State of West Virginia
Office of the Attorney General

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The Honorable Seth Murphy
Marion County Prosecuting Attorney
213 Jackson Street
Fairmont, W. Va. 26554

Dear Prosecutor Murphy:

Your office has asked for an Opinion of the Attorney General about the disclosure of supervision records under Rule 44.01 of the West Virginia Trial Court Rules. This Opinion is being issued under West Virginia Code Section 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

You explain that Marion County's probation office refuses to provide supervision records to your office absent a written court order, even when those records are necessary to prosecute revocations. The probation office maintains that Trial Court Rule 44.01 mandates this disclosure restriction. We understand that you disputed this reading of Rule 44.01 on two separate occasions. On the first occasion, the probation office asked your office to file a petition for revocation of probation against a juvenile probationer due to a failed drug screen. Your office filed the petition, but because probation did not provide the drug screen results to you or the probationer's counsel, the court dismissed the case. On the second occasion, the probation office again asked you to initiate revocation proceedings because of a failed drug screen, but again, the probation office refused to provide the drug screen results. Following an *in camera* hearing, the judge verbally ordered production of the drug screen, but the probation office still insists on having a written order before production.

With these facts in mind, you raise the following legal question:

> *Does West Virginia Trial Court Rule 44.01 require probation officers to secure a court order prior to disclosing supervision records related to a revocation proceeding to the prosecutor and defense counsel?*

We conclude that Trial Court Rule 44.01 does not apply to disclosures to counsel in a revocation proceeding. So probation officers need not obtain a court order before producing discovery to the prosecutor and defense counsel.

Discussion

A. Before examining the trial court rule at issue, "it is helpful to review the … burdens of evidentiary proof and the procedural standards implicated" during revocation proceedings. *State v. Foye*, 916 S.E.2d 88, 96 (W. Va. 2025). A revocation hearing "does not have the same stringent requirements as a criminal trial." *State ex rel. Jones v. Trent*, 200 W. Va. 538, 541, 490 S.E.2d 357, 360 (1997). This is because "probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime." Syl. Pt. 2, *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90 (1968) (cleaned up).

Yet, probationers are still afforded procedural protections before probation terms are changed. Revocation hearings "must comport with principles of fundamental fairness." *United States v. Tyler,* 605 F.2d 851, 853 (5th Cir. 1979). Thus, a defendant must be afforded certain "minimal procedural [due process] protections" during a revocation hearing. Syl. Pt. 12, *Louk v. Haynes*, 159 W. Va. 482, 484, 223 S.E.2d 780, 783 (1976); *see also Foye*, 916 S.E.2d at 95 ("Probationers are entitled to due process when faced with revocation of their freedom.") (cleaned up).

Included among these requirements is the "disclosure of the evidence against him or her." W. VA. R. CRIM. P. 32.1(a)(2); *accord* Syl. Pt. 12, *Louk*, 159 W. Va. at 484, 223 S.E.2d at 783 (listing requisite procedural protections). And before revocation may be ordered by a court, the court must find—based on evidence—that "reasonable cause exists to believe . . . the probationer" violated the terms of his or her probation. W. VA. CODE § 62-12-10(a)(1); *see also Foye*, 916 S.E.2d at 98 (construing "reasonable cause" to mean "proof by a simple preponderance of the evidence.").

B. With these standards and procedures in mind, we turn to Trial Court Rule 44.01, titled "Petition for Disclosure of Presentence or Probation Records." Rule 44.01 provides:

> (a) Except as provided in TCR 43.02, no confidential records of the court maintained by the probation office, including presentence and probation supervision records, shall be producible except by written petition to the court particularizing the need for specific information.
>
> (b) When a demand for disclosure of presentence and probation records is made by way of subpoena or other judicial process to a probation officer, the probation officer may petition in writing seeking instructions from the court regarding a response to the subpoena.
>
> (c) No disclosure shall be made except upon order of the court.

On its face, Rule 44.01 does not specify the disclosures to which it applies. Yet reading Trial Court Rule 44.01 *in pari materia* with related rules governing probation records demonstrates that its application is limited: it applies only to third parties—not to counsel litigating revocation proceedings. *See also* Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 15, 217 S.E.2d 907, 908 (1975) ("Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *Pari materia*").

Consider Rule 44.01's neighboring rule, Trial Court Rule 43.01. That rule governs presentence investigation reports, which are no doubt confidential records, and provides for automatic disclosure to counsel: "[T]he probation officer shall disclose the presentence investigation report to the defendant and to counsel for the defendant and to the attorney for the State not less than ten (10) calendar days prior to sentencing." W. VA. TR. CT. R. 43.01(a). And Rule 44.01 expressly carves out situations covered by Rule 43.02. Under Rule 43.02, the probation office must disclose to counsel, upon request, "all underlying public record information pertaining to the defendant that was gathered by documents obtained and used in the preparation of the presentence report." W. VA. TR. CT. R. 43.02(b). Taken together, Rule 44.01 is not meant to apply to discovery disclosures for revocation proceedings.

Reading Trial Court Rule 44.01 differently would undermine basic principles of due process and the Rules of Criminal Procedure that guarantee a defendant a right to receive discovery in a revocation proceeding. For one, Rule 32.1(a)(2) of the West Virginia Rules of Criminal Procedure provides that prior to a revocation hearing, the probationer shall receive "disclosure of the evidence against him or her" W. VA. R. CRIM. P. 32.1(a)(2)(B) (cleaned up); *accord State v. Ellis*, No. 21-0076, 2022 WL 1714609, at *3 (W. Va. May 26, 2022) ("The court properly denied petitioner's request for discovery . . . because the State provided petitioner with all the evidence it intended to use at petitioner's probation revocation hearing, thus meeting the safeguards of Rule 32.1 and . . . procedural protections"). For another, it's "axiomatic" that due process demands a probationer to receive and make use of all evidence against him. *U.S. v. Dixon*, 187 F. Supp.2d 601, 603 (S.D.W. Va. 2002). So Rule 44.01 cannot extend to the probation office an unfettered right to refuse disclosures to counsel who are otherwise entitled to inspect and make use of information as legal counsel. Put plainly, a court order is not required to do what the law already requires.

The federal rules don't erect such a hurdle either. *See, e.g.*, *State v. Ketchum*, 169 W. Va. 9, 13 n.4, 289 S.E.2d 657, 659 n.4 (1981) (considering analogous federal rule governing probation in evaluating West Virginia probation requirements). For example, Rule 32.1 of the Federal Rules of Criminal Procedure provides that prior to a revocation hearing, a probationer is entitled to "disclosure of the evidence against the person." FED. R. CRIM. P. 32.1(b)(2)(B). The Southern District of West Virginia's Local Rules of Criminal Procedure likewise demand disclosure before revocation, prescribing that "[t]he probation officer shall, without further request by the probationer, or releasee, or his/her counsel, disclose to the probationer or releasee or his/her counsel, all evidence against the probationer or releasee … including any potential oral statement and any potentially exculpatory material." S.D.W. VA. LOC. R. 32.1.1(b). Similarly, in the Northern District of West Virginia, "the probation officer shall release necessary probation records

to other federal, state, county and municipal law enforcement agencies . . . without petitioning the Court or obtaining a court order directing the disclosure of those records." N.D.W. VA. LOC. R. 32.02.

Of course, the purpose of Rule 44.01 is to promote the confidentiality of probation's records. But this concern is only served by limiting *third party* disclosures; "disclosure [of probation records] to the public could seriously undermine the [sentencing] process." *Howe v. Detroit Free Press, Inc.*, 487 N.W.2d 374, 378 (Mich. 1992). Prosecutors have independent duties to keep their files confidential, and it's the defendant's prerogative to share his own information.

C. Too, there are practical issues with applying Trial Court Rule 44.01 to counsel in active revocation proceedings.

Without discovery, a prosecutor cannot satisfy the applicable standard of proof by providing sufficient evidence of the existence of a violation and of the propriety of revocation. *See e.g.*, *Belk v. Purkett*, 15 F.3d 803 (8th Cir. 1994); *Rich v. State*, 640 P.2d 159 (Alaska Ct. App. 1982) (probation revocation reversed because state presented no evidence to satisfy its burden of proving good cause to revoke probation); *Commonwealth v. Maggio*, 605 N.E.2d 1247 (Mass. 1993) (state must do more than merely present the bare fact of an indictment or indictments for unrelated offenses in order to sustain burden of presenting sufficient evidence to justify revocation); *Randall v. State*, 741 So.2d 1183 (Fla. Dist. Ct. App. 2d Dist. 1999) (at revocation hearing state must produce enough evidence to satisfy standard of proof; probationer did not admit violations and no violations were proven). Even more, "[t]he prosecuting attorney representing the State and, as a consequence, the victim, in criminal matters has a legitimate role to play in probation considerations" and a court's "decision should consider the input of the [prosecutor], as well as the probation office." *State ex rel. Reed v. Douglass*, 189 W. Va. 56, 58, 427 S.E.2d 751, 753 (1993). Conversely, a probationer will not be able to effectively defend against the petition for revocation. And trial by ambush is a thing of the past.

Together, application of Rule 44.01 to discovery in revocation proceedings would run afoul of "the twofold aim . . . that guilt shall not escape or innocence suffer." *Berger v. U.S.*, 295 U.S. 78, 88 (1935) (cleaned up). "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." *U.S. v. Nixon*, 418 U.S. 683, 708–09 (1974). So "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id*.

Docket congestion would also ensue if orders were required for the disclosure of evidence in every revocation proceeding. Requiring this from our circuit courts is unreasonable and will produce substantial financial costs for the State to maintain such a system. A revocation proceeding is not as rigid as trial proceedings, nor was it ever intended to be. This is because "probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime." Syl. Pt. 2, *Melton*, 52 W. Va. at 500, 165 S.E.2d at 91 (cleaned up). Stated another way, "probation is simply one of the devices of an enlightened system of penology which has for its purpose the reclamation and rehabilitation of the criminal." *Id.* at 506, 94. So a revocation hearing "does not have the same stringent requirements as a criminal trial." *Trent*, 200 W. Va. at 541, 490 S.E.2d at 360. The State has an interest in expeditiously

containing the threat posed by, and imposing punishment upon, noncompliant probationers. And the law concerning revocation proceedings is designed to properly balance the State's interest in informality, flexibility, and economy with the probationer's conditional liberty interests.

At bottom, applying Rule 44.01 to revocation discovery disclosure frustrates the purpose and intent of probation enforcement mechanisms, overcomplicates a flexible penal system, and flies in the face of due process.

Conclusion

For these reasons, we conclude that Trial Court Rule 44.01 does not apply to discovery disclosures made in the course of a probation revocation proceeding.

Sincerely,

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Holly J. Wilson
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Mattie F. Shuler
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