
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-184

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STATE OF WEST VIRGINIA,

Respondent,

v.

LAWRENCE FOYE,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the
Circuit Court of Kanawha County
Case No. 18-F-306

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction.....	1
Assignment of Error.....	1
Statement of the Case.....	1
Summary of the Argument.....	5
Statement Regarding Oral Argument and Decision.....	6
Argument	6
A. Standard of Review	6
B. The State presented sufficient evidence to revoke Petitioner’s parole	6
1. The Court applied the correct burden of proof in Petitioner’s revocation hearing	6
2. The State’s evidence established reasonable cause to believe that Petitioner was involved in the Cabell County murder	7
3. The State presented evidence establishing reasonable cause to believe Petitioner violated the conditions of his parole by using marijuana and contacting a disreputable person	8
C. Petitioner’s parole revocation was not solely based upon hearsay, and the court did not abuse its discretion because the Rules of Evidence do not apply in revocation hearings ...	9
D. Petitioner’s revocation hearing satisfied due process requirements	13
E. The State established reasonable cause to believe Petitioner was involved in a murder and violated a no contact provision of his parole; thus, the Court properly imposed sentence on the underlying crime of Fleeing	15
Conclusion	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Canterbury v. Laird</i> , 221 W. Va. 453, 655 S.E.2d 199 (2007).....	13
<i>Conrad v. Council of Senior Citizens of Gilmer County, Inc.</i> , No. 14-1262, 2016 WL 6778918 (W. Va. Supreme Court, Nov. 16, 2016).....	13
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	10
<i>State ex rel. Grob v. Blair</i> , 158 W. Va. 647, 214 S.E.2d 330 (1975).....	15
<i>Koerner v. West Virginia Dep’t. of Military Affairs & Pub. Safety</i> , 217 W. Va. 231, 617 S.E.2d 778 (2005).....	13
<i>Lilly v. Virginia</i> , 527 U.S. 116 (1999).....	12
<i>Louk v. Haynes</i> , 159 W. Va. 482, 223 S.E.2d 780 (1976).....	14
<i>Sigman v. Whyte</i> , 165 W. Va. 356, 268 S.E.2d 603 (1980).....	7, 8, 10
<i>State v. Brown</i> , 215 W. Va. 664, S.E.2d 561 (2004).....	12, 13
<i>State v. Cooper</i> , 167 W. Va. 322, 280 S.E.2d 95 (1981).....	8
<i>State v. Duke</i> , 200 W.Va. 356, 489 S.E.2d 738 (1997).....	6
<i>State v. Evans</i> , 203 W. Va. 446, 508 S.E.2d 606 (1998).....	10
<i>State v. Fraley</i> , 163 W. Va. 542, 258 S.E.2d 129 (1979).....	10
<i>State v. Goff</i> , 168 W. Va. 285, 284 S.E.2d 362 (1981).....	14

<i>State v. Hann</i> , No. 13-1050, 2014 WL 1686895 (W. Va. Supreme Court, Apr. 28, 2014) (Memorandum Decision)	7
<i>State v. Henry</i> , No. 13-1248, 2015 WL 2402464 (W. Va. Supreme Court, May 18, 2015) (Memorandum Decision)	7
<i>State v. Ketchum</i> , 169 W. Va. 9, 289 S.E.2d 657 (1981)	7, 8
<i>State v. Kitchen</i> , No. 17-0607, 2018 WL 5778990 (W. Va. Supreme Court, Nov. 2, 2018) (Memorandum Decision)	16
<i>State v. Krystal M.</i> , No. 14-0737, 2015 WL 1740302 (W. Va. Supreme Court, Apr. 13, 2015) (Memorandum Decision)	16
<i>State v. Mann</i> , I.D. No. 1501012702, 2016 WL 1605512 (Del. Super. Ct., Apr. 1, 2016)	11
<i>State v. Pierce</i> , No. 16-1034, 2017 WL 4772877 (W. Va. Supreme Court, Oct. 23, 2017) (Memorandum Decision)	16
<i>United States v. Shakir</i> , No. 13-6567, 574 Fed.Appx. 712 (6th Cir. 2014)	12
Statutes	
W. Va. Code § 62-11B-12(b) (Home Incarceration Act)	6
W. Va. Code § 62-12-9	16
W. Va. Code § 62-12-10(a)(1)	15
W. Va. Code § 62-12-10(a)(1)(B)	7, 16
W. Va. Code § 62-12-10(a)(1)(C)	16, 17
W. Va. Code § 62-12-10	6, 7, 9
Other Authorities	
W. Va. R. Crim. P. 52(a)	12
W. Va. R. Evid. 1101(b)(3)	10, 11

W. Va. R. App. P. 18(a)(3)-(4)	5
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INTRODUCTION

Respondent State of West Virginia responds to Lawrence Davonn Foye's ("Petitioner") brief. Petitioner pleaded guilty to Fleeing in a Vehicle with Reckless Indifference and was sentenced to home confinement in 2018. Subsequently, Petitioner was released from home confinement to court-supervised parole in October 2022. In January 2023, the State filed a petition to revoke Petitioner's parole. Petitioner complains that the court erred when weighing the evidence presented at his revocation hearing, and asks this Court to reinstate Petitioner's parole. But the State presented evidence establishing reasonable cause to believe Petitioner committed three violations of parole. First, Petitioner is charged with a new crime, i.e., murder. Second, he had contact with a disreputable person who is his co-defendant in the murder case. And third, he used marijuana. Considering the evidence presented at the revocation hearing, the court did not abuse its discretion when it revoked his parole and imposed the underlying sentence for Fleeing.

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.

Pet'r's Br. 1.

STATEMENT OF THE CASE

In June 2018, Petitioner was indicted for Fleeing in a Vehicle with Reckless Indifference (Count One) and Possession of a Firearm by a Prohibited Person (Count Two). App. 5-7. In October 2020, Petitioner pleaded guilty to Fleeing and was sentenced to 1-5 years in prison. App. 8-9. The circuit court suspended the execution of Petitioner's sentence in favor of home

incarceration. App. 8-12. Subsequently, Petitioner filed a motion to reconsider his sentence and the court granted this motion in October 2022, placing Petitioner on one year of parole supervised by the Kanawha County Probation Department. App. 8-12. The conditions of Petitioner's parole are set forth in the court's order. App. 14-16. In relevant part, these conditions prohibit Petitioner from violating any law, "consorting with disreputable persons," or using any illegal drug. App. 14-15.

On January 30, 2023, a Kanawha County Probation Officer filed a Petition to Revoke Petitioner's Parole. App. 17-26. This Petition alleges three violations of the conditions of parole, to-wit: 1) Petitioner voluntarily admitted using marijuana; 2) on January 24, 2023, Petitioner was charged with the Murder of Christopher Johnson in Cabell County; and 3) Petitioner made contact with a disreputable person, Malik Hawk, who was in a vehicle with Petitioner at the time of the murder. App. 20-21. Both the criminal complaint charging Petitioner with murder and a "voluntary admission form" in which Petitioner admitted to using marijuana were attached to the petition. App. 22-26. At the revocation hearing, Petitioner did not contest the first and third allegations regarding marijuana use and contact with a disreputable person. App. 50, 51, 56. Petitioner did not testify or present any evidence at his parole revocation hearing. App. 1-2, 27-62.

Before his revocation hearing, Petitioner had a preliminary hearing on the murder charge in Cabell County Magistrate Court and the court found probable cause to bind his case over to the grand jury for indictment. App. 34-35. Huntington Police Detective Brandon Adkins testified at Petitioner's preliminary hearing, and, in the instant case, provided a factual basis for the second ground of the revocation petition by testifying to the evidence of Petitioner's involvement in the murder. App. 17-18, 34-35, 38-40.

At the revocation hearing, Adkins testified that Petitioner, along with Demarquis Patterson, Malik Hawk, and Matthew Daughtery, traveled from Charleston to Huntington in two separate vehicles to meet the decedent, Christopher Johnson. App. 38-39. At this meeting, Daughtery, and possibly Patterson, shot Johnson. App. 38-39. Immediately after the shooting, Daughtery got into a vehicle driven by Petitioner and fled the scene. App. 42-45. A cooperating witness who was with Petitioner “during ... the entire event” identified Petitioner as a participant in the murder. App. 32-33, 46-50. Further, surveillance video from the scene of the murder shows a black SUV matching the description of the Chevrolet Blazer that Petitioner drove to Huntington. App. 33. Adkins further reviewed subscriber information obtained from Petitioner’s cell phone company, which reflected that Petitioner’s cellphone “was in Huntington around the time of the incident.” App. 33. In sum, the evidence presented by Adkins established that Petitioner was at the scene of the murder and “the vehicle that was used in the shooting was in the possession of [Petitioner].” App. 44-45.

The murder complaint is attached to the petition to revoke probation, and Detective Adkins read the complaint into evidence at the revocation hearing. App. 22-23, 38-40. In relevant part, the complaint filed by Detective Adkins alleged as follows –

Based upon information obtained through a cooperating witness, the defendant, [Petitioner] Lawrence Foye, along with Matthew Daughtery, Malik Hawk, and Demarquis Patterson traveled from the Charleston, WV area to Huntington, WV in two separate vehicle, identified as a white Chevrolet Malibu ... and a black Chevrolet Blazer.... Once in Huntington, WV, the individuals traveled to the Altizer area and began to contact [the victim] Mr. Johnson to set up meeting him. The individuals then separated and entered back into the two vehicles and traveled to the area of 18th Street and Artisan Avenue. Once in the area, Matthew Daughtery and Demarquis Patterson exited the white Chevrolet Malibu. The cooperating witness stated that once they were out of the vehicle, the cooperating witness began to hear gunshots. Mr. Patterson entered back into the white Chevrolet Malibu and left the area. *Matthew Daughtery did not return to the vehicle and was picked up by the black Chevrolet Blazer, which was occupied by Malik Hawk and [Petitioner] Lawrence Foye....* After the shooting, all individuals involved returned back to the Charleston, WV area. According to the cooperating witness, [Petitioner], and other participating individuals, had firearms in their possession at the time of traveling to

Huntington, WV. The cooperating witness stated that to their belief, [Petitioner] and other individuals were planning to rob Mr. Johnson.... Based upon the evidence in its totality, [Petitioner] Lawrence Foye, along with Matthew Daughtery, Malik Hawk and Demarquis Patterson, willfully and deliberately participated in the events that ultimately led to the death of Christopher Johnson.

App. 22-23 (emphasis added).

After Adkins concluded his testimony, the State called Petitioner's probation officer Nona Black to testify. Before Black testified, the following colloquy occurred –

MR. SULLIVAN [Petitioner's counsel] – Your Honor, I want to note before the testimony, we're not going to contest this violation in paragraph 1 about using marijuana in violation of – in paragraph 3 about being in contact with a disreputable person. We're not contesting these violations. I'm not sure if the testimony of the probation officer is going to be necessary.

MS. CRANE [Prosecutor] – Your Honor, the State would accept his admissions to paragraphs 1 and 3. Obviously, paragraph 2 is in dispute.

THE COURT – I'm not so sure that he did what you just said. There's a difference between him saying that they're not going to go against it and you saying that he's admitting it. Let's just see which it is. ... Which is it, counsel?

MR. SULLIVAN – Your Honor, my phrase was not contesting, which means that the defendant accepts and agreed to a finding on those issues by the Court. I didn't plan to have him give a sworn admission. But for the legal purpose of this hearing, we'll accept those violations and understanding that they can lead to revocation.

App. 50-51.

The State proceeded with its case and presented evidence from Petitioner's probation officer Nona Black, who provided a factual basis for the first and third grounds of the revocation petition. App. 17-18, 51-55. In October 2022, Black began supervising Petitioner on parole. App. 52. Less than two months later, Petitioner signed a voluntary admission form, witnessed by Black, in which he admitted to using marijuana on December 16, 2022. App. 26, 53. Petitioner's use of marijuana, an illegal drug, violated the conditions of his parole. App. 1-2, 15.

Black further testified that her allegation of Petitioner's contact with a disreputable person, Malik Hawk, is based upon allegations contained in the murder complaint filed against Petitioner. App. 54. As previously noted, Petitioner did not contest the State's allegation that he had prohibited contact with Hawk. App. 50, 51, 56.

After Black's testimony, Petitioner's counsel reiterated "I'm not contesting the violations in No. 1 and No. 3, but I do contest the murder charge." App. 56. With regard to the murder charge, Petitioner argued that the State did not meet its "burden of proof to find that Mr. Foye committed a murder [or] is guilty as an aider and abettor to murder." App. 56-58. The State responded it met its burden of proof by presenting Detective Brandon Adkins to testify about his investigation of the murder. App. 58. Further, the State pointed out that the Cabell County Magistrate Court found probable cause to bind the murder charge over to the grand jury. App. 58. The State argued that Petitioner's murder charge is new criminal conduct justifying imposition of his underlying sentence for Fleeing. App. 58-59. The court agreed with the State and revoked Petitioner's parole and imposed the underlying sentence for Fleeing. App. 60-61. The court's final order found "reasonable cause to believe [Petitioner] violated his parole based on allegations contained in paragraphs one, two, and three as alleged in" the State's motion to revoke parole. App. 1-2.

SUMMARY OF ARGUMENT

The State presented evidence that established reasonable cause to believe Petitioner violated three conditions of his parole. Petitioner was involved in a murder, illegally used marijuana, and contacted a disreputable person who is his co-defendant in the murder case. Petitioner did not contest two of the State's allegations that he used marijuana and had contact with a disreputable person, the latter of which violated a special condition of parole. Further, the court heard substantial evidence proving Petitioner's involvement in a murder. The court found

reasonable cause to believe the State's allegations, and properly revoked Petitioner's parole and imposed the underlying sentence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3)-(4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

ARGUMENT

A. Standard of review.

"[W]hen 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).

B. The State presented sufficient evidence to revoke Petitioner's parole.

1. The Court applied the correct burden of proof in Petitioner's revocation hearing.

Petitioner incorrectly argues that the court applied the wrong evidentiary standard when it found "reasonable cause" to believe Petitioner violated his parole. Pet'r's Br. 10-11. When a circuit court conducts a parole revocation hearing for a person on home confinement, it applies the procedures and penalties set forth for probation revocation. W. Va. Code §§ 62-11B-12(b) (Home Incarceration Act); 62-12-10 (Violation of Probation). The legislature revised West Virginia Code § 62-12-10 in 2013, abrogating this Court's precedent on the State's burden of proof at probation revocation hearings. Before this statutory change, there was no burden of proof specified in West

Virginia Code § 62-12-10 and this Court filled the gap, holding “[w]here a probation violation is contested, the State must establish the violation by a clear preponderance of evidence.” Syl. Pt. 4, *Sigman v. Whyte*, 165 W. Va. 356, 268 S.E.2d 603 (1980); W. Va. Code § 62-12-10 (2012). But the 2013 statutory revision changed the State’s burden of proof in a probation revocation hearing. Currently, the State must present evidence establishing “reasonable cause to believe” a probation violation occurred. W. Va. Code § 62-12-10 (2023); *see State v. Henry*, No. 13-1248, 2015 WL 2402464 (W. Va. Supreme Court, May 18, 2015) (memorandum decision) (holding that the revisions to West Virginia Code § 62-12-10 operate prospectively); *State v. Hann*, No. 13-1050, 2014 WL 1686895 (W. Va. Supreme Court, Apr. 28, 2014) (memorandum decision) (same). Given the legislature’s 2013 revision of West Virginia Code § 62-12-10, the court correctly expressed the State’s burden of proof in its order revoking Petitioner’s parole. App. 1-2.

2. The State’s evidence established reasonable cause to believe that Petitioner was involved in the Cabell County murder.

The State’s evidence of Petitioner’s involvement in a murder satisfied its burden of proof at his revocation hearing. W. Va. Code § 62-12-10(a)(1)(B). Petitioner disagrees, arguing that the State did not provide “a proper theory of prosecution” of Petitioner on the murder charge, thus the court could not find that Petitioner “committed a crime” when it revoked Petitioner’s parole. Pet’r’s Br. 8-10. As stated by Petitioner, the Cabell County murder complaint alleges he “picked up the possible shooter in a vehicle that he was driving.” Pet’r’s Br. 8.

Contrary to Petitioner’s argument, it is irrelevant whether the Cabell County prosecutor’s theory at trial will be that Petitioner is an accessory, principal in the second degree, or an aider and abettor, because probation revocation proceedings do not involve a determination of criminal guilt. *State v. Ketchum*, 169 W. Va. 9, 12, 289 S.E.2d 657, 658-59 (1981) (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). Rather, a probation revocation proceeding “involves a factual determination

that an offense has been committed which imparts the conclusion that the rehabilitative and other purposes behind probation have failed.” *Ketchum*, 169 W. Va. at 12, 289 S.E.2d at 659. Thus, “[t]he State may proceed with a probation revocation proceeding based upon commission of another crime without first obtaining a final disposition of that crime.” Syl. Pt. 3, *Sigman v. Whyte*, 165 W. Va. 356, 268 S.E.2d 603 (1980); Syl. Pt. 2, *State v. Cooper*, 167 W. Va. 322, 280 S.E.2d 95 (1981). Because Petitioner’s revocation hearing is not a criminal prosecution, it is unnecessary for the State to provide a theory of the criminal prosecution at Petitioner’s revocation hearing. Given Detective Adkins’ testimony regarding his murder investigation, the State’s evidence at the revocation hearing established reasonable cause to believe that Petitioner violated his parole by his involvement in the murder of Christopher Johnson. App. 14, 30-50. And the evidence presented establishes a violation by a preponderance of evidence. Thus, the court did not abuse its discretion and this Court should affirm the order revoking Petitioner’s parole.

3. The State presented evidence establishing reasonable cause to believe Petitioner violated the conditions of his parole by using marijuana and contacting a disreputable person.

The State presented un rebutted evidence regarding two parole violations—illegal marijuana use and contact with a disreputable person. App. 14-18, 22, 26, 53-54, 56. Petitioner chose not to contest these violations at the revocation hearing, stating “the defendant accepts and agreed to a finding on those issues by the Court. I didn’t plan to have him give a sworn admission. But for the legal purpose of this hearing, we’ll accept those violations and understanding that they can lead to revocation.” App. 51, 56. Although Petitioner did not contest these two violations, the State provided a factual basis for them at the revocation hearing.

Nona Black testified that Petitioner voluntarily admitted to using marijuana on December 16, 2022, as alleged in paragraph one of the petition to revoke parole. App. 17, 26, 53. Petitioner’s

voluntary admission form is attached to the petition to revoke parole. App. 26. Petitioner's counsel did not rebut this evidence or argue that Petitioner did not sign the voluntary admission form. App. 56. Thus, the State reasonable cause to believe that Petitioner violated his parole by illegal use of marijuana. W. Va. Code § 62-12-10.

Further, Petitioner's counsel agreed to a finding that Petitioner had contact with a disreputable person, Malik Hawk, his co-defendant in the murder case. App. 51-56. The murder complaint alleges Petitioner was in a car with Malik Hawk at the scene of Christopher Johnson's murder. App. 22-23, 38-40, 54. The criminal complaint is attached to the petition to revoke parole. App. 22. Again, Petitioner chose not to rebut the State's allegation that he had contact with a disreputable person when Petitioner was in a vehicle with Hawk at the scene of the murder. App. 50, 51, 56. The State's evidence at the revocation hearing established reasonable cause to believe that Petitioner violated his parole by contacting a disreputable person, Malik Hawk, in the context of a murder.

In sum, the unrebutted evidence of Petitioner's illegal use of marijuana and contact with his co-defendant in the murder case established reasonable cause to believe that he violated the conditions of his parole. App. 14-16; W. Va. Code § 62-12-10. And the evidence establishes Petitioner's violations by a preponderance of evidence. The court did not abuse its discretion when it revoked Petitioner's parole, and this Court should affirm the court's order.

C. Petitioner's parole revocation was not solely based upon hearsay, and the court did not abuse its discretion because the Rules of Evidence do not apply in revocation hearings.

Contrary to Petitioner's argument, the revocation of his parole was not based solely on hearsay evidence adduced at the hearing. Pet'r's Br. 11-15. To the extent that hearsay established the factual basis for Petitioner's involvement in the murder, there is no error. In probation

revocation proceedings, the rules of evidence do not apply. Syl. Pt. 1, *State v. Evans*, 203 W. Va. 446, 508 S.E.2d 606 (1998); W. Va. R. Evid. 1101(b)(3). This is because a probation revocation “is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole (probation) revocations.” *State v. Fraley*, 163 W. Va. 542, 544, 258 S.E.2d 129, 130 (1979) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (“[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution”); *Sigman v. Whyte*, 165 W. Va. 356, 359, 268 S.E.2d 603, 605 (1980).

Hearsay did not constitute the entirety of the evidence presented at Petitioner’s revocation hearing. Petitioner focuses his argument on the evidence presented in support of the murder charge against him, but the State also presented un rebutted evidence that Petitioner violated his parole by using marijuana and having contact his co-defendant in the murder case, Malik Hawk. App. 14-18, 22, 26, 53-54, 56. Petitioner expressly chose not to contest these two alleged violations; stating that Petitioner “accepts and agreed to a finding on those issues by the [c]ourt” and “we’ll accept those violations and understanding that they can lead to revocation.” App. 51, 56. Thus, the revocation of Petitioner’s parole is not solely based on hearsay, as Petitioner alleges.

The State also presented non-hearsay evidence of Petitioner’s involvement in the murder. Detective Brandon Adkins testified that a cooperating witness, who was present with Petitioner throughout the events that led up to the murder, identified Petitioner as a participant in the crime. App. 32, 46-50. Corroborating the information from the cooperating witness, the State presented evidence that Petitioner is charged with murder in Cabell County, and the magistrate court found probable cause to bind this case over to the grand jury. App. 17, 20, 22-23, 35. In addition, Adkins testified “[w]e located a vehicle that was used during the incident, and at the time [Petitioner] was

identified as the individual that was supposed to have that vehicle.” App. 33. Adkins also viewed surveillance video from the scene of the murder showing a black SUV that matches the description of the Chevrolet Blazer that Petitioner drove to Huntington. App. 33. Further, Petitioner did not contest the State’s allegation that he was in contact with his co-defendant in the murder case, Malik Hawk. App. 50, 51, 56. Petitioner’s contact with Hawk corroborates the State’s theory that Petitioner was involved in the murder, because Petitioner never stated that he had contact with Hawk on some other occasion. Moreover, Adkins reviewed subscriber information obtained from Petitioner’s cell phone company, which reflected that Petitioner’s cellphone “was in Huntington around the time of the incident.” Pet’r’s Br. 11; App. 33. Petitioner’s cellphone records are admissible under the business records exception to the hearsay rule. *United States v. Carmona-Bernacet*, Criminal No. 16-547, 2023 WL 2616911 at *5-6 (D. P. R. Mar. 22, 2023); *State v. Mann*, I.D. No. 1501012702, 2016 WL 1605512 at *1 (Del. Super. Ct., Apr. 1, 2016). And the Cabell County Magistrate Court held a preliminary hearing and found probable cause to bind Petitioner’s murder case over to the grand jury. App. 34-35. Thus, the State provided adequate non-hearsay evidence to establish reasonable cause that Petitioner’s involvement in a murder violated his parole.

Hearsay is admissible in revocation hearings, but the revocation in this case is not based solely upon hearsay. W. Va. R. Evid. 1101(b)(3). The non-hearsay evidence presented in this case establishes the reliability of the portion of Adkins’ testimony that is based upon the statement of a cooperating witness. As stated above, the State introduced non-hearsay evidence at the hearing, including the Cabell County Magistrate Court’s finding of probable cause in the murder case. App. 17, 20, 22-23, 35. Despite this, Petitioner argues that Adkins’ alleged hearsay testimony regarding the murder is unreliable because it is based upon a confession of an accomplice to the murder.

Pet'r's Br. 12-13 (citing *Lilly v. Virginia*, 527 U.S. 116, 134 (1999)). But *Lilly* involves hearsay admitted in a criminal prosecution, not in a probation revocation. *Id.* Thus, *Lilly* and its concern over the admission of unreliable hearsay at trial is inapposite because a revocation hearing is not a trial, and hearsay is admissible in revocation hearings. In sum, the non-hearsay evidence presented at Petitioner's revocation hearing, including the magistrate court's finding of probable cause in the murder case, corroborates Adkins' testimony regarding Petitioner's involvement in the murder. Thus, the court did not abuse its discretion in admitting reliable hearsay evidence of Petitioner's involvement in the murder. *See* W. Va. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."); *United States v. Shakir*, No. 13-6567, 574 Fed.Appx. 712, 714 (6th Cir. 2014) (holding that a probation officer's testimony based upon an arrest warrant constitutes sufficient evidence for a court to find Shakir engaged in criminal conduct and revoke his supervised release).

Petitioner cites *State v. Brown* for the proposition that the State should have called the cooperating witness in the murder case as a witness at Petitioner's revocation hearing. Pet'r's Br. 12-14; Syl. Pt. 2, *State v. Brown*, 215 W. Va. 664, 600, S.E.2d 561 (2004). But *Brown* is not dispositive because there is non-hearsay evidence to support revocation in this case. The petition to revoke Brown's probation was based upon her alleged use of cocaine, and the State's evidence supporting revocation was a failed drug test. At the revocation hearing, Brown contested the results of the drug test and provided evidence that she was given an anesthetic during dental surgery. *Id.* at 667-68, 564-65. Brown's probation officer responded that "an unnamed laboratory technician" confirmed that "Brown had used cocaine, the anesthetic notwithstanding." *Id.* at 668, 565. On appeal, this Court reversed Brown's probation revocation because it was based solely upon hearsay and the lab technician was not present to answer Petitioner's questions about the drug test. The

court revoked Brown's probation solely on the basis of one failed drug test because it was solely based on the hearsay testimony of Brown's probation officer. *Id.* at 664, 563.

Unlike *Brown*, the court revoked Petitioner's parole on the basis of two un rebutted allegations and evidence establishing Petitioner's involvement in the Cabell County murder. App. 1-2. Detective Adkins reviewed surveillance footage from the scene of the murder that shows a black SUV matching the description of the Chevrolet Blazer Petitioner drove to Huntington. App. 33. Petitioner's cellphone "was in Huntington around the time of the incident." App. 33. Petitioner has been arrested for the murder and the magistrate court found probable cause of Petitioner's involvement in the murder. App. 17, 20, 22-23, 35. Further, Petitioner's attorney presented no evidence or argument to combat the State's allegations that he used marijuana and had contact with a disreputable person—his co-defendant in the murder case—Malik Hawk. App. 14-18, 22, 26, 53-54, 56. In conclusion, the revocation of Petitioner's parole was not solely based upon hearsay. Thus, the court did not abuse its discretion and this Court should affirm the court's order revoking Petitioner's parole.

D. Petitioner's revocation hearing satisfied due process requirements.

Although not assigned as an error, Petitioner argues that the order revoking his parole violates due process. Pet'r's Br. 15. The Court should decline to review this argument, because it "ordinarily will not address an argument not raised as an assignment of error." *Conrad v. Council of Senior Citizens of Gilmer County, Inc.*, No. 14-1262, 2016 WL 6778918 at *2 n.3 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision); see *Canterbury v. Laird*, 221 W. Va. 453, 458, 655 S.E.2d 199, 204 (2007) (refusing to consider argument in appellant's brief not assigned as error in petition for appeal); *Koerner v. West Virginia Dep't. of Military Affairs & Pub. Safety*, 217 W. Va. 231, 237, 617 S.E.2d 778, 784 (2005) (refusing to consider an argument in

appellant's brief that was not assigned as error in petition for appeal). Because Petitioner did not assign error to the alleged due process violation, this Court should refuse to address this argument.

Even if this Court reviews the due process issue, it lacks merit. Petitioner argues that the court's order inadequately establishes a factual basis for the revocation. Pet'r's Br. 15. In a probation revocation hearing, due process requires:

(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking (probation or) parole.

Louk v. Haynes, 159 W. Va. 482, 497, 223 S.E.2d 780, 790 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). In this case, Petitioner's revocation hearing afforded him due process. Petitioner was provided with written notice of the alleged violations that disclosed the evidence against him. App. 17-26. Petitioner had an opportunity to testify and present evidence, but chose not to do so. App. 1-2, 27-62. Petitioner's counsel confronted and cross-examined Detective Brandon Adkins and probation officer Nona Black. *Id.* And Petitioner's hearing was conducted by a neutral judicial officer, Judge O'Hanlon in the Circuit Court of Kanawha County. Finally, with regard to the revocation order, the Court states that:

the State adduced the testimony of Det. Brandon Adkins, Huntington Police Department, and Nona Black, Kanawha County Adult Probation Office, who subjected to cross examination. The defendant did not call any witnesses or testify. Based on the evidence and testimony hearing by the Court, [the court found that Petitioner] violated his parole based on the allegations contained in paragraphs one, two, and three as alleged in said written Notice of Motion to Revoke Parole.

App. 1. This is an adequate description of the evidence relied on and the court's reasons for revoking parole. *See State v. Goff*, 168 W. Va. 285, 287-88, 284 S.E.2d 362, 363 (1981) (holding

that a revocation order sufficiently related “the evidence relied on and the court’s reasons for revoking probation.”).

Even if this Court finds the revocation order lacks adequate detail, this error is harmless beyond a reasonable doubt. *See* Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). As stated above, the State provided evidence establishing reasonable cause that Petitioner violated three conditions of his parole. Petitioner has not shown that he was prejudiced by any alleged deficiency in the final order and this Court should find any error relating to the revocation order to be harmless. *See Blair* at 659, 337. In conclusion, this Court should decline to review Petitioner’s due process argument because it was not assigned as error. And if this issue is reviewed on the merits, the Court will find that Petitioner was provided with due process at his revocation hearing. To the extent that any error occurred, it is harmless beyond a reasonable doubt and this Court should affirm the revocation of Petitioner’s parole.

E. The State established reasonable cause to believe Petitioner was involved in a murder and violated a no contact provision of his parole; thus, the Court properly imposed sentence on the underlying crime of Fleeing.

Petitioner complains there was insufficient evidence of his involvement in the murder, and the court erred when it imposed a sentence of 1-5 years in prison for his underlying conviction of Fleeing. Pet’r’s Br. 16-17 (citing W. Va. Code § 62-12-10). The probation violation statute allows the court to impose sentence if it finds reasonable cause to believe Petitioner “engaged in new criminal conduct other than a minor traffic violation or simple possession of a controlled substance” or “violated a special condition of probation designed either to protect the public or a victim.” W. Va. Code § 62-12-10(a)(1).

First, as stated above, the State presented non-hearsay evidence establishing reasonable cause to believe Petitioner was involved in the murder of Christopher Johnson in Cabell County.

The murder charge against Petitioner is new criminal conduct that justifies imposition of the underlying sentence. W. Va. Code § 62-12-10(a)(1)(B); *see State v. Pierce*, No. 16-1034, 2017 WL 4772877 (W. Va. Supreme Court, Oct. 23, 2017) (holding that it was proper to revoke probation and impose the underlying sentence where defendant consumed marijuana and was arrested for petit larceny).

Second, there is reasonable cause to believe Petitioner violated a “special condition of probation,” which prohibited him from having contact with disreputable persons. W. Va. Code § 62-12-10(a)(1)(C). This no contact provision may be fairly characterized as a special condition of probation, because it is “designed either to protect the public or a victim.” *Id.*; *see State v. Krystal M.*, No. 14-0737, 2015 WL 1740302 at *2 (W. Va. Supreme Court, Apr. 13, 2015) (holding that a no contact provision was a special condition of probation); *State v. Kitchen*, No. 17-0607, 2018 WL 5778990 at *2 (W. Va. Supreme Court, Nov. 2, 2018) (holding that Kitchen’s use of heroin violated a special condition of probation intended to protect the public and Kitchen’s daughter). In this case, Petitioner did not contest the State’s evidence that he had contact with Malik Hawk, a disreputable person, who is Petitioner’s co-defendant in the murder case. App. 50, 51, 56. Petitioner’s contact with Hawk violated a condition of Petitioner’s parole that “[t]he defendant shall refrain from ... consorting with disreputable persons, including but not limited to, people who are charged with or have been convicted of a misdemeanor or felony, or are or have been on probation or parole, or any other person as directed by the supervising officer.” App. 14-15.

As evidenced by the facts of this case, the “no contact with disreputable persons” provision of Petitioner’s parole is a special condition designed to protect the public. Petitioner violated this provision and, as a result, ended up being charged with murder along with Hawk. Further, this no contact provision is not one of the standard conditions of probation enumerated by statute. *See W.*

Va. Code § 62-12-9 (conditions of release on probation). Petitioner violated the “no contact” special condition of probation, and this provides an independent ground for revocation of parole and imposition of sentence for his underlying conviction. W. Va. Code § 62-12-10(a)(1)(C). In sum, the State presented evidence establishing reasonable cause to believe Petitioner in engaged in new criminal conduct, i.e., murder, and violated a special condition of probation that he have no contact with disreputable persons. Thus, the court did not abuse its discretion when it imposed the underlying sentence, and this Court should affirm the final order revoking parole.

CONCLUSION

For the reasons stated, this Court should affirm the final order revoking Petitioner’s parole.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-184

STATE OF WEST VIRGINIA,

Respondent,

v.

LAWRENCE FOYE,

Petitioner.

CERTIFICATE OF SERVICE

I, Jason David Parmer, do hereby certify that on the 27th day of July, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure.



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