No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

John Henry Hoyle, *Petitioner*,

v.

State of West Virginia, *Respondent.*

_____

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

Jeremy B. Cooper
Counsel of Record
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
(304) 376-0037
jeremy@blackwaterlawpllc.com

QUESTION PRESENTED

Is West Virginia's sexual offender registration scheme, which requires the disclosure of any telephone number that a registrant "has" or "uses," unconstitutionally void for vagueness, so as to require the reversal of the Petitioner's convictions?

PARTIES TO THE PROCEEDINGS BELOW

1. John Henry Hoyle.

    a. Mr. Hoyle is a criminal defendant in the Circuit Court of Randolph County, West Virginia, whose conviction is the subject of the instant Petition for Writ of Certiorari.

    b. Mr. Hoyle is the Petitioner in the direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. Hoyle,* Docket No. 18-0141, (W.Va., November 22, 2019).

2. The State of West Virginia.

    a. The State of West Virginia is the Plaintiff in Mr. Hoyle's criminal case in Randolph County, West Virginia.

    b. The State of West Virginia is the Respondent in Mr. Hoyle's direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. Hoyle,* Docket No. 18-0141, (W.Va., November 22, 2019).

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The Petitioner, John Henry Hoyle, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

State v. Hoyle, Docket No. 18-0141, (W.Va., November 22, 2019). Signed Opinion of the Supreme Court of Appeals of West Virginia (included in the Appendix to this Petition at p. 1).

STATEMENT OF JURISDICTION

The Petitioner's convictions were affirmed on direct appeal by Signed Opinion issued by the Supreme Court of Appeals of West Virginia on November 22, 2019. This Honorable Court has jurisdiction over final judgments of the highest court of a state pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. Code §15-12-2:

§15-12-2. Registration.

[…]

(d) Persons required to register under the provisions of this article shall register in person at the West Virginia State Police detachment responsible for covering the county of his or her residence, and in doing so, provide or cooperate in providing, at a minimum, the following when registering:

[…]

(9) Information related to any telephone or electronic paging device numbers that the registrant has or uses, including, but not limited to, residential, work and mobile telephone numbers.

STATEMENT OF THE CASE

The Petitioner was indicted on October 27, 2014, by the Grand Jury of Randolph County, West Virginia for two counts of Failure to Register as a Sexual Offender or Provide Notice of Registration Changes, Second or Subsequent Offense. Appendix, at 36-38. Specifically, the Petitioner was accused of failing to inform the West Virginia State Police that one phone number he possessed was no longer in service, and that he had used his wife's phone without informing the State Police within the statutorily required time period. The State's theory of the case was that he had violated the requirement to disclose "[i]nformation related to any telephone or electronic paging device numbers that the registrant has or uses, including, but not limited to, residential, work and mobile telephone numbers." W. Va. Code

§15-12-2(d)(9). The Petitioner stipulated at trial to being required to register as a sex offender for life; that he had a prior conviction for Failure to Register; and that he had been advised as to the registration requirements. Appendix, at 6-12.

At trial, the State put on the testimony of four law enforcement officers. The trial testimony consisted of the officers recounting their interactions with the Petitioner, and their investigation of him. This testimony reflected that the Petitioner was not able to be reached at a phone number that he had disclosed to the State Police pursuant to his registration requirements, and that he engaged in a phone call with a member of law enforcement on his wife's phone, the phone number of which had not been disclosed to the State Police beforehand or thereafter. *Id.*

At the close of the State's case, the Petitioner moved for a judgment of acquittal, on the basis, *inter alia*, that there was insufficient evidence to demonstrate a violation of the registration requirements, specifically concerning the application of the statutory language "has" and "uses." Appendix, at 39-41. That motion was denied, and the jury ultimately convicted the Petitioner of both counts.

The State filed a recidivist information against the Petitioner alleging that he had been twice previously convicted of felony offenses. Eventually, the Petitioner stipulated to his prior convictions, but preserved an argument that West Virginia's recidivist statute should not be applied to him on proportionality grounds. The trial court disagreed and sentenced the Petitioner to the 10-25 year statutory sentence on one count, and a recidivist life sentence on the other count, to run consecutively, for an effective sentence of 25 years to life. Appendix, at 6-12.

On appeal to the Supreme Court of Appeals of West Virginia, the Petitioner challenged the trial court's denial of his motion for judgment of acquittal in light of the vague and

ambiguous statutory language, as well as a jury instruction issue, and proportionality challenges to both the statutory and recidivist sentences. The Petitioner invoked the vagueness doctrine and the Due Process Clause in the course of the appeal and the issue was considered by the court, but no relief was granted on that basis. Appendix, at 11-16, 43. The court below affirmed the trial court on all issues except the proportionality of the recidivist life sentence, issuing a new syllabus point that set forth a requirement that two out of the three felonies must involve violence or significant harm to a victim. Appendix, at 5, 6. Determining that the Petitioner's first offense failure to register conviction, as well as his instant convictions, were not crimes of violence, it reversed the lower court's imposition of a life sentence. Appendix, at 6. The Petitioner is now serving two consecutive statutory 10-25 year sentences, for an effective sentence of 20-50 years, for his violation of the requirement to update his telephone information.

The Petitioner now seeks review by this Court of the determination of the Supreme Court of Appeals of West Virginia that the statute is not unconstitutionally void for vagueness, so as to require the Petitioner's conviction to be reversed.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Pursuant to Rule 10(b) of the Rules of the Supreme Court of the United States, the Petitioner asserts that the Supreme Court of Appeals of West Virginia, a state court of last resort, has decided an important question of federal law raised in this petition in a manner which conflicts with the decisions of another state court of last resort and/or a United States court of appeals. Alternatively, the Petitioner asserts that this question should be, but has not yet been, decided by this Court pursuant to Rule 10(c).

Sex offender registration statutes vary significantly between the states. Numerous provisions have been challenged on vagueness grounds, with varying results. The lower courts

would benefit from guidance from this court in determining what statutory language passes constitutional muster and what does not. This Court has held:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (page numbers and footnotes omitted).

In the instant case, the registration requirement in question covers any telephone number that the registrant "has" or "uses." The Supreme Court of Appeals of West Virginia held that despite the "vast" amount of information this provision could require a registrant to disclose, the statute nevertheless passes constitutional muster. The opinion below stated: "The Act plainly requires registrants to list any numbers related to any telephone device to which they have access or which they use. This is a broad requirement, but it is not ambiguous." Appendix, at 16. Yet even the court's own construction, which includes not just a registrant's own phone numbers, but any to which a registrant "ha[s] access" simply demonstrates how unknown and unknowable the outer limits of criminal liability are under this law. Does a registrant "have access" to his coworker's phone if the coworker offers to let him borrow it, such that a failure to disclose the coworker's number to the State Police is a felony, even if the registrant never uses it?

The West Virginia Legislature has never authored a law requiring the registration of any telephone to which a registrant merely "has access," yet the court below appears to have

imposed new, or at least heretofore unknown, requirements upon every registrant in West Virginia as a side effect of its attempt to describe the limits of statutory language that is self-evidently impossible to define. The opinion below declined to resolve a number of hypothetical scenarios proposed by the Petitioner, including "whether a registrant who borrows a bystander's phone to call a cab must register that number, whether a landline in one's house that one never uses must be registered, and whether a phone which has been disconnected for nonpayment, but which is immediately reconnected, must be both removed and relisted." Appendix, at 13. None of these scenarios are far-fetched, and the ongoing and obvious uncertainty surrounding them effectively vouches limitless discretion in law enforcement to impose criminal liability for any violation, at the pain of decades in prison. No lay registrant can be confident that he has satisfied the statute, and no conscientious attorney can confidently advise a registrant client about what data must be disclosed to avoid incarceration.

Although not a court of last resort, in *McClernon v. State,* 19A-CR-1305 (Ind. Ct. App. 2019), the Indiana Court of Appeals held similarly to the West Virginia court, by upholding the application of a requirement to register any vehicle used on a "regular basis." The conviction was affirmed on the basis of the "objective reasonableness standard," which is not an analysis that the West Virginia court applied in reaching its decision. Similarly, in *Fomaro v. Polk County*, 773 N.W.2d 834 (Iowa 2009), the Iowa Supreme Court upheld a provision concerning where a person may "reside" and a related definition of the word "residence". In that case, the appellant had encountered serious difficulty in locating an apartment that complied with sex offender proximity restrictions under Iowa law. As part of his challenge of the statutory scheme, he asserted that aforementioned definitions exposed him to confusion and potential criminal liability. Unlike the Petitioner, he had not been convicted and incarcerated for a violation of the statute of which he complained. However, in denying his vagueness challenge,

the Iowa court appeared to endorse an interpretation of the complained-of provisions that would not impose the risk of criminal liability of which the appellant complained. This is in stark contrast to the West Virginia court which endorsed the broadest possible version of the duty to report phone numbers.

Not every court has been so sanguine about similar statutory ambiguity. In *Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016), the Fourth Circuit considered a prohibition on being "[a]t any place where minors gather for regularly scheduled educational, recreational, or social programs." *Id.*, at 838. The court held that it while the statute could be constitutionally applied, it did not "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)." *Doe*, 842 F.3d at 843.

Two courts of appeal have considered a provision of supervised release which required a person who was convicted of sexual offenses to disclose any "significant romantic relationships" to his probation officer. In *United States v. Rock*, 863 F.3d 827 (D.C. Cir. 2017). the D.C. Circuit disagreed with the government's assertion that "people of common intelligence understand what 'significant romantic relationship' means." *Id.*, at 832. This decision cited *United States v. Reeves*, 591 F.3d 77 (2nd Cir. 2010), in which the Second Circuit held that "We accept the force of Reeves's assertion that his continued freedom during supervised release should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude that a relationship was significant or romantic." *Id.*, at 81.

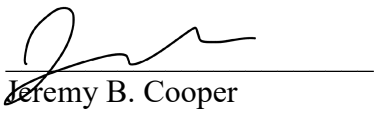
The closest statutory language to the Petitioner's case comes from Michigan. In *Does v. Snyder*, 834 F.3d 696 (6th Circuit 2016) the Sixth Circuit struck down the application of the

Michigan registration requirements as to the litigants in the case on other grounds, and therefore did not assess the district court's holding that certain provisions were void for vagueness. However, six days prior to the filing of this Petition, because the Sixth Circuit's action could cause the revivification of an earlier version of the Michigan statute, the district court again held certain provisions void for vagueness, including, as it had previously, "the requirement to report '[a]ll telephone numbers . . . routinely used by the individual,' Mich. Comp. Laws. § 28.727(1)(h)." *Does v. Snyder*, No. 16-13137 (E.D. Mich. February 14, 2020), at p. 26.

The language "routinely used" is clearly open to interpretation, and it would be nearly impossible to define the limits of what constitutes "routine." Yet even this provision, the enforcement of which is presently enjoined in Michigan, is not nearly as vague as the "has or uses" language in the West Virginia statute, not to mention the West Virginia court's "has access to" interpretation. Noting the difference in manner in which the various courts described in this Petition have treated these related provisions, the Petitioner respectfully requests that this Court grant review on the merits in this case, and in the process, impart guidance to courts throughout the country in resolving similar questions that implicate the rights of hundreds of thousands of registrants.

Respectfully Submitted,

Petitioner, John Henry Hoyle
by counsel,



Jeremy B. Cooper
Counsel of Record
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
(304) 376-0037
jeremy@blackwaterlawpllc.com