

IN THE UNITED STATES SUPREME COURT OF APPEALS

No. _____

**JAMES ROLAND L'HEUREUX,
PETITIONER**

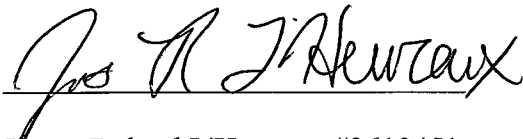
vs.

**STATE OF WEST VIRGINIA,
RESPONDENT**

**ON PETITION FOR WRIT OF CERTIORARI TO
THE WEST VIRGINIA SUPREME COURT OF APPEALS**

PETITIONER'S APPENDIX RECORD

Filed By:

A handwritten signature in cursive script, appearing to read "James R. L'Heureux", written over a horizontal line.

James Roland L'Heureux #3610451
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia, 25185

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**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**FILED
September 27, 2021**

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**State of West Virginia,
Plaintiff Below, Respondent**

vs.) No. 20-0811 (Barbour County 17-F-20)

**James Roland L'Heureux,
Defendant Below, Petitioner**

MEMORANDUM DECISION

Petitioner James Roland L'Heureux, by counsel Ashley Joseph Smith, appeals the Circuit Court of Barbour County's October 2, 2020, resentencing order. Respondent the State of West Virginia, by counsel Gordon L. Mowen II, filed a response to which petitioner submitted a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

In February of 2017, petitioner was indicted on five counts of first-degree sexual assault, fifteen counts of third-degree sexual assault, and five counts of soliciting a minor via computer. The victim, S.M., was eleven years old and petitioner was approximately twenty years old when the incidents resulting in the indictment began; the victim was the daughter of one of petitioner's co-workers. During one incident at the workplace, petitioner "fingered" S.M. by placing his finger inside her "no-no square." Petitioner also texted S.M. and began seeing her outside of the workplace. Petitioner began having sex with S.M. shortly thereafter and continued to do so on a regular basis. S.M. often told petitioner that "she did not want to have sex, and he would yell at her and throw a fit." The sexual relationship lasted for more than eighteen months. When S.M. had concerns that she may be pregnant, petitioner would buy pregnancy tests for her. At the time, she was just twelve years old. S.M.'s brother caught S.M. sneaking out with petitioner one night, after which S.M.'s father told petitioner to stay away from S.M. Shortly thereafter, petitioner returned to Maine, where he had lived previously. Petitioner was arrested in Maine for the West Virginia charges in October of 2016 and was extradited to West Virginia in December of 2016.

In April of 2017, petitioner pled guilty to fifteen counts of third-degree sexual assault pursuant to a plea agreement. In return, the State dismissed the remaining charges against him.

The plea agreement also provided that “[t]he State shall make a sentencing recommendation based upon the [p]re-sentence [i]nvestigation.” During the plea hearing, petitioner expressed his understanding of the felonies to which he was pleading guilty and his awareness that he faced an indeterminate term of not less than one nor more than five years of incarceration for each of the fifteen counts. He correctly informed the court that he understood he faced a sentence of fifteen to seventy-five years of incarceration following the acceptance of his plea if the court chose to run the sentences consecutively.

Prior to sentencing, petitioner underwent three comprehensive psychological evaluations, which ultimately concluded that petitioner “presents a low to moderate risk for re-offense” and “it is hard to make recommendations secondary to the amount of contact that [petitioner] had with the victim, other than incarceration. As I said previously this set of circumstances will not present itself again and [petitioner] is learning about the damage he has done to the victim.” In the pre-sentence investigation report (“PSI”), the probation officer recommended that the court sentence petitioner “to the maximum penalty allowed in this case, 15-75 years in the penitentiary.” She explained that petitioner

began priming and manipulating the victim at the age of 11. The sexual relationship began just prior to her 12th birthday. [Petitioner] talked the minor victim into sneaking out of her home for over a year and had all forms of sex with her on a daily basis for that same amount of time. [Petitioner] kept the victim out of her home, even on school nights, until 4:30 a.m. [Petitioner] had the victim send him pornographic pictures of herself and he also sent them of himself to her. [Petitioner] provided the victim with alcohol and administered an IV to sober her up. [Petitioner] showed no concern of the welfare of this child and attempted to justify his behavior to [the probation officer] by saying he loved [the victim] and was unable to make good decisions due to his drug and alcohol use.

S.M. provided a letter to the court in which she asked the court to impose the maximum sentence available.

During the December 5, 2017, sentencing hearing, petitioner agreed that the information in the PSI was accurate.¹ The State argued to the circuit court that petitioner had a long relationship with a minor that began when she was just eleven years old, he knew what he was doing was wrong, and he did not always accept responsibility for his conduct. The State, therefore, asked the court to sentence petitioner to not less than fifteen nor more than seventy-five years of incarceration. Petitioner’s counsel, however, requested alternative sentencing, arguing that petitioner was immature for his age and referred to his relationship with S.M. as “an affair.” He pointed out that one of the evaluators found that petitioner might be amenable to out-patient therapy so the court could consider “any form of alternative sentencing.” Petitioner requested that he be sentenced to probation and granted permission to return to Maine. Petitioner further argued that the reports submitted to the court contained “implicit bias” and that such implicit bias existed “in the parole officer of the State of West Virginia” because sex offenders rarely, if ever, receive

¹ In his reply brief, petitioner asserts that he was not provided with the sealed letters from S.M. and her mother so he could not agree to the information contained in those letters.

parole. In rebuttal, the State argued the following:

I would note serious – [petitioner's counsel] says, it's implicit bias, we have very much implicit bias in all the reports that have been submitted to you. Any advice by the defense would be that they are all based upon [petitioner's] interpretation of the facts. Specifically, if you will note that his sexual contact came as the relationship grew, but it was not the foundation of the relationship, was unlikely to occur again in the future. The relationship that he had was sexual from the beginning. It was sexual in January of 2015, in February of 2015, and in March of 2015, when she was eleven (11) years old. The relationship began that January and was sexual all the way through. The reports are implicitly biased upon [petitioner's] interpretations of what he's willing to state the relationship was. The facts are though he preyed upon a young child. Also, they said that it's not likely to occur again. Well, it is likely to occur again. When he left and he fled to Maine. He didn't – he actually continued to engage in conversations with minor children that were – that is very concerning. Specifically, in discovery we were able to obtain his Facebook records and in his Facebook records, he contacted another female, who would have been a witness in this case. And her initials or her first name is Emma and talked to her about his relationship with – with the victim and. [sic] And he also asked her request [sic] that she snapchat with him and asked where do you live. This is a sexual predator. This is someone who will repeat this. These are concerns the State has and this [sic] some of the things that the [c]ourt should be very concerned about. These are the most serious crimes that we have in our state and we would ask that the a [sic] serious sentence be imposed to protect not only this State but also Maine.

In considering those arguments, the circuit court stated that it had “to not only consider [petitioner] and his background and his evaluation but also the effect that these offenses had on the alleged victim. And you are dealing with an eleven (11) year old child and that's a very young age, eleven (11), twelve (12) years old. They are not mature.” The circuit court sentenced petitioner to an aggregate sentence of not less than fifteen nor more than seventy-five years of incarceration by order entered on April 3, 2018. In addition, petitioner was sentenced to forty years of supervised release and was ordered to register as a sex offender for life.

On October 2, 2020, the circuit court entered a resentencing order for purposes of appeal; it incorporated its findings of fact and conclusions of law from the April 3, 2018, order into the new sentencing order. However, during the August 12, 2020, hearing regarding the resentencing motion, petitioner argued that the State breached the terms of the plea agreement. During that hearing, the court explained

This is a resentencing[.]. Just for the purposes of perfecting an appeal . . . I've looked at the case law and particularly find that under *Adkins v. Leverette*, a 1980 case, that there is no reason[] to deny [petitioner] that resentence. And I am going to allow him to be resentenced. But the purpose of that resentence is to specifically start a new appeal period and to afford him an opportunity to perfect his right to appeal.

Petitioner appeals from the October 2, 2020, resentencing order.

In syllabus point one of *State v. Wilson*, 237 W.Va. 288, 787 S.E.2d 559 (2016), this Court explained the standard of review for matters involving an alleged breach of a plea agreement:

“Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court’s ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under the clearly erroneous standard. Second, in contrast, the circuit court’s articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed de novo.’ Syl. Pt. 1, *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995).” Syllabus point 1, *State v. Shrader*, 234 W.Va. 381, 765 S.E.2d 270 (2014).

State v. Blacka, 240 W. Va. 657, 660, 815 S.E.2d 28, 31 (2018).

On appeal, petitioner sets forth two assignments of error: (1) the circuit court erred by refusing to acknowledge or rule on the objection to the State’s breach of the plea agreement, the details of which are set forth below, made by petitioner’s counsel at the sentencing hearing; and (2) under the United States and West Virginia Constitutions, the prosecutor violated petitioner’s Fifth and Fourteenth Amendment rights when he breached the plea agreement.

With regard to petitioner’s contention that the circuit court failed to rule on his objection to the State’s breach of the plea agreement, petitioner asserts that during the resentencing hearing, petitioner’s counsel objected to the State’s breach of the plea agreement, arguing that the State’s sentencing recommendation was inconsistent with the PSI. Petitioner argues that although the circuit court never made a definitive ruling, petitioner’s objection has been preserved and is, therefore, reviewable by this Court.

In response, the State asserts that the circuit court did not err when it declined to rule on petitioner’s objections to the State’s alleged breach of the plea agreement because petitioner’s resentencing was undertaken solely to restore his right to seek a direct appeal. Petitioner’s sentencing hearing was held on December 5, 2017, and his counsel failed to file a direct appeal. Therefore, on October 2, 2020, petitioner was resentenced, at his request, for purposes of restoring his right to seek a direct appeal. During the subsequent hearing, petitioner’s counsel asked that

petitioner be resentenced "for appellate purposes only." However, petitioner then attempted to challenge his underlying conviction by arguing that the State breached the plea agreement and requested that the sentences be run concurrently. The State argues that the circuit court declined to entertain such a claim because it went far beyond the very limited purpose of the resentencing hearing. As the circuit court stated during that hearing, it had not reviewed any information from the case relevant to any breach of the plea agreement and that such a claim fell outside of the limited purpose of the proceeding. The State also explained that it was caught off guard by petitioner's unexpected challenge, as it understood the purpose of the hearing to be a resentencing purely for purposes of appeal. We agree with the State.

This Court has found that

"[o]ne convicted of a crime is entitled to the right to appeal that conviction and where he is denied his right to appeal such denial constitutes a violation of the due process clauses of the state and federal constitutions and renders any sentence imposed by reason of the conviction void and unenforceable." Syllabus, *State ex rel. Bratcher v. Cooke*, 155 W.Va. 850, 188 S.E.2d 769 (1972). . . . Where the state has not been extraordinarily derelict in its duty to afford the defendant an opportunity to appeal his conviction, such defendant may be resentenced and a new appeal period begun so as to afford him an opportunity to appeal. See *Johnson v. McKenzie*, [160] W.Va. [385], 235 S.E.2d 138 (1977).

Adkins v. Leverette, 164 W. Va. 377, 383, 264 S.E.2d 154, 157 (1980). As petitioner's counsel set forth during the resentencing hearing, "[w]e would ask that the [c]ourt just resentence him for appellate purposes only." In addressing the "other issue" of the alleged breach of the plea agreement, petitioner's counsel stated that she was "willing to [follow] that up with a written motion following [the resentencing] hearing." After some back and forth, the circuit court expressed its understanding that

the very purpose of this is to give an appeal right. Not to insert more error or potential error that was done from before. If I let you come in and argue sentencing again, not just for purposes of appeal, to be resentenced, the [S]tate could fix that. And then the question would be is there even an error there to make an appeal on. I don't think we get to any of that here today. And I am just going to simply resentence [petitioner] as he was sentenced before for purposes of giving him his opportunity to exercise his appeal right.

Further, when the circuit court inquired as to whether petitioner had any objection to the court's position, petitioner's counsel responded, "No objection, Your Honor." The docket sheet provided to this Court does not show that petitioner's counsel filed any type of motion or memorandum following that hearing. In addition, petitioner did not cite any law that permits the circuit court to essentially reopen arguments related to sentencing when the sole purpose of the hearing was resentencing to allow petitioner to appeal. Due to the fact that the circuit court resentenced petitioner, as required, in order to afford petitioner his right to appeal; petitioner's counsel requested during the hearing that petitioner be resentenced for purposes of appeal; and petitioner's counsel informed the circuit court that she had no objection to the circuit court's position that the

hearing was specifically for purposes of resentencing,² we find that the circuit court did not err in implicitly denying petitioner's additional motion.

Petitioner's second assignment of error boils down to the merits of the argument he sought to present to the circuit court during the resentencing hearing – the alleged breach of the plea agreement by the State. Petitioner argues that the State undermined the plea agreement by making characterizations of petitioner that were not supported by the PSI. Petitioner is critical of the prosecutor's comments accusing petitioner of attempting to flee the state to evade arrest; alluding to an unidentified second victim without evidence; and suggesting that the PSI contained implicit bias against the State in favor of petitioner. He admits that the State's recommendation is not binding on the lower court but asserts that the State should not be permitted to use that technicality as a guise for a prosecutor's misconduct at the sentencing hearing. Petitioner asserts that both parties entered into the plea agreement expecting to reap the rewards from the sentencing recommendation clause – petitioner expected to obtain the benefits of a favorable PSI, as he had no prior criminal history and was not classified as a predator in the psychological evaluations. He argues that the State did not object to the PSI, instead expressing opinions outside the scope of the PSI, which undermined the plea and proffered the prosecutor's personal opinion of petitioner instead of what the PSI revealed.

To evaluate whether a plea agreement has been breached by the State, the terms of the plea agreement itself are “subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled.” *State v. Wilson*, 237 W. Va. 288, 293, 787 S.E.2d 559, 564 (2016) (quoting *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 192, 465 S.E.2d 182, 192 (1995)). While ambiguities in a plea agreement will be construed against the State, “a plea agreement should be read reasonably, without resort to strained or hyper-technical interpretation.” *Wilson* at 293, 787 S.E.2d at 564. Further, a petitioner seeking relief based upon such a claim must establish that the alleged violation contributed to the sentence imposed by the court. *Id.* at 294, 787 S.E.2d at 565. Here, paragraph 7 of the plea agreement provides that “[t]he State shall make a recommendation based upon the [PSI].” Contrary to petitioner's argument, this Court has issued several opinions addressing alleged breaches of plea agreements based upon comments made by the State during sentencing. *See, e.g., Wilson; Blacka.*

In the PSI, the probation officer recommended that the circuit court impose “the maximum penalty allowed in this case, 15-75 years in the penitentiary.” Her recommendation was based on the fact that petitioner “began priming and manipulating his victim at the age of 11. The sexual relationship began just prior to her 12th birthday.” She also informed the circuit court therein that petitioner “showed no concern for the welfare of this child and attempted to justify his behavior to [the probation officer] by saying he loved [the victim]” and that petitioner “showed deviance in his ability to manipulate all involved, mainly the victim, an 11 year old child.” In the PSI, the probation officer indicated that petitioner accepted responsibility for his actions but blamed those actions on his use of drugs and alcohol. During the original sentencing hearing, petitioner's counsel

² The requirement that a party raise or waive an objection is designed “to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error.” *Wimer v. Hinkle*, 180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989).

highlighted the favorable portions of the psychological evaluations.

Before imposing sentence, the circuit court stated

[M]y question is should there be some punishment even though he may be a low to moderate risk to re-offend that there would be punishment for what . . . occurred here. What he plead to. Not what he didn't do to which those charges were dismissed. Again, he was facing much more serious exposure had this plea agreement not been entered into The [c]ourt has to not only consider [petitioner] and his background and his evaluation but also the effect that these offenses had on the alleged victim. And you are dealing with an eleven (11) year old child and that's a very young age, eleven (11), twelve (12) years old. They are not very mature It's going to have serious effects on the victim the rest of her life. So she is going to be paying consequences as the result of [petitioner's] conduct as well.

It appears from those comments that the circuit court properly considered the victim's criminal actions, which were undisputed, and the impact upon the victim, who requested that petitioner receive the maximum sentence. The court obviously focused on the victim's young age, as well. Because the State recommended the same sentence recommended by the probation officer and requested by the victim and the State's recommendation was not contrary to the PSI, we find that the State did not breach the plea agreement.

Affirmed.

ISSUED: September 27, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton

IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,
VS. JAN 10 2018
FELONY NO: 17-F-20
JAMES ROLAND L'HEUREUX,
DEFENDANT.

SENTENCING ORDER

On the 5th day of December, 2017, came the State of West Virginia, by Thomas B. Hoxie, Prosecuting Attorney for Barbour County, West Virginia, and also came the Defendant, James R. L'Heureux, in person and by his counsel, James Zimarowski, Esq., all for a Sentencing Hearing.

The Court heard proffers of counsel for the Defendant and the State and testimony from the Defendant.

The Defendant had entered a plea of "GUILTY" to Fifteen (15) Counts of "Sexual Assault in the Third Degree," as contained in Count 6 through 20 of the Indictment, and the Court ORDERED a Presentence Investigation to be completed prior to sentencing.

The Court has been advised that the Presentence Investigation has been completed in this matter and copies provided to all parties herein.

The Defendant had no objections to the Presentence Investigation Report.

Based upon aforementioned Presentence Investigation Report, proffers of counsel, statements by the Defendant, and upon review of the record herein, the Court thereupon **ORDERED** the Defendant **SENTENCED** to the West Virginia State Penitentiary for a term of one to five years for each count of "Sexual Assault in the Third Degree," and for all fifteen counts to run consecutively. The Defendant shall receive credit for all time served.

Upon release from incarceration, the Defendant shall have forty years of supervised release through the probation office.

The Court further **ORDERED** that the Defendant shall pay all court costs, including any and all regional jail fees, at the current per diem rate, attorney fees, and restitution assessed by the Clerk in this matter.

It is further **ORDERED** that the Circuit Clerk shall send certified copies of this Order to the following: Thomas B. Hoxie, Esq.; James B. Zimarowski, Esq.; Probation Office; Tygart Valley Regional Jail, and West Virginia Division of Corrections.

ENTER: 4/3/18



JOHN LEWIS MARKS, JR., JUDGE

IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,
VS.
JAMES ROLAND L'HEUREUX,
DEFENDANT.

FILED
OCT 02 2020
Barbour County Circuit Clerk

FELONY NO: 17-F-20

RE-SENTENCING ORDER

On the 12th day of August, 2020, came the State of West Virginia, by Thomas B. Hoxie, Prosecuting Attorney for Barbour County, West Virginia, and also came the Defendant, James R. L'Heureux, in person and by his counsel, Ashley Smith, Esq.

This Court, pursuant to *Carter v. Bordenkircher*, 159 W. Va. 717, 226 S.E.2d 711, held a Resentencing Hearing for purposes of allowing the Defendant the right to file a timely appeal in this matter.

The Court heard proffers of counsel for the Defendant and the State and testimony from the Defendant.

The Defendant had entered a plea of "GUILTY" to Fifteen (15) Counts of "Sexual Assault in the Third Degree," as contained in Count 6 through 20 of the Indictment and was previously sentenced on December 5, 2017.

Based upon review of the record herein, the Court thereupon **ORDERED** the Defendant **SENTENCED** to the West Virginia State Penitentiary for a term of one to five years for each count of "Sexual Assault in the Third Degree," and for all fifteen counts to run consecutively for a cumulative sentence of not less than fifteen not more than seventy-five years in prison. The Defendant shall receive credit for all time served. The Court specifically incorporates all

Findings on Fact and Conclusions of Law from the prior sentencing order entered on April 3, 2018.

Upon release from incarceration, the Defendant shall have forty years of supervised release through the probation office.

The Court then instructed the Defendant on the Defendant's right to appeal this sentence and in accordance with the same, ORDERED that the Defendant SHALL have the right to file an appeal with the West Virginia Court of Appeals by filing a Notice of Intent to Appeal within thirty (30) days from the final judgment in this proceeding and by filing a petition for appeal with the West Virginia Court of Appeals within four (4) months of the entry of judgment and otherwise complying with the West Virginia Supreme Court of Appeals Rules and Appellate Procedure.

The Court further ORDERED that the Defendant shall pay all court costs, including any and all regional jail fees, at the current per diem rate, attorney fees, and restitution assessed by the Clerk in this matter.

It is further ORDERED that the effective Resentencing Date for purposes of Appeal shall be the date of entry of this Order.

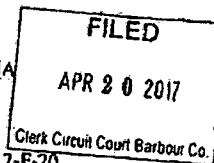
It is further ORDERED that the Circuit Clerk shall send certified copies of this Order to the following: Thomas B. Hoxie, Esq.; Ashley Smith, Esq.; Probation Office; Tygart Valley Regional Jail, and West Virginia Division of Corrections.

ENTER: 10-02-2020


SHAWN D. NINES, JUDGE

IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,
VS.
JAMES ROLAND L'HEUREUX,
DEFENDANT.

FELONY NO: 17-F-20
ALAN D. MOATS, JUDGE



PLEA AGREEMENT

This Agreement, made this 20th day of April, 2017, by and between the State of West Virginia, by and through Thomas B. Hoxie, Prosecuting Attorney for Barbour County, West Virginia, hereinafter referred to as "The State," and James Roland L'Heureux, both individually and by and through counsel, James B. Zimarowski, hereinafter referred to as "The Defendant."

WHEREAS: The Defendant was Indicted by the February 2017 Term of the Barbour County, West Virginia, Grand Jury on five (5) Counts of "Sexual Assault in the First Degree," fifteen (15) Counts of Sexual Assault in the Third Degree, and five (5) counts of Soliciting a Minor via Computer.

And WHEREAS: The State and the Defendant have entered into negotiations regarding the disposition of this case and an Agreement has been entered into between the parties upon the following terms, to-wit:

1. The Defendant agrees to tender to the Court a plea of "GUILTY" to Fifteen (15) Counts of "Sexual Assault in the Third Degree", as contained in Count 6 through 20 of the Indictment and to move the Court to withdraw the previous plea of "Not Guilty."
2. The State agrees to dismiss, with prejudice, the remaining charges in the Indictment based upon the Defendant's aforementioned guilty plea.
3. That the Defendant has discussed this plea with counsel and is aware and understands

Page 1 of 2

Filed April 20 2017
James B. Zimarowski

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that the statutory punishment applicable with regard to the offense to which the Defendant enters a plea pursuant to this Agreement is as follows:

"Sexual assault in the third degree" - W. Va. Code § 61-8B-5

Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.


4. Upon the Court's acceptance of this Plea Agreement, the Defendant agrees to provide for the Court an accurate factual basis for the plea so entered.

5. The Defendant acknowledges that if this Agreement is the type specified in Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure whereby the Prosecuting Attorney will make a recommendation or agree not to oppose the Defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the Court and that if the Court does not accept the recommendation or request, the Defendant nevertheless has no right to withdraw the plea, as advised in subdivision (e)(2) of said Rule.


6. The Defendant shall request a Pre-Sentence Investigation.

7. The State shall make a sentencing recommendation based upon the Pre-Sentence Investigation.

WITNESS our Agreement to the terms and conditions continued herein by our signatures, which appear below.


THOMAS B. HOXIE
Prosecuting Attorney


JAMES ROLAND L'HEUREUX
Defendant


JAMES B. ZIMAROWSKI
Counsel for the Defendant

SEXUAL OFFENDER TREATMENT PLAN

JAMES L'HEUREUX

17-F-20

July 30, 2017

OBJECTIVES TO BE MET:

INDIVIDUAL AND GROUP THERAPY:

Therapy will focus on both social and psychological. The goals of the therapy will be to develop behavior changes concerning inappropriate sexual behavior and the long-term effects of the behavior on both the victim and the offender James L'Heureux has plead guilty to having an inappropriate relationship and sexual contact with a non-consenting individual.

THE GOALS WILL INCLUDE THE FOLLOWING:

RESPONSIBILITY:

JAMES will clearly accept the responsibility for the sexual behavior without reservation or rationalization.

JAMES will clearly acknowledge the actual and potential harm to the victim, him self, and family.

JAMES will demonstrate responsibility in attendance and utilization of therapy opportunities.

JAMES will accept and adhere to conditions of probation and other directives of the criminal justice system.

JAMES will be able to differentiate between responsibility and guilt.

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POWER:

JAMES will acknowledge the inappropriate power relationship inherent in the sexual behavior.

JAMES will identify the correct power relationships in the family.

JAMES will identify areas of individual powerlessness and plans for change.

JAMES will assist in empowering the victims.

JAMES will demonstrate ability to share power in familial, and work situations.

CONTROL:

JAMES will demonstrate control over sexual arousal, behavior. He will admit to his arousal patterns and learn how to manage inappropriate arousal.

JAMES will acknowledge any disinhibitors and plans for controlling them, including Internet, video, print, use to view pornography. Possession of any pornography is prohibited during treatment. Drug use is prohibited unless prescribed by a physician. Alcohol use is also prohibited due to its disinhibiting effects.

Describe the "set-up" for the sexual contact and plans for controlling these. (Relapse prevention)

JAMES will demonstrate control over impulses.

JAMES will demonstrate control over day-to-day decision-making.

JAMES will understand and resolve issues regarding need for control over others and relinquish this need.

AFFECTIVE AWARENESS:

JAMES will identify the full range of feelings consistently and with understanding. He will learn that his emotional needs are met by age appropriate, consenting individuals who are equipped to meet his needs.

JAMES will express the range of feelings and clarify these feelings to the counselor.

JAMES will demonstrate ability to understand, clarify, and date appropriate action on others' feelings.

JAMES will explore personal history and be able to identify precursors to sexual behaviors. He will learn to identify his sexual arousal patterns.

COMMUNICATION:

JAMES will demonstrate ability to use "I" messages and active listening.

JAMES will demonstrate an ability to express and receive thoughts, feelings, opinions, and beliefs.

INTERPERSONAL RELATIONSHIPS:

JAMES will demonstrate improved interpersonal relationships with age appropriate consenting individuals.

JAMES will demonstrate awareness of intimacy needs within relationships and learn understanding that pre-teenagers are not equipped to care for his emotional needs.

JAMES will work on appropriate sexual relationship(s) with adult partner(s).

JAMES will demonstrate improved socialization skills.

James L'Heureux

Date

Jack R. Torsney, Jr., M.Ed.

Date

TREATMENT PLAN ADDENDUM

James Roland L'Heureux

17-F-20

On July 13, 2017 I traveled to the Tygart Valley Regional Jail to interview James Roland L'Heureux in order to develop a treatment plan for James to address his emotional and sexual issues secondary to his relationship with a non-consenting individual.

MENTAL STATUS:

James was in a depressed mood that would be expected secondary to his being incarcerated. He admitted that he was depressed and had been so for most of his life. James' speech was clear and well paced and his thoughts logical and goal directed. James was oriented to person, place, time, and situation. His memory was intact for recent, remote and immediate events. James was cooperative throughout the interview. He appeared open and honest. He understood that I had read his information prior to the interview. He did not present as psychotic or delusional. He denied any hallucinations, either visual or auditory and did not display any blocking or confabulation.

James stated that he is being treated for Bi-Polar Disorder. He is taking medications for this disorder although he told me that the Latuda, that is a very expensive drug, had been replaced with Depakote. He feels that it seems to be working for him. James denied any current suicidal ideation or planning but he said that he has been hospitalized for a suicide attempt in 2016 by a drug overdose. James has a history of substance abuse that may have started as a result of trauma from his job as an EMT. Emotionally, James is estimated to be much younger than his chronological age would indicate and working as an EMT certainly would create problems for him with coping with trauma. James told me early into our interview that he "did not like himself." He said that he doubted that he ever liked himself. Overall self-esteem and self-concept are poor. Intellectually James is estimated as average.

ASSESSMENT OF RISK FOR SEXUAL RE-OFFENSE:

Studies have shown that an adjusted actuarial method of analysis is the most accurate means to assess the risk of sexual re-offense. This method relies on data derived from a clinical interview of the offender combined with the use of questionnaires and a review of collateral sources. Sexual offenders have in common certain personality characteristics as well as similar defense and coping

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mechanisms. An understanding and knowledge of the behavioral, emotional, and social traits of offenders will facilitate both assessment and treatment. No single tool or methodology to determine risk for sexual re-offense has been proven to be 100% accurate.

Due to James' age and maturity he has a limited worldview and a constricted behavioral and emotional repertoire. He tends to deal in absolutes even though he has shown the ability to think in the abstract. James compartmentalizes his feelings and has little consideration of the consequences of his behaviors. James has conflicts centering on dependency vs. autonomy. He is basically immature and impatient.

James tends to act compulsively and tends toward addictions. He operates from a self-centered orientation. He tends to relate superficially to others and at times it seems likely that he views others as threatening to his self-worth. James has problems with impulse control and tends to be oriented to action rather than contemplation.

James appears to have compensated for his low self-worth by presenting himself as controlling, powerful and potent. This can be seen through his relationship with an individual who was immature and easily controlled.

Communication skills and problem resolution skills are not James' strong suits. He does not have a good capacity for conflict resolution; he has poor social skills, and is often withdrawn.

There are no reports of force or violence during the relationship that James had with the victim. There did not seem to be any bizarre rituals associated over the period of time of the offense. There was no evidence of violent acting out behaviors by James toward the victim.

James had chronic high stressors secondary to his work as an EMT and his inability to handle the stress associated with that job and with going to school away from home. James denies any history of severe childhood abuse.

James does not have a general criminal lifestyle evident from history, background checks or prior arrests. He does not have a diagnosis of severe character disorder, paranoia, psychosis, intellectual limits, or organicity. James has a history of social sexual maladaptation secondary to his maturity level and lack of self-worth.

James never used any defenses with me during the interview. He was open and honest and talked about the long relationship he had with the victim and how it came to end. James denied that he targeted the victim for sexual purposes. He seemed to indicate that he received positive regard from the victim unlike what he received from any other relationships he has had from other, age appropriate individuals.

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James has good social support in his family. They are very upset with James' behavior but have stood behind him.

CONCLUSION:

It is clear that James found in the victim an individual who could support his emotional needs and whom he could interact with on his emotional level. He did not understand that a person of the victim's age could not act as an adult and care for his emotional as well as physical needs. James did not understand the damage that could potentially happen to the victim secondary to this relationship. James' benefit from the relationship was friendship with the victim and someone, who I said previously, would satisfy James' emotional needs. Sexual contact came as the relationship grew but it was not the foundation of the relationship.

James did not have any relationships with non-consenting individuals in the past. His relationships were with age appropriate individuals and did not last for any period of time. When he met the victim he met an individual who was vulnerable and who looked up to James. In the long run she could not meet James' emotional needs because she was busy meeting her own emotional needs as a pre-teen.

James has good support from his family of origin. They have stood behind him and are going to be at his hearing to support him. There is no question that they would allow James to come home to do any alternative sentencing that might be handed down. His family appears stable and able to help James.

It is unlikely that the set of circumstances that occurred in this case would occur again. Although James is emotionally immature he is intellectually acute enough to understand the damage he has done to his victim and her family. He is intelligent enough to understand that this would happen to any pre-teen individual whom he might want to have a relationship with. James can learn to understand the importance of allowing children to mature with guidance not emotional and or sexual intrusion.

RECOMMENDATIONS:

James presents a low to moderate risk to reoffend. It is hard to make recommendations secondary to the amount of contact that James had with the victim, other than incarceration. As I said previously this set of circumstances will not present itself again and James is learning about the damage he has done to the victim.

I feel that this learning should continue and James is a candidate for alternative sentencing and community-based treatment.

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JACK R TORSNEY, JR, M.ED.

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**STATE OF WEST VIRGINIA
DIVISION OF CORRECTIONS
NORTHERN CORRECTIONAL FACILITY
DIAGNOSTIC UNIT**

RECEIVED
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**PRE-SENTENCE EVALUATION REPORT
62-12-7a 60 Day Law**

CIRCUIT CLERK
BARBOUR COUNTY

NAME: L'Heureux, James

OID #: 3610451

AGE: 22

DATE OF BIRTH: 08/21/1995

BIRTHPLACE: Kennebec, ME

SEX: M

RACE: W

SOCIAL SECURITY NUMBER: 004-96-9213

MARITAL STATUS: Single

EDUCATIONAL STATUS: Grade: 12

HSED:

OFFENSE: 17-F-20
3rd Degree Sexual Assault (15 Counts)

PLEA: Guilty

DATE OF RECEPTION: 09/12/2017

COUNTY: Barbour

RETURNED TO COURT: October 2017

JUDGE: Marks

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**WEST VIRGINIA DIVISION OF CORRECTIONS
NORTHERN CORRECTIONAL CENTER
DIAGNOSTIC EVALUATION
Confidential Information**

INMATE: L'Heureux, James R.
OIS#: 3610451
COUNTY: Barbour
DATE OF BIRTH: 08/21/95
DATE OF EVALUATION: 10/23/17
EVALUATOR: Amber Gump, M.A., Licensed Psychologist
WV #1126

Identifying Information:

James L'Heureux is a 22-year-old, Caucasian male currently housed in the Diagnostic and Classification Unit at Northern Correctional Center for the purpose of undergoing a 60-day presentence evaluation. On April 20, 2017, in Barbour County, West Virginia, before the Honorable Judge John L. Marks Jr., Mr. L'Heureux entered a plea of guilty to fifteen (15) counts of Third Degree Sexual Assault. Mr. L'Heureux was ordered to Northern Correctional Center for a diagnostic evaluation/risk assessment prior to sentencing and was received at Northern Regional Jail on September 12, 2017.

Information contained in this report was obtained via personal interview with the subject, a review of available records including but not limited to: relevant psychological tests, FBI reports, CIB reports, NCIC reports and a pre-sentence investigation.

Information presented in the evaluation, which was obtained solely from the interview with the inmate, is unverified and should therefore be viewed with appropriate caution.

LEGAL HISTORY:

Version of the Crime According to Report of Criminal Investigation:

"Between the dates of January, 2015 and April 5th, 2016, James Roland L'Heureux was involved in a sexual relationship with a juvenile female, S. M. (DOB: 03/16/2003). The two individuals reportedly had sexual intercourse almost every day in various locations, ranging from the victim's residence, the suspect's vehicle, and the suspect's dorm room located at Alderson Broadbush University."

Account of Instant Offense According to Criminal Complaint dated 10/27/16:

"On August 8th, 2016, a Child Advocacy Center interview was conducted with a juvenile female, S.M. (DOB: 03/16/2003), hereafter referred to as "the victim", of which the undersigned officer attended. During the interview, the victim revealed that in the later part of the month of

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January, 2015, James Roland L'Heureux (DOB: 08/21/1995), hereafter referred to as "the suspect", began kissing her and inserted his finger inside of her vagina for the purpose of sexual gratification while he was pushing her against a desk located inside of a storage closet at the Barbour County Emergency Squad in Philippi, WV. At that time, the suspect was employed as an Emergency Medical Technician at the Barbour County Emergency Squad. The victim was attending First Aid/CPR class.

The victim stated that around one week later, at the end of January 2015 or beginning of February 2015, she and the suspect had made plans to meet via text message near the victim's residence located at 404 Townsend Road, Philippi, WV 26416. The victim stated that she did meet with the suspect. The victim stated that while in the suspect's car, the suspect attempted to talk the victim into having sex with him. The victim stated that she and the suspect did not have sex on that date.

The victim stated that around one week after the previous meeting, the suspect picked the victim up from her residence again. The victim stated that they traveled to a spot located on the Alderson Broaddus University Campus in Philippi, WV and parked. At the time, the suspect was a student enrolled at Alderson Broaddus University in Philippi, WV. The victim stated that this was the first time that she and the suspect had sexual intercourse with each other. At this time, the victim still would have been eleven (11) years old, and the suspect would have been nineteen (19) years old.

The victim stated that on the night of 3/15/2015, after midnight, believed to be the early morning of 3/16/2015, the victim's birthday, the suspect and victim were having sexual intercourse on the campus of Alderson Broaddus University in the suspect's vehicle. The victim stated that the suspect wanted to have "birthday sex". The victim stated that on this night, they were caught by a police officer, believed to be Sr. Patrolman D. Cale of the Philippi Police Department. On 8/14/2016 at approximately 0200 hours, the undersigned obtained a statement of Sr. Patrolman D.A. Cale. Sr. Patrolman D.A. Cale stated that in the early spring months of 2015, he was working night shift for the Philippi Police Department, patrolling the campus of Alderson Broaddus University. He stated he observed a silver SUV parked backwards and facing US Route 119 in the parking lot located behind the day care. He stated he approached the vehicle and shined in his flashlight through the fogged up window of the vehicle. He knocked on the back window of the vehicle and a male wearing only boxers opened the door. He stated he recognized the man as being "James from the Barbour County Emergency Squad" and that he appeared to be very nervous, but stated everything was okay. Sr. Patrolman D. Cale stated that he observed two sets of legs in the back of the vehicle but did not see who the second person was. Sr. Patrolman D. Cale stated that it was clear that James and the second person in the vehicle were engaging in sexual intercourse. At this time, the victim would have just turned twelve (12) years old, and the suspect would have been nineteen (19) years old. The victim revealed that she and the suspect would have sex almost every day during the approximate 1.5 year long relationship.

On October 10th, 2016, the undersigned conducted a search warrant on the victim's residence after learning that items that show a relationship existed between the suspect and victim were currently located inside the victim's bedroom. During the execution of the search warrant, the undersigned located a scrapbook, underneath the victim's bed. Inside of the scrapbook there were several cards containing handwritten notes from the suspect to the victim. Several of these notes concluded with a signature of "James" or "James L'Heureux". In one of notes contained in a card located inside the scrapbook, the suspect wrote, "I got lucky because

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the sex is amazing and keeps getting better every month" and also refers to the victim as "fiancé". This occurred in Barbour County, WV

Holds, Detainers & Pending Charges:

Mr. L'Heureux denied any pending charges, holds, or detainers and none are noted in the Pre-Sentence Investigation Report.

Escape History:

There was no known escape history for this subject and he is not considered an escape risk.

Prior Record/Legal History:

The CIB/NCIC check, dated June 6, 2017, showed no prior charges and/or convictions.

Background Information:

Family/Social History:

Mr. James L'Heureux was born in southern Maine on August 21, 1995. His natural parents are Kevin Robert L'Heureux, 48, and Catherine Chase, 48. He reported his parents are currently separated. His father is employed as a salesperson for a medical supply company, and his mother is employed as a nurse. Neither of his parents reported any issues with criminality and or substance abuse.

Mr. James L'Heureux reported he grew up in Maine, until age four, when his family moved to North Carolina. He reported he returned, with his family, to live in Maine in 2005. He reported he has a younger sister, who is 15-years-old.

Mr. L'Heureux reported having a positive relationship with his parents and his family, though he stated he feels "my family feels obligated." He reported some emotional abuse by his father, but denied any other abuse. He reported his support system consists of his parents and extended family. He reported he speaks to his parents daily, "alternating each day" because they are separated.

Mr. L'Heureux reported he has never been married, nor does he have any children. He denied being in a current romantic relationship. Mr. L'Heureux reported he was previously employed as an EMT in West Virginia, and his last job was as a Lieutenant in the Ocean Reserve in Maine, in 2016. Currently, he is prescribed Depakote, Remeron, Buspar, Mobic, Prilosec, Tums (antacid), and a daily vitamin. He reported he is allergic to amoxicillin, sulfa, tenex, and Neosporin.

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He reported he has an annular tear in his back, mild scoliosis, and GERD. He denied ever experiencing seizures and/or sexually transmitted diseases. He stated he once had a high fever as a child, reporting it was "104."

Educational/Vocational/Military:

Mr. L'Heureux attended Wildwood Forest Elementary School in Raleigh, NC, and Kennebunk Middle School in Kennebunk, ME. He reported he attended Kennebunk High School in ME. He graduated high school and then attended Alderson-Broaddus University in Philippi, WV, majoring in Nursing.

Mr. L'Heureux reported he worked as an EMT in Barbour and Upshur Counties, WV, while attending college at Alderson-Broaddus University, from August 2013-2016. He reported when he returned to Maine in April 2016, he worked for the Ocean Reserve. His longest reported employment was as an EMT.

Substance Abuse Treatment:

Mr. L'Heureux reported a significant history of substance abuse. He stated he first drank alcohol at age 19. He reported he began drinking alcohol heavily at age 20, with daily drinking, and consuming 4-5 bottles of vodka a week. He reported he was prescribed Klonopin for anxiety at age 19, but admitted he abused the medication.

He reported at his peak use of Klonopin, he consumed 10mg a day, and also drank alcohol with the medication. He reported he was prescribed Tramadol for back pain at age 19. He reported he abused Tramadol, by taking more of the medication than he was prescribed. He admitted to using alcohol and prescription medications at the same time, to the point of intoxication.

He denied using any other drugs in his lifetime. He reported his last use of substances was in March 2016. This information is somewhat inconsistent with available records, as he previously reported he began consuming alcohol at age 18.

Mr. L'Heureux denied ever being charged with DUI and/or Public Intoxication. He reported participating in outpatient drug treatment when he was released from the hospital in Maine, in April 2016, following his hospitalization for a suicide attempt. He reported he attempted suicide in March 2016 by "taking a bunch of meds and drinking alcohol." He admitted to being under the influence of intoxicants at the time of his crime, and he also admitted to drinking alcohol with his victim, who is a minor child.

Mental Health History:

Mr. L'Heureux reported a history of mental health treatment, beginning in his childhood. When interviewed, he reported being treated psychiatrically for depression and anxiety since he was 10 years old. This is somewhat inconsistent with available records, in which he reported being treated as a child for ADHD.

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He reported being treated as an adult for depression, anxiety, and Borderline Personality Disorder, when he returned to Maine in 2016. He reports current treatment through WVRJ. He admitted to being hospitalized for psychiatric reasons. He reported being hospitalized for suicide attempts at age 16 and at age 20. He reported his maternal uncle committed suicide in 1996. He denied current suicidal ideation and/or intention.

Mr. L'Heureux denied any history of physical or sexual abuse. He reported he believes his father and his sister have depression, and his mother may have Obsessive-Compulsive Disorder. He indicated he was not aware of any substance abuse issues in his family, other than his own substance abuse problems. This information is consistent with available records.

CURRENT FUNCTIONING/MENTAL STATUS:

Mr. L'Heureux reported to the interview, via ZOOM, appropriately groomed and clothed in clean, standard issue correctional clothing. When interviewed, rapport was readily established. Eye contact and psychomotor activity were within normal limits. Mr. L'Heureux was oriented to person, place, time, and situation. When asked, Mr. L'Heureux stated his mood was "alright." His observed affect was appropriate and his observed mood was euthymic.

Mr. L'Heureux denied deficits in sleep, appetite, and energy. He reported he has gained 40 pounds in the last year. His presentation of self was fair and he afforded appropriate respect to the examiner. Posture and gait were considered unremarkable. Mr. L'Heureux's fingernails appeared well groomed and his facial hair was neatly trimmed. He presented with good dental/oral hygiene. Mr. L'Heureux was visibly wearing corrective eyeglasses and denied the use of a hearing assistance device.

Mr. L'Heureux indicated his strengths are, "good swimmer and compassionate in patient care." He indicated his weaknesses are, "unstable, annoy people by talking a lot, too smart for my own good, ugly, fucked up my life with this crime, and someone else's." He indicated the words which best describe him are "smart, dedicated, and annoying." In his definitions of the proverbs, an abstract valence was prominent.

Mr. L'Heureux denied an anger problem. He stated he deals with anger by, "repressing anger." He indicated his current stressor consists of, "lost my career in nursing." He indicated he deals with stress by, "binge eating." He reported he "feels empty inside."

When interviewed, speech was relevant, coherent, and connected. Repertoire of general information was adequate. Math skills were intact. He indicated his future plans are, "someday getting out of incarceration, getting a degree in culinary arts/bartending, and wants a family but is not sure if that is possible because of my crime."

When interviewed, judgment and insight were intact. Immediate recall was considered intact, as Mr. L'Heureux was able to repeat four random words immediately. Short-term memory was viewed as adequate. Retention and recall were viewed as impaired as Mr. L'Heureux was

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not successful at recalling four random words after a five minute delay; he recalled three out of four words, with one cue. Mr. L'Heureux was able to perform Serial 7's and Serial 3's, making no errors.

When interviewed, observed mood was euthymic and his affect was both reactive and appropriate. Mr. L'Heureux denied symptoms consistent with psychotic processes. He denied engaging in obsessive and/or compulsive behaviors. Mr. L'Heureux denied homicidal or suicidal ideations.

A paranoid predisposition did not seem prominent. When inquired of as to what would make him angry, he responded, "jail." He denied being afraid recently. When asked what he feared the most, he stated "being alone when I get out of prison."

Current Behavior:

Mr. L'Heureux was received at Northern Correctional Center Diagnostic Unit on September 12, 2017. During this course of assignment, Mr. L'Heureux has received two disciplinary sanctions, one for Tampering with Locks/Doors, and one for Refusing an Order. Mr. L'Heureux denied significant medical illnesses.

TEST RESULTS / INTERPRETATION:

BETA III

The BETA 3 is a brief screening measure of nonverbal intellectual ability. As it is not a comprehensive test of intelligence, results should be considered with this in mind.

The revised Beta III Examination indicated Mr. L'Heureux obtained a Beta III I.Q. score of "102," which would be in the "average" range of intellectual functioning. This score is coincidental with functioning at the 55th percentile rank of the general population.

MMPI-2-RF

The MMPI-2-RF (Minnesota Multiphasic Personality Inventory - 2nd Edition - Restructured Form) is a revised, 338-item version of the MMPI-2 designed to provide an exhaustive and efficient assessment of the clinically relevant variables measurable with the instrument's item pool. It is a broad-band instrument intended for use in a variety of settings. Audio administration of the test items is used with the test administered in a closely supervised group setting.

In his responding to the Minnesota Multiphasic Personality Inventory - 2nd Edition - Restructured Form (MMPI-2-RF), Mr. L'Heureux's MMPI-2-RF profile was valid.

Mr. L'Heureux responses indicate considerable emotional distress that is likely to be perceived as a crisis. He reports feeling sad, unhappy, and dissatisfied with his current life circumstances. He reports a lack of positive emotional experiences, significant anhedonia, and lack of interest.

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He describes others as well-intentioned, trustworthy, and disavows cynical beliefs about them. Mr. L'Heureux is possibly over trusting of others. He reports various negative emotional experiences including anxiety, anger, and fear.

Mr. L'Heureux reports a history of suicidal ideation and/or attempts. He reports feeling hopeless and pessimistic. He reports lacking confidence and feeling useless. Mr. L'Heureux reports being very indecisive and inefficient. He reports believing he is incapable of making decisions and dealing effectively with crises. He reports an above-average level of stress and worry.

He reports significant past and current substance abuse. He reports not enjoying social events and avoiding social situations, including parties and other events where crowds are likely to gather. He reports being shy, easily embarrassed, and uncomfortable around others.

Mr. L'Heureux reports disliking people and being around them. He reports no interest in activities or occupations of a mechanical or physical nature. He reports various negative emotional experiences and avoiding social situations.

WRAT-4:

The results of the Wide Range Achievement Test, 4th Edition (WRAT-4) examination indicated that this subject is performing in the Above Average level in all areas as indicated by the following:

<u>Subtest</u>	<u>Grade Equivalent</u>	<u>Percentile Rank</u>	<u>Performance Level</u>
Word Reading	12.9	88	Above Average
Sentence Comprehension	12.9	91	Above Average
Spelling	12.9	75	Above Average
Math Computation	12.9	96	Above Average
Reading Composite	--	91	Above Average

Mr. L'Heureux appears to have achievement consistent with his IQ and education level. Mr. L'Heureux would be expected to generally understand his current legal circumstances and the difference between right and wrong.

CTMT

The results of the Comprehensive Trail Making Test (CTMT) indicated that Mr. L'Heureux scored as average on Trails I, II, IV, and V. He scored as below average on Trail III. These scores do not indicate a neurological impediment.

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Minnesota Sex Offender Screening Tool-Revised (MnSOST-R):

The Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) is intended for use with the adult male population. It is used to assess for predatory and/or violent sexual offenders. Results from this test should be viewed with caution and are not to be seen as absolute in terms of assessing sexual recidivism risk.

Mr. L'Heureux obtained a total MnSOST-R score of +6, which places him within the Moderate risk level for sexual recidivism. A recidivism rate of 45% is indicated by scoring criteria for this device.

STATIC-99R:

The Static-99-R is an assessment tool designed to assist in the prediction of sexual and violent recidivism for sexual offenders. This instrument consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual. It should be noted that these estimates do not directly correspond to the recidivism risk of an individual offender, as an offender's risk may be higher or lower than the probabilities estimated by the STATIC-99-R depending on other risk factors not measured by this instrument.

The results of the STATIC-99-R produced a score of 3, which places Mr. L'Heureux within the Low-Moderate risk level for sexual recidivism. Based on this score, he would be expected to reoffend at approximately 1.39 times the recidivism rate of the typical sex offender. Offenders with the same score have been found to sexually reoffend at a rate of 6.6 percent in five years.

Diagnostic Impression:

296.32 (F33.1) Major Depressive Disorder, recurrent, moderate, With anxious distress, moderate
303.90 (F10.20) Alcohol Use Disorder, moderate, In a controlled environment
304.10 (F13.20) Sedative, Hypnotic, or Anxiolytic Use Disorder, moderate, In a controlled environment
304.00 (F11.20) Opioid Use Disorder, moderate, In a controlled environment
V62.83 (Z69.021) Encounter for mental health services for perpetrator of nonparental child sexual abuse
301.83 (F60.3) Borderline Personality Disorder
Rule Out: 302.2 (F65.4) Pedophilic Disorder

Discussion:

Mr. L'Heureux is a 22 year old male who pled guilty to 15 counts of Sexual Assault in the Third Degree, which carries a potential 1-5 year incarceration, per count. When interviewed, Mr. L'Heureux was forthcoming with information relevant to this evaluation. He reported past and current mental health treatment. He reported a history of substance abuse.

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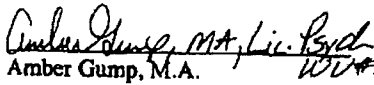
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Name: L'Heureux, James R.
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Date: 10/23/17

Recommendations:

Based on Mr. L'Heureux's sexual abuse of a minor age child, an indeterminate sentence of not less than fifteen years nor more than seventy-five years in the custody of the West Virginia Department of Corrections is recommended. It is recommended that while in the custody of West Virginia Department of Corrections, that Mr. L'Heureux participate in sex offender treatment and substance abuse treatment. It is recommended that Mr. L'Heureux continue his mental health treatment while in the custody of the West Virginia Department of Corrections.

PSYCHOLOGICAL EVALUATION PROVIDED BY:


Amber Gump, M.A. *WV #1126*
Licensed Psychologist WV #1126
PSIMED CORRECTIONS, LLC

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ORIGINAL

IN THE CIRCUIT COURT OF BARBOUR COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

v.

Criminal Case No. 17-F-20

JAMES ROLAND L'HEUREUX

Defendant.

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BARBOUR COUNTY
CLERK OF COURT

TRANSCRIPT OF PROCEEDINGS had at the Sentencing
Hearing regarding the above referenced matter held on Tuesday,
December 5, 2017, in the Second Floor Courtroom, Barbour
County Courthouse, Philippi, Barbour County, West Virginia, before
JUDGE JOHN LEWIS MARKS, JR.

Proceedings recorded by electronic sound recording, transcript
produced by court reporter.

SUE HATLEY, CCR
CERTIFIED COURT REPORTER
P. O. BOX 2
BEVERLY, WEST VIRGINIA 26253
(304) 637-2310

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APPEARANCES:

For Plaintiff:

THOMAS HOXIE, ESQ.
Prosecuting Attorney
Barbour County Courthouse
Philippi, WV 25801-4528

For Defendant:

JAMES ZIMAROWSKI, ESQ
Attorney at Law
265 High Street
Ste. 200
Morgantown, WV 26505

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(Call to Order of the Court)

1 THE COURT: The Court had set a Sentencing Hearing today,
2 the State of West Virginia v. James Roland L'Heureux, Case No. 17-F-
3 20. Mr. L'Heureux, is present in custody in person together with his
4 Attorney, James Zimarowski. Also present here on behalf of the
5 State, is Mr. Thomas Hoxie, Prosecuting Attorney for Barbour County,
6 West Virginia.
7

8 The Court would note that Mr. L'Heureux was indicted by the
9 Grand Jury at the February 2017 term of this Court. The indictment
10 was a twenty-five (25) count indictment alleging sexual assault in the
11 first degree.

12 Count One, Two, Three, Four, Five sexual assault in the third
13 degree.

14 Count Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen,
15 Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty and
16 then soliciting a minor via a computer in Counts Twenty-One, Twenty-
17 Two, Twenty-Three, Twenty-Four and Twenty-Five.

18 Eventually, Mr. L'Heureux appeared before the Court and
19 entered a guilty plea to Fifteen (15) counts of sexual assault in the

20 third degree as contained in Count Six through Twenty in the
21 indictment in this case. The Court accepted those guilty pleas. The
22 Court then ORDERED, directed that there be a pre-sentence
23 investigation prior to sentencing.

24 Also, ORDERED a diagnostic evaluation through the Division of
25 Corrections. In addition, Mr. Zimarowski had an evaluation

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1 conducted at his request on behalf of the Defendant. The Court would
2 note that that evaluation was provided to the Court and counsel.

3 The last time we were here it appeared that Mr. L'Heureux had
4 not gone through the diagnostic evaluation with the Department of
5 Corrections. And again, the Court indicated that it would like to have
6 that before sentencing and so Mr. L'Heureux agreed through Mr.
7 Zimarowski, that he would attend that evaluation.

8 I think that was – it was either August or sometime in August.
9 In any event, in September Mr. L'Heureux was taken in for that
10 evaluation. No, it was August 16th. The Court **ORDERED** that he
11 be transported for that evaluation and that evaluation was completed
12 then and a written report of that evaluation was provided to the Court.
13 Prior to receipt of that the Court directed our Court Clerk, Mr. Fogg,
14 to provide copies of that evaluation to counsel, Mr. Hoxie and Mr.
15 Zimarowski, since that would be another item that the Court would
16 look at prior to sentencing in this case. I wanted to make sure that
17 counsel had that as well.

18 So we have the evaluation conducted by the expert that Mr.
19 Zimarowski had contacted. We have the pre-sentence report
20 conducted by the adult probation officer and now we have the
21 Department of Corrections evaluation.

22 The Court would also note that Mr. Zimarowski has presented the
23 Court with several letters in support of his client. Those have been
24 reviewed and filed and made part of the record in this case as well. I
25 think you had sent some and asked that they be filed under SEAL

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1 Mr. Zimarowski and I did enter an Order that -- that granted that
2 request. So in any event, I think that's where we are and proceed
3 with sentencing today.

4 ~~First of all, let me ask Mr. Hoxie, if he has received the various~~
5 expert reports, as well as, the probation pre-sentence investigation?

6 MR. HOXIE: Yes, Your Honor, and no objection.

7 THE COURT: Mr. Zimarowski, have you and Mr. L'Heureux
8 received a pre-sentence investigation, as well as, the other reports that
9 the Court has referred to?

10 MR. ZIMAROWSKI: I have received the pre-sentence report.
11 Your Honor, we have gone over it and he has no objection to the
12 statements of fact therein. There is one other evaluation which the
13 Court maybe put -- a treatment plan that was --

14 THE COURT: That was submitted --

15 MR. ZIMAROWSKI: -- on -- report and that was --

16 THE COURT: Mr. Curry's evaluation.

17 MR. ZIMAROWSKI: It was, Your Honor. .

18 THE COURT: Okay, Mr. L'Heureux, have you in fact received
19 copies of these various evaluations and also the pre-sentence report
20 that the Court proposes?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And have you had a chance to review those and
23 go over those with Mr. Zimarowski?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you agree that the pre-sentence report is

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1 accurate and all this stuff?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You all may have some comments on the
4 evaluations that were presented and I'll give you every opportunity to
5 present whatever you wish to present for your positions, as far as,
6 sentencing is concerned.

7 Let me first ask you, Mr. Hoxie, does the State have anything to
8 offer prior to sentencing in this case?

9 MR. HOXIE: Yes, Your Honor, briefly. In this matter when
10 we first arrived for sentencing, Your Honor, back in August, the victim
11 was present at the time and had prepared a letter, I believe it was
12 submitted to the Clerk previously. The victim was notified of this
13 hearing, chose not to come to this hearing mainly because there was -
14 the counselor said there was a lot of closure with that original hearing
15 and so that they didn't want to reopen that door.

16 Your Honor, this - this reflects accurate on the basis of a year
17 and-a-half long relationship. Mr. L'Heureux engaged with a minor
18 child that started in January of 2015. It started when she was eleven
19 (11) years old. It was sexual from the beginning and continued all the
20 way up until they were caught sneaking out in 2016. And as you see in
21 the report this was - they were engaging in sexual relations about one
22 or two times a week.

23 Further, Your Honor, in this case, throughout the whole case I
24 think Mr. L'Heureux knew what he was doing was wrong and he not
25 fully always accepted responsibility for that and during the course of

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1 the entire relationship he hid the relationship. He lied about it and
2 told his college classmates that -- L'Heureux made that it was another
3 girl at the college that he was dating. He told his parents that she was
4 older than what she was. He hid the relationship from the juvenile's
5 family. All except for other juveniles who knew about the
6 relationship.

7 When he was arrested, Your Honor, he denied it. There was no
8 confession in this case. And so the State had to proceed without a
9 confession. Also, in his PSI and in Mr. Curry's report, you will note
10 that his actions -- he blames his actions on drug use, alcohol abuse. He
11 stated that he had no malice whatsoever in this case. And so he hasn't
12 really accepted that, yes, what he has done is wrong and he voluntarily
13 and knowingly did it.

14 The State also, Your Honor, as you note, the State has given a
15 lot of leniency in this case. The plea agreement was mainly based on
16 balancing -- protected balancing of victim's interest. The victim did
17 go to Highland, she was having mental issues. As we stated before, a
18 extended trial might not be in her best interest. However, I'd like the
19 Court to note that fifteen (15) counts that he is indicted on, that we
20 indicted him on is a very conservative estimate.

21 We chose -- the State chose to do a conservative estimate in the
22 indictment based on, we were not entirely sure what the victim's -- the
23 victim would be when he would go to trial. This is a case where she
24 was seduced. That she -- that they were caught and so we were not
25 sure of her position when it would go to trial. So we picked an

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1 estimate that we could prove without the victim's testimony. And the
2 State saw on the PSI you see that it could have been up to, if we knew
3 it was one to two times a week, it could have went up to fifty (50)
4 counts of third degree sexual assault.

5 Also, the case is strong with five (5) counts of first degree
6 sexual assault. Those are based upon the victim's statements when
7 she was under twelve (12) years of age.

8 So, Your Honor, it could have easily been a life sentence. So
9 the State based upon that, the State has given more than enough
10 consideration in what the extent of the sentence should be. Also, we
11 note that the Court has previously sentenced -- has sentenced
12 individuals to more time for less than what has occurred here. This is
13 the first time I can recall such a long-term relationship engaging with
14 an individual under the age of twelve (12).

15 And also, Your Honor, we have a letter from the victim wherein
16 statements that she states that she does request that the maximum
17 sentence be given. Her parents have also requested that. And so,
18 Your Honor, we request that all that all the sentences be run
19 consecutively. This is where an adult male has preyed upon a child for

20 over a year and-a-half and that there is really only one thing I have
21 asked the Court that we -- he has been given all the leniency he
22 deserves, justice is a part of this case and he be sentenced
23 consecutively. So I'd ask the Court to sentence him to no less than
24 fifteen (15), not more than seventy-five (75) years.

25 THE COURT: Mr. Zimarowski.

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1 MR. ZIMAROWSKI: Yes, Your Honor. Your Honor, it's a
2 very serious case and I'll be clear. We felt that all the paperwork that
3 we submitted to the Court, is quite extensive. The standings -- as you
4 all know that the court, it can and should consider some sort of an
5 alternative sentencing. And that is that the defendant is likely to
6 reoffend and is the defendant a danger to himself and others.

7 I believe that the tactics that were submitted, as well as, some of
8 the factual background on this supports the Court's serious
9 consideration of an alternative sentencing scheme which I am going to
10 get to at the end of my remarks as to what -- to be appropriate. The
11 first thing I think that the Court needs to note, is unlike some of the --
12 the media in Alabama, this has a -- this defendant was nineteen (19)
13 years old at the time. So it's not like he is an older male. He is an
14 adult. I am not going to diminish that but the age, he is nineteen (19)
15 years old as the reports, and all the psychological reports indicate
16 there is still -- Mr. L'Heureux, he is not very mature and was not very
17 mature for his age. And he tended to not socialize very well, didn't
18 like parties and that type of thing.

19 The affair, if you want to call it an affair, was -- the colloquy
20 this morning, it lasted for over a year and-a-half. It was not -- Mr.
21 Hoxie kind of indicates or suggests that he's not taking responsibility
22 that he somehow tried to conceal it. Which shows both good and bad
23 and given Mr. L'Heureux's psychological profile, I believe that an
24 alternative sentence would be appropriate and I will point out a couple
25 of things.

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1 First off, Dr. Curry, doctor of psychology actually out of Summit
2 Center in Clarksburg, does an extensive evaluation of Mr. L'Heureux.
3 Does a battery of tests that are far more significant and numerous to
4 the testing conducted by the State of West Virginia. And those test
5 results, the objective test results come back with a low to moderate
6 risk on Mr. L'Heureux. He also opines based upon the objective test
7 results that he is a doctor of psychology and derived to his amenable
8 treatment outside of the prison environment. And, in fact, he
9 recommends a wide variety of treatment and says in his report that the
10 risk of - any type of re-offending given the young age of Mr.
11 L'Heureux, as well as, the test results significantly impact by
12 receiving outpatient treatment for a wide variety of the psychological
13 issues that Mr. L'Heureux is afflicted by.

14 Counselor Jack Morgan from Northern which I know this court is
15 familiar with, is the therapist and he was commissioned to do sex
16 offender treatment plan which as the court notes, required by statute
17 for the court can actually consider an any form of alternative
18 sentencing.

19 And Mr. Torsing, Counselor Torsing concurs with the risk
20 assessment by Dr. Curry and not - along with treatment goals and the
21 like, in his assessment of risk on Mr. L'Heureux is also a low to
22 moderate risk based upon objective testing and counseling that
23 Counselor Torsing was involved in.

24 The State's evaluation is kind of also interesting in that -- first
25 off, Your Honor, the reason why - lots of reasons why it was not

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1 completed the first time is that they transferred Mr. L'Heureux to
2 Northern for the evaluation without his medication. That caused
3 serious problems. He felt safer at Tygart Valley Regional Jail. Once
4 his medications were being stabilized, this Court gave Mr. L'Heureux
5 the opportunity to conduct that evaluation which he then took and the
6 court may not have followed this but his second order for evaluation,
7 we expressly in agreement, Mr. Hoxie included, that his medication
8 had to accompany him to the Northern Regional Jail.

9 That evaluation was not by a licensed psychologist, who has a
10 Masters Degree and we objected to the findings – object to findings,
11 their test results support a low to moderate risk of re-offending.
12 What's interesting then is, that we seem to have a doctor of
13 psychology, a counselor, and the State psychologist all agreeing that
14 objectively based upon objective psychological testing that there is a
15 low to moderate risk of re-offending.

16 What the difference is, what the State's evaluation differs from
17 the evaluation by Dr. Curry and Counselor Torsing, is that Dr. Torsing
18 and Dr. Curry both based their recommendations for alternative
19 sentencing based upon the objective finding. If you look at the State's
20 recommendation, there is no basis – no basis for an objective finding
21 that is simply the psychological therapy a bias of the evaluator who
22 looked at the facts and said, this works without any links or basis to
23 the objective psychological data which was present.

24 Your Honor, given again all those factors that I have identified,
25 Mr. L'Heureux's age, his lack of any criminal history, his impaired

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1 social skills, maturity levels, we believe that he is a candidate for
2 alternative and we would take this on a three-tier approach.

3 We cannot – that the defendant has been incarcerated, actually,
4 in West Virginia since December of 2016 but he was incarcerated a
5 month prior to that in the State of Maine. So he has roughly thirteen
6 (13) months credit for time served, it may be a little bit more than that
7 fifteen (15) months or something along those kind of lines.

8 The Court has the option of granting probation to Mr. L'Heureux
9 but he spent thirteen (13) plus months incarcerated. He has no ties to
10 West Virginia, and we have already – the family through their Maine
11 attorney, has already consulted with certain psychological counselors,
12 carc givers up in the State of Maine to address the issues or implement
13 the issues raised in Dr. Curry's, psychological evaluation. The State
14 of Maine, is my understanding in talking to the Maine attorney does
15 not have a parole board. What they have done is collapse the entire
16 system into a state-wide probation department and whether it's parole
17 or probation, it's both administered out of the same office in the State
18 of Maine. Then they have probation officers, who do nothing more
19 than supervise sex offenders.

20 We in West Virginia, collapsed their system a couple of months
21 ago, if I recall but the State of Maine has expert probation office up
22 there, who feel more than able to implement the treatment plan that
23 Counselor Torsing has designed and is attached as an exhibit. The
24 interesting aspect of the lack of any rights for the State of West
25 Virginia, would be that under the Interstate Compact, Mr. L'Heureux,

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1 if the court would grant him probation now or sometime in the future,
2 that he cannot leave the State of West Virginia, unless he is totally
3 accepted in the State of Maine. And I understand that basically he
4 has 30 to 120 days on the Interstate Compact. So even if the court

5 would entertain option one and grant him probation for him to return to
6 the State of Maine, to receive his treatments and counseling, he will
7 probably remain in the Tygarts Valley Regional Jail for 30 to 120 days
8 until the Interstate Compact could satisfy and compensate the State of
9 Maine with the interstate. I would also point out that my
10 understanding of the Interstate Compact and probation officer who
11 spoke clearly on this and that is that your state of residence can help
12 you but there has been no question that the State of Maine could do
13 that - the State of Maine.

14 Your Honor, I point out that no matter how or what this Court
15 does, Mr. L'Heureux is going to be subject to supervision for the rest
16 of his life. Whether you call it probation, whether we call it
17 supervised release, whether we call it parole, whether we call it the
18 terms and conditions of the sex offender registration, Mr. L'Heureux
19 for the rest of his life would never ever be not subject to someone
20 looking over his shoulder saying, you ought to have this counselor, you
21 have to do this, you have to report here, you can't have internet, you
22 can't have a computer, you have to report your address registration,
23 whether it's a State Police Officer, or sex offender registration, or the
24 integrated probation officer in the State of Maine. He is for the rest of
25 his life subject to not being supervised, not being controlled, which

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1 also would limit any type of re-offending one would think.

2 So, Your Honor, our first recommendation is if the Court would
3 suspended the sentences, keep him in the North Central Regional Jail,
4 and allow him to return and receive the counseling in the State of

5 Maine under the Maine Division of Probation or sex offender
6 registration under the State of Maine, which he will be transferred
7 quite readily.

8 The second option is to entertain, remember I mentioned at the
9 outset that Mr. L'Heureux was - was nineteen (19) years old at the
10 time. He is twenty (20), I believe twenty-two (22) now, just turned
11 twenty-two (22). And this Court has the option of constructing a
12 sentence and then send him to the Anthony Center. The Anthony
13 Center would add about ten (10) months worth of counseling program,
14 sex offender and substance abuse issues that would combine with his
15 credit for time served would bring him to twenty-three (23) or so
16 months in incarceration.

17 So, Your Honor, if you revoke the probation and then we go into
18 the same thing with the Interstate Compact sending him up to the State
19 of Maine, to be supervised for any future terms in the State of Maine.

20 I would point out, Your Honor, that the - when you construct a
21 sentence for Mr. L'Heureux, I use the term implicit bias by the state
22 psychologist, there is also implicit bias in the parole office in the State
23 of West Virginia. It is a very low probability, at least, in my
24 experience that anyone charged with a sex offense makes parole to top
25 out the sentence. That is the reality of the situation, that is simply

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1 because the parole officer or Parole Board makes political decisions.

2 This Court makes factual decisions, makes judicial decisions and I

3 believe there is a big distinction there. The Parole Board, takes I

4 believe the easy way out and says, we are going to deny any sex

5 offender parole and therefore don't have to worry about it, it's not our

6 problem -- it's not our problem they would re-offend. So every --

7 every one of the third degree sexual assaults in this Court would

8 sentence -- is in effect a two and-a-half year sentence.

9 The Court would sentence him to five (5) consecutive and the

10 rest suspended. He is looking at a minimum of five and-a-half years.

11 The calculation in that is rather simple and that has to be recognized, I

12 believe, in the Court's fashion any type of a sentence.

13 The third action would be to ignore -- not follow number one,

14 not send him to the Anthony Center but the actual sentence from the

15 options available anywhere from one (1) to fifteen (15) -- one to five

16 sentences are available to the Court. But again, I would point out I

17 doubt seriously that when a court fashions such a sentence, the court

18 should recognize that a Parole Board is likely to grant parole. But

19 it's going to make a similar or complete his sentence before it will

20 grant release. And then again, even after it doesn't matter to the

21 court, has the option of holding supervised release, on top of that

22 which I believe anywhere from ten (10) to fifty (50) years. Probation

23 could be a term the Court could impose and could stack those as well.

24 So again, no matter how we turn this case over in our minds, there is

25 no way that Mr. L'Heureux for the rest of his life is going to be not

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1 subject to some very serious constant observation, drug testing
2 obligations and supervisory obligations.

3 Your Honor, we would ask the Court entertain options one (1)
4 and two (2). Of course, if you want to – if you want option two, you
5 recognize that you are looking at two and-a-half years effective on
6 each count when you impose the sentence.

7 Thank you.

8 MR. HOXIE: Your Honor, just brief rebuttal. I would note
9 serious – Mr. Zimarowski says, it's implicit bias, we have very much
10 implicit bias in all the reports that have been submitted to you. Any
11 advice by the defense would be that they are all based upon Mr.
12 L'Heureux's interpretation of the facts. Specifically, if you will note
13 that his sexual contact came as the relationship grew, but it was not
14 the foundation of the relationship, was unlikely to occur again in the
15 future. The relationship that he had was sexual from the beginning.
16 It was sexual in January of 2015, in February 2015, and in March of
17 2015, when she was eleven (11) years old. The relationship began that
18 January and was sexual all the way through.

19 The reports are implicitly biased upon Mr. L'Heureux's
20 interpretation of what he's willing to state the relationship was. The
21 facts are though he prayed upon a young child. Also, they said that
22 it's not likely to occur again. Well, it is likely to occur again. When
23 he left and he fled to Maine. He didn't – he actually continued to
24 engage in conversations with minor children that were – that is very
25 concerning. Specifically, in discovery we were able to obtain his

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1 Facebook records and in his Facebook records, he contacted another
2 female, who would have been a witness in this case. And her initials
3 or her first name is Emma and talked to her about his relationship with
4 – with the victim and. And he also asked her request that she

5 snapchat with him and asked where do you live. This is a sexual
6 predator. This is someone who will repeat this. These are concerns
7 the State has and this is some of the things that the Court should be
8 very concerned about. These are the most serious crimes that we have
9 in our state and we would ask that the a serious sentence be imposed to
10 protect not only this State but also Maine.

11 THE COURT: Do you have anything else, Mr. Zimarowski?

12 MR. ZIMAROWSKI: Your Honor, I would point out that if
13 although the low to moderate risk by the state psychologist wanted the
14 maximum sentence then why bother even with an evaluation. Our role
15 models has or should have some meaning by the State's interpretation
16 of their discounting that are both – in the Anthony Center. A lot of
17 kids belong to the Anthony Center. The seriousness that – with that
18 the analysis has been -- why bother with the analysis at all. It
19 becomes totally immune. The State says, if the low to moderate
20 evaluation is meaningless, then why do it at all.

21 I want -- Your Honor, the defendant wants to address the Court.

22 THE COURT: Do you have anything else, Mr. Hoxie?

23 MR. HOXIE: Sorry, Your Honor.

24 THE COURT: Anything else?

25 MR. HOXIE: No, Your Honor.

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1 THE COURT: Is there anything you'd like to say on your
2 behalf prior to sentencing?

3 THE DEFENDANT: Yes, sir. First off, I would like to thank
4 you for the second chance in completing the program at Northern.

5 When I first got there, I was taken off all my psych meds without
6 tapering and this is not a common practice for the type of medication
7 they put me on and it caused me to go into withdrawal.

8 I am very thankful you gave me the opportunity to go back and
9 make sure that I got my proper medication. I'd like to apologize first
10 and foremost to my victim and her family for the trouble and emotional
11 pain I have caused them. I'd also like to apologize to the community
12 for betraying their trust and to you Mr. Hoxie, and Trooper Clark, for
13 the valuable time and resources I have used up.

14 I could make excuses all day for my actions but at the end of the
15 day I know what I did was wrong. I am sincere about the harm that I
16 have caused. I have lost many friends, my medical career, and my
17 status in the community with personal trust.

18 Your Honor, I'd like to ask that you please sentence me to my
19 father's house to complete it back home in Maine where my support
20 system is. As Dr. Curry pointed out on his report my level of risk is
21 considered -- for the community and I just whenever -- of his report,
22 the circumstances surrounding my crime I am not opposing but I am --
23 alternative sentencing and community based treatment. Also, Ms.
24 Gum stated, in her report, I have a less than ten (10) percent chance
25 of recidivism and I confess to that, this will not happen again.

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1 Your Honor, I am humbly asking you to please heed to the
2 recommendations of the experts – for the community. I am prepared
3 to leave West Virginia and never return which would isolate me from
4 the victim. A lot of problems to be solved and uncontrolled back pain
5 – both of which cannot be effectively managed with medication but I --
6 due to the chiropractic care that I have been receiving in Maine, I
7 treatment lined up. Back home I have treatment lined up not only to
8 rehabilitate myself from this offense but also for my chemical
9 dependency and psychological problems that were almost certainly
10 contributing factors. I have no doubt the report my psychological
11 functioning could be conceived to be at a crisis level. This is
12 typically true with outpatient and type of outpatient therapy that I can
13 get back home.

14 I also want a stable home environment that will help me
15 rehabilitate and stay out of trouble. Should I be sentenced to my
16 family back home I would be attending college with a major in
17 culinary arts. I have never been in legal trouble before this and I
18 would – any and all risk of subjecting to if you will please just give
19 me a chance to continue to be a productive member of society.

20 Your Honor, I understand I made a very grave error in judgment.
21 I would like to – remorse to all those affected by this. Would you
22 please consider the affirmation from the department. Thank you.

23 THE COURT: Do you wish to file a copy of that with the
24 Court? That written statement?

25 MR. ZIMAROWSKI: No, Your Honor.

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1 THE COURT: Well, these are difficult cases that's for sure.
2 And certainly difficult for the Court to determine what's appropriate.
3 I never -- one thing I never get to avoid today is sentencing. You've
4 got to look at each case individually, you've got to look at the
5 defendants individually, you've got to look at the crimes, you have a
6 case that's somewhat different. That's it's also the previous case here
7 where a lot of stuff occurred and defendant received a greater
8 sentence, that wasn't my case.

9 There are certainly good things to say about Mr. L'Heureux. I
10 have looked at the pre-sentence report, studied it, looked at the other
11 evaluations and as you can -- I can see right now a well-spoken young
12 man. And that's a problem as well to court, is his age. He's young,
13 he made mistakes that's for sure. This wasn't an isolated incident
14 that's certainly clear from everything that we have. I don't think
15 anybody denies that. The Court finds that it went on for -- Mr. Hoxie
16 said about a year and-a-half and all with a young person eleven (11)
17 and twelve (12) years old. I don't know the victim or anything about
18 the victim but her age alone eleven (11) or twelve (12) year old victim
19 a very young child that Mr. L'Heureux took advantage of. And I

20 know you were young at the time as well. You say it started when he
21 was nineteen (19) years old but certainly knew what he was doing.
22 Knew what he was doing was wrong. The indictment in this case
23 would have been many counts more serious charges in the indictment
24 were dismissed as part of this plea agreement. Twenty-five (25)
25 counts in the indictment.

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1 The first four (4) or five (5) counts charge him with sexual
2 assault in the first degree the most serious sexual offense that we have
3 subjected him and although he didn't plead today, he wasn't found
4 guilty of those. But he was facing a lot of exposure with respect to
5 those five (5) counts and not that the rest of the indictment didn't
6 expose him to -- to the consequences. There are consequences and our
7 legislature has basically determined, they determine the law, they
8 determine the range of the sentence then the court has to work within
9 that -- they determined that as we proceed to sentence the person by the
10 court and what we have here is a defendant who has plead guilty to
11 fifteen (15) counts of sexual assault in the third degree.

12 Each count carries a sentence of not less than one nor more than
13 five (5) years. I understand certainly the position of Mr. Zimerowski,
14 the experts that did well. And I believe that due to everything it is
15 probably a low to moderate chance that he is going to re-offend. This
16 type of offense, he doesn't have any prior criminal history which is
17 good for him. It certainly a positive for him. Then they say that he
18 is probably a low to moderate risk of re-offending.

19 Now the -- my question is should there be some punishment even
20 though he may be a low to moderate risk to re-offend that there would
21 be punishment for what -- what occurred here. What he plead to. Not
22 what he didn't do to which those charges were dismissed. Again, he
23 was facing much more serious exposure had this plea agreement not
24 been entered into and I would commend counsel, Mr. Zimarowski for
25 your representation. Mr. L'Heureux and what you have done in terms

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1 of negotiating a plea agreement. You can only do so much, we know
2 that. We take pleas all the time they don't walk on water, their
3 clients think that they can sometimes but they are not able to do that.
4 You deal with the facts that you get and then you have to work with
5 what you have.

6 The Court has to not only consider Mr. L'Heureux and his
7 background and his evaluation but also the effect that these offenses
8 had on the alleged victim. And you are dealing with an eleven (11)
9 year old child and that's a very young age, eleven (11), twelve (12)
10 years old. They are not mature, just an affair that occurred if you
11 want to call it that, Mr. Zimarowski, it occurred over a year and-a-
12 half. It's going to have serious effects on the victim the rest of her
13 life. So she is going to be paying consequences as the result of your
14 defendant's conduct as well.

15 So what is the right thing. Well, I'm not bragging – but
16 practice in front of you today. I don't have the wisdom to solve this
17 and I hear his side of things and I hear your side of things and I look
18 at the report that – and whatever I do, someone's going to disagree
19 with. I know that, it happens all the time. Whatever I do may not be
20 right, I understand that as well. I am just human and I don't know
21 everything so one thing, whatever I do today is still – there is still a
22 period of time within which the defendant can ask the Court to look at
23 it again. That's a Rule 35 motion, I'll show you that here in a minute
24 so. The options throughout today, Mr. Zimarowski certain options
25 that I anticipated that you might request and that I have considered,

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1 although before today I did not hear your argument but I pretty much
2 anticipated what those might be.

3 In any event, the Court can still look at those and study those
4 options. Here's what I am going to do today with respect to the

5 defendant's conviction for third degree sexual assault as alleged in
6 Count six (6) through twenty (20) of the indictment in this case.

7 The court is going to **ORDER** that he serve a sentence on each
8 count of not less than one (1) nor more than five (5) years.

9 The Court is going to **ORDER** that those sentences run
10 consecutively to each other. And that he be given credit as required
11 by the law which he is entitled for the time that he has served with
12 respect to those offenses.

13 The Court would also **ORDER** that he pay the cost of these
14 proceedings as taxed by the Clerk. The State will have a judgment
15 against him for those costs. The Court previously went over with Mr.
16 L'Heureux, the requirements of the Sexual Defender Registration Act,
17 that's contained in the court file. I believe he previously had been
18 tested for HIV, as well as, had DNA typing as well. Correct me if I'm
19 wrong but I think that's already occurred.

20 MR. HOXIE: Yes, Your Honor.

21 THE COURT: The Court is going to **ORDER** that he serve a
22 term of supervised release of forty (40) years on the standard terms
23 and conditions. Those should be given to him in writing.

24 Who has those? Probation? You have the written supervised --

25 MR. PHILLIPS: I can print that --

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1 THE COURT: For the supervised –

2 MR. PHILLIPS: Extended supervision.

3 THE COURT: – extended supervision. Okay. And again,

4 that's what I want to do today Mr. Zimarowski and Mr. L'Heureux.

5 Now Mr. L'Heureux as I indicated what I did today is not – does not
6 have to be final. The Court can reconsider or reduce the sentence or
7 modify the sentence within one hundred and twenty (120) days of the
8 entry of the Court's Order from today. I don't – the way I read the
9 rule and the law that 120 day period doesn't start until the Order is
10 entered from today. And as long as you request relief under that rule
11 within that period of time, the Court doesn't have to decide within that
12 period of time, just the request has to be filed within that period of
13 time. But if it's not filed within that period of time, the Supreme
14 Court has recently – and I always take the position that they just
15 recently indicated in a recent opinion that that's jurisdiction. So if
16 it's not filed – if you wait six (6) months and file a request for the
17 court to modify the sentence or reconsider the sentence, I no longer
18 have the authority to do that after that time. So it's important that you
19 file your request within a hundred and twenty (120) days of the entry
20 of the Court's Order from today.

21 And Mr. Zimarowski, will certainly advise you on that as well.
22 He's familiar with the rules. He's a good lawyer, he'll know what the
23 – what he needs to tell you about that.

24 Also, you have a right to appeal the Court's sentence to the
25 Supreme Court of Appeals. If you wish to do that, you would have

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1 thirty (30) days in which to file a notice of intent to appeal and then
2 four (4) months within which to file a petition for appeal with the
3 Supreme Court to perfect your appeal. If you need more time than four
4 (4) months, you have to ask for more time before that four months
5 expires or that period expires.

6 The Court can extend it an additional two months. Normally, the
7 Court is very liberal about that. If more time is sincerely needed to
8 perfect an appeal, we want to make sure that everyone is able to
9 exercise their rights in that regard. So if that wouldn't be enough
10 time and Mr. Zimarowski sincerely thinks that there should be more
11 time than he asked for, the certainly the Court would most likely
12 would grant it then.

13 Well, what we did is, we extended conditions for extended
14 supervision, continuing in a document that was offered by the Supreme
15 Court of Appeals and the probation officer would have to check which
16 of those that follow in a case. Only did those for the probation
17 officer as well. There is an Order of Notification of Supervised
18 Release which needs to be signed by everyone. I filled in the term of
19 forty (40) years but from his counsel, probation officers have to sign
20 this and a couple blanks on the front page. I'll let you all do that and
21 then I'll enter that a well. Certainly, want to make sure that Mr.
22 L'Heureux gets a copy, as well.

23 In any event, again, I am not sure if this is the right thing. I
24 understand certainly the position from Mr. Zimarowski, the positions
25 of victim in this case, the position of the State and taking everything

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1 into consideration again, that's where the Court's decision will be
2 today.

3 Anything else today, Mr. Hoxie?

4 MR. HOXIE: No, Your Honor.

5 THE COURT: Mr. Zimarowski?

6 MR. ZIMAROWSKI: Not from the bench, Your Honor.

7 THE COURT: Okay. Make sure you -- and one other thing Mr.
8 L'Heureux, I don't -- I think you retained Mr. Zimarowski in this case
9 and the Court at some point, I think Ordered the State pay for the
10 evaluations.

11 MR. ZIMEROWSKI: Yes, they did.

12 THE COURT: And in the event that you are unable to -- you
13 are financially unable to appeal this case, what the Court were to do --
14 would do, appoint counsel to represent you for an appeal as soon as
15 you qualify and that would be free of charge.

16 Also, the Court would order the transcripts of any proceedings
17 that might be necessary for you to perfect an appeal would be provided
18 to you free of charge, if you qualify. So I don't know what your
19 financial situation is today. Mr. Zimarowski, you discuss all that with
20 him and then you can meet the Court to look at that further and I
21 certainly will, okay.

22 MR. ZIMEROWSKI: Okay, Your Honor.

23 THE COURT: Okay, we will take a brief recess.

24 (WHEREUPON, the hearing was concluded at 11:35 a.m.)

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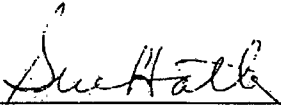
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REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF BARBOUR, to-wit:

I, Sue Hatley, Certified Court Reporter, in and for the State of West Virginia, do certify that the foregoing proceeding was duly taken by me at the time and place, and for the purpose therein mentioned, that such was correctly taken by me and accurately transcribed or written out in full into the English language to the best of my skill and ability; and I further certify that I am not interested in the result of said litigation, either directly or indirectly, as a party, witness or otherwise.

Given under my hand and seal this 12th day of December, 2018.


Sue Hatley, Certified Court Reporter

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IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA

State of West Virginia,

Case #17-F-20

Plaintiff,

V.

James R. L'Heureux

Defendant,

* * *

TRANSCRIPT OF PROCEEDINGS HELD before the Hon-
orable Shawn Nines, in the above-styled matter on
Wednesday, the 12th day of ~~July~~^{August 5th}, 2020, at 4:00 P.M.

* * *

APPEARANCES:

On Behalf of the Plaintiff:

Thomas Hoxie
P.O. Box 116
Philippi, West Virginia 26416

On Behalf of the Defendant:

Ashley Smith
103 Adams St.
Fairmont, West Virginia 26554

Daniel R. Arthur, CCR

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1 THE COURT: This is case number 17-F-20.
2 State of West Virginia v. James Roland L'Heureux.
3 Note the appearance of the state of West Virginia by
4 its prosecuting attorney Mr. Thomas Hoxie. And fur-
5 ther, note Mr. L'Heureux's appearance in person and by
6 his counsel Ms. Ashley Smith. This matter comes on
7 from a previous request. Ms. Smith, I had you ap-
8 pointed and then I think there were some motions to
9 continue to look over it. But there was a request in-
10 itially for a resentence in this case for the
11 purposes of perfecting an appeal. Do you want to ad-
12 dress that briefly?

13 MS. SMITH: Yes, Your Honor. As this
14 court has noted, I was not appointed to represent Mr.
15 L'Heureux until after he filed his motion to be re-
16 sentenced. He was represented originally by James
17 Zimarowski at sentencing. That sentencing took place
18 in front of Judge Marks. We would ask that the Court
19 just resentence him for appellate purposes only. The
20 only other issue that we would like to present to the
21 Court, Mr. L'Heureux, in his appeal, is filing several
22 counts of ineffective assistance of counsel on Mr.
23 Zimarowski and one of the specific factors that Mr.
24 Zimarowski did not present to the Court that

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1 he believed should have been presented at the time of
2 sentencing was that the state breached its plea a-
3 greement with the defendant. We're not asking the
4 Court to set aside the plea. We're asking the Court
5 to order specific performance. I'm willing to file
6 that up with a written motion following todays hear-
7 ing. However, for appellate purposes, we wanted the
8 record to have that reflected.

9 THE COURT: Well, tell me what exactly was
10 the alleged violation.

11 MS. SMITH: So, Your Honor, pursuant to
12 the plea agreement the state agreed to argue sentenc-
13 ing in accordance with the presentence investigation.
14 It's my understanding, again, I was not his counsel at
15 that original sentencing hearing, that there were
16 three separate psychological reports done and they
17 considered him to be the low to average range I be-
18 lieve, or less of a threat to the community. He is
19 arguing that Mr. Hoxie did not argue in accordance
20 with that. That he basically indicated that he was a
21 danger to society. That he was a menace or a predator
22 to society. I can't remember his exact phrase but it
23 was something along those lines. And he believes that
24 Mr. Hoxie did not

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1 argue in accordance with the recommendations in the
2 plea agreement and in fact went outside of what was
3 contained in the presentence investigation report.

4 THE COURT: Very specifically, that plea
5 agreement says the state shall make a sentencing rec-
6 ommendation based upon the presentence investigation.
7 I think that's the only thing it says in there, Ms.
8 Smith, as far as a contingency on what could be said
9 by the state.

10 MS. SMITH: Your Honor, Mr. L'Heureux's
11 position is that the P.S.I. was very favorable to him
12 and the psychological reports contained therein were
13 favorable to him. And the position and the stance
14 that the state took was opposite of what was outlined
15 in the P.S.I.

16 THE COURT: That brings me to another
17 point. This is a resentencing, Ms. Smith. Just for
18 the purposes of perfecting an appeal. For the record,
19 I have looked over Mr. L'Heureux's motion and ulti-

20 mately your motion to resentence. I've looked at the
21 case law and particularly find that under Adkins v.
22 Leverette, a 1980 case, that there is no reason to
23 deny Mr. L'Heureux that resentence. And I am going to
24 allow him to be resentenced. But the purpose of

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1 that resentence is to specifically start a new appeal
2 period and to afford him an opportunity to perfect his
3 right to appeal. I had Mr. L'Heureux in with Mr.

4 Zimarowski on a couple of occasions. I think he just
5 missed it. And I don't have a problem with it. And I
6 think it's mandated his rights to be able to do that.
7 But as far as rearguing sentencing, I don't know, Ms.
8 Smith. I don't know that I was even going to ask for
9 a recommendation from the state today. Is that a re-
10 quest that I do that?

11 MS. SMITH: Your Honor, we're just asking
12 for specific performance on the contract on the plea
13 agreement that he abide by the recommendations in the
14 presentence report. Which again, were very favorable
15 to him. All of these sentences were ran consecutive
16 and there are fifteen counts. So, we would ask that
17 the sentences be ran concurrent.

18 THE COURT: MR. Hoxie?

19 MR. HOXIE: Your Honor, I was based today
20 was just for purposes of resentencing to do the ap-
21 peal, not to reargue.

22 THE COURT: I think it is what it is, Ms.
23 Smith. That's going to be my ruling here today. I
24 certainly will instruct the state not to do anything

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1 that's contrary to the plea agreement. Initial glance
2 would be that that's an arguable violation. But I
3 would certainly order the state to do that. But I
4 wasn't going to take the states recommendation today
5 anyway. But I will order that they don't do anything
6 that's volitive of the plea agreement. But it very
7 specifically says, and going back to this Adkins case,
8 that the very purpose of this is to give an appeal
9 right. Not to insert more error or potential error
10 or even to allow for it or to correct an error that
11 was done from before. If I let you come in and argue
12 sentencing again, not just for purposes of appeal, to
13 be resentenced, the state could fix that. And then
14 the question would be is there even an error there to
15 make an appeal on. I don't think we get to any of
16 that here today. And I am just going to simply resen-
17 tence Mr. L'Heureux as he was sentenced before for
18 purposes of giving him the opportunity to exercise
19 his appeal right. And whatever happened before
20 happened. If it is an error then you can put that in
21 his appeal and the supreme court can take a look at
22 it. I don't see any reason to make it worse or fix
23 it. I think those are things
24 that are in the past and have happened. Mr. Hoxie,

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1 any objection to that position?

2 MR. HOXIE: No, Your Honor.

3 THE COURT: Ms. Smith?

4 MS. SMITH: No objection, Your Honor.

5 THE COURT: All right. For that, Mr.

6 L'Heureux, I am looking at your previous sentence or-

7 der from back on December 5th of 2017. Ms. Smith,

8 does that sound about right?

9 MS. SMITH: Yes, Your Honor.

10 THE COURT: All right then. All of the

11 information all of the same findings that were made

12 before will be made by the Court now. Al of the pre-

13 sentence that was filed before is filed now. The

14 recommendations of the state are the same as they

15 were. The arguments by counsel are the same as they

16 were. You were previously convicted of 15 counts of

17 sexual assault in the third degree, Mr. L'Heureux.

18 It's now the sentence of the Court that you be sen-

19 tenced to not less than one nor more than five years

20 on each one of those counts of sexual assault in the

21 third degree. That would be numbered counts six-twen-

22 ty of the indictment. It's also ordered that all

23 fifteen of those counts fun consecutively. It's fur-

24 ther ordered that you have credit for all the time

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1 that you have served. And upon your release from in-
2 carceration, you shall have 40 years of supervised
3 release through probation officer extended supervision
4 under the statute for sexual offenders. Further, it
5 should have been ordered before and it's insinuated
6 in the order. You're ordered to, upon your release,
7 have to file as a sex offender on the sex offender
8 registry for the rest of your life. Anything else,
9 Ms. Smith, that needs to be done sentence wise?

10 MS. SMITH: (No audible response)

11 THE COURT: You have a period of thirty
12 days, Mr. L'Heureux, to notice and intent to appeal.
13 You also have a period of four months to perfect that
14 appeal before the West Virginia Supreme Court of
15 Appeals. It's ordered that timeframe start to run
16 from today. Is it your intent to appeal.

17 MR. L'HEUREUX: Yes, Your Honor.

18 THE COURT: And I think you'll need coun-
19 sel for that. I'm going to appoint Ms. Ashely Smith
20 to be your counsel for your appeal. Ms. Smith, any-
21 thing further?

22 MS. SMITH: No, Your Honor.

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1 THE COURT: Mr. L'Heureux, do you have any
2 questions about anything today?

3 Mr. L'HEUREUX: No, sir, thank you.

4 THE COURT: Mr. Hoxie, anything further?

5 MR. HOXIE: No, Your Honor.

6 THE COURT: All right. Thank you. You
7 all may be excused.

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Daniel R. Arthur, CCR

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(Whereupon, the hearing was concluded.)

STATE OF WEST VIRGINIA,
COUNTY OF BARBOUR, TO-WIT:

I, Daniel R. Arthur, Certified Court Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the case of State of West Virginia v. James R. L'Heureux, Case No. 17-F-20 as reported by me by stenomask.

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto as promulgated by the Supreme Court of Appeals.

Given under my hand this 12th day of November, 2020.

Daniel Arthur
Certified Court Reporter

Daniel R. Arthur, CCR

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0811

JAMES ROLAND L'HEUREUX,

The Petitioner-Appellant,

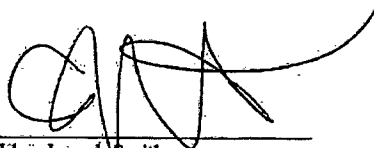
v.

STATE OF WEST VIRGINIA,

Respondent-Appellee.

**On appeal from the Circuit Court of Barbour County,
Criminal Case No. 17-F-20**

BRIEF OF THE PETITIONER-APPELLANT



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ASSIGNMENTS OF ERROR

- 1: THE COURT ERRED BY REFUSING TO ACKNOWLEDGE OR RULE ON THE OBJECTION TO THE STATE'S BREACH OF THE PLEA AGREEMENT MADE BY THE PETITIONER'S COUNSEL AT THE SENTENCING HEARING.
2. UNDER THE UNITED STATES CONSTITUTION AND THE WEST VIRGINIA STATE CONSTITUTION, THE PROSECUTOR VIOLATED THE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WHEN HE BREACHED THE PLEA AGREEMENT.

STATEMENT OF THE CASE

In August of 2013, the Petitioner was enrolled at Alderson Broaddus University in Barbour County, West Virginia. (App. at 40). While enrolled at Alderson Broaddus University in the Fall of 2014, he began working at Barbour County Emergency Medical Services. (App. at 41). During his tenure at Barbour County Emergency Medical Services, he became involved in an inappropriate relationship with S.M. (App. at 105). During and immediately after this time frame, the Petitioner was suffering from drug and alcohol abuse. (App. at 106, 135).

Following the conclusion of the inappropriate relationship with S.M., the Petitioner attempted suicide on April 1, 2016. (App. at 106). On April 2, 2016, the Petitioner contacted his therapist, and at her request, the Petitioner's parents traveled to West Virginia. (App. at 120). The Petitioner's parents picked him up and took him back to Maine for treatment. *Id.* The Petitioner was admitted to Southern Maine Healthcare's emergency department on April 3, 2016 and was discharged on April 28, 2016. (App. at 102, 120). During this time, the Petitioner was unaware of any criminal charges pending against him in West Virginia. (App. at 132). The Petitioner remained in Maine until his arrest on October 27, 2016. (App. at 129).

The Petitioner was arrested in Maine on October 27, 2016, by Detective Stephen M. Borst, of the Kennebunk Police Department for the felony offense of Sexual Assault in the Third Degree.

(App. at 129). The Petitioner signed a waiver of his extradition hearing on November 16, 2016. (App. at 129). The Petitioner was extradited from Maine back to West Virginia by Trooper A.H. Clark on December 14, 2016, and transported to the Tygart Valley Regional Jail. (App. at 129).

Subsequently, an indictment was returned against the Petitioner by the February 2017 term of the Barbour County, West Virginia, Grand Jury (App. at 1-9, 129). The indictment alleged five (5) counts of Sexual Assault in the First Degree, five (5) counts of Solicitation of a Minor via Computer, and fifteen (15) counts of Sexual Assault in the Third Degree. *Id.* On April 20, 2017, the Petitioner plead guilty, pursuant to a plea agreement, to fifteen (15) counts of Sexual Assault in the Third Degree. (App. at 129). Pursuant to the plea agreement, the remaining counts of the indictment were dismissed. Further the parties agreed "[t]he State shall make a sentencing recommendation based upon the Pre-sentence Investigation." (App. at 11).

Prior to the sentencing hearing, the Petitioner underwent three comprehensive psychological evaluations for the purpose of determining if he could be safely released into the community (App. at 99-117, 135). These evaluations determined that the Petitioner "presents a low to moderate risk to reoffend," and further stated that "it is hard to make recommendations secondary to the amount of contact that James had with the victim, other than incarceration. As I said previously this set of circumstances will not present itself again and James is learning about the damage he has done to the victim." (App. at 117). Additionally, these evaluations were provided to, and reviewed by, Jennifer Freeman in preparing the Pre-Sentence Investigation Report. (App. at 135).

At the Sentencing Hearing, held on August 16, 2017, the State of West Virginia through its Prosecuting Attorney made the comment, "[t]his is a sexual predator." (App. at 217). This

statement is not in line with what was provided in the psychological evaluations or Pre-Sentence Investigation. (App. at 117). Prosecutor Hoxie also accused the Petitioner of being a flight risk when he stated, "Well it is likely to occur again. When he left and fled to Maine...." (App. at 216). Prosecutor Hoxie also made false mention of a second victim when he said "he contacted another female, who would have been a witness in this case. And her initials or her first name is Emma and [I] talked to her about this relationship..." (App. at 217). In his rebuttal, Prosecutor Hoxie suggested "an implicit bias" against the State and stated "we have very much implicit bias in all the reports that have been submitted to you. Any advice by the defense would be that they are all based upon the [Petitioner's] interpretation of the facts." (App. at 216). The Court sentenced the Petitioner to fifteen (15) to seventy-five (75) years in prison with forty (40) years of supervised release and a lifetime sex offender registration requirement. (App. at 223-24).

The Petitioner requested that his then retained attorney, James Zimarowski, withdraw as his counsel due to a breakdown in communication regarding the appeals process and Mr. Zimarowski's deficient performance in not filing a direct appeal on the Petitioner's behalf. (App. at 238-40). On April 12, 2019, Mr. Zimarowski's motion to withdraw was granted during a hearing in front of the Honorable Judge Shawn D. Nines. (App. at 240). The Petitioner also filed a pro se request for appointment of counsel to represent him during the appeals process. (App. at 239). The request for appointment of counsel was taken under advisement and subsequently granted by the Honorable Judge Nines. (App. at 240). On December 12, 2019, Ashley Joseph Smith, Esquire, was appointed to represent the Petitioner. (App. at 235). On August 12, 2020, the Petitioner was re-sentenced for purposes of allowing the Petitioner the right to file a timely appeal. The Order

entered on October 2, 2020. (App. at 243-44). The following is an Appeal from the October 2, 2020 Re-Sentencing Order.

SUMMARY OF THE ARGUMENT

The State of West Virginia by Prosecuting Attorney T. Hoxie, breached the plea agreement entered into between the State of West Virginia and the Petitioner. Based on the breach of the plea agreement, the Petitioner was disproportionately sentenced to fifteen (15) consecutive counts of one (1) to five (5) years and forty (40) years of supervised release which resulted in a fifty-five (55) year minimum sentence. This sentence was the result of inflammatory statements made by the State of West Virginia during the original sentencing hearing, which were impermissible by the terms of the plea agreement.

Additionally, at the resentencing hearing, the Court refused to acknowledge or make a ruling on the objection of the Petitioner's counsel with regards to the breach of the plea agreement. The Petitioner's counsel attempted to address the breach with the Court, but was informed that the hearing was only for the purpose of resentencing the Petitioner in order to provide him the opportunity to file a timely appeal. Because the Petitioner stated the objection on the record, this court has jurisdiction to review the Court's error and review the breach of the plea agreement by the State of West Virginia.

ORAL ARGUMENT

The Petitioner respectfully requests Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 20. Oral argument is necessary as this case does not meet any of the disqualifying criteria established under *Id.* R. 18(a). *W. Va. R. App. P. 18*. The Petitioner states that a Rule 20 argument is requested because as the rules state an

argument is suitable for cases of first impression. The Petitioner believes that this case is a case of first impression, as there is no current case law in West Virginia regarding the Petitioner's contention that the State of West Virginia breached a specific clause, paragraph no. 7, of the plea agreement. This breach was to the detriment of the Petitioner and should be argued and addressed before this Honorable Court for clarification of the law and to prevent future breaches of plea agreements by the State of West Virginia.

STANDARD OF REVIEW

As for the Petitioner's first assignment of error, this Court has held that Sentencing Orders are reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). However, "where the issue involves the application of constitutional protections, [this Court's] review is de novo." *State v. Patrick C.*, No. 18-0945, 2020 W. Va. LEXIS 119 (Feb. 25, 2020). Therefore, the Petitioner's first assignment of error should be reviewed for abuse of discretion.

For the Petitioner's second assignment of error, this Court previously held:

Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court's ultimate determination are reviewed only for clear error. There are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under a clearly erroneous standard. Second, in contrast, the Circuit Court's articulation and application of legal principals are scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore whether the disputed conduct constitutes a breach is a questions of law that is reviewed *de novo*.¹

State v. Blacka, 240 W. Va. 657, 816 S.E.2d 28 (2018). Therefore, the Petitioner's second assignment of error, the factual findings should be reviewed for clear error, but the question of law surrounding the breach should be reviewed *de novo*.

ARGUMENTS

I. THE CIRCUIT COURT ERRED BY REFUSING TO ACKNOWLEDGE OR RULE ON THE OBJECTION TO THE STATE OF WEST VIRGINIA'S BREACH OF THE PLEA AGREEMENT MADE BY THE PETITIONER'S COUNSEL AT THE RE-SENTENCING HEARING.

The Trial Court erroneously overruled the Petitioner's objection to the State of West Virginia's breach of the plea agreement without additional consideration. The Petitioner objected to the State of West Virginia's breach of plea agreement by arguing that the State of West Virginia's sentencing recommendation was not consistent with the Pre-Sentence Investigation. (App. at 247-48). In fact, the Petitioner argued that the State of West Virginia's sentencing recommendation was contrary to the Pre-Sentence Investigation report. In the case at Bar, the Petitioner objected to the sentence as being a breach of the plea agreement at the Petitioner's re-sentencing hearing based on his reasonable understanding that the State was limited by the Pre-Sentence Investigation in its sentencing recommendation. (App. at 248). The Court overruled the objection made by the Petitioner's counsel in this matter and simply stated, "It is what it is" in response to said objection. (App. at 249, Line 22)

The Court first mentioned that the purpose of the hearing on August 12, 2020, was "just for the purpose of perfecting an appeal." (App. at 248). However, the Petitioner was not trying to argue the sentence he was given. The Petitioner is aware that re-sentencing hearings of that nature are solely for the purpose of reinstating appeal rights. *Wheeler*, 2011 W. Va. LEXIS 76; *Adkins v. Leverette*, 164 W.Va. 377; 264 S.E. 2d 154. The Petitioner was asked by the Court how the State

breached the plea agreement, and when the Petitioner presented evidence of the breach, the Court categorized this as arguing against the Petitioner's sentencing, which was not the intent of the objection. (App. at 250). After refusing to hear additional evidence, the Court did not make a ruling on the objection. Rather, the Court stated that the issue "is what it is" and overruled the Petitioner's objection. (App. at 249-50).

Rule 51 of the West Virginia Rules of Criminal Procedure states, in relevant part, that, "it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes it known to the Court the action which the party desires the Court to take his or her objection to the action of the Court and the grounds therefore..." *W. Va. R. Civ. P. 51*. The Petitioner in this case, not only made it known to the Court that there was an issue, but also requested specific performance. (App. at 247). Despite the Petitioner's unconventional timing for the objection (which was a direct result of prior Counsel's failure to object at the Petitioner's original sentencing hearing), "to preserve an issue for appellate review, a party must articulate it with sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." *State v. Sites*, 825 S.E.2d 785 (2019); *See also United States v. Tapia*, 946 F.3d 729, 733 (5th Cir. 2020) ("To preserve an alleged error, a party must raise an objection that is sufficiently specific to (1) alert the district court to the nature of the error and (2) to provide the opportunity for correction"). Although the Circuit Court never made a definitive ruling, The Petitioner's objection has been preserved and is therefore reviewable by this Court pursuant to *State v. Sites*, 825 S.E.2d 785.

II. **UNDER THE UNITED STATES CONSTITUTION AND THE WEST VIRGINIA STATE CONSTITUTION, THE STATE OF WEST VIRGINIA VIOLATED THE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WHEN PROSECUTOR HOXIE BREACHED THE PLEA AGREEMENT.**

The Fifth and Fourteenth Amendments to the United States Constitution, and Article III,

Section 10, of the West Virginia State Constitution establish the due process rights of individuals, stating that life, liberty, and property shall not be taken away without due process of law. U.S. Const. amends. V, XIV; *W.Va. Const. art. III, Sect. 10*. The State of West Virginia through Prosecuting Attorney Thomas Hoxie, violated this fundamental right of the Petitioner when it breached the plea agreement it entered into with the Petitioner. Pursuant to Paragraph No. 7 of the Petitioner's plea agreement, Prosecutor Hoxie violated the plea agreement by arguing for a sentence outside of the scope of the plea agreement. (App. at 11).

An axiom of American criminal jurisprudence is that "[p]lea bargains rest on contractual principles, and each party should receive the benefit of its bargain" *United States v. Ringling*, 988 F.2d (4th Cir. 1993). The State must "adhere strictly to the terms and conditions of the plea agreement it negotiates" *Kerdachi*, 756 F.2d at 352 because "a defendant who enters such a plea simultaneously waives several constitutional rights." *McCarthy*, 22 L. Ed. 2d 418. See also *State v. Myers*, 513 S.Ed.2d 676 (1998) (holding that "when a defendant enters into a valid plea agreement with the State that is accepted by the Trial Court, an enforceable right inures to both the State and the Defendant not to have the terms of the plea agreement breached by either party"). In *Santobello v. New York*, the Court held that "the State breaches a plea agreement when it fails to fulfill a promise that can be said to be part of the inducement or consideration for the plea agreement." *Santobello*, 30 L. Ed. 2d 427. When the State breaks a promise that originally induced the acceptance of a guilty plea agreement, the due process clause is implicated. See *Mabry*, 81 L. Ed. 2d at 442; *Crouse v. United States* W.D. Va. Jul. 18, 2006) (holding "A government promise that is part of the incentive for a plea agreement must be satisfied, and failure to do so constitutes a breach of the plea agreement and violates due process.") In determining whether a plea agreement

was breached, the court must look at whether the parties had a *reasonable understanding* of the terms of the agreement. *Vaval*, 404 F.3d at 152.

This case presents an issue of first impression for this Honorable Court as the State of West Virginia does not have case law specific to a breach of contract with regards to the sentencing recommendation clause included in a plea agreement. However, several Federal Courts have issued rulings on similar cases within the Fourth Circuit Court of Appeals and in surrounding areas which could be used as persuasive evidence on how this Honorable Court should rule. In *United States v. Edgell*, the Fourth Circuit held that the government undermined a plea agreement by requesting a sentence which was inconsistent with the plea agreement signed by the defendant. *United States v. Edgell*, 914 F.3d 281 (4th Cir. 2019). The Court found plain error and reversed the lower court's decision in favor of the Defendant. The Court reasoned that the government may not hide behind the duty to provide the sentencing court with relevant factual information to advance a position that contradicts the promises made in a plea agreement. *Id.* Further, the State must carefully balance its duty of candor with the Court with the duty to honor its plea agreement commitments. *Id.* at 288.

The Second Circuit Court of Appeals has provided similar guidance. In *Vaval*, the Second Circuit found that the government breached a plea agreement. "The government acknowledged that the plea agreement prohibited it from seeking an upward departure or taking a position on the appropriate sentence within the applicable guidelines range." *Vaval*, 404 F.3d at 154. The Court found that the government was permitted by the plea agreement to advise the Court of information related to sentencing including criminal activity of the Defendant, and the government could technically make an upward departure from the plea agreement. However, the Court found that the

statements made by the Government, which offered negative characterizations of the Defendant and alleging that his regret for his crimes was disingenuous, were not within the category of permissible behavior nor were the statements to be considered information that was protected by the plea agreement requiring candor to the court by the Government upon sentencing. *Id.* at 153-54.

Additionally, the Eleventh Circuit of Appeals has also addressed a breach of plea agreement similar to that of the Petitioner's. In *United States v. Boatner*, the Court held that the government can enter into a binding agreement with the defendant to restrict the facts upon which the substantive offense is based. *Boatner*, 966 F.2d at 1578. *Boatner* can be compared and contrasted with an Eighth Circuit ruling in *United States v. Noriega*, where the government did not breach the plea agreement by introducing additional evidence at the sentencing hearing because there was no provision limiting the scope of information regarding conduct or the role of the Defendant in the offense. *Noriega*, 760 F.3d 908.

The present case can be distinguished from *Noriega* because there was an agreed upon limitation on the scope of the State of West Virginia's sentencing recommendations. The State of West Virginia "shall make a sentencing recommendation based upon the Pre-Sentence Investigation." (App. at 11). This case is similar to *Boatner*, *Vaval*, and *Edgell* because the State of West Virginia undermined the plea agreement by making characterizations of the Petitioner that are not supported by the Pre-Sentence Investigation. (App. at 216-17). This is crucial because it is recognized that the Pre-Sentence Investigation "establishes the factual and legal backdrop for the sentencing hearing." *Jones*, 899 F.2d at 1102. Here, the State of West Virginia's sentencing recommendation was required to be based on the Pre-Sentence Investigation, but Prosecutor Hoxie

breached the plea agreement by adding additional commentary outside of the scope of the Pre-Sentence Investigation report and recommendations contained therein. (App. at 216-217). The State of West Virginia (1) accused The Petitioner of attempting to flee the state and evade arrest, (2) alluded to an unidentified second victim without evidence, and (3) suggested that the Pre-Sentence Investigation report contained implicit bias against the State in favor of The Petitioner.^{Id.}

Therefore, the Court should find that the State of West Virginia breached the terms of the plea agreement when Prosecutor Hoxie argued Sentencing Recommendations contained outside of the recommendations of the Pre-Sentence Investigation.

- a. **The State of West Virginia breached the plea agreement when Prosecutor Hoxie stated that the Petitioner was a flight risk and accused him of fleeing the state to evade arrest and prosecution at the Sentencing Hearing.**

In April of 2016, the Petitioner returned to Maine, to his family home, and sought medical treatment at a facility where he could be surrounded by strong familial support. (App. at 131). As stated above, in April of 2016, the Petitioner was a permanent resident of Maine, with no prior or additional ties to West Virginia. (App. at 40-41). The Petitioner's only tie to West Virginia was his enrollment and attendance at Alderson Broaddus University. (App. at 40-41). The psychological reports of Dr. Curry show that the Petitioner was at home in Maine for mental health and substance abuse treatment in the spring of 2016. (App. at 102-03). Dr. Curry's report states that he received mental health records from Southern Maine Health Care regarding the care received by the Petitioner between April 3, 2016, to April 28, 2016. (App. at 102). This does not meet the legal definition of "flight," even though the State of West Virginia attempted to create that narrative during the sentencing hearing.

Flight is defined as "the act or an instance of fleeing, especially to evade arrest or prosecution." *Black's Law Dictionary* 765 (10th ed. 2014). When the Petitioner returned home to

receive substance abuse and mental health treatment, he did not know of any criminal charges against him, nor that anyone outside of the family knew of the events that had transpired between the victim and the Petitioner. (App. at 132). He did not flee the State of West Virginia in hopes that he could not be found. *Id.* The West Virginia State Police had the Petitioner's permanent home address and the Petitioner never attempted to hide from law enforcement or stay at an alternate location that law enforcement would be unaware of. (App. at 141). The Petitioner did not know there was a warrant for his arrest out of West Virginia, until the police arrived to arrest him at his place of employment in Maine on October 27, 2016. (App. at 132).

As stated in the report of Criminal Investigation included in the Pre-Sentence Investigative Report, he was arrested without incident. (App. at 145). The Petitioner did not attempt to run or evade the police in this instance either. *Id.* In support of the assertion that he was not "fleeing to evade arrest or prosecution," the Petitioner waived his extradition hearing and willingly returned to West Virginia with Trooper A.H. Clark to face the charges against him. (App. at 146-47). Therefore, when the State of West Virginia made a statement regarding fleeing with the intent to characterize the Petitioner as a flight risk who required the maximum sentence, the State of West Virginia breached Paragraph No. 7 of the plea agreement, which stated that he would defer to the recommendations of the Pre-Sentence Investigation report for sentencing purposes. (App. at 11).

Therefore, the Court should find that the State of West Virginia breached the terms of the plea agreement when Prosecutor Hoxie made statements that the Petitioner fled from the State of West Virginia. (App. at 216-17).

- b. **The State of West Virginia breached the plea agreement in violation of The Petitioner's due process rights when Prosecutor Hoxie negatively characterized the Petitioner as predatory by alluding to a second, unidentified victim of the Petitioner.**

During the sentencing hearing, the State of West Virginia mentioned a second, unidentified alleged victim. (App. at 217). This allegation was grossly prejudicial to the Petitioner and without merit. The Pre-Sentence Investigation, nor any other portion of the record, ever mentions a second victim. The Petitioner was not tried on charges against multiple victims, but instead multiple counts with respect to the same victim. (App. at 1-9). The Pre-Sentence Investigation even clearly states that while there were other young girls present at the squad building for CPR classes while the Petitioner was in the building, it is not believed that those two juvenile females were victims of the Petitioner. (App. at 145). This was an act of gross misconduct by the prosecution and does not fall under the purview of the *Vaval* Court's ruling that the Government could make statements related to criminal activity of the Defendant at the sentencing hearing. *Vaval*, 404 F.3d 144.

Based on the results of The Petitioner's psychological report, the "relationship" at incident in this matter occurred secondary to the Petitioner's maturity level, and psychological experts deemed the Petitioner safe for the community. (App. at 110, 117). Dr. Curry even characterized the Petitioner's actions as "regressed and situational" as opposed to "fixated and preferential." (App. at 109).

However, Prosecutor Hoxie did not agree with the characterizations made by professionals and took it upon himself to give a recommendation in opposition of the Pre-Sentence Investigation report and recommendation. (App. at 216-17). The State of West Virginia negatively characterized the Petitioner as "predatory" and "fixed and preferential," which was the opposite of how he was characterized by psychological professionals who were sought for their expert opinions for the purpose of the Pre-Sentence Investigation report. *Id.*

This case is similar to the *Vaval* Court's decision because in *Vaval* where the Court found when the Government offered negative characterizations of the Defendant, that its conduct was not within the category of what should be considered permissible conduct protected by the plea agreement's requirement for candor to the Court. *Id.* In the instant case, it is clear that the statements made by the State of West Virginia, through its prosecuting attorney, were not permissible within the scope of plea agreement candor because these statements were not statements of truth the Court needed to consider in order to make its decision on sentencing, but rather personal negative opinions held by Prosecutor Hoxie of the Petitioner.

Therefore, the Court should find that the State breached the terms of the plea agreement when Prosecutor Hoxie made statements of personal and prejudicial nature against the Petitioner's character as "predatory" and "preferential". (App. at 216-17).

- c. **The State of West Virginia breached the plea agreement in violation of the Petitioner's due process rights when Prosecutor Hoxie suggested that the Pre-Sentence Investigation contained implicit bias against the State in favor of the Petitioner which breached Paragraph No. 7 of the plea agreement.**

During the Sentencing Hearing, the State of West Virginia suggested an implicit bias against itself in the Pre-Sentence Investigation. (App. at 216). The State of West Virginia argued that this was because the "The Petitioner's understanding of and point of view of the events were skewed." *Id.* All three psychological experts interviewed the Petitioner and reviewed the available lower court record before preparing their reports. (App. at 100-17). It is unreasonable for the State of West Virginia to argue that all three of those reports could have shared the same implicit bias in favor of the Petitioner because each report was created independently and without collaboration between professionals. (App. at 216). Alternatively, it seems likely that if the reports had been in

favor of the State of West Virginia, Prosecutor Hoxie would not have been concerned about any implicit bias against the Petitioner which would not have fit into the narrative he was creating.

This Honorable Court has established that the State of West Virginia does breach a plea agreement "after having agreed to remain neutral as to the sentence and fail[ing] to do so." *Duncil v. Kaufman*, 394 S.E.2d 870, 878 (W. Va. 1990). See also *Blacka* and *Santabello*, (where the Courts issued a remand for re-sentencing after the State of West Virginia's breach of a sentencing neutrality clause in both cases). This case is similar to the facts of *Blacka* and *Santabello* because in the instant case, a sentencing recommendation clause has also been breached. However, unlike the facts of the two cases above, the State of West Virginia did not agree to stand silent with respect to sentencing, but instead agreed to make a recommendation consistent with the Pre-Sentence Investigation report (App. at 11). In *United States v. Marin-Echeverri*, the Court held that "technical compliance" should not be allowed to undercut the "substance of the deal." *Marin-Echeverri*, 846 F.3d at 478. Cases like *Vaval*, *Edgell*, and *Marin-Echeverri* illustrate that it is possible to undermine a plea agreement so harshly that it reaches to the level of a breach of plea agreement.

While the Petitioner recognizes that the State of West Virginia's recommendation is not binding on the lower court, and that the lower court is the Court that retains sentencing discretion, the State of West Virginia should not be permitted to use this technicality as a guise for a prosecutor's misconduct at the Sentencing Hearing. As the Michigan Court of Appeals stated in *People v. Jones* (Michigan Court of Appeals No. 343621, September 17, 2019)(per curiam):

Our [state] Supreme Court has implicitly recognized that the realm of plea bargains, the prosecuting attorney's strength stems from his charging power and his ability to make a sentencing recommendation to the judge. The fact that this recommendation is not binding does not diminish its potential impact on the

sentencing decision. It is crucial to the successful operation of plea bargaining that these recommendations are usually accepted. Otherwise the bargain lacks sufficient certainty to induce a defendant to waive his right to trial.

This Honorable Court should adopt this holding, and hold the State of West Virginia accountable for the breach of the plea agreement by not allowing the State to use the lower Court's discretion to alleviate its error.

In the instant case, both parties entered into the plea agreement expecting to reap the benefits from the sentencing recommendation clause. The Petitioner expected to obtain the benefits of a favorable Pre-Sentence Investigation report, as he had no prior criminal history and was not classified as a predator in the psychological evaluations. On the other hand, the State of West Virginia expected the Pre-Sentence Investigation report to portray the Petitioner as a predator that would be a danger to public safety. However, when the Pre-Sentence Investigation report was completed and distributed to counsel, the State of West Virginia did not object to the Pre-Sentence Investigation Report, but did express opinions outside of the scope of what was reported in the Pre-Sentence Investigative Report. (App. at 194, 216-17). As a result of the report, the State of West Virginia undermined the plea and proffered its personal opinion of the Petitioner instead of what the Pre-Sentence Investigation had revealed. (App. at 216-17). As the Court held in *Edgell*, "just as we often enforce plea agreements against criminal defendants even in the face of subsequent, favorable changes in the law... so too must we enforce plea agreements that may later prove less advantageous than the Government had anticipated." *EEdgell*, 914 F.3d at 298.

In instances such as this, there are two options for relief: (1) specific performance of the plea agreement, or (2) allowing the Petitioner to withdraw the plea agreement.

However, it is this Court's preference to require specific performance of the plea agreement. *State v. Starcher*, 465 S.E.2d 185 (W. Va. 1995). Therefore, this Court should find that the State has breached the plea agreement by failing to make a recommendation based on the Pre-Sentence Investigation report and recommendation instead of in opposition of the same. This Honorable Court should remand this case for re-sentencing in accordance with the plea agreement.

CONCLUSION

If West Virginia Courts are to continue to function properly, plea bargaining is an essential part of the process. However, in the interest of justice, this process must be fair and reasonable to both parties. The State of West Virginia must play by the same set of rules as the Defendant when offering a plea in which both sides are required to make a compromise and both sides intend to benefit from the bargain. The State of West Virginia's breach of the plea agreement opened the door for the Circuit Court to order a sentence which was disproportionate to the recommendations of the Pre-Sentence Investigation Report. This was in direct violation of the plea agreement which was agreed to and signed by the Petitioner based on the fact that both parties would accept the recommendations of the Pre-Sentence Investigation without knowledge of which side it would benefit. The Petitioner did not know it would be favorable to him, and he accepted the potential of an unfavorable report. The State of West Virginia agreed to do the same, but did not accept the results and took matters into its own hands and made recommendations outside of the scope of the Pre-Sentence Investigation. This breach should make the Petitioner's plea agreement a candidate for specific performance on the plea agreement. Without correction, this Court is making it clear that the State of West Virginia is not held to the same standard of honesty

in bargaining that the Defendant is required to afford the State of West Virginia. Based on the foregoing brief, the Petitioner respectfully requests that this Court remand the Petitioner's case back to the Circuit Court for resentencing with a new prosecuting attorney, and the imposition of a sentence that is consistent with the plea agreement signed by the parties.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES ROLAND L'HEUREUX
Petitioner-Appellant

v.

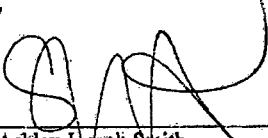
No. 20-0811

STATE OF WEST VIRGINIA
Respondent-Appellee

Certificate of Service

I, Ashley Joseph Smith, counsel for the Petitioner, hereby certify that service of the foregoing *Brief for The Petitioner-Appellant* was made this 29th day of January, 2021 via certified mail to the following:

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