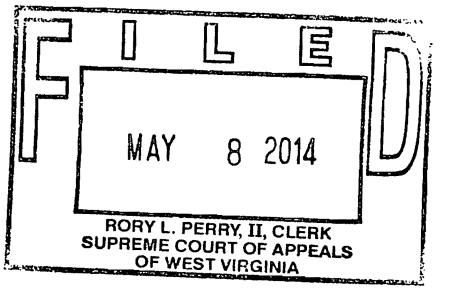
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1266



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

VIRGIL EUGENE SHRADER,

Defendant Below, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT

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Comes now the respondent State of West Virginia, by counsel, Laura Young, Deputy Attorney General, pursuant to the Revised Rules of Appellate Procedure and a Scheduling Order from this Honorable Court, and files the within brief in response to petitioner's brief.

I.

STATEMENT OF THE CASE

This case is an almost perfect example of the dilemma faced by judges when dealing with an individual who has taken advantage of a plea agreement involving sexual abuse, particularly child sexual abuse, but who will not admit that he actually abused children, and therefore, cannot successfully complete a program designed to prevent him from abusing children in the future. In this case, the petitioner was given the opportunity to complete a deferred plea agreement, but could not fulfil his portion of the agreement. The petitioner's deferred plea and probationary sentence were properly revoked, with the petitioner receiving all of his procedural and constitutional rights, and an active sentence was properly imposed. Under the circumstances of petitioner's plea and sentence,

the court had the discretion to withhold any credit for time served. If, however, this Honorable Court believes that credit for the time petitioner spent on home incarceration should be granted, this matter should not be reversed, but rather remanded for calculation of the correct amount of credit to be applied to the underlying sentence. (The petitioner has a projected parole date in September 2014, and a projected release date in April, 2016, according to www.wvdoc.com/offendersearch.)

Out of a twelve count indictment charging first degree sexual assault, first degree sexual abuse and sexual abuse by a custodian or person in position of trust (App. at 1-3), the petitioner eventually ended up being prosecuted on counts 4-9 of the indictment (later renumbered.) (*Id.* at 6.) Those counts alleged sexual abuse in the first degree of A.A. T., a child of eleven years or less at the time of the offenses. (*Id.* at 1-2.) The indictment was filed on February 13, 2008, but the petitioner had been arrested and placed on bail on or about May 28, 2007. A condition of bail was home confinement. (*Id.* at 210.)

The parties engaged in plea negotiations resulting in a plea agreement, later revised. That agreement provided that the petitioner would plead no contest to one count of sexual abuse in the first degree (Count 1 of the renumbered indictment, original count 4). The remaining counts of the indictment would be dismissed. Any adjudication of guilt would be deferred for a time period to be determined by the Court and under such conditions as set by the Court. However, those conditions would include a sexual offender psychiatric evaluation, following such treatment recommendations as contained in that evaluation. If the petitioner failed to complete the terms and conditions, he would be sentenced. (*Id.* at 84-85.)

The petitioner completed forms relevant to his plea of guilty. Those forms indicated he fully understood the constitutional rights he had attendant upon a criminal proceeding. He understood that

the potential sentence for the offense of first degree sexual abuse was one to five years in the penitentiary. He understood that by pleading guilty he waived all of his rights. He understood the parameters of his plea agreement. (*Id.* at 7-12.) The petitioner noted that the plea was in his best interest. (*Id.* at 14.) The written form did not contain any recitation of the offense, and further, the petitioner stated clearly that he did not believe himself to be guilty. (*Id.*)

At the plea hearing, the petitioner indicated that he was voluntarily entering into the plea. (*Id.* at 21.) The petitioner indicated he was aware of the state's case, what had to be proven in order for him to be convicted, and had no questions about the charges. (*Id.* at 28-29.)

The parties then laboriously addressed exactly the contents of the plea agreement. The petitioner was not to be adjudicated guilty; that finding was deferred. (*Id.* at 32.) The judge described it as similar to a conditional plea, that the petitioner would not be adjudged guilty until the judge saw that the petitioner met (or did not meet) the conditions, whatever they might be. The length of time adjudication was deferred was in the court's discretion, up to five years. (*Id* at 32-33.) If he met the conditions, the case would be dismissed. If he did not, the "probation as you call it" would be revoked. (*Id.* at 34.)

The conditions agreed upon in the plea letter were not exclusive. However those did include a sexual offender evaluation, and a promise by the petitioner to abide by whatever terms and conditions as far as treatment recommendations were made. The court noted that if he were to violate any of the specific terms, he would be adjudicated guilty at that time, and petitioner's counsel agreed. (*Id.* at 35.) The petitioner indicated he understood that he had to meet the conditions, or he could go to the penitentiary, and the judge noted that it was the petitioner's responsibility to meet those conditions, that it was not anyone else's responsibility to nag the petitioner to meet the

conditions. (*Id.* at 36-37.) Further, the court specifically reminded the petitioner "If you do just sort of well for a few years and don't make it to the end, you'll still be looking at the same term in the penitentiary because you don't get any credit for time." (*Id.* at 39.) The petitioner stated he understood he could be close to 70 years of age and still go to the penitentiary. (*Id.* at 41.)

The petitioner was informed that a no contest plea meant the same thing as a guilty plea to the court, save for the adjudication. (*Id.* at 45.) The petitioner indicated he understood his rights and their waiver upon voluntarily entering his plea. (*Id.* at 49.) The judge stated orally that the duration of the deferred plea would be five years. (*Id.* at 50.)

Approximately 10 days after the plea hearing, on February 27, 2009, a status hearing was held. That hearing was to clarify that the petitioner would not be subject to registration as a sexual offender unless and until he was adjudicated guilty. (*Id.* at 64.) Further, the probationary contract would be the standard contract and not the sexual offender contract. (*Id.* at 65.) However, it was discovered that a sexual offender evaluation, with a treatment recommendation had already been completed. (*Id.* at 66-67.) There was a treatment program available that would accept an offender who did not admit his acts. (*Id.* at 67.) Jason Newsome was the individual who ran the program.

Mr. Newsome was the director of clinical services at a counseling agency. The agency ran a treatment program at the Day Report Center. (*Id.* at 69.) Mr. Newsome understood that the petitioner was required to participate in treatment, and on the morning of the hearing, he was to be evaluated to determine the treatment needs. (*Id.*)

When going over the initial paperwork, the petitioner balked at signing some preliminary paperwork that contained the abbreviation "ASO" short for Adult Sex Offender. (*Id.*) Mr. Newsome indicated that the program was for people who had committed a crime, and the petitioner denied that

he committed any inappropriate acts. Mr. Newsome, therefore, rejected the petitioner from the program. (*Id.* at 69-70.)

Mr. Newsome stated that some admission of guilt, of responsibility, was necessary for his program. (*Id.* at 70.) The judge noted that the petitioner had pled no contest, which was an admission, but told the petitioner if he wished, he could withdraw his plea and go to trial. (*Id.* at 71.) The court noted that the petitioner was in denial that he did anything, which wasn't unusual. However, he had to be in a treatment program per the agreement. (*Id.* at 71.) The judge stated that "So your client basically is already in default." (*Id.* at 72.)

The referenced evaluation noted that the petitioner was a candidate for out-patient treatment if he was found guilty. (*Id.* at 73.) The judge again noted that legally, the case was in a posture where there was an admission to first degree sexual abuse, but that probably the petitioner could not get treatment if he denied the fact that he did anything wrong. (*Id.* at 73-74.) Again the judge stated if the petitioner wanted to deny the offense, perhaps they should go to trial. The prosecutor and judge agreed that this was an "odd diversion." (*Id.* at 74.)

When pressed why the petitioner just didn't go to trial if it was important to him to maintain he didn't do it, counsel answered that "given all the evidence" it was in petitioner's best interest to enter this plea. (*Id.* at 75.) The court continued the hearing for a few weeks, in order for the petitioner to determine whether he wanted a trial, because the court could not "accept a plea bargain agreement that carries these things in it that he cannot abide by from the start and he's doomed to fail." The court noted specifically that he foresaw receiving reports that said the petitioner was doing well, yet still failing a program because he wouldn't admit he did anything wrong. (*Id.* at 78.)

On March 13, 2009, a hearing termed an amended plea hearing was held. The court went over the revised plea agreement with the petitioner, including the necessity for treatment and to abide by the conditions set by the Court, and that failure to meet any condition could result in the petitioner being adjudicated guilty. (App. at 91-92.) The petitioner was informed that the possibility still existed for him to be sent to the penitentiary and have to register as a sexual offender. (*Id.* at 92-93.)

The court informed the petitioner that he could not refuse to answer questions asked him by the evaluator. He further told the petitioner that if he (the judge) received a report from the sexual offender evaluator/treatment program that he was hesitant about answering questions or if they believed the petitioner was not being truthful, then the petitioner was "flunking" the deal. (*Id.* at 94-95.)

The judge reiterated that the court imposed conditions for sexual offender treatment, including being truthful in everything they asked him, the petitioner further could not drink alcohol, had to obey the law, report monthly in person to the probation office, inform the office of any change of address. Apparently, the petitioner was to be re-evaluated in terms of sexual offender treatment, and the evaluator was to take into account in that evaluation and recommendation that the petitioner had pled guilty, and was guilty of the offense. (*Id.* at 98-99.) The petitioner was again given the opportunity to withdraw his plea and declined. (*Id.* at 100-101.)

The court acknowledged that there would be difficulty in arranging an evaluation, and refused to accept the previous evaluation on the basis that the petitioner had been guarded in everything he said. (*Id.* at 104.) The court stressed that he wanted the petitioner to be open and honest. (*Id.* at 105.) The judge also stressed that if he didn't get good reports about the petitioner being honest and forthright, he would be brought back in as violating the agreement. (*Id.* at 108.) The petitioner was

going to be seen by a Mr. Brezinski (apparently an evaluator or counselor regarding sexual offenses) twice a month for six months. (*Id.* at 109.) The judge wanted a sexual offender evaluation. (*Id.* at 110.)

An order reflecting that hearing indicated that disposition was deferred for five years under the conditions that the petitioner attend sexual offender counseling, obey all laws, not consume alcohol, report monthly to the probation office, abide by the normal conditions of probation and submit to another sexual offender evaluation by Dr. Brezinski, and such evaluation be provided to the court. (*Id.* at 112-13.)

Following a hearing in June 2009, the petitioner was ordered to continue counseling with Dr. Brezinski until deemed unnecessary by said counselor. (*Id.* at 114.) At that hearing, the court received a forensic report from Dr. Miller and an updated report from Brezenski. (*Id.* at 117.) The hearing confirmed that the petitioner was receiving treatment from Brezinski, and that treatment might continue for the full five years, but would continue until Brezinski said it was unnecessary, and to stop going would violate the deferred plea. (*Id.* at 124.)

In April 2011, the court entered an order that released the petitioner from any obligation to continue to have counseling with Brezinski, based upon Brezinski's report that the petitioner had been wholly compliant. The court further ordered that the petitioner was to participate in sexual offender evaluation and counseling at the Day Report Center as that staff deemed appropriate, including polygraph examinations. (*Id.* at 134.)

Dr. Brezinski had follow up recommendations, but the judge was concerned that there would be no monitor if something happened. (*Id.* at 146.) The judge had anticipated that the petitioner would be in treatment with Brezinski longer. Even though the petitioner had not been accepted by

Day Report initially because of his refusal to fill out the paperwork, the judge ordered him to go to that program for at least a year. (*Id.* at 148.)

The prosecutor and probation officer reminded the judge that polygraph examinations were used in the group sessions at Day Report, as part of treatment. The court noted that they would hit the same problem, that the petitioner didn't think he did anything wrong. (*Id.* at 150.) The judge noted that perhaps the petitioner should have gone to trial, but the petitioner stated affirmatively he knew what he was doing. However they "stretched it out by allowing him stay on five years of what turn out supervised probation, which is not probation at all basically." (*Id.* at 150-51.) The judge wanted him in the "other program" and if a polygraph was required, so be it. The judge informed the petitioner he needed to face reality. The consequences still existed, and would not go away until the conclusion of the five year period. (*Id.* at 151.)

Petitioner's counsel asked if the petitioner flunked a polygraph, was everything automatically revoked. (*Id.* at 153.) The court noted that while polygraphs were not admissible at trial, they were used to see whether "we continue on the program we've got." The judge stated that "probably" there would be a hearing. (*Id.* at 154.) The prosecutor noted that the polygraph was not used in the historical sense–to determine whether the petitioner was guilty of the charged offense, but as a deterrent for future conduct. The judge then stressed that the petitioner had to be as honest as he could be. (*Id.* at 154-55.) Dr. Brezinski's report, which was made a part of the record indicated that the treatment had followed guidelines developing victim empathy, understanding cycles leading to reoffense, and establishing relapse prevention skills. The petitioner had not admitted guilt. The petitioner did understand that the child was a victim who believed he had molested her, and that there were serious ramifications for that child's future. He had been compliant. (*Id.* at 158.)

In 2012, the conditions were modified to permit telephone contact with the petitioner's grandchildren and supervised adult visitation on special occasions with those same grandchildren. (*Id.* at 160.)

On July 12, 2013, an order was entered reflecting another status hearing. The matter was set for adjudication on October 1, 2013, based upon the court's concerns about the petitioner's failure to actively participate in sexual offender therapy. (*Id.* at 168.)

The prosecutor noted that the State was now of the opinion that the petitioner had not successfully complied with the specific terms of the defferred adjudication, and that such deferred probation should be revoked, the court should accept the plea, adjudicate the petitioner guilty and sentence him. (*Id.* at 171.)

The petitioner's counsel noted that the Court was looking at the issue that the petitioner had failed two polygraphs and was not cooperating with his probation officer. (*Id.* at 172.)

The court noted that the questions that the petitioner failed related directly to sexual offenses, "relate directly to what he's in court about." (*Id.* at 173.) The court stated that probation and the State had over a long period of time expended resources to get the petitioner to acknowledge, so that he could learn to deal with "it", and if he were turned loose without that having been accomplished, nothing had been accomplished. (*Id.* at 173.) The judge noted that the petitioner had not accomplished the key feature of the deferred plea. (*Id.*) Although petitioner's counsel had hesitations about the evidentiary weight of the polygraphs, the court noted that if the psychologist indicated that he would not give an answer that treatment had been successful in the absence of a clean polygraph, then the petitioner would have failed. (*Id.* at 174.) The judge stated that he was not going to cancel the rest of the probationary period and sentence him that day, but did not see a

better alternative. (*Id.*) The judge again stated that the petitioner did not meet the conditions of probation, because he couldn't get a psychologist to come in and say he had successfully completed sexual offender counseling. (*Id.* at 175.)

The parties came back in October. At that time, the State requested that the petitioner be adjudicated and sentenced because the petitioner had failed to actively participate in treatment, as ordered by the court. (*Id.* at 191.) The court had stated, without objection, that the purpose of the hearing was for adjudication. (*Id.* at 190.)

Apparently after the petitioner realized he was going to go to prison, he made an admission to his therapist before the October hearing. (*Id.* at 192.) The court expressed some degree of scepticism regarding the admission stating "I just think his admission isn't sincere." (*Id.* at 193.) His supervising probation officer, who had never been entirely comfortable with the arrangement noted that the petitioner had been compliant, but that he had not completed treatment because he did not acknowledge guilt. (*Id.*)

The court asked if anyone had anything else, and there being no response, rescinded probation, without objection from petitioner's counsel. Counsel asked him to be reinstated for "proper" treatment. The State called his treating therapist. (*Id.* at 194.)

Rance Berry had worked with the petitioner for approximately two years until August. Treatment ceased, but the petitioner did not successfully complete treatment. (*Id.* at 195-96.) Mr Berry said that treatment stopped because the petitioner refused to accept responsibility for his actions, and that he, therefore, could not be treated. (*Id.* at 196.) The petitioner failed two polygraph examinations administered by the probation officer, although reportedly passed one administered by an evaluator hired by defense counsel. (*Id.* at 197.)

The petitioner had recently admitted the abuse, but had refused to do so for two years. The failure of the polygraph was only part of the reason for this termination. (*Id.* at 198.)

The judge noted that the petitioner had every opportunity to "do the right thing" which included an admission, important not only for him but for his victim. The petitioner did not make such admission until staring at jail. The judge did not believe the admission was sincere, but made only to avoid jail time. (*Id.* at 200-201.) There was no answer for the judge's question which was why didn't the petitioner make the admission and get the treatment he needed and be done with it. (*Id.* at 201.)

After a conference with his client, petitioner's counsel objected to the proceeding and the court's ruling. Counsel argued that the petitioner had been fully compliant with the plea. The judge stated that the petitioner could not be treated because he refused to admit his actions, and to the judge that was tantamount to lying under oath. (*Id.* at 202.) When reminded that it was a best interest plea, the court noted it wasn't in the victim's best interest. Further, no matter the name given, when the petitioner pled, the court assumed his guilt. The petitioner had not complied with the conditions. (*Id.*)

The State asked for a penitentiary sentence, the defense for reinstatement of probation. The court stated again, that in his opinion the admission was a red herring to stay out of jail. The case had lingered for five years, and it needed to be ended, not the least reason being that the victim's family needed to be able to move on. (*Id.* at 204-205.)

The court asked if there was any reason to delay sentence, and no one, including the petitioner and his counsel stated a reason for the delay. (*Id.* at 205.) The petitioner did not receive

credit for the time served on home confinement and was sentenced to one to five years in prison, with lifetime registration, and a ten year period of supervised release. (*Id.* at 206.)

This appeal ensued.

II.

SUMMARY OF THE ARGUMENT

The petitioner objected only generally to the proceeding revoking the deferred adjudication and objected generally to the result. The petitioner did not object to the use of the polygraph results, which were not used to determine that the petitioner was in fact lying, but were used as a tool to determine if the petitioner could be treated. From the very beginning of the process, it was apparent that the treatment proviso was going to be a huge stumbling block, as it was for the years that this deferred adjudication dragged on. The revised agreement provided that the petitioner had to successfully complete the terms and conditions of his agreement which included sexual offender treatment and such other conditions imposed by the court. The petitioner was refused admission to a program, and later terminated from that program because he was not a candidate for successful treatment. Mr. Berry, who treated the petitioner for two years, terminated the petitioner's treatment because it was not successful. Therefore, the petitioner breached the specific term of the plea, and revocation of the deferred adjudication was appropriate. It was not based on unreliable information, but rather upon testimony from the treatment professional.

The petitioner was not denied the benefit of the plea, but rather wishes now to avoid the consequences of his inability to successfully complete the conditions of that plea. Although the petitioner was permitted to plead no contest, and in fact would not admit wrongdoing, the judge warned him from the beginning that he would not receive credit for time. The petitioner was

released from a treatment program after two years, the deferred adjudication was for five. The judge never required an admission. He required the petitioner to be open and honest. The judge merely stated the obvious, which was without such admission, treatment was impossible. The petitioner was required to be in treatment, and was terminated from that treatment before the end of the deferred adjudication. It was not the petitioner's maintenance of his denial, but rather the fact that he could not be treated, that led to the revocation of the deferred adjudication.

After nearly two years of treatment with Mr. Berry, a status hearing was held in July, 2013. At that hearing in July the petitioner was clearly informed by the prosecutor that he had not successfully complied with the deferred adjudication, that the State was seeking revocation, adjudication and sentence. Petitioner's counsel was aware of the specific issues with the petitioner including the polygraph examinations. The court directly informed the petitioner and his counsel that the key feature of the deferred adjudication had not been accomplished, that is ensuring the petitioner had been treated so that he was not a danger to any other little girls. However, no action was taken that day. The parties returned three months later, and had further hearings. Although it does not appear that a written notice to revoke was filed, an oral motion to revoke was made by the assistant prosecutor in July, and the petitioner was clearly notified that he was in danger of going to prison because of his ongoing failure to successfully complete a mandated sexual offender treatment program.

At the hearing in October, the petitioner had the ability to and did cross-examine the person who terminated the petitioner from counseling. The failure to complete counseling was the basis for the revocation. The supervising probation officer, without objection, stated that the petitioner had not completed treatment because he did not acknowledge guilt. The decision to terminate from the

program was not based entirely upon the use of polygraphs, and petitioner's counsel not only did not object to the use of polygraphs, but pointed out that the petitioner had passed at least one polygraph.

Assuming the petitioner was on home confinement for 21 months before his plea, the granting or failure to grant credit for that time was wholly discretionary with the court. As the petitioner was not entitled to such credit, the failure to award such credit is not error.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented in the briefs and record on appeal. The decisional process would not be significantly aided by oral argument. This matter is appropriate for a memorandum decision.

IV.

ARGUMENT

A. The petitioner received the benefit of his plea agreement, which was breached neither by the Court nor the State.

It is well settled law in West Virginia that a plea agreement is essentially a contract between the defendant and the State, and that there are consequences if either party breaches the agreement. For example, *State v. Martin,* 225 W. Va. 408, 693 S.E.2d 482 (2010) involved a plea agreement in which the State agreed to make a recommendation of probation, and then recommended the opposite at disposition. On page 412, 486 of the opinion the court notes that there was a valid plea agreement, which the State breached. The court found that such breach constituted plain error, and that the conduct of the State affected the fairness, integrity and public reputation of the proceeding. Therefore, the conviction was reversed, and the parties restored to their original positions, the Court noting on that same page of the opinion that the State is bound to the terms of the plea once the

defendant acts to his detriment in reliance, and that when a plea rests on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

No such breach occurred in the case at bar. The explicit terms of the plea agreement were fulfilled. The judge did not force the petitioner to admit the act, he set as a condition of the deferred adjudication that the petitioner be open and honest. By the terms of the plea letter, the judge had the authority to impose such condition. (App. 84-85.)

The finalized plea agreement provided in pertinent part, the "Defendant shall undergo a sexual offender psychiatric evaluation . . . and abide by such treatment recommendations as may be contained in said evaluation." (*Id.* at 84.)

The judge did not require the petitioner to do anything that was not addressed in the agreement, nor did the prosecutor do or fail to do anything that breached the plea. The judge was explicit with the petitioner from day one (well, day ten) that the petitioner had already defaulted on the plea by his refusal to fill out the necessary paperwork to receive sexual offender treatment. (*Id.* at 72.) The judge pointed out that, although denial was not unusual, the petitioner had to be in a treatment program, and that the petitioner probably could not get treatment if he continued to deny the fact that he did anything wrong. (*Id.* at 73-74.) The judge invited the petitioner to withdraw the plea, and in fact, continued the status hearing for the petitioner to consider withdrawing the plea because the court believed–with clarity any medium would appreciate–that the petitioner would do well, but yet fail a program because he wouldn't admit he did anything wrong. The judge stated at least three times that perhaps the petitioner should just go to trial. However, the petitioner wished to persist in his plea.

At the next hearing, the petitioner was again given the opportunity to withdraw his plea, but declined. (*Id.* at 100-101.) The petitioner declined the opportunity to withdraw his plea after being informed that he had to abide by the conditions set by the court, and that such conditions included that he could not refuse to answer questions asked by the evaluator, and that if any report from a treatment program indicated he was hesitant or untruthful, then the petitioner was "flunking" the deal. (*Id.* at 94-95.) The conditions were treatment, including being absolutely truthful. Further, the petitioner had to be open and honest, and that if positive reports were not received, that was a violation of the plea. (*Id.* at 108.)

Apparently Mr. Brezinski was willing to treat the petitioner without an acknowledgement of wrongdoing, but released the petitioenr after only two years. The court did not find such early release acceptable, and ordered additional treatment. The petitioner did not object to the additional treatment, and was informed that the treatment would be through Day Report, including polygraph examinations. The petitioner did not object. (*Id.* at 134; 148.)

The trial court accepted and enforced the plea as written. The court was given the absolute discretion to set the duration of the deferred adjudication and its terms and conditions. Those conditions included, but were not limited to, an evalution, following treatment recommendations, no contact with the victim, and standard terms and conditions of probation. (*Id.* at 84.) Therefore, notwithstanding the conditional nature of the no contest plea with the refusal to admit guilt publicly, the court had in its discretion the ability to impose a requirement that the petitioner be open, honest and forthright with his treatment, so that it would be effective. When the judge orally announced that it was a requirement that petitioner be honest and forthright, no objection was made. When the

court determined it would not release petitioner from the treatment obligation when Brezinski released him, but rather require standard treatment including polygraphs, no objection was made.

Having agreed to the terms and conditions of the plea, the petitioner is also bound to the agreement. The State has relied on the agreement to its detriment in that five felony charges have been dismissed. The petitioner relied on the agreement to his benefit, in that he received a get out of jail free card. The fact the he could not live up to even the minimal requirements of the plea agreement and eventually received an active sentence does not mean the State or the judge breached the plea. It means that the petitioner failed in his obligation. The petitioner received the benefit of a lenient plea offer, and has to accept the consequences now that he has failed even those minimal obligations.

B. The petitioner received adequate notice that his deferred adjudication was being revoked, and further was afforded the opportunity to confront the evidence against him.

The petitioner was not precisely placed on probation. The petitioner did not precisely plead guilty. With probably the best intentions (although the road to hell is paved with good intentions) the State, the court, and the petitioner, with the advice of counsel entered into an agreement that was, as noted by the court, always destined to failure.

The petitioner did not wish to roll the dice and be found guilty of six felonies. The State did not wish to roll the dice and have the petitioner acquitted. Therefore, in a display of somewhat Solomon-like wisdom, the baby got cut in half and nothing worked out.

Status hearing after status hearing was held with the court continually pointing out to the petitioner that the court had a significant problem with the petitioner and his failure to successfully complete sexual offender treatment.

The petitioner failed to qualify for regular offender treatment by his refusal to fill out the paperwork. He then received some sort of counseling for two years, the upshot of which was apparently he and his wife would keep notebooks in order to keep the petitioner from molesting any other children. The judge, understandably, was unsatisfied with the short-term notebook therapy and ordered the petitioner into the regular program, where treatment limped along for another period of time, apparently two years.

However, it became apparent that the goal of the deferred adjudication had not been reached in four years of therapy and was never going to be reached.

In July, 2013, the prosecution moved (orally) to revoke the deferred adjudication on the basis that the petitioner had failed to successfully comply with the specific terms. Petitioner's counsel was aware that the default involved failure to cooperate with probation, failure to successfully complete treatment and problems with the polygraph. The court further informed petitioner and his counsel that the specific failure to meet the conditions of the deferred plea was that the petitioner could not find anyone–including his present treatment team–to state that he had successfully completed sexual offender treatment. Petitioner did not object to that characterization.

The court indicated that it saw no alternative other than to revoke the deferred adjudication and sentence him. However, and this is key, the petitioner was not sentenced that day, nor was the deferred adjudication revoked. Rather, the matter was continued from July to October.

While it is clear that no formal notice to revoke probation reduced to writing was served upon the petitioner, it is also clear that the petitioner was not formally placed upon probation. While agreeing that the deferred adjudication should not have been revoked arbitrarily and capriciously, it is clear that the petitioner did receive due process in the revocation process.

"We begin with the proposition that the revocation of parole (probation) 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." *Morrissey v. Brewer*, 408 U.S. at 480, 92 S.Ct. at 2600. *State v. Fraley*, 163 W. Va. 542, 544, 258 S.E.2d 129, 130 (1979).

Fraley also notes although the better practice is to include all violations in a written notice, that where petitioner and his counsel had actual notice of additional violations, knew the evidence against him, had the opportunity to be heard and present witnesses, had the opportunity to cross-examine witnesses, had a neutral and detached hearing officer, and had a written statement of the evidence relied upon and reasons for revocation, due process was satisfied.

The petitioner in the case at bar not only had 3 months of notice that his deferred adjudication was in peril of revocation because of his failure to complete sexual offender treatment, the court had told him every step of the way that without an honest acknowledgement of the problem, treatment was always going to be unsuccessful. When given notice in July of the state's motion to revoke the deferred adjudication, the petitioner did not object to the failure to provide written notice, and although the petitioner lodged a general objection in October to the proceeding and the decision to revoke, no specific objection as to failure of notice was made then, either.

> "One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue." Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. . . . When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial . . . he or she ordinarily must object then and there or forfeit any right to complain at a later time.

State v. LaRock 196 W. Va. 294 at 316, 470 S.E.2d 613 at 635 (1996.) (Citations omitted.)

The petitioner did not object to proceeding without written notice, and in these proceedings to revoke the not-quite probation, the petitioner had ample notice–five years worth–of what he needed to do, and what would happen if he didn't. With specific reference to when the judge made good on the ominous threats, and actually revoked the deferred adjudication, the petitioner had actual notice in July of what the problems were, did not object to the oral notice, and did not object to the oral notice in October. The petitioner was aware of the issues-the failure to complete sexual offender treatment and the polygraph issues. The petitioner was aware of the evidence against him.

Further, although the judge did indicate that the deferred adjudication was revoked, in fact, the petitioner had the opportunity to confront and cross examine his accusers. The petitioner was ordered to attend the regular offender treatment after Brezinski released him, and was given actual knowledge of the use of polygraphs. The petitioner did not object then (the April 2011 proceeding).

The petitioner attended that counseling for two years, but did not successfully complete it. At the hearing in October, Rance Berry, the treatment coordinator testified and was subject to cross-examination. Mr. Berry had worked with the petitioner for two years, but the petitioner did not successfully complete treatment. (App. at 195-96.) That failure was because the petitioner refused to accept responsibility for his actions and could not be treated. (*Id.* at 196.) Although the petitioner had failed two polygraph examinations, such failure was only part of the reasons that he was terminated from the program as unsuccessful. (*Id.* at 198.) The petitioner did not request the opportunity to put on witnesses, and when asked if there was anything else before sentence was imposed, the petitioner and counsel said no. (*Id.* at 194, 205.) During examination of Mr. Berry, the petitioner did not object to the mention of the polygraphs. Additionally, the petitioner was not terminated as unsuccessful at treatment because he failed the polygraph. When asked specifically

"And did he successfully complete the program?". "No, ma'am, he did not." "Then why did his treatment stop?" "His refusal to accept responsibility for his actions." "If a client, for lack of a better work (sic) won't admit–or accept–responsibility for their actions can you treat them?" "No, ma'am." (*Id.* at 196.) The failure of the polygraph had "something" to do with the termination. (*Id.* at 200.)

However, the reason the petitioner was terminated from the program, as testified to under direct and cross examination was not flunking a lie detector test, but flunking the whole conditional plea (or whatever it was) entirely, because the petititioner could not complete a program to treat a problem that he wouldn't admit he had.

There is no suggestion that the hearing officer was biased. Further, the court entered a written order adjudicating the petitioner guilty of first degree sexual abuse because of the petitioner's non-compliance with the conditions of his probation, including his failure to abide by the sex offender psychiatric treatment recommendations. That finding was based upon the petitioner's statements and the testimony of Mr. Berry, who testfied regarding the petitioner's sexual offender treatment, lack of compliance, and recent admisssion that he did abuse the victim. (*Id.* at 188.)

Therefore, despite the lack of formal written notice, the petitioner had actual notice of his violations and was afforded due process throughtout the plea and eventual revocation proceedings.

C. The petitioner was not entitled to credit for time spent on home incarceration before entry of his deferred adjudication plea.

The petitioner was arrested and placed on bail, with home confinement being a term and condition of bail. He was released from home confinement the day he pled no contest, February 17, 2009. (*Id.* at 36.)

> When a person who has been arrested, but not yet convicted of a crime, is admitted to pre-trial bail with the condition that he be restricted to home [incarceration] pursuant to West Virginia Code § 62–lC–2(c) (1992), the home [incarceration] restriction is not considered the same as actual incarceration in a jail, nor is it considered the same as home [incarceration] under the Home [Incarceration] Act, West Virginia Code §§ 62–11B–1 to –12 (1993). Therefore, the time spent in home [incarceration] when it is a condition of bail under West Virginia Code § 62–1C–2(c) does not count as credit toward a sentence subsequently imposed. Syl. Pt. 4, *State v. Hughes,* 197 W.Va. 518, 476 S.E.2d 189 (1996). As noted above, petitioner was placed on home incarceration as a condition of his bond pending a re-trial, thus was not yet convicted.

State v. Barnett, 12-0116, 2013 WL 949522 (W. Va. Mar. 12, 2013, Memorandum Decision).

The petitioner's time on home incarceration was pre-trial, pre-conviction, and thus he was not entitled to have that time credited toward his sentence.

V.

CONCLUSION

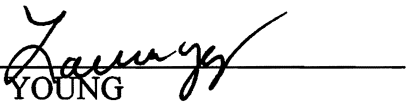
Therefore, based upon the foregoing recitations of fact and conclusions of law, the respondent respectfully requests that this Honorable Court affirm the revocation of the deferred adjudication in this matter, and affirm the decision of the Circuit Court of Mercer County sentencing the petitioner to a term of incarceration of not less than one nor more than five years upon his plea of no contest to the felony offense of first degree sexual abuse.

Respectfully submitted

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



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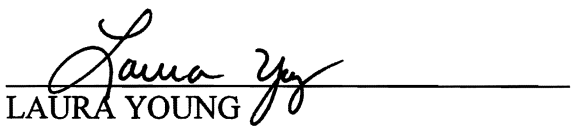
CERTIFICATE OF SERVICE

I, LAURA YOUNG, Deputy Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE RESPONDENT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of May, 2014, addressed as follows:

To: Derrick W. Lefler, Esquire
Gibson, Lefler & Associates
1345 Mercer Street
Princeton, WV 24740



LAURA YOUNG