Va. 236, 324 S.E.2d 379 (1984), a case in which this Court reversed the determination of the Circuit Court of Marion County that a youthful offender was unfit to remain at the Anthony Correctional Center and should be sentenced to the penitentiary.
>
> In *Stuckey,* this Court compared the Circuit Court's determination of unfitness to a violation of probation and concluded that, inasmuch as the majority of foreign jurisdictions hold that a probation revocation cannot be based upon hearsay alone, the Circuit Court committed error in relying solely on hearsay in its determination that the youthful offender had engaged in conduct warranting his expulsion from the Anthony Correctional Center.

*State v. Brown*, 215 W. Va. 664, 667, 600 S.E.2d 561, 564 (2004).

> This Court agrees with that assessment and is of the opinion that the Circuit Court committed error in relying entirely upon hearsay to resolve the most critical issue in the proceedings. Beyond stating that the West Virginia Rules of Evidence do not apply to probation revocation proceedings, the Circuit Court never set forth a specific reason for overruling appellant Brown's objection to Officer Arnold's testimony. The record does

> not indicate that the Circuit Court considered whether the unnamed laboratory technician was unavailable to be called as a witness. Nor does the record reveal why the Circuit Court did not observe appellant Brown's right of confrontation in that regard. *See,* syl. pt. 12, *Louk, supra.*

*State v. Brown*, 215 W. Va. 664, 668, 600 S.E.2d 561, 565 (2004)

**The Order revoking parole does not meet Constitutional standards**

A review of the record demonstrates that Mr. Foye was denied his due process rights in other ways. The defendant is entitled to 2) disclosure to the probationer of evidence against him. *Brown, Id.* W.Va.R.Crim.P. Rule 32.1(2)(B). Officer Adkins testified to cell tower records of Mr. Foye's phone number. These records were not provided to the defendant or the Court.

Due Process requires "6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation." *Brown, Id.* Rule 32.1(2)(D). In this case, the Court's order summarily states "Based on the evidence and testimony heard by the Court, the Court finds reasonable cause to believe that the defendant-probationer violated his parole based on the allegations in paragraphs one, two and three as alleged." This written statement does not meet the requirements of due process. In this case it was established that Mr. Foye was not present at the shooting. There were issues raised regarding the nature of the charge and theory of prosecution. There were objections to the hearsay evidence and the reliability of the hearsay evidence that was introduced. There should have been a record by the Court addressing these issues and establishing the factual basis for the ruling.

In the absence of such a record, there should not be an attempt by the Respondent to suggest a theory of prosecution, a theory of admissibility of the testimonial hearsay, or an argument as to how the State met the burden of proof. These issues were not presented to the Circuit Court. At best, the case should be remanded for a hearing that complies with required due process standards and a ruling based on the required burden of proof.

**The remaining technical violations of parole should have been resolved through graduated sanctions**

In addition to the murder charge, the petition for parole violation contained two other violations. Mr. Foye was alleged to have used marijuana in December 2022. He is alleged to have had contact with a disreputable person in January 2023. At the hearing, the petitioner informed the Court that he was not contesting these violations. His probation officer, Nona Black, testified regarding these violations and was not cross-examined.

These violations were part of the violation hearing, but by themselves would not justify a revocation of parole and imposition of a prison sentence. The graduated sanctions statute provides for a jail sanction on a violation of parole other than commission of a felony or absconding. The penitentiary sentence was based on the murder allegation, not these lesser violations.

If the Court finds that the State did not meet its burden of proof regarding the murder allegation, revocation of parole cannot be based on the two lesser violations which were established at the hearing. These "technical" violations would be covered under the graduated sanctions statute and should have resulted in a jail sanction and reinstatement to parole.

West Virginia Code § 62-12-10 is the probation revocation statute, which applies to home incarceration parole revocations. It provides for graduated jail sanctions for minor violations of probation. In West Virginia trial courts, these violations are generally called "technical violations."

> (1) If the court or judge finds reasonable cause exists to believe that the probationer:
> (A) Absconded supervision;
> (B) Engaged in new criminal conduct other than a minor traffic violation or simple possession of a controlled substance; or
> (C) Violated a special condition of probation designed either to protect the public or a victim; the court or judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed and order that sentence be executed.

> (2) If the judge finds that reasonable cause exists to believe that the probationer violated any condition of supervision other than the conditions of probation set forth in subdivision (1) of this subsection then, for the first violation, the judge shall impose a period of confinement up to sixty days or, for the second violation, a period of confinement up to one hundred twenty days. For the third violation, the judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed and order that sentence be executed, with credit for time spent in confinement under this section.

Murder would clearly fall under the category of new criminal conduct. Use of marijuana falls under the exception for simple possession of a controlled substance. Contact with a "disreputable person" is also a minor violation which would fall under subsection (2). Not only is this prohibition a relatively minor violation, it is also phrased in confusing archaic language and might be so broad as to be unreasonable.

If this case is remanded for insufficiency of the evidence regarding the murder allegation, the Circuit Court should be directed to impose a graduated sanction and reinstate the petitioner to parole.

## CONCLUSION

WHEREFORE, the petitioner respectfully prays this Honorable Court for an Order reversing the Circuit Court's revocation order and remanding the matter with directions to reinstate the petitioner's parole.

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CERTIFICATE OF SERVICE

I, John Sullivan, hereby certify that on June 13, 2023 a true and accurate copy of this brief and appendix record were served upon counsel for respondent, Jason Parmer, Assistant Attorney General, 1900 Kanawha Boulevard E, Building 6, Suite 406, Charleston, WV 25305 by use of the Court's e-filing system.

John Sullivan